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# THE JOURNAL OF LAW

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# WHO CARES WHAT CONGRESS THINKS? NOT JAMES MANN

## THE MANN ACT'S *MARBURY* MOMENT

Ross E. Davies<sup>†</sup>

In *Caminetti v. United States*, the U.S. Supreme Court employed a severely puritanical approach — on the facts and on the law — to statutory interpretation.<sup>1</sup> Conversely, the opinion for the Court in *Caminetti* triggered an intriguingly indulgent legislative-judicial exchange about the role of the courts in statutory interpretation.

This little essay begins with a quick look at *Caminetti* and the statute it interpreted, proceeds through a similarly speedy examination of that indulgent post-decision exchange, and concludes with a few questions.

*Caminetti* was, basically, a successful federal prosecution of a man for engaging in an extramarital affair during which the licentious couple in question crossed state lines, from California to Nevada and back. Drew Caminetti's conviction was upheld by the Supreme Court. He paid a \$1,500 fine and served about one third of an 18-month prison sentence.<sup>2</sup> (For the full story, read Professor David Langum's excellent book, *Crossing Over the Line*.)

*Caminetti* was also a near-caricature of the perpetual conflict between “plain meaning” enthusiasts (that is, jurists who tend to *resist* recourse to

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<sup>†</sup> Editor-in-chief, the *Green Bag*; professor of law, George Mason University. A shorter paper that overlaps a bit with this one appeared online long ago. It is still out there, though to get a look at it you will have to pay LexisNexis. See Ross E. Davies, *Historical Precedents: The Secret Meaning of Intent*, [www.law.com/nationallawjournal/almID/1202475258747/](http://www.law.com/nationallawjournal/almID/1202475258747/) (Nov. 23, 2010).

<sup>1</sup> *Caminetti v. United States*, 242 U.S. 470 (1917).

<sup>2</sup> David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* 111, 138 (1994).

extrinsic sources when determining the meanings of words in a statute) and “legislative history” enthusiasts (that is, jurists who tend to *embrace* recourse to extrinsic sources when determining the meanings of words in a statute). In *Caminetti*, the “plain meaning” enthusiasts prevailed.

In his January 1917 opinion for the Court in *Caminetti*, Justice William R. Day spoke for a majority that leaned heavily on what it took to be the plain meaning of the words “immoral purpose” in the disturbingly named “White-slave traffic Act”<sup>3</sup> — also known as the “Mann Act,” after its sponsor, Representative James R. Mann (R-IL).<sup>4</sup> At that time, the Mann Act provided that:

any person who shall knowingly transport . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years, or by both such fine and imprisonment, in the direction of the court.<sup>5</sup>

According to Day — who was joined by Justices Oliver Wendell Holmes, Willis Van Devanter, Mahlon Pitney, and Louis Brandeis — those italicized words obviously meant that the Mann Act criminalized non-commercial, consensual, interstate extramarital affairs, as well as interstate sex-for-hire:

To cause a woman or girl to be transported for the purposes of debauchery, and for an immoral purpose, to wit, becoming a concubine or mistress, for which *Caminetti* . . . [was] convicted; . . . would seem by the very statement of the facts to embrace transportation for purposes denounced by the act, and therefore fairly within its meaning.

While such immoral purpose would be more culpable in morals and attributed to baser motives if accompanied with the expectation of pecuniary gain, such considerations do not prevent the lesser offense against morals of furnishing transportation in order

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<sup>3</sup> 36 Stat. 825, ch. 395, sec. 8 (June 25, 1910).

<sup>4</sup> *Mann, James Robert*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, [bioguideretro.congress.gov/Home/MemberDetails?memIndex=m000104](http://bioguideretro.congress.gov/Home/MemberDetails?memIndex=m000104).

<sup>5</sup> 36 Stat. 825, ch. 395, sec. 2 (emphasis added).

that a woman may be debauched, or become a mistress or a concubine from being the execution of purposes within the meaning of this law. To say the contrary would shock the common understanding of what constitutes an immoral purpose when those terms are applied, as here, to sexual relations.<sup>6</sup>

Therefore, Day concluded, there was no need to look at any sources other than the Mann Act itself (and the commonsense expertise about “immoral purpose” in the minds of himself and Justices Holmes, Van Devanter, Pitney, and Brandeis, of course) to understand the meaning of the words “or for any other immoral purpose” in the Mann Act, nor any reason to doubt that those words made *Caminetti*’s affair a crime:

Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation . . . . But, as . . . has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source.<sup>7</sup>

Justice Joseph McKenna wrote the dissent, speaking for himself, Chief Justice Edward D. White, and Justice John H. Clarke. McKenna agreed that “[o]ur present concern is with the words ‘any other immoral practice.’”<sup>8</sup> (The Mann Act referred repeatedly both to “immoral purpose” and to “immoral practice,” sometimes in the same sentence, and both the majority and the dissent in *Caminetti* used the two terms interchangeably.<sup>9</sup>) But McKenna objected that the presence of the words “White-slave traffic act” in the text of the statute itself<sup>10</sup> made the meaning of the words “any other immoral practice [or purpose]” unclear in the context of the statute. So, should the words “any other immoral practice [or purpose]” be given the “comprehensive” meaning the majority preferred, or instead the “limited” meaning preferred by the dissenters? Turning to the Mann Act’s legislative

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<sup>6</sup> *Caminetti*, 242 U.S. at 486.

<sup>7</sup> *Id.* at 490.

<sup>8</sup> *Id.* at 496.

<sup>9</sup> Which is odd, isn’t it, since “purpose” and “practice” are not interchangeable. Plainly.

<sup>10</sup> 36 Stat. 825, ch. 395, sec. 8.

history — the “[r]eports to Congress” the majority had declined to consider — McKenna discovered some evidence, including a telling line by the sponsor of the legislation:

The author of the bill was Mr. Mann, and in reporting it from the House Committee on Interstate and Foreign Commerce he declared for the Committee that it was not the purpose of the bill to interfere with or usurp in any way the police power of the States, and further . . . that the sections of the act had been “so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution.”<sup>11</sup>

On the basis of that report and other “highly persuasive” commentary from the legislature and the executive,<sup>12</sup> McKenna concluded:

In other words, it is vice as a business at which the law is directed, using interstate commerce as a facility to procure or distribute its victims.<sup>13</sup>

This was not enough for the majority of Justices, though, because it was not even relevant, the text of the statute being plain on its face.

• • •

On January 29, 1917, a few days after the *Caminetti* decision was handed down, Mann himself wrote a note (facsimile on next page) to Day:<sup>14</sup>

My dear Mr. Justice Day:—

I hope it is entirely proper for me to congratulate you upon your opinion and the decision of the Supreme Court in the white slave cases. While I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act and hence have refrained from any expression of opinion concerning my intent and thought when I wrote the language of the white slave law, yet you have construed the law the way I intended when

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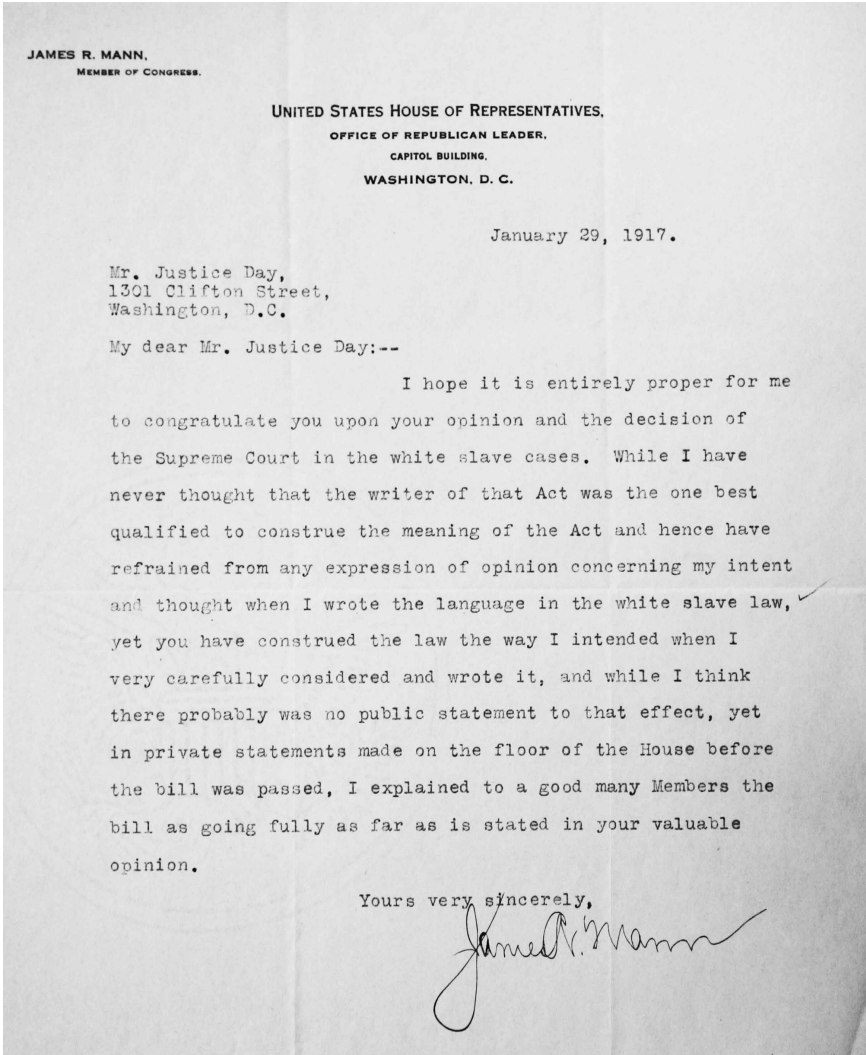
<sup>11</sup> *Caminetti*, 242 U.S. at 497-98 (McKenna, J., dissenting) (quoting House Report No. 47, 61st Cong., 2d sess., pp. 9, 10).

<sup>12</sup> Plus a purposivist “*Holy Trinity*” argument that is not relevant here. See *Caminetti*, 242 U.S. at 499-503 (McKenna, J., dissenting) (discussing *Holy Trinity Church v. United States*, 143 U.S. 457 (1892)).

<sup>13</sup> *Caminetti*, 242 U.S. at 498 (McKenna, J., dissenting).

<sup>14</sup> Letter from James R. Mann to William R. Day, Jan. 29, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 32.

WHO CARES WHAT CONGRESS THINKS? NOT JAMES MANN



I very carefully considered and wrote it, and while I think there probably was no public statement to that effect, yet in private statements made on the floor of the House before the bill was passed, I explained to a good many Members the bill was going fully as far as is stated in your valuable opinion.

Yours very sincerely,  
James R. Mann

ROSS E. DAVIES

January 20th, 1887.

Hon. James R. Mann,  
House of Representatives,  
Washington.

My dear Mr. Mann:

I beg to thank you for your kind note of the 20th instant, received this morning.

I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which it gives the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.

With best wishes, I am, with high regard,  
Very sincerely, yours,  
William L. ...

In other words, the lines the dissent had quoted from Mann's congressional report on the Mann Act — that "the sections of the act had been 'so drawn that they are limited to cases in which there is the act of transportation in interstate commerce of women for purposes of prostitution'"<sup>15</sup> — were a lie. Mann had told the public that his law was directed at commercial sex, but what he really intended — and what he secretly told his colleagues in Congress who would decide whether to enact the law or not — was something else: criminalization of both commercial and non-commercial

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<sup>15</sup> *Caminetti*, 242 U.S. at 498 (McKenna, J., dissenting) (quoting House Report No. 47, 61st Cong., 2d sess., pp. 9, 10).

immoral sex. Just what the majority had said was plain from the text of the statute.

Justice Day expressed his pleasure the next day, in a note (facsimile on previous page) to Mann:<sup>16</sup>

My dear Mr. Mann:

I beg to thank you for your kind note of the 29th instant, received this morning.

I think it is not improper for me to express to you the appreciation that I have of your view of the recent opinion of the Supreme Court in construing the so-called "White Slave Act". While of course we could not know, except from the language used, the purpose and intent of the framers of the law, the confirmation which you give the construction of the act is very gratifying indeed. It was very good of you to send me your kind letter.

With best wishes, I am, with high regard,

Very sincerely yours,

William R. Day

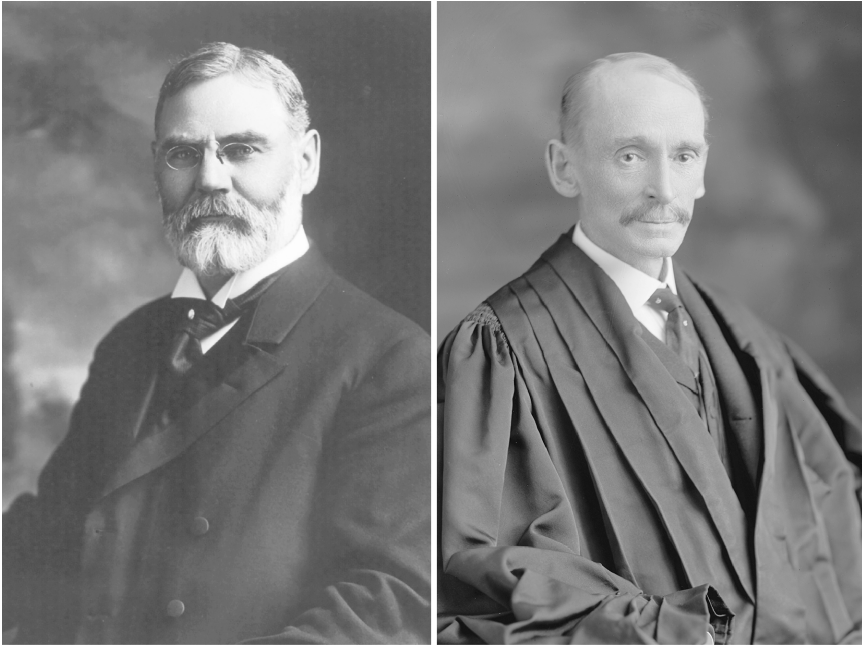
It should come as no surprise that Day appreciated the kindness of Mann's note. Many people appreciate kindness. But Day's appreciation for the "confirmation which you give the construction of the act" is surprising. Learning that he and his colleagues had unknowingly served Mann's secret purpose — to make noncommercial, immoral sex a federal crime — should have been irrelevant to Day's view of his work as an interpreter of the plain meaning of the words of a statute. (It would have been nice, though, if Day had expressed a wish that in the future Mann would be honest in public about what he said in private about his purposes as a public servant.)

Why didn't Day instead thank Mann for the part of that note that did in fact vindicate Day's approach to statutory interpretation?

"I have never thought that the writer of that Act was the one best qualified to construe the meaning of the Act" — could have been written by Chief Justice John Marshall. Who knows? When he was writing to Day, Mann might even have been thinking about Marshall's most famous line, the one from his opinion for a unanimous Court in *Marbury v. Madison*: "It is

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<sup>16</sup> Letter from William R. Day to James R. Mann, Jan. 30, 1917, in Papers of William R. Day, Library of Congress, Manuscript Division, box 4.



*Illinoisan James Mann of the U.S. House of Representatives (left) and Ohioan William R. Day of the U.S. Supreme Court. Photographs courtesy of the Library of Congress, reproduction numbers LC-USZ62-55627 and LC-DIG-hec-16432.*

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emphatically the province and duty of the judicial department to say what the law is.”<sup>17</sup> In his note to Day, Mann was engaging in a mighty bendy bit of legislative genuflection to the judiciary. According to Mann, all he and his congressional colleagues could do was draft and enact laws. They could not know the meaning of what they had done until after it was complete and in use and they were instructed by the judges.<sup>18</sup> Mann’s confession — of what? incompetence? powerlessness? — was so complete that Day may have opted for silence about it because to speak out loud of such a submission would have been bad form.

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<sup>17</sup> 5 U.S. 137, 177 (1803).

<sup>18</sup> Or perhaps Mann was a realist ahead of his time, foreshadowing the practical wisdom of Justices Robert H. Jackson (“We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., opinion concurring in result)) and William J. Brennan (“Five votes can do anything around here.” James F. Simon, *The Center Holds: The Power Struggle Inside the Rehnquist Court* 54 (1995)).

But then again, why should Day have believed anything Mann put in that note? After all, Mann had shown he was not to be trusted on the subject of the Mann Act. It was his misrepresentation in a congressional report (the one quoted by McKenna in his dissent in *Caminetti*) that Mann was disclosing and correcting in his note to Day. Would it, in fact, have been in Day's best interest to disbelieve every word of Mann's note? The note would have been pointless if Mann had simply told the same story to the public (in a congressional report) that he told "in private" to "a good many Members" of Congress. And, by entering Mann's circle of deception — "we could not know . . . the purpose and intent of the framers," Day said in his note, but now Day did know of both the intention and the misrepresentation that concealed it — Day would become a silent partner in Mann's deception of the public. But only if he believed Mann's revelation in the note. Much better, perhaps, for Day to adhere to his belief in plain meaning and cordially, noncommittally indulge Mann.

But that bit of political-ethical intrigue pales in comparison to the intriguing question of what Mann's deception (of the public) and disclosure (to legislators) during the legislative process, followed later by disclosure (to a judge) might mean to "legislative history" enthusiasts. Is there such a thing as secret legislative history? If there is, and a secret is revealed post-enactment, may it be considered when settling the meaning of statutory language enacted in the shadow of that secret?<sup>19</sup> Imagine the amicus briefs if the Supreme Court, or even just a single Justice, answered that question "Yes"!

Alas, the answer probably will not come from any study Representative Mann's discreet congratulatory confession to Justice Day: the plain-or-not criminalization of "immoral practice [or purpose]" was amended out of the Mann Act by Congress long ago.<sup>20</sup>

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<sup>19</sup> Cf. *District of Columbia v. Heller*, 554 U.S. 570, 662 n.28 (2008) (Stevens, J., dissenting) (quoting *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part)).

<sup>20</sup> Public Law 99-628, 100 Stat. 3510 (Nov. 7, 1986); see also 18 U.S.C. § 2421 (as amended).

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# IN-CHAMBERS OPINIONS AND THE *BLUEBOOK*

Ira Brad Matetsky<sup>†</sup>

**T**he *Journal of In-Chambers Practice* is on hiatus, except for this essay, for this issue of *The Journal of Law*. Our search for the U.S. Supreme Court's in-chambers opinions (ICOs) of the past is on hold because for the past several months, the archives and libraries where we do our searching have been closed. Our reporting on ICOs of the present is on hold because for the sixth consecutive year, the Court finished its most recent Term (O.T. 2019) without any justice's having authored one.

There were plenty of opportunities for the justices to have written ICOs this year if they had wanted to. Circuit justices have been presented with important stay and injunction applications on topics including emergency closures arising from the coronavirus pandemic, changes to election rules also occasioned by the pandemic, and the administration of the federal death penalty. However, the circuit justices have generally referred these applications to the full Court for decision, rather than rule on them individually. As this issue goes to press, election-related litigation before the Court is still underway. We expect to write about the Court's recent handling of its so-called Shadow Docket in a later issue of this *Journal*.

Although the justices' propensity to author ICOs has waned, ICOs received renewed attention recently in another legal institution: the just-published Twenty-First Edition of *The Bluebook: A Uniform System of Citation*. In this edition, the *Bluebook* editors have changed the recommended citation form for opinions issued by individual circuit justices, and for the first time they have listed *Rapp's Reports* — the shorthand designation for Cynthia Rapp's compilation of *In Chambers Opinions by the Justices of the Supreme Court of the United States* — as a source for locating and citing these opinions. For

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<sup>†</sup> Partner, Ganfer Shore Leeds & Zauderer LLP, New York, NY.

better or worse, the *Bluebook* remains the leading authority on legal citations in the United States. That includes both what reporters to cite and how to cite them. The *Bluebook* editors' decision to add *Rapp's Reports* to the list of sources for ICOs is welcome, because it will promote knowledge of these reports' existence and increase the likelihood that academics, practitioners, and ultimately courts will find them, read them, and cite them.<sup>1</sup>

Until the Twenty-First Edition, the *Bluebook* did not mention *Rapp's Reports*, which were issued as a compilation within the Court in 2001 and made available to the public by Ross Davies of *The Green Bag* in 2004. That is not to say that ICOs themselves went unmentioned. The *Bluebook's* First (1926) through Ninth (1955) Editions did not mention these opinions.<sup>2</sup> However, by the 1950s, successive editions of the *Bluebook* were becoming longer and more detailed. Meanwhile, ICOs had started to be reported with some regularity in publications such as West's *Supreme Court Reporter*.<sup>3</sup> Reflecting these developments, in its Tenth Edition (1958), the *Bluebook* instructed in Rule 1:2:3(c) that "[a] decision by a Supreme Court Justice sitting alone in his capacity as Circuit Justice is cited only to Sup. Ct."<sup>4</sup> This edition also instructed in Rule 1:3 on how one is to signify that the cited opinion is an ICO by a single justice, rather than the work of the full Court: "A decision by a Supreme Court Justice sitting along in his capacity as Circuit Justice is cited: (Douglas, Circuit Justice, 1953)."<sup>5</sup> The Eleventh Edition (1967) retained these instructions, but with one necessary qualifi-

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<sup>1</sup> Reflecting the value of coverage in the *Bluebook*, "one legal publication may actually have failed because *The Bluebook* provided no abbreviation" for it. James W. Paulsen, *Book Review: An Uninformed System of Citation*, 105 HARVARD L. REV. 1780, 1787 (1992) (citing Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 LAW LIBR. J. 19, 22 (1982)). See also Ira Brad Matetsky, *GB Meets BB*, 8 GREEN BAG 2D 341 (2005) (noting with relief that the *Bluebook's* then-new edition included a listing for *The Green Bag*).

<sup>2</sup> The First through Fifteenth Editions of the *Bluebook* are conveniently reprinted in ROBERT BERRING, ED., *THE BLUEBOOK: A SIXTY-FIVE YEAR RETROSPECTIVE* (William S. Hein & Co. 1998). For convenience and simplicity, all editions of A UNIFORM SYSTEM OF CITATION and THE BLUEBOOK will be cited herein as "BLUEBOOK" with the edition number, without regard to changes in the book's official title.

