Faithless Electors of 1912

Arthur Wakeling on the Kansas Electoral Case

Ross E. Davies

Arthur Wakeling of Nutley, New Jersey, reported on the Taft–Roosevelt dispute over Kansas electors for the original *Green Bag*. See *The Kansas Electoral Case*, 24 Green Bag 517 (1912). His report is quoted in its entirety in this article at pages 180-184, with footnotes and illustrations added by the author.

– *The Editors*

As the incumbent, William Howard Taft was the presumptive Republican nominee for President in 1912, but he faced a challenge from Theodore Roosevelt, his old friend and predecessor in the White House. Roosevelt enjoyed enormous personal popularity. Moreover, with that growing portion of the public – including many Republicans – whose sympathies were progressive, Roosevelt's views on several key issues had shifted sharply away from the traditional positions that remained bedrock for Taft and the conservative core of the party. Taft, however, controlled the party machinery and thus in most states the selection of delegates to the Republican national convention, making it impossible for Roosevelt to acquire the party's presidential nomination by conventional means. The only hope for Roosevelt lay in the popular primaries that had by 1912 taken hold in about a dozen states. His campaign rested on the theory that if he could show overwhelming support in the primary states, the political superiority of his prospects to Taft's would be obvious, and as a result the Republican organization would back him rather than Taft.

The first step of the Roosevelt Republican nomination plan worked, but the second failed. He ran away with the vast majority of the primary states (including Taft's home state of Ohio), campaigning on the mix of progressive themes that he labeled "the New Nationalism," including a graduated income tax,

Ross Davies is an editor of the Green Bag, Second Series. *He thanks Linda Barnickel of the Kansas State Historical Society, Robert Ellis of the National Archives and Records Administration, Patricia Evans of the Library of the Supreme Court of the United States, and Julia Schaeffer. Mr. Wakeling's quotations from the Kansas courts and the U.S. Supreme Court contain minor inaccuracies. See notes 2, 4-6, 11,* infra. *For the complete text of the key filings, orders, and opinions cited in this article, see* Faithless Electors of 1912: Appendix, *at www.greenbag.org.*

expanded government control of big business through regulation rather than antitrust enforcement, direct primaries and election of Senators, initiative and referendum, women's suffrage, labor law reform, a "scientific" high tariff, and recall of judicial decisions. Roosevelt drew a total of 1,157,397 votes, to 761,716 for Taft and 351,043 for Robert La Follette, the progressive senator from Wisconsin. Taft nevertheless marshaled the party regulars and prevailed at the Republican national convention in June 1912. In response, Roosevelt and many of his supporters bolted to form the National Progressive Party (aka the Bull Moose Party).

The Bull Moose forces, with less than five months to prepare for a national election, struggled with the problems shared by every national third party movement in the United States – lack of local political organization, lack of candidates for Congress and local and state offices in general, and (most importantly for Roosevelt) lack of established slates of presidential electors. Possible solutions varied from state to state, depending on local regulations and political conditions. In some states where Roosevelt was especially strong, progressives proposed to simply co-opt part or all of the local Republican organization, including Republican presidential electors, for the Bull Moose.[1] Kansas was one such state, and after a majority of the certified Republican candidates for elector declared that given the opportunity they would vote for Roosevelt, Taft supporters went to court.

And it is here that Arthur Wakeling and the 1912 *Green Bag* take up the story.

The kansas electoral case will doubtless be argued before the full bench of the United States Supreme Court soon after this journal goes to press.

The Justices will determine whether or not eight Republican electors may run on President Taft's ticket with the understanding that if they are elected they will vote in the Electoral College for his opponent, Colonel Roosevelt.

Involving momentous issues, this legal battle is without precedent in the history of the country. Beneath its prosaic title of *Marks* v. *Davis* is hidden a peculiarly intricate and novel political struggle. And this conflict, in turn, is the cloak for two questions of fundamental importance that have never before arisen in exactly the same way. One is the perplexing problem of state rights. Disputes over the demarcation of state and federal authority have been frequent and, as before the Civil War, serious. The other question has to do with the rights of Presidential electors.

Has the United States Supreme Court jurisdiction in the matter of choosing Presidential electors?

Has an elector, once he has been elected, the right to show his personal preferences?

Associate Justices Mahlon Pitney and Willis Van Devanter granted a writ of error in the case on August 1, five days before the primary election in which the disputed electors were nominated.

In their opinion, they said:

> It is conceded that the questions are important and of large public concern, and we have concluded that those who present them are fairly entitled to the judgment of the court

1 Roosevelt encouraged this approach. 7 The Letters of Theodore Roosevelt: The Days of Armageddon 1909-1914 at 576 (Elting E. Morison ed. 1954) ("Roosevelt Letters") ("I hold that I am in honor and honesty entitled to the vote of every elector nominated by the people through their primaries, and that Mr. Taft is entitled to the votes of those electors nominated by [the party bosses] in the different sections where the bosses had the say and the people did not …").

> which by the Constitution is made the final arbiter of all controversies arising under that instrument. In this situation we think the writ of error should be allowed.[2]

The application for the writ was made by the regular Republicans in a Taft–Roosevelt fight over eight Kansas electors. These men were nominated by petition before the Republican National Convention met. After President William H. Taft and Vice-President James S. Sherman were re-nominated the eight electoral nominees said that they would run on the Taft–Sherman ticket but would cast their votes in the Electoral College for Colonel Roosevelt and his associate.

