Introduction

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One of the few benefits of Covid-19 is that I seem to have a lot more time to read not only serious works, such as John Barry's *The Great Influenza*, the story of an earlier pandemic a century ago, but also lighter material, such as Ben Aaronovich's series *The Rivers of London* about Thomas Nightingale and Peter Grant, two members of Scotland Yard who are magicians (real ones). Even people who are working at home tell me they have more time, if nothing else than in the hours they would be dressing for work, putting on makeup, or commuting. So I hope you all enjoy this issue. It does not have magicians, but it does have a little lightheartedness that we can all use these days.

Mark Killenbeck, Davis Distinguished Professor of Law at the University of Arkansas and an old friend, writes about two justices and their dissents, William Johnson in *Fletcher v. Peck* (1810) and Louis Brandeis's concurrence in *Whitney v. California* (1927). Needless to say, I am much interested in dissent and also in the Brandeis opinion, which Professor Mark Tushnet of Harvard has called the greatest dissent ever written, even if it is a concurrence. What Killenbeck does is to dig deeply into both opinions, and much as I have studied *Whitney*, it gave me great pleasure to see it from a different angle and learn more about it.

I must confess, I probably would have accepted Todd Pepper's article for the title alone, "Chief Justice Melville Weston Fuller and the Great Mustache Debate of 1888." Pepper, Fowler Professor of Public Affairs at Roanoke College, adjunct professor at Washington & Lee Law School, and a previous contributor to the Journal, gives us a great story that is almost impossible to take seriously in this time of plague. Oh to be young and innocent in 1888!

There have, fortunately, been no disabled justices in recent years, but at other times in our history men who sat not only on the high court but in the district and circuit tribunals could not, by cause of physical or mental infirmity, fulfill their responsibility. Some, like Holmes and Brandeis, stepped down voluntarily. But others had to be "pushed," often for political reasons. The Constitution ignores this problem, and the only valid means of removing a judge is impeachment. Judge Glock, a Senior Policy Advisor at the Cicero Institute, looks at this issue and how political pressure from the legislative branch, as well as generous retirement packages, opened up judicial seats.

Another old friend is Robert Post, Sterling Professor of Law and former dean at the Yale Law School. Bob is working on the Taft Court volumes for the *Oliver Wendell Holmes Devise*, and has asked me from time to time to read drafts. In one section, he deals with what is one of the landmark decisions of the Taft Court, *Myers v. United States* (1926). I asked him if he could give me an article for the Journal on the case, which he graciously agreed to do. Taft, a former president, tried to use the case to bolster the authority of the presidency. His opinion evoked dissents from three justices, including one of Brandeis's most important, and the *Myers* decision was to be effectively overruled less than a decade later in *Humphrey's Executor v. United States* (1935).

When we think of the Supreme Court and World War II, the cases that always grab our attention are three in number that deal with the Japanese internments. But there were other cases involving enemy aliens and the courts, and Charles J. Sheehan, a lawyer for the federal government, tells us about one of them, involving a Japanese sailor who was injured and fought to get his case for compensation before the courts, seeking justice. Kumezo Kawato, despite a ruling from the nation's highest court, did not get justice, and after his release from internment he returned to Japan.

Because of the plague, the Society did not hold its annual meeting at the Supreme Court this past June. As a result, there was no opportunity to formally recognize the winner of the Hughes-Gossett Award for the best article in the journal in 2019 (vol. 44, no. 2). The winner is Cynthia Nicoletti, a legal historian and professor of law at the University of Virginia, and her compelling article is titled "Chief Justice Salmon P. Chase and the Permanency of the Union." It is our hope that the presentation of the award can be made in person at the 2021 meeting.

So, we all wish you to take care and stay safe, and hope that this issue will make some of the quarantine less burdensome.

Fletcher, Whitney, and the Art of Disagreement

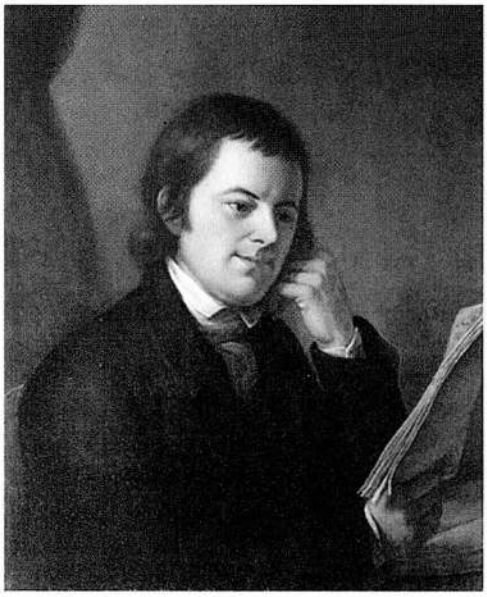
MARK R. KILLENBECK

Justice William Johnson began his separate opinion in *Fletcher v. Peck* with a disarmingly simple statement: "In this case I entertain on two points, an opinion different from that which has been delivered by the court."[1] So he "threw out" certain ideas, making it clear that he did not object to a Georgia statute because it violated the Contract Clause. Rather it was at odds with "the reason and nature of things: a principle which will impose laws even on the deity."[2] In a similar vein, Justice Louis D. Brandeis, "concurring" in *Whitney v. California*, delivered what is universally regarded as a devastating dissent—a paean to the "freedom to think as you will and to speak as you think"[3]—even as he allowed Charlotte Anita Whitney's conviction to stand.

These are the two most prominent examples of the art and science of being agreeably disagreeable, purporting to concur even as you write an opinion positing that your brethren simply do not have a clue. The equivalent, if you will, of Courtly Fighting Words, said with a judicially if not injudicious "disarming smile."[4]

Dissent—whatever its form—is as old as the Court itself.[5] Very few likely realize that the first reported decision of the Court was actually a dissent. That "honor" fell to Justice Thomas Johnson, who as the junior justice in an era when the Court spoke seriatim chimed in first, with all of his brethren reaching the opposite result.[6] A more notable and consequential early disagreement was voiced by Justice James Iredell in 1793, when, in *Chisholm v. Georgia*,[7] he was the only one to conclude that Article III courts could not entertain a suit filed against a state by a citizen of another state. That result—contradicted by the clear text[8]—led, of course, to the ratification of the Eleventh Amendment, which has since spawned its own tale of movement and counter movement.

Dissent has accordingly played an important role throughout the Court's history. Chief Justice Charles Evans Hughes famously characterized dissents as "an appeal to the brooding spirit of the law, to the



Thomas Johnson of Maryland was the original dissenter on the Supreme Court. As the junior justice he chimed in first in *Georgia v. Brailsford* (1792); his brethren reached the opposite result. It was Johnson's only recorded opinion during his fourteen-month tenure.

intelligence of a future day."[9] Justice Robert H. Jackson, in turn, noted that dissents when "[w]isely used on well-chosen occasions … ha[ve] been of great service to the profession and to the law."[10] That said, dissents have also proven controversial. This was especially so as William Johnson and Louis Brandeis crafted their opinions. Both John Marshall, the fourth Chief Justice of the United States, and William Howard Taft, its tenth, viewed dissents as at least a nuisance, even on occasion a positive harm. Johnson and Brandeis knew this, and that reality provides one of the contexts we must explore as we look with care at their curious opinions in *Fletcher* and *Whitney*.

Marshall, Johnson, and Dissent

One of my many quirks is that I habitually think of John Marshall as the Accidental Chief Justice. Part of the story is familiar. John Jay refused to undertake a second stint as chief after John Adams sent his name to the Senate, which actually gave its "advice and consent." Governor of New York at the time, Jay was both content in that role and dismissive, offering a candid and unfortunately highly accurate assessment of the Court:

> I left the Bench perfectly convinced that under a System so defective, [the Court] would not obtain the Energy weight and Dignity which are essential to its affording due support to the national Government; nor acquire the public Confidence and Respect, which, as the last Resort of the Justice of the nation, it should possess.[11]

Most narratives have Adams turning inevitably and immediately to John Marshall, bolstered by an account penned by Marshall some twenty-five years after the fact:

> When I waited on the President with Mr. Jays letter declining the appointment he said thoughtfully "Who shall I nominate now?" I replied that I could not tell, as I supposed his objection to Judge Patteson remained. He said in a decided tone "I shall not nominate him." After a moments hesitation he said "I believe I must nominate you." I had never before heard my self named for the office and had not even thought of it. I was pleased as well as surprised, and bowed in silence. Next day I was nominated.[12]

The actual story is much more complicated. Adams was determined to elevate a sitting member of the Court if Jay declined, planning to offer the post to William Cushing and then, hoping Cushing would refuse, to William Patterson.[13] Working through his son Thomas, he tried for weeks to convince Jared Ingersoll of Philadelphia to accept the seat vacated should either Cushing or Patterson become chief.[14] But the press of time and

unanticipated events forced his hand, leading to the act he subsequently described as "the pride of my life [to have] given to this nation a Chief Justice equal to Coke or Hale; Holt or Mansfield."[15]

There is every reason to believe a key aspect of Marshall's claim that he was surprised at this turn of events. In a December 18, 1800 letter to Charles Cotseworth Pinckney, Marshall expressed his intent to return to Richmond and the practice of law. "If my present wish can succeed so far as respects myself I shall never again fill any political station whatever."[16] That said, once confirmed he took the judicial bit between his teeth and pursued his new responsibilities with determination and vigor.

Two objectives consumed him. The most important was his quest to have the Court assume its rightful place in the American constitutional order. To serve, as explicated in *Marbury*, as a coequal branch of government that would "emphatically" discharge its mandate to "say what the law is."[17] The second, a necessary corollary of the first, was to ensure that whenever possible the Court spoke with a single, authoritative voice. In particular, dissent was anathema. As Marshall explained in the wake of *M'Culloch*:

> The course of every tribunal must necessarily be, that the opinion which is to be delivered as the opinion of the court, is previously submitted to the consideration of the judges; and, if any part of the reasoning be disproved, it must be modified as to receive the approbation of all, before it can be delivered as the opinion of all.[18]

Thomas Jefferson was deeply disturbed by Marshall's appointment. He did declare famously in his First Inaugural Address that "every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists."[19] But those conciliatory sentiments did not include John Marshall and the Court. A scant ten days later Jefferson complained that the Federalists "have retreated into the judiciary as a stronghold, the tenure of which renders it difficult to dislodge them."[20] He repeated the sentiment in December, arguing that "[t]here the remains of federalism are to be preserved ... and from that battery all the works of republicanism are to be beaten down and erased. By a fraudulent use of the Constitution, which has made the judges irremovable, they have multiplied useless judges merely to strengthen their phalanx."[21]

Jefferson had numerous reasons for being angry with the Federalists, not the least of which was John Marshall. He recognized the power of Marshall's intellect and his persuasive abilities. But that made him uneasy:

> When conversing with Marshall, I never admit anything. So sure are you to admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry, you must never give an affirmative answer, or you will be forced to grant his conclusion. Why, if he were to ask me whether it were daylight or not, I'd reply, "Sir, I do not know, I can't tell."[22]

The two were almost invariably on opposite sides in the great questions of the day. In the early 1790s, for example, they clashed over how the new nation should respond to the revolution in France, prompting Jefferson to complain to Madison (with ironic and mistaken insight) that it might be best to put Marshall where he could do less harm: "nothing better could be done than to make him a judge."[23]

Jefferson was accordingly delighted when Justice Alfred Moore resigned, seizing what he hoped would be the opportunity to remake the Court. He solicited the advice of Secretary of the Treasury Albert Gallatin,

who agreed that "the importance of filling this vacancy with a Republican and a man of sufficient talents to be useful, is obvious, but the task is difficult."[24] The main problem was geographic balance. With Moore gone two of the six judicial circuits were not represented on the Court. "As there are now two circuits without a presiding Judge (the circuits of Virginia and North Carolina having yet two), the person may be taken from either."[25]

Gallatin looked to South Carolina, observing that "I am told that the practice is as loose in Georgia as in New England and that a real lawyer could not easily be found there. But South Carolina stands high in that respect, at least in reputation."[26] Five individuals were suggested by two South Carolinians, Senator Thomas Sumter and Representative Wade Hampton. One was William Johnson, described as "a state judge, an excellent lawyer, prompt, eloquent, of irreproachable character, republican connections, and of good nerves in his political principles. about 35 years old. was speaker some years."[27]

That assessment was accurate to a point. Johnson had earned the respect of his colleagues, who made him speaker of the South Carolina House and elevated him to the Bench. John Quincy Adams said he was "a man of considerable talents and law knowledge,"[28] a "learned man [who] defends his opinions with so much earnestness and vigor" that, on one occasion, Adams found it "advisable, after some discussion, to waive the subject[.]"[29] But Johnson's conduct, both on and off the Bench, also compelled Adams to conclude that, while intelligent and accomplished, he was ultimately "a restless, turbulent, hot-headed politician caballing judge."[30]

The Senate received Johnson's name on March 22, 1804 and confirmed him two days later. Secretary of State James Madison then contacted him and asked if he would accept the position.[31] Johnson's biographer, Donald G. Morgan, is perhaps overly dramatic in his description of what followed, but his characterization of the events is worth repeating:

After Thomas Jefferson appointed William Johnson of South Carolina (pictured) to the Court in 1804, he tried to encourage a return to the custom of seriatim opinions and to foster a rift between his appointee and Chief Justice John Marshall.

> Toward the middle of April this communication overtook the rising young state judge in the midst of his state activities, judicial and otherwise. Would he accept? Or would he, like his mentor C. C. Pinckney before him, turn it down out of preference for a local career? He was doubtless aware of the struggle over the federal judiciary, then at its height, and of the difficulties he would encounter there. He would occupy an outpost on the front and would be called on, in the interest of Republicanism, to resist single-handed the aggressions of Marshall and the Federalists.[32]

Johnson himself did not seem terribly troubled, conveying "my Acknowledgments to the President for this Mark of Attention

and Confidence, & to communicate my willingness to accept the Appointment."[33] He asked only that he be given "until the 1st May next" to complete certain local duties and obligations.[34] There were no objections, and Court records have Johnson taking his judicial oath on May 7, 1804.[35]

Jefferson and Gallatin clearly believed that a Republican Cat had been set among the Federalist Canaries, a "zealous" advocate, presumably prepared and able to become "an active and useful promoter of the Republican intererst[s] in our country."[36]

That judgment turned out to be mistaken, although not for the reason usually cited, the charms and persuasive powers of John Marshall. Even the most cursory inspection of Johnson's record on the South Carolina bench would have revealed deep cause for concern. In 1801, for example, a case came before him involving an indictment under state law for counterfeiting notes of the Charleston branch of the First Bank of the United States. The defense argued that the state court did not have jurisdiction: the offense was a matter of federal law. Speaking for the court in *State v. Pitman*, Johnson disagreed, declaring that "[t]he national government may pass such laws as may be proper and necessary to avoid all the mischiefs arising from the counterfeiting, and passing, as true, the forged bills of credit of the Bank of the nation."[37]

That broad construction embraced two things Jefferson regarded as intolerable evils: the existence of implied powers, and the constitutionality of the Bank of the United States. Both were Federalist Heresy. Both would have incurred Jefferson's ire, and likely have killed the nomination, if only he knew. There was some room for comfort. Johnson did recognize the authority of the states, observing that "it cannot be maintained that the several state governments may not also pass such laws, as they shall deem necessary, to the welfare of their internal concerns, in relation to the same subject."[38] Assuming that the respective measures were "reconcilable and consistent"—presumably, that no preemption questions were posed—both the nation and states could act to protect their respective interests. But his reading of the Constitution and assessment of the nature and scope of federal power were diametrically opposed to Jeffersonian orthodoxy.

The views expressed in *Pitman* became central motifs during Johnson's years on the Court. True to Jeffersonian principles, he was sensitive to state rights and generally cautious in his affirmations of federal power. In *Martin v. Hunter's Lessee*, for example, he stressed that "the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."[39] He nevertheless insisted that it was largely for Congress, not the Court, to implement the structural details of appellate jurisdiction, "so firmly am I persuaded that the American people can no longer enjoy the blessings of a free government, whenever the state sovereignties shall be prostrated at the feet of the general government."[40] But he was also a willing and consistent ally of Marshall, supporting the existence of implied powers and routinely joining opinions voicing a robust theory of those expressly granted.[41] Indeed, in one notable instance, his concurring opinion in *Gibbons v. Ogden*,[42] Johnson both argued for a more expansive view of the federal commerce power than Marshall's and grounded the need for that approach in the sins of the states, which had been "selfish," with their insistence on passing "iniquitous laws and impolite measures ... was the immediate cause, that led to the forming of a convention."[43] The document that emerged, in turn, gave Congress "exclusive grants ... of power over commerce."[44]

Johnson did chafe at the notion that he could not routinely express his own opinion, especially when he disagreed with his brethren. Many years later he informed Jefferson that "[w]hile I was on our State-bench I was accustomed to delivering seriatim Opinions in our appellate Court, and

was not a little surprised to find our Chief Justice in the Supreme Court delivering all the Opinions in cases in which he sat, even in some instances when contrary to his own judgment & vote."[45] Johnson took issue with this, declaring that "I remonstrated in vain; the Answer was, he is willing to take the Trouble, & it is a Mark of Respect to him."[46]

Ironically, the first indication that Johnson would not quietly comply came in 1805 in a case involving the Contract Clause, *Huidekoper's Lessee v. Douglass*.[47] Anticipating *Fletcher*, Marshall spoke for the Court, finding that a Pennsylvania statute created "a contract; and although a state is a party, it ought to be construed according to those well-established principles, which regulate contracts generally."[48] Johnson concurred, agreeing "that any construction of a statute which will produce absurdities, or consequences in direct violation of its own provisions, is to be avoided."[49] He lodged the first of his many dissents in1807 in *Ex parte Bollman and Ex parte Swartwout*,[50] which grew out of the Burr Conspiracy. Marshall held that the Court had the power to issue the writs of habeas corpus in question, arguing that "the sound construction" of the provision in the Judiciary Act involved "is, that the true sense of the words is to be determined by the nature of the provision and by the context," rather than a "strict grammatical construction."[51]

Johnson disagreed, arguing at length that the Court "can exercise appellate jurisdiction in no case, unless expressly authorised to do so by the laws of congress."[52] He made it clear that he spoke reluctantly, but with a sense of duty, declaring that "[i]n this case, I have the misfortune to dissent from the majority of my brethren" and ending with the observation that he had experienced "the painful sensation resulting from the necessity of dissenting from the majority of the court."[53] Nevertheless, "[a]s it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the [my contrary] opinion ... ."[54]

Johnson subsequently recounted his version of what happened next:

> Some case soon occurred, in which I differed from my brethren, & I thought it a thing of course to deliver my opinion. But, during the rest of the session I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate courts had sustained by pursuing such a course. At length I found that I must either submit to circumstances or become a cypher in our consultations as to effect no good at all. I therefore bent to the current, and persevered until I got them to adopt the course they now pursue, which is to appoint someone to deliver the opinion of the majority, but leave it to the discretion of the rest of the Judges to record their opinions or not ad libitum.[55]

Johnson overstates his case. The process was gradual and dissent became an accepted norm as the Court matured, albeit not at Johnson's insistence. That said, it is important to understand the situation in the Court's early years and to take into account factors that counseled restraint.

Fletcher v. Peck: Johnson, Concurring?

Most of us are familiar with the events that shaped *Fletcher*: massive land grants, the allure of speculation and the power of speculators, and a protracted sequence of events characterized by self-dealing, bribery, and general malfeasance by the members of the Georgia legislature.[56] A 1795 act approved four major land grants in what became known as the Yazoo land fraud. The public learned the sordid background details and was outraged. In response, the legislature

repealed the earlier law and voided the land transactions. It was this measure that was at issue, and struck down, in *Fletcher*.

Marshall's opinion for the Court staked out three key propositions. The first was that the land grants authorized by the 1795 Act were contracts. "[P]urchase[s]" made "in the year 1795, from the state of Geogia" were "contract[s] ... which w[ere] made in the form of a bill passed by the legislature of that state."[57]

The second was that the 1796 Act rescinding those purchases was void:

> It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.[58]

The third was that the Court had the authority and responsibility to reach these results. The Contract Clause applied, even though these were state rather than purely private agreements. The Court, in turn, had the power to declare the state act unconstitutional. This was, Marshall stressed, "a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case."[59] That said, "[w]hen ... a law is in its nature a contract, when absolute rights have been vested in that contract, a repeal of the law cannot divest those rights[.]"[60]

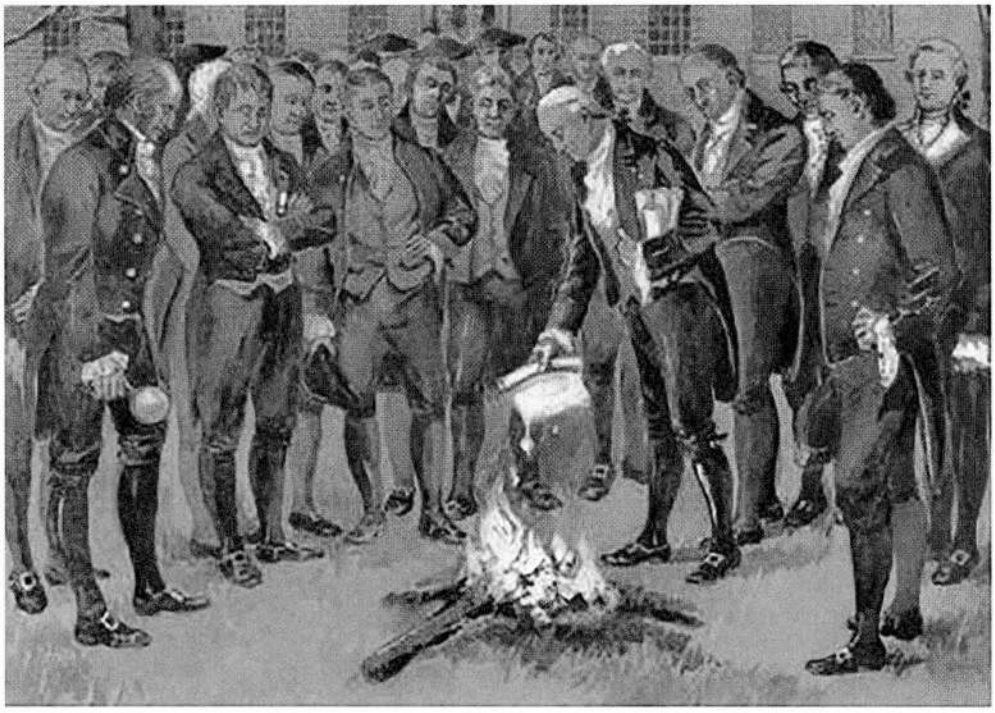
Fletcher is a Constitutional Law warhorse, albeit one that is actually rarely reprinted in the casebooks, much less read. It is routinely cited for three propositions. The first is its supposedly novel, expansive reading of the Contract Clause, given Marshall's conclusion that the prohibition included within its ambit state measures, not simply private agreements. The second is that *Fletcher* was the first case in which the Court ruled that a state statute was unconstitutional. The third is that Justice William Johnson's separate opinion, generally styled as a concurrence, was in fact a dissent.

The first two are simply wrong.

The notion that state measures could constitute contracts and that subsequent state enactments "impairing" them were void was established long before *Fletcher*. That process began in 1792, when Chief Justice John Jay and Justice William Cushing, riding the circuits, held that "a State have no right to make a law ... impairing the obligation of contracts, and therefore contrary to the Constitution of the United states."[61] Similar sentiments were expressed by Justice William Patterson when he declared that a state statute "impairs the obligation of a contract, and is therefore void."[62] This then became a formal holding of the Court in *Huidekoper's Lessee*, in which Marshall stated in no uncertain terms that "[t]his is a contract; and although the state is a party, it ought to be construed according to those well-established principles, which regulate contracts generally."[63]

What about invalidating state statutes? One year before *Fletcher*, as part of what has been styled as the Olmstead Affair, the Court reviewed a Pennsylvania measure declaring that a federal circuit court opinion "illegally usurped and [was] exercised in contradiction to the just rights of Pennsylvania in that suit" and "was null and void."[64] Speaking for a unanimous Court, Marshall declared in *United States v. Peters* that

> [i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under these judgments, the constitution itself becomes a solemn



Justice Johnson's separate opinion in *Fletcher v. Peck* (1810), usually characterized as a concurrence, was in fact a dissent. Above, Georgia legislators burn the Yazoo Act, which resulted in the Yazoo land fraud of 1795 and led to the landmark case.

> mockery; and the nation is deprived of the means of enforcing its laws by the instrumentalities of its own tribunals.[65]

The Pennsylvania measure could not stand. "[T]he order which this court is enjoined to make by the high obligation of duty and of law, is not made without extreme regret at the necessity which induced the application. But it is a solemn duty, and therefore must be performed."[66]

State statutes and contracts? Invalidate state laws? Been there, done that.

It is nevertheless hardly surprising that these developments were attributed to *Fletcher* and that the impulse to do so persists. One of the hallmarks of Marshall's approach to matters constitutional was to emphasize the case at hand, eschewing reliance on precedent in favor of grand pronouncements crafted in ways that presented them as legal innovations. This was especially true in cases that carried both considerable constitutional cachet and significant public importance. *Fletcher* was one such decision. The Yazoo land fraud had been a national cause celebre for decades. It had been widely discussed and debated and had consumed considerable time and effort in Congress, which struggled in vain to craft a solution. Accordingly, it is hardly surprising that the opinion would be written, and subsequently described by John Marshall himself, as breaking new ground.[67] Indeed, in this respect *Fletcher* bears a strong resemblance to another landmark Marshall opinion, *M'Culloch v. Maryland*,[68] which did not in fact offer the first Court approval of the doctrine of implied powers, a construct initially recognized in 1805 and repeatedly embraced in subsequent cases.[69]

The third *Fletcher* claim to fame, Johnson's concurrence as dissent, is correct, at

least as far as it goes. And raises the perplexing question: why?

Johnson clearly agreed with the Court's resolution of the dispute:

> I do not hesitate to declare that a state does not possess the power of revoking its own grants.
>
> ...
>
> When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them[.][70]

He emphasized, however, that his "opinion on this point is not founded on the provision in the constitution of the United States, relative to laws impairing the obligation of contracts."[71] Rather, "I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the deity."[72]

That observation is puzzling, given that Marshall expressly invoked natural law, "the general principles which are common to our free institutions."[73] Why was this not enough?

One possible answer lies in Johnson's belief that the Contract Clause employed "words ... of equivocal significance."[74] He stressed that "[w]hether the words, 'acts impairing the obligation of contracts,' can be construed to have the same force as must be given to the words 'obligation and *effect* of contracts,' is the difficulty in my mind."[75] That was especially so since "[t]he states and the United States are continually legislating on the subject of contracts," dictating, apparently properly, numerous rules that governed their formation, implementation, and effect.[76]

The subtleties of contracts and contract law are not my strengths. That said, these quibbles about the scope of the Contract Clause and concerns about "obligations" as opposed to "effects" strike me as clearly that: quibbles.[77] For example, Marshall recognized in *Fletcher* that Georgia had, and could enforce, "rules of property which are common to all citizens of the United States" and "principles of equity which are acknowledged in all our courts."[78] As he explained two years later, there are, and can be administered without implicating the Clause, "requisites to the formation of a contract."[79] Indeed, in his only dissent in a constitutional case, Marshall declared in *Ogden v. Saunders* that the state "right to regulate contracts, to prescribe the rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised."[80]

The problem in *Fletcher* was not then one of formation or execution, but of repudiation. "[W]hen absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them."[81]

So why did Johnson feel obliged to write separately? Especially if the goal was to recognize the existence and force of natural law? Marshall had clearly embraced natural law, emphasizing that "there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded" and that "the constitution of the United states contains what may be deemed a bill of rights for the people of each state."[82] These are not sops, inserted to assuage Johnson, secure his acquiescence, and make it possible to declare that it was "the unanimous opinion of the court" that the 1796 measure was void. They were, rather, consistent expressions of what Bill Nelson has characterized as Marshall's nature as "a traditionalist who believed in natural rights that pre-existed government and legislation."[83]

The answer ultimately lies in contexts already set forth: Marshall as Chief Justice, Jefferson's hopes for Johnson,

and the problems posed by unrealized expectations.

Two overarching considerations. First, it is important to recognize that Johnson joined the Court after *Marbury* was decided. That decision created the predicates for what Jefferson would subsequently describe as a "judiciary of the United States [that] is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."[84] It was, moreover, a Court that routinely spoke with a single voice, that of John Marshall. "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."[85]

Second, during Johnson's initial years on the Court there were few if any decisions that drew Jefferson's attention, much less his ire. This does not mean that the Court did not craft opinions and doctrines advancing key aspects of what we might call the Marshall Project. In 1805 and again in 1809 it was abundantly clear that the Court had embraced the "heresy of implied powers."[86] But these decisions flew beneath the political and social radar. The one possible exception was the Burr Conspiracy and trial. In *Ex parte Bollman and Ex parte Swartwout*, Marshall held that the Court had the power to issue the writs of habeas corpus in question, arguing that "the sound construction" of the provision in the Judiciary Act involved "is, that the true sense of the words is to be determined by the nature of the provision and by the context," rather than a "strict grammatical construction."[87]

Jefferson was outraged, seeing in the process and result the continuing subversions wrought by Federalist judges entrenched by life tenure:

> The fact is, that the federalists make Burr's cause their own, and exert their whole influence to shield him from punishment... . [I]t is unfortunate that federalism is still predominant in our judiciary department, which is consequently in opposition to the legislative and executive branches and is able to baffle their measures often.[88]

Fletcher accordingly provided a rare opportunity to probe and resolve issues that lay at the heart of Jefferson's decision to nominate Johnson. Unfortunately, an already fraught situation was compounded by an opinion Johnson issued while sitting on the Circuit Court in South Carolina.

Jefferson had secured passage of the Embargo Act of 1807 in response to violations of the United States' neutrality by the warring European powers. The captain of a ship in the Charleston harbor applied for clearance papers. The request was denied and the owners sought a writ of mandamus allowing the ship to sail. Writing for himself and District Judge Thomas Bee, Johnson held that "[t]he granting of clearances is left absolutely to the discretion of the [port] collector; the right of detaining in cases which excite suspicion is given him, with a reference to the will of the executive."[89] Directions to the contrary in a letter from the Secretary of the Treasury (expressing Jefferson's will) were not binding:

> The officers of our government, from the highest to the lowest, are equally subjected to legal restraint; and it is consistently believed that all of them feel themselves equally incapable, as well from law as inclination, to attempt an unsanctioned encroachment on individual liberty.[90]

Jefferson was not amused. In a letter to South Carolina Governor Charles Pinckney, he argued that embargo determinations "should be as uniform as possible."[91] The

Dissent gradually became an accepted norm as the Court matured. Above is the Capitol building, where the Marshall Court justices convened regularly in the Courtroom after 1819.

Charleston collector had "broke[n] down that barrier which we had endeavored to erect against favoritism, and furnished the grounds for the subsequent proceedings,"[92] that is, Johnson's ruling. Jefferson believed that decision had "too many important bearings on the constitutional organization of our government to let it go off so carelessly."[93] He enclosed a letter written by Attorney General Caeser A. Rodney arguing that the writ was void and tried to enlist Pinckney's assistance, expressing his desire that "the business will stop here, and that no similar case will occur."[94]

Johnson responded, at length. He did not question Jefferson's right to seek legal advice. "But when that opinion is published to the world" he saw "no other purpose than to secure the public opinion on the side of the executive and in opposition to the judiciary."[95] As the presiding judge of the court that issued the opinion in question, he had an obligation to speak. And he did, declaring that "[t]here never existed a stronger case for calling forth the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality and an honest intention to discharge our duty."[96]

It was a remarkable episode and exchange, redolent of the extra-judicial dialogue between the Richmond Junto and Marshall that broke out in the wake of *M'Culloch*. But it was also an exercise that placed Johnson at stark odds with his patron. The net effect: he was suspect, presumably now a card-carrying member of the corps of "sappers and miners constantly working under ground to undermine the foundations of our confederated fabric."[97] *Fletcher* accordingly gave Johnson what must have been seen as a welcome opportunity to repair the breech. But he was torn, trying to serve three masters: himself; his patron, Thomas Jefferson; and the individual with whom he had cast much of his judicial lot, John Marshall.

The line he walked was carefully calculated. He clearly adhered to his personal conviction that the Court should not parse the

Constitution "[t]o give it the general effect of a restriction of the state powers in favor of private rights."[98] He also aligned himself with Marshall, stating in no uncertain terms that "[t]here is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection of individual rights against the acts of the state legislatures."[99]

Most importantly, by emphasizing his reliance on natural law, he placed himself firmly in Jefferson's camp. The existence and importance of natural law was a persistent theme for Jefferson. In 1790, for example, he stated:

> Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the majority is the natural law of every society of men.[100]

These rights were innate and superior, "not left to the feeble and sophistical investigations of reason, but … impressed on the sense of every man."[101] It was "[f]undamental to Jefferson's political philosophy that no government could legitimately transgress natural rights."[102] And, as L. K. Caldwell has stressed, "no single individual is more responsible than Thomas Jefferson for the persistence of the natural law concept in American life."[103]

Johnson was sending a clear signal that he was aligning himself with a core Jefferson value and repudiating Marshall's "fraudulent use of the Constitution."[104] He avoided Marshall's "constitutional twistifications,"[105] finding a welcome refuge in Jefferson's "fundamental principles of the republic."[106] After all, if natural law constituted "a principle which will impose laws even on the deity,"[107] it must be binding on John Marshall, a mere mortal.

Her post-college experiences as a social worker and philanthropist gave Charlotte Anita Whitney a deep understanding of poverty. The wealthy suffragist became a committed socialist and then joined the nascent Communist Labor Party in 1919.

Johnson subsequently tempered his enthusiasm for natural law, in particular its application in cases parsing the Contract Clause. In *Ogden*, for example, he stated that "the right and power" of contract "will be found to be measured neither by mortal law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three."[108] That was not the case in *Fletcher*, and Johnson's opinion remains one of the two most prominent examples of concurrences that operate as dissents, of agreeing, disagreeably.

Whitney v. California: Attack, or Abdication?