<sup>3</sup> See generally Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 6 J. OF L. (1 J. IN-CHAMBERS PRACTICE) 19 (2016).

<sup>4</sup> BLUEBOOK 10th ed at 17 (1958). The fact that some ICOs were reported elsewhere was not mentioned.

<sup>5</sup> *Id.* at 18.

cation to the first: “A decision by a Supreme Court Justice sitting alone in his capacity as Circuit Justice is cited (if possible) to S. Ct.”<sup>6</sup>

The Twelfth Edition (1976) of the *Bluebook* was the first to appear after the Court began including ICOs in the official *United States Reports* in 1969.<sup>7</sup> The instructions in what was now Rule 10:3:1(c) were changed: “Cite a decision by a Supreme Court Justice sitting in his capacity as Circuit Justice to U.S. (post-1969) or S. Ct. (pre-1969).”<sup>8</sup> Rule 10:4(a), covering how to designate the jurisdiction that issued an opinion, was unchanged, with the form “(Douglas, Circuit Justice, 1953)” still being used.<sup>9</sup> In a table in the back of the book, the *Bluebook* recapitulated the instructions: “**Circuit Justices** (e.g., Douglas, Circuit Justice). *Cite to U.S. or S. Ct., in that order of preference.*”<sup>10</sup>

The Thirteenth Edition (1981) adhered to these citation rules for ICOs, but offered a specific example: “Cite a decision by a Supreme Court Justice sitting along in his capacity as Circuit Justice: Russo v. Byrne, 409 U.S. 1219 (Douglas, Circuit Justice 1972).”<sup>11</sup> The table in the back now instructed that for the opinion of a circuit justice, such as “(Rehnquist, Circuit Justice)”, one should “[c]ite to U.S., S. Ct., or U.S.L.W. if therein, in that order of preference.”<sup>12</sup> But in welcome recognition of the complicated history of the reporting of ICOs, the *Bluebook* editors added: “(A few other opinions are reported in other reporters. E.g., United States v. Motlow, 10 F.2d 657 (Butler, Circuit Justice 1926).)”<sup>13</sup>

The next seven editions of the *Bluebook*, from the Fourteenth (1986) through the Twentieth (2015), left the basic citation format for ICOs unchanged.<sup>14</sup> One minor change was that the *Lawyer’s Edition* was added to as a permissible source: “Cite to U.S. if therein; otherwise, cite to S. Ct., L.

<sup>6</sup> BLUEBOOK 11th ed. at 17 (1967); see also *id.* at 20.

<sup>7</sup> See Matetsky, *supra* note 3, at 31.

<sup>8</sup> BLUEBOOK 12th ed. at 38 (1976)

<sup>9</sup> *Id.* at 41.

<sup>10</sup> *Id.* at 100.

<sup>11</sup> BLUEBOOK 13th ed. at 45 (1986). Note that the comma after “Circuit Justice” has disappeared. In this citation in the Thirteenth Edition, there is visible extra space between “Justice” and “1972”, reflecting that removing the comma must have been a last-minute change. See *id.* In later editions the space was closed up, but the entry was otherwise unchanged. E.g., BLUEBOOK 14th ed. at 45.

<sup>12</sup> BLUEBOOK 13th ed. at 133.

<sup>13</sup> *Id.* The example of *Motlow* was an inspired choice because — as reflected in its parallel citation, 1 Rapp 1 — it was the first ICO reported in the main compilation of *Rapp’s Reports*.

<sup>14</sup> E.g., BLUEBOOK 20th ed. at 105, 233 (2015)

Ed., or U.S.L.W. in that order of preference.”<sup>15</sup> *Russo v. Byrne* and *United States v. Motlow* remained the sample citations through several editions, although beginning with the Eighteenth Edition (2005), the tables replaced the citation of *Motlow* with two opinions that, while written by “circuit justices,” were not ICOs.<sup>16</sup>

The *Bluebook*'s treatment of ICOs is significantly upgraded in the Twenty-First Edition (2020). In their Preface, the editors explain that a new “**Rule 10.6.2** was added to bring *The Bluebook* into conformity with current U.S. Supreme Court practice regarding citations to stay or bail applications ruled upon by a single Justice.”<sup>17</sup> The text of Rule 10.6.2 on “In-Chambers Opinions” briefly describes what ICOs are and instructs that “[t]o cite such an opinion, include the parenthetical ‘(Lastname, J., in chambers)’.”<sup>18</sup> This is a notable change from the previous form “(Lastname, Circuit Justice)” that was recommended from the Tenth through Twentieth Editions. As presaged in the Preface to the Twenty-First Edition, the change brings this aspect of *Bluebook* form in line with the Supreme Court’s own longstanding practice, as recommended by the Reporter of Decisions and uniformly followed in the *United States Reports* for many decades.

The *Bluebook* states that ICOs since 1969 have been officially reported in the *U.S. Reports*, which is true (with a few exceptions), and that some pre-1969 ICOs had also appeared in the *United States Reports*, which is incorrect.<sup>19</sup> As one would expect, an ICO is to be cited to the *United States Reports* where possible, with a form such as “*Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers).”<sup>20</sup>

<sup>15</sup> *Id.* at 233.

<sup>16</sup> *Id.* The first, “*Halperin v. Kissinger*, 807 F.2d 180 (Scalia, Circuit Justice, D.C. Cir. 1986)”, was a D.C. Circuit case, decided by a three-judge panel, which represented unfinished business from Scalia’s tenure as a Court of Appeals judge before he was elevated to the Supreme Court. Although no formal Allotment Order or list of circuit justice assignments records the fact, Scalia apparently arranged to be designated as a “Circuit Justice” for the D.C. Circuit so he could vote on the remaining cases that he heard while on that court. *Id.* at n.\*. Thus, *Halperin* is a D.C. Circuit case, not a Supreme Court Justice’s ICO. The second example, “*United States v. Benson*, 31 F. 896 (Field, Circuit Justice, C.C.D. Cal. 1887)”, was an ordinary instance of a justice sitting as a member of a circuit court under standard nineteenth-century practice. These examples are still used today, see BLUEBOOK 21st ed. (2020) at 227, and should probably be replaced.

<sup>17</sup> BLUEBOOK 21st ed. (2020) at vii.

<sup>18</sup> *Id.* at 108.

<sup>19</sup> *Id.* at 108-09. Some ICOs before 1969 were published in the *Supreme Court Reporter* and elsewhere, but not in the *United States Reports*. See Matetsky, *supra* note 3.

<sup>20</sup> BLUEBOOK 21st ed. at 109.

What, however, about citing an ICO that is not found in the *U.S. Reports*? Significantly, the Twenty-First Edition adds for the first time that many pre-1969 ICOs “have been gathered by Cynthia Rapp and published in a multi-volume set, *In Chambers Opinions by the Justices of the Supreme Court of the United States*, that also includes the opinions written after 1969.”<sup>21</sup> ICOs not found in the *U.S. Reports* are now to be cited to these reports, and an example is given: “*Sacco v. Massachusetts*, 1 Rapp 16 (1927) (Holmes, J., in chambers).”<sup>22</sup> Table T1.1 in the “Blue Pages” directs that for cases decided by “**Circuit Justices** (e.g., Sotomayor, J., in chambers): Cite to U.S. if therein; otherwise, cite to S. Ct., Rapp, L. Ed., or U.S.L.W. if therein, in that order of preference.” “Rapp” is defined in the table as “Rapp’s In Chambers Opinions, 1925-date.”<sup>23</sup>

Cynthia Rapp’s efforts in compiling 75 years of the justices’ ICOs, Ross Davies’ efforts in issuing and publicizing commercial and online editions of what he christened *Rapp’s Reports*, and the editors’ efforts in searching for additional unreported ICOs and editing this *Journal* all shared the objective of making these opinions available to justices, jurists, practicing lawyers, academics, and legal historians. We hope the *Bluebook*’s mention and description of these reports will further this goal.

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 109.

<sup>23</sup> *Id.* at 227. There is a minor discrepancy between Rule 10.6.2, which indicates that if an ICO is not found in the *U.S. Reports* it should be cited to Rapp, and Table T1.1, which indicates that only if an ICO is not found in the *United States Reports* or in West’s *Supreme Court Reporter* it should be cited to Rapp. Now that this nit has been picked, it can be clarified by the editors of the Twenty-Second Edition five years hence. More substantively, we invite the *Bluebook* editors to mention in the Twenty-Second Edition or in an interim online supplement that (1) *Rapp’s Reports* have subsequently been expanded to include some opinions that pre-date 1925, and (2) the entire contents of *Rapp’s Reports* are readily available without charge on the *Green Bag*’s website, [www.greenbag.org](http://www.greenbag.org).

JL

# ALMANAC EXCERPTS

SELECTED WORKS FROM THE LATEST EDITION OF THE *GREEN BAG  
ALMANAC & READER*,

AKA

THE “ETHEREAL VERSION” OF THE

## GREEN BAG ALMANAC

OF USEFUL AND INTERESTING TIDBITS FOR LAWYERS

&

## READER

OF EXEMPLARY LEGAL WRITING FROM THE YEAR JUST PASSED

# 2020

EDITED BY

ROSS E. DAVIES & CATTLEYA M. CONCEPCION

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*Journal of Law* editors’ note: Page references in the text of works published here are to pages in the ink-on-paper edition of the 2020 *Almanac & Reader*. Page references in the table of contents and footers here, however, are to pages in this version.

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*Ethereal Version.*

There are two versions of the 2020 *Almanac & Reader*. One is this, the “Ethereal Version,” in *The Journal of Law*. The other is the “First autograph edition.” Eligible *Green Bag* subscribers should receive one version or the other, but not both.

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# PREFACE

## Business as Unusual as Usual

This is the 15th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the “Preface” to the 2006 edition. It is available on our website ([www.greenbag.org](http://www.greenbag.org)).

### I.

#### *Our Autograph Plans, Rescripted*

Every year, we combine four flavors of material in the *Almanac & Reader*: (1) exemplary legal writing, some presented via recommendations by respectable authorities, some reprinted in whole or in part in the book; (2) reviews of the year just past, written by articulate people who’ve been paying attention; (3) items organized around a theme<sup>1</sup> and scattered throughout the book; and (4) odds and ends that strike us as useful or interesting.

Also, each new edition of the *Almanac & Reader* sees some things change a bit and some stay pretty much the same. This time around, our coverage of exemplary legal writing and our reviews of the events in the year just past have not changed much since last year — other than the particular exemplars and particular events, of course. And it’s the same for our customary magpie’s collection of odds and ends, which remains miscellaneously different from and similar to prior years’ hodge-podges.

But the theme. Oy. That is another matter entirely. Here is how we explained it in the Spring 2020 issue of our flagship journal, the *Green Bag*:

We’ve had no word in recent weeks about defects in our publications, but we have suffered another kind of publication misfortune, which we now disclose: we should have taken better snapshots sooner.

It involves the 2020 *Green Bag Almanac & Reader*. When it is — eventually — in print, it will feature facsimiles of notes written by U.S. Supreme Court Justices, dating from 1887 to 1997. Each will be accompanied by scholarly commentary and a transcription (some Justices having bad handwriting).

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<sup>1</sup> The themes have ranged widely over the years, and have included, for example, games (baseball in 2010, whist in 2018), individuals (Rex Stout in 2012, Thurgood Marshall in 2018), and events (presidential elections in 2008, Philadelphia’s 1887 constitutional centennial celebrations in 2014). And so on and so on.

The originals of many of the notes are held by the Manuscript Division of the Library of Congress. When we were collecting many, many interesting notes and attempting to enlist appropriate scholars to write about them, we quickly took usable<sup>2</sup> (but not publishable-quality) snapshots of each note. There were a lot of them, and we did not know which ones would eventually be paired with scholars who would deliver good papers about them.

The idea was to provide those useable images to scholars, and return to the Library later to invest the time and effort to make fine, publishable-quality scans of just the notes — those happy few — that would in fact appear in the *Almanac & Reader*. But then, just as we were getting set to head back to the Library, it closed, quite reasonably but inconveniently.

So, the *Almanac & Reader*, mostly ready to go, waits in the starting gate, ready to gallop to the printer after we make one visit to the Library — soon, we hope, and safely, we expect — for those good images of notes. Until then, and with apologies for the delay, we'll be sharing an occasional outtake, starting with the note on the next page, which proves the *Green Bag* is not alone in being overtaken and slowed by unexpected and intractable events.<sup>3</sup>

Then, when we learned that the situation at the Library of Congress would persist until at least September — for the same perfectly reasonable pandemic reasons — we decided that we would have to carry on into print with our less-than-perfect digital images. When we can, will put out a superior set of images, probably in a convenient issue of the *Green Bag* or our *Journal of Law*, or in next year's *Almanac & Reader*. What we have here is not bad. It is sufficient for our purposes, and the parts that are illegible are that way because of the lousy handwriting of the writers. Crisper reproduction of their chicken scratch would not improve readability. But still, it would be nice to have something a bit nicer. Sorry about that!

Now to the thematic content itself. In each month of this *Almanac & Reader* you will find a note or letter (or maybe more than one), connected to a particular U.S. Supreme Court Justice (or maybe more than one). It is (or they are) accompanied by commentary from a modern scholar, which is in turn followed by an “Editors’ Appendix” consisting of some additional associated judicial writing that we think you might enjoy. Transcripts are provided where the handwriting might be hard on the eyes or the patience of the reader.

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<sup>2</sup> Corrected here from “useable” at the prompting of Bryan Garner.

<sup>3</sup> Our Misfortune, 23 *Green Bag* 2d 173 (2020).

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The homepage of the Manuscript Division, shortly before this *Almanac & Reader* went to press (please note the text we have circled).

## II.

### *Homer Continues to Nod*

We published this notice under the “Our Mistakes” heading in the summer 2019 issue of the *Green Bag*:

We begin this installment of the *Green Bag*’s never-ending saga of self-embarrassment with an apology to Professor Lucy Salyer. Here is why. She sent us a tactful note in July:

Dear editors,

I was delighted to have my book, *Under the Starry Flag: How a Band of Irish Americans Joined the Fenian Revolt and Sparked a Crisis over Citizenship*, as a title recommended by Judge Rakoff and Lev Menand in *Green Bag Almanac & Reader* for 2018. It was such an honor to be selected. Unfortunately, my name was spelled incorrectly as “Saylor” when it should have been “Salyer”. Is there a way to correct the spelling, at least on the webpage which lists the recommended books? I just want people to be able to find the book, if they’re interested in reading it.

Thanks very much for your support.

All best wishes,

Lucy Salyer

We were mortified. We replied with an apology and promises to correct the spelling of her name on our website (done: see [green-bag.org/green\\_bag\\_press/almanacs/almanacs.html](http://green-bag.org/green_bag_press/almanacs/almanacs.html)) and publish corrections in the next issue of our flagship quarterly journal (done: right here and now) and the next *Green Bag Almanac & Reader* (to be done in 2020).<sup>4</sup>

Our penance is complete, and our mortification is forever.

In other nodding news, we have this useful correction from attentive, and kind, reader Walter Carson:

Page 36:

Greetings. Enjoyed the 2019 *Almanac & Reader*. At least one item in The Year in Law 2017-2018 needs to be corrected. At page 36, the entry for September 19th is inaccurate. It was not “Montgomery County (Maryland).” Rather it should have been “Montgomery County (Pennsylvania).” By the way, here in Maryland the court

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<sup>4</sup> Our Mistakes, 22 *Green Bag* 2d 277 (2019).

of general jurisdiction is the county “Circuit Court.” Thanks for the *Green Bag*! Best wishes.

Carson is not the only one who is paying attention, knows more than we do, and is able and willing to kindly correct us. Rick Fehling (of Pennsylvania) writes,

FYI: On page 36 of your *The Year in Law*, you identify Judge Steven T. O’Neill as sitting in Montgomery County, Maryland. Judge O’Neill sits in Norristown, Montgomery County, Pennsylvania.

Thanks to all!

### III.

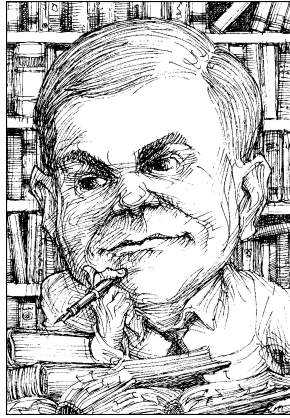
#### *Other Business*

Our goals remain the same, year after year: to present a fine, even inspiring, year’s worth of exemplary legal writing — and to accompany that fine work with a useful and interesting (and sometimes entertaining) potpourri of distracting, thought-provoking oddments. Like the law itself, the 2019 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we’ll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing are not entirely accurate.

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by thanking and apologizing to all those who deserve to be mentioned here but aren’t. We cannot, however, forget that we owe big debts of gratitude to O’Melveny & Myers LLP (especially Nadine Bynum, Greg Jacob, and Meaghan VerGow); to Jeff Flannery of the Library of Congress’s Manuscript Division and his extraordinary colleagues, without whom this volume — and much else that the *Green Bag* does — would not be possible; and, as ever, to the super-literate Ira Brad Matetsky, who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing support for the *Green Bag* and your kind remarks about the *Almanac & Reader* are inspiring.

Ross E. Davies  
July 18, 2020



Bryan A. Garner<sup>†</sup>

# THE YEAR 2019

## IN GRAMMAR, LANGUAGE, AND WRITING

### JANUARY

The *Independent* reported that orthography and grammar helped two U.K. students avoid prison after being convicted of dealing drugs. Noting that their text messages were far more literate than those of most drug pushers, the judge forbore assessing jail time and instead sentenced them to 100 hours of community service. (Must be a lesson there for drug dealers.) • A federal judge wasn't amused when a lawyer bombarded the court with quotations from the cartoon character Tweety Bird and the movie *Animal House*, among others, to attack special prosecutor Robert Mueller. The Associated Press quoted a sample: "The Special Counsel's argument is reminiscent of Otter's famous line, 'Flounder, you can't spend your whole life worrying about your mistakes! You f\*\*\*ed up . . . you trusted us. Hey, make the best of it.'" Having been judicially admonished for "unprofessional, inappropriate, and ineffective" conduct, the lawyer shrugged it off as merely one judge's opinion.

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The case was set for trial in April 2020 — one hopes on the first of the month. • Google announced an automatic-punctuation feature for its digital personal assistant, Google Assistant — one that will automatically insert punctuation when you dictate messages, without the need for awkwardly saying “period” or “question mark” or “comma.” Google Assistant senses pauses and voice inflections to predict appropriate punctuation. • In the *Atlantic*, linguist John McWhorter analyzed and criticized President Trump’s misuses of the English language. While cautioning that “one must not automatically equate sloppy spelling with sloppy thinking,” McWhorter nevertheless noted myriad typos in President Trump’s tweets on dire matters such as the partial government shutdown and raging wildfires in California. McWhorter contrasted Trump’s careless compositions with Harry Truman’s awareness of his shortcomings in English and the care he took to overcome them. Truman, whose education ended with high school, wrote in a personal letter, “Say, it sure is a grand thing that I have a high-school dictionary handy. I even had to look on the back to see how to spell the book itself. The English language so far as spelling goes was created by Satan I am sure.” McWhorter also commented that in speaking, “Trump presents an oddly abbreviated rendition of English, reminiscent of languages when they are dying out or compromised in some way.” He noted that Trump overuses *do* in place of concrete action verbs or diplomatic language for sensitive matters, *call* instead of *declare* when dealing with emergencies, and *very* with almost every adjective, which reduces *very* to meaning “an adjective is coming.” These linguistic cues, McWhorter concluded, reflect a lack of understanding and inadequate thought. (All curable, perhaps, by executive order.) • Because the White House kitchens were closed when the Clemson University national-championship football team visited, fast food was ordered in for the players. President Trump tweeted that the food included “hamberders,” which prompted Burger King to tweet “due to a large order placed yesterday, we’re all out of hamberders. Just serving hamburgers today.” In an irregular move, the Trump White House corrected the tweet. (For many, this move raised false hopes.) • In a censuring tweet, President Trump’s intended target was a Fox News correspondent who had covered the potential border wall with Mexico. But as reported in many news sources, Trump misspelled *Gillian* as *Jillian* and tagged the wrong Twitter account — that of a California high-school student, who found herself suddenly assailed on Twitter by hundreds of people. The teenager had no idea why until she received a copy of a tweet that described the mistake. She posted “SO THAT HAPPENED” with a screenshot of the corrective tweet and commented, “I’m lowkey kinda pissed. This is not what I need.”

After a few hours, the President's original tweet was deleted and reposted with corrections made. (Again, people got their hopes up.)

## FEBRUARY

The *Guardian* (London) reported that some American parents blame a British television show for their children's adopting Britishisms. The program *Peppa Pig* follows the adventures of Peppa, a porcine cutie who lives with her family in a small town in the United Kingdom. According to American parents who have recorded their children speaking with a British inflection, the "Peppa effect" is causing American toddlers to say "Mummy" and /tə-mah-oh/ (with the glottal stop). But linguistic experts say that the Peppa effect, first reported by the parenting website Romper, is simply a manifestation of the normal toddler tendency to mimic new words. Although kids may have picked up a Britishism or two, they aren't developing a whole accent from a TV show, said Dr. Susannah Levi, an associate professor of communicative sciences and disorders at New York University: "Typically, you would develop the accent of the community around you." But she says it's possible for children to mimic individual words (and their British pronunciation) from the show — especially ones that the child doesn't already know, such as /zeb-rə/ or /zed/. (The author of this column, however, suspects that the spread of the glottal stop in American English has something to do with British television shows playing in the United States.)