This was something new and astounding. Never before had such a thing been heard of. Electors had always voted for the head of their ticket. The Electoral College had been considered merely a cog in the elaborate machinery for electing a President. But here were eight men who said they would not vote for the man in whose column their names were to be placed.

Nothing like it had ever been encountered in politics before. The Taft forces were perplexed beyond measure. They nominated ten additional candidates by petition, making twenty in all. The state's allotment in the Electoral College was ten, so that if the eight Roosevelt men were nominated at the primaries, the Taft column of the Presidential ballot in November would contain only two Taft supporters.

On the other hand, it was too late under the laws of Kansas to organize the Bull Moose party there. The Roosevelt men were determined to fight to keep their electors on the regular Republican ticket.

The legal fight was started when the Taft forces made charges of gross fraud against the eight men. R.A. Marks and eleven other citizens of Kansas, all of whom had signed the petitions of the eight electoral nominees, asked the Harvey County Court for an injunction restraining the county clerks of Kansas from placing the eight names on the primary ballots.

In this action Samuel A. Davis, the seven other disputed nominees, and all the county clerks of the state were named as defendants.[3]

The plaintiffs wanted the petitions of the eight declared null and void on the ground that their twelve signatures had been obtained by fraud and under false pretenses and that, without their signatures, the petitions of the defendants would not have the requisite number.

A temporary injunction was granted and the case was fixed for argument on July 23, 1912. The primaries were to be held on August 6, making a speedy settlement imperative.

Before the Harvey County case came up, however, the Attorney-General of Kansas instituted mandamus proceedings in the state Supreme Court for the purpose of compelling the county clerks to place the names of the eight Roosevelt electoral candidates upon the ballot.

This was the court's opinion:

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2 See Kansas Supreme Court Case Files, *Marks v. Davis*, Case #18363, Kansas State Historical Society ("KSHS *Marks v. Davis* File"). See pages 186-187, *infra*.

3 According to the plaintiffs, all eight defendants had taken the same position as lead defendant Samuel Davis did in a letter to the Kansas Republican party leadership:

> In reply to yours of the 8th inst., asking me how I will stand if nominated and electoed to the position of elector. I do not believe Taft the legal nominee of the Republican Party. I believe and I think you believe the nomination was stolen. And any man to support Taft believing as I do would have to be a rabbit against his own conscience. This I absolutely refuse to do. … I will vote for Roosevelt if I am elected because if I am nominated it will be by a majority of voters that believe as I do, and I propose to carry out their instructions … .

Letter from Samuel A. Davis, candidate for Republican presidential elector, to Fred B. Stanley, Kansas Republican National Committeeman, July 10, 1912, Transcript of Record, *Marks v. Davis*, 227 U.S. 682 (1912) (No. 773) at 13 ("Transcript of Record") (typographical oddities in original).

> The court is of the opinion that the district court of Harvey County has jurisdiction to entertain the petition filed therein and to issue a restraining order pending its examination of the case. It is further of the opinion that such petition does not state a cause of action for a kind of fraud cognizable by a court of law or equity. Assuming the facts stated to be true they are political in their nature and the remedy of the plaintiffs is by political methods. The courts cannot be called upon to decide political matters further than the statutes clearly require, and the statutes of Kansas do not, expressly or by implication, authorize the granting of the relief asked of the district court of Harvey County.
>
> It is assumed that the district court of Harvey County will reach the same conclusion and dismiss the action pending before it. Upon such dismissal the occasion for the proceeding in this court will be removed and, consequently, this proceeding is dismissed.[4]

The next day, when the proceedings in the Harvey County Court were hea[r]d, this opinion was read and the defendants moved the dismissal of the action. Objecting, the plaintiffs set forth their claim of rights, privileges, and immunities under the Constitution.

The opinion of the County Court was as follows:

> And thereupon the court, having heard argument of counsel and being fully advised concerning the said opinion of the Supreme Court of Kansas, finds that said objections, protest and claim of right under the Constitution and laws of the United States, should be and the same hereby is denied;
>
> And thereupon the court further finds that the plaintiffs herein have not stated a case by their petition cognizable in any court of law or equity, and it is, therefore, by the court ordered and adjudged that the action be, and the same is, dismissed.[5]

But this was only the beginning of the rapid-fire proceedings. An appeal was immediately taken and on July 27 the Supreme Court of Kansas delivered this opinion:

> The court adheres to its ruling in the case of the *State ex rel.* v. *County Clerks, et al.*, and since the questions involved in the present case are political and moral in their nature and the wrongs complained of are of a kind for which the courts are not authorized to grant relief, the judgment of the district court dismissing the action and denying the injunction must be affirmed. The court refrains from the expression of any opinion respecting the regularity or irregularity of the conduct of any political faction or organization.[6]

So far the Taft forces had been defeated at every point. The day for the primary election was drawing very near and 300,000 ballots had to be printed. By stipulation it was agreed that the printing of the ballots should be delayed still longer, pending an application to the United States Supreme Court for a writ of error.[7]

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4 *Dawson v. Branine*, 125 P. 343, 344 (Kan. 1912).