This brings me to our second major touch point, the Brandeis "concurrence" in *Whitney*. Once again, the general outlines

of the case are familiar. Charlotte Anita Whitney was a member of "an influential and refined family."[109] After college she engaged in extensive social work in New York and charitable undertakings in California, experiences that gave her a deep understanding of the ravages of poverty and the problems common workers confronted in an era where labor had few if any rights and attempts to organize and bargain were viewed, at best, as anti-American. A committed socialist, she eventually joined the nascent American communist movement and, in the words of her indictment,

> did ... unlawfully, willfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism.[110]

The Court believed Whitney's membership in the California branch of the Communist Labor Party of America and participation in a November, 1919 convention of that group meant that she knew of and embraced that organization's "propaganda" and tactics, in particular "the value of the strike as a political weapon."[111] The California Supreme Court, for example, had emphasized that party writings "compel[] the proletariat to make use of the means of battle, which will concentrate its entire energies, namely, mass action, with its logical result, direct conflict with the governmental machinery in open combat. All other methods, such as revolutionary use of bourgeois parliamentarism, will be of only secondary significance."[112] It was irrelevant that the resolution Whitney actually signed "fully recognize[d] the value of political action as a means of spreading communist propaganda."[113] As the California court noted with approval, the party had been found to be "of such a character as to

Justice Brandeis's concurrence in *Whitney v. California* (1927) has also been characterized as a dissent. Brandeis (pictured) said he tried not to dissent in "ordinary" cases where "certainty & definiteness" are required, but he drew the line at "constitutional cases" because he believed nothing is ever settled.

easily lead a *reasonable* man to conclude that the purpose of the Communist Party is to accomplish its end, namely, the capture and destruction of the state, as now constituted, by force and violence."[114]

The Court, in an opinion by Justice Edward Sanford, sustained her conviction:

> [T]hat a State in the exercise of its police power may punish those who abuse this freedom [of speech] by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.[115]

The California legislature had declared that knowing membership in any such organization "involves such danger to the public peace and security of the state, that these acts should be penalized in the exercise of its police power."[116] The *Whitney* majority believed that "[t]hat determination must be given great weight" and that "[e]very presumption is to be indulged in favor of the

validity of the statute."[117] Indeed, the fact that this constituted group action "involves even greater danger to the public peace and security than the isolated utterances and acts of individuals is clear."[118]

Justice Brandeis, joined by Holmes, concurred. The opinion is justly revered as an extended endorsement of the vital role that free speech plays in our society:

> [F]reedom to think as you will and to speak as you think are means indispensable value and to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[119]

Further:

> Fear of serious injury cannot alone justify suppression of free speech and assembly. Mean feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.[120]

The fact that the legislature had concluded otherwise was irrelevant. "[T]he enactment of the statute cannot alone establish the facts which are essential to its validity."[121]

Given this and more, why was this a concurrence and not a dissent? Most scholars credit the explanation proffered, that procedural defaults in the litigation strategy below doomed Charlotte Whitney's appeal. Emphasizing that "the result of ... an enquiry [such as this] may depend upon specific facts of the particular case,"[122] Brandeis stressed that Whitney "did not claim that ... there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed on by the court and jury."[123] That "might have been made the important issues in the case" and "[s]he might have required that the issue be determined either by the court or the jury."[124]

She did not, and "there was evidence on which the court or jury might have found that such danger existed."[125] In particular

> there was ... testimony which tended to establish the existence of a conspiracy, on the part of the members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed.[126]

Indeed, as the California Court of Appeals emphasized, Charlotte Whitney's character and intelligence worked against her:

> That this defendant did not realize that she was giving herself over to forms and expressions of disloyalty and was, to say the least of it, lending her presence and the influence of her character and position as a woman of refinement and culture to an organization whose purposes and sympathies savored of treason, is ... past belief.[127]

The explanation strikes me as plausible. Brandeis had a well-deserved reputation as a Progressive who "favored bold judicial innovation to bring individual rights."[128] For example, in his celebrated dissent in *New State Ice Co. v. Liebmann* he did not simply extol the ability of "a single courageous state ... to serve as a laboratory ... to try novel

social and economic experiments without risk to the rest of the country."[129] He also cautioned that the Court, "in the exercise of [its] high power" of judicial review "must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold."[130]

That said, Brandeis was also a staunch believer in judicial restraint. In *Ashwander v. Tennessee Valley Authority*, three of the six rules he catalogued regarding the need to "avoid passing ... on constitutional questions" spoke directly to the approach taken in *Whitney*:

> 2. The Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."
>
> ...
>
> 3. The Court will not "formulate a rule of constitutional law broader than is required by the precise facts to which it is applied."
>
> ...
>
> 5. The Court will not pass on the validity of a statute upon complaint of one who fails to show that he is injured by its operation.[131]

Tellingly, as Professors Ronald K. L. Collins and David M. Skover have stressed, "[f]rom the beginning, *Whitney* was not a case that Brandeis wanted to hear."[132] Rather, much of what we see in the Brandeis opinion in *Whitney* was actually crafted as a dissent in a prior case, *Ruthenberg v. Michigan*.[133]

Charles Ruthenberg was a communist and, like Charlotte Whitney, attended a convention of the party. No overt acts ensued, but as "a voluntary vassal of the Third International ... he [wa]s to be judged by the declared policies, fixed doctrines, and commanded tactics of the Communist Party of America, section of the Communist International."[134] As such, he

> was acting under orders from Moscow. He was pledged to obey such orders, and, under this record, it taxes credulity too far to believe he was endeavoring to bring communist doctrines and tactics within the law. Such doctrines and tactics, formulated in Russia and promulgated here, are without the law.[135]

Ruthenberg appealed. The Court heard oral argument and was prepared to sustain the conviction. Brandeis prepared a dissent, but Ruthenberg's death rendered the case moot and it was never issued.[136] Instead, it provided the foundations for what became the *Whitney* concurrence, issued in place of the text Brandeis had prepared with the expectation that *Ruthenberg* would be decided. That draft declared that "[f]or reasons stated by me in *Ruthenberg v. Michigan*, decided this day, the [California] statute is, in my opinion, invalid, if applied at a time when there did not exist clear and present danger as there defined."[137] And it reiterated the belief that Whitney "might have," but did not, request "that either the court or jury determine" the question of whether the California statute was appropriately applied, foreclosing the option of reaching the merits.

Brandeis did not then believe that Charlotte Whitney was guilty in any meaningful sense. Rather, he crafted a concurring opinion in which he explained why—with a proper record and appeal—she presented a compelling case for clarification of the so-called "clear and present danger" test and why, invoking the proper standard, he would have found that "[t]he [mere] fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression."[138]

That focus on the test that supposedly applied is one of the three reasons why I believe it is necessary to treat the Brandeis opinion with caution, even in the face of

claims that it is "the greatest dissent ever written" and "is the best example we have of what a dissent can do."[139]

First, it is important to understand what Brandeis did and did not say given how the clear and present danger test was formulated, evolved, and consistently applied by the Court. Second, the two Chief Justices in place during this process, Edward D. White and William H. Taft, agreed with a key aspect of the John Marshall agenda, consistently expressing their antipathy toward dissent. Finally, there is reason to believe that Brandeis found it wise to temper his approach in light of the political, economic, and social conditions that prevailed during the litigation and resolution of *Whitney*.

The clear and present danger test, promulgated in *Schenck v. United States*, is deceptively simple:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the government] has a right to prevent. It is a question of proximity and degree.[140]

Grounded in the assumption that the First Amendment "cannot have been, and obviously was not, intended to give immunity for every possible use of language,"[141] the question is whether it is obvious that the words spoken or conveyed risk harms that society has a right to prevent. Whether or not those harms actually occur is irrelevant. Words have certain "natural tendenc[ies] and reasonably probable effect[s],"[142] and they would not "have been [uttered] unless [they] had been intended to have some effect."[143]

Each of the opinions in this initial sequence was written by Justice Holmes. They were certainly notable, marking as they did a departure from the restrictive view of the free speech guarantee that Holmes set out in *Patterson v. Colorado*, where he embraced the English common law rule that the "main purpose" of that provision was "to prevent all such *previous restraints* upon publication ... and ... not [to] prevent the subsequent punishment of such as may be deemed contrary to the public welfare."[144] They also led to a remarkable sequence of events, through which a chance encounter with District Judge Learned Hand initiated a protracted campaign to convince Holmes to reexamine and refine his approach.[145]

The problem: on what basis do we determine that the danger in question is both "clear" *and* "present"? As parsed by a majority of the Court, the test was reduced to what has aptly been characterized as a "bad tendencies" inquiry.[146] What, according to the government, is the "manifest" or "plain" purpose of a given statement?[147] In particular, was it "propaganda," a value-laden descriptor that takes certain forms of speech outside the quest for truth, freighted as it is with biases and emotionally laden language designed to persuade rather than enlighten? In *Abrams*, for example, the majority summed up its rationale as follows:

> [T]he plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe.[148]

The only question then was "whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict."[149] And that, the Court emphasized, was "a question to be determined ... by the jury at the trial."[150]

This approach was coupled with a rule of deference to legislative and prosecutorial judgments about whether certain types of speech are simply beyond the pale. As the *Gitlow* majority stressed:

> By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.[151]

In a similar vein, the *Whitney* majority emphasized that the California legislature had found that the acts Charlotte Whitney was accused of "involve[] such danger to the public peace and security of the state, that these acts should be penalized in the exercise of its police power."[152] Once again, "[t]hat determination must be given great weight" and "[e]very presumption is to be indulged in favor of the validity of the statute," a result bolstered by the fact "[t]hat there is a wide-spread conviction of the necessity for legislation of this character ... indicated by the adoption of similar statutes in several other States."[153]

Holmes protested in his *Abrams* dissent that the defendants in that case were "poor and puny anonymities ... made to suffer not for what the indictment alleges but for the creed that they avow."[154] There were no overt acts, harmful or otherwise. "Th[e] indictment is founded wholly upon the publication of two leaflets."[155] There was no "*present* danger of *immediate* evil,"[156] no "forcible act of opposition to some proceeding of the United States in pursuance of the war."[157] The proper response was, accordingly, to allow Abrams and his colleagues to indulge in the "free trade in ideas," with "the best test of truth" being "the power of the thought to get itself accepted in the competition of the market," with "truth ... the only ground upon which their wishes safely can be carried out."[158] But that was not the approach that the Court embraced and dissident voices found scant comfort in the courts in the decision's wake.

The *Whitney* concurrence was then grounded in two assumptions. The first is that the "legislative declaration" set forth in the California statute "creates merely a rebuttable presumption that th[e necessary] conditions have been satisfied."[159] The second is that the problem could be cured by making it clear that "[i]n order to support a finding of clear and present danger it must be shown either that *immediate* serious violence was to be expected or was advocated, or that past conduct furnished reason to believe that such advocacy was then contemplated."[160]

Both of those would clearly have helped advance free speech values if embraced. But neither accounted for a reality within the clear and present danger test I have not yet addressed: its admonition that the speech in question is suspect if it is of a certain "nature."[161] The devastating impact of that portion of the test was driven home in *Gitlow*, where the majority swept back the Wizard's drape and fessed up to what really mattered: certain types of speech, by their very nature, "involve such danger of substantive evil that they may be punished."[162]

In effect a form of strict liability, this principle revealed a core, and in the hands of the majority, dispositive assumption: certain forms of speech—communism, labor organizing, and the like—are palpably and intolerably un-American. This was subsequently made unmistakably clear in *Dennis v. United States*, where Chief Justice Fred Vinson stressed that "[s]peech is not an absolute, above and beyond control by the legislature when its judgment, subject to review here, is that certain kinds of speech are so undesirable as to warrant criminal sanction."[163] The proper approach under the clear and present danger test was, accordingly, "[i]n each case [courts] must ask whether the gravity of

the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[164]

The line of development between *Schenck*, *Whitney*, and *Dennis* was uneven. In *De Jonge v. Oregon*, for example, the Court arguably eviscerated the majority judgment in *Whitney* when it held that "mere participation in a peaceable assembly and a lawful public discussion [cannot serve] as the basis for a criminal charge."[165] In *Bridges v. California*, in turn, it seemingly accomplished much of what Brandeis and Holmes sought when it declared that "[w]hat finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[166]

Any hope that *De Jonge* and *Bridges* worked positive change was belied by *Dennis* and subsequent cases, which embraced a regime within which, for example, "[a] member [of a subversive organization] may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatsoever."[167] Accordingly, it was not until 1969 that the Court finally fashioned an approach that fulfilled the promise of the *Whitney* concurrence. Consistent with that opinion's expectation that "immediate serious violence was to be expected,"[168] it held

> that the constitutional guarantee of free speech and free press do not permit a State to forbid or prescribe advocacy of the use of force or of a law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[169]

The original Brandeis opinion accordingly fell short in at least two respects. It did not mention—much less discuss and account for—the *Gitlow* confession that certain types of speech were simply deemed intolerable in this nation. More tellingly, it continued to embrace the formulation that all that was needed was some "*reasonable* ground to fear that serious evil will result if free speech is practiced."[170] Brandeis did stress that "[t]he right of free speech, the right to teach and the right of assembly, of course, are fundamental rights."[171] But it is important to recognize that "fundamental rights" at that time did not enjoy the degree of protection developed in the wake of *United States v. Carolene Products Company*.[172] In *Meyer v. State of Nebraska*, for example, a case Brandeis cited, the operative standard was whether the legislative act in question is "arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[173] Restrictions on speech of the sort sanctioned in *Whitney* reflected, accordingly, measures that had a "reasonable relation to some purpose within the competency of the State."[174]

Please do not get me wrong. I agree that in most reasonable respects the Brandeis opinion is a devastating attack on free speech doctrine as it stood at the time. In that respect, it merits the praise it has garnered and its characterization as a dissent. That said, when examined with care, it fails to accomplish what it putatively set out to do and required further action by the Court to fulfill its promise.

A second important reality: Chief Justices White and Taft both embraced John Marshall's admonition that dissent was to be avoided if at all possible. White, for example, stressed very early in his tenure on the Court, prior to becoming Chief Justice, that "[t]he only purpose which an elaborate dissent can accomplish, if any, is to weaken the effect of the opinion of the majority, and thus engender want of confidence in the conclusion of courts of last resort."[175] He is reported to have said, shortly after being elevated, that he was "going to stop this dissenting

business,"[176] and during his tenure as chief ninety-five percent of the Court's cases were decided without a dissent.[177] Taft was of a similar mind, stating that "I don't approved of dissents generally,"[178] characterizing most of them as "a form of egotism" that "don't do any good, and only weaken the prestige of the Court."[179] Declaring that "[i]t is much more important what the Court thinks than what one thinks,"[180] he singled out Brandeis as an especially egregious offender, stating that "his ultimate purpose is to break down the prestige of the Court."[181]

These internal pressures were compounded by assaults in the political arena. Senator Robert La Follette of Wisconsin made dissent an issue in his Progressive Party campaign for the President in 1924. The American Bar Association in turn declared in that same year that a judge should not

> yield to the pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in cases of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.[182]

Brandeis was aware of and sensitive to this, noting that "[t]he whole policy is to suppress dissents."[183] He conceded that "[i]n ordinary cases there is a good deal to be said for not having dissents. You want certainty & definiteness & it doesn't matter terribly how you decided, so long as it is settled."[184] But he drew the line at "constitutional cases," where nothing is ever settled—"unless statesmanship is settled & at an end."[185] *Whitney* was one such case, where he was able to temper his opinion by styling it as a concurrence, even as he pursued his goal of seeing that "[c]lauses guaranteeing to the individual protection against specific abuses of power ... have a ... capacity of adaptation to a changing world."[186]

Finally, there are sound reasons to believe that Brandeis may have deliberately pulled some of his punches. I freely admit that I now enter the realm of sheer speculation. It is nevertheless important to take into account the contexts within which *Whitney* was decided and that prevailed when subsequent decisions were issued.

For example, the legal establishment in the 1920s and early 1930s did not share today's enthusiasm for the *Abrams* dissent and the *Whitney* concurrence.[187] Professor Edward S. Corwin, embracing the rule of deference, declared in the wake of *Abrams* that it was entirely appropriate that "the cause of freedom of speech and of the press is largely in the custody of legislative majorities and of juries, which, so far as there is evidence to show, is just where the framers of the Constitution intended it to be."[188] The dissent was described by another individual as "unfortunate and indeed deplorable," a "result [that] approaches a positive menace to society and this Government" that would be "seize[d] upon ... as propaganda" and used to "destroy[] ... the beneficial result of the conviction of these defendants and the otherwise salutary effect of the affirmance of that conviction by a majority of this great court."[189] And Day Kimbrell, a student editor of the *Harvard Law Review*--subsequently hired by Holmes to serve as his clerk—maintained that "legal toleration pushed to its ultimate conclusion becomes impotence, self-destruction."[190]

The most extensive attack was mounted by John Henry Wigmore, who characterized Abrams and his associates as a "band of alien parasites" whose actions were "cowardly and dastardly."[191] Describing what Holmes sanctioned as "Freedom of Thuggery," and disparaging the notion of "free trade in ideas," Wigmore declared that it

> mean[s] that those who desire to gather and set in action a band of thugs and murderers may freely

> go about publicly circulating and orating upon the attractions of loot, proposing a plan of action for organized thuggery, and enlisting their converts, yet not be constitutionally interfered with until the gathered band of thugs actually sets the torch and lifts the rifle.[192]

Free speech, he concluded, "represents the unfair protection much desired by impatient and fanatical minorities—fanatically committed to some revolutionary belief, and impatient of the usual process of rationally converting the majority."[193]

The reaction to *Whitney* was admittedly less strident, but by no means celebratory. The *New York Times*, for example, with no hint of criticism, reported that the Court had "upheld the constitutionality of the California Criminal Syndicalism law, which imposes heavy fines and terms of imprisonment for violence in the furtherance of political causes or an industrial dispute."[194] The Court, it stressed, "held that freedom of speech did not constitute unbridled license for every possible use of language, as was held in the Gitlow case from New York."[195] The concurring opinion, in turn, was neither discussed nor quoted, characterized simply as an expression of "regret" that the two were "unable to rule on [the] legality of Miss Whitney's acts."[196] California Governor C. C. Young, in turn, issued an executive pardon, sparing Charlotte Whitney the burden of imprisonment.[197] But he did not embrace any notion that the underlying statute was constitutionally suspect or that future prosecutions should be avoided. Rather, emphasizing that the "law under which she was convicted" was "of ... undoubted constitutionality," he focused on Charlotte Whitney herself, characterizing her as a sympathetic figure and stressing that "her imprisonment might easily serve a harmful purpose by reviving the waning spirits of radicals, through making her a martyr."[198]

Those sentiments persisted on the Court and in the body politic. As Robert Cover has emphasized, "[t]he conservatives had resolved to accept the force of law, the voice of the then dominant group in the community."[199] There was "a wide-spread conviction of the necessity" for such legislation and prosecutions," a justified and justifiable rejection of "unrestricted and unbridled license giving immunity for every possible use of language."[200] The need to remain vigilant in the face of contrary claims, Taft emphasized in 1929, meant that even though he was becoming "older and slower and less acute and more confused ... I must stay on the Court in order to prevent the Bolsheviki from getting control."[201]

This was the norm for much of the legal establishment. The views of the so-called Four Horseman were the rule not the exception. "Congress," they declared, was never intended "to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."[202] Indeed, it is worth recalling that in December, 1934 John W. Davis, speaking on behalf of the American Bar Association, delivered a broad-based attack on the New Deal, declaring that

> No line or syllable of the Constitution grants to the Federal Government a roving commission over the whole field of social betterment.
>
> The Government set up for us in Washington is not and was never intended to be an eleemosynary institution or a foundation for miscellaneous charities. It was not designed as a universal parent or an earthly Providence.[203]

There is an understandable impulse to believe that as the nation got deeper into the 1920s many of the fears expressed during and in the immediate wake of World War I dissipated. Imperial Germany had been vanquished and Wilson's prized League of

Nations had not yet proven to be a false hope for peace. The Russian Revolution and the assassination of Tsar Nicholas II and his family were fading memories. The American Expeditionary Force sent to Siberia to aid the White Russian troops had returned home from that futile and thankless task. Rapid industrial growth in turn fueled widespread prosperity and an abundance of consumer goods. And, for better or worse, the transportation revolution spawned by Henry Ford and his assembly line innovations was well underway.

That said, fears of communism, organized labor, and the like persisted. Even the most cursory review of the major newspapers of the day—both nationally and in California—reveal persistent reports of the evils of socialism and acts of violence associated with the so-called radical groups.

On January 22, 1926, for example, the *New York Times* reported that "communists" were "boring into Negro labor," "directed by the Communist Internationale in Moscow as part of its world-wide propaganda."[204] On October 22, 1926, the banner headline in the *San Francisco Examiner* shrilled, "Third Terror Thug Caught, Confesses: 4 Beaten with Hammer in Strike Riots."[205] On April 18, 1927—one month before *Whitney* was decided—the *Times* reported that the American Legion had issued a report condemning radicalism in public schools,

> submitt[ing] that it is entirely out of place for discussions tending to create disregard for the United States government to be had in an educational institution supported by taxes. Especially is that true when there is so great a presumption that the organization concerned is identified with a "parent body" whose aims and objects are the undermining of our form of government.[206]

Indeed, anticipating widespread campus support for socialism and communism in the United States in the 1930s, the President of the Civil Legion declared "that college-trained men and women constitute[] the most dangerous element in the Communist movement and that Communist doctrines [a]re now preached by renegade Americans instead of the foreigners who formerly upheld them."[207] Even American labor unions—acutely aware that they themselves were suspect—felt compelled to "declare war on the Reds,"[208] making it clear that they would take drastic action to resist union infiltration ordered and supported by "Soviet Moscow."[209]

Brandeis and Holmes were surely aware of this. I am not suggesting that what emerged in *Whitney* was a calculated decision to abandon free speech principles in the face of political, economic, and social disorder. I am submitting that Brandeis in particular was savvy enough to grasp the risks posed by a standard of review for trial courts and juries that turned on subjective judgments, grounded in assessments of whether a given set of facts suggested that speech posed a "reasonable" prospect of undesirable results. Indeed, as he noted in his *New State Ice Company* dissent, "[m]an is weak and his judgment is at best fallible."[210]

It is one thing for the Supreme Court to promulgate a rule. It is quite another for the judicial machinery below to implement it. As Professor Christina Well has noted, "[f]aced with a threat to the nation, fear and prejudice generate demand for action."[211] Judges, much less juries, are not exempt. They "are, after all, human. They remain subject to the same passions, fears, and prejudices that sweep the rest of the nation."[212]

Too often, trial courts and juries fail to act with what Professor Vincent Blasi has characterized as a necessary "civic courage."[213] As Learned Hand noted in his exchange of views with Holmes:

> All I say is, that since the cases actually occur when men are excited and since juries are especially clannish

> groups ... it is very questionable whether the test of motive is not a dangerous test. Juries wont much regard the difference between the probable result of the words and the purposes of the utterer. In any case, unless one is rather set in conformity, it will serve to intimidate,—to throw a scare into,—many a man who might moderate the storms of popular feeling. I know it did in 1918.[214]

It is important to keep in mind that conditions had changed significantly when both *De Jonge* and *Bridges* reached the Court. In 1937 the nation was emerging from the ravages of the Great Depression. The National Labor Relations Act had both passed and been declared constitutional, giving workers the legal right to organize and bargain. Soviet Russia, in turn, was seen as a somewhat benign entity, one whose governmental system remained anathema but whose internal problems made it much less a threat. Indeed, when *Bridges* was decided just one day after the Pearl Harbor attack the United States was about to embark on its Great Crusade against the evils of Hitler's Germany, firmly aligned with its new partner and best friend, Stalin's Soviet Union. And *Dennis*, with its shameful retreat, was issued at the height of the Red Scare, a time when courage and conviction were in decidedly short supply.

Conclusion

What then can we say about opinions styled one way that read quite another? In particular, about Johnson in *Fletcher* and Brandeis in *Whitney*?

They are, to my way of thinking, stellar exemplars of judicial craftsmanship, efforts to bring together competing strands of law and fact and weave an explanation balancing divergent needs and interests. For Johnson, the goal was to meet the demands of multiple masters, even as he strove to remain true to his principles. In a similar vein, Brandeis embraced his abiding sense of the need for judicial restraint, albeit charting an initial path toward a future within which free speech would enjoy the protections required in a society that values both the quest for truth and the need for public order.

Both wrote with care. They avoided the temptation to voice harsh criticisms of their brethren and were restrained in their approach. They did not write as "gladiator[s] making a last stand against the lions."[215] The opinions served different yet complementary purposes. Johnson sought redemption, even as he laid out a different vision of the source of the rights at issue. Brandeis in turn penned an essay on what the law of free speech should aspire to be, as opposed to what it was at the time.

The opinions they fashioned endure and command our respect precisely because they are agreeably disagreeable. They were crafted by judicial statesmen in ways that contrast sharply with strident dissents that too often chart different and less sympathetic courses. Theirs remains a road less traveled, all the more remarkable for that fact and as such worthy of our attention and respect.

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ENDNOTES

[1] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring).

[2] *Ibid.*

[3] 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Holmes joined the opinion.

[4] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

[5] For what the now definitive account of dissent in the Court is, see Melvin I. Urofsky, **Dissent and the**

Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue (New York: Vintage Books, 2015).

[6] *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405 (1792). It was Thomas Johnson's only recorded opinion during his brief, fourteen-month tenure. Justices James Iredell, John Blair, James Wilson, William Cushing, and Chief Justice John Jay disagreed. As Herbert Johnson has observed with considerable justification, "[f]ew men have so conducted their lives to escape historical study better than Thomas Johnson of Maryland." Herbert Alan Johnson, "Thomas Johnson," in Leon Friedman and Fred Israel, eds., **The Justices of the Supreme Court of the United States 1789-1978: Their Lives and Major Opinions** (New York: Chelsea House Publishing, 1980): 149.

[7] 2 U.S. (2 Dall.) 419, 429 (1793).

[8] See U.S. Constitution, Article III, Section 2 ("The judicial Power shall extend . . . to Controversies . . . between a State and Citizens of another State.").

[9] Charles Evans Hughes, **The Supreme Court of the United States** (New York: Columbia University Press, 1928): 68.

[10] Robert H. Jackson, **The Supreme Court in the American System of Government** (Cambridge: Harvard University Press, 1955): 19.

[11] Letter from John Jay to John Adams (January 2, 1801), in Maeva Marcus and James Perry, eds., **The Documentary History of the Supreme Court of the United States, 1789–1800** (New York: Columbia University Press, 1985): 146, 147 [**Documentary History**].

[12] John Marshall, John Stokes Adams, and Joseph Story, eds., **An Autobiographical Sketch by John Marshall, Written at the Request of Joseph Story** (Michigan: University of Michigan Press, 1937): 30. The best account is Kathryn Turner, "The Appointment of Chief Justice Marshall," *William and Mary Quarterly* XVII (1960): 143. A more global treatment is James R. Perry, "Supreme Court Appointments, 1789–1801: Criteria, Presidential Style, and the Press of Events," *Journal of Early Republic* 6 (1986): 371.

[13] Marshall himself recognized this, noting that "[s]hould [Jay] as is most probable decline the office I fear the President will nominate the senior Judge." Letter from John Marshall to Charles Cotesworth Pinckney (December 18, 1800), in Charles F. Hobson, ed., **The Papers of John Marshall** (North Carolina: University of North Carolina, 1990): Vol. 6, p. 41 [**Marshall Papers** and Marshall to Pinckney].

[14] A combination of politics and pragmatism led to the abandonment of this plan. The measure that would become the ill-fated Judiciary Act of 1801 was slowly making its way through Congress. See, *An Act to provide for the more convenient organization of the Courts of the United States*, 2 Stat. 89 (1801). It would have reduced the number of justices, depriving Adams of the opportunity to add a Federalist to the Court. In addition, Cushing's health was suspect and allegations regarding Patterson's Federalist loyalties were circulating.

[15] Letter from John Adams to John Marshall (August 17, 1825), in X **Marshall Papers**, p. 197.

[16] Marshall to Pinckney, p. 41.

[17] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[18] John Marshall, "A Friend to the Union No. I" (April 24, 1819), in 8 **Marshall Papers**, p. 290. See *also Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1805) (Marshall describing at length how he abandoned his initial conclusions and "acquiesce[d] in that of my brethren").

[19] Thomas Jefferson, "First Inaugural Address" (March 4, 1801), in James D. Richardson ed., **A Compilation of the Messages and Papers of the Presidents** (New York: Bureau of National Literature, 1897): 309, 310.

[20] Letter from Thomas Jefferson to Joel Barlow (March 14, 1801), in Andrew A. Lipscomb and Albert Ellery Bergh, eds., 10 **The Writings of Thomas Jefferson** (Washington, D.C.: Thomas Jefferson memorial Association of the United States 1903): 222, 223 [**Jefferson, Writings**].

[21] Letter from Thomas Jefferson to John Dickinson (December 19, 1801), in 10 *Id.*, pp. 301, 302.

[22] Thomas Jefferson, quoted in Charles Richard Williams ed., **Diary and Letters of Rutherford Birchard Hayes, Nineteenth President of the United States** (September 20, 1843), (Columbus: Ohio State Archaeological and Historical Society and Kraus, 1922; reprinted New York: Kraus, 1971): 116.

[23] Letter from Thomas Jefferson to James Madison (June 29, 1792), in Robert A. Rutland and Thomas A. Mason, eds., **The Papers of James Madison** (Virginia: University Press of Virginia, 1983): 333.

[24] Letter from Albert Gallatin to Thomas Jefferson (February 15, 1804), in Albert Gallatin and Henry Adams, eds., **The Writings of Albert Gallatin** (Philadelphia: J.B. Lippincott and Co., 1879): 178.

[25] *Ibid.* Gallatin suggested that if the nominee were to come from "the Second District, Brockholst Livingston is certainly first in point of talents." *Id.* The observation proved prophetic. In 1806, Jefferson nominated Livingston to replace William Patterson.

[26] *Id.*

[27] "Characters of the lawyers of S.C. (February 17, 1804)," in Gaillard Hunt, "Office-Seeking during Jefferson's Administration" *American Historical Review* 3 (1898): 270, 282. The standard (and only!) biography is Donald G. Morgan, **Justice William Johnson: The First Dissenter** (South Carolina: University of South Carolina Press, 1954) [Morgan]. For brief accounts of Johnson's life and tenure on the Court, see Mark R.

Killenbeck, "William Johnson, the Dog That Did Not Bark?," *Vanderbilt Law Review*, 62 (2009): 407; Mark R. Killenbeck, "'No Bed' of Roses: William Johnson, Thomas Jefferson and the Supreme Court, 1822–23," *Journal of Supreme Court History* 37 (2012): 95 ["No Bed"]; Sandra F. VanBurkleo, "In Defense of 'Public Reason': Supreme Court Justice William Johnson," *Journal of Supreme Court History, 32 (2007): 115.*

[28] Charles Francis Adams, ed., **Memoirs of John Quincy Adams, Comprising Portions of His Diary from 1795 to 1848** (March 27, 1820) (Philadelphia: J.B. Lippincott and Co, 1874) [**Adams, Memoirs**].

[29] 4 *Ibid.*, p. 129 (September 2, 1818).

[30] 6 *Id.*, p. 43 (March 27, 1820).

[31] David B. Mattern et al., eds., **The Papers of James Madison: Secretary of State Series** (Virginia: University of Virginia Press, 2005): 79n1 (referencing Madison's letter of March 31, 1804 and noting that it "has not been found") [**Madison, Sec'y State**].

[32] Morgan, p. 51. Washington offered the seat vacated by the resignation of John Rutledge jointly to Pinckney and Edward Rutledge. Letter from George Washington to Charles Cotesworth Pinckney and Edward Rutledge (May 24, 1791), in **Documentary History**, pp. 725–726. They declined in a letter dated June 12, 1791. *Ibid.*, pp. 727–728.

[33] Letter from William Johnson to James Madison (April 18, 1804), in **Madison, Sec'y State**, p. 78.

[34] *Ibid.*

[35] https://www.supremecourt.gov/about/members_text.aspx

[36] The characterization as a "zealous Democrat" comes from Senator William Plumer. The notion that description of someone promoting Republican interests is Johnson's own, albeit not of himself, in a May, 1805 letter to Jefferson, quoted in Morgan, p. 53.

[37] *State v. Pitman*, 3 S.C.L. (1 Brev.) 32, 33 (1801).

[38] *Ibid.*

[39] 14 U.S. (1 Wheat.) 304, 363 (1816) (Johnson, J., concurring).

[40] *Id.*

[41] In *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821), for example, he offered what was arguably a more sweeping formulation than Marshall. He conceded the theoretical point that "the genius and spirit of our institutions are hostile to the exercise of implied powers." *Id.*, p. 225. He then asked: "But what is the fact? There is not in the whole of that admirable instrument, a grant of powers which does not draw after it others, not expressed, but vital to their exercise, not substantive and independent, but auxiliary and subordinate." *Id.*, pp. 225–226.

[42] 22 U.S. (9 Wheat.) 1 (1824).

[43] *Ibid.*, p. 224 (Johnson, J., concurring).

[44] *Id.*, p. 236. Marshall had hedged his bets on that matter. The Court would eventually take a contrary view, holding that the Congress and the states had concurrent power to regulate commerce. See *Cooley v. Board of Wardens of Port of Philadelphia*, 53 U.S. (12 How.) 299 (1852).

[45] Letter from William Johnson to Thomas Jefferson (December 10, 1822), "No Bed," p. 116. This letter was part of the first real exchange of views between the two since the estrangement caused by Johnson's decision in *Gilchrist v. Collector of Charleston*, 10 Fed. Cas. 355, 356 (C.C., D.S.C. 1808) (No. 5,420). Jefferson tried to lure Johnson back into the Jeffersonian fold. In particular, he tried to encourage a return to the custom of seriatim opinions and to foster a rift between Johnson and Marshall.

[46] "No Bed," p. 116.

[47] 7 U.S. (2 Cranch) 1 (1805).

[48] For a discussion of the case and its significance, see R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (Louisiana: Louisiana State University Press, 2001): 212–222.

[49] *Huidekoper's Lessee*, 7 U.S. (2 Cranch) 72 (Johnson, J., concurring).

[50] 8 U.S. (4 Cranch) 257 (1807).

[51] *Ibid.*, p. 95.

[52] *Id.*, p. 103 (Johnson, J., dissenting).

[53] *Id.*, pp. 101, 107.

[54] *Id.*, p. 101. He also stressed that he was "relieved . . . in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending," *Id.*, p. 107, referring to Justice Samuel Chase, who was ill and could not participate.

[55] Johnson, December 10 Letter, "No Bed," 369.

[56] The two best treatments of the case are Charles F. Hobson, **The Great Yazoo Lands Sale: The Case of Fletcher v. Peck** (Kansas: University Press of Kansas, 2016), and C. Peter McGrath, **Yazoo, Law and Politics in the New Republic: The Case of Fletcher v. Peck** (Rhode Island: Brown University Press, 1966).

[57] *Fletcher*, 10 U.S. (6 Cranch) 127.

[58] *Ibid.*, p. 139.

[59] *Id.*, p. 128.

[60] *Id.*, p. 135.

[61] *Champion & Dickason v. Casey* (C.C.D. R.I. 1792) (unreported) (quoted in 1 Charles Warren, **The Supreme Court in United States History** (South Carolina: Nabu Press, 1923): 67).

[62] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 320 (C.C. Pa. 1795).

[63] *Huidekoper's Lessee*, 10 U.S. (3 Cranch) 76.

[64] *An Act Relating to the Claim of This Commonwealth*, ch. MMCCCXL, 17 **Pa. Stat.** 472 (1803), quoted in George L. Haskins and Herbert A. Johnson,

Foundations of Power: John Marshall, 1801–1815 (New York: Cambridge University Press, 1981): 325.

[65] *United States v. Peters*, 9 U.S. (5 Cranch) 115, 136 (1809).

[66] *Ibid.*, p. 141.

[67] See, for example, *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166 (1812) (per Marshall, "[i]n the case of *Fletcher v. Peck*, it was decided in this Court on solemn agreement and much deliberation, that this provision of the constitution extends to contracts to which a state is a party, as well as to contracts between individuals").

[68] 17 U.S. (4 Wheat.) 316 (1819).

[69] See, for example, *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805); *Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61 (1809); *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1810); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *Fisher*, ironically, was the first post-Marshall case with a recorded dissent. See 6 U.S. (2 Cranch) 397 (Justice Washington, who participated in the opinion below, stating that "[a]lthough I take no part in the decision of this cause, I feel myself justified by the importance of the question" to explain the result below). *Hudson*, in turn, was William Johnson's first major opinion for the Court. *Martin*, of course, was significant as an affirmation of the power of the Court to review decisions of state courts, albeit not widely noted for Story's statement that "[t]he government . . . of the United States, can claim no powers which are not granted to it by the constitution, and the powers granted, must be such as are expressly given, or given by necessary implication." 11 U.S. (7 Cranch) 326.

[70] *Fletcher*, 10 U.S. (6 Cranch) 143.

[71] *Id.*, p. 144.

[72] *Id.*, p. 143. A second objection, actually styled as a "dissent from the opinion," involved whether, given Native American titles and rights, Georgia actually held a fee-simple estate in the lands that could be conveyed. It is both picky and tangential.

[73] *Fletcher*, 10 U.S. (6 Cranch) 139.

[74] *Ibid.*, p. 144.

[75] *Id.*

[76] *Id.*, p. 145.

[77] Various individuals have discussed these matters at length, both as general propositions and as aspects of the Marshall-Johnson dialogue in *Fletcher*. See, for example, Warren B. Hunting, **Obligation of Contracts Clause of the United States Constitution** (Maryland: John Hopkins Press, 1919).

[78] *Ibid.*, p. 134.

[79] *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164, 166 (1812).

[80] 25 U.S. (12 Wheat.) 213, 347 (1827) (Marshall, C.J., dissenting).

[81] *Fletcher*, 10 U.S. (6 Cranch) 135.

[82] *Ibid.*, pp. 133, 136. One such right was the ability to form contracts. "[I]ndividuals do not derive from government their right to contract, but bring that right with them into society." *Ogden*, 25 U.S. (12 Wheat.) 346 (Marshall, C.J., dissenting).

[83] William E. Nelson, "The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* ,76 (1978): 893, 931.

[84] Letter from Thomas Jefferson to Thomas Ritchie (December 25, 1820), in 12 **Jefferson, Writings**, 175, 177.

[85] *Ibid.*, pp. 177–178.

[86] See Morgan, 110–125.

[87] 8 U.S. (4 Cranch) 75, 95 (1807).