- The *Guardian* (London) reported on a linguistic study of a famous children's author: Roald Dahl. The lexicographer Susan Rennie collected the author's neologistic insults and expletives in her book *Roald Dahl's Rotsome and Repulsant Words*. "Children and grownups alike are fascinated by words that push the boundaries a little bit," Rennie said. "And Dahl, in his language as much as in his characters and plots, always has a twinkle in his eye." Dahl uses reduplication (*ucky-mucky*), malapropisms (*tummyrot* for *tommyrot*), onomatopoeia (*whizzpopper*), portmanteau words (*rotsome*, from *rotten* and *gruesome*) and, most potently, alliterative phonaesthesia, whereby consonant clusters and specific sounds connote meaning in the made-up words (*squinky squiddler* and *troggy little twit*). Rennie said, "I think we, as grownups, sometimes forget how much fun language can be, especially when you make words up."
- Two law professors studied the readability of American websites' sign-up terms and conditions. In a paper titled "The Duty to Read the Unreadable," they reported that 99% of website contracts are written at the level of an academic journal. Although experts recommend that consumer contracts be written at an 8th-grade level (as such things are commonly assessed), the professors found that website contracts are at a college-

sophomore level. Some 70% of the contracts had an average sentence length of more than 25 words; at least one contract had a 161-word sentence. Noting that consumers are presumed to have read the contracts they accept — no matter how incomprehensible they may be — the professors suggested that the drafters should bear a legal responsibility for simplifying their consumer contracts. • The *ABA Journal* reported on the release of a federal court’s order in draft form. It contained a statement of the requirements for a false-advertising claim followed by a parenthetical: “(Meh. I need a better rule statement than this.)” In an amended order, the judge deleted the parenthetical note-to-self.

## MARCH

The newspaper bible known as the *AP Stylebook* released a new section on writing about matters involving race, ethnicity, and gender. The guide now recommends dropping the hyphen in compounds such as *Asian-American* (now *Asian American*). The plurals *blacks* and *whites* are now sanctioned, but not the singular form except as an attributive adjective, as in *white students* and *black shopkeepers*. In other changes, the stylebook now recommends “%” instead of *percent* with numerals (because the symbol is well understood), and diacritical marks to be retained in names (because technology now makes it easy). The most surprising change was allowing the removal of hyphens in well-recognized phrasal adjectives such as *high school students*, with the unfortunate example of favoring *first quarter touchdown* over *first-quarter touchdown*. (For the repercussions of these changes, see September.) • A West Virginia man tried to pardon himself by forging a letter from the state’s governor. The fake was quickly discovered because it consisted of a single 74-word sentence written in all caps and containing one comma and no other punctuation. It was also rife with spelling and grammatical errors. It opened: “I ENCLOSIMG THIS LETTER THAT I THE SAID GOVERNOR . . .” Some suggested, to no avail, that this format might have suggested a politician’s authenticity. • In a 1998 double-murder trial in Pennsylvania, the judge instructed the jury on reasonable doubt, saying that if the prosecutors had not met their burden of proof, “then your verdict must be guilty.” The judge left out the word *not* before *guilty*. Even though it took 20 years for anyone to complain about the missing word, the *York Daily Record* (in Pennsylvania) reported, an appellate court in 2019 decided it couldn’t treat the omission as a harmless error in a death-penalty case. Commenting that the error was “clearly a simple example of a jurist misspeaking during the lengthy process of instructing a jury,” the court found it debatable whether the error could have been corrected at trial. Because the defendant had been sentenced to death, the court

ordered a new trial. • Bonham's, the London auction house, auctioned off a first-edition of *Harry Potter and the Philosopher's Stone* for \$90,000. The book's value was enhanced by its numerous typographical imperfections, including a misspelling on the title page (*Philospher's*) and a duplicate entry in a list of school supplies. Only 500 copies were distributed, 300 of them to public libraries. Libraries have begun reporting their copies missing.

## APRIL

Professor Kate Suslava of Bucknell University reported on her study of how and why corporations use euphemisms and what the consequences of using them are. A corporation's euphemizing was found to dampen the effect of bad news and to make the implications of the bad news take longer to sink in. That benefits both bad actors and blunderers. To sugarcoat or even obscure bad news, employees who are fired may be told that the reason is *downsizing*, *restructuring*, *headcount management*, or an *involuntary separation program*. General Motors even announced mass layoffs by declaring the employees *unallocated*. The CEO of a company that failed to plan ahead referred to the problem as *cloudier near-term visibility*. Another CEO described operational problems with delivering products as *lumpiness*. When bad news or mistakes are reported in plain language, share prices react quickly, then stabilize. But when abundant euphemisms "cloud the near-term visibility," investors typically respond slowly and in waves, causing shares to slide over long periods. • *Mental Floss* reported that Lego bricks are now designed as educational tools for learning Braille — the tactile alphabet that enables visually impaired and blind people to learn spelling and punctuation, to read print, to use a keyboard, and more. Blind people who learn Braille are said to be more independent, attain more education, and have better employment opportunities. Yet only 10% of blind American children are taught Braille. • Pingit, a money-exchange app developed by Barclays Bank, surveyed its U.K. users about the terms they use for money and payments. Three terms — *notes*, *dosh*, and *coin* — were almost equally common, used by nearly half the respondents. But 47 other terms joined the list. Many were curiously food-related: *bacon*, *cheddar*, *bread*, *cab-bage*, *biscuits*, and *dough*. Dialectal terms were popular: *Arthur Ashe* (cash) and *beehive* (a five) in Cockney rhyming slang; *bucks* in Scotland; *copper* in East Anglia; *bob* in Yorkshire; and *tuppence* in southwest England. To make payments, people said they *tap* (a screen without a PIN) or *ping over* money (send funds through the Pingit app). Half the respondents found ten of the slang terms utterly perplexing, especially *rhino* (a 400-year-old term of uncertain origin) and *Pavarotti* (a ten-pound note, through paronomasia equating

*tenner* with *tenor*). • The centuries-old tradition of referring to ships by feminine pronouns is changing. Many U.K. news sources reported that the Scottish Maritime Museum decided to drop *she* and to use *it* instead after politically correct vandals changed the pronouns on two signs. The museum director said, “We have, like other museums, recognized changes in society, and we’re moving to gender-neutral interpretation.” *Lloyds List*, the 285-year-old daily maritime bible, abandoned *she* for *it* almost 20 years ago. The List’s editor said the change had been made to bring the paper “in line with most other reputable international business titles, and referring to ships as *she* seemed anachronistic.” A Royal Navy spokesman disagreed: “The Navy has a long tradition of referring to its ships as ‘she’ and will continue to do so.” A naval historian at the National Maritime Museum in Greenwich opined that the tradition of feminine pronouns and ships “relates to the idea of goddesses and mother figures playing a protective role in looking after a ship and crew.” The editor of *Lloyds List* opined: “Perhaps making ships feminine was understandable in the days of wooden sailing ships that arguably had a personality, but I challenge anyone to look at a modern 400-meter-long containership and identify a gender.” • The CIA placed ungrammatical recruiting posters for Russian speakers in D.C. subway stations. Russia’s RT media pointed out that words were garbled, apparently during the translation from English to Russian, so the syntax was wrong. The mistake was a subject-verb agreement issue. The sentence on the poster was partly in English and partly in Russian. The first part — “your mastery of foreign languages” — included a singular noun and appeared in Russian. The second part of the sentence — “are vitally important to our national security” — was written in English. The verb *are* should have been *is*. After being alerted to the mistakes by social-media users, the CIA replaced the posters with grammatically unimpeachable versions.

## MAY

The Scripps National Spelling Bee — a three-day event with 562 contestants from the U.S., its territories, and six other nations — saw something unprecedented in its 92-year history. The final eight participants spelled the last 47 words correctly through 5 perfect rounds (of the 20 rounds in all). Faced with the possibility of running out of challenging words, the organizers declared all eight spellers cochampions. Rather than splitting the cash award, each speller was given a full \$50,000 cash prize. Changes were said to be in the works. (See December.) • A feature film, *The Professor and the Madman*, released by Voltage Pictures on May 10, tells an important part of the story of the *Oxford English Dictionary*. Based on the book *The Surgeon of Crowthorne* by Simon

Winchester, the film stars Mel Gibson as Professor James A.H. Murray, the chief lexicographer for the original *OED*. Sean Penn plays William Minor, an American physician who, while an inmate at the Broadmoor Criminal Lunatic Asylum, contributed more than 10,000 illustrative quotations. Gibson, who was originally going to direct the film, sued the production company in 2017 over issues involving the final cut and the filming of certain scenes. The litigation was settled just a month before the film's release. • The BBC reported that the Reserve Bank of Australia printed 46 million AU\$50 notes before a sharp-eyed person with a magnifying glass discovered a typo in the background. The note features Edith Cowan, the first woman elected to Parliament, and decoratively incorporates the first line of her first speech: "It is a great responsibility to be the only woman here, and I want to emphasise the necessity which exists for other women being here." But, *responsibility* was missing its final *i*. The Reserve Bank pledged to correct the error in future printings. The BBC finished its report with this: "Let's just hope we didn't make any typos in this artifice." (Hope springs yternal.) • *Psychology Today* considered *ahhhs* and other speech cues to determine what they reveal about a speaker. When heard in casual speech, fillers such as *ah* and *um* are perceived as signals that listeners should stay tuned while the speaker finds the right words. They increase listeners' attention because they anticipate an interesting or important remark following the filler. Yet in a prepared speech, such fillers suggest diffidence and unpreparedness. How fast a person speaks is related to fluency in language: a person who can speak fluently and rapidly is perceived as charismatic, but speaking too fast can indicate nervousness. Accents also affect perception, but not in universally understood ways. Some think people with foreign accents to be more intelligent. But generally, people perceive speakers with unfamiliar accents as being ill-educated and untrustworthy. But when a person with an accent speaks with an especially confident tone, the negative perceptions tend to diminish or disappear. • Should schoolchildren be taught standard English grammar? No, says Jane Hodson of the University of Sheffield, where she lectures in English language and literature. In an online argument in *The Conversation*, Hodson claimed that there is little purpose in learning Standard English grammar. She acknowledged that formal grammar is necessary for formal writing and for improving one's writing in a range of styles, but she argued that basic grammar is acquired from birth as an innate part of natural language and that "learning about [formal] grammar is about acquiring abstract terminology and a set of nitpicky (and occasionally outdated or simply invented) rules about 'correct' grammar." All this, she says, discourages children's interest in English. Without explaining why, Hodson noted that until the 18th century, educated people studied only Latin

grammar, and ancient Romans didn't study the rules of their own grammar. So that, she reasoned, is a reason not to study the rules of English grammar. She attacked the 18th-century grammarian Robert Lowth for introducing "the idea that incorrect grammar was a terrible social stigma" when he wrote in his preface: "The principal design of a grammar of any language is to teach us to express ourselves with propriety in that language." (Seems pretty anodyne.) • The *Daily Telegraph* (London) reported that Microsoft announced "Ideas," a new feature for Word to help writers avoid using sexist language. Ideas will identify gender-specific terms such as *policeman* and *manhole* and suggests gender-neutral alternatives such as *police officer* and *sewer cover*. • The *Guardian* (London) announced updates to its style guide to help writers use terms that will better depict the exigencies of the world's environmental crises. Katherine Viner, editor in chief, explained: "The phrase *climate change*, for example, sounds rather passive and gentle when what scientists are talking about is a catastrophe for humanity." Preferred alternatives are *climate emergency*, *climate crisis*, and *climate breakdown*. The *Guardian* also recommends *global heating* over *global warming*. Other updates include preferring *wildlife* over *biodiversity*, *fish populations* over *fish stocks*, and *climate-science denier* over *climate skeptic*. (Who's guarding the *Guardian*?)

## JUNE

A medical study suggested that Facebook "statuses" may help physicians as a diagnostic tool. Published in *PLOS ONE*, the study by researchers from Penn Medicine and Stony Brook University concluded that social-media posts often reveal a person's mental and physical state, lifestyle choices, and experiences. All of these might provide information relating to disease development and management. The linguistic cues are sometimes surprising. For example, people who use religious terms the most often are 15 times as likely to be susceptible to developing diabetes than people who rarely or never write about religion. People who often express hostility and overuse expletives are more likely to abuse drugs or suffer psychosis. The researchers plan a large-scale study in which participants will share their social-media posts directly with healthcare providers to learn whether the data might be medically useful. (Fewer doctor visits in the offing?) • *Nuntii Latini finite*. That was the headline for Finnish public radio's final weekly news bulletin in Latin. Begun humbly as a joke in 1989, *Nuntii Latini*, a five-minute review of world events, was broadcast every Friday immediately after the evening news. The show developed a loyal audience of at least 5,000 listeners in Finland, plus thousands more all over the world who listened by shortwave radio and the Internet. The

three Latin professors who founded the program relied on classical Latin's 92,502-word vocabulary plus later medieval additions; they avoided Latinate neologisms as much as possible. To adapt to the modern world, they compounded old forms: *acta diurna* for newspaper, *aeroplanum* for airplane, *interete* for internet, and *cursus electronicus* for e-mail. Hence they were able to use "pure" Latin while making it fresh and modern, drawing plaudits from aficionados around the world and contributing to the contemporary study of Latin. • The retirement of *Nuntii Latini* wasn't the end of newscasts in Latin. The Vatican announced in June that it was launching *Hebdomada Papae*, or the Pope's Week, a weekly news bulletin in Latin. • Researchers from Concordia University's Department of Education published a study in the *Journal of Research of Reading* in which they concluded that parents who have high reading-related knowledge are more likely to have children with higher reading scores. They are also more attentive when their children read aloud to them, thereby encouraging the children to read more. Bookish parents were found to praise children more and criticize them less than parents with lower reading-related knowledge. (Who might have guessed it?) • The U.S. Supreme Court struck down the longstanding ban against trademarks on "immoral" or "scandalous" words and symbols. Writing for the majority in *Iancu v. Brunetti*, Justice Kagan declared: "There are a great many immoral and scandalous ideas in the world (even more than there are swear words)," and that the trademark law covers them all. So the ban "violates the First Amendment." The justices unanimously agreed on that point, although three nonetheless dissented and stated that the ban should be upheld. In her dissent, Justice Sotomayor opined that the government will now have no choice but to register "the most vulgar, profane or obscene words and images imaginable." And Justice Breyer said that some words could even lead to physical altercations. "Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet." The U.S. Patent and Trademarks Office was reviewing the decision to bring its policies in line with it.

## JULY

On the basis of punctuation, a Florida lawyer claimed ownership of his former employer's law firm. After the lawyer was fired, he began holding himself out as the firm's true owner and filed for a professional association under the same name. He defended his actions by stating that he believed the firm was never a valid professional association because it had used "PA" instead of the properly punctuated "P.A." that he used. He argued that the lack of punctuation meant the original firm had never been validly formed, and therefore all

the firm's activities had been unlawful and even fraudulent. Unsurprisingly, he couldn't cite any authority to support his interpretations of Florida law. Noting the "total absence of legal (or rational) authority for Respondent's position," the Florida Supreme Court found that these actions — plus burglary of the firm's safe and computer server — supported the lawyer's permanent disbarment. • The *New York Times* reported on the influence that gradually legalizing marijuana is having on the language. Marketers want consumers to use the term *cannabis* because it's largely free of the negative connotations attached to *marijuana*, a word introduced from Spanish in 1874. Early 20th-century news articles suggested that marijuana caused Mexicans who smoked it to become violent. By the 1930s, slang terms for marijuana had entered mainstream culture: *pot*, *reefer*, *weed*, *dope*, *grass*, *loco weed*, and *tea* (all but the last two terms reappearing in the 1960s). In the 1970s, advocates of legalization began using *cannabis* to reduce the stigma, especially in view of the increasing acceptance of the plant for medicinal and recreational purposes. But the slang terms haven't diminished. If anything, they're proliferating as cannabis products increase, examples being *dabs* and *prerolls*. (Isn't that dank?) • Linguist Gretchen McCulloch published a book, *Because Internet*, in which she argues that the Internet is driving the English language to evolve. In an interview with NPR, she said: "The old rules are these top-down, 'here's how you use an apostrophe,' 'here's how you use a semicolon' type of thing. The new rules are about: How are other people going to interpret your tone of voice? . . . The old rules are about using language to demonstrate intellectual superiority, and the new rules are about using language to create connection between people." McCulloch suggested that many interpretive difficulties stem from the fact that people read Internet writing differently, depending on when they started going online. As examples, McCulloch claimed that the acronym LOL no longer stands for "laughing out loud," even though people who began using the Internet 20 or more years ago still use it as genuine laughter. Younger users see it as meaning "Oh, that's kind of funny," or as a marker of irony, softening, rudeness, or hostility, sometimes hinting at a mixed or double meaning.

## AUGUST

BBC News addressed the perceived rudeness of using a full stop in a text or instant message. As part of her book promotion, linguist Gretchen McCulloch said that the perception is widespread. "If you're a young person and you're sending a message to someone, the default way to break up your thoughts is to send each thought as a new message. Because the minimum thing necessary to send is the message itself, anything additional you include can take on an

additional interpretation.” McCulloch explained that in speech, a full stop ending a sentence is signaled by lowering one’s voice, which also connotes formality or seriousness. The gravity of the full stop, McCulloch said, “creates a sense of passive aggression.” Linguist Erika Darics said that distinguishing the use of a full stop as merely traditional or as an expression of annoyance depends on context: “If you and your friends don’t normally use full stops in a WhatsApp group, and then somebody does, they are probably trying to tell you something about how they feel.” • The *Del Mar Times* reported on the 2019 International Linguistics Olympiad, in which Wesley Zhang, a high-school student at Canyon Crest Academy in California, won a team gold medal and individual honors with his knack for languages. He was one of eight American students to qualify for the competition. Held in Yongin, South Korea, the competition included 209 participants from 36 countries and territories testing their ability to solve problems drawn from world languages. Zhang’s U.S. team won the team competition, in which 53 teams were given three hours to work out the rules of the notation system used by rhythmic-gymnastics judges. Zhang placed second overall in the individual contest, which was a six-hour exam featuring problems from the languages and scripts of Yonggom, Yurok, Book Pahlavi script, West Tarangan, and Noonii. • The National Trust (U.K.) sponsored a study of the language of nature and technology to determine how connected people are with nature. Researchers used software to search for terms in two databases containing transcribed conversations. One covered the 1990s, the other the 2010s. In the 1990s, *stream* almost always referred to “a little river,” but by the 2010s, (with *streaming video*) that literal meaning applied to only 36% of uses. And just 1% of the uses of *tweet* after 2010 had anything to do with birds. Dr. Robbie Love, a linguistics fellow at the University of Leeds, opined that people find it easier to visualize technological concepts when using nature-terms as metaphors. “*Stream* nicely describes the idea of information flowing into our devices — and without the word, it would be hard to describe this complex process.” Similarly, “We can see a cloud hanging above us, while *cloud computing* is harder to fathom.” Many parents and grandparents expressed concern about children’s losing the original meanings of words, especially because the study showed that in addition to having nature terms shifting to technological terms, single-meaning nature words, such as *lawn*, *twig*, *black-bird*, *fishing*, *paddle*, *sand*, *parw*, and *shell*, were all less frequently used by young people. A few, such as *bumblebee*, had all but disappeared. • The humble English pronoun sparked controversy in briefs were filed in the U.S. Supreme Court in *Harris Funeral Homes v. EEOC*, a civil-rights case about transgender discrimination. Aimee Stephens, a transgender woman, sued her

former employer, Harris Funeral Homes, for unlawful discrimination after she was fired for being transgender. Dozens of briefs supporting her used feminine pronouns throughout, as did the favorable intermediate appellate opinion. But the briefs filed by the funeral home and by the Department of Justice used no gendered pronouns at all to refer to the plaintiff, instead continually repeating her name. Harris declared: “Out of respect for Stephens and following this Court’s lead in *Farmer v. Brennan* . . . Harris [the funeral home] tries to avoid use of pronouns and sex-specific terms when referring to Stephens.” Stephens supporters complained that this convention betrayed a deep disrespect.

## SEPTEMBER

Can the definite article *the* be trademarked? What if it’s in all caps? Seeking to distinguish itself from other schools (such as Ohio University), Ohio State University began emphasizing that it’s THE [sic] Ohio State University on campus signage and logo-containing apparel. In August, the school filed an application to trademark the THE, claiming the language’s most common word as a distinctive mark for its clothing. The U.S. Patent and Trademark Office soon rejected the application, saying: “Registration is refused because the applied-for mark as used on the specimen of record is merely a decorative or ornamental feature of applicant’s clothing and, thus, does not function as a trademark.” • Is the phrase *you guys* sexist? Not according to linguist Allan Metcalf, in his book *The Life of Guy: The Gunpowder Plot, and the Unlikely History of an Indispensable Word*. British revulsion over Guy Fawke’s 1605 plot to blow up the House of Lords was memorialized in Parliament’s “Fifth of November Act.” That annual event featured bonfires to burn effigies of Fawkes, the Pope, and other public enemies. The continued vilification of the mock “Guys” eventually led to the term’s use for low-class men, then gradually to all men, and by the mid-1900s to all people regardless of gender. Over that long span, English’s second-person singular pronouns *thou* and *thee* fell from use, with *you* — formerly used only as a plural — becoming singular as well. Hence we now have, as unmistakable plurals, *you all*, *y’all*, and *you guys*. • The Poynter Institute for Media Studies reported that the Associated Press had tweaked its recent changes in style-manual guidance on hyphenating phrasal adjectives (see March) in the face of “linguistic pandemonium” felt by copyeditors. *AP Stylebook* editor Paula Froke said the reaction had stemmed from a misconception: “The updates we announced in March did not call for fewer hyphens or no hyphens in compound modifiers.” (Methinks it certainly called for fewer.) The new advice was that hyphens

aren't needed if "the modifier is commonly recognized as one phrase, and the meaning is clear and unambiguous without the hyphen." So go back to *first-quarter touchdown* instead of *first quarter touchdown*. In other words, they punted.