5 Opinion of the District Court of Harvey County, Kansas, July 23, 1912 (Transcript of Record at 29).

6 *Marks v. Davis*, 125 P. 344 (Kan. 1912).

7 On the same day that the Kansas Supreme Court announced its decision, Kansas Governor Walter R. Stubbs, a Roosevelt partisan, sent a telegram to the Clerk of the Supreme Court, who in turn telegraphed Stubbs's message to all but one of the Justices (Justice Joseph McKenna was out of the country):

> "Will you please notify each Justice of the Court that we desire notice of any effort to secure supersedeas restoring order or continuance of injunction on Marks versus Davis now pending in Supreme Court of Kansas. We contend the United States Supreme Court has no jurisdiction to grant such stay directed by state courts."

Telegrams from James H. McKenney, Clerk, to Chief Justice White and Justices Holmes, Day, Lurton, Hughes, Van Devanter, Lamar, and Pitney, July 27, 1912, Case No. 23,348, Box 4400, Location 17E3/5/13/6, National Archives and Records Administration ("NARA *Marks v. Davis* File").

Justice Van Devanter, in whose circuit, the eighth, Kansas is included, was on his vacation in West Springfield, N.H. out of telegraphic communication.

Justice Pitney, who was at his home in Morristown, N.J., seemed to be the only Supreme Court Justice available, and to him application for the writ was made on Monday, July 29.[8] After telegraphing to Governor Stubbs for assurance that the case would be preserved *in statu quo*, he set down argument on the application for the following Thursday.[9]

The hearing was held in the Federal Building, New York City. Justice Van Devanter arrived from New Hampshire the night before and sat with Justice Pitney.[10]

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8 The parties may have had little success contacting Van Devanter, but members of the Court had no trouble at all. Pitney kept Van Devanter posted on the proceedings:

> Presume Clerk McKenney has repeated to you telegram from Governor of Kansas and attorneys referred to below. Today Olmsted telephoned me because of your absence and will have record here tomorrow. I have just sent following telegram to Governor Stubbs, Topeka, Kansas:
>
> > "Clerk McKenney yesterday repeated to me your telegram concerning Marks versus Davis but without naming attorneys. Today Congressman Olmsted telephones from Harrisburg Pennsylvania he will apply to me here tomorrow for writ of error with supersedeas. I propose to hold application until Thursday August first at Morristown, so as to give fair hearing to both sides, provided you can and will take efficient and adequate measures to preserve *status quo* pending hearing before me. Not knowing your local situation I can only suggest you submit your proposed measures for safeguarding opponents' rights to their attorneys, getting their approval if possible, and wire me fully here tomorrow. Mahlon Pitney, Associate Justice United States Supreme Court."
>
> Have sent copy to Olmsted's correspondent, D.R. Hite, Topeka. Can you not come here or New York in time to dispose of case instead of or together with me. Understand it involves official ballots for primary election to be held Tuesday, August sixth.

Telegram from Pitney to Van Devanter, July 28, 1912, Papers of Willis Van Devanter, Box 29, Library of Congress, Manuscript Division ("Van Devanter Papers"). Pitney notified Hite of the proposal he had sent to Stubbs, and exhorted him to "cooperate so that fair hearing may be had without jeopardizing the interests of either side meantime." Telegram from Pitney to Hite, July 28, 1912 (Van Devanter Papers).

9 See note 8, *supra*. On July 29, the parties delivered a satisfactory stipulation ("the Defendants in error agree to prevent any further progress in printing the [challenged electors] on the Republican Primary ballot"), and Pitney ordered, "that the hearing of said application [for a writ of error] be and the same was set down for Thursday, August 1, 1912 at the Federal Court Room in the City of New York." Stipulation and order, July 29, 1912 (KSHS *Marks v. Davis* File).

10 On July 28, Pitney had sent Van Devanter a care package consisting of copies of his correspondence with McKenney, Stubbs, and Hite, and an outline of his plans for handling the case:

> On hearing from Mr. Olmsted by 'phone this morning, I suggested his application should be made to you; but on account of your absence, the extreme urgency of the matter, and (I presume) the difficulty of reaching you by 'phone and making arrangements for an early hearing, he seemed inclined to press his application before me, and I could not see my way clear under the circumstances to decline to hear it. I should of course prefer that you should hear it, but the complications caused by the effort to give both parties a hearing seemed to render it impracticable to send them to you, especially as I have no information as to whether you intend to make any stay in West Springfield.
>
> I send you the inclosures, hoping you can find it convenient to take hold of the case by coming here or to New York to hear the application, or by designating some place near you, to which I could send the parties; or else that you can either sit with me or write or wire me your views on the matter, to be shown by me to the respective parties.

Representative Marlin E. Olmsted, of Harrisburg, Pa., and Dick R. Hite, of Topeka, argued for the writ; Representative Frederick S. Jackson, of Topeka, and L.W. Keplinger, of Kansas City, opposed the granting of it.

Mr. Olmsted asserted that there was a federal question sufficiently presented by the record to warrant the allowance of the writ of error. He insisted that the eight electoral nominees had fraudulently obtained their petitions and that their names therefore should not appear upon the primary ballot.