[88] Letter from Thomas Jefferson to James Bowdoin, Jr. (April 2, 1807), in XI **Jefferson, Writings**, 183, 186.

[89] *Gilchrist v. Collector of Charleston*, 10 Fed. Cas. 355, 356 (C.C. D.S.C. 1808) (No. 5,420).

[90] *Id.*

[91] Letter from Thomas Jefferson to Charles Pinckney (July 18, 1808), in XII **Jefferson, Writings**.

[92] *Ibid.*, p. 104.

[93] *Id.*

[94] *Id.* The Rodney letter is in *Gilchrist*, 10 Fed. Cas., 357–359. His primary argument was that the circuit court did not have jurisdiction, an issue Johnson treated in passing, albeit subsequently acknowledging that Rodney was correct. See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813).

[95] *Gilchrist*, 10 Fed. Cas. 359.

[96] *Ibid.*, p. 366.

[97] Letter from Thomas Jefferson to Thomas Ritchie (December 25, 1820), in 12 **Jefferson, Writings**, 175, 177.

[98] *Fletcher*, 10 U.S. (6 Cranch) 145 (Johnson, J., concurring).

[99] *Ibid.*, p. 144.

[100] Thomas Jefferson, "Opinion on the Constitutionality of the Residence Bill," in Julian B. Boyd, ed., **The Papers of Thomas Jefferson**, (New Jersey: Princeton University Press, 1965): 194.

[101] Letter from Thomas Jefferson to John Manners (June 12, 1817), in 15 **Jefferson, Writings**, 124.

[102] David N. Mayer, **The Constitutional Thought of Thomas Jefferson,** (Charlottesville and London: University Press of Virginia 1994): 76.

[103] L. K. Caldwell, "The Jurisprudence of Thomas Jefferson" *Indiana Law Journal* 18 (1943): 193, 202 [Caldwell].

[104] Letter from Thomas Jefferson to John Dickinson (December 19, 1801), in **Jefferson, Writings**, 301, 302.

[105] See Letter from Thomas Jefferson to James Madison (May 25, 1810), in J. Jefferson Looney, ed., **The Papers of Thomas Jefferson: Retirement Series,** (New Jersey: Princeton University Press, 2005): 416, 417

(condemning "twistifications in the case of Marbury, in that of Burr, and the late Yazoo case"). This was the only reference to *Fletcher* by Jefferson I could find, a somewhat surprising reality likely reflected the fact that the opinion paved the way for Congress to finally resolve the Yazoo mess, a positive turn of events that arguably outweighed the sins of Marshall's opinion.

[106] Caldwell, 202.

[107] *Fletcher*, 10 U.S. (6 Cranch) 143 (Johnson, J., concurring).

[108] *Ogden*, 25 U.S. (12 Wheat.) 282.

[109] Ronald K. L. Collins and David M. Skover, "Curious Concurrence: Justice Brandeis's Vote in Whitney v. California," *The Supreme Court Review* (2005) 333–397 [Collins and Skover]. For a recent, definitive discussion, see Philippa Strum, **Speaking Freely: Whitney v. California and American Speech Law** (Kansas: University Press of Kansas, 2015).

[110] *People v. Whitney*, 57 Cal. App. 449, 450 (1923).

[111] *Whitney*, 274 U.S. 364.

[112] *People v. Taylor*, 187 Cal. 378, 386–387 (1921) (quoting the Manifesto of the Third International).

[113] *Whitney*, 274 U.S. 365.

[114] *United States ex rel. Abern v. Wallis*, 268 F. 413, 413 (S.D.N.Y. 1920) (emphasis added).

[115] *Whitney*, 274 U.S. 371 (citing *Gitlow v. New York*, 268 U.S. 652, 666–668 (1925)).

[116] *Ibid.*

[117] *Id.*

[118] *Id.*, p. 372.

[119] *Id.*, p. 375 (Brandeis, J., concurring).

[120] *Id.*, p. 376.

[121] *Id.*, p. 374.

[122] *Id.*, p. 378.

[123] *Id.*, p. 379.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Whitney*, 57 Cal. App. 452.

[128] Daniel A. Farber, "Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century," *University of Illinois Law Review*, (1995):163, 177. For the now-definitive biography and discussion of Brandeis's life and work, see Melvin I. Urofsky, **Louis D. Brandeis: A Life** (New York: Knopf Doubleday Publishing Group, 2009).

[129] 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[130] *Ibid.*

[131] 297 U.S. 288, 346–347 (1936) (Brandeis, J., concurring).

[132] Collins and Skover, "Curious Concurrence," 380.

[133] 273 U.S. 782 (1927) (dismissing the writ of error).

[134] *People v. Ruthenberg*, 229 Mich. 315, (1925).

[135] *Ibid.*, pp. 339–340.

[136] The full text may be found in Collins and Skover, "Curious Concurrence," 388–395.

[137] *People v. Ruthenberg*, 396–397.

[138] *Whitney*, 274 U.S. 378 (Brandeis, J., concurring).

[139] Mark V. Tushnet, **I Dissent: Great Opposing Opinions in Landmark Supreme Court Cases,** (Massachusetts: Beacon Press, 2008): 99.

[140] 249 U.S. 47, 52 (1919).

[141] *Frohwerk v. United States*, 249 U.S. 204, 206 (1919). *Cf. Schenck*, 249 U.S. 52 ("The most stringent protection of free speech would not protect a man falsely shouting fire in a theatre and causing a panic.").

[142] *Debs v. United States*, 249 U.S. 211, 216 (1919).

[143] *Schenck*, 249 U.S. 51.

[144] 205 U.S. 454, 462 (1907) (citations omitted).

[145] For the classic account, see Gerald Gunther, "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," Stanford Law Review 27 (1975): 719 [Gunther]. A more complete narrative is now available. See Thomas Healy, **The Great Dissent: How Oliver Wendell Holmes Changed His Mind—and Changed the History of Free Speech in America** (New York: Picador, 2013).

[146] See, for example, *Pierce v. United States*, 252 U.S. 239, 244 (1920). As Professor Curtis notes, there are those who would resurrect this test. See Michael Kent Curtis, "Critics of 'Free Speech' and the Uses of the Past," *Constitutional Commentary*, 12 (1995): 29.

[147] See *Abrams v. United States*, 250 U.S. 616, 622, 623 (1919).

[148] *Ibid.*, p. 623.

[149] *Id.*, p. 619.

[150] *Pierce*, 252 U.S. 244.

[151] *Gitlow v. New York*, 268 U.S. 652, 668 (1925).

[152] *Whitney*, 274 U.S. 371.

[153] *Ibid.*, pp. 370–371.

[154] *Abrams*, 250 U.S. 629 (Holmes, J., dissenting). Brandeis joined this dissent.

[155] *Ibid.*, p. 624.

[156] *Id.*, p. 628 (emphasis added).

[157] *Id.*, p. 629.

[158] *Id.*, p. 630. This formulation stands in stark contrast to an earlier Holmes declaration, that "[w]hen I was young I used to define the truth as the majority vote of that nation that can lick all the others." Letter from Oliver Wendell Holmes to Learned Hand (June 24, 2018), in Gunther, 756, 757.

[159] *Whitney*, 274 U.S. 379.

[160] *Ibid.*, p. 376 (emphasis added).

[161] *Schenck*, 249 U.S. 52.

[162] *Gitlow*, 268 U.S. 670.

[163] 341 U.S. 494, 508 (1951).

[164] *Id.*, p. 510 (quoting Chief Judge Learned Hand, 183 F.2d 212).

[165] 299 U.S. 353, 365 (1937).

[166] 314 U.S. 252, 263 (1941).

[167] *Scales v. United States*, 367 U.S. 203, 228 (1961). *But* see *Yates v. United States*, 354 U.S. 298, 320

(1957) (distinguishing "advocacy of forcible overthrow as an abstract doctrine," which is protected speech, from "advocacy of action to that end," which is not).

[168] *Whitney*, 274 U.S. 376 (Brandeis, J., concurring).

[169] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

[170] *Whitney*, 272 U.S. 376 (Brandeis, J., concurring) (emphasis added).

[171] *Ibid.*, p. 373.

[172] 304 U.S. 144, 152n4 (1938) (stating that there "may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").

[173] 262 U.S. 390, 400 (1923).

[174] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1924).

[175] *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, 608 (1895) (White, J., dissenting). Having made this observation, he then justified his dissent there as necessary given the majority's departure from "a long and consistent line of decisions" and repudiation of "a power conceded to [the government] by universal consensus for one hundred years." *Id.*

[176] *Quoted in* Marie Carolyn Klinkhamer, **Edward Douglass White, Chief Justice of the United States** (Washington D.C.: Catholic University of America Press, 1943): 61.

[177] Stephen Budiansky, **Oliver Wendell Holmes: A Life in War, Law, and Ideas,** 345 (Washington D.C.: W. W. Norton, 2019).

[178] Letter from William Howard Taft to John Hessin Clarke (February 10, 1922), *quoted in* Robert Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," *Minnesota Law Review* 85 (2001): 1267, 1311 [Post].

[179] Letter from William Howard Taft to Willis Van Devanter (December 26, 1921), *quoted in Ibid.*

[180] *Id.*

[181] *Id.* n. 140.

[182] Canon 19, **ABA Canons of Judicial Ethics**, *quoted in* Post, 1348.

[183] Melvin I. Urofsky, "The Brandeis-Frankfurter Conversations," The *Supreme Court Review* (1985): 299, 330 (conversations of July 6, 1924).

[184] *Ibid.*, p. 314 (July 1, 1923).

[185] *Id.*

[186] *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

[187] It is worth noting that even today that enthusiasm is not universal. See, for example, Paul H. Brietzke, "How and Why the Marketplace of Ideas Fails," *Valparaiso University Law Review* 31 (1997): 951.

[188] Edward S. Corwin, "Freedom of Speech and Press Under The First Amendment: A Resume" *Yale Law Journal* 30 (1920): 48, 55.

[189] C. W. German, "An Unfortunate Dissent," *University of Missouri Bar Bulletin* 20 (1920): 75, 77, 80.

[190] D. Kimball, "The Espionage Act and the Limits of Legal Toleration," *Harvard Law Review* 33 (1920): 442, 446.

[191] *John H. Wigmore*, "Abrams v. U.S.: Freedom of Speech and Freedom of Thuggery in War-Time and Peace-Time," *Illinois Law Review* 14 (1920): 539–549.

[192] *Ibid.*, p. 552.

[193] *Id.*, p. 559.

[194] "Syndicalism Law of California Valid," *New York Times*, May 17, 1927.

[195] *Ibid.*

[196] *Id.*

[197] The full text is in Haig Bosmajian, **Anita Whitney, Louis Brandeis, and the First Amendment** (New Jersey: Fairleigh Dickinson University Press, 2010): 165–177.

[198] *Ibid.*, p. 177.

[199] Robert M. Cover, "The Left, the Right and the First Amendment: 1918–1928," *Maryland Land Review* 40 (1981): 349, 387.

[200] *Whitney*, 274 U.S. 370–371.

[201] Letter from William Howard Taft to Horace Taft (November 14, 1929), quoted in Post, 1325.

[202] *United States v. Butler*, 297 U.S. 1, 77 (1935).

[203] John W. Davis, "Fundamental Aspects of the New Deal from a Lawyer's Standpoint," *Tennessee Law Review* 13 (1935): 158, 160–161.

[204] "Communists Boring into Negro Labor," *New York Times*, January 22, 1926.

[205] "Third Terror Thug Caught, Confesses," *San Francisco Chronicle*, October 22, 1926.

[206] "Veterans Condemn School Radicalism," *New York Times*, April 18, 1927.

[207] "Calls College Reds Peril," *New York Times*, January 28, 1927.

[208] "Green Declares New War on Reds," *New York Times*, January 29, 1927.

[209] "Fight for Control of Garment Union," *New York Times*, November 20, 1926.

[210] *New State Ice Co.*, 285 U.S. 310.

[211] Christina E. *Wells*, "Fear and Loathing in Constitutional Decision-Making," *Wisconsin Law Review* (2005): 115, 116.

[212] *Ibid.*, p. 117.

[213] Vincent Blasi, "The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California," *William and Mary Law Review* 29 (1988): 653.

[214] Letter from Learned Hand to Oliver Wendell Holmes (late Mar., 1819), in Gunther, 759, 760.

[215] Benjamin Cardozo, "Law and Literature," *Yale Review* 14 (1925): 699, 715, quoted in Jackson, 18.

Chief Justice Melville Weston Fuller and the Great Mustache Debate of 1888

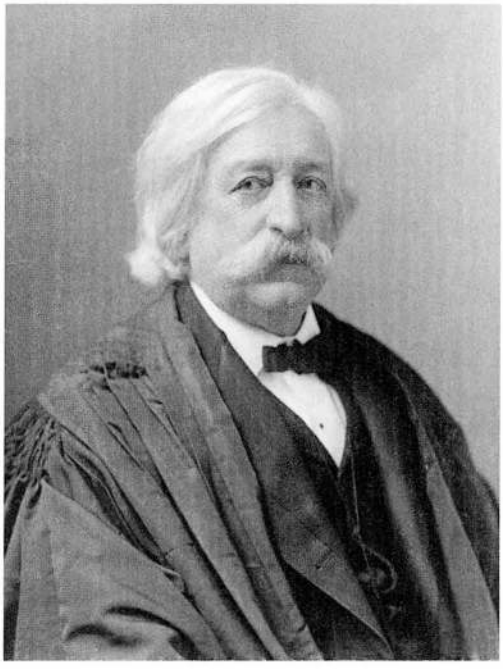
TODD PEPPERS

Over the long history of the Supreme Court, nominees to the highest court in the land have been opposed for a variety of reasons. Often opponents are concerned about the nominee's political ideology or competency. Occasionally, allegations are raised about political cronyism. And candidates have come under fire for their religion. But nominee Melville Weston Fuller's selection launched a national debate that went to the very heart of what makes one qualified to sit on the Supreme Court: whether a judge should have a mustache.

On March 23, 1888, Morrison R. Waite died of pneumonia after sitting for fourteen years in the Supreme Court's center chair. Approximately one month later, President Grover Cleveland nominated Fuller to be the next Chief Justice. A prominent and highly successful Chicago attorney, Fuller was a life-long Democrat who had sported a mustache at least since 1867.[1] Fuller had previously declined appointments to be on the United States Civil Service Commission and to be solicitor general. This time, however, Fuller answered the call to duty.

At the time of Fuller's appointment, it is highly unlikely that President Cleveland—himself the first president to have a mustache—anticipated that newspapers around the country would argue about the propriety of a mustached Chief Justice. After all, the previous Chief Justice wore a long and poorly trimmed beard—albeit a beard with a bare upper lip—throughout his time on the Supreme Court, and no newspaper had taken him to task.[2] What difference could a mustache without a beard make? The answer was soon to come.

At first, Fuller's nomination was met with praise and the national newspapers predicted a quick confirmation. Noting the public comments made by politicians and editorial pages on both sides of the political



When Melville W. Fuller was appointed to the Court in 1888, the press first made note of his diminutive size, calling him "rather below middle height." Then newspapers critiqued his mustache.

aisle, *The New York Times* reported that "[s]ome of the most cordial words of approval of the nomination have been found in the newspapers that would naturally object to contrive objections to it" and that President Cleveland's selection of Fuller "must be regarded as one of the most fortunate selections made by him since he took office."[3] The *Washington Post* echoed *The New York Times*' assessment of the bipartisan support for Fuller, noting that one Republican senator even "spoke of Mr. Fuller in terms of admiration almost of love." Concluded the *Post*: "confirmation by the Senate is assured."[4]

The *New York Sun* also weighed in on the nomination. The newspaper sang Fuller's praises, telling its readers that Fuller was "preeminent in his profession, is of unimpeachable integrity, and his private character is exemplary in every respect." The article ended by providing a physical description of Fuller.

> [He] is a slim, wiry-looking man, rather below the middle height. He has silver-gray hair and a drooping gray mustache. He dresses well, and is considered exceptionally good looking. His face is fresh and unwrinkled, his 55 years notwithstanding.[5]

The *Sun* did not further discuss Fuller's mustache. Nor did it appear to see the darkening storm clouds ahead.

Many local and state newspapers reprinted the *Sun*'s physical description of Fuller, with a few papers adding amusing comments about his weight (between 120 and 125 pounds) and his diminutive stature. "It is well that he [Fuller] will take time to get a gown made for himself before his installation," commented the *Boonville Standard*. "If he should venture to go through the ceremony in a gown borrowed from one of his associates…the clerk of the court would best tie a string to him when he gets into it or there will be some difficulty to find him afterwards."[6]

It was Fuller's hometown paper, the *Chicago Tribune*, that first reported that people were grumbling about the nominee's mustache. "The greatest objection that has been urged against Chief Justice Fuller is that he wears a mustache."[7] The *Tribune* reassured its readers, however, that the mustache would not be an impediment to Fuller's nomination. "This is an objection that could be easily removed. It need not stand in the way of his confirmation, however, and probably will not." Concluded the article: "He will be confirmed by a large majority, and without a close shave."[8]

Within a few short days, the *New York Sun* turned its full attention to the matter of Fuller's mustache.

> But it is evident from an attentive study of MR. FULLER'S features that their chief curve of beauty, their piece of resistance and their point of support, is his uncommonly

> luxuriant and beautiful moustache. In bristling reds, in car-driver blacks, in characterless browns or yellows, this moustache would not be the thing of beauty it is. Its form is good, but it is the grayish white or whitish gray of its color which raises it above the mob of plebeian and ordinary moustaches, and gives it character, dignity, tone. This moustache in any other color would not look so handsome.[9]

The *Sun* rejected the claims by unnamed critics that "[t]he idea of a Chief Justice with moustache is intolerable." While conceding that in the "good old times" moustaches were only worn by military officers, and that tradition dictated that the upper lip of the man occupying the center seat at the court must be clean shaven, the *Sun* reported that admirers of the "lovely perfection" of Mr. Fuller's mustache were raising their voices and demanding to know whether "this fair pearl [must] be melted in the vinegar of custom." In the opinion of the *Sun* editorial board, the answer was a resounding "no."

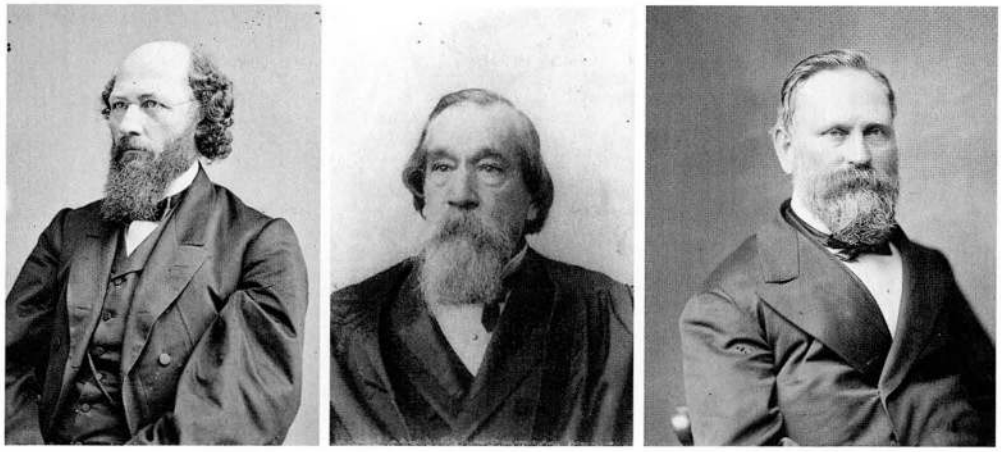
> Mr. Fuller, in all the glory of his robes, but dismoustached, will not look so well as he does with that while glory overhanging his mouth, a shield and a benediction. We advise him not to shave it off.

Within days, newspapers across the country weighed in on the great moustache debate. "Mr. Fuller's mustache is kicking up a great sensation at the north," wryly observed the *Atlanta Constitution*.[10] "Washington sticklers for judicial conventionality are troubling themselves very much because they fear that the newly appointed chief justice...will not conform to the custom which requires that there shall be only cleanly shaven upper lips on the supreme court."[11] The *Rock Island Argus* chimed in the next day, claiming that "no chief justice has ever disfigured his face" with hair on his upper lip.[12] And the *Herald-Ledger* simply tried to put Fuller's mustache in perspective, writing that Fuller "weighs 125 pounds, with or without the mustache."[13]

While conceding the beauty of Fuller's mustache, and admitting that "[t]o cut it off would be a positive disfigurement," the *Leavenworth Standard* reluctantly conceded that "to wear it on the bench would do violence to the dignity of the court and would be a shock to the reverend judges who have such respect for precedent."[14] Warned the *Standard*: "It is possible that the senate will want an understanding with Mr. Fuller about this mustache business before his name is taken up for confirmation." The historical record does not show whether the Senate Judiciary Committee sought such an "understanding" as it considered the merits of the Fuller nomination.

While the *Kinsley Graphic* did not officially take a position, it acknowledged that "it is generally believed that a Chief-Justice should not offend the legendary customs which pertain to his office—including keeping his upper lip 'free from hirsute adornment.'"[15] And other Kansas newspapers reported that there was a "widely prevalent conviction" amongst its citizens that the mustache should disqualify Fuller from assuming the bench.[16] "It seems difficult to imagine a man with a dude mustache, and who answers to the name of Mel to be occupying a seat on the supreme bench of the United States," grumped the *Oberlin Opinion*.[17] Clearly, Fuller had lost the state of Kansas.

Some newspapers challenged both the "tradition" of bare upper lips at the Supreme Court as well as the recommendation that the nominee reach for his razor. Referring to the reports "that Fuller will be forced to 'shave off his big, beautiful white mustache' as 'absurd,'" the *People's Press* cited an unnamed but authoritative Washington insider as evidence that there was no tradition—



Justices Stephen J. Field, Lucius Q. C. Lamar, and Stanley Matthews all sported full beards on the Bench prior to Fuller's arrival.

citing the beards of Justices Stephen J. Field, Lucius Q. C. Lamar and Stanley Matthews as evidence.[18] What the *Press* failed to recognized, however, was the seemingly critical distinction between a mere mustache and a full beard.

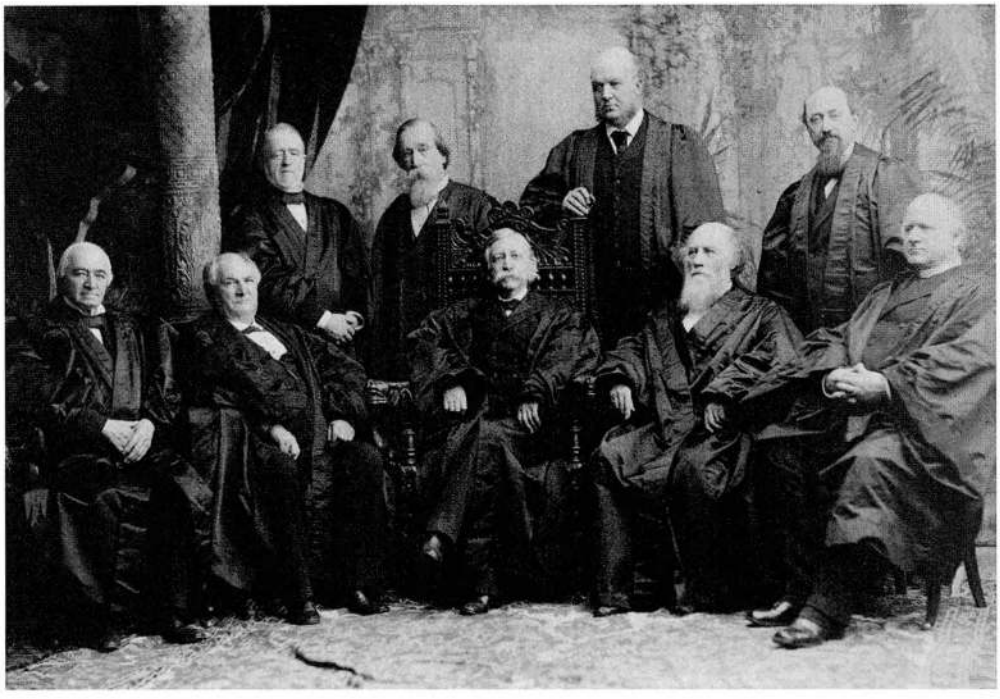
A few newspapers made aesthetic arguments in favor of the mustache. "Mr. Fuller's mustache is undoubtedly a thing of beauty, and therefore a joy forever," proclaimed the *Lancaster Weekly Examiner*. "If it falls a victim to the 'barbarous shears,' his fine face will lose some of its force and completeness."[19] The *Lancaster* added, to its relief, that Fuller seemed inclined to keep the mustache. The *Fort Worth Weekly Gazette* reassured its readers that changes in the nominee's personal grooming habits were not to be feared, and that the future looked bright: "From under that silvery mustache will flow opinions worthy of that great court in its palmist days."[20]

At least one newspaper appreciated the importance of precedent in resolving the judicial dilemma. The *Wichita Eagle* pointed to President Grover Cleveland's mustache as precedent for Fuller's facial hair. "That settles it. Let him be confirmed."[21] The Republican-leaning *Jackson Standard* had a political reason to support the retention of the mustache. "Mel. Fuller's mustache is a good quality for a Democratic politician—it shuts his mouth."[22]

On July 20, 1888, the United States Senate voted to confirm Fuller as the next Chief Justice of the Supreme Court. Fuller's confirmation, however, did not end the great mustache debate. Perhaps hoping to boost circulation by stirring the smoldering embers, in December of 1888 the *Sun* itself returned to the subject of Fuller's mustache. This time, however, readers were shocked by the *Sun*'s announcement that the Chief Justice's mustache was "deplorable."

The *Sun*'s new position on the Chief Justice's mustache rested on argument involving courtroom statuary and artistic composition. After explaining to its readers that a statue of an eagle with spread wings was located directly about the Supreme Court Bench, the *Sun* pointed to the similarities between this national symbol and the Chief Justice's mustache.

> The Supreme Court spread eagle always was a most impressive object to the eye and to the imagination, and it would still be such if Chief justice Fuller's deplorable moustaches were out of sight. The



The composition of the Fuller Court in 1890 showing a range of facial hair.

> plain truth is that the decorative and symbolic effect of the eagle's extended wings is dwarfed by the sweep and spread of the Chief Justice's moustaches, immediately below. The lines are precisely similar, and the dimension nearly alike. There is no contrast to relieve the feelings of uneasiness and oppression which every beholder must experience, provided his eyes are at all sensitive to such violations of aesthetic propriety.[23]

Given the similarities between the mustache and the eagle's wings, the *Sun* wondered aloud if attorneys appearing before the Court would lose their train of thought. Concluded the *Sun*: "This is not as it should be. It detracts from the dignity of the tribunal." The solution? Either remove the eagle statue or shave off the mustache, lest the aforementioned similarities between the two continue "bewildering the bar and distracting attention from the business of the court."[24]

If the *New York Sun*'s intention was to spark a second round of debate about the Chief Justice's mustache, its plan worked. In the coming months, a flurry of new articles appeared on the subject. The tide of public sentiment, however, appeared to have turned in the Chief Justice's favor. "Chief Justice Fuller doesn't look half as funny with his mustache and his silk gown on as people thought he would," the *Fall River Globe* gamely reassured its readers.[25] The *Chanute Weekly Times* reported that "Chief Justice Fuller is one of the most striking figures in public life," but admitted that the Chief Justice nervously "twists his mustache or strokes his fine flowing locks of white" while on the Bench. And the *Atlanta Constitution* reported that at a reception for the Chinese ambassador, former Secretary of State James G. Blaine had the "scrumptious good breeding" to not comment on the Chief Justice's mustache.[26] In sum, the battle over the Chief Justice's personal grooming appeared over. "None of the abuse or sarcasm aimed

by Washingtonians at Chief Justice Fuller's mustache moves him a hair," trumpeted the *Chicago Tribune*.

Yet only two months later, the battle resumed. The first salvo was fired after the March 19, 1889 elopement of Chief Justice Fuller's daughter, Pauline. Although the Fuller family did not seem distraught by the surprise marriage, some newspapers suggested that the Chief Justice might shave his mustache—perhaps as the modern equivalent of wearing sack cloth and ashes. This time, it was the *Star Tribune* that leapt to the defense of the famous mustache.

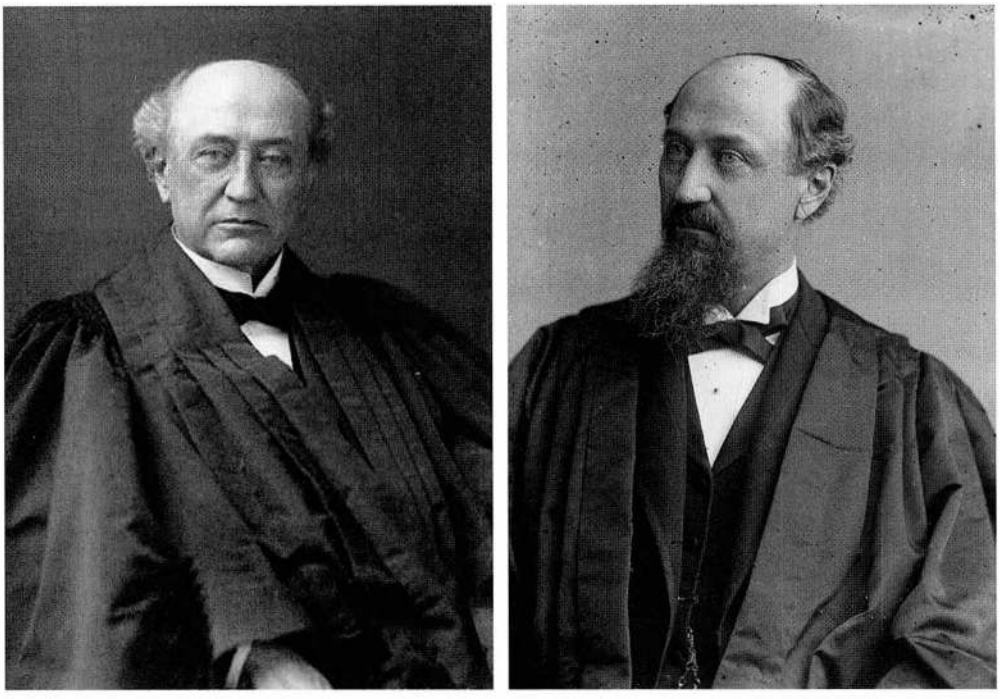
> We fail to see what connection there is between Chief Justice Fuller's mustache, and the elopement of his daughter. A number of our contemporaries evidently believe that because Pauline ran away and was married, the Justice should shave off his mustache. We are puzzled as to why this is so. Simply because a girl married the man of her choice is this any reason, that the highest judicial authority in the country should wreak his revenge on the atmosphere, and deprive the zephyrs of their sport? Most assuredly not.[27]

But battle lines were again drawn. Newspapers across the country predicted the mustache was doomed because now the Chief Justice's Bench mates were pressuring him to shave. "Chief Justice Fuller, mindful of the honored traditions of the court and yielding to the importunities of his associates on the bench, has consented to sacrifice his superb mustache, the fame of which has filled two hemispheres,"[28] sadly reported the *San Francisco Examiner*. Noting that the "exceeding beauty" of the mustache "excited jealousies and arouses animosities," the paper admitted that it did not know whether it should "congratulate the Chief Justice upon his sagacity in consenting to appease" or "deplore his lack of courage in so readily falling down before popular clamor." And the *Examiner* had a final warning for the Chief Justice: if he shaved off his mustache, he would be unrecognized when he returned home to Chicago "with a nude upper lip."[29]

At least one newspaper publicly blamed the *New York Sun* for the second round of mustache mischief. "If the *New York Sun* doesn't stop making fun of Chief Justice Fuller's mustache, it will get itself disliked by all the young ladies in the country," warned the *Boston Globe*. "They all say it is 'just lovely.' Our own opinion is that it is at least as handsome as the whiskers of the *Sun's* office cat."[30]

In January of 1890, David J. Brewer joined the Supreme Court. A former member of the Kansas Supreme Court and the United States Court of Appeals for the Eighth Circuit, Brewer took the judicial oath with a clean-shaven face "except at the chin, from which hangs a tolerably long beard."[31] Alas, the "tolerable" beard lasted less than a year. "Justice David J. Brewer...has at last sacrificed his imposing whiskers and he now appears upon the bench with a smoothly-shaven face,"[32] announced the *Wichita Beacon*. The paper characterized the former beard as "a truly Western cut. It was confined in its growth to the chin, although it was a little more ample and luxuriant than the Napoleonic style." Explaining that a shaved face "adds to the dignity of the owner, and consequently to the gravity of the great temple of justice," the paper added that Fuller's notorious mustache remained—as did the "moth-eaten old plantation whiskers" of Justice Lamar. As for Justice Brewer, he made no public statement as to why he banished his whiskers.

While momentarily silenced, in early 1890 the *New York Sun* made one more effort to whip up its readers. "It's lucky that Justice is blind," observed the *Sun*. "If she were able to see Chief Justice Fuller's mustache waving in the winds of eloquence at the celebration [of the Court's centennial] she would stop the



David J. Brewer of Kansas shaved off his "Western cut" beard a few weeks after joining the High Bench in 1890.

proceedings while she beat her sword into a razor."[33]

Once again, the newspapers rallied to Fuller's side. "Chief Justice Fuller's mustache is again agitating the public mind,"[34] reported the *Tennessean*. "The abolition of the Chief Justice's mustache is one of the reforms undertaken by the *New York Sun*." The *Tennessean* reminded its readers that "it is nobody's business except his [Fuller's] own whether he be bearded like the bard or as clean-faced as a door knob," at least as long as the Chief Justice did not "allow his mustache to absorb too much of his time and attention."[35]

The *Saint Paul Globe* tried to remain neutral. While admitting that the Chief Justice "looks a good deal more like a cavalry officer than the presiding judge of the United States Supreme Court," the *Globe* pointed out that the undeniable fact that Fuller was "certainly the handsomest man on the bench; men and women agree as to that."[36] The chief concern for the *Atlanta Constitution* involved table etiquette: "[i]t is hoped the chief justice doesn't drink buttermilk."[37]

The Chief Justice was reportedly "keeping a stiff upper lip" and sticking with his mustache despite more public pressure as well as his fellow justices' continuing demands that he shave "in the name of dignity and impressiveness."[38] And the *Saint Paul Globe* informed its readers that the Chief Justice's stubbornness was "all the more heroic" because he was receiving hate mail. The *Nebraska State Journal* reported that the anti-mustache "crusade" by New York newspapers, along with "an occasional spurt of assistance from a side concert of provincial editors," had resulted in Fuller "receiving threatening letters purporting to come from hard-fisted laboring men of the country threatening to 'do him up' in some shape if he does not shave it off immediately."[39] One example of these letters was published by the *Daily Globe*:

When Justice William Moody became clean shaven in 1908, newspapers noted that the Court now stood "5-4 on whiskers." He is pictured here in 1905, the year before he was appointed to be an Associate Justice.

> Ef yer doant shave of that there hary main on yer mout weal sea that yer doant have no eezy time. Do yer ketch on? Wee'l shave it of for yer pretty soon. Take worning.[40]

The *Daily Globe* concluded, based on the style of writing, that "[e]vidently it was not written by Fuller's colleagues on the bench."[41] What is truly evident is that the *Daily Globe* reporters had too much time on their hands and were having a bit of fun at the Chief Justice's expense.

This curious national anxiety on facial hair was not limited to the Chief Justice alone; in the years following Fuller's ascension to the center chair, a few court newcomers found their own facial hair coming under public scrutiny. A clean-shaved Henry Billings Brown did not offend sensibilities when he was sworn into office on January 5, 1891. But in the summer of 1892, newspapers warned newcomer George Shiras Jr. (who sported a combination of a beard and muttonchops) to find a razor. "Chief Justice Fuller is allowed to keep his flowing mustache because there would be so little of him left if they were cut off,"[42] explained the *Pittsburgh Gazette*. "Justice Lamar clings to his chin beard because, if he should remove it, he would be doing violence to one of the most sacred traditions of the South." Concluded the *Gazette*:

> But these two cases are exceptions, as Mr. Shiras will undoubtedly learn. When Mr. Brewer came upon the bench he wore a long beard which he was compelled to part with after a few weeks. Justice Gray is pointed to as a man who has broken through the rule, but the point is not a good one, for the only whiskers worn by the Massachusetts giant, legally and physically, consists of two little tufts under his ears that are hardly noticeable. The rule that Justices of the Supreme Court must part with their whiskers when they assume their robes of office was made after Justice Lamar's appointment, and is an ironclad one, which will be promptly called to the attention of Mr. Justice Shiras.[43]

Whether the rule was formally called to Mr. Shiras's attention or not, his facial hair remained.