- Good Morning America reported on a petition demanding that the *Oxford English Dictionary* remove sexist terms for women. Maria Beatrice Giovanardi, a communications and marketing expert, typed *woman* into a search engine and she said she was bombarded with results for synonyms that included *bitch*, *piece*, *bit*, *mare*, *baggage*, *wench*, *petticoat*, *frail*, *bidly*, and more. Discovering that she was seeing content generated by Oxford University Press, she started a petition called "Change Oxford Dictionary's Sexist Definition of 'Woman.'" OUP responded that the content derives from the *Oxford Thesaurus of English* and the *Oxford Dictionary of English*, which "aim to cover contemporary English usage and are accessible online in a variety of formats." But Giovanardi persisted, and by the end of September she had gathered 30,000 signatures. (This isn't the first time people have rallied to pressure lexicographers.)
- Why do scam e-mails contain so many misspellings and grammatical errors? Cybersecurity expert Joseph Steinberg said in a blog post that it's all by design. He gave four reasons for these intentional "mistakes": (1) For scam e-mails that are supposedly sent by an individual rather than an institution, misspellings and grammatical errors make the e-mail seem more "authentic" and "believable." (2) Scammers with relevant words misspelled have a better chance of penetrating spam filters. (3) Because most recipients aren't so literate themselves, they may have a subconscious affinity for e-mails with minor errors. (4) The goal of a scammer is to make money — and the errors are designed to discourage responses from anyone who isn't sufficiently gullible to fall prey to the scam. So although errors may make the scammer appear dumb, they may actually be quite smart. (Steinberg missed #5: maybe they're actually stupid.)
- A child with an older brother is likely to experience delays in developing language skills, reported *Science Daily*. Although one might suppose a child with older siblings to have a more stimulating linguistic environment and therefore to acquire language skills faster, previous studies had concluded that an only child develops language skills faster than a child with an older sibling. The new study has narrowed those findings, establishing that children with older sisters develop language skills at the same pace as their older siblings. But children with older brothers lag in development by an average of two months. The scientists proposed two hypotheses. One is that elder sisters tend to talk more with their younger siblings than brothers do. The second is that elder sisters are less inclined to compete for parental attention.
- Merriam-Webster announced that it had added a new sense of *they* to its online dictionary — as a singular nonbinary pronoun. This usage

isn't new. In a letter from 1881, Emily Dickinson referred to an unnamed person with the pronouns *they*, *theirs*, and *themselves*. The M-W blog post noted that the singular *they* has now become acceptable for "a person whose gender isn't known or isn't important in the context" rather than just for a person who doesn't identify as male or female. So the new sense is indeed a novel extension. The M-W dictionaries now say that *they* can also be "used to refer to a single person whose gender identity is nonbinary."

## OCTOBER

Like many politicians, Peter Kyle MP is a frequent tweeter whose posts are picked on daily for spelling errors. Although many comments are gentle or humorous, some amount to outright bullying, including name-calling, with adjectives such as "thick." Kyle has struggled with acute dyslexia since childhood, when one teacher forced him to read Shakespeare aloud to the class "one painful word at a time." Despite leaving school with no qualifications, he enrolled in the University of Sussex, where he eventually earned a PhD. Kyle explained that dyslexia can feel like having a disconnect between the eyes and the brain. "Sometimes words are just shapes," he tweeted. "However much I try to engage my brain, the connection just isn't there. I can see the shape but it simply has no meaning. Frustrating, huh." Kyle said he doesn't have staff proofread his tweets because he prefers them to use their time doing "something valuable." • Scientists have long believed that one part of the brain (Broca's area) supports speaking and writing, while another (Wernicke's area) supports listening and reading. But Peter Hagoort, writing in the journal *Science*, observed that language comprehension and production are not so neatly or separately encapsulated in those areas, which share some functions. And these functions also extend to other regions of the brain. So the classical model of how the brain processes language needs to be modified, said Hagoort. Words are elementary building blocks of language, but comprehension requires context, intonation, world knowledge (such as what kind of work an editor does or where Argentina is located), and inferring a speaker's intention (a statement that a room is hot may actually be a request to open a window, not just a comment on the temperature). Neuroimaging studies show that receiving and processing such information takes place in multiple parts of the brain, not just Broca's and Wernicke's areas. Hagoort proposes a new model of the language-ready brain in which it is viewed as having an extensive network of areas and in which some language operations might be shared with other cognitive domains, such as music and arithmetic. (Seems like a no-brainer.) • A Canadian study reported in *JAMA* concluded that

limited fluency in the predominant language might impede a medical patient's recovery. Over eight years, researchers compared two types of patients hospitalized with acute conditions (such as pneumonia or broken bones) and long-term conditions (such as COPD or cardiac diseases): (1) those with limited language proficiency, and (2) those who were linguistically proficient. Patients with limited English were 32% more likely to visit the ER again within a month and 32-51% more likely to be readmitted. Dr. Shail Rawal, the lead researcher, said: "We think that challenges with communication in a hospital and after discharge play a large role in our findings. The care of patients with complex chronic diseases requires clear communication between patients, caregivers, and clinicians during hospitalization, in the transition home, and in the community." • Legislators in Maine wanted vanity license plates to be screened before being issued. The *Portland Press Herald* reported that this type of screening was largely halted in 2015 because of free-speech issues, and now the only plates rejected or recalled are those considered likely to incite violence or expressing racial slurs. Although many citizens have complained about vanity plates with expletives and other offensive language, the Maine Legislative Council rejected the screening bills for the 2020 legislative session. • The American Psychological Association announced that the new 7th edition of its Publication Manual would sanction the use of *they* as a singular third-person pronoun. The APA's blog post said that it is now "officially good practice in scholarly writing to use the singular *they*." Experts in sexual orientation and gender diversity drafted the APA's bias-free language guidelines for writing about gender, including guidance for the singular *they*, which they say should be used in two main instances: (1) when referring to a generic person whose gender is unknown or irrelevant to the context, and (2) when referring to a specific, known person whose preferred pronoun is *they*.

## NOVEMBER

The phrase *climate emergency* was named Oxford Dictionaries' 2019 "word" of the year. According to OUP data, use of that term was up 10,789% over 2018. Oxford defines *climate emergency* as "a situation in which urgent action is required to reduce or halt climate change and avoid potentially irreversible environmental damage resulting from it." Also on the environment-oriented shortlist: *climate action*, *climate denial*, and *eco-anxiety*. Katherine Connor Martin, an editor at Oxford Dictionaries, said that the word of the year "reflects . . . a real preoccupation of the English-speaking world in 2019." (Take *that*, climate-change deniers!) • "Bad writing does not normally warrant sanctions, but we draw the line at gibberish," declared the U.S. Court of

Appeals for the Seventh Circuit. Diane S. Sykes, Michael Y. Scudder, and Amy J. St. Eve JJ., sanctioned a lawyer for permitting his client to submit an “incoherent” brief of “86 interminable pages” in a frivolous appeal. The brief was replete with impenetrable arguments and unsupported assertions, lacking any scintilla of logical organization. The court called the brief “a typographical nightmare” that “uses five different fonts and various font sizes, including three different fonts in one sentence, and capitalizes words seemingly at random.” When questioned by the court about his abysmal briefing, the lawyer admitted he hadn’t examined the lower-court record and claimed he hadn’t had time to write a proper appellate brief. Writing for the court, Judge Sykes noted that the lawyer was a solo practitioner who tried to get the help of clients and others and then merged all that information into one document. “Whatever that means,” the court wrote, “it in no way excuses this unprofessional conduct.” • The *Journal of Neuroscience* published a brain-imaging study that sought to determine whether the same or adjacent neural circuits respond to reading and speech. The researchers placed study participants inside functioning MRI machines while they read a story and then listened to it, or listened to a story and then read it. The MRI created a detailed map of each participant’s brain activity. After discounting for the brain’s sensory areas that process sight and sound, the maps indicated that the neural circuits responding to reading or listening were almost identical. This was said to be the first study to use stories rather than single words to stimulate brain activity to determine the neural circuits involved. • Reflecting on pronominal issues and the singular *they*, the *New York Times* ran a historical piece on 17th-century Quakers, who found that the rules of grammar didn’t work well with a society of equals. When the Quaker movement began in the 1650s, people of high authority or social rank customarily referred to themselves with plural pronouns, not singular — and civility required others to refer to them with those plural pronouns. *You* was considered plural (or high-status); the singular equivalents were *thee* and *thou*. To Quakers, equality meant a humble, universally low status: the Quakers’ founder, George Fox, explained that “[God] forbade me to put off my hat to any, high or low; and I was required to *thee* and *thou* all men and women, without any respect to rich or poor, great or small.” This was perceived as conscientious disrespect of everyone, which led to Quakers’ being ridiculed and persecuted. At the same time as the Quakers rejected the high-status *you*, increasing social and geographic mobility was causing pronouns to level upward — the plural *you* had begun to displace the singular *thee* even for those of low social stations. The Quakers rejected the universal *you* as signifying the sin of pride and, when used of individuals, a form of idolatry. For more than two centuries,

the Quakers would argue that *thee* and *thou* were grammatically and theologically (not to say politically) correct. Not until early in the 20th century did the Quakers finally accept *you* as both a singular and plural pronoun. (Shall I compare *thee* to the singular *they*?)

## DECEMBER

Merriam-Webster chose the word *they* as its word of the year for 2019, saying that lookups increased by 313% over 2018. Although *they* has been sporadically used for hundreds of years as a gender-neutral singular pronoun to correspond with singular pronouns such as *everyone* or *someone*, the grammatical consensus hardened against it in the 18th and 19th centuries. Today it has begun to be used in another sense. *They* now also refers to a person whose gender identity is neither male nor female. Merriam-Webster pointed out that the American Psychological Association — in the new 7th edition of its Publication Manual — officially recommended that singular *they* be preferred in professional writing over *he* or *she* when referring to a person of unknown gender or to a person who explicitly prefers the pronoun *they*. The other top lookups in 2019 were *quid pro quo*, *impeach*, *crowdad*, *snitty*, and *tergiversation*. (Isn't progress wonderful?) • A few months after the Scripps National Spelling Bee ended in an eight-way tie (see May), Scripps announced reforms to the competition, first by reducing the number of wildcard participants. The 2020 Bee will have roughly 140 wildcard entrants, down from nearly 300 in 2019. Those wildcard places will be available only to seventh and eighth graders, not younger students (as in the past). Paige Kimble, the Bee's executive director, said: "We will present a competition that is challenging and that also honors the achievement of these spellers who have worked so very hard to master the ins and outs of the English language. Our focus more than anything else is on celebrating that achievement." • CNBC reported that Elon Musk was sued in a Los Angeles federal court for defamation after calling British spelunker Vernon Unsworth "pedo guy" in a tweet. Musk argued that the phrase was 1980s South African slang unrelated to pedophilia. He testified: "*Pedo guy* is used in other countries also. It's quite common in the English-speaking world. I'm quite confident if you do a search, it will just say 'creepy old dude.'" But research didn't substantiate Musk's claims. According to *Slate*, most of Musk's 1980s contemporaries had never heard the phrase *pedo guy* but did associate *pedo* with pedophiles. And a South African website, *The Outline*, unequivocally declared: "No, *Pedo Guy* is not a harmless South African slang term. . . . It means a guy who is a pedophile!" It found no evidence that the term was ever in common use anywhere. Musk apologized to Un-

sworth and said he did not believe the cave explorer was a pedophile. In closing arguments, Musk's lawyer implored the court not to police Internet speech and characterized Musk's offensive tweets as merely insulting and not statements of fact. The court ruled in Musk's favor. • The Commission to Examine Racial Inequity in Virginia Law, created in June by Governor Ralph Northam, completed its review of discriminatory language in Virginia statutes enacted between 1900 and 1960. The task force — which included lawyers, law professors, scholars, judges, and state officials — reported on 98 laws that it recommended for repeal in 2020. Many of the laws stem from Virginia's past practices of segregation, including Jim Crow laws; laws designed to evade federal mandates to integrate schools, transportation, and neighborhoods; statutes forbidding interracial marriage; and a poll tax designed to prevent black Virginians from voting. Some of the laws had been overturned or long unenforced, but the governor stated that the discriminatory and racist language still needed to be formally repealed "because words matter, and so do actions." (Who knew?) • The Common Core education standards dropped cursive writing in 2010, and so did many schools. Today, reported *The Press* (N.J.), seven states still require teaching cursive in grade school, and New Jersey's legislature is considering joining them. Although studies suggest that students can process and retain information better when they handwrite notes, *The Press* was skeptical that compulsory cursive would produce significant benefits over printing and argued against teaching the skill. It opined that printed documents are faster to read and that a printed signature is just as good as a cursive one because the law requires only a distinctive mark that the signer attests to. Further, learning and writing cursive requires time and practice that *The Press* argued could be better used for other subjects, such as science, math, and reading — not to mention texting and video games. • The BBC reported on the politics underlying the English-only movement in the United States and its goal of restricting the use of Spanish. One prominent group, ProEnglish, has been classified by the Southern Poverty Law Center as a hate group — a designation based on an organization's official statements or principles, the statements of its leaders, or its activities or practices that attack or malign an entire class of people. ProEnglish advocates making English the official language of the United States, declaring: "In a pluralistic nation such as ours, the function of government should be to foster and support the similarities that unite us, rather than institutionalize the differences that divide us." ProEnglish seeks to eliminate bilingual education from public schools and replace it with language-immersion programs. But Professor Geoffrey Pullum of the University of Edinburgh warned that empirical studies don't support the ProEnglish posi-

tion: “It has been found through careful testing that accepting bilingualism or bidialectalism in the classroom, and transitioning students gently toward the standard language or dialect, works better, much better, than proscribing rival languages or dialects.” • A study published in the *British Medical Journal* suggested that male scientists are more likely to frame their work in words having positive connotations. The study analyzed 6 million papers published in peer-reviewed journals, looking for 25 specific words, including *first*, *novel*, *excellent*, *unique*, *promising*, and *remarkable*, that were used to cast the findings as highly significant. Papers with male lead authors used positive framing 21% more often than those with female lead authors. And papers with positive framing were cited 13% more often. The study concluded that this difference in language might contribute to the fact that women in the sciences tend to receive fewer promotions, earn lower salaries, and receive fewer research grants than their male counterparts. Rosemary Morgan, of the Johns Hopkins Bloomberg School of Public Health in Baltimore, commented on the study’s findings: “Male researchers are more likely to describe their work as groundbreaking or novel compared to female research not because men are more confident than women, but because women are penalized when they demonstrate typical ‘masculine’ traits like assertiveness.” She suggested that journals could make the wording of published papers gender-neutral by creating strict criteria that research must meet for scientists to describe their work as *first* or *novel* or use other common superlatives. • After 18 years, the Apostrophe Protection Society is no more, reported the *Washington Post* and BBC News. The society’s founder, John Richards, 96, had worked hard to defend the “much-abused punctuation mark,” as seen in advertisements for “ladies fashions” or claiming that “Diamond’s are forever.” The society’s closure piqued renewed interest in apostrophes and their use: Traffic to the society’s website increased 600-fold, and many people left messages about their own apostrophe woes. All the renewed interested prompted Richards to say he might return to campaigning for improved punctuation.





*Rakesh Kilaru, Kristi Pearson & Brian Quinn<sup>†</sup>*

# THE YEAR IN LAW

2018-2019

## NOVEMBER 2018

**November 1:** Neomi Rao, the Administrator of the Office of Information and Regulatory Affairs and a candidate for a vacant seat on the U.S. Court of Appeals for the D.C. Circuit, celebrates the Trump Administration’s regulatory reforms, suggesting the Administration has helped stop the “steady expansion of the regulatory state.”

**November 2:** The U.S. Supreme Court grants certiorari in *The American Legion v. American Humanist Association*, a case involving an Establishment Clause challenge to the Bladensburg Cross, also known as the “peace cross,” which commemorates soldiers from Washington, DC who died in World War I.

**November 5:** The Trump Administration asks the Supreme Court to grant immediate review of several cases pending in courts of appeals involving challenges to the Administration’s decision to wind down the “Deferred Action for Childhood Arrivals” program, established during the Obama Administration, which allows undocumented immigrants who came to the United States as children to apply for protection from deportation. • Adidas and Reebok file a lawsuit in the U.S. District Court for the Southern Dis-

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trict of Florida against hundreds of online retailers selling counterfeit versions of sportswear designed by Kanye West.

**November 6:** President Donald Trump nominates A.B. Culvahouse Jr., the former Chair of O'Melveny & Myers and former White House Counsel to President Reagan, as ambassador to Australia. • Jeff Sessions resigns as Attorney General. In a tweet, President Trump announces that Matthew Whitaker, Sessions's chief of staff, will fill in as acting Attorney General. • In a rare mid-term election split, Democrats seize control of the U.S. House of Representatives after picking up a net of 40 seats, while Republicans retain control of the Senate and pick up a net of two seats.

**November 7:** Rudolph Giuliani, the former New York City mayor now serving on President Trump's legal team, appears in Manhattan court for proceedings in his third divorce.

**November 8:** The Supreme Court announces that Justice Ruth Bader Ginsburg was admitted to George Washington University Hospital after breaking three ribs in a fall in her chambers. • The U.S. Court of Appeals for the Ninth Circuit issues its decision in *Regents of the University of California v. U.S. Department of Homeland Security*, blocking the Trump Administration's decision to wind down the "Deferred Action for Childhood Arrivals" program. Judge Kim Wardlaw pens the opinion, which is joined by Judges Jacqueline Nguyen and John Owens (see Nov. 5 entry).

**November 9:** The Supreme Court announces that Justice Ginsburg has been released from George Washington University Hospital after being treated for broken ribs, and will work from home for the day.

**November 13:** Jones Day announces that it has hired 11 Supreme Court law clerks from the October 2017 Term, beating its own previous record for clerks hired in one year. The firm will shell out \$4.4 million in signing bonuses as a result. • Maryland Attorney General Brian E. Frosh files a lawsuit in the U.S. District Court for the District of Maryland challenging Matthew Whitaker's appointment as acting Attorney General, claiming that the appointment is unconstitutional (see Nov. 6 entry). • President Trump appoints Neomi Rao, the Administrator of the Office of Information and Regulatory Affairs, to the seat on the U.S. Court of Appeals for the D.C. Circuit vacated by Justice Brett Kavanaugh (see Nov. 1 entry).

**November 14:** Emory University School of Law places Professor Paul Zwier on leave after he allegedly uses the "N-word" in a conversation with an African-American student. Zwier previously had been disciplined for using the term in a class.

**November 19:** Senators Richard Blumenthal (D-CT), Sheldon Whitehouse (D-RI), and Mazie Hirono (D-HI) file a lawsuit in the U.S. District Court for the District of Columbia challenging Matthew Whitaker's appointment as acting Attorney General, asserting that he is ineligible to assume the post because he was never confirmed by the Senate (see Nov. 13 entry).

**November 20:** Judge Jesse Furman of the U.S. District Court for the Southern District of New York rebuffs the Trump Administration's effort to delay a lawsuit challenging Secretary of Commerce Wilbur Ross's decision to add a question about citizenship to the 2020 census questionnaire. Judge Furman asserts that the government's motion "makes so little sense, even on its own terms, that it is hard to understand as anything but an attempt to avoid a timely decision on the merits altogether." • Judge Jon Tigar of the U.S. District Court for the Northern District of California issues a temporary restraining order blocking the Trump Administration from denying asylum to immigrants who enter the United States unlawfully from Mexico. Tigar observes that "[w]hatever the scope of the President's authority, he may not rewrite the immigration laws to impose a condition that Congress has expressly forbidden."

**November 21:** During the traditional turkey pardon, President Trump pardons two turkeys from South Dakota named Peas and Carrots, but then jokes that "House Democrats are likely to issue them both subpoenas" and that their pardons might be "enjoined by the Ninth Circuit." • Chief Justice John Roberts issues a statement that "[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges," after President Trump criticizes Judge Tigar, who temporarily blocked a Trump Administration immigration rule, as an "Obama judge." The Chief Justice's statement prompts several tweets by President Trump stating that "Obama judges . . . have a much different point of view than the people who are charged with the safety of our country" (see Nov. 20 entry).

**November 25:** Judge Randolph D. Moss of the U.S. District Court for the District of Columbia denies George Papadopoulos's motion to delay his surrender date for a 14-day prison term. Papadopoulos was convicted of making false statements to the FBI in connection with Special Counsel Robert Mueller's investigation into Russian interference in the 2016 presidential election, and asked for a stay of surrender pending the D.C. Circuit's resolution of a case challenging the lawfulness of Mueller's appointment.

**November 26:** Judge Richard Leon of the U.S. District Court for the District of Columbia dismisses an unfair competition lawsuit brought by Cork Wine Bar in Washington, DC. The lawsuit claimed that President Trump

was leveraging his office to attract customers to the Trump International Hotel who otherwise would have tipped at Cork. • In a published interview, Bill Cosby says that he does not expect to express remorse at any future parole hearing, stating that he would rather serve his entire ten-year sentence for sexual assault than admit to wrongdoing that he denies. Cosby reports that while in prison, he is working to help other inmates through the prison reform program “Mann Up.”

**November 27:** The U.S. Court of Appeals for the Third Circuit issues its decision in *United States v. Baroni*, upholding five convictions but invalidating two others in prosecutions connected to the “Bridgegate” scandal in New Jersey. • The North Carolina State Board of Elections refuses to certify the validity of the election of GOP candidate Mark Harris in the Ninth Congressional District, after Democrats allege election fraud in the form of tampering with absentee ballots. Harris associate Leslie McCrae Dowless will later be indicted in February 2019 on three felony charges of obstruction of justice, two charges of conspiracy to commit obstruction of justice, and two charges of possession of an absentee ballot.

**November 29:** Deputy Attorney General Rod Rosenstein announces revised “compromising and closing” policies that allow prosecutors to give more credit to companies that cooperate in civil cases.

**November 30:** Two lawyers, Harry Bell and Edward Claffy, file a class action lawsuit against Marriott just hours after it announces a massive data breach that began in 2014. • Eighteen law firms send a letter to the Supreme Court complaining that its proposed rules shortening the length of briefs will harm their ability to “thoroughly and thoughtfully brief issues” before the Court. • President Trump, Mexican President Enrique Peña Nieto, and Canadian Prime Minister Justin Trudeau sign a new U.S.-Mexico-Canada Agreement, or USMCA, at the G20 Summit in Argentina. If ratified, the USMCA will make a variety of significant changes to 1994’s NAFTA.

## DECEMBER 2018

**December 3:** Indiana University’s Maurer School of Law announces that it has launched a Title IX investigation into Ian Samuel, a law professor who is publicly credited with starting a movement against mandatory arbitration in law firm employment contracts.

**December 6:** The U.S. Court of Appeals for the D.C. Circuit hears oral argument in *USA v. AT&T Inc.*, an appeal of a district court decision rejecting an antitrust challenge to AT&T Inc.’s acquisition of Time Warner Inc. Re-

ports suggest that the panel is skeptical of the government's arguments for reversal.