Mr. Jackson, on the other hand, urged that under the Constitution the method of choosing electors was specifically reserved to the legislature of the state, that all necessary relief could be had within the state, and that no federal question was involved.

The Justices announced their decision in the evening. They granted the writ of error but refused to order the names of the disputed electoral nominees removed from the primary ballots. In case the Taft forces were ultimately victorious, the names of the eight Roosevelt electors, it was understood, could be excluded from the official ballot in November.

The opinion of the Justices was, in part, as follows:

> The record discloses that the plaintiffs specially and clearly asserted in the state courts certain rights claimed to arise under the Constitution and laws of the United States, and that these rights, by necessary implication and intendment, were denied by the two state courts.
>
> Whether the rights asserted have a real basis in the Constitution and laws of the United States is the criterion by which we must determine whether the writ of error should be allowed. Under the settled practice, if the Justices to whom the application is made believe that the existence or non-existence of the rights asserted is involved in serious doubt, the writ should be allowed. We think that is the situation here.
>
> The questions raised do not seem to be determined or settled by any previous decision of the United States Supreme Court. Some of the opinions of the court contain expressions which tend to sustain the contentions of the plaintiffs. Whether in view of the facts in the cases in which these expressions occur they should be regarded as deliberate and controlling, ought not to be determined otherwise than by the court itself. …
>
> As courts are reluctant to interfere with the ordinary course of elections, whether primary or otherwise, as the rights asserted are not clear, but doubtful, and as the injury and public inconvenience which would result from a supersedeas or any like order, if eventually the judgment of the state court should be affirmed or the writ of error dismissed, would equal the injury which otherwise would ensue, we think no supersedeas or kindred order should be granted.[11]

The final decision of the Supreme Court in the Kansas tangle will be of importance in judicial history not only because the case itself is unique, but also because it profoundly involves the status of Presidential electors.

Arthur wakeling's story in the 1912 *Green Bag* did not provide a blow-by-blow of the argument before Pitney and Van Devanter, but the next day's *Topeka Daily Capital* did.[12] In the lead-in to its report, the *Daily Capital* provided a clear summary of the

11 See note 2, *supra*. In addition to the opinion quoted above, Pitney and Van Devanter issued a short handwritten order at the bottom of the original petition for a writ of error, Transcript of Record at 48 ("Writ of error allowed, but without supersedeas or continuance of restraining order") (see page 187, *infra*), and the largely formulaic writ of error itself. Transcript of Record at 55-56.

12 *Roosevelt Electors Go On Ballots*, Topeka Daily Capital, August 2, 1912, at 1, 7.

immediate significance of the August 1 decision:

> In deciding not to interfere with the state primaries, Justices Van Devanter and Pitney declared that the only way not to injure either party was to let the primaries proceed with the Roosevelt candidates on the ticket and await the action of the full court. It is understood the court will decide the case in time to keep the Roosevelt electors off the ballots in the November election in case the latter are defeated in the litigation. The only possibility that the court will not have to decide the case is that none of the eight Roosevelt candidates is successful in the primaries August 6. In all there are twenty candidates for electors and ten will be chosen. Twelve are declared Taft men.[13]

According to the *Daily Capital*, oral argument in *Marks* had begun, "When the two justices settled back into the big easy chairs":

> Justice Pitney said they were there to decide a petition for a writ of error on a question with which he was not very familiar.
>
> "Just explain this case to us now, Mr. Olmstead [sic]," he said.
>
> Olmstead [sic] started to read from a bulky printed brief. The [t]wo jurists listened a few seconds, plainly impatient, and then Justice Pitney again broke in:
>
> "Oh, no! Not that. Just tell us the merits of this contention in plain English. We want to get right at the heart of it."

After marching through the history of the case, Olmsted made the first of his two main arguments, that Taft Republicans had been defrauded when they signed petitions to put Davis and the other Roosevelt Republican electors on the ballot, but Van Devanter interrupted:

> "You don't mean to say that these men did not change their minds after the Chicago convention, but that they went into that convention with their minds made up to bolt the ticket nominated there, do you?"
>
> "Yes, that is what I mean," replied Olmstead [sic]. "When they publicly stated their attitude the petitioners in this action appealed to the Harvey county court to enjoin the placing of their names on the primary ballot. Before the court had decided the matter the case was docketed into the supreme court of the state. That body held that the petition does not furnish a real cause of action which could be passed on by a court as the issue that was involved was of an absolute political nature.
>
> "This we contend not to be true."

Olmsted then moved on to his second, and potentially constitutional, argument:

> "Many persons who want to support Taft and Sherman signed the petitions for the men in question here. Under the law they must support them at the election as they have no right to vote for anyone else and it is a case of either being disfranchised or voting for electors who will not support in the electoral college the men these voters want supported."

The *Daily Capital* did not report any more questioning of Olmsted.