We do not know what Chief Justice Fuller himself thought of the great mustache debate, but he must have been pleased when another part of his face—his nose—was publicly celebrated in 1891. In an article entitled "Statesmen's Noses: Peculiar Probosces of the Great Men in Washington and What They Indicate," the *St. Louis Dispatch* turned its attention to the nation's highest court.

> It is in the Supreme Court where you find the big noses of Washington. Justice Fuller has The Nose Of A Roman. It stands well up from his

> cheeks. It sets off his classic features and makes his pale face almost noble as it stands out in front of his leonine gray hair above his fierce silver mustache.[44]

The *Dispatch* saved its most lavish praise, however, for Justice John Marshall Harlan. "Justice Harlan has a head which would do for a model of Jove and his nose is that of a God,"[45] it gushed. The justice with the least god-like nose? That was Horace Gray, who possessed a "weak, fleshy nose."

By the time Chief Justice Fuller celebrated his fifth anniversary on the Bench in 1893, articles about judicial facial hair only sporadically appeared in national and state newspapers. This was undoubtedly due in large part to the fact that the newest justices (Howell E. Jackson in 1893 and Edward D. White in 1894) possessed perfectly smooth faces. The addition of Rufus W. Peckham in 1896 and Joseph McKenna in 1898 was met, at least when it came to their facial hair, with silence.

Rather than arguing about the propriety of mustaches and beards, most newspapers simply "kept score" in terms of the justices and their facial hair. "Mr. Justice Moody has shaved off his mustache and the supreme court now stands 5 to 4 on whiskers," reported the *Omaha Bee* in the spring of 1908. "That's the usual division."[46] When commenting on Judge Horace Lurton's potential nomination to the Supreme Court, the *Ottumwa Tri-Weekly Courier* blandly described him as a "small, white-haired man, with a white moustache."[47] No mention of offense to tradition or style was made.

One of the last stories about the Chief Justice and "will he or won't he shave" appeared in *The Chicago Eagle* in 1894. Apparently, another tired round of stories had appeared about the Chief Justice and the potential loss of his beloved mustache. The *Eagle* would not stand for such a development. "We are opposed to Chief Justice Fuller's proposition to shave his mustache," announced the *Eagle*. "[W]e recognize the danger involved in the sudden dislocation of the center of gravity in all great bodies."[48] This was the only time that physics was cited in support of retaining the country's most famous mustache.

The nomination of Oliver Wendell Holmes Jr. to the Supreme Court of the United States was the final death knell to the great mustache debate of 1888. Holmes arguably possessed the grandest mustache to ever grace the face of a state or federal court judge, a handle bar mustache that Holmes joked was "nourished in blood." While the *Chicago Tribune* grimly predicted that "[t]he esteemed *New York Sun* will not fail to view with horror the spectacle of another judge with a long mustache on the United States Supreme Court,"[49] the *Sun*'s enthusiastic endorsement of Holmes's appointment made nary a mention of his mustache.[50] The war was over.

This is not to say, however, that the guns forever fell silent on the topic of Fuller's mustache. Even decades after his death, Fuller's facial hair sparked comment. For example, when law professor John P. Frank reviewed Willard King's definitive biography of the Maine-born jurist, Frank was a bit unkind regarding Fuller's appearance. "His appearance in the standard pictures always seem to me to be a little unseedy," wrote Frank. "I suppose it could be 'majestic' if you don't mind unkempt hair and a straggly mustache."[51] Professor James W. Ely Jr., another Fuller biographer, was kinder than Professor Frank—merely referring to Fuller's mustache as "distinctive."[52]

So what should we make of the Great Mustache Debate of 1888? First of all, the fight over Fuller's mustache, its aesthetic merits, and its alleged offense to Court tradition was surely tongue-in-cheek. That being said, the motives of the main player in the drama, the *New York Sun*, remain a mystery. At the time of Fuller's nomination

to the Supreme Court, the editor of the *Sun* was Charles Anderson Dana. Although the newspaper was considered a Democratic publication, Dana was a fierce critic of Glover Cleveland (who had once turned down Dana's request for a political favor, thereby becoming a life-long enemy) and the *Sun* referred to presidential candidate Cleveland as a "'gross debauchee' who would 'bring his harlots to Washington and hire lodging for them convenient to the White House.'"[53]

It is possible that Dana's distain for Cleveland meant that all the President's nominees would be guilty by association. Yet the *Sun* originally praised Fuller's nomination, and many of its articles about Fuller's mustache were published after Cleveland lost his first reelection bid. And if Dana wanted to rough up a Cleveland appointment, surely the brilliant editor could have found more compelling faults than a simple mustache. It is much more likely that the Fuller articles are simply examples of what Dana biographer Janet E. Steele calls the editor's "playful sense of humor."[54]

And what about the mustache's impact on the institutional rules and norms surrounding the justices? Would it being going too far to argue that Fuller's brave stand blazed a trail for such mustached justices as Peckham, Holmes, William Rufus Day, William Howard Taft (who also wore a mustache during his presidency), and Thurgood Marshall? Not to mention the goateed Charles Evans Hughes? If Fuller did have an effect, it was short lived.

After the retirement of Hughes, no justice other than Thurgood Marshall sported any variation of facial hair until the fall of 1996—when Antonin Scalia briefly grew a full beard (one might also include the long hair and bushy sideburns worn by William H. Rehnquist in the 1970s, which prompted a *New York Times* columnist to call him "the hippie of the court"[55]). The sight of a bearded justice was so unique that, once again, articles about the return of facial hair to the Supreme Court appeared across the country.[56] Somewhere Melville Weston Fuller must have been smiling. (Justice Scalia shaved the beard the following summer.)

Author's Note: The author admits that he has had facial hair for the last twenty years. He would like to thank Chad Oldfather and Margaret Stein for their review and comments on an earlier draft of this paper.

ENDNOTES

[1] Willard L. King's biography of Fuller does not discuss the Chief Justice's mustache, but the book contains Fuller's 1853 Bowdoin College graduation photograph of a bare-faced Fuller and an 1867 photograph of a mustached Fuller. Willard L. King. **Melville Weston Fuller: Chief Justice of the United States, 1888-1910** (New York: Macmillan, 1950): 23, 67.

[2] I have not located any newspaper accounts written at the time of Waite's nomination that criticized his large beard.

[3] "The Next Chief-Justice: Popularity of Mr. Fuller's Nomination," *New York Times*, May 2, 1888.

[4] "A New Chief Justice: Melville W. Fuller, of Chicago, Named by President," *Washington Post*, May 1, 1888.

[5] "The New Chief Justice: Melville W. Fuller of Chicago Nominated to the High Office," *New York Sun*, May 1, 1888.

[6] "A Pen Sketch of Mr. Fuller," *The Boonville Standard* (Boonville, Indiana), June 1, 1888.

[7] *The Chicago Tribune*, May 6, 1888.

[8] *Id.*

[9] "Will He Shave It Off?" *New York Sun*, May 7, 1888.

[10] *Atlanta Constitution*, May 10, 1888.

[11] *Atlanta Constitution*, May 9, 1888.

[12] *Rock Island Argus* (Rock Island, Illinois), May 10, 1888.

[13] *Herald-Ledger* (Russellville, Kentucky), June 13, 1888.

[14] *Leavenworth Standard* (Leavenworth, Kansas), May 9, 1888.

[15] *The Kinsley Graphic* (Kinsley, Kansas), June 8, 1888.

[16] The *Voorhees Vindicator* (Voorhees, Kansas), June 7, 1888.

[17] *The Oberlin Opinion* (Oberlin, Kansas), May 28, 1888.

[18] *The People's Press* (Winston-Salem, North Carolina), June 28, 1888.

[19] "Muster Fuller's Mustache Go," *Lancaster Weekly Examiner* (Lancaster, Pennsylvania), May 9, 1888.

[20] *Fort Worth Gazette*, May 11, 1888.

[21] The *Wichita Eagle*, May 11, 1888.

[22] *Jackson Standard* (Jackson, Ohio), May 31, 1888.

[23] "The Moustaches of Justice," *New York Sun*, December 28, 1888.
[24] *Id.*
[25] *Fall River Globe* (Fall River, Massachusetts), January 2, 1889.
[26] "The Best of Good Breeding," *Atlanta Constitution*, January 17, 1889 (quoting the *Cincinnati Enquirer*).
[27] *Star Tribune* (Minneapolis, Minnesota), March 23, 1889.
[28] "The Doomed Mustache," *San Francisco Examiner*, March 26, 1889. See also "Justice Fuller's Mustache," *Kanopolis Journal* (Kanopolis, Kansas), March 23, 1889; *Springfield Reporter*, April 19, 1889.
[29] *Id.*
[30] "Notes and Opinions," *Democrat and Chronicle* (Rochester, New York), June 10, 1889 (quoting the *Boston Globe*).
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[33] "Seems to Worry Mr. Dana," *Pittsburgh Dispatch*, February 1, 1890 (quoting the *New York Sun*).
[34] *Tennessean* (Nashville, Tennessee), March 14, 1890.
[35] *Id.*
[36] "Fuller's Military Mustache." *Saint Paul Globe*, May 18, 1890.
[37] *Atlanta Constitution*, March 9, 1890.
[38] *Anaconda Standard*, March 14, 1890.
[39] *Nebraska State Journal*, March 11, 1890.
[40] *St. Paul Globe*, March 11, 1890.
[41] *Id.*
[42] "Don Cameron's Big Contract: He Is Straining Every Nerve to Form a Coalition Strong Enough to Defeat George Siras," *Pittsburg Dispatch*, July 22, 1892.
[43] *Id.*
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[45] *Id.*
[46] *Omaha Daily Bee*, March 4, 1908.
[47] *Ottumwa Tri-Weekly Courier*, November 2, 1909.
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[49] *Chicago Tribune*, August 13, 1902.
[50] "Mr. Justice Gray Resigns: O. W. Holmes Succeeds Him in the Federal Supreme Court." *New York Sun*, August 12, 1902.
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[54] *Id.* p. 95.
[55] Warren Weaver, Jr., "Mr. Justice Rehnquist, Dissenting: Relative Youth and Long Sideburns Notwithstanding, He Has become the Point Person of the Supreme Court's Right Wing." *New York Times*, October 13, 1974.
[56] "To Beard or Not to Beard: That's the Question," *Deseret News*, October 7, 1996; "Scalia's Beard Overshadows High Court's Weighty Agenda," *Cincinnati Post*, October 7, 1996; "Supreme Court – Scalia Shows Up With a Beard," *Seattle Times*, October 7, 1996; "Scalia's Beard Raises Some Eyebrows," *Austin American Statesman*, October 8, 1996; "Scalia's Beard Begins Term's Opening Session on Historical Note," *Milwaukee Journal Sentinel*, October 8, 1996; "Court Has New Look – Scalia's Beard," *Buffalo News*, October 8, 1996; "Bearded Gentleman," *Times-Picayune*, October 8, 1996; "Justice's Appearance a 'Hairy Situation,'" *Tulsa World*, October 8, 1996; Tony Mauro, "A Beard on the Bench for the First Time Since '41," *USA Today*, October 8, 1996; "A Trend That Is Just a Whisker Away?," *Rocky Mountain News*, October 9, 1996; "Whiskers in the Court," *Cincinnati Post*, October 9, 1996; "Hair Apparent," *Pittsburgh-Post Gazette*, October 10, 1996; "And He Smokes, Too!" *Tampa Tribune*, October 11, 1996; Tony Gabrielle, "Bearded Community Gets Justice," *Daily Press*, October 16, 1996. "On Washington—Rejected Nominee Blames Past." *Atlanta Journal Constitution*, October 8, 1997.

The Politics of Disabled Supreme Court Justices

JUDGE GLOCK

Supreme Court history is littered with stories of incapacitated or disabled Justices lingering long past their prime. Sometimes, disabled Justices have merely delayed the work of the Court. At other times, they have brought the work of the Court into disrepute.[1] Yet in more than 200 years of political and constitutional debate, the U.S. political system has never found a satisfactory answer to the problem of disabled Justices.

At certain periods in U.S. history, however, Congress and the President have intervened to entice or push disabled Justices from the bench. Although researchers have noted how Congress passed pension acts for federal judges in general, and even pension acts for individual disabled Justices, they have neglected to note how politics and personal finances played an essential part in when and how Congress decided to pension individual Justices, and how, as many of the pension acts were time-limited, Congress essentially pushed some Justices from the bench.[2] The pension bills for disabled Justices have thus created a type of judicial dependence on the elected branches of government that other constitutional provisions tried to avoid.

This article will look at how Congress and the President have struggled to entice or remove disabled Justices from the bench. It will focus on how they used time-limited pensions to convince two Justices, Ward Hunt and William Moody, to leave.[3] It will also examine how these acts influenced President Franklin D. Roosevelt's Court-Packing Plan, or "Un-Packing" Plan as some saw it at the time, since the plan tried to induce older and disabled Justices to leave the bench.[4] One final, though forgotten, effect of the failure of Roosevelt's plan was the passage of a congressional act to allow voluntary retirement for disabled Supreme Court Justices, which is still in effect today.

The Early Debate on Judicial Disability

Judicial Disability and the Constitution

The American Constitutional Convention in 1787 had to ponder the important

question of how to ensure both judicial independence and accountability. From early in the Convention, the attendees agreed on the English standard of judicial independence on the bench during the "good behavior" of the judges, subject only to the impeaching power of Congress.[5] Some who supported this standard, however, still thought there should be an alternative way to remove judges. On August 27[h], the scholarly John Dickinson of Delaware submitted a motion to the Convention that would have allowed Congress to vote, by mere majority, on an "address" to the President against a particular judge, after which the President could remove that judge, without impeachment and without showing of bad behavior.[6]

The main impetus behind Dickinson's amendment appears to have been a desire to remove disabled judges. It was a modified version of the British Parliament's "address to the king," under which the British Parliament, since 1700, could remove judges without impeachment. It was also a version of Massachusetts's 1780 constitutional provision allowing for legislative "removal by address," a variant of which was included in the constitutions of at least four other states. The general assumption was that such an address would be used as a type of "removal for incapacity."[7] Yet, despite the support of Elbridge Gerry and John Sherman, the Constitutional Convention voted against Dickinson's proposal.[8]

Some at the time still worried about the absence of such a clause for incapacitated judges. Alexander Hamilton, in **Federalist 79**, noted "The want of a provision for removing the judges on account of inability has been a subject of complaint." But Hamilton worried that "An attempt to fix the boundary between the regions of ability and inability, would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good." Although Hamilton noted that New York had taken "a particular age as the criterion of inability," in that case age sixty, he thought such a strict line was both arbitrary and unfair. In effect, Hamilton thought there could and should be no special provision for disabled judges.[9] Still, complaints about disability on the bench continued. Thomas Jefferson, who had helped establish the American standard of judicial independence during good behavior with his draft of the 1776 Virginia Constitution, later complained that judges were "irremovable...even by their own body for the imbecilities of dotage."[10]

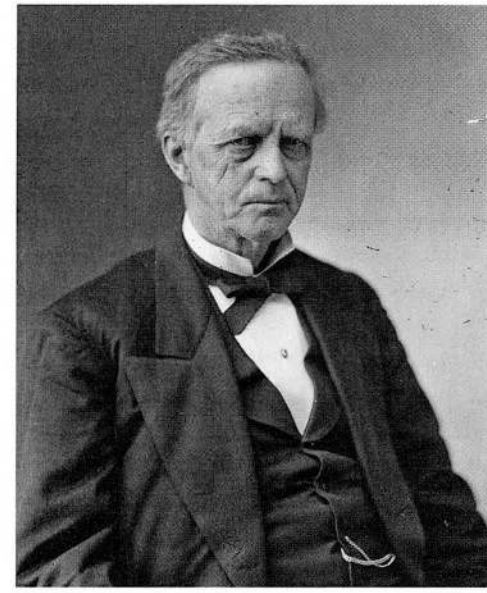
Congress Confronts Disabled Justices

The problems with aged and disabled Justices became apparent after the Civil War, when two Supreme Court Justices, Robert C. Grier and Samuel Nelson, stayed on the bench despite advanced years and declining abilities. Grier had become semiparalyzed from a stroke in 1867. *The Supreme Court Reporter* noted that "while not affecting the brain at all, the shock did affect his power to use his hand in writing, and to consult with facility the heavy books of the law."[11] Nelson's ailments were described as "general," but he did recover after a sharp congressional debate on his and his colleagues' health.

The fact that these two older Justices were Democrats fueled the desire of a Republican Reconstructionist Congress to remove them. In 1869, as part of a reform adding one new seat to the Supreme Court, Representative John Bingham proposed adding a voluntary but semiactive "retirement" status for judges or Justices who had passed age seventy and had served at least ten years on the federal bench.[12] He noted in particular that "at least two (Nelson and Grier) of the present justices of the Supreme Court... will not long be able, by reasons of the infirmities of age, to take their places on the Supreme Bench."[13] Bingham's bill, however, also said that if any member of the

Supreme Court wrote to the President that a particular judge or Justice was disabled, the President could forcibly place that Justice in retirement and appoint another. Despite the radical disability clause, Bingham's act easily passed the Republican House.[14] In the Senate, Lyman Trumbull worried that such semiactive "retired" judges could return to the bench at their whim, thus upsetting what constituted a majority or a quorum on the courts. So he replaced Bingham's retirement plan with a plan for complete "resignation" and a pension at age of seventy, again after ten years' service. He also eliminated the proposal for forced retirement for disabled judges. Trumbull's version of the judicial pension bill passed into law in March 1869.[15] The press still reported the act as something of a forced retirement for the two Justices by saying, for instance, that under the new bill, "Judges Nelson and Grier of the Supreme Court *will be retired* at once."[16] (Emphasis added.) Some on the Supreme Court recognized the act as an implicit "push" against the older and incapacitated Grier in particular. When he had not resigned by November, a Philadelphia lawyer wrote to Justice Joseph P. Bradley that Justice Samuel Nelson, since recovered, and Chief Justice Chase planned to "crowd" Grier and convince him to leave. They would tell him "Congress would also crowd him if he dont [sic] resign." When Nelson and Chase came to Grier in early December, Grier's daughter, Sarah Beck, wrote that they told him "that the politicians are determined to oust him, & if he don't, they will repeal the law giving the retirement salaries." Grier wrote his resignation letter soon after.[17]

Others saw that under the bill, there still remained the problem of disabled or incapacitated judges who had not sat on the bench for the required term of years or who refused to leave even if they had. As Representative C. A. Eldridge said during the debate, a judge "may be afflicted with paralysis or insanity or some other disease which renders him utterly incompetent to discharge the duties of judge; yet...because he has not served for a period of ten years he is not to be permitted to retire upon his salary, but the temptation is held out to him to continue in the office."[18]



Senator Lyman Trumbull's version of the judicial pension bill passed in1869 eliminated the provision for forced retirement of disabled Justices. His plan called for the voluntary retirement of Justices at age seventy with ten years of service.

Congress Confronts Disabled Lower Court Judges

Not a year had passed after the passage of the pension act before Representative Eldridge's concern about ineligible yet disabled judges staying on the bench manifested itself in the lower courts.[19] In March 1870, the House reported a bill to give disabled District Judge John Watrous of Texas a full pension if he resigned, despite his not having reached the age of seventy. Benjamin Butler of Massachusetts seemed to imply the pension was more than a mere offer when he said, "The only other way to remove him that I know of is by impeachment," which he thought

would be too long and costly. In fact, the desire to remove a longtime congressional bugbear may have motivated this first special pension bill for a judge. A committee of the House had already recommended Watrous's impeachment in 1858 for fraud and misadministration of the courts, and he faced several other impeachment attempts since. As a longstanding Democrat, he was also a thorn in Reconstructionist Republican sides.[20] Despite one representative's claim that "It would be a bad precedent" to offer salary to a judge upon the condition he resign, the bill passed easily.[21] Five years later, Congress also offered the disabled Judge David Smalley of Vermont, a former Democratic National Convention vice chair appointed to the bench by President Franklin Pierce, a similar pension. As one representative said, "you cannot compel this judge to resign," but the pension would encourage him to leave.[22]

The problem was that Smalley refused to take the encouragement. The Republicans in Congress would not let it happen again. When J udge Wilson McCandless of Pennsylvania, a Democratic appointee of President James Buchanan, became ill, Senator George Edmunds of Vermont added an amendment to the proposed McCandless pension bill demanding the judge resign in six months if he were to receive his pension. Why the time limit? According to one representative, Senator Edmunds requested this proviso because "a few years ago he obtained the passage of a similar bill for the benefit of a judge in Vermont [Smalley] who declined to take advantage of it and is still on the bench."[23] Democratic Representative William Morrison noted the political advantage, however, and claimed the Republicans "just want the appointment of his successor themselves," before a potential change in Presidents the next year.[24] The bill passed, and would provide an important precedent for a battle over a Supreme Court seat.[25]

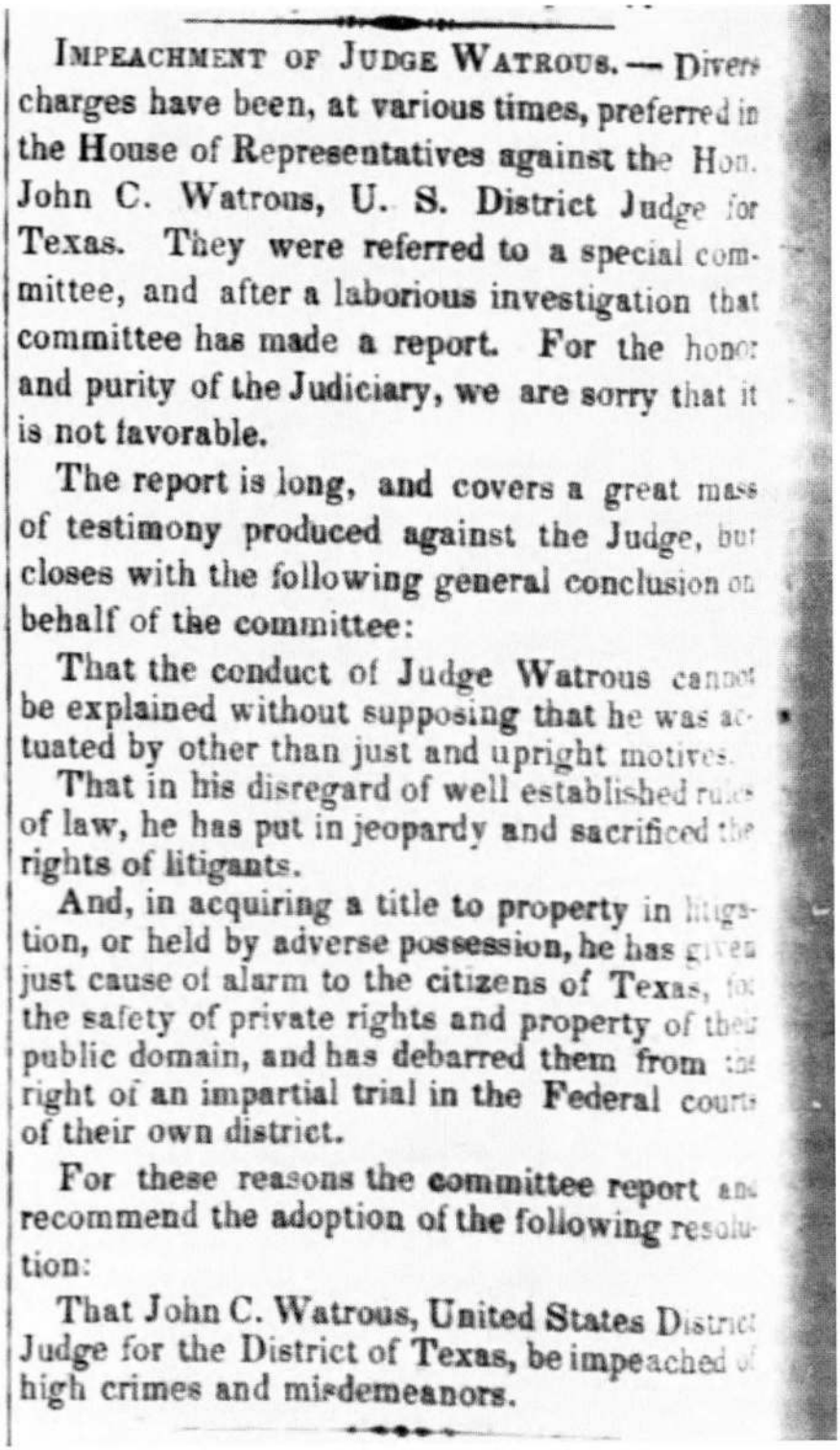
Justice Ward Hunt, Incapacitated and Obstreperous

Hunt's Dilemma

The bill providing for the resignation of Ward Hunt was the most explicit attempt to push a Supreme Court Justice out of office with a time-limited pension; the attempt was especially clear as Hunt had less than one more year of service to retrieve his full pension at the time the bill passed.

Hunt was an upstate New York lawyer who was a close friend of the Republican powerhouse and New York Senator Roscoe Conkling. President Ulysses Grant had appointed Hunt to the bench in 1872 at Conkling's request.[26] Ironically, considering his later history, Hunt was confirmed at the advanced age of sixty-two to take the place of Justice Samuel Nelson, who at the time became the first Justice in recent memory to resign in good health, after recovery from his earlier illnesses, and thus take voluntary advantage of the new pension act. A modern commentator has called Nelson "A Pioneer of Retirement."[27] At an event honoring Nelson soon after, a fellow New York lawyer celebrated the singularity of Nelson's resignation by arguing that "the number of those who have voluntarily retired from a great office are so few, that it can hardly be said, that any custom touching such retirement has been established."[28]

Justice Hunt, his successor, would not trod the same path. Hunt suffered a stroke in 1878 and lingered in near total incapacity for four years. Some reported that Hunt and senator Conkling did not trust whom President Rutherford Hayes would appoint as his successor. Justice Samuel Miller thought Hunt would resign "at once" if his sponsor Roscoe Conkling demanded it, but that "Conklin[g] kept Hunt from resigning after he had made up his mind to do so" due to his distrust of Hayes.[29]



IMPEACHMENT OF JUDGE WATROUS. — Divers charges have been, at various times, preferred in the House of Representatives against the Hon. John C. Watrous, U. S. District Judge for Texas. They were referred to a special committee, and after a laborious investigation that committee has made a report. For the honor and purity of the Judiciary, we are sorry that it is not favorable.

The report is long, and covers a great mass of testimony produced against the Judge, but closes with the following general conclusion on behalf of the committee:

That the conduct of Judge Watrous cannot be explained without supposing that he was actuated by other than just and upright motives.

That in his disregard of well established rules of law, he has put in jeopardy and sacrificed the rights of litigants.

And, in acquiring a title to property in litigation, or held by adverse possession, he has given just cause of alarm to the citizens of Texas, for the safety of private rights and property of their public domain, and has debarred them from the right of an impartial trial in the Federal courts of their own district.

For these reasons the committee report and recommend the adoption of the following resolution:

That John C. Watrous, United States District Judge for the District of Texas, be impeached of high crimes and misdemeanors.

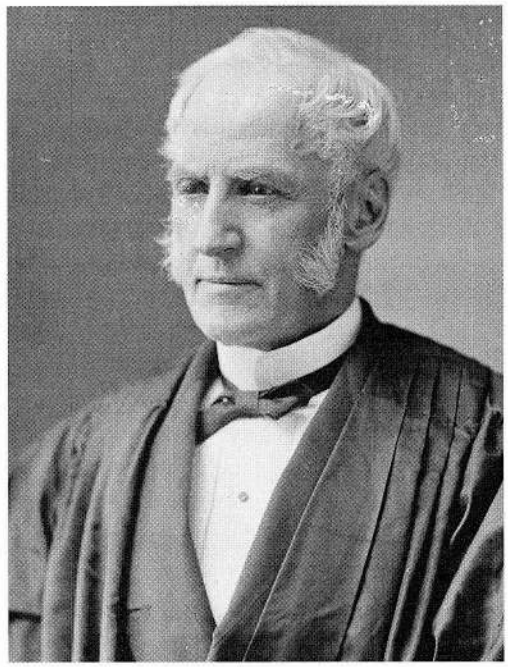
In 1870, the House reported a bill to give disabled District Judge John Watrous of Texas a full pension if he resigned, despite his not having reached the age of seventy. Watrous had been accused of fraudulent land speculation and this was seen as an easier alternative to impeachment. Above is an 1857 article in the *Vicksburg Whig* detailing the impeachment charges against him.

Congress against Justice Hunt

Hunt's continued inactivity eventually spurred Congress to act. Senator David Davis of Illinois introduced a bill on January 17, 1882, to permit Justice Hunt to resign and collect a full pension, as long as he did so within thirty days after passage of the act.[30] Ironically, Senator Davis, who submitted the Hunt retirement bill, had himself been enticed to step down from the Supreme Court seven years earlier by the promise of an Illinois Senate seat, from which he now enticed Hunt away with the promise of a pension.[31] Davis himself knew Hunt from his time on the bench and knew the difficulty of serving there. He privately said the Supreme Court was "wearing to both body and mind," which explains why he also proposed a general bill to offer a pension to any disabled judge who had not served a full term.[32]

As *The New York Times* said, Davis "evidently expected no opposition or debate" to the bill, but opponents were legion.[33] Many Senators hurled vituperation on Hunt for refusing to resign despite obvious incapacity and bristled at offering him money to do his duty, as Nelson had done. Senator George Hoar, a former supporter of Hunt, dismissed those who worried about Hunt's family living in penury if he resigned without a pension: "I would saw wood for a living all my days rather than permit a father or brother of mine to hold an office under those circumstances."[34] In the House, Representative Richard Townshend of Illinois said that if Hunt accepted the retirement, it would prove "he has more avarice than patriotism."[35] Representative Benton McMillan of Tennessee bemoaned "what a sickening spectacle we have," of someone who stays on the high court merely for "the purpose of getting the lucre."[36]

Supporters of the bill recognized it as something close to a forced removal. Davis himself occasionally slipped into the imperative when speaking of Hunt's resignation.



In 1878, six years after he joined the bench at the age of sixty-two, Justice Ward Hunt of New York suffered an incapacitating stroke. He refused to resign for four years, until Congress appropriated a special pension for him, drawing the moral censure of Senators who thought he should step down without financial inducement.

Davis said Hunt "*is* to resign the office of associate justice of Supreme Court within thirty days after passage of the act" [emphasis added]. He continued that Hunt "does not ask for this bill to be passed." Senator Thomas Bayard of New Jersey said, "Because of the refusal of the incumbent to recognize the public duty of resignation of a life office," they had to pass a special act "for the virtual removal" of the Justice. He said the act is necessary to correct a "defect" in the 1869 act, which allowed disabled Justices to remain on the Court.[37]

The dangerous precedent of such a forced removal bill was on many minds. Senator Benjamin Hill said this was "a hard case, and a bad precedent," an analysis echoed by many others."[38] Representative Nathaniel Hammond, though, said that "It is not a question of establishing a bad

precedent, for it will be rare that such a thing will happen again." This insistence on the nonprecedential nature of the decision from many Congress members is odd since Davis himself had mentioned the "three precedents for this bill" in the lower courts.[39]

Although Hunt was a Republican appointee, it was largely Democrats who opposed the pension bill. The final vote made evident the political implications of giving Republican President Chester Arthur and a Republican Congress another appointment, especially when many expected the upcoming midterm elections to be favorable to the Democrats. The retirement bill passed the overwhelmingly Republican Senate 41 to 14, but 11 of the opponents were Democrats. In the House it passed 139 to 91, and 78 of the opponents were Democrats.[40] The Knoxville *Daily Chronicle* noted after the vote, "There is much opposition to the retirement of Justice Ward Hunt" through congressional bribery, noting that tempting a member to leave with cash "does not add to the respect of the highest judicial tribunal in the land."[41]

One unspoken reason for the pension bill may have been to open the traditional "New York" spot on the bench for Hunt's former supporter, Roscoe Conkling. And indeed, just four days after Hunt's resignation, President Arthur nominated Conkling to the Court. The Senate quickly approved him. Yet, because of Conkling's continuing political ambitions and his now substantial fees as a private lawyer, he declined the appointment.[42]

Justice William Moody and the Need for Financial Security

William Moody's Dilemma

The debate over Justice William Moody's resignation was less heated than that over Hunt's resignation, but it demonstrated how financial problems could lead to Justices' dependence on the generosity of Congress and the President.