**December 7:** The Judicial Panel on Multidistrict Litigation refuses to create a separate MDL proceeding for claims by opioid-addicted babies, concluding it would have “substantial overlap” with the broader opioid MDL created a year earlier. • The Supreme Court of Virginia issues its decision in *Bergano v. Virginia Beach*, holding that the City of Virginia Beach must provide more information about the legal fees it incurred in litigating against a dentist who was a former tenant of an office building purchased by the city. Citing the attorney-client and work-product exceptions, Virginia Beach had redacted large portions of the records it disclosed. • Kirkland & Ellis announces that non-attorney employees will no longer be required to sign mandatory arbitration agreements — the latest firm to do so amidst a campaign by law students against the practice (see Dec. 3 entry). • President Trump announces that he will nominate former Attorney General William Barr to serve for a second time as Attorney General. Barr previously served as Attorney General from 1991 to 1993 under President George H.W. Bush.

**December 10:** The Supreme Court grants certiorari in *Kisor v. Wilkie*, in which the petitioner asks the Court to overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which require courts to defer to an agency's reasonable interpretation of an ambiguous regulation. • Justice Clarence Thomas, joined by Justices Samuel Alito and Neil Gorsuch, dissents from the Court's denial of certiorari in *Gee v. Planned Parenthood of Gulf Coast, Inc.*, a case presenting the question whether Medicaid recipients can challenge a State's determination of which providers are “qualified.” Justice Thomas suggests that the Court's “refusal to do its job . . . has something to do with the fact that some respondents in these cases are named ‘Planned Parenthood.’”

**December 12:** Judge William Pauley III of the U.S. District Court for the Southern District of New York sentences Michael Cohen, President Trump's former lawyer, to three years in prison in connection with his guilty plea to various criminal charges, including one count of making an excessive campaign contribution to then-candidate Trump for purposes of influencing the election.

**December 13:** Chief Justice Tani Cantil-Sakauye of the California Supreme Court re-registers as a no-party preference voter, giving up her Republican registration in reaction to the confirmation hearings for U.S. Supreme Court nominee Brett Kavanaugh. • Maria Butina, who attempted to infiltrate conservative political groups in the United States, pleads guilty, as part of her

cooperation with federal prosecutors, to conspiring to act as an unregistered foreign agent of Russia within the United States.

**December 14:** Former Ninth Circuit Judge Alex Kozinski, who retired amidst widespread allegations of sexual misconduct, returns to the U.S. Court of Appeals for the Ninth Circuit to present oral argument in *Zindel v. Fox Searchlight Pictures*. Kozinski argues that the film “The Shape of Water” copied a play written by Paul Zindel, the father of Kozinski’s client, David Zindel. • The U.S. Court of Appeals for the D.C. Circuit locks down an entire floor of the courthouse to hear oral argument in a lawsuit challenging a grand jury subpoena presumed to have been issued in connection with Special Counsel Robert Mueller’s investigation into Russian interference in the 2016 presidential election.

**December 18:** Judge Claudia Wilken of the U.S. District Court for the Northern District of California hears closing arguments in *In re NCAA Grant-in-Aid Antitrust Litigation*, an antitrust lawsuit involving challenges, by current and former college football and basketball student athletes, to NCAA rules limiting the level of athletics-based financial aid and benefits that student athletes may receive. • The Judicial Council of the Tenth Circuit dismisses 83 charges of misconduct filed against Justice Kavanaugh based on his comments and conduct during his confirmation hearing, concluding that Justice Kavanaugh is no longer subject to the Judicial Conduct and Disability Act. • The U.S. Court of Appeals for the D.C. Circuit issues its ruling in *Electronic Privacy Information Center v. IRS*, holding that members of the public cannot use FOIA to obtain other individuals’ tax records without their consent, and dismissing a lawsuit seeking President Trump’s income tax records.

**December 19:** Judge Tigar issues a final ruling blocking the Trump Administration from denying asylum to immigrants who enter the United States unlawfully from Mexico (see Nov. 20 entry). • District of Columbia Attorney General Karl Racine files a lawsuit against Facebook, alleging that it failed to safeguard the personal data of its users and permitted Cambridge Analytica to access information of up to 87 million users.

**December 20:** William Barr, President Trump’s nominee for Attorney General, submits to Congress a June 2018 letter he sent to Deputy Attorney General Rod Rosenstein criticizing Special Counsel Robert Mueller’s investigation into possible obstruction of justice by President Trump (see Dec. 7 entry).

**December 21:** The U.S. Department of Justice announces that it recovered over \$2.8 billion in settlements and judgments from civil cases under the False Claims Act during fiscal year 2018. The government asserts that it has recovered over \$59 billion since Congress amended the Act in 1986. • By a 5-4 vote, the Supreme Court denies the Department of Justice's application for a stay of a federal district court's ruling blocking the Trump Administration from denying asylum to immigrants who enter the United States unlawfully from Mexico. Chief Justice Roberts joins the Court's four more liberal Justices in denying the stay (see Dec. 19 entry). • Justice Ginsburg undergoes surgery for the removal of two malignant nodules in her left lung.

**December 27:** Marquette University Law School suspends Paul Secunda, a professor of labor and employment law, pending an investigation into allegations of an inappropriate relationship with a student.

**December 28:** Judge John Bates of the U.S. District Court for the District of Columbia declines to stay proceedings in *New York v. United States Department of Labor* in light of the government shutdown. Bates notes that while the Department of Justice is affected by the shutdown, the Department of Labor, which is responsible for compiling the record, has full funding. The lawsuit involves a challenge to new rules issued by the Trump Administration that would allow small businesses to offer "association health plans." • Speaker of the House of Representatives Nancy Pelosi selects Douglas Letter, a veteran of the Department of Justice, to be the House General Counsel. • Wells Fargo announces a \$575 million settlement with the 50 states and the District of Columbia in suits alleging unfair trade practices, including the opening of unauthorized accounts.

**December 30:** Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas issues a stay pending appeal of his decision in *Texas v. United States*, in which he ruled that the individual mandate in the Affordable Care Act is unconstitutional and that, as a result, the entire law must be struck down.

**December 31:** In his annual year-end report on the federal judiciary, Chief Justice Roberts endorses the recommendations of the Federal Judiciary Workplace Conduct Working Group, organized to determine whether sufficient protections against inappropriate conduct exist for law clerks and judiciary employees. Roberts adds that "the job is not done" in securing "the exemplary workplace that we all want."

JANUARY 2019

**January 3:** The Supreme Court announces that Justice Alito is no longer recused in *Rimini Street, Inc. v. Oracle USA Inc.*, a case regarding which costs can be assessed under the Copyright Act — marking his ninth “unrecusal” as a Justice.

**January 4:** The Supreme Court grants review in *Iancu v. Brunetti*, a case presenting a challenge to the U.S. Patent and Trademark Office’s ban on “scandalous” and “immoral” trademarks. Eric Brunetti, an artist and entrepreneur who launched the clothing line “FUCTION,” brought the challenge. • The Supreme Court grants review in *Rucho v. Common Cause* and *Lamone v. Benisek*, cases presenting challenges to alleged partisan gerrymandering in North Carolina and Maryland. • Judge Vince Chhabria of the U.S. District Court for the Northern District of California publishes an editorial in the *National Law Journal* arguing that judges should adopt a “Rooney Rule” for law clerks — drawing an analogy to the NFL’s requirement that teams interview at least one minority candidate for head coach and general manager positions.

**January 7:** The federal judiciary announces that it will run out of funds to sustain paid operations on January 18 as a result of the partial government shutdown. • Justice Ginsburg, recovering from lung cancer surgery, misses oral argument for the first time in her 25 years on the Supreme Court (see Dec. 21 entry).

**January 8:** The Supreme Court denies a request for stay of enforcement from a foreign-owned corporation challenging a grand jury subpoena presumed to have been issued in connection with Special Counsel Robert Mueller’s investigation into Russian interference in the 2016 presidential election (see Dec. 14 entry). • Justice Kavanaugh issues his first majority opinion as a member of the Supreme Court in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, holding that federal courts cannot set aside contractual clauses delegating issues of arbitrability to an arbitrator on the grounds that the arguments in favor of arbitrability are “wholly groundless.” The opinion is unanimous.

**January 11:** The Supreme Court announces that Justice Ginsburg is “on track” in her recovery from cancer surgery (see Jan. 7 entry).

**January 14:** The Supreme Court denies review in *State National Bank v. Mnuchin*, a challenge to the constitutionality of the Consumer Financial Protection Bureau’s single-director structure. Justice Kavanaugh recuses himself from the decision.

**January 15:** The federal judiciary announces that it can sustain paid operations through January 25, marking a one-week extension of its predicted timeline for running out of funds as a result of the partial government shutdown (see Jan. 7 entry). • Judge Furman issues an opinion precluding Secretary of Commerce Ross from adding a question about citizenship to the 2020 census questionnaire (see Nov. 20 entry).

**January 17:** The Missouri Supreme Court temporarily stays an upcoming 13-plaintiff trial involving allegations that Johnson & Johnson's talcum powder products caused them to develop ovarian cancer. Johnson & Johnson's petition for a writ of prohibition to stay the trial claimed that it was improper to have a multi-plaintiff trial, including on the basis that 12 of the 13 plaintiffs do not belong in the trial venue.

**January 22:** The Supreme Court grants review in *N.Y. State Rifle & Pistol v. New York*, a case involving a Second Amendment challenge to New York City's ban on transporting licensed, locked, and unloaded handguns outside city limits. The case represents the first major firearms controversy to receive full Court scrutiny in several years. • In a 5-4 vote, the Supreme Court grants the Trump Administration's request to permit its ban on military service by most transgender individuals to go into effect while challenges to the ban work their way through the lower courts. • The federal judiciary announces a further extension of paid operations through January 31, marking another extension of its predicted timeline for running out of funds as a result of the partial government shutdown (see Jan. 15 entry).

**January 25:** Judge James Burke of the Manhattan Supreme Court authorizes attorney Benjamin Brafman to withdraw as counsel for Harvey Weinstein in his high-profile criminal prosecution for sexual assault. • Several retired federal judges, including Richard Posner, formerly of the U.S. Court of Appeals for the Seventh Circuit, file an amicus brief in a class action challenging PACER fees, arguing that charging for access to court records harms the federal judiciary's credibility. • Prosecutors in the U.S. District Court for the District of Columbia indict political consultant and Trump campaign official Roger Stone for obstruction of justice in connection with ongoing investigations into Russian interference with the 2016 presidential election.

**January 28:** Judge Leonard Stark of the U.S. District Court for the District of Delaware invalidates three patents owned by MorphoSys for lack of enablement, permitting Janssen Biotech to continue to market Darzalex, a cancer drug worth approximately \$2 billion a year. • Chief Judge Thomas Thrash Jr., of the U.S. District Court for the Northern District of Georgia, allows

lawsuits to proceed against Equifax in connection with a 2017 data breach that affected over 100 million consumers.

**January 31:** President Trump nominates Daniel P. Collins, Kenneth Kiyul Lee, and Daniel A. Bress to seats on the U.S. Court of Appeals for the Ninth Circuit, in the face of opposition from the nominees' home state Senators, Dianne Feinstein (D-CA) and Kamala Harris (D-CA).

## FEBRUARY 2019

**February 1:** The website *Big League Politics* posts pictures from Virginia Governor Ralph Northam's medical school yearbook, which depict a person alleged to be Northam in blackface, as well as another person wearing a Ku Klux Klan hood. Northam apologizes for appearing in the blackface photos. Separately, Northam's 1981 yearbook from the Virginia Military Institute lists "Coonman" as one of Northam's nicknames, which is believed to be a racial slur.

**February 2:** In a reversal, Governor Northam states that he was not the person depicted in blackface in his medical school yearbook, but admits to having worn blackface around the same time, and that other people used the nickname "Coonman" for him (see previous entry).

**February 3:** As Justin Fairfax, Lieutenant Governor of Virginia, is predicted to rise to the Virginia governorship in light of the Northam scandal, *Big League Politics* reports accusations that Fairfax assaulted Vanessa Tyson, an associate professor at Scripps College and a fellow at Stanford University, at the 2004 Democratic National Convention in Boston. Fairfax denies the allegations, suggesting that political rivals are behind them. Tyson goes public with her allegations a few days later, stating she is a Democrat with no political agenda.

**February 5:** Neomi Rao, President Trump's nominee to replace Justice Kavanaugh on the U.S. Court of Appeals for the D.C. Circuit, tells the Senate Judiciary Committee that some of her college newspaper opinion pieces make her "cringe" in retrospect (see Nov. 13 entry).

**February 6:** Stanford Law School names Jenny Martinez, a professor on the faculty since 2003, as its new dean. Martinez succeeds Elizabeth Magill, who stepped down to become provost of the University of Virginia. • Virginia Attorney General Mark Herring acknowledges that he wore blackface at a 1980 party, making him the third senior Virginia government official to become embroiled in scandal in the last month. Herring is third in line to lead the Commonwealth after Governor Northam (also involved in a black-

face scandal) and Lieutenant Governor Fairfax (accused of sexual assault) (see Feb. 1 and Feb. 3 entries.)

**February 7:** The Supreme Court stays a decision by the U.S. Court of Appeals for the Fifth Circuit upholding Louisiana's admitting-privileges requirement for doctors who perform abortions. The Court struck down a similar Louisiana law in 2016. The decision on the stay is 5-4, with Chief Justice Roberts joining the Court's more liberal Justices in the majority and Justice Kavanaugh authoring the dissent. • In a 5-4 decision, the Supreme Court denies a stay of the execution of Domineque Hakim Ray, a Muslim man convicted of murder who challenged Alabama's decision to exclude a Muslim imam from the execution chamber. Justice Elena Kagan dissents, calling the Court's decision "profoundly wrong" because Alabama would have permitted a Christian prisoner to have a minister accompany him into the execution chamber.

**February 8:** Meredith Watson accuses Virginia Lieutenant Governor Justin Fairfax of raping her in 2000 at Duke University. She is the second accuser to come forward against Fairfax within a week. Fairfax denies the allegations. In response, Morrison & Foerster announces that it has retained outside counsel to conduct an investigation into allegations of sexual assault against Fairfax, a partner in the firm (see Feb. 6 entry). As of the publication of this piece, Northam, Fairfax, and Herring all remain in their roles in the Virginia government.

**February 12:** Anna McNeil, Eliana Singer, and Ry Walker, female undergraduate students at Yale University, file a lawsuit against the school in the U.S. District Court for the District of Connecticut, claiming the university knew about widespread sexual harassment at nine fraternities and did nothing in response. • The Supreme Court declines to stay the execution of Christopher Lee Price, a death-row inmate in Alabama. Justice Stephen Breyer, joined by Justices Ginsburg, Sonia Sotomayor, and Kagan, dissents, claiming that the Court's handling of the case eliminates any "doubt that death sentences in the United States can be carried out in an arbitrary way." Justice Breyer's dissent notes that there was undisputed evidence that the method of execution would cause Price severe pain and suffering; the Eleventh Circuit rejected Price's unchallenged evidence of another, more humane method of execution because it came in the form of a preliminary draft report; a final version of the report became available; the Eleventh Circuit refused to consider the new evidence; and the Court refused to stay the execution by 30 days to allow consideration of the issues presented by Price's request for review. The opinion concludes, "To proceed in this matter in the

middle of the night without giving all Members of the Court the opportunity for discussion tomorrow morning is, I believe, unfortunate.”

**February 13:** Senators Chuck Grassley (R-IA), John Cornyn (R-TX), Thom Tillis (R-NC), and Ben Sasse (R-NE) reintroduce the Litigation Funding Transparency Act, a bill that would require plaintiffs to disclose any third-party funding sources for litigation. • In public remarks at Belmont University College of Law, Chief Justice Roberts asserts that he is “probably the most aggressive defender of the First Amendment” on the Supreme Court.

**February 14:** The Senate confirms William Barr as Attorney General by a 54-45 vote (see Dec. 20 entry).

**February 15:** The Supreme Court grants review in *Department of Commerce v. New York*, a challenge to Secretary of Commerce Wilbur Ross’s decision to reinstate a question about citizenship on the 2020 census questionnaire (see Jan. 15 entry).

**February 16:** NeoPollard Interactive LLC and Pollard Banknote Limited, companies that help facilitate New Hampshire’s “iLottery” mobile lottery gaming platform, sue the Department of Justice in the U.S. District Court for the District of New Hampshire, challenging a 2018 opinion issued by the Department’s Office of Legal Counsel reinterpreting the federal Wire Act to prohibit gambling on all types of games, rather than just sporting events.

**February 19:** Justice Ginsburg returns to the Supreme Court bench for oral arguments in *Return Mail Inc. v. U.S. Postal Service* after being sidelined for over a month while recovering from cancer surgery. • Justice Thomas issues an opinion concurring in the denial of certiorari in *McKee v. Cosby*, arguing that the Court should reconsider whether the Constitution requires a showing of actual malice in state-law defamation suits brought by public figures.

**February 19:** Actor Jussie Smollett, famous for his role in the TV series *Empire*, is indicted on 16 felony counts of disorderly conduct for allegedly staging a fake hate-crime assault on himself in January 2019 and filing a related false police report.

**February 22:** Carmel Ebb, thought to be the first woman ever to clerk for a judge on a federal court of appeals, dies in Maryland at age 94. Ebb, a graduate of Columbia Law School, clerked for Judge Jerome Frank of the U.S. Court of Appeals for the Second Circuit. Judge Frank hired Ebb after she contacted him regarding an article he wrote arguing that women and men should have the same workplace opportunities.

**February 24:** The U.S. Court of Appeals for the Fifth Circuit denies jurisdiction over a patent lawsuit between Xitronix and KLA, concluding that it is “implausible that we are the proper court to decide this appeal.” The case had recently been transferred from the U.S. Court of Appeals for the Federal Circuit, which concluded that it lacked jurisdiction because the case did not “arise under” the U.S. patent laws.

**February 25:** The Supreme Court issues a unanimous, per curiam decision in *Yovino v. Rizo*, holding that a federal court cannot count the vote of a judge who dies before a decision is issued. In the en banc decision below, Judge Stephen Reinhardt of the U.S. Court of Appeals for the Ninth Circuit had been one of the six judges in the majority, and had written the majority opinion, but he died before the decision and opinion were issued. The Supreme Court’s opinion notes that “federal judges are appointed for life, not for eternity.”

**February 26:** The Nevada Gaming Commission issues a record \$20 million fine against Wynn Resorts Limited for damaging the state’s reputation by failing to investigate eight claims of workplace sexual harassment against former Chairman and CEO Steve Wynn. • The Supreme Court issues its unanimous opinion in *Nutraceutical Corp. v. Lambert*, holding that the 14-day deadline for seeking leave to appeal an order granting or denying class certification is not subject to equitable tolling. The case involved claims that a dietary supplement called “Cobra Sexual Energy” does not actually deliver the promised aphrodisiac effects. • The U.S. Court of Appeals for the D.C. Circuit issues its opinion in *USA v. AT&T Inc.*, affirming the dismissal of the government’s antitrust challenge to AT&T Inc.’s acquisition of Time Warner Inc. Judge Judith Rogers issues the opinion, which is joined by Judges Robert Wilkins and David Sentelle (see Dec. 6 entry).

**February 27:** The Supreme Court issues its opinion in *Madison v. Alabama*, holding, by a 5-3 vote, that the Eighth Amendment does not categorically bar the execution of a prisoner who can no longer remember his crime, but may apply to bar executions of individuals with dementia, as opposed to just psychotic delusions. Justice Kagan authors the majority opinion, which is joined by the Chief Justice and Justices Ginsburg, Breyer, and Sotomayor. Justice Alito issues the dissent. • The Florida Bar opens an investigation into Representative Matt Gaetz (R-FL) after he tweets about alleged infidelity by President Trump’s former lawyer Michael Cohen on the eve of Cohen’s testimony before Congress.

**February 28:** The New York legislature approves a bill outlawing and providing civil remedies for victims of so-called “revenge porn,” or the sharing of sexual photos or videos of someone without their consent.

### MARCH 2019

**March 5:** The U.S. Court of Appeals for the D.C. Circuit issues its opinion in *Novato Healthcare Center v. NLRB*. The first line of the opinion, authored by Chief Judge Merrick Garland, references a “master class in cross-examination” by Vincent Gambini — the movie character played by Joe Pesci in *My Cousin Vinny* — in upholding an NLRB decision based on a cross-examination by an NLRB attorney.

**March 6:** In response to widespread concerns about a law clerk training academy organized by the conservative Heritage Foundation, the Committee on Codes and Conduct of the Judicial Conference of the United States issues an advisory opinion warning judges and law clerks not to attend partisan training programs.

**March 7:** Judge T.S. Ellis III of the U.S. District Court for the Eastern District of Virginia sentences Paul Manafort to 47 months in prison after his conviction for financial fraud crimes uncovered during Robert Mueller’s investigation into Russian interference in the 2016 presidential election. The sentence is more than 15 years short of the term recommended by the Special Counsel.

**March 9:** Tonja Jacobi and Mathew Sag, law professors in Illinois, publish “Taking Laughter Seriously at the Supreme Court” in the *Vanderbilt Law Review*, which examines “more than 9000 instances of laughter witnessed at the Court since 1955” and concludes that Supreme Court Justices use humor and laughter as an advocacy tool.

**March 12:** The United States Court of Appeals for the Sixth Circuit issues its en banc opinion in *Planned Parenthood of Greater Ohio v. Hodges*, permitting Ohio to cut state funding to health care providers that offer abortion services. The decision is 11-6, with Judge Jeffrey Sutton writing the majority opinion and Judge Helene White delivering the dissent.

**March 13:** The Senate confirms Neomi Rao to the U.S. Court of Appeals for the D.C. Circuit, amidst controversy over college essays regarding date rape. Rao assumes the seat formerly occupied by Justice Kavanaugh (see Feb. 5 entry). • Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia sentences Paul Manafort to an additional 43 months in prison for various crimes, including failing to register as a foreign lobbyist, bringing his overall sentence to 73 months (see Mar. 7 entry).

**March 14:** The U.S. Patent and Trademark Office names Scott Boalick Chief Judge of the Patent Trial and Appeal Board (PTAB). Boalick had served as acting Chief Judge for several months, before occupying various other positions within the PTAB. • The Connecticut Supreme Court issues an opinion permitting family members of the victims of the December 2012 shooting at Sandy Hook Elementary School to sue the makers of the AR-15 rifle.