Jackson, arguing for the Roosevelt electors, opened more sensationally:

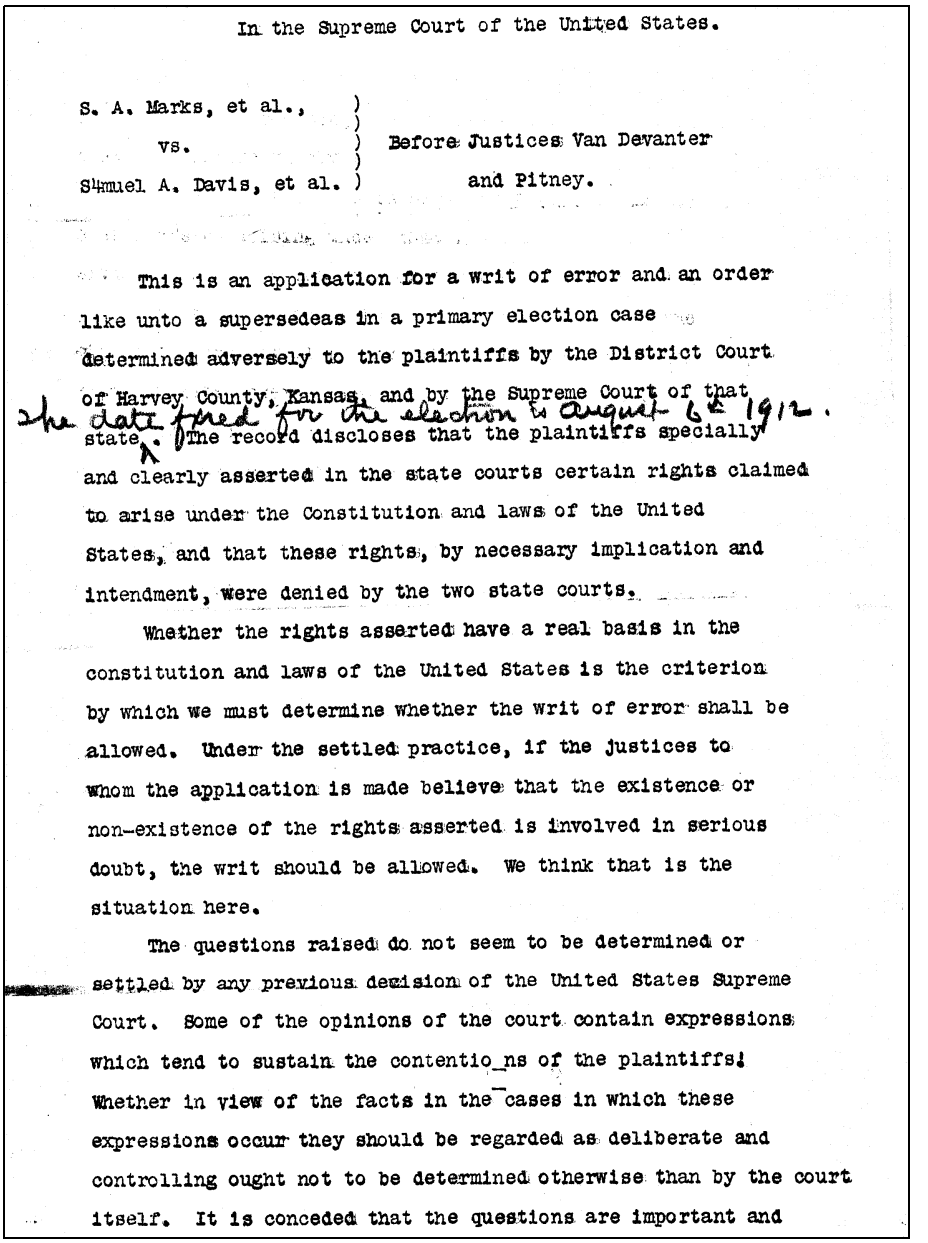
> "Your honor, this case involves more dynamite than any case that has come before the supreme court since the days of reconstruction. It involves the right of states to govern themselves without the interference of the federal judiciary. The matters involved in this action are those that have plunged states into war –"

Pitney, at least, was not moved. "Oh, well, Mr. Jackson, … I don't think we are going to have any war. Please state the facts of your defense."

Jackson settled down, and made two defenses to Olmsted's allegations of fraud – notice, and statute of limitations:

> "Why, everybody in Kansas," he said, "knew

13 *Id*. at 1. "It was the only thin[g] the supreme court could have done," was Roosevelt's public response. *Is Only Thing Court Could Have Done – T.R.*, Topeka Daily Capital, August 3, 1912, at 1.



In the Supreme Court of the United States.

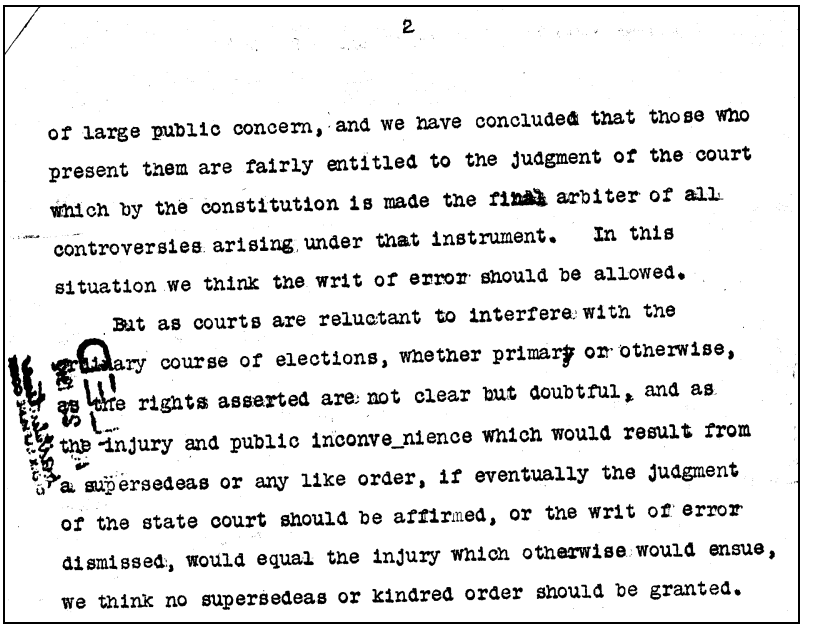
S. A. Marks, et al.,)
vs.) Before Justices Van Devanter
Samuel A. Davis, et al.) and Pitney.