William Moody was a popular lawyer and a Massachusetts Congressman whom President Theodore Roosevelt appointed to be Secretary of the Navy, Attorney General, and then, in 1906, Associate Justice of the Supreme Court. He replaced Henry Billings Brown, who sent in his letter of resignation exactly on the day of his seventieth birthday, in order to take full advantage of his pension.[43] Roosevelt and other members of his administration, including future President William Howard Taft, stayed close to Moody when he was on the bench.[44] Roosevelt even wrote Moody celebrating a workmen's compensation act he had signed, which provided benefits for disabled railroad workers, right after the Supreme Court had heard oral arguments on its constitutionality. (Moody wrote back to the President, agreeing with his argument, and he would later write the main dissent against striking down the law.)[45]

During the presidential transition in 1908, it was common knowledge that many members of the Supreme Court were ailing. Just before Roosevelt left office, he wrote Moody a letter, the envelope stating that it was "Only to be opened by the Justice himself." The missive contained a draft address warning the Senate that the "there is reason to believe that before another session of Congress the Court will become unable to act through the death from old age of a majority of the Court" and sending "conditional nominations of five men" to take effect if the Court ceased to function because of absences. Roosevelt was plumbing Moody's opinion of this radical idea, but he never acted on it.[46] Still, other politicians understood the problems of widespread disability on the Court. In September 1909, now President Taft wrote to Senator Henry Cabot Lodge, "It is an outrage that the four men on the bench who are over seventy should continue there and thus throw the work and responsibility on the other five. This is the occasion of Moody's illness."[47]

Congress Helps Justice Moody

In Congress, Moody's debilitating rheumatism, as it was called at the time (some have since argued it was Lou Gehrig's disease, or amyotrophic lateral sclerosis (ALS)), attracted sympathy and a new pension bill.[48] The two sponsors of the bill were senator Lodge and Representative Frederick Gillett, both friends of Moody's from the Justice's home state of Massachusetts.[49] Gillett had also lived with Moody in Washington when both served in the House and had long been concerned with his friend's finances. In 1904 he had suggested that Moody push for the Attorney General position, which "would be especially helpful to your fees as [a] lawyer."[50]

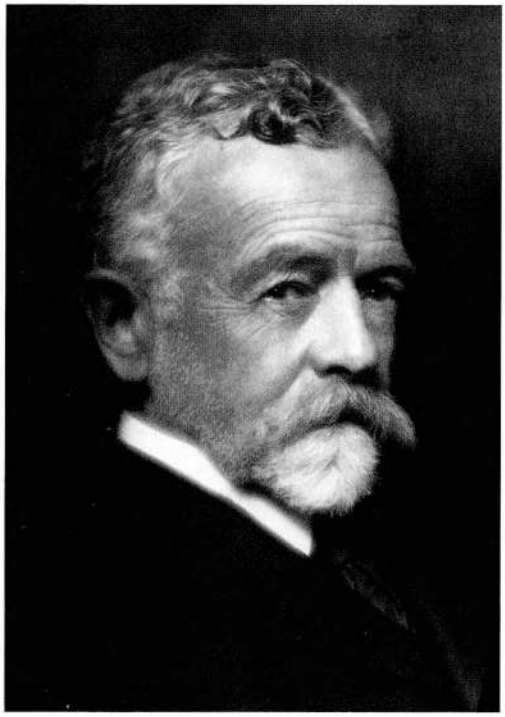
Moody had particular pecuniary concerns that made him unlikely to retire without a special pension. One indication of his trouble is that after the Panic of 1907, Moody tried to sell his significant stockholdings in the Columbia Trust Company back to the company and then tried to have the company loan money on the stock, but each time his friend, company President Robert Bartley, refused.[51] Moody then obtained a loan on that stock from another individual, and, when he was in danger of defaulting on that loan, persuaded Bartley to endorse and secure a $15,000 loan for him from another bank.[52]

Moody also alerted others to his financial stresses under his $12,500-a-year Supreme Court salary. In one letter to President Roosevelt, Moody offhandedly mentioned that he "felt ashamed of himself for telling the carpenter the other day how poor I was and how hard it was to get along on my salary."[53] Another friend of Moody's wrote that he was glad to hear that a Senate Committee had voted a salary increase for judges, which might allow Moody to keep his Massachusetts house. Unfortunately for Moody, the bill went no further.[54] Another friend noted that a revised bill in 1909 to increase salaries by just $2,000 a year was so inadequate that Moody "would be justified in resigning from the Bench and taking up the practice of law," where you could use your talents "in accumulating a large fortune."[55] Moody responded that he would rather the bill die because such an increase "will stand in the way of any further increase for many years."[56]

Taft himself understood Moody's financial concerns and those of the other Justices. In his second annual message, he recommended raising judicial salaries to $17,000, as "next to the life tenure an adequate salary is the most material contribution to the maintenance of independence on the part of our Judges."[57] (One year later, Congress would provide a raise of only $2,000.)[58]

When Lodge and Gillett explained to Congress that the ailing Moody needed financial help, they knew of which they spoke. Unlike Hunt's pension bill, Moody's was enacted at the behest or at least the acquiescence of the Justice. *The New York Times* noted that, although Moody had been ill for over a year and there had been "talk" of such a bill earlier, "it is understood that the introduction of the bill now is tantamount to an acknowledgement by friends of the justice that he has no real hope of being able to return to the bench."[59] Afterward, the *Virginia Law Review* argued, "Of course Justice Moody's assent to the introduction of this bill is to be presumed, for there is no means by which a Justice of the Supreme Court can be retired for physical or mental disability except with his consent," for a moment forgetting the precedent of Hunt.[60]

Members of Congress did not believe that Moody deserved the moral censure that Congress had hurled upon Hunt. Representative Henry Clayton noted that Moody had taken the position of Supreme Court Justice at a fraction of the salary he was planning on receiving at his private law firm, but now "he is a poor man dependent on his salary," which explained why he couldn't resign. Clayton also said that the judiciary



The special retirement bill for Justice William Moody, who was probably suffering from ALS, was pushed through by his friend Senator Henry Cabot Lodge of Massachusetts. Lodge (pictured) knew that Moody was financially strapped.

committee "[d]oes not believe the morals or the ethics of the circumstances *require* the resignation of Justice Moody" [emphasis added].[61]

Of course, the "bad precedent" that concerned Congress during the Hunt debate in 1882 was now cited as a reason for allowing a special pension in Moody's case. The House Judiciary Report said, "We are not without precedents," and it cited Hunt's example and others from the lower courts, both before and since Hunt's resignation.[62] *The Times* said the bill "follows the precedent set in the case of Ward Hunt."[63] It sailed through both houses in two days, without a recorded vote in either.[64]

The Judiciary Committee's Report did note that this act gave Moody six months to retire, instead of the thirty days provided for Hunt, yet it contradicted itself on why. At first it said there might be some hope of recovery, and the time would allow Moody to decide if he wanted to leave, but later the same report said that "he will not now, and doubtless will never be able to resume his place upon the bench." The real reason may have been to push the retirement and new nomination past the next congressional election, as the report noted that no appointment would be made "until the Senate is in session next December."[65]

About two weeks after the bill passed, President Taft went to see Moody and told him "how eager everyone was to pass the bill providing for his retirement." Moody began sobbing uncontrollably, and between sobs said he would not leave the bench if he could only crawl to it. Taft told him to hang on at least until the December date for retirement came.[66] On October 3, Moody wrote Taft that he would never recover, adding "I should, of course, resign at once" so the Court would have a full bench for the October Term. But he said he knew that Taft would not appoint another Justice until Congress sat in December, and he added "there are some private reasons, not in any way adversely affecting the public interest, why I should like to postpone the taking effect of my resignation for a few weeks" until November 20. Perhaps concerned about Moody's vague allusion to personal circumstances, a White House note on the upper left of this letter "suggested that this [letter] be not given out." On Taft's reply letter accepting the resignation, a note on the upper left said "give out tonight…Moody's not given out."[67]

As with Hunt's retirement, Moody's included its ironies. Moody had been appointed to his seat only after then Secretary of War William Howard Taft, his occasional correspondent, had refused Roosevelt's offer of the Associate Justice job.[68] Now President Taft appointed Moody's successor, Joseph R. Lamar, who himself suffered a stroke just five years later and for whom some proposed a special retirement act. Lamar's death however, made the case moot.[69]

When Franklin D. Roosevelt first explained his judicial reform bill in 1937, he criticized the 1919 legislation that allowed a President to appoint additional district and circuit judges to supplement disabled judges. "No president should be asked to determine the ability or disability of any particular judge," he stated.

Justice Pitney's Quiet Retirement

After Moody's retirement, many understood that such situations would not be an aberration. Indeed, in 1922, Justice Mahlon Pitney received a special, and time-limited, retirement bill, but by now there was no need for Congress to cite precedents, and there was no debate in either chamber. Pitney's retirement bill was introduced by a Republican, but there seemed to be no partisan implication, merely a conformance to now-established precedent. The only discussion in the *Congressional Record* was four letters from doctors confirming that Pitney was too ill to continue on the bench.[70]

After Pitney left the bench, some began looking for more systematic solutions to the problem of disabled judges. The *Virginia Law Review* concluded that, "It does seem that some method should be devised by which a Judge appointed for life should be retired upon proof of the fact that he was physically or mentally unable to perform his duties."[71] In 1928, a *Michigan Law Review* article noted that, despite some reforms at the state level, there was "no disability pension for federal judges; only a superannuation pension," and thus reform was necessary. Indeed the article said a "disability pension is the most important and desirable form of pension" since it was the only thing that insured against incapacitated judges, while an old-age pension was only a roundabout method for accomplishing the same end.[72]

Unpacking the Court of Disabled Justices

Disability and Roosevelt's Court-Packing Plan

The problems with disabled judges did lead to reforms. In 1919, Congress adopted an act allowing the President, at his discretion, to place disabled lower-court judges in a form of semi-active retirement, and appoint a new, replacement judge to their position. Concerns about shifting majorities and quorums, however, prevented the extension of this clause to Supreme Court Justices.[73]

Dealing with disabled Justices was an important though little remembered part of President Franklin D. Roosevelt's famous "Court-Packing Plan" of 1937, or, as some at the time called it, an "Un-Packing" plan to push older Justices from the bench. Attorney General Homer Cummings's draft for what was officially called "The Judicial Procedures Reform Bill" stated that the administration needed to create something like the 1919 provision for disabled lower court judges but one that would "operate in a mandatory fashion." Cummings argued that "[i]f the elder judge is not in fact disabled, no harm can come from the presence of an additional judge." Although the final plan retained only an age requirement for adding an additional

judge, it operated like a mandatory version of the 1919 act except that it applied only to judges over seventy with ten years experience, and it applied to all courts, including the Supreme Court.[74]

The final Roosevelt proposal in fact included two time limits to encourage the speedy retirement of older judges and Justices.[75] First, the bill said that an additional judge or Justice would be appointed only after the current one had reached the qualifying age for his full pension and "within six months thereafter has neither resigned [n]or retired," which was an extension from the three months provided in an earlier draft.[76] Additionally, the act would not take effect until "the thirtieth day after the date of enactment" of the bill. These provisions gave older Justices both a chance and an incentive to resign before the Court would be "packed." Cummings, during his testimony before the Senate Judiciary Committee, was asked if his plan "provide[s] for the appointment of six additional judges" on the Supreme Court. He responded, "No" and explained, "If none of them resign or retire of those who are eligible to do so within the 30-day period after the law becomes effective, then the appointments would be made," but only then.[77]

In Roosevelt's first public explanation of the plan, he described the 1919 law that said the "President 'may' appoint additional district and circuit judges" if he deemed judges disabled. Roosevelt claimed that "[t]he discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge." A reporter asked if his whole bill was "intended to take care of cases where the appointee has lost the mental capacity to resign?" This remark brought laughter to the assembled press, after which the President agreed with the statement, "That is all."[78]

At the same time, Texas Representative Hatton Sumners proposed a bill that extended a provision for voluntary but semiactive retirement to Supreme Court Justices, a position now known as "senior status."[79] The bill was written by Department of Justice employee Alexander Holtzoff, and it garnered Roosevelt's support as part of his overall plan to encourage retirement.[80] It passed in March 1937, yet it obviously left younger but disabled Justices with no option to retire, and did not do enough to encourage older Justices to leave the bench as Roosevelt desired. When Roosevelt signed a much-diminished version of his overall court reform bill in August 1937, he thus complained, "It does not touch the problem of aged and infirm judges who fail to take advantage of the opportunity accorded them to retire or resign on full pay." He demanded another reform for judicial disability.[81]

Creating Voluntary Disability at the Supreme Court

At the Roosevelt administration's behest, Congress did finally consider a voluntary statute for disabled Justices who did not yet qualify for retirement. In 1939 the Department of Justice drafted a bill allowing any disabled judge or Justice to certify his own disability and then for the chief circuit judge or Chief Justice to agree on that certification. The judge or Justice in question would then retire with his final pay in proportion to what he would receive if he served his full ten years on the bench.[82]

The congressional discussion of the disability act focused on disabled judges in a handful of states. The Senate Committee on the Judiciary report noted, "The Department of Justice...originally suggested for the purpose of relieving a condition which exists in a few districts, i.e., the tendency of a judge who is physically unfit for service on the bench to continue his duties until retirement age" to receive a salary.[83] Yet the concern with Supreme Court Justices themselves was likely paramount in drafting the bill. Alexander Holtzoff, the Department

of Justice employee who had helped draft the earlier Supreme Court retirement statute as well as Roosevelt's Court-packing plan, was the only administration official to appear at the hearings, where he directed the conversation.[84]

Yet the Senators at the hearing realized there was no easy way to encourage a disabled judge to leave. Senator Carl Hatch noted the problems with Holtzoff's bill allowing proportional pensions based on the amount of time served under ten years, as Hatch thought it could compel a judge to stay for a few extra years to get a larger pension. Senator Claude Pepper suggested three-year increments, but Hatch finally decided simply to cut the pension in half for judges or Justices serving less than ten years, which would still leave a Justice near that cut-off with an incentive to remain on the bench.[85] The distance the debate had evolved since Congress hurled epithets at Ward Hunt for staying for his salary is clear in Hatch's comment that there should be no criticism of a disabled judge, "for he does exactly as any of us would do under the same circumstances."[86]

On the floor of Congress, some Senators were still concerned that the bill could be another version of Roosevelt's Court-Packing or "Unpacking Plan." Senator Walter George asked three separate times if the bill was "entirely voluntary" and wondered if "any pressure [could] be brought to bear" on judges, to which Hatch responded that there was no compulsion.[87] Roosevelt signed the voluntary retirement bill on August 5, 1939.[88] In 1962, Justice Charles Whittaker became the only Justice, so far, to avail himself of this possibility, due to his nervous collapse after heated debates around the *Baker v. Carr* redistricting case. He stayed on disability for three years, and then resigned completely from the Court to work as general counsel to General Motors.[89]

Today, involuntary retirement for disability still exists in the lower courts. The only change to the 1919 act came in 1980, when Congress added the consent of the majority of the circuit judicial council as a requirement for the President to place a lower court judge in disability retirement, what is sometimes known as disability senior status. There was almost no debate about including Supreme Court justices in this provision.[90] Thus disabled or incapacitated Supreme Court Justices can remain on the bench as long as they please, with no positive incentive to leave and a positive disincentive to leave before ten years on the bench. Perhaps Hamilton was right. Perhaps there is simply no objective way to determine incapacity and remove disabled Justices and therefore this constitutional quandary will forever lack a satisfactory answer.

ENDNOTES

[1] For examples of public concern over disabled Justices, such as Chief Justice John Rutledge and Justice William O. Douglas, see David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review* 67 (2000): 1000, 1052–1053. In this article, disability or incapacity will merely mean the inability of a judge or Justice to perform his duties in hearing and deciding cases and writing opinions. Most of the Justices discussed here were completely disabled, in that they were not even able to attend conferences at the time of their disability.

[2] Almost every writer on the topic of judicial disability has focused on individual judges' or Justices' decisions to resign, rather than the politics surrounding resignations or the special acts that encouraged them. Previous writers also have not looked at the congressional and public debates about the 1882, 1910, and 1939 pension acts discussed below, or the reasons for time-limited pensions, and they have not examined how Justice William Moody's financial situation influenced his decision to leave. See David N. Atkinson, **Leaving the Bench: Supreme Court Justices at the End** (Lawrence, Kansas: University Press of Kansas, 1999); Artemus Ward, **Deciding to Leave: The Politics of Retirement from the United States Supreme Court** (Albany, New York: University of New York Press, 2003); Garrow, "Mental Decrepitude," Stephen Burbank, S. Jay Plager, and Gregory Ablavsky, "Leaving the Bench, 1970–2009: The Choices Federal Judges Make, What Influences

Their Choices, and Their Consequences," *University of Pennsylvania Law Review* 161 (2012): 1–102, and more cited below, fts. 19, 27, 34, 89. Some earlier researchers, such as John Goff, mentioned that in some situations, such as that of Ward Hunt, "politics seems to have entered the picture" of when to "retire" them, but the authors rarely went further. John Goff, "Old Age and the Supreme Court," *American Journal of Legal History* 4 (1960): 99.

[3] Mahlon Pitney was also offered and accepted a time-limited pension in 1922, but the debate on this act was nonexistent, as is detailed below, section "Justice Pitney's Quiet Retirement."

[4] For background on the political battles over Supreme Court retirement in general, and on the "Un-packing" nature of Roosevelt's plan, see Judge Glock, "Un-packing the Supreme Court: Judicial Retirement, Judicial Independence, and the Road to the 1937 Court Battle," *Journal of American History* 106 (2019): 47–71.

[5] Max Farrand, **The Records of the Federal Convention of 1787** (New Haven, Connecticut: Yale University Press, 1911), I: 116 (June 5, 1787).

[6] Farrand, **The Federal Convention,** II: 428–429 (August 27, 1787)

[7] See Louis Frothingham, "The Removal of Judges by Legislative Address in Massachusetts," *American Political Science Review* 8 (1914): 216–221. There was debate about whether the removal by address was to be reserved for disability, but Hamilton's concerns and the subsequent history indicate disability was the focus. See also William Seal Carpenter, **Judicial Tenure in the United States: With Special Reference to the Tenure of Federal Judges** (New Haven, Connecticut: Yale University Press, 1918), 127–128; Raoul Berger, "Impeachment of Judges and '"Good Behavior" Tenure," *Yale Law Journal* 79 (1970): 1475–1531.

[8] Farrand, **The Federal Convention,** II: 428–429 (August 27, 1787). The Convention did implicitly allow another type of manipulation, when they changed the original standard of a "fixed compensation" for judges to one that only forbid a diminution, not an increase, of salary. *Id.*, 429.

[9] Alexander Hamilton, **Federalist Papers, No. 79**, *The Avalon Project, Yale Law School*, https://avalon.law.yale.edu/18th_century/fed79.asp.

[10] Thomas Jefferson Randolph, ed., **Memoirs, Correspondence, and Private Papers of Thomas Jefferson** (London: Henry Colburn and Richard Bentley, 1829), III: 294–295; Walter F. Pratt, "Judicial Disability and the Good Behavior Clause," *Yale Law Journal* 85 (1976): 713. Jefferson had been particularly concerned about the unstable mental state of U.S. District Judge John Pickering. Congress voted to impeach and remove him without any particular charge, which seemed to point to his disability, not his bad behavior, as the reason for his removal. Jefferson thought this was a clumsy way to remove a disabled judge. Lynn Turner, "The Impeachment of John Pickering," *American Historical Review* 54 (1949): 485–507.

[11] Memoranda, 75 U.S. vii (1870).

[12] *Congressional Globe*, March 29, 1869 (41 Cong., 1 session), 336-337. https://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=088/llcg088.db&recNum=461. Some congressmen thought the bill amounted to a type of forced retirement, as the President could also appoint an additional judge for any eligible judge who refused to resign, which new judge would have precedence over the older. *Id.*, 341. https://memory.loc.gov/ammem/amlaw/lwcglink.html#anchor41.

[13] *Id.*, March 29, 1869, 337.

[14] The final vote was yea 90, nay 53. *Id.*, 345.

[15] *Congressional Globe,* April 7, 1869 (41 Cong, 1 session), 574.

[16] *Tipton* (Iowa) *Advertiser*, April 8, 1869.

[17] Charles Fairman, "The Retirement of Federal Judges," *Harvard Law Review* 51 (1938): 418. Few have since noted that Fairman's famous piece, one of the first to look at the history of judicial retirement, was written as a reaction to Roosevelt's Court-packing proposal, which he said came from, "the general agreement that it would probably be desirable to bring about earlier retirement." *Id.*, 397.

[18] *Congressional Globe*, April 8, 1869 (41 Cong., 1 session) 649.

[19] See the full list of district judges pensioned in Emily Field Van Tassel, "Resignations and Removals: A History of Federal Judicial Service–and Disservice–1789–1992," *University of Pennsylvania Law Review* 142 (1993): 401–402.

[20] For earlier impeachment attempts, see *Congressional Globe*, Appendix, December 13, 1858 (35 Cong. 2d session.), Appendix, 63–64; "The Case of Judge Watrous: His Impeachment Imminent," *New York Times*, July 11, 1860, 5.

[21] *Congressional Globe*, March 21, 1870 (42d Cong., 1st session), 2097.

[22] *Congressional Globe*, January 26, 1875 (43d Cong., 2d session), 761; "Obituaries: Hon. David A. Smalley," *New York Times*, March 11, 1877.

[23] *Congressional Globe*, May 5, 1876 (44th Cong., 1st session), 3016. Republicans had tried to pass a bill for McCandless just a month after Smalley's bill, but it met opposition and was laid on the table. *Id.*, February 17, 1875, 1417–1418.

[24] *Id.*, May 5, 1876, 3016.

[25] *Id.*

[26] Timothy Hall, **Supreme Court Justices: A Biographical Dictionary** (New York: Facts on File Library of American History, 2001): 166.

[27] Rose E. Davies, "Pioneer of Retirement: Justice Samuel Nelson," *Green Bag*, 17 (No. 2, Winter 2014): 209.

[28] Proceedings by the Bar of the United States Courts for the Second Circuit, on the Retirement of Mr. Justice Nelson, *Id.*, 217–218.

[29] There are reports that Chief Justice Morrison R. Waite tried to get Hunt to resign, but Hunt responded that he would not resign without a pension. It does not seem that these reports reached Congress. Atkinson, **Leaving the Bench,** p. 61; Ward, **Deciding to Leave**, 87.

[30] *Congressional Record*, January 17, 1882 (47th Cong., 2d session), 437.

[31] Some said that the Illinois legislature had promised Davis the Senate seat as a lure to secure his vote, or his removal to allow another Republican Justice to vote, for the Republican President in his position as the independent or swing member of the fifteen-member Presidential Commission, which would decide the disputed presidential election of 1876. In 1881, Davis was elected by his colleagues as President Pro Tempore of the Senate, again because he was considered an independent. Thus Davis was next in the line of presidential succession, as President Chester Arthur lacked a Vice President, a position from which he could potentially appoint new Supreme Court members himself. See Atkinson, **Leaving the Bench**, 55–56; President's Death Eases Senate Deadlock, *United States Senate History* https://www.senate.gov/artandhistory/history/minute/Presidents_Death_Eases_Senate_Deadlock.htm

[32] Ward, **Leaving the Bench,** 55. On Davis's suggestion of a general disability bill, *Congressional Record*, January 19, 1882 (47th Cong., 2d session), 505.

[33] "Justice Hunt's Place: The Bill for His Retirement Passed by a Vote of 41 to 14," *New York Times*, January 1, 1882.

[34] *Congressional Record*, January 19, 1882 (47th Cong., 2d session) 505. For former support, see Henry J. Abraham, **Justices and Presidents: A Political History of Appointments to the Supreme Court** (New York, New York: Oxford University Press, 2d ed. 1985), 129.

[35] *Congressional Record*, January 24, 1882 (47th Cong., 2d session), 613.

[36] *Id.*

[37] *Congressional Record*, 4 January 19, 1882 (47th Cong., 2d session) 505. Representative Nathaniel Hammond said of the act: "I place it on the low ground of a trade, if you will... I would buy him out." *Id.*, January 24, 1882, 613.

[38] *Id*, 505.

[39] *Id.*, January 24, 1882, 613.

[40] See Voteview: https://voteview.com/rollcall/RS0470248.

[41] *Daily Chronicle* (Knoxville), January 26, 1882.

[42] Alfred Ronald Conkling, **Life and Letters of Roscoe Conkling: Orator, Statesman, Advocate** (New York: Charles L. Webster, 1889): 276–277.

[43] Other writers mention the date but do not seem to connect it to Brown's birthday. Paul Heffron, "Theodore Roosevelt and the Appointment of Mr. Justice Moody," *Vanderbilt Law Review* 18(1965): 545–568; for birthday, see "Henry Billings Brown," *Encyclopedia Britannica*, https://www.britannica.com/biography/Henry-Billings-Brown. Heffron notes that Roosevelt tried to force John Marshall Harlan off the bench, too, by appointing his son to the Interstate Commerce Commission, which would pose a potential conflict of interest, but Harlan indicated that he would refuse to leave even if such an appointment were made.

[44] See Moody to William Howard Taft, February 23, 1909, Reel 342, William Howard Taft Papers, Library of Congress; William Howard Taft to Moody, June 21, 1906, Book 14, William H. Moody Papers, Library of Congress; Roosevelt to Moody, September 3, 1907, Reel 163, Felix Frankfurter Papers (William Moody Collection), Library of Congress. Felix Frankfurter's papers hold most of Moody's more important correspondence, a result of an apparent gift from Moody.

[45] President Roosevelt to William Moody, September 21, 1907; Moody to President Roosevelt, September 26, 1907; Felix Frankfurter Papers; Employers' Liability Cases, 207 U.S. 463 (1908).

[46] Unsigned on White House Stationary (likely Roosevelt) to Moody, c. 1909, Reel 163, Felix Frankfurter Papers.

[47] Taft to Henry Cabot Lodge, September 2, 1909 in Goff, "Old Age and the Supreme Court," 102; Walter F. Pratt, **The Supreme Court Under Edward Douglass White, 1910–1921** (South Carolina: University of South Carolina, 1999): 4.

[48] Garrow, "Mental Decrepitude," 1011.

[49] Edith Kermit Roosevelt to Moody, c. 1908, Reel 163, Felix Frankfurter Papers, asking him to invite Senator Lodge to a dinner at the White House.

[50] "Moody May Retire: Bills Gives Income," *New York Times*, June 16, 1910, 3; Gillett to Moody, June 23, 1904, Book 16, Moody Papers.

[51] See further attempts to sell, James Gifford to Moody, February 25, 1908, Reel 163, Felix Frankfurter Papers.

[52] As late as June 1909, just before Moody's pension bill was introduced, he was asking for another loan. Otis Carlton to Moody, June 9, 1909, *Id.*

[53] *Id.*, September 26, 1907.

[54] *Id.*, Otis Carlton to Moody, June 16, 1909.

[55] *Id.*, Oliver Cromwell to Moody, January 21, 1909.

[56] *Id.*, February 5, 1909.

[57] William Howard Taft, Second Annual Message, December 6, 1910, *The Miller Center*,

https://millercenter.org/the-presidency/presidential-speeches/december-6-1910-second-annual-message

[58] Judicial Salaries: Supreme Court Justices, Federal Judicial Center, https://www.fjc.gov/history/judges/judicial-salaries-supreme-court-justices. Unfortunately, Moody did not receive this increase because Congress did not pass a law tying judicial pensions to current salaries until 1954. David Nixon and J. David Haskin, "Judicial Retirement Strategies, The Judge's Role in Influencing Control of the Appellate Courts," *American Politics Quarterly*, 28 (2000): 469–470.

[59] "Moody May Retire: Bills Gives Income,"*New York Times*, June 6, 1910, p. 3; "Justice Moody Ready to Retire From Bench," *Washington Times*, June 16, 1910.

[60] "Judges Under Disability," *Virginia Law Register* 16 (July 1910): 218–219.

[61] *Congressional Record*, June 20, 1910 (61st Cong., 2d session), 8557.

[62] Committee of the Judiciary, House of Representatives, June 17, 1910 (61st Cong., 2d session), House Judiciary Rpt. 1621.

[63] "Moody May Retire: Bills Gives Income," *The New York Times*, June 6, 1910, 3.

[64] *Congressional Record*, June 6, 1920 (61st Cong., 2d session), 8556–8557 and June 21, 1910, 8626.

[65] House Judiciary Rpt., 1621.

[66] Archibald Butt to Clara Butt, July 8, 1910, in Archibald Willingham Butt, **Taft and Roosevelt: The Intimate Letters of Archie Butt, Volume II** (New York: Doubleday Doran, 1930): 437–439. Taft visited the man whom Butts called the "Dying justice" again in September. Butt to Clara, September 11, 1910, *Id.*; Ward, **Leaving the Bench,** 80.

[67] Moody to William Howard Taft, October 3, 1910; Taft to Moody, October 4, 1910, Reel 372, William Howard Taft Papers.

[68] See William Taft to William Moody, June 21, 1906, advising Moody on Standard Oil prosecution.

[69] Carpenter, **Judicial Tenure,** 191.

[70] *Congressional Record*, November 21, 1922 (67th Cong., 3d session), 21; House Committee on the Judiciary, 67th Cong., 3d session, November 29, 1922, House Judiciary Rpt. 1262. The House report mentioned that "the committee is informed" that Pitney would reach the age of seventy in "a few months," which was untrue. He was still sixty-five. *Congressional Record*, 6, November 27, 1922 (67th Cong., 4th session), 272–273. Pitney's pension act was the very first law passed at the Fourth Session of the 67th Congress. December 11, 1922; 42 *Statutes at Large*, 1063; Mahlon Pitney, **Biographical Directory of the United States Congress,** Congressional Biography: https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=P000370

[71] *Judges Under Disability*, 218–219.

[72] Burke Shartel, "Pensions for Judges," *Michigan Law Review* 27(1928): 138. For an actual disability provision for lower-court federal judges whom Shartel neglected in this comment, see section "Disability and Roosevelt's Court-Packing Plans."

[73] For this and more of Roosevelt's judicial retirement plans, see Judge Glock, *Unpacking the Supreme Court*, pp. 52–54 and 61–66.

[74] "Draft No. 5," January 5, 1937, Box 199, Cummings Papers (Special Collections, University of Virginia Library); Technical Memorandum on Judiciary Proposal, January 21, 1937, Box 200, *Id.;* Draft of Suggestions on Judicial Reform, Draft #2, [ca. December 1936], Box 199. *Id.*

[75] Although not a time limit issue, the provision allowing retired Justices to serve on lower courts contributed to Willis Van Devanter's decision to step down in1937. See, Stephen L. Wasby, "Retired Supreme Court Justices in the Court of Appeals," *Journal of Supreme Court History* 39 (2014):146–165.

[76] Draft December 28, 1936, Box 199, Homer Cummings Papers, Library of Virginia Archives.

[77] Committee on the Judiciary, *Hearings on the Reorganization of the Federal Judiciary*, 5, 15–16, 33.

[78] Press Conference #342, Executive Offices of the White House, February 5, 1937, pp. 8–14, 18, *Franklin D. Roosevelt Library Online*, http://www.fdrlibrary.marist.edu/archives/collections/franklin/?p=collections/findingaid&id=508. See, Jeff Shesol, **Supreme Power: Franklin Roosevelt vs. the Supreme Court** (New York; London: W.W. Norton, 2011) 295–296.

[79] The act allowed Justices to continue serving on lower courts, which the Roosevelt administration saw as necessary to maintain the constitutionally protected salaries of such Justices, but which some Justices viewed as an important incentive to retirement in its own right. See Minor Myers, "The Judicial Service of Retired United States Supreme Court Justices", Journal of Supreme Court History 32 (2007): 46–61.

[80] Alexander Holtzoff, Memorandum for the Attorney General Re: Retirement of Supreme Court Justices, January 29, 1936, Box 199 Homer Cummings Papers; William Stanley, Memorandum for Mr. Carusi, February 1, 1935, *Id.*

[81] Samuel Rosenman, ed., **The Public Papers and Addresses of Franklin D. Roosevelt, 1937: The Constitution Prevails** (New York: Random House, 2005), 339.

[82] This bill's background, as far as I can tell, has never been discussed. For one of the few mentions even of its passage, see Van Tassel, *Resignation*, 402.

[83] Senate Committee on Judiciary, *Retirement for Disabled Judges* (76th Cong., 1st session), S. Rpt. 751

(year); *Congressional Record*, July 18, 1939 (76th Cong., 1st session), 9365. Senator Henry Ashurst said the bill was "suggested,—in fact, if I remember correctly—drawn, by the Department of Justice." *Id.*, 9365.

[84] Senate Subcommittee of the Committee of the Judiciary, *Hearing on Retirement of Federal Judges for Disability, S. 1282*, June 28, 1939 (76th Cong., 1st session).

[85] Senate Committee of the Judiciary, *Hearing on Retirement of Federal Judges*, 3–4.

[86] *Congressional Record*, July 18, 1939 (76th Cong., 1st session), 9365.

[87] *Id.*, 9365–9366. The House passed it by unanimous consent without any discussion. *Id.*, July 31, 1939, 10538.

[88] 53 *Statutes at Large*, 1204–1205.

[89] Chief Justice Warren encouraged Whittaker to take the disabled route, rather than mere resignation. Craig Alan Smith, **Failing Justice: Charles Evan Whittaker on the Supreme Court** (North Carolina: McFarland & Co., 2005): 221–222.

[90] Hatton Sumners proposed a very early version of this reform for lower courts in 1937, soon after he helped pass the Supreme Court retirement act, which required lower-court circuits to sign off on disability rather than just the President, but it went no further for decades. John H. Holloman, "The Judicial Reform Act: History, Analysis, and Comment," *Law and Contemporary Problems* 30 (1970): 131–133; 28 U.S. Code 372. Today, there is an online site for people to submit "disability complaints" about federal judges. "FAQs: Filing a Judicial Conduct or Disability Complaint against a Federal Judge," United States Courts Website, https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability/faqs-filing-judicial-conduct-or-disability-complaint.

Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of *Myers v. United States*

ROBERT POST

William H. Taft is the only person ever to have served as both president of the United States and as chief justice of the Supreme Court of the United States. That unique confluence of roles is evident in *Myers v. United States*,[1] an "epoch-making"[2] and "landmark"[3] case that Taft considered "one of the important opinions I have ever written."[4]

The precise question in *Myers* was "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate."[5] *Myers* was the first decision in the history of the nation to invalidate a congressional statute on the grounds that it violated an inherent Article II power of the president. It was as if fate itself had reserved *Myers* until Taft could take his seat at the center of the Court.

Frank Myers, a thirty-seven-year-old Democratic activist, was appointed to a four-year term as the first-class postmaster of Portland, Oregon, in April 1913.[6] After an uneventful first term, Myers was reappointed in July 1917. Myers' tenure soon became engulfed in controversy, and in January 1920 Wilson sought to fire him.[7] At the time, the removal of first-class postmasters was governed by an 1876 statute providing that such postmasters "shall be appointed and may be removed by the President by and with the advice and consent of the Senate."[8] Senatorial consent was easily obtained by the nomination and approval of a successor postmaster. But for reasons that remain obscure, Wilson refused to nominate a successor or in any other way to seek the consent of the Senate.[9] Myers therefore sued the government for the remainder of his salary, some $8,838.72. He lost in the Court of Claims in 1923 on the ground of laches,[10]

In 1920, President Woodrow Wilson removed U.S. Postmaster Frank S. Myers of Portland, Oregon. Myers (pictured) filed suit in the Court of Claims seeking to recover his salary, claiming that his removal violated an 1876 law requiring that the president obtain Senate consent for appointing or removing postmasters.

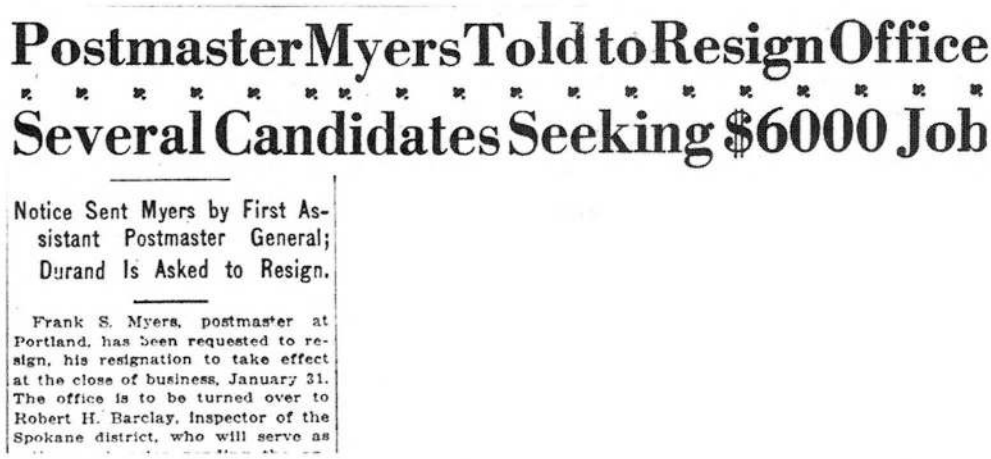
which was a transparent attempt to evade the underlying constitutional issue whether the president could remove Myers despite contrary congressional legislation.

Myers died in December 1924, "but his widow continued the litigation in the name of his estate."[11] The case was first argued on December 5, 1924.[12] James M. Beck appeared for the government as Solicitor General, but no one argued Myers' side of the case.[13] Beck effectively conceded that the Court of Claims had incorrectly decided the question of laches. In his brief, Beck had written that he "would be glad to accept" the Court's judgment "and thus spare the court the necessity of deciding one of the most important constitutional questions which can arise under our form of Government," but "candor compels me to add ... that the disposition, which the Court of Claims made of the case in this respect, is not entirely convincing to me."[14] Beck added, "I do not mean to confess error, for the action of the very learned and able Court of Claims is entitled to very great respect and the Government should not waive the benefit of this decision in its favor."[15] When the case was re-argued for a second time, however, Beck would be far more explicit:

> I agree with opposing counsel that, if this statute is unconstitutional, the appellant has a good cause of action... .
>
> In this case, I am frank to say, I can find no evidence of any waiver or acquiescence. I do not know what more Mr. Myers could have done in asserting his rights. The pertinacity with which he asserted his title until his commission had expired is worthy of the legendary boy on the burning deck. He stood by his guns in respect to the alleged unlawfulness of his dismissal and awaited an opportunity to serve in an office, of which he consistently asserted he had been unlawfully deprived, until his commission had expired and then within a few weeks thereafter he commenced his suit.[16]

Laches could not plausibly be used to sidestep the monumental constitutional issue presented by *Myers*.

The Court knew in December 1924 that Justice Joseph McKenna would step down from the bench in January.[17] *Myers* was too important a case not to be heard by a full bench, and the Court therefore set it for rehearing. Two days after the first December



Postmaster Myers Told to Resign Office

Several Candidates Seeking $6000 Job

Notice Sent Myers by First Assistant Postmaster General; Durand Is Asked to Resign.

Frank S. Myers, postmaster at Portland, has been requested to resign, his resignation to take effect at the close of business, January 31. The office is to be turned over to Robert H. Barclay, inspector of the Spokane district, who will serve as

In January 1920, the *Oregon Journal* reported that there were numerous candidates vying for President Wilson to appoint them to Myers' vacated job. The salary was a healthy $6,000.

argument, Taft wrote Attorney General Harlan F. Stone that

> [t]he Court, after Conference, authorized me to speak to Senator [Albert B.] Cummins as the head of the Judiciary Committee, and also incidentally the President of the Senate, to see whether they could not suggest some one to appear at the re-argument as an amicus curiae. I hope you will bring this matter to the attention of Beck, and possibly as Attorney General confer with Senator Cummins in respect to what can be done to facilitate a re-argument, with a proper amicus curiae.[18]

When Cummins concluded "that it was not practicable to ask the Senate to authorize the selection of one or more of its members to appear as an amicus curiae,"[19] the Court itself designated as *amicus* "to present the views of the legislative branch of the government"[20] the distinguished Republican senator from Pennsylvania, George Wharton Pepper.[21] Re-argument of *Myers* was set for April 13–14, 1925, a month after Stone assumed his seat on the bench.