**March 15:** Hundreds of people gather outside the Supreme Court and perform the plank exercise in honor of Justice Ginsburg's 86th birthday. The gathering stems from a social media campaign involving the hashtag #PlankLikeRBG. • The Judicial Council of the Tenth Circuit denies 20 petitions for review of its order dismissing 83 charges of misconduct filed against Justice Kavanaugh in connection with his confirmation hearing (see Dec. 18 entry).

**March 18:** U.S. Senators and Presidential aspirants Elizabeth Warren (D-MA), Kamala Harris (D-CA), and Kirstin Gillibrand (D-NY) tell *Politico* that they are all open to expanding the size of the Supreme Court in order to counteract the effect of President Trump's appointment of conservative Justices. Senator Warren comments that doing so could help "depoliticiz[e] the Supreme Court."

**March 24:** Attorney General William Barr sends a four-page summary of Special Counsel Robert Mueller's conclusions to Congressional leaders. According to Barr, Mueller's investigation concluded that Russia did try to interfere with the election, but that there was no evidence of coordination with the Trump presidential campaign. Barr asserts that the report neither concluded that President Trump committed obstruction of justice nor exonerated him. Barr adds that he and Deputy Attorney General Rod Rosenstein have concluded that there is insufficient evidence to prove that President Trump committed an obstruction-of-justice offense, and that their "determination was made without regard to, and is not based on, the constitutional considerations that surround the indictment and criminal prosecution of a sitting president."

**March 25:** The Department of Justice files a brief in the U.S. Court of Appeals for the Fifth Circuit arguing that the entire Affordable Care Act must be struck down because the law's individual mandate is unconstitutional. The Department had previously taken the position that the mandate was unconstitutional but severable from the rest of the law (see Dec. 30 entry). • The Supreme Court denies review of a challenge by a foreign-owned corporation to a grand jury subpoena presumed to have been issued in connection with

Special Counsel Robert Mueller's investigation into Russian interference in the 2016 presidential election (see Jan. 8 entry).

**March 26:** Oklahoma Attorney General Mike Hunter announces a \$270 million settlement with Purdue Pharma in a lawsuit alleging that the opioid manufacturer created a public nuisance. The settlement will establish a \$200 million endowment at Oklahoma State University's Center for Wellness and Recovery to help treat victims of the opioid epidemic.

**March 27:** A jury in the U.S. District Court for the Northern District of California issues an approximately \$80 million verdict against Monsanto in the first federal-court lawsuit involving allegations that Monsanto's popular herbicide Roundup causes non-Hodgkin's lymphoma. In an earlier phase of the trial, the jury had concluded that Roundup was a substantial factor in causing plaintiff Hardeman's cancer. A San Francisco Superior Court jury had previously issued a \$289 million verdict against Monsanto based on similar allegations. • In public remarks at the University of Houston Law Center, Anita Hill calls for reforms to the nomination and confirmation process for Supreme Court Justices.

**March 28:** Jessie Liu, the U.S. Attorney for the District of Columbia, withdraws from consideration to serve as Associate Attorney General in the face of opposition from members of the Senate Judiciary Committee based on her past service as Vice President of the National Association of Women Lawyers, a women's legal group that opposed the nomination of Justice Alito.

**March 29:** Judge Norman K. Moon of the U.S. District Court for the Western District of Virginia denies Alex Jones's motion to dismiss a defamation lawsuit brought against him by Brennan Gilmore, who filmed footage of the car attack that killed one individual and injured 36 others during the "Unite the Right" rally in Charlottesville in 2017. Jones had published articles and videos claiming that Gilmore was a political operative who conspired to orchestrate the violence in Charlottesville in an effort to oust President Trump. • By a 7-2 vote, the Supreme Court stays the execution of Patrick Murphy, a Texas death row inmate who challenged the state's decision to preclude him from having a Buddhist spiritual adviser with him in the execution chamber. One month earlier, the Court had, by a 5-4 vote, denied a stay of execution for a Muslim man who challenged Alabama's decision to exclude a Muslim imam from the execution chamber (see Feb. 7 entry). • Judge John Bates of the U.S. District Court for the District of Columbia issues an opinion in *New York v. United States Department of Labor*, invalidating new rules from the Trump Administration that would allow small businesses to offer "association health plans" that are noncompliant with the

ACA. Bates calls the rules “clearly an end-run around the ACA” (see Dec. 28 entry).

**March 30:** In remarks at the Pepperdine University School of Law, Justice Thomas announces that he has no plans to retire from the Supreme Court.

## APRIL 2019

**April 1:** President Trump and Presidential hopeful Senator Bernie Sanders (D-VT) announce, via TikTok, that the former will invoke the President’s inherent authority under the Emoluments Clause to enact a “Free Everything” platform, under which everything under the sun will be paid for by the U.S. government, with all payments to be made by citizens of Europa, a moon of Jupiter formerly inhabited by Dr. Manhattan.\*

**April 3:** Six former Jones Day associates file a putative class action lawsuit against the firm, accusing it of having a “fraternity culture” and claiming that its “black box” compensation model and firm leadership deny women equal pay and opportunities for advancement.

**April 5:** The U.S. House of Representatives sues the Trump Administration to try to stop the President from invoking emergency powers to construct a wall along the United States-Mexico border. • The U.S. Court of Appeals for the D.C. Circuit issues its ruling in *McKeever v. Barr*, holding, in a 2-1 opinion, that federal district judges cannot disclose grand jury information outside the terms of Federal Rule of Criminal Procedure 6(e). Chief Judge Sri Srinivasan issues a dissenting opinion. The case began when Stuart McKeever, an author, petitioned for the release of grand jury materials from 1957 and urged the district court to exercise its “inherent authority” to issue a release. • On the same day that former firm co-chairman Gordon Caplan announces he will plead guilty to paying bribes to rig his daughter’s ACT score, Willkie Farr & Gallagher LLP announces that he is no longer a partner.

**April 8:** Justices Breyer and Alito issue a statement that there was “no way” for them to have known about a conflict of interest they missed in January when denying certiorari in a case involving Rockwell Collins, a company acquired by United Technologies. Both Justices owned stock in United Technologies, but because Rockwell Collins waived its right to respond to the petition for certiorari, no corporate disclosure statement showing its ownership was filed.

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\* April Fools!

**April 9:** The U.S. Court of Appeals for the D.C. Circuit denies Gibson Dunn’s request for over \$800,000 in attorney’s fees in connection with its work in *Lucia v. SEC*, a case addressing whether the appointment process for SEC administrative law judges complies with the Constitution.

**April 11:** Federal prosecutors in Washington, DC charge former White House Counsel Greg Craig with making false statements to the Department of Justice in connection with his work for Ukraine while a partner at Skadden Arps Slate Meagher & Flom LLP (see Aug. 15 entry). • Federal prosecutors in Los Angeles charge Michael Avenatti with 36 counts of tax fraud, bankruptcy fraud, and stealing from clients. Avenatti had recently become famous for representing adult film actress Stormy Daniels in her lawsuit against President Trump.

**April 12:** The Committee on Foreign Investment in the United States, or CFIUS, announces a \$1 million civil penalty for breach of a 2016 mitigation agreement — the highest penalty in history. The penalty was imposed in 2018.

**April 16:** A high-profile patent dispute between Apple and Qualcomm settles during opening statements, with the companies striking a license agreement for wireless chip technology, and Apple agreeing to pay several billion dollars to Qualcomm.

**April 18:** Special Counsel Robert Mueller issues his 448-page report, which concludes that there was “sweeping and systematic” illegal interference by Russia in the 2016 presidential election. The report neither exonerates nor incriminates President Trump of obstruction of justice, starting from the premise — based on an opinion by the Office of Legal Counsel in the U.S. Department of Justice — that a sitting President cannot be convicted of a crime. That portion of the report appears in tension with the position taken in the summary of the report issued by Attorney General Barr (see Mar. 24 entry).

**April 22:** The Supreme Court grants review in *Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*, a group of cases presenting the question whether Title VII prohibits discrimination on the basis of sexual orientation and transgender status.

**April 23:** The Supreme Court hears oral argument in *Department of Commerce v. New York*, a challenge to Secretary of Commerce Wilbur Ross’s decision to reinstate a question about citizenship on the 2020 census questionnaire. Argument focuses on the reasons why the question was added (see Jan. 15 entry).

**April 24:** The Supreme Court issues its decision in *Lamps Plus v. Varela*, holding that class arbitration is improper where a contract is ambiguous on the availability of that form of dispute resolution. The decision is 5-4; Chief Justice Roberts writes the majority decision, and Justices Ginsburg, Breyer, and Kagan all file dissenting opinions.

**April 25:** The U.S. Court of Appeals for the Second Circuit affirms the dismissal of LLM Bar Exam's antitrust lawsuit against Barbri, which claimed that Barbri had colluded with law schools to dominate the bar preparation market.

**April 26:** Attorneys for several former NFL players seeking to make claims from the league's concussion settlement lodge objections to rules requiring players to be tested for dementia within 150 miles of their homes. The fund administrator had noted that players tended to seek treatment from four doctors who had allegedly issued suspect findings. • Maria Butina, who attempted to infiltrate conservative political groups in the United States, is sentenced to 18 months in prison after pleading guilty to conspiring to act as an unregistered foreign agent of Russia within the United States (see Dec. 13 entry).

**April 29:** President Trump files a lawsuit in Manhattan federal court to try to stop Deutsche Bank and Capital One from producing financial documents subpoenaed by House Democrats in connection with their investigation of his family and business interests. • Rod Rosenstein, the Deputy Attorney General who appointed Robert Mueller as special counsel to investigate links between the Russian government and the Trump presidential campaign, resigns. • U.S. District Judge Robert N. Scola Jr., of the Southern District of Florida, recuses himself from a class action lawsuit over a health insurance company's denial of radiation treatment, citing his own prostate cancer diagnosis and a friend's recent decision to pay \$150,000 out of pocket for the radiation treatment at issue in the case. In the recusal order, Judge Scola notes that denying the treatment to a patient "if it is available, is immoral and barbaric." • General counsel of over 250 companies, including Nike, Amazon, and Twitter, urge Congress to increase federal funding for the Legal Services Corporation, which provides legal services to low-income Americans. • Actress Lori Loughlin, her husband Mossimo Giannulli, and 15 other wealthy parents appear in the U.S. District Court for the District of Massachusetts to plead not guilty to charges of conspiracy to commit fraud and conspiracy to commit money laundering in connection with payments that they allegedly made for the purpose of securing their children's acceptance into prestigious colleges and universities, often through false claims that their children are exceptional athletes.

**April 30:** The Department of Justice issues new guidance for prosecutors evaluating the effectiveness of corporate compliance programs, which involves an assessment of whether a program is “well designed,” “being applied earnestly and in good faith,” and works in practice. • Former White House Counsel Gregory Craig files a motion for a bill of particulars, seeking more factual specificity in connection with the government’s prosecution of him for allegedly making misstatements and omissions in an effort to avoid registration under the Foreign Agents Registrations Act (see Apr. 11 entry). • Senator Richard Blumenthal (D-CT) suggests that several of President Trump’s judicial nominees were instructed to avoid answering whether the Supreme Court’s landmark *Brown v. Board of Education* decision was correctly decided during their confirmation hearings.

## MAY 2019

**May 1:** •The Florida House passes a controversial bill that would allow teachers to carry guns in the classroom, aiming to stop school shootings.

**May 2:** Attorney General William Barr does not appear at a hearing in which he was scheduled to testify for a third time (following his prior testimony in the House of Representatives on April 9 and his testimony in the Senate on May 1) regarding Special Counsel Robert Muller’s report, prompting House Democrats to threaten to hold him in contempt of Congress. The Justice Department attributes Barr’s refusal to appear to conditions imposed on his testimony by the House Judiciary Committee, including a requirement that he be subject to direct questioning by staff attorneys. The Committee nevertheless meets for 15 minutes, with Democratic members placing a plastic hen and a bucket of fried chicken in front of the empty chair behind Barr’s name placard.

**May 6:** Michael Cohen reports to prison to serve a three-year sentence after pleading guilty to charges related to tax evasion, banking and campaign finance violations, and lying to Congress (see Dec. 12 entry).

**May 7:** Governor Brian Kemp (R-GA) signs House Bill 481, which bans an abortion once a fetal heartbeat can be detected, following enactment of similar laws in Mississippi, Kentucky, and Ohio since the beginning of 2019.

**May 8:** Iran threatens to withdraw from portions of the 2015 nuclear accord, including returning to a higher level of uranium enrichment, unless new terms are negotiated within 60 days. The U.S. had withdrawn from the deal a year earlier.

**May 10:** President Trump increases tariffs on \$200 billion in Chinese goods from 10% to 25% after negotiations toward a trade deal between the U.S. and China stall. • Uber's shares hit the NYSE at an initial price of \$45, making the company's market cap just over \$75 billion on a non-diluted basis.

**May 13:** Jurors award over \$2 billion in damages to a couple who claimed their use of Monsanto's Roundup herbicide caused them to develop non-Hodgkin's lymphoma (see Mar. 27 entry). • In a 5-4 decision authored by Justice Kavanaugh and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, the Supreme Court rules in *Apple Inc. v. Pepper* that consumers who purchased apps from the App Store are direct purchasers under *Illinois Brick Co. v. Illinois*, and therefore can sue Apple for monopolizing the market for the sale of apps and charging customers "higher-than-competitive" prices.

**May 15:** A Georgetown student whose father pleaded guilty to paying a college admissions consultant \$400,000 to, among other things, write his son's admission essay and bribe a tennis coach to pretend to recruit him, files a lawsuit to fight his expulsion, claiming he did not know about his father's actions and that the university subjected him to arbitrary and capricious process as it contemplated disciplinary options. • Kenneth Lee's appointment to the U.S. Court of Appeals for the Ninth Circuit is confirmed by the Senate, 52-45, in spite of strong opposition from Senators Diane Feinstein (D-CA) and Kamala Harris (D-CA) for Lee's failure to turn over during his confirmation process dozens of writings in his record that they said "demonstrate extreme views on important issues."

**May 17:** The Council of the American Bar Association approves a new bar passage standard that requires 75 percent of a law school's graduates who sit for the bar to pass the exam within two years. Schools that do not meet this standard would have at least two years to bring their numbers into compliance.

**May 20:** The Supreme Court rules 8-1 in *Mission Product Holdings, Inc. v. Tempnology, LLC* that rejection of a trademark license by a company in bankruptcy pursuant to the Bankruptcy Code amounts to a breach of contract rather than a termination of the trademark license, allowing the licensee to continue to use the trademark. • American Airlines files suit alleging that actions by Transport Workers Union Local 514, which represents maintenance workers in two states, amount to illegal work slowdowns intended to leverage contract negotiations and have caused 644 canceled flights and 270 maintenance delays between February and May of this year.

**May 21:** In a written statement, Macon, Georgia District Attorney David Cooke says he does not intend to prosecute women under the state's controversial fetal heartbeat abortion bill, stating that the bill is unconstitutional (see May 7 entry).

**May 24:** Theresa May announces her resignation as Prime Minister of the United Kingdom after Parliament rejects the third Brexit package she negotiated with the European Union. • A federal judge issues a preliminary injunction blocking President Trump's attempt to construct a border wall using diverted defense funds, calling "Congress's 'absolute' control over federal expenditures" an "essential" feature in our system of government. Congress had allocated \$1.4 billion to cover additional barriers at the border, but President Trump declared a national emergency in February in an attempt to divert additional funds. • Governor Mike Parson (R-MO) signs into law a bill banning abortion after eight weeks. The bill includes no exception for pregnancies that are the result of incest or rape and would ban abortion altogether if *Roe v. Wade* is ever overturned.

**May 28:** The Supreme Court issues a per curiam opinion in *Box v. Planned Parenthood of Indiana and Kentucky, Inc.*, reversing a Seventh Circuit opinion insofar as it invalidated an Indiana law relating to the disposition of fetal remains by abortion providers. The Court concludes that the law can satisfy rational basis review. • Netflix announces it will rethink its decision to film in Georgia should abortion legislation signed into law by Governor Brian Kemp go into effect. Georgia is a popular filming location because of favorable state tax incentives (see May 7 entry).

**May 30:** Lawmakers in New Hampshire vote to abolish the death penalty, overriding Governor Chris Sununu's (R-NH) veto and making it the 21st state to ban capital punishment in the U.S. New Hampshire has not executed anyone since 1939 and has only one person on death row.

## JUNE 2019

**June 3:** The California Bar moves to suspend attorney Michael Avenatti's license based, in part, on claims by former client Gregory Barela, who alleges Avenatti failed to send him settlement payments from a settling party or to make an accounting concerning those funds as is required under California law.

**June 4:** The U.S. House of Representatives passes the American Dream and Promise Act of 2019, which would allow undocumented children who came to the U.S. as children and meet certain requirements the ability to apply for

permanent resident status. • The Trump Administration bans cruise ship travel to Cuba, reversing the Obama Administration's efforts to restore relations between the U.S. and Cuba.

**June 5:** An Ohio doctor is charged in 25 deaths for prescribing large doses of fentanyl to patients who were near death.

**June 6:** An en banc panel of the U.S. Court of Appeals for the Ninth Circuit overrules a controversial 2018 decision that decertified a settlement class because the district court failed to analyze whether California law could be applied to a nationwide class, noting that the predominance analysis under Rule 23 should be different for settlement classes than for litigated classes. • A proposed merger between Fiat Chrysler and Renault, which would have created the third largest automaker, behind Toyota and Volkswagen, falls apart after a representative of the French government, which owns 15 percent of Renault, asks to postpone the vote.

**June 9:** United Technologies announces it will merge with Raytheon in a "merger of equals" to create the second largest aerospace company in the U.S., behind Boeing.

**June 12:** Protests in Hong Kong over a controversial bill, which would allow China to extradite fugitives from Hong Kong for trial in mainland China, delay a scheduled debate on the bill. Police fired tear gas and rubber bullets into the crowd of protesters after some protesters charged police during what was previously a peaceful protest. • The House Oversight Committee recommends holding Attorney General Barr and Commerce Secretary Wilbur Ross in contempt of Congress after they fail to comply with subpoenas for information regarding the addition of a citizenship question to the 2020 census (see June 27 entry). • John Vandemoer, the former sailing coach at Stanford University, is sentenced to one day in prison and two years' probation for his role in the college admissions scandal. Vandemoer pleaded guilty to one count of racketeering and conspiracy for accepting over \$600,000 in bribes. It was undisputed that Vandemoer funneled all of those funds into Stanford's sailing program (see Apr. 29 entry). • Contrary to legislation enacted in several states restricting access to abortion, Illinois Governor J.B. Pritzker signs the Reproductive Health Act, which repeals a 1975 law that imposed felony penalties on doctors who perform abortions and establishes that a fetus does not have "independent rights."

**June 13:** Margaret Hunter, the wife and former campaign chair of Representative Duncan Hunter (R-CA), pleads guilty to one count of corruption after being indicted for using campaign funds for personal expenses and

agrees to testify against her husband. Rep. Hunter had suggested his wife was responsible for any improper use of funds. • Actor Cuba Gooding Jr. is charged with forcible touching stemming from two incidents in which he allegedly groped two women; one incident is alleged to have taken place on June 9 and the other in 2008.

**June 15:** Hong Kong's Chief Executive Carrie Lam agrees to suspend a controversial extradition bill following mass protests in the city (see June 12 entry).

**June 18:** President Trump officially announces his intent to run for reelection in 2020 at a rally in Florida and changes his campaign slogan to "Keep America Great."

**June 20:** The Supreme Court rules in *Gamble v. United States* that the Double Jeopardy Clause was not triggered when Gamble was federally indicted for possessing a firearm even though he already pleaded guilty to violating a state felon firearm possession statute, as the act of possession was a violation of two separate laws (one federal and one state) and therefore constituted two separate offenses. • The Supreme Court issues its judgment in *American Legion v. American Humanist Association*, rejecting a challenge to the constitutionality of the Bladensburg Peace Cross, a monument to Washington, DC area soldiers who died during World War I. Justice Alito authors the opinion of the Court, which is joined by the Chief Justice and Justices Breyer, Kagan, and Kavanaugh. Justices Thomas and Gorsuch concur, noting that the suit should be dismissed for lack of standing. Justice Thomas also concurs in the merits ruling, and Justices Ginsburg and Sotomayor dissent (see Nov. 2 entry).

**June 21:** Cardi B is indicted by a grand jury on multiple charges, including reckless endangerment and assault, stemming from a 2018 fight at a New York strip club. • The Supreme Court announces its opinion in *Flowers v. Mississippi*, holding, by a 7-2 margin, that Curtis Flowers's murder conviction must be overturned based on the prosecution's discriminatory use of peremptory challenges. Among other factors, the majority opinion, authored by Justice Kavanaugh, notes that across six trials of Flowers for the same offense, Mississippi struck 41 of the 42 black prospective jurors that it could have struck, and five of the six black prospective jurors at his most recent trial. • The Supreme Court issues its opinion in *Knick v. Township of Scott, Pennsylvania*, holding that property owners raising Takings Clause claims need not exhaust their state remedies, and overruling *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*. Chief Justice Roberts issues the majority opinion, and Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissents.

**June 24:** The Supreme Court issues its opinion in *Iancu v. Brunetti*, holding that the Lanham Act's bar on the registration of "immoral[] or scandalous" trademarks violates the First Amendment because it "disfavors certain ideas." Justice Kagan authors the majority opinion, joined by Justices Thomas, Ginsburg, Alito, Gorsuch, and Kavanaugh. The Chief Justice, Justice Breyer, and Justice Sotomayor issue opinions generally agreeing on "immoral" trademarks but dissenting on "scandalous" trademarks (see Jan. 4 entry).

**June 26:** The Supreme Court issues its opinion in *Kisor v. Willkie*. In a 5-4 decision authored by Justice Kagan and joined in major part by Chief Justice Roberts and Justices Ginsburg, Breyer, and Sotomayor, the Court declines to overrule *Auer v. Robbins* and *Bowles v. Seminole Rock & Sand Co.*, which require courts to defer to reasonable agency interpretations of genuinely ambiguous regulations. Justice Kagan's opinion notes that while the Court is upholding *Auer* and *Bowles*, it also recognizes their limits, which result in a deference doctrine that is "potent in its place, but cabined in its scope." Justice Gorsuch issues an opinion, joined by Justices Thomas, Alito, and Kavanaugh in parts, that concurs in the judgment insofar as the Court remands the case for further proceedings, but argues that the Court's decision is "more a stay of execution than a pardon" for *Auer* and *Robbins*, which are "maimed and enfeebled — in truth, zombified" (see Dec. 18 entry).