This is an application for a writ of error and an order like unto a supersedeas in a primary election case determined adversely to the plaintiffs by the District Court of Harvey County, Kansas, and by the Supreme Court of that state. The date fixed for the election is August 6th 1912. The record discloses that the plaintiffs specially and clearly asserted in the state courts certain rights claimed to arise under the Constitution and laws of the United States, and that these rights, by necessary implication and intendment, were denied by the two state courts.

Whether the rights asserted have a real basis in the constitution and laws of the United States is the criterion by which we must determine whether the writ of error shall be allowed. Under the settled practice, if the justices to whom the application is made believe that the existence or non-existence of the rights asserted is involved in serious doubt, the writ should be allowed. We think that is the situation here.

The questions raised do not seem to be determined or settled by any previous decision of the United States Supreme Court. Some of the opinions of the court contain expressions which tend to sustain the contentions of the plaintiffs. Whether in view of the facts in the cases in which these expressions occur they should be regarded as deliberate and controlling ought not to be determined otherwise than by the court itself. It is conceded that the questions are important and

Figure 1. D.A. Valentine, clerk of the Supreme Court of Kansas, received this unsigned opinion on August 23, 1912. Courtesy of the Kansas State Historical Society.



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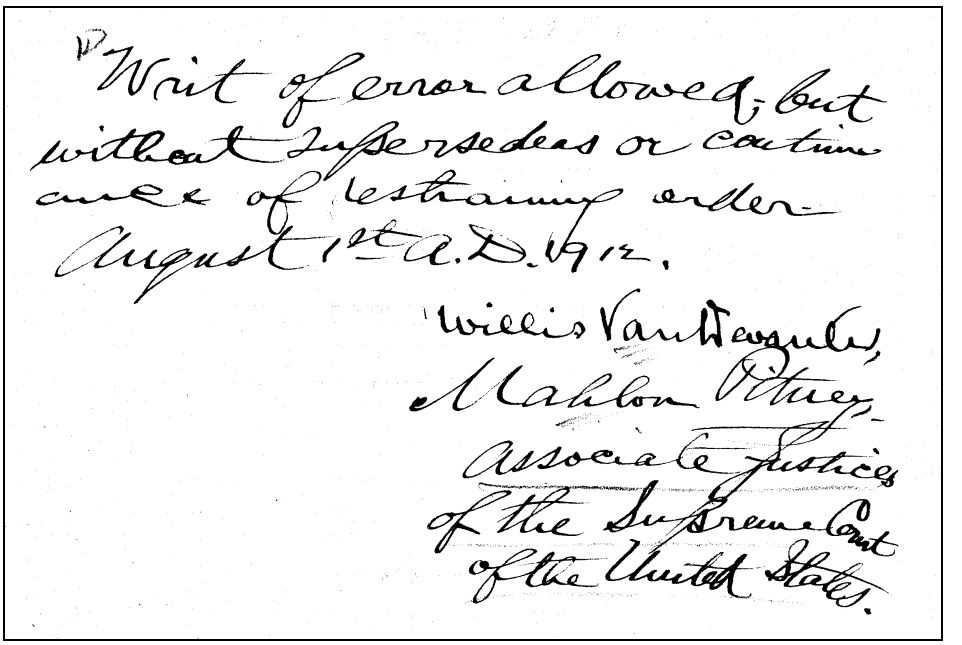
of large public concern, and we have concluded that those who present them are fairly entitled to the judgment of the court which by the constitution is made the final arbiter of all controversies arising under that instrument. In this situation we think the writ of error should be allowed.

But as courts are reluctant to interfere with the ordinary course of elections, whether primary or otherwise, as the rights asserted are not clear but doubtful, and as the injury and public inconvenience which would result from a supersedeas or any like order, if eventually the judgment of the state court should be affirmed, or the writ of error dismissed, would equal the injury which otherwise would ensue, we think no supersedeas or kindred order should be granted.

Figure 2. Second page of Pitney–Van Devanter opinion.



Writ of error allowed, but without supersedeas or costume nor of restraining order.
August 1st A.D. 1912.

Willis Van Devanter,
Mahlon Pitney,
Associate Justices
of the Supreme Court
of the United States.

Figure 3. Order granting the Taft supporters' petition for a writ of error, signed by Justices Pitney and Van Devanter. Courtesy of the National Archives and Records Administration.