At the beginning of argument, Taft announced that the Court "should much prefer to have" Stone sit in the case even though "he was Attorney General while the case was in the department."[22] Taft represented that Stone "took no part in the case and it did not come before him in any official capacity."[23] Both Beck and Will R. King, who argued for the Myers estate, announced that they would "be very glad to have" Stone sit in the case.[24]

As president, Taft had dealt extensively with the requirements of the statute of 1876. He had sought to remove at least 175 postmasters, and he had always scrupulously adhered to the statute, even when the Senate refused to consent to requested removals.[25] He never once questioned the constitutionality of the statute, even though he strongly believed that presidents had the duty and authority to interpret the "extent and limitations" of executive power.[26]

Taft had also complied with congressional legislation forbidding removal of members of the Board of General Appraisers in the absence of a showing of "neglect of duty, malfeasance in office, or inefficiency."[27] The legislation had been enacted precisely to overrule the Court's decision in *Shurtleff v. United States*,[28] which had interpreted the

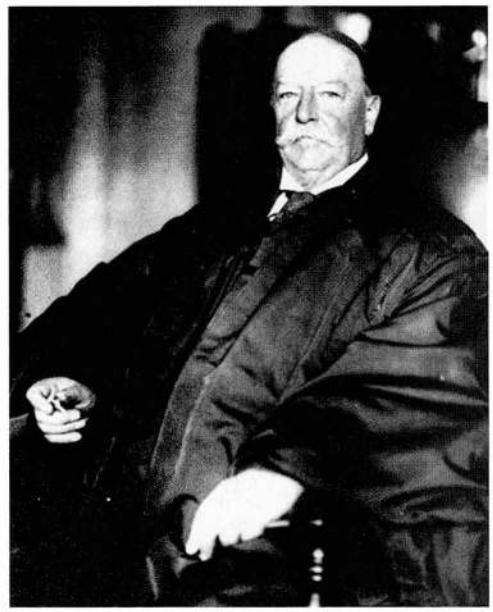
previous statute to permit the president to remove members of the Board at will. Taft had even commissioned a Board of Inquiry that included Felix Frankfurter to make the necessary statutory findings to support a removal.[29]

Strikingly, Taft had also urged Congress to put all postmasters, including first-class postmasters like Myers, "into the classified service" and thus remove "the necessity for confirmation by the Senate."[30] "Machine politics and the spoils system," Taft explained, "are as much an enemy of a proper and efficient government system of civil service as the boll weevil is of the cotton crop."[31]

After 1912, Taft was strongly criticized for his legalistic conception of the presidency. In 1913, Theodore Roosevelt proclaimed that a president ought to adopt a "stewardship" theory of executive leadership:

> My view was that every executive officer, and above all every executive officer in a high position, was a steward of the people bound actively and affirmatively to do all he could for the people ... I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.[32]

Roosevelt contrasted his stewardship theory with the "Buchanan-Taft" school of the "power and duties of the President," which Roosevelt believed converted the Chief Executive into "the servant of Congress rather than of the people." A president like Taft "can do nothing, no matter how necessary it be to act, unless the Constitution explicitly commands the action."[33] Roosevelt illustrated the contrast between himself and



As President, William H. Taft had urged Congress to halt the need for Senate confirmation of postmasters. "Machine politics and the spoils system," he warned, "are as much an enemy of a proper and efficient government system of civil service as the boll weevil is of the cotton crop."

Taft by reference to the removal power. He proclaimed that the president should form his own judgment of his subordinates without recognizing "the right of Congress to interfere ... excepting by impeachment or in other Constitutional manner."[34] Taft, Roosevelt cruelly observed, had "permitted and requested Congress to pass judgment on the charges made against Mr. Ballinger as an executive officer."[35]

Taft was stung by Roosevelt's attack, and in 1916 he sought to answer it explicitly and directly.[36] He thought that Roosevelt's "ascribing an undefined residuum of power to the president is an unsafe doctrine and that it might lead under emergencies to results of an arbitrary character."[37]

> The true view of the Executive function is, as I conceive it, that the President can exercise no power which cannot be fairly and

> reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise. Such specific grant must be either in the Federal Constitution or in an act of Congress passed pursuance thereof. There is no undefined residuum of power which he can exercise because it seems to him to be in the public interest.[38]

"While the President's powers are broad," Taft wrote, "the lines of his jurisdiction are as fixed as a written constitution can properly make them."[39] Taft regarded Roosevelt's views as "lawless."[40]

Taft was nevertheless convinced that the constitutional authority of the president was quite broad enough to "give the President wide discretion and great power, and it ought to. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require."[41] Although Taft deeply believed in a "law-governed presidency,"[42] he was nevertheless clear that the president was "no figurehead."[43] For Taft, the president was clothed with robust authority to carry out the many duties accorded him by the Constitution. Taft believed in "a generous interpretation of executive power,"[44] one which in its proper sphere was not at all subordinate to Congress. "The rule seems to be that Congress may not control by legislation the constitutional powers of the president when the legislation in any way limits the discretion which the Constitution plainly confers."[45]

So, for example, Taft is generally regarded as "the father of administrative reorganization and of the executive budget."[46] He believed that the president himself, rather than any department head, ought to be responsible for the federal budget,[47] because he conceptualized the president as the "general manager of the administration."[48] Congress, fearing loss of authority, resisted President Taft's efforts to standardize budgetary practices. It "put a rider in the appropriation bill directing that in effect no heads of departments, no bureau chiefs and no clerks should be used for the preparation of estimates in any other form than as that directed by the existing statutes."[49] "This was for the purpose," Taft knew, "of preventing my submitting to Congress the estimates for government expenses in the form different from that of the statutes and in accordance with the budget principle."[50] "When the heads of departments applied to me to know what they should do, I directed them to prepare the estimates under the old plan as required by statute and also to prepare the budget as recommended by my Commission [on Economy and Efficiency], and to ignore this restriction, which Congress had attempted to impose."[51]

Taft was quite explicit that he defied the congressional restriction "on the ground that it was my constitutional duty to submit to Congress information and recommendations and Congress could not prevent me from using my subordinates in the discharge of such a duty."[52]

> Under the Constitution, the power to control the purse is given to the Congress. But the same paragraph which makes it the duty of the Congress to determine what expenditures shall be authorized also requires of the administration the submission of "a regular statement and account of the receipts and expenditures"—i.e., an account of stewardship. The Constitution also prescribes that the President shall "from time to time give to the Congress information of the state of the Union and recommend to their consideration such measures as he shall judge necessary and expedient." Pursuant to these

> constitutional requirements I am submitting for your consideration a concise statement of financial conditions and results as an account of stewardship as well as certain proposals with estimates of revenues and expenditures in the form of a budget.[53]

Taft had been similarly adamant about the president's removal power. He affirmed in 1916 that

> [i]t was settled, as long ago as the first Congress, at the instance of Madison, then in the Senate, and by the deciding vote of John Adams, then Vice-president, that even where the advice and consent of the Senate was necessary to the appointment of an officer, the president had the absolute power to remove him without consulting the Senate. This was on the principle that the power of removal was incident to the Executive power and must be untrammeled.[54]

Taft noted that Congress had attempted to reverse "this principle of long standing by the Tenure of Office Act in Andrew Johnson's time," but that this temporary aberration was caused by "partisan anger against Mr. Johnson... . It never came before the courts directly in such a way as to invoke a decision on its validity, but there are plain intimations in the opinion of the Supreme Court that Congress exceeded its legislative discretion in the act."[55]

It is plain, therefore, that Taft did not approach the *Myers* case as a blank slate. He held definite and strong preconceptions about presidential removal power, which he viewed "through executive-colored glasses."[56] He would bring to *Myers* the entire weight of his considerable presidential experience.

According to Pierce Butler's docket book, the Court voted on *Myers* on April 25, 1925. Butler's notes of the conference are cryptic, but they suggest that Taft argued that the case could not be decided on the ground of laches, and that no one in conference disagreed with him. On the constitutional question, Taft asserted that the president's authority to remove was an "ex[ecutive] power" and could not be restrained by the Senate's advice and consent. Oliver Wendell Holmes thought that the statute should "stand." Willis Van Devanter voted to affirm the "exec[utive] power" of the president. James C. McReynolds was uncertain and passed. Louis D. Brandeis agreed with Holmes. Pierce Butler, George Sutherland, and Edward T. Sanford agreed with Taft. Butler records that Harlan F. Stone voted to affirm the Court of Claims, with the terse remark: "entitled to look at consequences." Stone's law clerk Alfred McCormack, however, later recalled that "In the Myers case Stone felt that the real issue was whether the business of the Executive could be conducted efficiently if every officer confirmed by the Senate were to have a lease on his office until the Senate approved his removal. To Stone it was clear that the position of the Executive under such a restriction would be impossible."[57]

Taft assigned the opinion to himself, reporting to his son the next day that because he had a "very important" case to write, he would "be fully occupied" during the subsequent "five weeks."[58] By May, Taft had concluded that he would need to take the entire summer to write the opinion. "Its importance justifies it."[59] In July, Taft reported to Van Devanter that he was "reading Webster and Madison and the speeches of some others on the subject."[60] "My constitutional post office case I have on my shelves up here," he wrote in August to Sutherland from his summer home in Murray Bay, Canada, "with a lot of volumes that I brought, and I see them every day, and have been quite able, without any injury to my conscience, to look at the backs of the volumes and not examine them."[61] "I haven't opened the books on the executive power case," he confessed to Van

Devanter four days later, "but must tackle it shortly."[62]

On September 1, Taft wrote his law clerk Hayden Smith asking if Smith could research "the meaning of the words 'Executive power' as contained in Article II, Section I."[63] Taft asked:

> Does the executive power thus stated include the power to appoint and remove executive officers and agents, and would it do so in such a way as to exclude the right of Congress to make appointments and remove appointees, if there were no specific provision in the other sections as to how appointments shall be made? I wish you would consult Montesquieu's "Spirit of the Laws" to see whether he makes any reference to the scope of the executive power as he understood it, and whether it includes the power to appoint and remove executive agents. The framers of the Constitution were very familiar with Montesquieu and it is quite clear that they were well read generally in matters of the structure of government. It is quite possible that you will find nothing. I have here the discussions of the question of the power of removal by Madison in the first Congress, by Webster in subsequent Congresses when the power of removal again came up and the arguments were made in the impeachment trial of Andrew Jackson. [sic] I believe there is a discussion in Pomeroy's "Constitutional Law", and that I have.[64]

Smith replied on September 22. He cited scattered references and concluded that "I have deduced that executive included in its meaning the power of appointment and that sharing it with the legislative was extraordinary."[65] Smith had not discovered much about the power of removal. He reported that the library was still looking for W.H. Rogers, **The Executive Power of Removal**. Smith reported, however, that Chancellor Kent had changed his mind on the question, writing that although in 1789

> he had leant toward Madison, but now (1830) because of the word "advice" must have meant more than consent to nomination, he said he had a strong suspicion that Hamilton was right in his remark in the Federalist, no.77, April 4th, 1788: "No one could fail to perceive the entire safety of the power of removal if it must thus be exercised in conjunction with the senate."[66]

Two weeks later, Taft wrote Butler that

> The more I think it over, the stronger I am in the necessity for our reaching the conclusion that we have. I agree that in the beginning it might have been decided either way, but it was decided in favor of the view that the Constitution vested the executive power of removal in the President, with only the exceptions that appear in the instrument itself. My experience in the executive office satisfies me that it would be a great mistake to change that view and give to the Senate any greater power of hampering the President and tying him down than they have under the view we voted to recognize as the proper one.[67]

Butler was a Democrat, and Taft took the occasion to indulge in a mea culpa about the Reconstructionist Republican party:

> As I study the injustice that the radical Republicans did to Andrew Johnson, I am humiliated as a Republican. My father was a just man but I thought he sympathized with

Taft worked on his *Myers* opinion in the summer of 1925 while at his house in Murray Bay, Canada (pictured). When he returned to Washington, he invited Justices Van Devanter, Sutherland, Butler, and Sanford to his home to discuss the draft opinion on a Sunday afternoon.

> those who voted to impeach Johnson. I think the feeling against Johnson growing out of the assassination of Lincoln threw into the extremists of the Republican party a power that led to reconstruction and seriously affected to its detriment our country. I think this is usually thought to be the case, and certainly we ought not to allow such a departure from a long established constitutional construction to influence us in a wise interpretation, enforced by a Congress that was almost a part of the Constitutional Convention and whose decision lasted without any real controversy from the first Congress down to the one that was controlled by a militant, triumphant and harsh political group.[68]

Taft drafted a "long opinion" while on vacation at Murray Bay, but, after returning to Washington, he found that "it does not satisfy me as I read it through, and I have had to do some more reading."[69] He wrote his son that "one of the most difficult things in preparing an … opinion … is the plan or arrangement of the statement of the facts and the argument to sustain your conclusion. This takes me rather more time than other feature of a long opinion – I mean an opinion that necessarily has to be long. I have a tendency to length that I try to restrain."[70]

In November, Taft asked Van Devanter, Sutherland, Butler, Sanford, and Stone to an unusual Sunday afternoon conference at his home to discuss his draft of *Myers*, "to make such suggestions as may occur before I revise it again and circulate it."[71] It was, Taft wrote Butler, "a most important matter and the opinion should be carefully considered."[72] Taft anticipated that "there will probably be some dissents."[73] "Brandeis voted no, and I think Holmes did, while McReynolds was doubtful."[74]

Two days after this unusual conference, Taft sent "a revised copy of the opinion" to

Van Devanter, Sutherland, Butler, Sanford, and Stone, asking them to "read it over and make as many suggestions as you can."[75] Three days later, Taft expressed "relief to get the heavy part of [the opinion] out of the way,"[76] and he hoped he would "be able to circulate it early next week."[77]

At this point, the documentary record becomes far less certain and detailed. Stone's law clerk Alfred McCormack recalls that Taft had named Stone, Butler, and Van Devanter "as a Committee to help with the majority opinion."[78] McCormack remembers that Stone was exasperated by the Taft's draft, remarking, "There is nothing left to do with this opinion ... except to rewrite it."[79]

> Accordingly he directed his clerk to go through the opinion and outline the points, arranging them in a logical order. That done, and Stone having revised the outline, the next job was to take the printed proof and a pair of scissors and arrange the material according to the outline, deleting, and where necessary combining and rewriting, to remove duplications, and introducing each point by a topic or transitional sentence.
>
> From that beginning Stone prepared and submitted to Van Devanter and Butler, a new draft of the opinion that was widely different from the original in arrangement and emphasis, with many additions, deletions and revisions of language. The Committee was pleased, and Stone was commissioned to wait upon the Chief and submit the new draft as their joint recommendation. Taft received the document with grace and promised to read it; and later he sent a warm note of thanks, praising Stone's work and adopting the revision as a substitute for his previous draft.[80]

In Stone's papers, there is a November 13 memorandum to Taft, offering numerous editorial recommendations.[81] Stone observed:

> To my mind, as a mere matter of exposition of the written document, the fact that the executive power was given in general terms with specific limitations, whereas the legislative powers were specifically enumerated, gives very great importance to the fact that there was no express limit to the power of removal either in the enumerated legislative powers or the enumerated restrictions on executive power.[82]

Stone also cautioned that Taft may have implied that the president does not have removal power over executive officials "to whom discretion is not delegated." "It is the duty of the President to enforce the laws," Stone wrote,

> even though little or no discretion is involved. As Chief Executive he is entitled to faithful and efficient services by subordinates charged only with administrative duties. It is for that reason that the power is conferred and the duty imposed on him to exercise the power of removal, and that, to my mind, is just as controlling in the case of officers with little or no discretion as in the case of a cabinet officer.[83]

Perhaps sensing his audacity as a newly seated justice addressing a former president about a matter of presidential power, Stone demurred, "I hope you will realize that my suggestions ... are due to the feeling that this is one of the most important opinions of the Court in a generation at least."[84]

On November 22, Taft wrote his son that he had circulated a draft of his opinion and was "awaiting the result to see how many will stand by it."[85] There is a second memorandum from Stone to Taft dated November 24,

in which Stone appears to have numbered and rearranged the paragraphs in Taft's draft.[86] The surviving copy of this memorandum is in Van Devanter's papers, and it bears a notation in Van Devanter's hand: "C.J. sent this to me to work out 'so far as may be advisable.'"

Apparently after Taft had circulated his draft, Stone undertook to "survey the whole opinion from the point of view of the proper emphasis,"[87] offering basic structural suggestions for reorganization. "I have had the opinion digested paragraph by paragraph," Stone reported. "The digest is placed in the form of an outline so that the outline of the opinion as it proceeds from the statement of the question to the final conclusion may be seen in its proper perspective."[88] On November 28, Taft wrote his brother to complain that the Court's "youngest member Stone is intensely interested and is a little bit fussy and captious in respect to form of statement, and betrays in some degree a little of the legal school master – a tendency which experience in the Court is likely to moderate."[89]

Taft was in an ungenerous mood because "Brandeis has announced his intention of writing a dissent," and Holmes "is likely to concur with him."[90] Brandeis's intention to dissent provoked a stream of angry invective, which gradually subsided as Taft dictated a letter to his brother:

> Brandeis puts himself where he naturally belongs. He is in favor evidently of the group system. He is opposed to a strong Executive. He loves the veto of the group upon effective legislation or effective administration. He loves the kicker, and is therefore in sympathy with the power of the Senate to prevent the Executive from removing obnoxious persons, because he always sympathizes with the obnoxious person. His ideals do not include effective and uniform administration unless he is the head. That of course is the attitude of the socialist till he and his fellow socialists of small number acquire absolute power, and then he believes in a unit administration with a vengeance. I suppose we ought not to be impatient with some of our colleagues who do not agree with us, because it is a question which was very earnestly discussed in the First Congress and settled there for three-quarters of a century, but it was agitated again in the time of Jackson and Webster and Calhoun and Clay, and was of course made the chief subject of discussion in Johnson's day and in his impeachment. It is curious that the question should have remained undecided by our Court in all that time .... Brandeis is taking time to write his dissent. I don't know when he will finish it, but he is a hard worker and I expect to get his dissent in a day or two.[91]

Taft did not "know what McReynolds will do. I think he is inclined to go with us, but he objects to long opinions, and he is cantankerous at any rate. He may write a concurring opinion, and he may dissent, although I think not the latter."[92]

Taft was frank to acknowledge that the "opinion has given me a great deal of work and a great deal of anxiety. The rest of the Court have stood by me well and have helped me in going over it and making corrections and suggestions."[93] "The opinion has had to be very long," Taft observed,

> because half of it is taken up in an historical review, which is most important in confirming the conclusion. I have been rearranging it some since I circulated it, and have attempted to make the steps in the reasoning more orderly, with a view of enabling the reader to follow

> the argument more intelligently. I presume it will be the subject of great discussion and doubtless of much criticism.[94]

The following day Taft confided to his son that the opinion "has occupied me very intensely, and has been the occasion for my losing some sleep. Those members who agree with me have helped me. When one works on a case all alone and gets very much absorbed, he is not quite sure whether he has lost his sense of proportion as to arguments in the pressure to state them all."[95]

On November 30, Taft received yet another detailed memorandum from Stone.[96] Stone was worried about *United States v. Perkins*,[97] an 1886 precedent in which the Court had upheld the suit of a naval officer challenging his honorable dismissal by the Secretary of the Navy on the ground that legislation provided that "no officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect."[98] The Court had explicitly adopted the language of the opinion in the Court of Claims:

> Whether or not congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the president by and with the advice and consent of the senate, under the authority of the constitution, (article 2, § 2,) does not arise in this case, and need not be considered. We have no doubt that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto.[99]

Perkins was the constitutional rock on which the federal civil service was erected, for it held that whenever Congress exercised its authority under Article II, Section 2, to vest the appointment of "inferior Officers" in the "Heads of Departments," it could restrain executive discretion by regulating the terms under which such inferior officers might be removed.

Stone was "somewhat concerned" that under *Perkins* Congress could "vest the appointment of all officers other than those specifically enumerated in Article 2, in the heads of departments, but with limitations on the power of removal both by the head of the department and by the President."[100] Stone was "extremely loathe to admit that congress could set such a limitation on the President's power in the case of purely executive officers on whom he must depend for the execution of the laws."[101] He stressed, therefore, that *Perkins* "said nothing as to the power of the President to remove an inferior officer appointed by the head of a department."[102] He wanted to be sure that in his draft, Taft did not inadvertently read *Perkins* to imply that the president lost his "power of removal in the case of purely executive officers," even if the president did not appoint them.[103] This implication might arise because Taft's draft had apparently reasoned that the president possessed the constitutional power of removal because he had both "the power of appointment and the executive power."[104] Stone was concerned that "we do not foreclose ourselves with respect to the power of

removal except as it is actually involved in the present case."[105]

The logic of Stone's memorandum threatened to undermine the legal architecture of the civil service. Many years later, in his biography of Stone, Alpheus Mason would claim that Stone's memorandum had anticipated the holding of *Humphrey's Executor v. United States*,[106] in which the Court unanimously upheld congressional restrictions on the president's ability to remove FTC Commissioners with fixed statutory terms.[107] At the time of *Humphrey's Executor*, Stone, according to Mason, "had the cold comfort of saying 'I told you so.'"[108] But in fact Stone's memorandum had nothing to do with the issue presented in *Humphrey's Executor*, and in 1925 Stone seems to have been pushing for an even more pro-executive position than that eventually adopted by Taft in *Myers*. Indeed, Stone's papers contain a second long memorandum about *Perkins*, probably written at the beginning of the 1926 Term,[109] urging once again that Taft's opinion be modified explicitly to hold that even when Congress sought by legislation to limit the power of removal of inferior officers appointed by heads of departments, the legislature did not acquire "the power to regulate the removal even by the President."[110]

Taft did not explicitly address Stone's concerns in his published opinion, but instead argued that the "evil of the spoils system" concerned "inferior offices," and insofar as appointments with regard to such offices "were vested in the heads of departments to which they belong, they could be entirely removed from politics."[111] (Taft's notes for his oral presentation of his opinion went even further, asserting that the Civil Service System "applies only to inferior officers not appointed by the President by and with the advice and consent of the Senate, and over the removal of these officers Congress has complete control, and the maintenance or extension of the Merit System is wholly with Congress.")[112] As Taft wrote to Van Devanter, "Stone continues to tinker, but I don't think he helps much."[113]

With his usual tact, Taft nevertheless wrote to Stone the following day:

> I thank you for the trouble you have taken to help me in the Myers case opinion. I agree with you that we have not had a case in two generations of more importance. It looks now as if we would stand 6 to 3, but if were 5 to 4, I should be happy for my country that by even so small a margin we could prevent the excesses of congressional action which in view of the McCarl statute we would have to expect.

Taft was referring to John Raymond McCarl, the first Comptroller General of the United States, who had been appointed pursuant to the Budget and Accounting Act of 1921.[114] *Myers* clearly had important implications for the constitutionality of the Act,[115] which forbade unilateral executive removal. Taft also commented to Stone:

> I have adopted your suggestions generally except when Van Devanter anticipated you. There may be one or two instances in which I rather preferred my own phrases when they were equivalent.... As to the President's power to remove all executive officers whether their appointment be vested in the Courts of Law or in the Heads of Departments or not, I do not think we decide it and as it is not necessary for us to decide it, I think we should not mention it. That is Van's judgment about it too. I'll now ... recirculate it.[116]

Stone replied the next day:

> Many thanks for your kind note of last evening. You know I am a team player and I should not have kicked

> over the traces if you had not accepted any of my views which after all concern only incidental matters of minor importance. I have only been longing to be helpful in the way which I believe we should all be, in carrying on the difficult work of the Court–without, I hope, pride of opinion or over insistence on anything.[117]

Taft then settled down to await Brandeis's dissenting opinion.[118] On December 23, Pepper filed the recently delivered decision of the Pennsylvania Supreme Court in *Commonwealth ex. Rel. Woodruff v. Benn*,[119] which held that the governor could not unilaterally remove a member of the Pennsylvania Public Service Commission whose tenure was protected by legislation that prohibited removal without cause and that required "the consent of the Senate."[120] The Pennsylvania court reasoned that "Public Service Commissioners must be viewed as deputies of the General Assembly to perform legislative work."[121] Taft wrote to Van Devanter that *Benn* "is not important except to suggest that the removal of Interstate Commerce Commissioners doing legislative work may be different from members of purely executive boards and therefore not seemingly included in our decision."[122]

On January 5, Brandeis circulated his dissent. "I thought mine was pretty long," Taft wrote his brother,

> but his is 41 pages with an enormous number of fine print notes, and with citations from statutes without number. So far as I can make it out from a most cursory examination, his chief objection to our opinion is the merit system of the Civil Service. As Congress has complete power to give every inferior office for appointment by the head of a department, and then make provision for the removal, or absence of it, as it chooses, it is a little difficult to see how our conclusion with reference to the power of removal by the President in respect to superior officers has any real application to the question that we have to consider.[123]

Then Taft received news that "McReynolds thinks he has to write a dissenting opinion, and wishes to spread himself."[124] McReynolds estimated that his opinion would not be ready until March.[125] "McReynolds," Taft wrote his son, "is always inconsiderate. There is no reason why he should not have written his opinion before, because he knew that Brandeis took the last recess to prepare his."[126]

McReynolds had apparently circulated his dissent by March 29, for there is yet another long memorandum on that date from Stone analyzing the opinions of McReynolds and Brandeis.[127] Although Stone had "very little to suggest about" McReynolds' dissent,[128] he devoted six detailed pages to dissecting that of Brandeis.[129] Stone took particular exception to Brandeis's assertion that "Power to remove, as well as to suspend, a high political officer, might conceivably be deemed indispensable to democratic government and, hence, inherent in the president. But power to remove an inferior administrative officer appointed for a fixed term cannot conceivably be deemed an essential of government."[130] Stone commented that

> It is difficult to see on what basis this distinction is based unless it be his assumption that the laws can be executed even though incompetent, disloyal, inferior officers be kept in office. Certainly President Lincoln found out differently during the Civil War and the experience of the Government in that time, and especially in the previous administration, points out the fallacy of the assumption that power of removal of inferior officers in the head of

> departments, either with or without the consent of the Senate, is an adequate provision for the execution of the laws without any reserve power in the President to remove inferior officers regardless of the consent of the Senate.[131]

Ignoring the obvious fact that Taft's own opinion for the Court dedicated many pages to the discussion of past constitutional practice, Stone professed to be mystified by Brandeis' elaborate invocation of history.

> The opinion appears to be devoted principally to showing that a construction of the Constitution made by Congress in many pieces of legislation is the one which we must adopt because Congress adopted it, and incidentally because from time to time various presidents did not veto the legislation and sometimes complied with it. Of course inferring presidential acquiescence in a particular construction of the Constitution because presidents did not veto the bills involving that construction or refuse to comply with them is going rather far. Assuming, however, such assent on the part of the executive, I think nevertheless that the whole dissent proceeds on a fallacy... . Congress has no power to change the Constitution. Neither have Congress and the President acting together. Therefore, no more or greater weight can be given to their acquiescence in a particular construction of the Constitution than it is entitled to by its inherent merits.
>
> From this point of view, the value of the early legislative construction of the power of removal lies chiefly in the fact that it occurred soon after the Convention when its events were fresh in mind and the events in Congress, so far as known, developed nothing to indicate that the Congressional construction was a radical departure from the wishes of the Convention.[132]

Taft recognized that the dissents were "very forcibly expressed," and that he would "have to devote my attention to shaping up my opinion and getting it ready for delivery," which he proposed to do "as soon as we get through the hearings" in early May.[133] But in June Taft suffered a major heart attack, and he "concluded to take [the opinion] up to Murray Bay and perhaps revamp it, in view of the dissents. I hope I can do this without subjecting myself to intense labors."[134]

At first Taft found it difficult to concentrate. "I am very anxious to revamp my opinion in the Myers case before I go down to Washington, but I can not do anything about it until I feel more at liberty to use my brain in a way that really calls for the proper circulation of the blood."[135] "I have been turning it over in my mind," he wrote to Van Devanter.

> I think I shall rearrange the opinion by stating first the necessary effect of the Congressional decision of 1789 and the 74 or 75 years of acquiescence in that decision. I am well satisfied with the conclusion reached that evening that we met at my house, that it is well not to make any concession but to take the position that we have already taken-that with that decision and with the obvious abuse of the Tenure of Office Act we can make such a contrast as to make clear the wisdom of our view.[136]

By August, however, Taft still had not "yet tackled the job of revamping the opinion."[137]

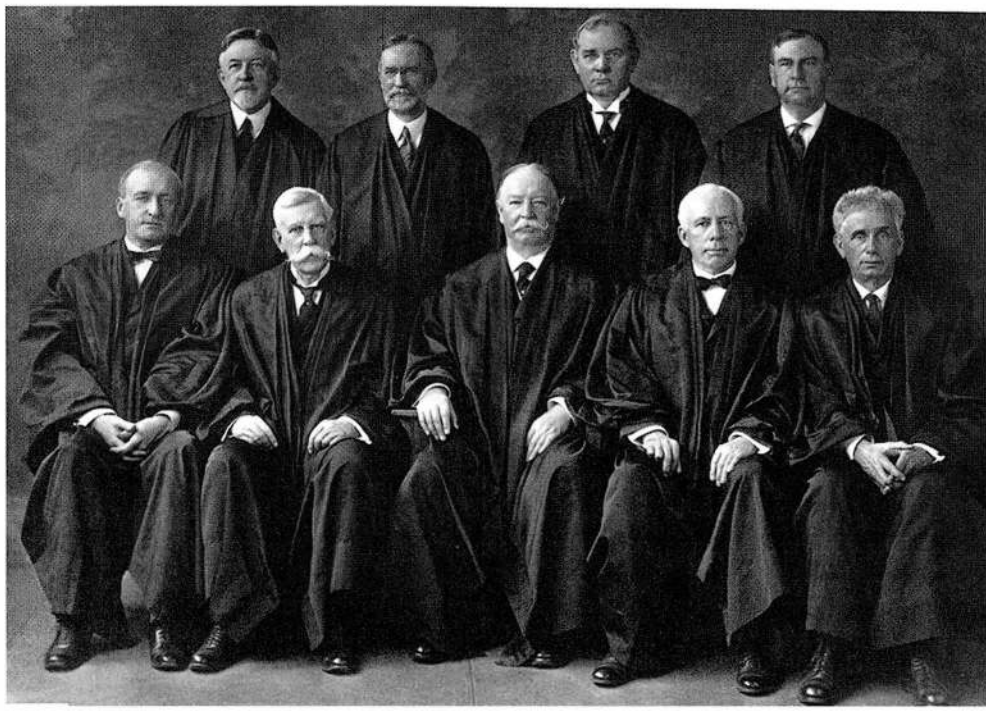
Taft settled down to serious editing by the end of the month, reporting to Sutherland that "I am working now a revamping of my opinion ... and shall hope to be able to have it printed and submitted to the five concurring Judges for consideration and criticism before recirculating it. It is likely to be considerably longer, because the discussion in the two dissenting opinions have required some amplification and the consideration of some additional points."[138] Taft finished a first draft of his revisions on September 6,[139] noting that it was "outrageously long."[140] Taft wrote his brother that he hoped

> to get back a proof of it before I leave here, so as to see what I can do in cutting it down, for I find that the putting of an opinion in print gives you a better general view of it and furnishes you more opportunity for suggestions of useful changes than if it is typewritten. It is a good method of correcting and revising opinions, although Justice McReynolds complains that most of us do not allow ourselves to be economical in this matter. But these opinions are important, and any means of making them better should not be spared.[141]

Taft sent a second draft of the opinion to the printer on September 20, with instructions to have a revised proof ready for his arrival in Washington on the 25th so that Taft could rapidly revise it and circulate amended copies "to some of my brethren."[142] Taft sent out the revised print on September 28 to Van Devanter, Sutherland, Butler, Sanford, and Stone, proposing that they meet in a second rump conference to be held on October 13 to evaluate the opinion.[143] "I hope," Taft wrote his brother, that "this is the last stretch."[144] The opinion "has been a very great burden to me, a kind of nightmare, and I shall be greatly relieved when the announcement is made."[145] "I shall feel like a woman who has given birth to a child."[146] Taft recognized that the opinion was "unmercifully long, but it is made so by the fact that the question has to be treated historically as well as from a purely legal constitutional standpoint."[147] All went well, however, and *Myers* was set for announcement on October 25. The night before, Taft wrote his son with barely concealed excitement: "Tomorrow I expect to deliver the most important and critical opinion that I have written on the Court."[148]

It would be accurate to say that the *Myers* opinion was constructed through a most unusual process. There appears to be nothing even remotely analogous during the entire Taft Court era. Taft essentially constituted his majority of six into a committee that met twice at his home to discuss the holding, structure, and argument of Taft's drafts. No doubt this was partly because Taft keenly appreciated the enormous importance of the case, which would settle a fundamental question of executive power that had remained open and controversial since the dawn of the Republic, but that "now ... has been brought up by the obstinacy of Wilson and Burleson in removing a man and for two years sending no appointment to the Senate for his successor."[149]

Myers' unusual process of composition also signified the great difficulty Taft experienced in summoning adequate forms of constitutional argument. In recent times, the reasoning of *Myers* has been claimed by no less an authority than Antonin Scalia as "a prime example of what, in current scholarly discourse, is known as the 'originalist' approach to constitutional interpretation."[150] Scalia no doubt refers to the fact that Taft, faced with a constitutional text that says nothing at all about the power to remove executive officials, spent a great deal of time and effort explicating what he called the "decision of 1789,"[151] in which the first Congress drafted a statute in a way that presumed that the



Chief Justice Taft (seated center) convened the same rump conference (from left Sanford, Sutherland and Butler are standing; Butler is seated second from right) at his home in September 1926 after having spent the summer working on a revamped version of the burdensome and "unmercifully long" opinion.

president was empowered unconditionally to remove the Secretary for the Department of Foreign Affairs (the equivalent of the modern Secretary of State).[152]

Unlike a modern originalist, however, Taft was unwilling to rest his conclusion entirely on evidence of original meaning. To the contrary, Taft explained, "We have devoted much space to this discussion and decision of the question of the Presidential power of removal in the First Congress, not because a Congressional conclusion on a constitutional issue is conclusive, but … because of our agreement with the reasons upon which it was avowedly based."[153] To Taft, the conclusion that the president must be accorded an unimpeded constitutional right of removal was supported by "very sound and practical reasons."[154] One of these reasons is that "those in charge of and responsible for administering the functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint."[155] The power of removal was "an indispensable aid" for exercising "the disciplinary influence" on subordinates necessary to ensure "the effective enforcement of the law."[156] "The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him."[157] Any other interpretation, Taft asserted, "would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed."[158]

In a long and furious dissent,[159] McReynolds took sharp issue with Taft's pragmatic logic. He excoriated "the hollowness of the suggestion that a right to remove" inferior officers like postmasters "may be inferred from the President's duty

to 'take care that the laws be faithfully executed.'"[160] From 1789 through 1836, the appointment of postmasters was vested in the postmaster general, not in the president.[161] Although Congress could concededly control the terms by which such postmasters might be removed, nevertheless "the President functioned and met his duty to 'take care that the laws be faithfully executed' without the semblance of power to remove any postmaster. So I think the supposed necessity and theory of government are only vapors."[162] "I suppose," McReynolds asserted, that "Congress may enforce its will by empowering the courts or heads of departments to appoint all officers except representatives abroad, certain judges and a few 'superior' officers-members of the cabinet. And in this event the duty to 'take care that the laws be faithfully executed' would remain notwithstanding the President's lack of control."[163]

McReynolds struck at a serious vulnerability in Taft's argument. In his internal memoranda to Taft, Stone had insisted that the functional argument be taken to its logical conclusion and that the president be accorded unrestricted removal power of all executive subordinates, superior and inferior, whether appointed by the president or by the head of a department. But Taft, as a practical politician, refused even to intimate that the Civil Service was constitutionally infirm in this way. Taft's argument was thus left curiously suspended and unsatisfying.