**June 27:** The Supreme Court issues its opinion in *Department of Commerce v. New York*. Chief Justice Roberts authors the principal opinion, which commands a majority in several parts. His opinion concludes that Secretary of Commerce Wilbur Ross did not violate the Constitution or the Census Act by reinstating a citizenship question on the 2020 census questionnaire, but that the case should be remanded to the Department because the rationale for the Secretary's decision does not match the evidence. As the Chief Justice puts it, "the evidence tells a story that does not match the explanation the Secretary gave for his decision." In general, the Court's more conservative Justices join the portions of the opinion siding with Secretary Ross, and the Court's more liberal Justices join the portions siding against him (see Apr. 23 entry). • The Supreme Court issues its opinion in *Rucho v. Common Cause*, holding, by a 5-4 margin, that partisan gerrymandering claims present political questions "beyond the reach of the federal courts." Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, dissents "[w]ith respect but deep sadness," accusing the majority of going "tragically wrong" (see Jan. 4 entry).

**June 28:** The Supreme Court grants review of a trio of cases involving challenges to the Trump Administration's decision to wind down the Deferred

Action for Childhood Arrivals (DACA) program (see Nov. 8 entry). • Judge John Miraldi of Lorain County, Ohio reduces to \$25 million the \$44 million libel jury verdict that the small Oberlin business Gibson's Bakery won against Oberlin College for its role in falsely accusing the bakery of racism and then fostering a damaging boycott.

**June 30:** President Trump meets North Korean leader Kim Jong Un in the Korean Demilitarized Zone, becoming the first sitting U.S. President to enter North Korea. The meeting takes place one day after President Trump tweets an invitation to the North Korean leader, while visiting South Korea for scheduled talks with South Korean President Moon Jae-in.

## JULY 2019

**July 2:** A military jury finds Navy SEAL Edward Gallagher not guilty of murder in connection with a 2017 incident in Iraq in which fellow SEALs claimed that Gallagher stabbed a captive ISIS fighter, who later died. Gallagher is found guilty of posing for a picture with the 17-year-old ISIS fighter's corpse.

**July 3:** Boeing pledges \$100 million to the families of 346 people who were killed in the crashes of two 737 MAX airliners, one off the coast of Indonesia in October 2018 and one in Ethiopia in March 2019. Boeing is facing multiple lawsuits stemming from these incidents.

**July 6:** Jeffrey Epstein, a wealthy, convicted sex offender with ties to many influential people around the world, is arrested in New York and charged with sex trafficking of under-age girls in Florida and New York between 2002 and 2005. In 2008, Epstein pleaded guilty to lesser state charges of soliciting prostitution and avoided federal prosecution for more serious allegations that he had sex with several underage girls.

**July 8:** Judge Amit Mehta of the U.S. District Court for the District of Columbia blocks a regulation announced by the Department of Health and Human Services that would have required drug makers to include drug prices for certain drugs in television advertisements because the regulation exceeds the authority allocated to the agency by Congress.

**July 9:** The U.S. Court of Appeals for the Second Circuit rules that it is "unconstitutional viewpoint discrimination" for President Trump to block users from following his Twitter account, which he uses in his capacity as a public servant. • Carrie Lam announces that the controversial extradition law in Hong Kong is "dead," but refuses to withdraw it (see June 12 entry).

**July 11:** President Trump announces the White House will cease its efforts to include a citizenship question on the 2020 census. Trump had previously vowed to continue trying to find a way to include the question, including through use of an executive order, after the Supreme Court upheld a lower court order blocking its inclusion (see June 27 entry).

**July 14:** U.S. Immigration and Customs Enforcement begins raids in as many as ten cities, targeting for deportation undocumented immigrants recently ordered to leave by an immigration judge.

**July 16:** Retired Supreme Court Justice John Paul Stevens, who served on the Supreme Court for 34 years, dies at age 99 of complications from a stroke. • Representative Al Green (D-TX) introduces articles of impeachment against President Trump after Democrats pass a resolution condemning “racist” remarks the President made, stating that four minority members of Congress should “go back” to their countries of origin.

**July 17:** The U.S. House of Representatives votes to block President Trump’s efforts to sell over \$8 billion of weapons to Saudi Arabia and the United Arab Emirates, including missiles and surveillance equipment. The Trump administration previously announced its intention to use emergency authority to complete the transactions after lawmakers in both houses of Congress blocked the sales amid suspicions surrounding Saudi Arabia’s possible involvement in journalist Jamal Khashoggi’s death and concerns the equipment would be used against civilians in Yemen.

**July 22:** Equifax proposes a settlement of up to \$700 million to compensate approximately 150 million people for a 2017 data breach that exposed Social Security numbers, birthdates, and addresses (see Jan. 28 entry).

**July 23:** President Trump files suit against the Ways and Means Committee to prevent publication of his tax returns. With the exception of Gerald Ford, who released summary tax data, every other president over the last four decades has voluntarily published at least one return.

**July 24:** Puerto Rico Governor Ricardo Rosselló resigns, effective August 2, to the delight of protestors who had called for his resignation amid allegations of corruption and following the leak of homophobic and misogynistic private messages involving Rosselló.

**July 25:** The U.S. Department of Justice resumes administering the death penalty for federal offenses, 16 years after the last federal execution. The Bureau of Prisons sets execution dates for five prisoners on death row who have exhausted their appeals.

**July 26:** The Department of Justice approves a \$26 billion merger between T-Mobile and Sprint, clearing the way for the third- and fourth-largest wireless carriers to consolidate, but requires the companies to make certain divestitures to Dish Network, including Boost Mobile, Virgin Mobile, thousands of cell sites, and hundreds of retail locations.

**July 28:** The California State Bar accidentally sends a list of general essay topics to be included on the July Bar exam to the deans of several law schools just days before the exam. As a precaution, the State Bar decides to send the information to everyone scheduled to take the July 30-31 exam.

**July 29:** President Trump signs a bill authorizing funding for the 9/11 Victim Compensation Fund through 2092. The fund had been running short on capital and benefit payments had recently been cut by as much as 70 percent.

**July 30:** A class-action lawsuit is filed against Capital One, one day after the company announced a data breach that compromised more than 100 million accounts and credit card applications. • A former Amazon employee, Paige Thompson, is arrested after she brags online under her alias “erratic” that she was responsible for the hack.

## AUGUST 2019

**August 1:** The Committee on Judicial Conduct and Disability of the Judicial Conference of the United States denies petitions for review of misconduct complaints against Supreme Court Justice Brett Kavanaugh (see Mar. 15 entry).

**August 2:** Judge Randolph D. Moss of the U.S. District Court for the District of Columbia holds that the Trump Administration’s rule prohibiting immigrants from seeking asylum except at ports of entry violates the Immigration and Nationality Act. • Vice Chancellor Kathaleen McCormick of the Delaware Chancery Court holds that Venezuelan opposition leader Juan Guaidó’s appointments to the board of Citgo’s parent company are lawful, denying an attempt by the board appointees of Venezuelan President Nicolás Maduro to invalidate those appointments.

**August 5:** The Puerto Rico Senate files suit in the Puerto Rico Supreme Court to remove Governor Pedro Pierluisi. • New Zealand Justice Minister Andrew Little introduces a bill that would decriminalize abortion. • President Trump calls for reforming the background check process for firearms in the wake of shootings in Ohio and Texas.

**August 6:** The U.S. Court of Appeals for the Second Circuit revives former Alaska Governor Sarah Palin’s defamation claim against *The New York*

*Times*, vacating an order dismissing Palin's claim. • The U.S. Court of Appeals for the Third Circuit vacates a district court's order certifying a settlement class of Google users who alleged that the company installed cookies on their browsers and collected their information without permission. • President Trump files suit in the U.S. District Court for the Eastern District of California, seeking the invalidation of a new California statute requiring candidates to disclose their tax returns as a precondition to appearing on a ballot in a primary election. • The U.S. Court of Appeals for the Fifth Circuit affirms the grant of an injunction preventing the Equal Employment Opportunity Commission from enforcing 2012 guidance related to the use of criminal history in hiring decisions.

**August 7:** Puerto Rico swears in Wanda Vázquez Garced as governor — its third of 2019 — after the Puerto Rico Supreme Court holds that Pedro Pierluisi's investiture as governor did not comply with the territory's constitution, and Pierluisi's subsequent resignation.

**August 8:** Applying the Supreme Court's precedent in *American Humanist Ass'n v. Maryland National Capital Park and Planning Comm'n* — the Bladensburg Cross case — the U.S. Court of Appeals for the Third Circuit holds that Lehigh County, Pennsylvania need not change its county seal, which includes an image of a cross alongside other images. • Former Acting FBI Director Andrew McCabe sues U.S. Attorney General William Barr in the U.S. District Court for the District of Columbia, alleging a "politically motivated and retaliatory demotion in January 2018 and public firing in March 2018 — on the very night of [McCabe's] long-planned retirement from the FBI."

**August 9:** Accepting an award at an American Bar Association event, Judge M. Margaret KcKeown of the U.S. Court of Appeals for the Ninth Circuit warns that recent attacks on the judiciary "undermine the credibility of our judiciary," "threaten the impartiality of the judiciary," and put judicial independence at risk.

**August 12:** The U.S. Court of Appeals for the Ninth Circuit affirms an order upholding Montana's electioneering disclosure law in the face of a First Amendment challenge by the National Association for Gun Rights. • The Trump Administration announces major changes to the implementation of the Endangered Species Act. • The Trump Administration unveils changes to the criteria for legal immigration to the United States, emphasizing the use of income and past usage of benefits such as Medicaid, food stamps, and housing vouchers to screen applicants. • A whistleblower complaint is filed with the Inspector General of the Intelligence Community concerning President Trump's July 25 phone call with Ukraine President Volodymyr Zelensky.

**August 13:** The Supreme Court of Hawai'i holds that the state constitution requires public schools to offer reasonable access to Hawaiian language immersion courses. • The U.S. Court of Appeals for the Third Circuit affirms an order dismissing a trucking industry Commerce Clause challenge to Pennsylvania's highway tolls.

**August 14:** Judge Paul Innes of the Superior Court of New Jersey preliminarily enjoins a state statute permitting terminally ill patients to take medications to end their lives. • The U.S. Department of Labor issues a notice of proposed rulemaking to clarify that religious organizations may make employment decisions based on sincerely held religious tenets and beliefs.

**August 15:** Federal prosecutors and counsel for former White House Counsel and Skadden Arps Slate Meagher & Flom LLP partner Gregory Craig deliver opening statements in a criminal trial in the U.S. District Court for the District of Columbia; the government contends that Craig made false statements to the U.S. Department of Justice about work he performed for the Ukrainian government (see Apr. 11 entry).

**August 16:** *The Washington Post* reports that Senior Judge A. Raymond Randolph of the U.S. Court of Appeals for the District of Columbia Circuit replied—all to an email from Judge Emmet G. Sullivan of the U.S. District Court for the District of Columbia in which Sullivan invited federal judges to attend a seminar about the science of climate change supported by the Federal Judicial Center; Randolph appeared to threaten to report Sullivan to the judiciary's ethics committee and wrote that “[t]he [supposed] science and stuff you are now sponsoring is nothing of the sort.”

**August 19:** U.S. Attorney General William Barr replaces the top leadership at the U.S. Bureau of Prisons after inmate Jeffrey Epstein commits suicide while imprisoned. • Planned Parenthood Federation of America announces that it will no longer accept funding from the Title X Family Planning Program after the Trump Administration implements a “gag” rule prohibiting Title X facilities from offering patients abortion counseling or referrals to abortion clinics. • New York City Police Commissioner James O’Neill announces his decision to fire Officer Daniel Pantaleo, whose use of excessive force in arresting Eric Garner caused the latter’s death.

**August 20:** The Antitrust Division of the U.S. Department of Justice files suit in the U.S. District Court for the District of Delaware, seeking to enjoin travel-booking platform Sabre Corp. from acquiring booking services provider Farelogix, Inc. • Judge George L. Russell, III of the U.S. District Court for the District of Maryland denies the Trump Administration’s mo-

tion to dismiss claims that its ban on transgender individuals serving in the military violates the Fifth Amendment.

**August 21:** The U.S. Departments of Homeland Security and Health & Human Services announce a new rule intended to navigate — and arguably circumvent — the Flores Settlement Agreement, an agreement that limits the length of time for which the federal government may detain immigrant minors. The agreement’s time limitation on holding minors sometimes led to family separations, because the immigrant parents who accompanied the minors across the border could be lawfully held in detention for substantially longer periods of time after the children were required to be released. • The U.S. Court of Appeals for the Tenth Circuit reverses the dismissal of a presidential elector’s claim that Colorado violated his constitutional rights by removing him when he voted for John Kasich instead of Hillary Clinton, the candidate who won the state’s popular vote in the 2016 presidential election.

**August 22:** Attorneys general from all 50 states and the District of Columbia announce a collaboration with major wireless carriers to track illegal robocalls and prosecute responsible parties.

**August 23:** The U.S. Court of Appeals for the Third Circuit reverses a lower court’s grant of summary judgment, holding that the “theists-only” policy of the Pennsylvania House of Representatives — which bars atheists from delivering invocations during legislative sessions — does not violate the Establishment Clause of the U.S. Constitution. • The U.S. Court of Appeals for the Fourth Circuit dismisses an interlocutory appeal from a district court order holding that CACI Premier Technology, Inc. — a U.S. government contractor that provided civilian interrogators at Abu Ghraib prison in Iraq — is not entitled to derivative sovereign immunity. • It is reported that NASA is investigating whether astronaut Anne McClain may have committed the first crime in outer space when she allegedly illegally accessed her estranged wife’s bank account while on a six-month mission aboard the International Space Station.

**August 26:** California and 18 other states announce plans to sue the Trump Administration to prevent it from enforcing its new rule relating to the Flores Settlement Agreement (see Aug. 21 entry). • The Trump Administration asks the Supreme Court to stay an injunction preventing the U.S. Department of Homeland Security from requiring many asylum seekers to apply in other countries before they reach the United States. • Judge Thad Balkman of the District Court of Cleveland County, Oklahoma finds that Johnson & Johnson caused a public nuisance by engaging in false and misleading marketing of its drugs and opioids generally, and orders the company to pay

\$572.1 million to abate the opioid crisis in the state. • Federal prosecutors announce that they will seek the death penalty for Robert Bowers, who killed 11 and injured six in a 2018 mass shooting at Tree of Life Synagogue in Pittsburgh, Pennsylvania.

**August 27:** Judge Howard F. Sachs of the U.S. District Court for the Western District of Missouri preliminarily enjoins key portions of a Missouri statute banning abortion after eight weeks from the patient's last menstrual period. • Judges Carmen Messano and Arnold Natali of the New Jersey Superior Court Appellate Division vacate a lower-court order enjoining a state statute permitting terminally ill patients to seek life-ending medications. • The U.S. Court of Appeals for the Seventh Circuit affirms a district court's order enjoining an Indiana law that requires attorneys for unemancipated minors seeking abortions to provide parental notice.

**August 28:** The U.S. Court of Appeals for the Fifth Circuit rejects a petition for review of the U.S. Environmental Protection Agency's decision to delay the implementation of a rule governing power plant waste streams, holding that the agency's action was not arbitrary and capricious. • The U.S. Environmental Protection Agency announces its intention to roll back Obama-era standards for methane emissions in the transportation, storage, and processing of oil and natural gas.

**August 29:** The U.S. Court of Appeals for the Seventh Circuit affirms the dismissal of a Second Amendment challenge to Cook County, Illinois's ban on assault rifles and high-capacity magazines. • U.S. Department of Justice Inspector General Michael Horowitz issues a report finding that former FBI Director James Comey mishandled memoranda that he drafted summarizing meetings with President Trump, former White House Chief of Staff Reince Priebus, and former National Security Advisor Michael Flynn.

**August 30:** Midwestern law firms Taft Stettinius & Hollister LLP and Briggs & Morgan announce that they will merge to form a 600-lawyer, 12-office combined firm.

## SEPTEMBER 2019

**September 3:** Judges Paul C. Ridgeway, Joseph N. Crosswhite, and Alma L. Hinton of North Carolina Superior Court hold that the state's legislative districts — the product of “extreme partisan gerrymandering” — violate the North Carolina Constitution's Free Elections, Equal Protection, Freedom of Speech, and Freedom of Assembly Clauses. • Judge Carlton W. Reeves of the U.S. District Court for the Southern District of Mississippi finds that

Mississippi violated the Americans with Disabilities Act by failing to provide local treatment options for residents suffering from mental illness.

**September 4:** Google and YouTube agree to pay \$170 million to settle claims by the U.S. Federal Trade Commission and the New York Attorney General that YouTube illegally collected personal information from children without notice or their parents' consent. • Judge Richard Leon of the U.S. District Court for the District of Columbia completes a Tunney Act review of a \$70 billion merger between CVS Health Corp. and Aetna and approves the tie-up.

**September 5:** The Southern Poverty Law Center and other groups sue the Florida Department of Juvenile Justice in the U.S. District Court for the Northern District of Florida, seeking to end the state's use of solitary confinement in juvenile detention facilities.

**September 6:** The Antitrust Division of the U.S. Department of Justice opens an investigation into automakers that struck a deal with California air quality regulators to adhere to the state's vehicle emissions standards. • Consolidated Edison, Inc. and eight other utility companies file a petition for review in the U.S. Court of Appeals for the D.C. Circuit challenging the U.S. Environmental Protection Agency's repeal of the Obama-era Clean Power Plan and its implementation of the more lenient Affordable Clean Energy Rule.

**September 9:** Judge Jon Tigar of the U.S. District Court for the Northern District of California reinstates a nationwide injunction preventing the Trump Administration from enforcing a rule requiring immigrants to apply for asylum in countries through which they travel before reaching the United States-Mexico border (see Dec. 19 entry). • California Governor Gavin Newsom signs legislation to strengthen penalties for doctors who fraudulently procure medical vaccine exemptions for children. • Judge Dan Aaron Polster of the U.S. District Court for the Northern District of Ohio denies pharmaceutical companies' and drug distributors' motion to dismiss claims alleging that their marketing, distribution, and dispensing of opioids created a public nuisance.

**September 10:** The National Labor Relations Board issues a ruling in which it abandons the "clear and unmistakable waiver" standard and adopts the "contract coverage" test for evaluating unilateral changes to employment contracts. • President Trump announces in a tweet that he has fired U.S. National Security Advisor John Bolton after the two disagreed on a series of foreign policy issues. • Judge Daniel Hovland of the U.S. District Court for

the District of North Dakota enjoins a state statute requiring physicians to inform women seeking abortions that the procedure may be reversible if performed via medication.

**September 11:** The Supreme Court grants the Trump Administration's application for a stay of a district court's order enjoining the Administration's rule requiring asylum seekers to seek protection from third countries while in transit to the United States (see Sept. 9 entry).

**September 12:** The U.S. House of Representatives' Committee on the Judiciary approves a Resolution for Investigative Procedures to govern the process by which it will decide whether to recommend articles of impeachment against President Trump. • U.S. Environmental Protection Agency Administrator Andrew Wheeler and Department of the Army Assistant Secretary of the Army for Civil Works R.D. James announce that their agencies are repealing a 2015 rule that interpreted the phrase "waters of the United States" under the Clean Water Act.

**September 13:** The U.S. Court of Appeals for the Second Circuit vacates a district court's order dismissing a complaint — thereby allowing the lawsuit to proceed — alleging that President Trump's continuing business interests in restaurants, hotels, and event spaces patronized by foreign nationals violate the Domestic and Foreign Emoluments clauses of the U.S. Constitution.

**September 16:** Assistant Attorney General Makan Delrahim defends an antitrust probe into four automakers who reached agreement with California air regulators to limit vehicle emissions, rejecting criticism linking the investigation to political considerations.

**September 17:** The U.S. Court of Appeals for the Ninth Circuit affirms the dismissal of a First Amendment challenge to Arizona's practice of withholding information about drugs administered during executions and the qualifications of the personnel administering them. • The U.S. Court of Appeals for the Third Circuit holds that the County of Lackawanna, Pennsylvania Transit System violated the First Amendment rights of a group of atheists seeking to advertise on public buses, and instructs a district court to enjoin enforcement of the System's religious speech ban.

**September 18:** President Trump announces that Robert O'Brien will succeed John Bolton as U.S. National Security Advisor after the President fired Bolton on Twitter. • Judge Lawrence L. Piersol of the U.S. District Court for the District of South Dakota enters a preliminary injunction preventing South Dakota from enforcing an anti-riot act, finding that the legislation —

which lawmakers enacted as a check on protests of the Keystone XL oil pipeline — unlawfully impinges on protestors' First Amendment rights.

**September 19:** California Governor Gavin Newsom signs legislation making it more difficult for companies to classify “gig economy” workers as independent contractors. The legislation is strongly opposed by Uber and Lyft, which vow to seek to overturn the legislation by referendum. • President Trump asks Judge Victor Marrero of the U.S. District Court for the Southern District of New York to enter an injunction prohibiting the New York County District Attorney's office from enforcing a subpoena seeking the President's tax records in connection with a criminal investigation. • The Trump Administration announces that it will revoke California's waiver under the Clean Air Act to set emissions standards for new automobiles that are stricter than federal standards.

**September 20:** Judge Deborah K. Chasanow of the U.S. District Court for the District of Maryland grants a motion to dismiss a First Amendment challenge to a state law banning “conversion” therapy for minors. • In an interlocutory appeal from the denial of a motion to dismiss, the U.S. Court of Appeals for the Tenth Circuit holds that the Fair Labor Standards Act's protections extend to all workers, including those in the marijuana industry.

**September 23:** Four Indiana Medicaid recipients sue the Trump Administration in the U.S. District Court for the District of Columbia and ask the court to enjoin the Administration's grant of a waiver to Indiana to implement Medicaid work requirements.