> exactly where these electors stood. They knew that they were Roosevelt men. When the petitions were circulated everyone knew that these men would never be for Taft. And anyhow, the Kansas law provides that where fraud in connection with primary petitions is alleged, these allegations must be made within three days. And the petitioners in this case failed to do so."

Van Devanter, however, asked the natural follow-up:[14]

> "But can you say that these petitioners knew within the time that you mention, three days, that these men were not going to support the nominee in question?"
>
> "Why, your honor," replied Jackson, "the petitioners knew all the time that these men were Roosevelt men. This was just an ordinary business transaction in every day life. The candidates circulated their petition and it was signed by their neighbors. These petitions nominated these men as Republican candidates for electors."

Pitney, too, had doubts. "But were not these promises made and broken … . It seems to me that there must have been promises –"

Interrupting, Jackson made a remarkable transition into his jurisdictional argument:

> "Oh, yes, there were, political promises," interjected Jackson, "but that was all."
>
> "Do you mean to be understood that political promises are made to be broken and not to be fulfilled?" queried Justice Pitney.
>
> "Not especially. What I contend is that the Kansas supreme court was right in its declaration that the question of promises such as mentioned, and in fact, the entire question involved here, was absolutely of a political nature and should not be submitted to any court for decision," replied Jackson.

Turning away from circular questioning about political questions, the Justices challenged Jackson with Olmsted's disenfranchisement argument:

> "Now for the purpose of argument," said Justice Vandevanter [sic], "if these eight Roosevelt electors, for that is what they really are, if they defeat the Taft electors at the primary, how then will the Taft people of Kansas be represented at the November election?"
>
> "We have no right to assume that they will defeat the Taft men and be elected," Jackson said. …
>
> "Well, then, there would be no harm in stopping their running if they could not be elected," smiled Vandevanter [sic], and a general laugh followed in which Jackson joined.
>
> "Even if there is a new party formed," continued Jackson, "I would like to ask you, Justice Vandevanter [sic], whether there is any law to prevent the Republicans of Kansas voting for its candidate?"
>
> "Certainly there is not," said the justice, "but there ought to be a law to prevent the Roosevelt men stealing the Taft electors to elect their own candidate."

Pitney and Van Devanter were also attuned to the political consequences that would flow from any decision they might make:

> "Well, now, is it not a fact that the real issue here is whether the Taft or the Roosevelt faction in Kansas is entitled to the prestige of the regular Republican organization?" asked Justice Pitney.
>
> "Yes, that is the question," said Jackson. "It is whether the Kansas Republicans are to have for their candidate Taft or Roosevelt."
>
> "Yes, but it also seems to be whether Roosevelt is to run as a Republican or as a candidate of a new party," said Justice Vandevanter [sic].
>
> "But under the Kansas laws Roosevelt must run as a Republican," said Jackson. "The time for a new party has expired under the state law as petitions could not now be filed. So if the progressives are to be represented in the coming campaign their electors, already

14 See, *e.g.*, *Bailey v. Glover*, 88 U.S. 342, 347-50 (1875).

nominated, must remain on the ballot."

Jackson closed with his most practical point: "the petitioners were not injured because if they did not wish to vote for the eight Roosevelt candidates they could vote for the Taft candidates if both sets were on the regular ballots."[15] And he prevailed, at least in the short term.

Chief Justice of the United States Edward D. White had been anxious since Pitney first took the case in hand on July 27, and understandably so. Pitney and Van Devanter were honest and respected judges, but both men had been named to the Court by Taft, and therefore a ruling in Taft's favor might have been perceived as politically motivated. The fact that it was Pitney who had agreed to hear argument on the petition, after an ex parte telephone conversation with one of the lawyers for the Taft forces, must have been particularly disconcerting. Only a few months earlier Pitney had suffered through an unusually bruising confirmation process – filled with allegations that he was anti-labor and anti-progressive – in which he did not enjoy great support from the progressive Republicans who were now tilting in favor of Roosevelt, and against the Court's jurisdiction over the *Marks* case.[16]

Beyond questions of politics, perceptions, and institutional reputations, White also had reason to be concerned about the danger the *Marks* case posed to the Court's already unstable voting rights jurisprudence. Less than ten years earlier the Court had practically removed itself from the issue of discrimination in voter registration,[17] and yet the controversy that would become the *Grandfather Clause Cases* was percolating up from Oklahoma.[18] Race was not an issue in *Marks*, as it was in the other electoral cases, but the cases did share another critical constitutional question: the extent, and even the existence, of federal versus state power over the machinery of elections. Between Reconstruction and the turn of the century, state power in this area had gradually ascended to near-sovereignty, and the *Grandfather Clause Cases* were shaping up as an important test of the limits of that power. An intrusion by Pitney and Van Devanter into the workings of the Kansas primary had the potential to heighten tensions that already were building.[19]

This state of affairs was reflected in the arguments before Pitney and Van Devanter, especially in Jackson's argument that the *Marks* case "involves the right of states to govern themselves without the interference of the federal judiciary," and his claim that "[t]he matters involved in this action are those that have plunged states into war."[20] Jackson could well have been reminding the Justices of the

15 *Roosevelt Electors Go On Ballots*, *supra* note 12, at 7.