Taft argued that all executive power was lodged in the president by virtue of the "vesting clause" of the Constitution, which provides that "The executive Power shall be vested in a President of the United States of America."[164] He also argued that discretionary authority to remove executive officials was an executive power necessary to ensure that the laws be faithfully executed.[165] It is therefore baffling why *Myers* nevertheless authorized Congress legislatively to regulate the removal power simply by vesting the appointment of inferior executive officers in the heads of departments. Yet Taft seems quite explicit on this point:

> The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in some one other than the President with the consent of the Senate. Congress may not obtain the power and provide for the removal of such officer except on that condition. If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal.... It is true that the remedy for the evil of political executive removals of inferior offices is with Congress by a simple expedient but it includes a change of the power of appointment from the President with the consent of the Senate. Congress must determine, first, that the office is inferior; and, second, that it is willing that the office shall be filled by the appointment by some other authority than the President with the consent of the Senate.[166]

Before becoming chief justice, Taft had himself urged that first-class postmasters like Myers be included in the civil service. But Congress's decision to vest the appointment of postmasters in the president meant "that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and until it is willing to vest their appointment in the head of the department they will be subject to removal by the President alone, and any legislation to the contrary must fall as in conflict with the Constitution."[167]

Taft thus constructed an argument effectively ceding to Congress constitutional

authority to determine when discretionary removal power for inferior executive officers was and was not prerequisite for the president's capacity faithfully to execute the laws. This is surely not an argument that would be embraced by contemporary advocates of a powerful "unitary executive," who argue for "a hierarchical, unified executive department under the direct control of the President."[168] It was in fact an oddly insecure argument that received scathing reviews in the scholarly literature of the time.[169]

At root, the weakness of Taft's position lay in its failure to specify the precise circumstances that required unfettered executive control. Presidential appointment is obviously only a proxy, and a rather loose proxy, for the necessity of presidential supervision. Whether Congress chooses to vest the appointment of an inferior executive officer in the head of a department is only vaguely related to the need for such supervision. The question of necessary executive supervisory authority would seemingly turn, as Edward Corwin saw immediately, on a functional analysis of "the essential character of the office involved."[170]

The question cannot be analyzed without drawing a preliminary distinction. *Myers* importantly distinguishes between the legislative design of executive offices, which is a legislative power,[171] and the authority to appoint specific persons to fill those offices or to remove specific persons from those offices, which is an executive power granted by Article II.[172] On the basis of this dichotomy, *Myers* strongly condemns senatorial intrusion into the decision whether to remove specific persons. This intrusion is inconsistent with the basic separation of "legislative from the executive functions."[173]

This narrow conclusion is sufficient to invalidate the Act of 1876, which requires Senatorial consent before removing first-class postmasters. Congress cannot "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power," Taft wrote. "To do this would be to ... . infringe the constitutional principle of the separation of governmental powers."[174] The Court has never retreated from this conclusion.[175]

But whether Congress can itself participate in the removal of executive officers is an entirely different question from whether Congress can regulate the procedures and criteria that the president must apply when he takes executive action to remove executive officials. It would seem at first blush that Congress's legislative authority to fix the obligations of an office, its salary and jurisdiction, would also include authority to determine the grounds on which an officeholder might be removed.[176]

Whether legislative regulations of this kind infringe the Article II prerogatives of the president would appear to require a functional inquiry into the need for unrestricted executive removal power, which in turn would depend on the kinds of duties that legislation may properly impose on executive officers. Since at least 1838, it has been constitutionally accepted that "it would be an alarming doctrine, that congress cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution; and in such cases, the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President."[177]

Congress can impose duties on subordinate executive officers that are not merely ministerial in nature. Congress sometimes imposes discretionary duties on subordinate executive officers to insure that they apply technical administrative expertise in a manner that is free from the political control of the president, as for example in the case of members of the Federal Reserve Board. Congress sometimes imposes discretionary duties on subordinate executive officers to insure that they act with appropriate judicial judgment, as for example in the case of

judges of the Court of Claims before it became an Article III tribunal. In instances like these, Congress has limited the authority of presidential removal in order to insure that executive discretion is exercised free from the taint of political presidential oversight.[178]

Taft well understood these issues. In *Myers*, he observed that

> Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.[179]

The *Myers* opinion refuses, however, to let these circumstances impair the "unity and coordination in executive administration" that Taft deemed "essential to effective action."[180] Taft therefore explicitly concludes that even though legislation may sometimes prevent a president from substituting his judgment for that of an appointed subordinate, the president may nevertheless "consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed."[181]

In essence, *Myers* holds that presidential supervisory authority categorically overrides any possible legislative determination that removal procedures for presidentially appointed subordinate executive officers ought to insulate them from close political supervision. Taft thus created a "paradox that, while the Constitution permitted Congress to vest duties in executive officers in the performance of which they were to exercise their own independent judgment, it at the same time permitted the President to guillotine such officers for exercising the very discretion which Congress had the right to require."[182]

Myers produced a result that can only be described as schizophrenic. Presidential removal power might easily be circumvented by vesting the appointment of inferior executive officers in heads of departments, yet all executive officers appointed by the president were as a matter of constitutional law "removable at the President's will."[183] Neither side of this dichotomy is especially convincing or reasonable. After *Myers*, the Court quietly undermined the first by focusing constitutional attention on the functional question of whether removal restrictions imposed by Congress to protect inferior officers appointed by heads of departments "are of such a nature that they impede the President's ability to perform his constitutional duty."[184] And in *Humphrey's Executor v. United States*,[185] a 1935 decision rightly regarded as severely undercutting *Myers*,[186] a unanimous Court explicitly overturned the second, holding that Congress can regulate the removal of presidentially appointed executive officers, like FTC Commissioners, who act "in part quasi legislatively and in part quasi judicially."[187] Indeed, in *Humphrey's Executor* a unanimous Court, per Justice Sutherland, dismissed *Myers* in almost disrespectful terms. "The narrow point actually decided," it said,

> was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions

> occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved.[188]

Taft knew that not all Article II officials appointed by a president acted in a purely executive capacity. In 1916, Taft had written that "[t]he functions of the President are both legislative and executive. Among the executive functions we shall find a gradual tendency to a division into the purely executive and the quasi-legislative and quasi-judicial duties."[189] It is all the more striking, then, that Taft was so careless in *Myers* in failing to define or limit the "executive officers and members of executive tribunals" to whom *Myers'* conclusions applied. During the pendency of the case, Taft toyed with the thought that *Myers* might not apply to ICC Commissioners,[190] and several days after his opinion was released, Taft expressed anger at McReynolds' "reference to judicial offices," which in Taft's view had "nothing to do with the case, because we only decide the case as to an executive office and we limit our decision to that. I would be inclined to limit it so at any rate."[191]

Taft's complaint is not entirely candid, for he deliberately wrote *Myers* quite broadly, seemingly to encompass all officers appointed by the president. Thus, *The Nation* commented that the decision "makes it impossible for Congress to give any determined tenure to" "quasi-judicial offices," so that "the fear of removal will henceforth operate to bow hitherto independent officials to the will of the President or of his party speaking through him."[192] We know that Taft specifically meant the opinion to apply to the many so-called independent agencies that McReynolds lists in his dissent, like the "Interstate Commerce Commission, Board of General Appraisers, Federal Reserve Board, Federal Trade Commission, Tariff Commission, Shipping Board, Federal Farm Loan Board, [and] Railroad Labor Board."[193] The officers running these agencies were appointed by the president, but they were nevertheless accorded fixed statutory terms of office that could be interrupted only for cause. Commentators immediately complained that "The most important officers menaced by the Myers decision are the members" of agencies "such as the Interstate Commerce Commission, the Federal Trade Commission and the Tariff Commission. These agencies need protection because of the semi-judicial nature of their functions; public confidence in their non-partisan character must not be impaired."[194]

Yet Taft regarded the proliferation of independent agencies as congressional efforts to fragment and undercut the executive power of the president, in much the way that Congress had sought to handicap President Andrew Johnson. Taft wrote to his friend Tom Shelton, a southern lawyer:

> I am very strongly convinced that the danger to this country is in the enlargement of the powers of Congress, rather than in the maintenance in full of the executive power. Congress is getting into the habit of forming boards who really exercise executive power, and attempting to make them independent of the president after they have been appointed and confirmed. This merely makes a hydra-headed Executive, and if the terms are lengthened so as to exceed the duration of a particular Executive, a new Executive will find himself stripped of control of important functions, for which as the head of the Government he becomes responsible, but whose action he can not influence in any

> way. It was exactly this which the two-thirds majority of the Republicans in the Congress after the War attempted to with the Tenure of Office Act. They attempted to provide that Cabinet officers who had been appointed by Lincoln, and who differed with Johnson as to the policy to be pursued in respect to dealing with reconstruction questions should be retained in office against his will.[195]

Similarly, Taft wrote to the editor of the *St. Louis Post-Democrat* that a "study of the legislation made under" the inspiration of the Johnson impeachment

> will show that not directly but stealthily through the creation of boards who exercised part of the executive power[, it] has been sought to divide that power vested in the president by the Constitution, and it would very much minimize that power if the members of those boards were made free from administrative control through the power of the removal by the president. By making their terms long so as to reach from one term through another or into another, they would strip a new president of much of his capacity to determine and carry out his legitimate policies.[196]

Although Taft confessed that *Myers* "was the hardest case I have had in the matter of work since I have been on the Bench," he was also "convinced we were right .... I am hopeful that the question will not be agitated and that the decision may remain as a permanent constitutional feature of constitutional construction."[197]

It is plain that Taft was at heart an administrator who deplored "the narrow, factional selfishness of Congress."[198] Several months before the 1924 presidential election, he had complained to his wife that "Congress is unrepresentative. The Senate is at the lowest ebb in its history and the House is not much better."[199] It was precisely Coolidge's "independence of Congress that gives him his strength," and he therefore should "act upon legislation according to his best judgment and the people will approve even though he differs from Congress."[200] Taft expressed an analogous thought in *Myers*: "The President is a representative of the people, just as the members of the Senate and of the House are, and it may be at some times, on some subjects, that the President, elected by all the people, is rather more representative of them all than are the members of either body of the Legislature, whose constituencies are local and not country wide."[201]

The extraordinary reach of *Myers* expressed the priority Taft accorded to the administrative needs of a nationally elected president for control, coherence, and efficiency. Taft regarded these virtues as paramount when threatened by the bickering, petty, local, and merely political concerns of Congress. He therefore refused to credit the possibility that laws might in fact be more faithfully executed if specialized, presidentially appointed executive officers were legislatively endowed with some independence from centralized political, presidential control. The nature of the office, and of the law applied by the office, were irrelevant. What mattered was the impertinence of congressional interference with executive unity and coherence.

In an influential dissent, Brandeis offered a fundamentally different picture of the relationship between the legislative and executive branches. "The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency," he said, "but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental

powers among three departments, to save the people from autocracy."[202]

> The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted....
>
> Checks and balances were established in order that this should be 'a government of laws and not of men.' In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide .... Nothing in support of the claim of uncontrollable power can be inferred from the silence of the convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected. In America, as in England, the conviction prevailed then that the people must look to representative assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.[203]

For Brandeis, what mattered was not the independence of the executive from the Congress; what mattered was the interdependence of the two branches. This was because Brandeis regarded unconstrained power as potentially despotic, and he believed that the only realistic constraint on such power lay in the checks and balances hardwired into the constitutional scheme. These impediments might well impair administrative efficiency, but this was a necessary cost of a constitutional design framed to hedge against tyranny.[204] For Brandeis, the ultimate goal of the Constitution was to maximize the subordination of all government actors to general rules of law, which were the antithesis of presidential administrative discretion. Rules of law could legitimately emanate only from the multimember assembly of Congress, notwithstanding its incessant, inefficient, and petty squabbling.

The tension between Brandeis' view of checks and balances and Taft's appeal to the necessity of executive discretion and unity is still with us. Those inclined to an originalist point of view must ask which perspective more accurately reflects the fears and hopes of the framers.

Notes

[1] 272 U.S. 52 (1926).

[2] Albert W. Fox, *Senate Fight Seen To Strip President of Removal Power*, THE WASHINGTON POST (October 27, 1926), p. 1.

[3] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 493 (2010).

[4] William H. Taft (WHT) to Mrs. Frederick J. Manning (October 24, 1926) (Taft Papers).

[5] 272 U.S. at 106.

[6] The story of Myers is told in Jonathan L. Entin, *The Curious Case of the Pompous Postmaster: Myers v. United States*, 65 CASE WESTERN RESERVE LAW REVIEW 1059 (2015).

[7] See *ibid.* at 1062–64.

[8] Act of July 12, 1876, 19 Stat. 78, 80.

[9] *See* Entin, *The Curious Case of the Pompous Postmaster*, 1066–73.

[10] 58 Ct. Cl. 199, 208 (1923).

[11] Entin, *The Curious Case of the Pompous Postmaster*, 1065.

[12] In the official *United States Reports*, the date of first argument is given as December 5, 1923, but this is an error. *See Journal of the Supreme Court of the United States* (October Term 1924) 99; Butler's 1924 Term docket book, 249; WHT to Horace D. Taft (December 7, 1924) (Taft Papers); WHT to Charles P. Taft 2nd (December 7, 1924) (Taft Papers).

[13] *Journal of the Supreme Court of the United States* (October Term 1924), 99. *See* WHT to Harlan Fiske Stone (HFS) (December 7, 1924) (Taft Papers).

[14] Brief for the United States, at 3.

[15] *Id.*

[16] The argument is reproduced in *Power of the President to Remove Federal Officers*, S. Doc. 174, 69th CONG., 2nd SESS. (December 13, 1926), at 184.

[17] Memorandum, November 10, 1924 (Taft papers), reprinted in WALTER MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS 199–201 (3rd ed. 1979).

[18] WHT to HFS (December 7, 1924) (Taft Papers). *See* WHT to HFS (December 23, 1924) (Taft Papers); WHT to HFS (December 26, 1924) (Taft Papers); HFS to WHT (December 31, 1924) (Taft Papers).

[19] Albert B. Cummins to James M. Beck (January 29, 1925) (Taft Papers).

[20] WHT to HFS (December 23, 1924) (Taft Papers).

[21] *Journal of the Supreme Court of the United States* (October Term 1924), 182; Albert B. Cummins to James M. Beck (January 29, 1925) (Taft Papers); Albert B. Cummins to WHT (January 29, 1925) (Taft Papers); James M. Beck to WHT (February 2, 1925) (Taft Papers).

[22] *Power of the President to Remove Federal Officers*, at 153.

[23] *Ibid.*

[24] *Id.*

[25] Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independent*, 75 KENTUCKY LAW JOURNAL 699,736 nn.166–67 (1986).

[26] WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 2 (1916).

[27] Act of May 27, 1908, Pub. L. No. 60–146, 35 Stat. 406.

[28] 189 U.S. 311 (1903).

[29] The story is told in Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 UNIVERSITY OF RICHMOND LAW REVIEW 691 (2018).

[30] *Presidential Message on the Financial Condition of the Treasury, Etc.*, 48 CONG. REC. (December 21, 1912). *See, Concerning the Work of the Departments of the Post Office, Interior, Agriculture, and Commerce and Labor and District of Columbia* (December 19, 1912), in DAVID BURTON, ed., THE COLLECTED WORKS OF WILLIAM HOWARD TAFT (2002), 340.

[31] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 59.

[32] THEODORE ROOSEVELT, AN AUTOBIOGRAPHY (1913), 389.

[33] *Ibid.* at 395–96.

[34] *Id.* at 396.

[35] *Id.*

[36] For an excellent discussion, *see* H. Jefferson Powell, *Editor's Introduction* to the republication of OUR CHIEF MAGISTRATE AND HIS POWERS (2002).

[37] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 144.

[38] *Ibid.* at 147.

[39] *Id.* at 53.

[40] WILLIAM HOWARD TAFT, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS (1916) 59.

[41] *Id.* at 141.

[42] Powell, *Editor's Introduction*, xlviii.

[43] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 157.

[44] LOUIS FISHER, THE CONSTITUTION BETWEEN FRIENDS: CONGRESS, THE PRESIDENT, AND THE LAW (1978), 20. *See* L. Peter Schultz, *William Howard Taft: A Constitutionalist's View of the Presidency*, 9 PRESIDENTIAL STUDIES QUARTERLY 402, 403 (1979); Rene N. Ballard, *The Administrative Theory of William Howard Taft*, 7 Western Political Quarterly 65, 68 (1954).

[45] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 106.

[46] Ballard, *The Administrative Theory of William Howard Taft*, 69.

[47] William Howard Taft, *Financial Retrenchment and Governmental Reorganization*, 9 PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE IN THE CITY OF NEW YORK 90, 91 (1921). *See ibid.* at 93; TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 4–9.

[48] Ballard, *The Administrative Theory of William Howard Taft*, 73. *See, More Powers for President Urged by Taft*, NEW YORK TRIBUNE (May 14, 1921), 3.

[49] William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE LAW JOURNAL 599, 612 (1916). *See An Act Making Appropriations for the Legislative, Executive, and Judicial Expense of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Thirteen, and for Other Purposes*, Pub. L. No. 62-299, § 9, 37 Stat. 360, 415 (August 23, 1912).

[50] Taft, *The Boundaries Between*, 612.

[51] *Ibid. See Message of the President of the United States Submitting for the Consideration of the Congress a Budget*, S. Doc. No. 1113, 62nd CONG. 3rd SESS. (February 26, 1923), at 9.

[52] Taft, *The Boundaries Between*, 612.

[53] *Message of the President of the United States Submitting for the Consideration of the Congress a Budget*, at 5. The story is told in Ballard, 71–73; STEVEN G. CALABRESI AND CHRISTOPHER S. YOU, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008), 250–51.

[54] TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 56. *Compare* Taft, *The Boundaries Between*, 608.

[55] TAFT, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS, 54. The "intimation" to which Taft referred was *Parsons v. United States*, 167 U.S. 324 (1897). *See* Taft, *The Boundaries Between*, 608.

[56] James Hart, *The Bearing of Myers v. United States upon the Independence of Federal Administrative Tribunals*, 23 AMER. POL. SCI. REV. 657, 671 (1929).

[57] Alfred McCormack, *A Law Clerk's Recollections*, 46 COLUMBIA L. REV. 710, 714 (1946).
[58] WHT to Charles P. Taft 2nd (April 26, 1925) (Taft Papers).
[59] WHT to Mrs. Frederick J. Manning (May 17, 1925) (Taft Papers).
[60] WHT to WVD (July 4, 1925) (Van Devanter Papers).
[61] WHT to GS (August 11, 1925) (Sutherland Papers).
[62] WHT to WVD (August 15, 1925) (Van Devanter Papers).
[63] WHT to Hayden Smith (September 1, 1925) (Taft Papers).
[64] *Ibid.*
[65] Hayden Smith to WHT (September 22, 1925) (Taft Papers).
[66] *Ibid.*
[67] WHT to PB (September 16, 1925) (Taft Papers).
[68] *Ibid.*
[69] WHT to Charles P. Taft 2nd (November 1, 1925) (Taft Papers).
[70] *Id.*
[71] WHT to WVD (November 6, 1915) (Van Devanter Papers). *See* WHT to ETS (November 7, 1925) (Taft Papers); WHT to HFS (November 6, 1925) (Stone Papers).
[72] WHT to PB (November 7, 1925) (Taft Papers).
[73] WHT to Robert A. Taft (November 8, 1925) (Taft Papers).
[74] WHT to Horace D. Taft (November 13, 1925) (Taft Papers).
[75] WHT to WVD, GS, PB, ETS, and HFS (November 10, 1925) (Taft Papers).
[76] WHT to Louis More (November 13, 1925) (Taft Papers).
[77] WHT to Horace D. Taft (November 13, 1925) (Taft Papers).
[78] McCormack, *A Law Clerk's Recollections*, 711.
[79] *Ibid.*
[80] *Id. See also* THOMAS ALPHEUS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 227 (1956).
[81] HFS to WHT (November 13, 1925) (Stone Papers).
[82] *Ibid.* at 1.
[83] *Id.*
[84] *Id.*
[85] WHT to Robert A. Taft (November 22, 1925) (Taft Papers).
[86] HFS to WHT (November 24, 1925) (Van Devanter Papers).
[87] *Ibid.* at 1.
[88] *Id.*
[89] WHT to Horace D. Taft (November 28, 1925) (Taft Papers).
[90] *Ibid.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] WHT to Charles P. Taft 2nd (November 29, 1925) (Taft Papers).
[96] HFS to WHT (November 30, 1925) (Stone papers).
[97] 116 U.S. 483 (1886).
[98] 116 U.S. at 484.
[99] 116 U.S. at 484–85.
[100] HFS to WHT (November 30, 1925) (Stone Papers).
[101] *Ibid.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] 295 U.S. 602 (1935).
[107] ALPHEUS THOMAS MASON, HARLAN FISKE STONE: PILLAR OF THE LAW, 232.
[108] *Ibid. See* Marquis Childs, *Minority of One*, 214 THE SATURDAY EVENING POST 14, 15 (No. 12) (September 20, 1941).
[109] This dating is based upon the fact that the memorandum refers to *Myers* as having docket number 2.
[110] The memorandum is undated and unsigned, but all internal evidence suggests that it was written by Stone.
[111] 272 U.S. at 173–74.
[112] Synopsis Delivered at Opinion Announcement, at 13½ (Taft Papers). *See* Thomas Reed Powell, *Spinning Out the Executive Power*, 48 THE NEW REPUBLIC 369, 369 (No. 624) (November 17, 1926); Louis D. Brandeis to Felix Frankfurter (October 27, 1926), in MELVIN I. UROFSKY AND DAVID W. LEVY, eds., "HALF BROTHER, HALF SON": THE LETTERS OF LOUIS D. BRANDEIS TO FELIX FRANKFURTER (1991) 256.
[113] WHT to WVD (December 5, 1925) (Van Devanter Papers).
[114] Pub. L. 67-13, 42 Stat. 20 (June 10, 1921).
[115] *McCarl's Tenure Held at Stake in Supreme Court Decision*, THE BALTIMORE SUN (October 27, 1926), at 2.
[116] WHT to HFS (December 6, 1925) (Stone papers).
[117] HFS to WHT (December 7, 1925) (Taft Papers).
[118] *See* WHT to Robert A. Taft (December 20, 1925) (Taft Papers).
[119] 284 Pa. 421 (1925).
[120] *Id.* at 426–27. George Wharton Pepper to WHT (December 23, 1925) (Taft Papers).
[121] 284 Pa. at 436.
[122] WHT to WVD (December 30, 1925) (Van Devanter papers).
[123] WHT to Horace D. Taft (January 5, 1926) (Taft Papers).
[124] WHT to Horace D. Taft (January 7, 1926) (Taft Papers).
[125] *Ibid.*

[126] WHT to Robert A. Taft (January 10, 1926) (Taft Papers).
[127] HFS to WHT (March 29, 1926) (Stone papers).
[128] *Ibid.*
[129] *Id.*
[130] 272 U.S. at 247 (Brandeis, J., dissenting).
[131] HFS to WHT (March 29, 1926) (Stone papers).
[132] HFS to WHT (March 29, 1926) (Stone papers).
[133] WHT to Robert A. Taft (May 2, 1926) (Taft Papers).
[134] WHT to Horace D. Taft (June 5, 1926) (Taft Papers).
[135] WHT to Robert A. Taft (July 16, 1926) (Taft Papers).
[136] WHT to WVD (July 18, 1926) (Van Devanter papers).
[137] WHT to Robert A. Taft (August 2, 1926) (Taft Papers).
[138] WHT to GS (August 25, 1926) (Sutherland papers). *See* WHT to ETS (August 18, 1926) (Taft Papers).
[139] WHT to Clarence E. Bright (September 6, 1926) (Taft Papers).
[140] WHT to Horace D. Taft (September 9, 1926) (Taft Papers).
[141] *Ibid.*
[142] WHT to Clarence E. Bright (September 20, 1926) (Taft Papers).
[143] WHT to WVD, GS, PB, ETS, & HFS (September 28, 1926) (Taft Papers). *See* Taft Daily Task Memorandum (October 12, 1926) (Taft Papers).
[144] WHT to Horace D. Taft (September 30, 1926) (Taft Papers).
[145] WHT to Robert A. Taft (October 17, 1926) (Taft Papers).
[146] WHT to Horace D. Taft (October 17, 1926) (Taft Papers).
[147] WHT to Mrs. Frederick J. Manning (October 24, 1926) (Taft Papers).
[148] WHT to Charles P. Taft 2nd (October 24, 1926) (Taft Papers).
[149] WHT to Horace D. Taft (November 28, 1925) (Taft Papers).
[150] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. OF CINCINNATI L. REV. 849, 851–52 (1989).
[151] 272 U.S. at 142.
[152] The meaning and implications of the Decision of 1789 has provoked great controversy among commentators. *See, e.g., Myers v. United States*, 272 U.S. at 284–85 (Brandeis, J., dissenting); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUMBIA LAW REVIEW 353, 362 (1927); EDWIN S. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION vi (1927); George B. Galloway, *The Consequences of the Myers Decision*, 61 AMER. L. REV. 481, 491–92 (1927); Robert E. Cushman, *Constitutional Law in 1926–1927*, 22 AMER. POL. SCI. REV. 70, 74–75 (1928); Charles S. Collier, *The President's Removal Power under the Constitution*, 77 U. OF PENN. L. REV. 432 (1929); CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 52–70, 205–10 (1969); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 49 (1997); Curtis A. Brandley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 662–63 (2004); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV.1021, 1027, 1068–70, 1072–73 (2006); Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 CARDOZO L. REV. 2255, 2259 (2011); J. DAVID ALVIS, JEREMY D. BAILEY, & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789–2010 16–47 (2013); Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive* (May 8, 2020), available at SSRN: https://ssrn.com/abstract=.
[153] 272 U.S. at 136.
[154] *Ibid.* at 122.
[155] *Id.* at 119.
[156] *Id.* at 132.
[157] *Id.* at 134.
[158] *Id.* at 164.
[159] *See* 272 U.S. at 204 (McReynolds, J., dissenting).
[160] *Ibid.* at 193.
[161] *Id.* at 192.
[162] *Id.* at 192.
[163] *Id.* at 204.
[164] 272 U.S. at 117.
[165] *Id.*
[166] *Id.* at 162.
[167] *Id.* at 163.
[168] Steven G. Calabresi and Kevin H. Rhodes, *The Structural Constitution; Unitary Executive, Plural Judiciary*, 105 HARVARD L. REV. 1155, 1165 (1992).
[169] See, e.g., Robert E. Cushman, *Constitutional Law in 1926–1927*, 74 ("The dissenting opinions seem clearly to have the better of the argument, both in historical accuracy and in logic."); Thomas Reed Powell, *Spinning Out the Executive Power*, at 369 ("The logic is so lame, the language is so inconclusive, the history so far from compelling, that I venture to think that the mainspring of the decision and its only conceivable justification are to be found in the judgment of the majority that the result is one that ought to be reached."); Galloway, *The Consequences of the Myers Decision*, at 491–92 ("The sharp dichotomy between the Chief Justice's interpretation of the precedent of the first Congress, subsequent executive practice and legislative policy and the actual facts of history as introduced so ably and convincingly by Mr. Justice Brandeis in his margin, leaves the reader dubious of the infallibility of constitutional truths judicially revealed."); *The Supreme Court as Revolutionary*, 123 THE NATION 468 (No. 3201)

(November 10, 1926) ("The position of the majority judges is curious. They admit that Congress may take from the President the power of appointing inferior officers and, by vesting it in the head of some other department, restrict removals as it will, yet they hold that the moment Congress transfers that appointing power to the President it is deprived of this restrictive power. The decision is, as usual, political rather than legal. The settled habit of the court is so to interpret the Constitution as to prevent legislation which seems to disturb intrenched interests.").

[170] Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 366.

[171] 272 U.S. at 129.

[172] *Ibid.* at 117–18, 126, 161.

[173] *Id.* at 115–16.

[174] 272 U.S. at 161.

[175] See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

[176] Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 386.

[177] *Kendall v. United States*, 37 U.S. 524, 610 (1838).

[178] Pub. L. No. 63-43, 38 Stat. 260 (December 23, 1913) (Setting terms for members of the Federal Reserve Board); Pub. Law No. 33-122, 10 Stat. 612 (February 24, 1855) (providing that judges of the Court of Claims will "hold their offices during good behavior").

[179] 272 U.S. at 135.

[180] *Ibid.* at 134.

[181] *Id.* at 135.

[182] Edward S. Corwin, *The President as Administrator in Chief*, 1 J. POLITICS 17, 50 (1939). *See* TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS, 126.

[183] Corwin, *The President as Administrator in Chief*, 46.

[184] *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

[185] 295 U.S. 602 (1935).

[186] Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUMBIA LAW REVIEW 573 (1984).

[187] 295 U.S. at 628.

[188] *Ibid* at 626.

[189] TAFT, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS, 10.

[190] Ballard, *The Administrative Theory of William Howard Taft*, 71 n. 35.

[191] WHT to Horace D. Taft (November 4, 1926) (Taft Papers). *See Myers*, 272 U.S. at 181–82, 210–13, 224–25 (McReynolds, J., dissenting).

[192] *The Supreme Court as Revolutionary*, 468–69.

[193] 272 U.S. at 181 (McReynolds, J., dissenting). *See* James M. Landis, *Mr. Justice Brandeis: A Law Clerk's View*, 46 PUBLICATIONS OF THE AMERICAN JEWISH HISTORICAL SOCIETY 467, 472 (1957).

[194] Galloway, *The Consequences of the Myers Decision*, 501. *See A Very Serious Decision*, THE NEW YORK WORLD (October 27, 1926), 16 ("If it is true, as Justice McReynolds says, that members of the Interstate Commerce Commission, the Federal Reserve, Shipping, Tariff, Trade, Farm Loan, Railroad Labor and similar quasi-judicial, quasi-executive boards can now be removed at 'the President's pleasure or caprice,' then the gravity of the decision is evident."); Thomas Reed Powell, *Spinning Out the Executive Power*, 369; *The President's "Right to Fire,"* 91 THE LITERARY DIGEST 5 (No. 1907) (November 6, 1926), 5; James Hart, *The Bearing of Myers v. United States upon the Independence of Federal Administrative Tribunals*, 659.

[195] WHT to Thomas W. Shelton (November 9, 1926) (Taft Papers).

[196] WHT to Casper S. Yost (November 1, 1926) (Taft Papers). For other comments to this effect, *see* WHT to Horace D. Taft (October 28, 1926) (Taft Papers) (*Myers* "curtails the power of the Senate and the power of Congress in erecting executive tribunals and boards that cut down the president's authority, and the members of such boards of course are strongly against the exercise of this presidential power."); WHT to Oren Britt Brown (November 19, 1926) (Taft Papers) (*Myers* "is the greatest constitutional case that I have had to do with, and of course in that respect it was a real opportunity. I think we have come to the right conclusion, in view of the history of the question and its early decision by Congress. I think, too, it is a wise result, in that it secures a proper equilibrium between the legislative and executive branches of the Government. The legislative branch of the Government will never lose its power. It has the whip hand of all the other departments in its law making power and is quite disposed at times to ignore the limitations of the Constitution which set boundaries between the power of Congress and the power of the other branches."); WHT to Clarence H. Kelsey (December 2, 1926) (Taft Papers) ("[N]o one can under the current trend fail to observe that Congress pushes its power in every direction by constant legislation, relying on the others affected, especially the other branches of the Government, to enable the legislation that it passes to acquire permanency and constitutional conformity merely by lapse of time. Through the institution of boards whose members have terms that would outlast the Administration, it is possible for Congress to divide up the executive power, take it away from the President and tie his hands in many directions. This can not be done if he has the power of removal which he had uncontested for seventy-three years. I am glad to note that a majority of the press seem to favor the conclusion we reached.").

[197] WHT to William M. Hunt (May 5, 1927) (Taft Papers).

[198] WHT to Calvin Coolidge (June 4, 1924) (Coolidge papers).
[199] WHT to Helen Herron Taft (April 20, 2924) (Taft Papers).
[200] *Ibid.*
[201] 272 U.S. at 123.
[202] *Ibid.* at 293 (Brandeis, J., dissenting).
[203] 272 U.S. at 292–94 (Brandeis, J., dissenting).
[204] The fullest expression of this organic view of separation of powers is in Justice Robert H. Jackson's famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

Kumezo Kawato and "Justice Court"

CHARLES J. SHEEHAN

The Accident

Among the early acts reported in Volume 317 of the **Supreme Court Reports** was the December 21, 1942, memorial for the late Justice Louis D. Brandeis. Gathered that morning were leading jurists and members of the Court's bar. The proceedings were called to order by Solicitor General Charles Fahy. His brief remarks recognized the members absent, those "called this last year to other tasks and places that need them during the war."[1] Judge Calvert Magruder noted the occasion's setting "[a]mid the din and distractions of war."[2] Imperial Japan's fury loosed much of the din. Its baleful reach would deepen the struggle of a middle-aged West Coast working man in the early months of 1942—a story that quietly unfolded in Volume 317.

In 1889, Kumezo Kawato was born in the southeast coast city of Ugui, Japan.[3] He arrived as a teenager in the United States in 1905 and settled in the Los Angeles area.[4] In April 1940, he took work as a fisherman on the "vessel Rally," with his wages set as a share of the *Rally*'s catch.[5] On December 4, the *Rally* was docked and Kawato, in a small skiff alongside (he was five feet one inch),[6] was repairing fish nets hanging from the larger vessel. Suddenly, the skiff was "thrown against" the *Rally*.[7] Kawato sustained "severe injuries to his left foot and leg," a fracture, and a wrenched knee.[8] Immediate medical care from a physician and surgeon was required. Four months of incapacitation followed. Having paid his own medical bills, Kawato was now unable to support himself.[9]

In April 1941, Kawato brought suit against the *Rally* in federal district court. His attorney was Herbert R. Lande, of nearby San Pedro. Lande had practiced in California since 1934.[10] He represented injured seamen, and his sometime opponent in these matters was attorney Lasher Gallagher.[11] Kawato sought "wages due" ($387) and "maintenance care while ashore" ($264—consisting of $38 in medical expenses and $2 "per day" while unable to work).[12] In August, Gallagher answered for the *Rally* with denials both of responsibility and of federal court jurisdiction.[13] In a "SEPARATE AND

Kumezo Kawato was a Japanese-born fisherman who lived on Terminal Island, an enclave of 3,500 Japanese Americans near Los Angeles. Above is a photo of unidentified seamen docked at Terminal Island taken before World War II.

SPECIAL DEFENSE," he asserted that Kawato was a "citizen and subject of the Emperor of Japan," and that "no citizen of the United States shall pay any ... subject of the said Emperor of Japan."[14]

A "Japanese" Seaman

The case of Kawato the seaman was not the first encounter between Lande and Gallagher, nor the first in which the two contestants over a seaman's claim found themselves on the docket of federal district court Judge Leon R. Yankwich. In late 1939, Clarence Robinson, an "ordinary seaman," had fallen ill after "a voyage to the East Coast and return."[15] Robinson, represented by Lande, was unable to work for several months and sued the ship owner, represented by Gallagher, for lost wages and "maintenance" during convalescence. The owner disputed the diagnosis of malaria. Judge Yankwich rendered a brisk and unhesitating decision on May 17, 1940. Declaring "immaterial" the cause of the illness and finding Robinson "unable to work," he ruled the seaman "entitled to recover his wages to the end of his voyage."[16] The maintenance claim he treated with the same dispatch and awarded "actual costs."[17]

Unlike Robinson, Kawato was no "ordinary seaman" appearing before Judge Yankwich. The times were far from ordinary. Pearl Harbor still smoldered, its horror acutely raw on the Pacific coast, when the *Rally* sharpened its rhetoric and characterized Kawato as "a Japanese," with the United States and Japan "at war."[18] Claiming that

The first- and second-generation Japanese-Americans living at Terminal Island were forced to leave their homes in February 1942 and were given only forty-eight hours to sell their household goods and fishing equipment.

during the "state of war" no "enemy alien has the right to prosecute any action in any court,"[19] the *Rally* moved to "abate" the case.[20]

Judge Yankwich ordered the action abated on January 20, 1942. He reasoned that the decision of the Supreme Court two weeks earlier, in *Ex Parte Colonna*,[21] which denied access to federal court by the government of Italy, then at war with the United States, extended to all subjects of enemy nations, wherever residing. Kawato's right to be heard was abated, moreover, "for the duration of the war."[22] Three days later, Lande turned to the Ninth Circuit which, on March 4 and without opinion, backed Judge Yankwich. Twice the courthouse door shut on Kawato.