16 See notes 8 & 10, *supra*; Alexander M. Bickel, 9 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Part One 327-32 (1984). Pitney's "very cordial" relations with Woodrow Wilson, the Democratic presidential candidate and Pitney's classmate at Princeton in the 1870s, could have complicated matters even further. *Id*. at 326 & n.27.

17 *Giles v. Harris*, 189 U.S. 475 (1903).

18 Benno C. Schmidt, Jr., 9 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Part Two 925-67 (1984).

19 Later, White would find himself a dissenter in the company of Pitney but not Van Devanter in *Newberry v. United States*, 256 U.S. 232 (1921), in which the Court found that the federal government had no authority at all over primaries. *Newberry* was distinguished into oblivion in *United States v. Classic*, 313 U.S. 299, 317 (1941) ("the authority of Congress, given by [Art. I] § 4, includes the authority to regulate primary elections"). See also *Ray v. Blair*, 343 U.S. 214, 230 (1952).

20 *Roosevelt Electors Go On Ballots*, *supra* note 12, at 7.

Court's ongoing troubles with election law, and of the opportunity to dodge the issue entirely by denying jurisdiction.

On August 6 – the day on which the writ of error issued, the day of the Kansas primary (anti-climactic now that both the Taft and Roosevelt candidates were on the ballot), and the day of Roosevelt's "Confession of Faith" speech to the National Progressive Party's nominating convention in Chicago – White wrote with evident relief to Van Devanter:

> My dear Judge
>
> The letter and newspaper clippings came this morning. Nothing could have been more judicious than what was done in New York and I of course, know who brought it about.
>
> When the first message came to me from our brother P – . it seemed such a departure from established traditions and so full of danger it worried me – hence my message of which I send a copy. Wholly irrespective of any opinion of mine as to the merits for me to have disregarded the consideration due the Justice of any Circuit would have been inexcusable! The first message received by me plainly indicated it to me seemed *the opinion of the sender on the merits!* Thank goodness it was not only possible but right for you to go and stop the possibility of great harm. We are all well and join in the kindest messages to Mrs. V and yourself.
>
> Ever faithfully
>
> E.D. White[21]

The danger of great harm never materialized, and neither did a final decision of the Supreme Court. Instead, the Court docketed the case on September 4, and then did nothing.[22]

At this point pressures from within the Kansas Republican community took over. While continuing their unsuccessful pursuit of related litigation in the lower state and federal courts, Taft supporters pressed hard on one of Roosevelt's key weaknesses – his need to preserve the viability within the traditional Republican organization of his progressive allies who also were candidates for Congress and state offices. The Taft Republicans threatened to withhold their support not only from Roosevelt himself but also from all progressive Republicans if Roosevelt refused to give up his Republican electors. Meanwhile, Charles Sessions, the Kansas Secretary of State, made clear that he would list Taft at the top of the Republican column on the ballot no matter who the electors were or what allegiances they maintained.[23]

Eventually, in mid-September, Sessions reached a settlement acceptable to both Taft and Roosevelt. Taft's name led the Republican column on the November ballot, with Taft supporters filling out the slate of Republican electors; in return, Roosevelt received a separate independent column reserved exclusively for himself and his own slate of electors. Now all Roosevelt's men and women needed to do was educate his followers to mark the Republican column on the ballot for their progressive candidates for every office except President, and then shift to the special independent column to vote for their National Progressive Party presidential candidate.[24] They succeeded. Roosevelt trounced Taft – a result pre-

21 Letter from White to Van Devanter, August 6, 1912 (Van Devanter Papers). Pitney shared some of White's sentiments. See Letter from Pitney to Van Devanter, August 3, 1912 (Van Devanter Papers) ("I want to thank you again for coming to sit in the Kansas case. Under the peculiar circumstances I should have felt quite uncomfortable if obliged to bear the responsibility alone.").

22 Letter from McKenney to Hite, September 30, 1912 (NARA *Marks v. Davis* File).

23 Robert Sherman La Forte, Leaders of Reform: Progressive Republicans in Kansas 1900-1916 at 194-96 (1974).

24 *Id.*; Roosevelt Letters, *supra* note 1, at 582, 599-600.

saged by the strong showing of the Roosevelt electors in the August 6 primary. Unfortunately for both men, their division of the Republican electorate enabled Woodrow Wilson, the Democratic candidate, to take Kansas with just over 39 percent of the vote, and the Presidency with a bit less than 42 percent of the vote nationwide.

Olmsted had been making noises about dismissal of the *Marks* case since early October, but he did not make such a motion until January 23, 1913.[25] The Court promptly granted it, although it did not get around to remanding the case to the Kansas Supreme Court until August 14.[26] By then it did not matter whether the Republican electors from Kansas voted for Taft or Roosevelt. Chief Justice White had sworn in Woodrow Wilson on March 4. GB

25 Letter from M.E. Olmsted to John D. Maher, Office of the Clerk of the Supreme Court, October 9, 1912 (NARA *Marks v. Davis* File); Motion by counsel for Plaintiff in Error to Dismiss Writ of Error, January 23, 1913 (NARA *Marks v. Davis* File).

26 227 U.S. 682 (1913); Mandate, August 14, 1913 (NARA *Marks v. Davis* File).