In the distant Supreme Court lay a fast-expiring final hope. The pervading national fear could hardly have offered odds more dismal to a noncitizen resident alien from a ravaging enemy nation. Such were the predations of Japan that the telling of the Commission on Wartime Relocation and Internment of Civilians (Commission) four decades later loses none of the dread:

> On the same day as Pearl Harbor, the Japanese struck the Malay Peninsula, Hong Kong, Wake and Midway Islands, and attacked the Philippines, destroying substantial numbers of American aircraft … The next day Thailand was invaded … On December 13 Guam fell, and on Christmas the Japanese occupied Hong Kong. On February 27 the battle of the Java Sea resulted in another American naval defeat with the loss of thirteen Allied ships. In January and February 1942, the military situation in the Pacific was bleak indeed … There was fear of Japanese attacks on the west coast.[23]

Thousands of American and Filipino men fell during the Bataan Death March

Kawato was photographed on July 30, 1942 as an internee in Fort Lincoln, North Dakota.

in April 1942. In May, with Corregidor's surrender, the last American stronghold in the Pacific was lost. The Japanese flag flew in the Aleutian Islands in June, menacing an invasion of North America.

On May 27, Lande sought the Supreme Court's permission to file a "writ of mandamus" ordering that Judge Yankwich hear Kawato's case. *Ex Parte Colonna* denied American courts to "enemy plaintiffs," Lande argued, including residents living in enemy nations.[24] Kawato was neither. He was a "resident enemy alien" living in Los Angeles, not Japan.[25] A resident enemy alien "is not disabled from prosecuting a case in our Courts."[26] Lande asked to proceed "on typewritten papers" since Kawato "has no funds or credit with which to pay for the printing of the petitions and briefs."[27]

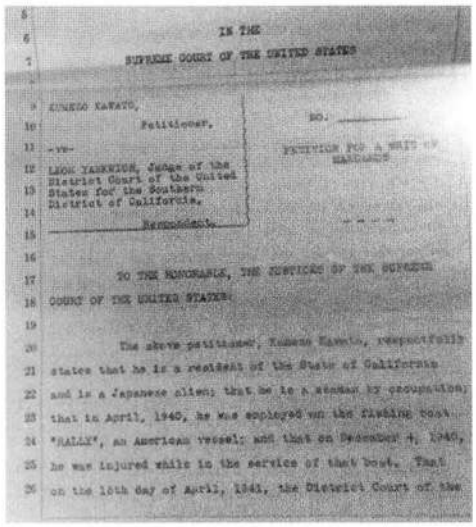
A crack in the federal courthouse door opened with the Court's per curiam decisions on June 8. On a page whose four preceding motions or applications were all "denied" in two or three lines, the eight lines devoted to *Ex Parte Kawato* drew the lone good news: "Motion for leave to file a petition for writ of mandamus is granted."[28] Granted also was "leave to proceed on typewritten papers."[29] Argument was set for October 12. Lastly, the Court asked that a new actor join the proceedings. "The Solicitor General is requested to file a brief."[30]

Amicus Brief by Solicitor General Charles Fahy

For Solicitor General Fahy, this was not the usual case of a President, federal department, or Congress expecting his defense of executive action or congressional enactment. A Japanese-born noncitizen pursuing a private claim against an American business during war with Japan presented singular circumstances. The Supreme Court had signaled no leanings either way in its dry disposition on June 8. The one certainty of Fahy's brief was that its author was not bound to either side, but was "amicus curiae"—friend of the Court.

Fahy had lately been the first General Counsel of the National Labor Relations Board, bent with all his vigor on advancing the right of the "working man" to a fair field of play in dealing with powerful management forces.[31] Five years earlier, it was the National Labor Relations Act, in five decisions announced on a single day upholding the right of workers to organize and collectively bargain with management, that toppled the Supreme Court wall steadfastly set against New Deal legislation.[32]

On July 25, Fahy filed his amicus brief in *Ex Parte Kumezo Kawato*. It was decidedly friendly to this working man's lone sally against judicial barriers to fair reckoning with his employer. To Judge Yankwich, the *Rally* had offered "no information or belief" with regard to Kawato's claims of injury and costs. No findings had been made either way. Such would have been the business of Judge Yankwich had he not "abated" trial. Fahy, however, cast the central fact as established. Kawato "was injured while employed on the fishing boat Rally."[33] Toward Kawato's reception by the lower court, Fahy's tone was



IN THE

SUPREME COURT OF THE UNITED STATES

KUMEZO KAWATO,

Petitioner,

-vs-

LEON YANKWICH, Judge of the District Court of the United States for the Southern District of California,

Respondent.

NO. _____

PETITION FOR A WRIT OF MANDAMUS

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above petitioner, Kumezo Kawato, respectfully states that he is a resident of the State of California and is a Japanese alien; that he is a seaman by occupation; that in April, 1940, he was employed on the fishing boat "RALLY", an American vessel; and that on December 4, 1940, he was injured while in the service of that boat. That on the 18th day of April, 1941, the District Court of the

Herbert Lande, a California lawyer who represented injured seamen, filed this petition for a writ of mandamus in the Supreme Court on May 27, 1941. He asked the Court to compel Southern California district judge Leon R. Yankwich to hear Kawato's case despite his status as a "Japanese alien."

stiff. Judge Yankwich had "refused to hear the case."[34]

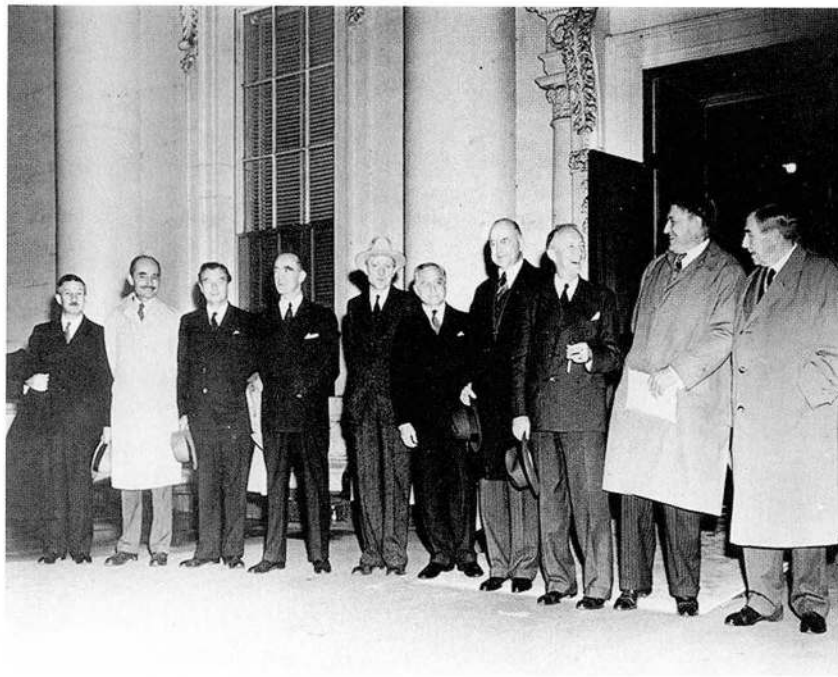
Of Kawato's race, or birthplace in the nation on a murderous path against America, Fahy took no notice. He set the case squarely on the principles of law and values long engrained in Anglo-American tradition. A "person who came to England in time of peace and remained there quietly and without disturbance" was welcome in English courts.[35] Even the "resident enemy was present under the protection of the King, and … 'suing is but a consequential right of protection.'"[36] Barring courts to resident aliens benefits no enemy nation, but does inflict "unnecessary hardship" if "such persons were deprived of access to the courts as a means of safeguarding their civil rights."[37]

The Supreme Court had never squarely addressed the question, but lower federal and state courts "uniformly adhered" to Fahy's position.[38] Even "during the present war," three trial courts had initially refused to hear cases brought by enemy alien residents but "reversed their position … [when] authorities were called to their attention."[39] As one district court observed, "the contracts of individuals ought not to be affected by the quarrels of nations."[40]

Having staked the legal ground, Fahy turned to the justice, and human toll, of such treatment of resident enemy aliens as endured by Kawato at the hands of Judge Yankwich. "The experience of this country … during the present war, has demonstrated that the vast majority of those subjects of countries with which we are at war who reside here, are either entirely loyal to our institutions, or at least unwilling to disobey our laws by giving aid to the enemy."[41] In America lived some 1,350,000 enemy aliens. "To deprive such persons … of all access to the courts, might subject them to extreme hardship without any compensating benefit to the United States."[42] Culpable parties would escape justice, for "those physically injured (such as [Kawato]) would be unable to recover, although the injury was caused by the willful, reckless or negligent act of another."[43]

"The spirit of justice, upon which our institutions are founded, and the manifest undesirability of forcing innocent persons into want and destitution forbid any such result when not in the least helpful to the effective prosecution of the war."[44]

But this was, after all, wartime, with attendant fears of aiding the enemy. Fahy raised and met each. Measures available to government could block judicial recoveries from being sent to the enemy.[45] Those suspected of disloyalty could be interned, with restrictions placed on their property.[46] *Ex Parte Colonna* was swept aside as holding only that "war suspends the right of enemy plaintiffs to prosecute actions in our courts."[47] The government of Italy pursuing its case while at war with the United States was "obviously" barred.[48] Fahy closed with the ardor of the Attorney General's earlier statement in January 1942: "no native, citizen, or subject of any nation with which the



The Justices assembled at the White House for their annual visit to President Roosevelt on October 12, 1942, the same day that *Ex Parte Kawato* was argued. (Left to right) Solicitor General Charles Fahy; Attorney General Francis Biddle; Justices Jackson, Murphy, Douglas, Frankfurter, Reed, Black, and Roberts; and Chief Justice Stone. Fahy filed an amicus brief in Kawato's case and Black (holding a cigar) wrote the unanimous opinion.

United States is at war and who is resident in the United States is precluded ... from suing in federal or state courts."[49]

Judge Yankwich's Views

Leon Yankwich was born in Romania one year before Kawato and reached American shores in 1907, two years after him.[50] Parallels in their immigrant personal histories, however, awoke no sympathies in the jurist, who rather took Kawato's challenge to his "abatement" order as a personal affront. Three weeks before argument in the Supreme Court, Judge Yankwich aired his grievances to the Clerk of the Supreme Court.[51] There is "no one to whom I can appeal to present my views," he wrote.[52] While he "preferred ... public counsel," such as the United States Attorney, this hope was frustrated by the Solicitor General taking a position "opposite" his.[53] He "hesitated" to use private counsel, many of whom appeared before him.[54] "Local" counsel might be sought as a "friend of the court," yet he was loath to "request an attorney to stand the expenditure which representation before the Supreme Court would entail."[55] He apparently assumed counsel would shoulder all Court costs.

Yet Judge Yankwich need not have fretted at lack of counsel, as within the week he had prevailed on Lasher Gallagher. "At the request of the Honorable Leon R. Yankwich," Gallagher wrote the Clerk, he would make oral argument and file a brief for the judge.[56] Gallagher pressed the same financial straits for Judge Yankwich as Lande for Kawato. "It does not seem that the rules require a judicial officer to pay for ... printing,"[57] he pled in seeking to submit a typewritten brief.

A late filing from Fahy on October 7 bore striking news. Neither Lande nor Gallagher nor Yankwich had ever noted that,

"some months after the court had abated his action," Kawato had been interned.[58] As the Supreme Court characterized Fahy's supplemental brief, the United States "does not consider that this circumstance alters [Kawato's] position ... in respect to his privilege of access to the courts."[59]

Ex Parte Kawato was the first case argued on October 12. Only Gallagher appeared, no longer for the now-forgotten *Rally* but for his new-found second client, and "argued the cause for Leon R. Yankwich, Judge."[60]

The Supreme Court Decision

On November 9, 1942, came a unanimous decision. Authored by Justice Hugo L. Black, it was a paean of mingled sympathy for Kawato and a tribute to the nation so long his home. Few facts particular to Kawato, the man, were known, yet the Court held him aloft, a symbol of the noble, freedom-seeking immigrant.

Did there stir in Justice Black the memory of that other poor man, and the larger cause for which that man stood five months earlier? In *Betts vs. Brady*,[61] Smith Betts, a "farm hand, out of a job and on relief,"[62] had a criminal trial but was denied an attorney. In *Ex Parte Kawato*, the injured, jobless fisherman had an attorney but was denied a trial. Justice Black dissented in *Betts*, but in *Ex Parte Kawato* wrote for the whole Court in pressing the keenly held creed to which he had recently given voice in *Betts*—and would again two decades later in his majority opinion in *Gideon*: the "promise of our democratic society to provide equal justice under the law," and society's "duty" to provide "defence of the poor."[63] Black wrote:

> Nothing in [Kawato's] record indicates ... that he came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promises equal protection to all who abide by them.[64]

The injured fisherman embodied the patriotic pride of a nation whose "lifeblood came from an immigrant stream."[65] Indeed, many soldiers in the war of 1812 were born in England but fought for America. Immigrants "by the millions ... have learned to love the country of their adoption more than the country of their birth."[66]

Building on the lineaments of Fahy's brief, Black embraced British openness to resident enemy aliens "even when the alien is interned, as is petitioner here."[67] He cited Fahy's authorities that forbidding their access to court "would be repugnant to sound policy, no less than to justice and humanity."[68] He repeated Fahy's assurances that safeguards could be set to prevent "aid and comfort" to the enemy.[69] Like Fahy, he dismissed *Ex Parte Colonna* as "having no bearing on the rights of resident enemy aliens.[70] As Fahy argued, such would be antithetical to the "modern, humane principle" allowing their suits to proceed. He closed, echoing Fahy, with the Attorney General's recent affirmation of resident enemy alien rights.[71]

Word traveled fast. Two days later a typed letter, addressed to "Mr. Black," was mailed from Topaz, Utah. The writer, Victor Abe, introduced himself as a "citizen of Japanese ancestry ... serving as an evacuee attorney in the Central Utah W.R.A. Project ... vitally interest[ed] in the opinion concerning Mr. Kawata [*sic*]... upholding the right of the Japanese alien ... to seek justice in the American courts."[72] The decision was "the most encouraging event which has occurred,"[73] he continued. Those "confined to project areas" yet seeking to "maintain their faith in American democracy" while "[u]prooted from homes" and "anxiously await[ing] any expression or gesture which

would encourage them" could at last "see and feel democracy in action."[74] "Could you possibly send a copy of the opinion or a digest of it?"[75]

Ex Parte Kawato spurred the Department of Justice. On December 3, Attorney General Francis Biddle instructed all United States Attorneys that the case "establishes ... that a resident alien enemy has a right to bring suit in any court and that ... there must be no abatement of his action for the duration of the war because of his status."[76] Reaffirming Fahy's supplemental brief and the Supreme Court's admonition, the Attorney General took particular care to extend the decision's far reach. The resident alien enemy "can sue even if interned."[77]

One week later, a punctilious Judge Yankwich provided the Clerk of the Court a second letter, shed of comment or complaint. "I have caused ... the Opinion to be filed in open court ... as is the case with formal mandates," and "ordered the case restored to the calendar."[78]

Kawato's Internment: "1 suitcase, 1 box, 1 seabag"

The embers suddenly stirred to life by the Supreme Court went quickly cold again. After Judge Yankwich's sole "abatement" order of January 20, 1942, and despite the Court's upholding Kawato's right to sue "even when ... interned," the case would languish without trial until after the war—precisely the span of years that saw the unraveling of Kawato's life and livelihood.

His home in the early 1940s was Terminal Island, a "Japanese community" off Los Angeles described by the Commission as six miles long and a half-mile wide, reachable only by ferry or drawbridge and sustaining a Japanese population of 3,500.[79] Half were American-born. The island's economy centered on canning and fishing. It supported restaurants, groceries, small businesses, and three physicians. The FBI began removing individuals "considered dangerous aliens" on December 7, 1941.[80] By early 1942, the Department of Justice saw to it that "every alien male on Terminal Island who held a fisherman's license" was sent to an inland camp.[81]

On February 2, 1942, two weeks after Judge Yankwich abated his case, Kawato's fortunes turned exceedingly dark. That day he entered the Justice Department internment camp in Lordsburg, New Mexico, near the Mexico border. His "internee report" noted his "fisherman" past and $300 worth of furniture left at 627 Barracuda Street, his Terminal Island residence.[82] He surrendered the $73.34 in his possession when the gates closed behind him.[83]

A period of profound dislocation had commenced. By July, Kawato had been transferred far north to Fort Lincoln, North Dakota, close to the Canada border, where he entered with "1 suitcase, 1 box, 1 seabag."[84] In August, he was back in Lordsburg, where his "internee behavior" was rated "favorable" for "general attitude and cooperativeness with Camp authorities," as was his "trend of mental condition (despondency, etc.)."[85] He weighed 115 pounds.[86] In late March 1943, he and scores of internees were moved to a camp on the outskirts of Santa Fe, New Mexico.[87] From Lordsburg, Kawato had arrived at Santa Fe with $127.04 "in final settlement."[88] Each month in Santa Fe he received "payroll" in amounts usually ranging between $.80 and $1.60. In July 1943 it reached $24.80.[89] One month's $1.43 earnings were credited to "ditch work."[90]

Perhaps the brief cool of the north border suited Kawato more than the desert southwest, for one month after arriving at Santa Fe he "volunteered" for transfer to the internment camp at Kooskia, Idaho, which promised $45 per month for "manual labor" on "road construction."[91] His request was denied. In landlocked Santa Fe, among fifteen hundred mostly Japanese-born internees, the

fisherman would remain, how indefinitely he could not know.

The government held loyalty hearings to decide whether individual internees threatened the security of the United States by retaining allegiance to hostile nations. Hearings were chaired by a Department of Justice representative assisted by local citizens appointed by the Attorney General. Testimony was taken from the government and the enemy alien.[92] Those deemed not loyal to an enemy nation could, a Santa Fe citizen member recollected, be "paroled."[93] At some point Kawato had a loyalty hearing, although whether Kawato was found loyal or not is unknown.[94]

Back to the Lower Court

A global jolt occurred on September 2, 1945. Japan surrendered. The ripples quickened a series of sharp turns in Kawato's fortunes. His stagnant case against the *Rally* lurched into motion. During his over three and one-half years' internment, the district court had quietly continued the case, usually several months at a time. In February 1944, trial had been set for February 1945, then was pushed back until February 1946.[95] Suddenly, four days after Japan's surrender, the trial date was for the first time accelerated—to October 1945—until it was postponed to March 4, 1946.[96]

With Japan defeated and the closing of internment camps imminent, there was at last a window. Through it leapt Herbert Lande. Three years to the week after Judge Yankwich restored Kawato's case to the docket, on November 19, 1945 Lande wrote the Santa Fe camp commanding officer and asked to depose his "Japanese alien" client for his pending lawsuit.[97] "We are anxious to have the matter come to trial."[98]

Lande requested a camp-supplied notary public to depose Kawato with questions submitted by Lande and to record Kawato's answers.[99] An official replied with "regret that we are not in a position to assist you."[100] Undeterred, on December 17, Lande sought Kawato's release "so that he might attend the trial of his case,"[101] a plea passed to Alien Control Headquarters in Philadelphia. There was no authority to release Kawato, Headquarters replied on January 5, 1946, but trial arrangements for Kawato could "possibly" be made were Kawato to travel "under guard" and assume "all expenses" for transportation and guard services.[102]

Unable to meet these terms but spurred by the trial date's final postponement to March 4, Lande took a final tack. He notified the *Rally*, on January 10, that a privately retained notary from Santa Fe would depose Kawato at camp.[103] Lande attached fifteen questions delving into the events and aftermath of December 4, 1940—Kawato's injuries, medical costs, and loss of earnings. The deposition was set for February 11, 1946.[104]

Loyal to Japan

On February 27, one week before trial, Lande and Gallagher submitted a joint stipulation and order of dismissal. *Kumezo Kawato vs. Gas Screw Vessel "Rally,"* the lawyers agreed, was "fully settled."[105] The next day, District Court Judge Campbell Beaumont, in three lines, ordered the five-year-old lawsuit "dismissed ... each party to bear their own costs."[106] With scarcely a murmur, the aged case, begun by wind or wave flinging Kawato against the *Rally*'s side half a decade earlier, fought out by Kawato up every rung of the judicial ladder before war, through war, and beyond war, expired. Its terms were shrouded in silence.

Of the Terminal Island fisherman himself, however, the record was not so obscured. It opened on a life rich in incident and hope. During 1942, Kawato had applied for "repatriation" to Japan while in Lordsburg.[107] In Santa Fe, after Japan's surrender, Kawato again pressed repatriation. Perhaps he yielded

to the tug of heritage and native soil, now tantalizingly nearer, in assuming a different name: Shobei Matsubara. In Japan, his typewritten application explained, was Kura Matsubara, his wife. In Japan lived his three children. All were in Ugui.[108]

His reasons for returning, "unconditionally and without qualification," were plain enough.[109] "I feel it is my duty to go back to Japan and support my wife for bring up [sic] the children. At previous hearing I have expressed my loyalty to Japan and I have no intention of changing the same in the future. It is my sincere desire that I be repatriated to Japan as soon as possible."[110] The reviewing official's signature below Kawato's testified to the application's "outstanding merit."[111]

On February 28, 1946, the day the case of *Kawato vs. Gas Screw Vessel "Rally"* was forever dispatched to the closed-case room in the federal courthouse, Kumezo Kawato, or Shobei Matsubara, was a world away. On February 21, 1946, the fifty-seven-year-old fisherman, perhaps for the last time, put out to sea from southern California.[112] With other internees bound for their defeated birthplace and home, he likely had Terminal Island in view as he passed through his old waters.

His medical release from Santa Fe had noted "General condition good" and "Duodenal ulcer-healed."[113] In his pocket was $161.60 in U.S. currency "earned ... while interned in the United States," and the $60 apparently issued to departing internees.[114] In July 1945, the FBI had returned Kawato's property "procured ... at the time of his apprehension."[115] He may have again been carrying with him his "1 Buddist pamphlet ... 1 card of Baptist Church ... 1 Fishermen's Union retirement card ... 1 alien registration card [and] 1 notice to appear in Justice Court."[116]

Conclusion

In 1957, Charles Fahy shared his recollections of the case of the Japanese-born fisherman "barred from our courts" during war with Japan: "I thought this unsound."[117] An aspect of the opinion lingering with special pleasure for Fahy, champion of the working man's right to fair wages, was Justice Black's "interesting observation" that English-born men fought for America in the war of 1812.[118] "If they could fight for us, the Court seemed to be saying, they could sue in our court for wages."[119] Fahy also pondered the constitutional forces at work during the "din and distractions of war,"[120] when the "[e]xecutive and military hold the forward positions, in advance of the legislative and judicial branches of Government."[121] "Yet" to the courts still fall the "peaceful means" to justice—for "a nation draws strength in war as at other times from her legal foundations."[122]

Constitutional tension during wartime had also drawn Fahy into another remarkable episode echoing his observation in *Kawato*, as amicus curiae, that "[t]he experience of this country ... has demonstrated that the vast majority of those subjects of countries with which we are at war who reside here, are ... entirely loyal to our institutions."[123] Two years to the day after *Ex Parte Kawato* was argued, Fahy personally presented to the Supreme Court the case for the United States in *Ex Parte Endo*.[124] "Miss [Mitsuye] Endo was a young American citizen of Japanese descent" who, while interned, "had been cleared individually from a loyalty standpoint."[125] Nonetheless, "she was still held under some restraint of her freedom."[126]

To Fahy, the government's position was deeply unsound. "I thought the executive branch ... should abolish the regulations ... which continued to hold her."[127] Fahy's views were resisted. "Contrary to my recommendations and judgment it was felt that public acceptance of abolition of the regulations would require Supreme Court decision."[128] But, Fahy was the Solicitor General and, "[b]ecause of the nature and importance of

the case ... it seemed to me that I should present the position of the United States."[129]

In the usual cases, Fahy believed, "the United States should ... press ... vigorously and forcefully."[130] In *Endo*, however, "there [was] very strong reason" for the Solicitor General not to do so.[131] Fahy thus began on an extraordinary note. "I told the Court I could not argue [the case] with the same conviction as [*Korematsu*], in which the Court upheld the exclusion of Japanese Americans from the West Coast in 1944."[132] But "I wished to present the matter as fairly and fully as I could from the standpoint of the government."[133] Hardly had he commenced when headwinds hit. "Chief Justice Stone immediately indicated grave uncertainty, to put it mildly, about the government keeping any restraints on Miss Endo, a citizen who had been cleared from a loyalty standpoint. ... [The Chief Justice] ... went after me about it. I thought to myself, 'Well, I wish you could get after some of those whom I've been trying to get to clear this matter up without even bothering you about it'."[134] The Court reversed, holding that the government could not continue to detain a citizen who was "concededly loyal" to the United States.

The constitutional storms of the internment era saw few doughtier contestants than resident enemy alien Kumezo Kawato. With no capital but Herbert Lande's unending pluck and a congenial spirit in Charles Fahy, he clamored at the gate of every "Justice Court" set before him, even through barbed wire. With years of legal fees sunk in defense and trial one week out, perhaps also tucked in Kawato's pocket as he steamed homeward, and the familiar shore was lost to sight, was the litigant's partial justice—dearly won wages and expenses paid out by the *Rally*.

If so, his case and his life, both long and much "abated," stood in some small measure restored.

ENDNOTES

[1] "Proceedings in Memory of Mr. Justice Brandeis", 317 U.S. ix, ix (1942).

[2] *Ibid.*, p.x.

[3] Immigration and Naturalization Service, Internment Camp, Santa Fe (March 18, 1944), National Archives & Records Administration (NARA), Washington DC, Record Group 85, Box 14 (NARA Box 14). NARA Box 14 consists of internment forms and documents pertaining to Kumezo Kawato, without order or pagination.

[4] *Internee Report, Lordsburg Internment Camp* (February 2, 1942), NARA Box 14.

[5] *Kumezo Kawato v. Gas Screw Vessel "RALLY" (Kawato)*, Complaint in Admiralty, Libel in Rem, 2 (S.D. Cal. April 15, 1941), National Archives & Records Administration, Washington DC, Record Group 267, Box 407 (NARA Box 407). NARA Box 407 consists of judicial filings and other documents associated with Kawato's Supreme Court litigation, including filings in the lower federal courts attached to his Supreme Court pleadings. They are also without order or pagination.

[6] *Internee Report* (March 23, 1943), NARA Box 14.

[7] *Kawato*, Complaint in Admiralty, 3, NARA Box 407.

[8] *Ibid.*

[9] *Id.*

[10] *Kumezo Kawato v. Leon Yankwich (Kawato v. Yankwich)*, Motion of Herbert R. Lande for Permission to Appear Before the Supreme Court of the United States, 2 (undated), NARA Box 407.

[11] For example, *Burke v. W.R. Chamberlin & Co.*, 51 Cal. App. 2d 421, 422 (1942) (seaman working on steamship moored in Los Angeles harbor injured by "timber ... catapulted from the dock"). Gallagher represented the steamship and Lande the seaman.

[12] *Kawato*, Complaint in Admiralty, 3, NARA Box 407.

[13] *Kawato*, Answer to Libel, 1–3 (August 12, 1941), NARA Box 407.

[14] *Id.*, p. 6 (upper case in original).

[15] *Robinson v. Swayne & Hoyt*, 33 F. Supp. 93, 94 (S.D. Cal. 1940).

[16] *Id.*, p. 95.

[17] *Id.*, p. 96.

[18] *Kawato*, Claimant's Motion to Abate Action, 1 (January 19, 1942), NARA Box 407.

[19] *Id.*

[20] *Id.*

[21] 314 U.S. 510 (1942).

[22] *Kawato*, Minute Order (January 20, 1942), NARA Box 407.

[23] *Report of Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (Commission Report)*. Summary, at 2, (Government Printing Office, Washington DC, 1982)

[24] *Kawato v. Yankwich*, Brief of Petitioner in Support of Petition for Writ of Mandamus, 6 (No. ___ U.S. May 27, 1942), NARA Box 407.
[25] *Ibid.*, p. 4 (emphasis in original).
[26] *Id.*
[27] *Kawato v. Yankwich*, Motion for Leave to File Typewritten Papers, 1 (June 2, 1942), NARA Box 407.
[28] 316 U.S. 650 (1942) (per curiam).
[29] *Ibid.*
[30] *Id.*
[31] Memoirs of Charles Fahy, *Columbia University Oral History Project Collection* (1958), 118 (available at website for The Historical Society of the District of Columbia Circuit) (Fahy Oral History).
[32] For example, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
[33] *Ex Parte Kumezo Kawato*, Brief of the United States as Amicus Curiae (No. 10, Original July 25, 1942), 2 (signed also by Robert L. Stern and Carl J. Schuck) (Amicus Brief).
[34] *Id.*
[35] *Id.*, p. 5.
[36] *Id.*, p. 6.
[37] *Id.*, pp. 6–7.
[38] *Id.*, p. 8.
[39] *Id.*, pp. 8–9.
[40] *Id.*, p. 8n11.
[41] *Id.*, p. 10.
[42] *Id.*
[43] *Id.*
[44] *Id.*, p. 11.
[45] *Id.*, p. 18.
[46] *Id.*, p. 18–19.
[47] *Id.*
[48] *Id.*, p. 7n7.
[49] *Id.*, pp. 22–23.
[50] Leon Yankwich, "U.S. Judge, Is Dead," *New York Times*, February 12, 1975, 40.
[51] Letter from Leon R. Yankwich to Charles E. Cropley, September 18, 1942, NARA Box 407.
[52] *Ibid.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] Letter from Lasher B. Gallagher to Charles E. Cropley, September 24, 1942, NARA Box 407.
[57] *Id.*
[58] *Ex Parte Kumezo Kawato*, 317 U.S. 69, 73 n.3 (1942). Fahy's supplemental brief has been lost. A cover letter (NARA Box 407) from Fahy testifies to its being filed on October 7, 1942, and the Supreme Court decision noted its position, but the brief is not in the possession of the NARA, the Library of Congress, the Supreme Court or the Department of Justice (Office of the Solicitor General and Justice Management Division (overseeing main library)).
[59] *Id.*
[60] *Id.*, p. 70.
[61] 616 U.S. 455 (1942), overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963).
[62] *Ibid.*, p. 474 (Black, J., dissenting).
[63] *Id.*, p. 477.
[64] *Ex Parte Kawato*, 71.
[65] *Ibid.*, p. 73.
[66] *Id.*
[67] *Id.*
[68] *Id.*, p. 74.
[69] *Id.*, p. 75.
[70] *Id.*, p. 75n7.
[71] *Id.*, p. 77n13.
[72] Letter from Victor Abe to Mr. Black, November 11, 1942, in Hugo L. Black Papers, Library of Congress, Manuscript Division, Washington DC, Box 269. The "War Relocation Authority" was the federal agency established to manage the internment program.
[73] *Ibid.*
[74] *Id.*
[75] *Id.*
[76] Circular No. 3763, To All United States Attorneys, from Francis Biddle, Attorney General (December 3, 1942), NARA Box 407.
[77] *Ibid.*
[78] Letter from Judge Leon Yankwich to Charles E. Cropley, November 16, 1942, NARA Box 407.
[79] *Commission Report*, 106.
[80] *Ibid.*
[81] *Id.*
[82] *Internee Report, Lordsburg Internment Camp* (February 2, 1942), NARA Box 14.
[83] *Ibid.*
[84] Personal [Property] Receipt (July 6, 1942), NARA Box 14.
[85] "Information on Internee Behavior" Memorandum (March 16, 1943), NARA Box 14.
[86] Internee Report (March 24, 1943), NARA Box 14.
[87] Lordsburg Internment Camp, Special Order No. 66 (March 22, 1943), NARA Box 14.
[88] Immigration and Naturalization Service Receipt (May 25, 1943), NARA Box 14.
[89] Immigration and Naturalization Service Receipt (July 27, 1943), NARA Box 14.
[90] Immigration and Naturalization Service Receipt (December 12, 1943), NARA Box 14.
[91] *Japanese Enemy Alien Volunteers for Transfer to Alien Detention Camp* (April 23, 1943), NARA Box 14.
[92] Daniel T. Kelly, **The Buffalo Head: A Century of Mercantile Pioneering in the Southwest** (New Mexico: Vergara Publishing Company, 1972), 217–218, 220–221.

[93] *Ibid.*, p. 219.

[94] Application for Repatriation (September 9, 1945) (referring to "previous [loyalty] hearing"), NARA Box 14.

[95] NARA, Riverside, CA Archives (containing 1942–1946, post-Supreme Court *Kawato* federal district court filings — mostly brief letters from the Clerk of the Court to Herbert R. Lande continuing the previous trial date. The documents are unordered, not contained in a numbered box and are referred to as "Riverside Archives."

[96] Letter from Edmund Smith, Clerk, to Herbert R. Lande (September 6, 1945); Letter from Edmund Smith, Clerk, to Herbert R. Lande (October 2, 1945), Riverside Archives.

[97] Letter from Herbert R. Lande to Officer in Charge, Santa Fe Internment Camp (November 19, 1945), NARA Box 14.

[98] *Ibid.*

[99] *Id.*

[100] Letter from Abner Schreiber to Herbert R. Lande (November 28, 1945), NARA Box 14.

[101] Letter from Herbert R. Lande to Officer in Charge, Santa Fe Internment Camp (December 17, 1945), NARA Box 14.

[102] Letter from W.F. Kelly to Herbert R. Lande (January 5, 1946), NARA Box 14.

[103] Notice of Time and Place of Taking Deposition on Written Interrogatories (January 10, 1946), Riverside Archives.

[104] *Ibid.*

[105] *Kawato*, Stipulation and Order of Dismissal (February 27, 1946), Riverside Archives.

[106] *Kawato*, Order (February 28, 1946), Riverside Archives.

[107] *Petition for Reuniting Family in Family Internment Camp* (December 9, 1942) (Kawato declined "family internment" and listed no family members, but elsewhere in the petition stated: "I have ... applied for repatriation"). NARA Box 14.

[108] Application for Repatriation (September 21, 1945), NARA Box 14.

[109] *Ibid.*

[110] *Id.*

[111] *Id.*

[112] *List of Repatriated Japanese Enemy Aliens* (including earlier dates of repatriation) (April 12, 1946), NARA Box 14.

[113] Medical Certificate (Santa Fe, NM) (February 11, 1946), NARA Box 14.

[114] Certification, Santa Fe Internment Camp (January 31, 1946), NARA Box 14.

[115] Federal Bureau of Investigation (Los Angeles) letter to Officer in Charge, Santa Fe Camp (July 5, 1945), NARA Box 14.

[116] *Id.*

[117] **The Supreme Court in World War II** (Annual Banquet of Institute of Military Law, May 5, 1957), 3, Charles Fahy Papers, Library of Congress, Manuscript Division, Washington DC, Box 8.

[118] *Ibid.*

[119] *Id.*

[120] "Proceedings in Memory of Mr. Justice Brandeis," at x.

[121] **The Supreme Court in World War II**, 1.

[122] *Ibid.*

[123] *Amicus Brief* at 10.

[124] 323 U.S. 283 (1944).

[125] Fahy Oral History at 149.

[126] *Ibid.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*, p. 150.

[131] *Id.*

[132] *Id.* p. 149. *See also* Editorial, Unique Judge (Whispering Charlie), *New York Times*, Sept. 18, 1979. "One dramatic day he announced in court that he could defend 'with conviction' only portions of the Government's program of [internment]."

[133] *Ibid.*

[134] *Id.*, p. 179.

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Illustrations

Page 114, Portrait by Charles Wilson Peale, 1824, Maryland State Archives
Page 115, Collection of the Supreme Court of the United States
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Pages 170, 182, Collection of the Supreme Court of the United States
Page 195, Terminal Island Archives
Pages 196, 197, 198, National Archives
Page 199, Library of Congress
Errata: In vol. 44, no. 3, the caption on page 285 misidentified Ernst Freud as his son Paul.

Photograph attributed to Clarence Dodge (1847–1914) for the C.M. Bell Studio, Collection of the Supreme Court of the United States.

Erratum by Franz Jantzen for his article "From the Urban Legend Department: McReynolds, Brandeis, and the Myth of the 1924 Group Photograph" (*Journal of Supreme Court History*, 2015, vol. 40, no. 3):

On page 326, I state that the Supreme Court adopted its seating arrangement based on seniority at its portrait session on Monday, May 22, 1899 after the arrival of justice Joseph McKenna. I also illustrate this on the same page. This is incorrect. The justices actually adopted the seniority-based seating arrangement at its previous portrait session, which took place on Saturday, October 13, 1894 after the arrival of Justice Edward Douglass White. Above is an illustration of the group photograph of the 1894 Fuller Court, which was taken that day.

Cover photo: Monument to Japanese-American fishermen who settled on Terminal Island. Photo by David Kaesong.