**September 24:** Speaker of the U.S. House of Representatives Nancy Pelosi announces that the House will officially open an impeachment inquiry to investigate allegations that President Trump conditioned the release of security assistance to Ukraine on its agreement to investigate his political rivals (see Sept. 12 entry). • The U.S. Office of Special Counsel sends letters to the President and Congress to alert them that numerous Federal Aviation Administration safety inspectors were not sufficiently trained to certify pilots, calling into question the operational review of several aircraft, including the Boeing 737 MAX. • Massachusetts Governor Charlie Baker declares a public health emergency and announces a four-month ban on the sale of all vaping products following an uptick in lung disease. • The National Redistricting Foundation files suit in North Carolina Superior Court, alleging that Republican lawmakers violated the state constitution when they gerrymandered the state's 2016 congressional map to lock in a partisan advantage.

**September 25:** Seventeen states sue in the U.S. District Court for the Northern District of California and ask the court to enjoin Trump Administration rules interpreting the Endangered Species Act. • The United States and Japan reach agreement on a trade deal concerning certain agricultural products, industrial goods, and digital trade. • Jodi Kantor and Megan Twohey, reporters for *The New York Times*, release their new book “She Said,” which details sexual assault allegations against film producer Harvey Weinstein, as well as his use of intimidation tactics to prevent reporting of those allegations

**September 26:** The U.S. House of Representatives Permanent Select Committee on Intelligence releases a partially redacted copy of a whistleblower complaint alleging that President Trump attempted to solicit foreign interference in the 2020 presidential election during a July 2019 phone call with Ukrainian President Volodymyr Zelensky (see Sept. 24 entry).

**September 27:** Judge Ketanji Brown Jackson of the U.S. District Court for the District of Columbia issues a preliminary injunction preventing the Trump Administration from implementing a plan to deport undocumented immigrants before they appear at a hearing before an immigration judge.

**September 30:** Senior Judge Henry E. Hudson of the U.S. District Court for the Eastern District of Virginia invalidates Virginia laws requiring second-trimester abortions to be performed in hospitals and imposing facility restrictions on abortion clinics, but upholds provisions requiring that abortions be performed by physicians and mandating that patients obtain an ultrasound 24 hours before having an abortion. • Judge J. Paul Oetken of the U.S. District Court for the Southern District of New York dismisses four states’ claims that the state-and-local tax cap component of the 2017 Tax Cuts and Jobs Act violates the federalism principles undergirding the U.S. Constitution. • Democratic leaders of the U.S. House of Representatives notify Rudolph Giuliani that they will issue him a subpoena seeking documents in connection with his dealings on behalf of President Trump in Ukraine (see Sept. 26 entry). • California Governor Gavin Newsom signs the Fair Pay to Play Act, which permits collegiate athletes to obtain compensation for endorsements. • Judge Allison D. Burroughs of the U.S. District Court for the District of Massachusetts finds that Harvard’s race-conscious admissions program does not violate Title VI of the Civil Rights Act of 1964.

OCTOBER 2019

**October 1:** In a per curiam opinion, the U.S. Court of Appeals for the D.C. Circuit upholds the Federal Communications Commission's order reversing an Obama Administration policy regarding network neutrality principles, while holding that the Commission lacked the legal authority to preempt similar state-law network neutrality frameworks. • Latinx voters in Arizona, California, Florida, and Texas file suit against the U.S. Department of Commerce in the U.S. District Court for the Northern District of Alabama and ask the court to require the Department to use an "actual enumeration" of the population rather than sampling to apportion seats in the U.S. House of Representatives and votes in the Electoral College. • Judge Morrison England Jr. of the U.S. District Court for the Eastern District of California issues a preliminary injunction blocking the application of California's Presidential Tax and Transparency Act, which requires presidential candidates in the California primary to disclose their federal tax returns for the previous five years as a precondition to appearing on the State's partisan primary ballot. • Judge Steve C. Jones of the U.S. District Court for the Northern District of Georgia issues a preliminary injunction barring enforcement of Georgia's Living Infants Fairness and Equality (LIFE) Act, which prohibited abortion after a fetal heartbeat could be detected.

**October 2:** Rohan Ramchandani, a former employee of Citigroup Inc., files suit in the U.S. District Court for the Southern District of New York and seeks \$112 million in compensatory damages from his former employer after the company allegedly lied to the Antitrust Division of the Department of Justice about his role in a conspiracy to manipulate foreign exchange markets.

**October 3:** The American Civil Liberties Union files a class action lawsuit in the U.S. District Court for the District of Arizona on behalf of families separated at the United States-Mexico border as a result of the Trump Administration's migrant family separation policy.

**October 4:** The Supreme Court grants certiorari in the consolidated cases of *June Medical Services LLC v. Gee* and *Gee v. June Medical Services LLC*, which involve challenges to a Louisiana law requiring physicians to obtain admitting privileges at nearby hospitals as a precondition to performing abortions. • The Democratic leadership of the U.S. House of Representatives subpoenas Acting White House Chief of Staff John "Mick" Mulvaney and requests that Vice President Mike Pence produce documents in connection with the House's impeachment inquiry into President Trump's conduct with respect to Ukraine and Ukrainian President Volodymyr Zelensky (see Sept. 26 entry).

**October 7:** The Supreme Court hears oral argument in *Ramos v. Louisiana*, which presents the issue of whether the Fourteenth Amendment protects the right to a unanimous jury verdict.

**October 8:** White House Counsel Pat A. Cipollone informs the Democratic leadership of the U.S. House of Representatives that President Trump will not participate in its impeachment inquiry, which Cipollone's letter characterized as a violation of due process. • The Supreme Court hears consolidated oral argument in *Bostock v. Clayton County, Georgia* and *Altitude Express Inc. v. Zarda*, which present the issue of whether the Civil Rights Act reaches discrimination on the basis of sexual orientation (see Apr. 22 entry).

**October 9:** In a letter to Treasury Secretary Steven Mnuchin, U.S. Senators Robert Menendez (D-NJ) and Marco Rubio (R-FL) ask the Committee on Foreign Investment in the United States (CFIUS) to open a probe into the U.S. operations of Brazilian meat-processor JBS SA, and raise concerns about connections between the company and the Venezuelan government under Nicolás Maduro.

**October 10:** The Democratic leadership of the U.S. House of Representatives issues a subpoena to U.S. Secretary of Energy Rick Perry as part of its investigation into President Trump's conduct with respect to Ukraine and Ukrainian President Volodymyr Zelensky (see Oct. 4 entry). • Federal prosecutors charge Igor Fruman and Lev Parnas, both associates of President Trump's personal attorney Rudolph Giuliani, with criminal violations of U.S. campaign finance laws.

**October 11:** Attorneys for U.S. Ambassador to the European Union Gordon Sondland announce that he will appear before the U.S. House of Representatives pursuant to its impeachment inquiry into President Trump's dealings with Ukraine and Ukrainian President Volodymyr Zelensky (see Oct. 10 entry). • The U.S. Court of Appeals for the District of Columbia Circuit affirms a district court order requiring Mazars USA, LLP to produce records related to work performed for President Trump and several of his business entities both before and after he took office to the U.S. House of Representatives House Committee on Oversight and Reform. • The U.S. Court of Appeals for the Sixth Circuit affirms a district court's order enjoining an Ohio law prohibiting abortions after tests reveal that the unborn child has Down syndrome. • Senior Judge David Briones of the U.S. District Court for the Western District of Texas enjoins the Trump Administration's funding plan for a wall on the United States-Mexico border. • Judge Rossie D. Alston, Jr. of the U.S. District Court for the Eastern District of Virginia invalidates a Virginia law requiring couples to identify their race on an appli-

cation for a marriage license, finding that the law violates the Fourteenth Amendment.

**October 15:** The Supreme Court hears oral argument in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment*, which presents the issue of whether the appointment of members of the Financial Oversight and Management Board for Puerto Rico must comply with the U.S. Constitution's Appointments Clause. • Judge Reed O'Connor of the U.S. District Court for the Northern District of Texas holds that the Affordable Care Act's nondiscrimination rules violate the Administrative Procedure Act and the Religious Freedom Restoration Act. • The U.S. Court of Appeals for the Fourth Circuit orders en banc rehearing of *District of Columbia v. Trump*, which presents the issue of whether President Trump's continued ownership interest in his businesses provides him with consideration from foreign governments and persons acting on their behalf in violation of the Foreign and Domestic Emoluments clauses of the Constitution.

**October 16:** The Supreme Court hears oral argument in *Mathena v. Malvo*, which presents the issue of whether "DC sniper" Lee Boyd Malvo is entitled to habeas relief from his two life sentences without parole under the Court's precedent in *Miller v. Alabama*.

**October 17:** U.S. Ambassador to the European Union Gordon Sondland testifies before the U.S. House of Representatives Committee on Foreign Affairs, Committee on Oversight and Reform, and Permanent Select Committee on Intelligence in connection with the impeachment inquiry into President Trump's dealings with Ukraine and Ukrainian President Volodymyr Zelensky (see Oct. 11 entry).

**October 18:** The U.S. Court of Appeals for the Third Circuit affirms a district court order upholding a Pittsburgh ordinance providing for a 15-foot demonstration-free "buffer zone" outside of hospital entrances. • The U.S. Court of Appeals for the Fifth Circuit denies Louisiana's petition for a writ of mandamus seeking dismissal of a challenge to the state's regulatory framework for abortion. • Judge Robert L. Hinkle of the U.S. District Court for the Northern District of Florida issues a preliminary injunction blocking Florida from enforcing a law requiring convicted felons to pay all outstanding court fees and fines as a precondition to registering to vote. • The U.S. Supreme Court grants certiorari in *Seila Law LLC v. Consumer Financial Protection Bureau*, which presents the issue of whether the agency's structure violates separation of powers principles (see Jan. 14 entry).

**October 21:** The American Civil Liberties Union of Minnesota files suit in Minnesota state district court on behalf of individuals seeking invalidation under the Minnesota Constitution of a state statute that denies felons who are on probation the right to vote.

**October 22:** The U.S. Court of Appeals for the D.C. Circuit denies a petition for a writ of mandamus in which Roger Stone and his family members sought vacatur of a “gag” order preventing them from making public statements about Stone’s criminal case in the U.S. District Court for the District of Columbia. The district judge issued the order after Stone posted an image on his Instagram account depicting the judge with crosshairs next to her head alongside inflammatory commentary in which he accused her of bias. • Federal prosecutors in the Central District of California charge Imaad Zuberi, a financial supporter of President Trump, with criminal violations of the Foreign Agents Registration Act, the Federal Election Campaign Act, and federal tax laws.

**October 23:** The U.S. Department of Justice sues California in the U.S. District Court for the Eastern District of California, alleging that the state’s cap-and-trade pact with Quebec violates the Constitution by complicating and burdening the Trump Administration’s task of regulating foreign commerce and negotiating competitive international agreements.

**October 24:** U.S. Magistrate Judge Sallie Kim finds the U.S. Department of Education and Secretary Betsy DeVos in civil contempt of court and imposes a fine of \$100,000 after DeVos and the Department violated a preliminary injunction requiring them to stop collecting loan payments from students who attended for-profit schools owned and operated by Corinthian Colleges, Inc. • Chief Judge Colleen McMahon sentences Matthew Connolly and Gavin Campbell — both executives at Deutsche Bank — to home confinement following their convictions on charges stemming from a conspiracy to manipulate the London Interbank Offered Rate (LIBOR) benchmark.

**October 25:** Chief Judge Beryl A. Howell of the U.S. District Court for the District of Columbia orders the U.S. Department of Justice to produce to the U.S. House of Representatives Committee on the Judiciary all portions of Special Counsel Robert Mueller’s Report that were previously redacted, as well as the redacted portions of transcripts or exhibits referenced in the Report. • The U.S. Court of Appeals for the D.C. Circuit dismisses as premature petitions for review of the U.S. Environmental Protection Agency’s adoption of less stringent automobile emissions standards, holding that it did not have jurisdiction because the agency had not taken final action. •

Former U.S. Deputy National Security Advisor Charles M. Kupperman files suit in the U.S. District Court for the District of Columbia and seeks a declaratory judgment as to whether he is lawfully obliged to comply with a subpoena issued by the impeachment investigators from the U.S. House of Representatives, or whether he is lawfully obliged to abide by the assertion of immunity from congressional process made by the White House. • President Trump seeks rehearing en banc after a panel of the U.S. Court of Appeals for the District of Columbia Circuit affirms a district court order requiring the President's accountants at Mazars USA, LLP to comply with a subpoena seeking his tax records (see Oct. 11 entry).

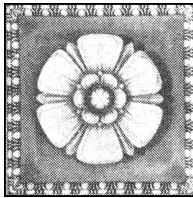
**October 28:** Judges Paul C. Ridgeway, Joseph N. Crosswhite, and Alma L. Hinton of the Superior Court of North Carolina issue a preliminary injunction blocking the use of a gerrymandered electoral map in the 2020 primary and general congressional elections.

**October 29:** Judge Myron H. Thompson of the U.S. District Court for the Middle District of Alabama enters an order preliminarily enjoining enforcement of Alabama's Human Life Protection Act, which criminalized nearly all abortions, completed or attempted, regardless of fetal viability. • Judge Marc T. Treadwell of the U.S. District Court for the Middle District of Georgia enjoins a Georgia county sheriff's practice of posting signs in front of the homes of sex offenders during the Halloween season announcing to the public that their homes are dangerous for children, finding that it runs afoul of the First Amendment. • Lawmakers in the U.S. House of Representatives introduce legislation that would authorize residents of Puerto Rico to vote on a statehood referendum in November 2020. • Lieutenant Colonel Alexander S. Vindman, Ukraine Director for the National Security Council, testifies before the House Permanent Select Committee on Intelligence, the House Committee on Foreign Affairs, and the House Committee on Oversight and Reform regarding the events giving rise to the impeachment inquiry into President Trump's dealings with Ukraine.

**October 30:** The U.S. Department of Justice and Low Taek Jho (a.k.a. Jho Low) reach a settlement under which the government will recover more than \$700 million that Low embezzled from 1Malaysia Development Berhad (1MDB), Malaysia's investment development fund.

**October 31:** The American Civil Liberties Union of Massachusetts files suit in the U.S. District Court for the District of Massachusetts on behalf of individuals seeking policies, contracts, and other records relating to the use by DOJ, the FBI, and the DEA of facial recognition programs and other biometric identification and tracking technology. • The U.S. House of Repre-

sentatives approves a resolution to formalize the impeachment inquiry into President Trump's dealings with Ukraine, largely along party lines (see Oct. 17 entry). • The Supreme Court of Kentucky affirms a lower court ruling that an LGBTQ+ organization lacked statutory standing under a county ordinance to challenge a t-shirt shop's refusal to make Pride festival apparel on religious grounds.





*Tony Mauro*<sup>†</sup>

# A YEAR IN THE LIFE OF THE SUPREME COURT

2019

*A summary of developments involving the Supreme Court of the United States in 2019, most of which are unlikely to be memorialized in the United States Reports.*

*Speech Defender:* During a public appearance at Belmont University in February, Chief Justice John Roberts Jr. used himself as an example to prove the point that members of the court should not be pigeonholed as liberal or conservative. He stated, “I don’t know where you put conservative or liberal in the First Amendment area, but I think I’m probably the most aggressive defender of the First Amendment on the court now. I think most people might think that doesn’t quite fit with my jurisprudence in other areas.” It was a remarkable statement that provoked debate among First Amendment scholars. Sonja West of the University of Georgia School of Law said Roberts has “earned the title” by protecting “unloved speakers” in several decisions. But she added that “speakers who have fared less well under a Roberts First Amendment include students, prisoners and government employees.”

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*Swearing in:* Over the decades, the number of unusual introductions of new members of the Supreme Court bar have added to the court's lore. In 2011, five brothers in the Mitchell family of Maryland were sworn in at the same time. In 2006, nine members of the Snyder family from New York were sworn in, among them four siblings including two sisters. Nine Perla family members, also from New York, were sworn in in 1994, including four brothers and a sister. On March 20th, a group of 10 lawyers may have topped them all. Dana Matthews I, a partner at the Florida firm Matthews & Jones, moved the admission of a son, a nephew, a cousin, and then another son along with six other unrelated lawyers. Laughter in the court grew as Matthews rattled off the names. Chief Justice said, "Your motion is granted, and your relatives and the other applicants will be admitted."

*Not Retiring:* Rumors that Justice Clarence Thomas was considering retirement were dashed by the justice himself on March 30. Speaking before a Pepperdine University School of Law audience in California, the 71-year-old justice said he had no plans to leave the court. During a conversation with Thomas, incoming Pepperdine University president James Gash hypothetically asked the justice who he would like to have speak at his retirement party in 20 years. "But I'm not retiring!" Thomas said emphatically. "Twenty years?" Gash asked. "No!" Thomas replied. "Thirty years?" Again, Thomas said, "No!"

*Scandalous marks:* The case titled *Iancu v. Brunetti*, argued on April 15, was the latest in the long history of First Amendment cases involving unpopular utterances. At issue was whether the government could deny trademark protection for "scandalous" marks such as FUCT, a clothing brand launched by designer Erik Brunetti. In cases like this one, the court has sometimes told advocates that during oral argument, they need not speak the controversial word involved. To allay any concerns before argument, Brunetti's lawyer in the case, John Sommer, dropped an unusual footnote in his merits brief stating, "It is not expected that it will be necessary to refer to vulgar terms during argument. If it should be necessary, the discussion will be purely clinical, analogous to when medical terms are discussed." The court on June 24 ruled 6-3 in Brunetti's favor.

*Write Tighter:* On April 18, the court announced rules changes requiring advocates to make their briefs briefer, an unwelcome development for high court practitioners. The changes, which took effect July 1, limited briefs on the merits to 13,000 words, down from the previous 15,000-word limit. The word limit for *amicus curiae* briefs filed by nongovernmental entities went from 9,000 to 8,000 words. Apparently responding to criticism from advocates,

the court decided to keep the word limit for reply briefs — which advocates view as highly important in culminating their briefing before the court — at 6,000 words. It had previously suggested a 4,500-word limit. In a commentary that accompanied the rules changes, clerk of the court Scott Harris wrote, “Experience has shown that litigants in this Court are able to present their arguments effectively, and without undue repetition, with word limits slightly reduced from those under the current rule.”

*Doing Better:* At a rare budget hearing May 7 before a House subcommittee, Justice Elena Kagan said the court was “doing better” in hiring diverse law clerks than it had in the past. Asked about the persistent dearth of non-white law clerks, Kagan said the issue is taken “very seriously by the court as a whole.” Kagan added, “It is important for us to use whatever bully pulpit we have” to promote recruiting more minorities for the Supreme Court. Separately, representatives asked Kagan and Justice Samuel Alito Jr. about the fact that Supreme Court justices, unlike lower court judges, are not bound by any ethics code. Kagan said Chief Justice Roberts was seriously considering developing such a code for the justices. By year’s end, the court gave no indication that an ethics code is in the works.

*Running Circuit:* In a sign that he has assimilated easily at his new workplace, Justice Brett Kavanaugh in May gathered a team of Supreme Court law clerks to participate with him in a three-mile run for the Capital Challenge. It is sponsored by the American Council of Life Insurers, and draws political figures, executive and judicial branch personnel, and journalists. Kavanaugh’s predecessor Anthony Kennedy ran the race in 1990, the only other justice to do so. Kavanaugh’s team was named Running Circuit, a twist on riding circuit, which justices did long ago. Among his teammates were clerks for justices Stephen Breyer, Sonia Sotomayor, and Clarence Thomas. Notably, Solicitor General Noel Francisco also fielded a team for the race, titled Argumentative Bastards.

*Virtual Briefing:* A *Cornell Law Review* article titled “Virtual Briefing at the Supreme Court” provoked discussion in May about the justices’ use of information outside the record before them in deciding cases. Stanford Law School professor Jeffrey Fisher and professor Allison Orr Larsen of William & Mary Law School, the authors of the article, found that at least 25 of the court’s law clerks from the last two terms have active Twitter accounts. Online commentary, sometimes at the 11th hour before oral argument, may influence the court, according to the authors. “No longer must a litigant or other individual seeking to influence the court reach out months or years in advance to would-be authors,” the authors wrote. “Now such persons can generate

blog posts and the like within days — and can pinpoint their issuances to exactly the time at which they have the maximum chance of being read inside the court.”

*Stevens Died:* Justice John Paul Stevens, a respected jurist whose tenure on the high court spanned nearly 35 years, died on July 16 at the age of 99 in Fort Lauderdale, Florida, where he had a home. A statement from the court said he died of complications following a stroke that he suffered the day before. His daughters were by his side. Chief Justice Roberts said of Stevens, “A son of the Midwest heartland and a veteran of World War II, Justice Stevens devoted his long life to public service . . . . He brought to our bench an inimitable blend of kindness, humility, wisdom, and independence. His unrelenting commitment to justice has left us a better nation.”

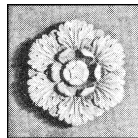
*Few Females:* A September panel discussion sponsored by the Women’s Bar Association of the District of Columbia focused on the longstanding dearth of female advocates arguing cases before the Supreme Court. Williams & Connolly partner Sarah Harris reported that in the last Supreme Court term, 31 of the 184 appearances were women. That amounts to 17%, lower than some other recent terms. The numbers are even worse for female lawyers in private practice, Harris noted. Only seven of the 90 appearances by private practitioners were by women. And among the 31 lawyers who argued on behalf of corporations, only three were women. Many factors are to blame, the panelists said, including clients who insist on seasoned advocates — most of them male — to take a case being argued before the nation’s highest court. “General counsels are afraid of their boards. They’re big cases, right? You’re not going to get yelled at if you pick a former solicitor general. And so that’s a safe choice,” Harris said.

*Two-Minute Hiatus:* In a rare change of longstanding tradition, the court on October 3 announced that oral advocates before the court would “generally” be given two minutes of uninterrupted time at the beginning of argument. No reason for the lacuna was offered, but several justices in recent years have acknowledged, abashedly, that the court’s rapid-fire barrage of questioning needed to be cut back. The change was promulgated in the latest edition of the court’s Guide for Counsel, just a few days before the new term’s oral arguments were scheduled to begin. “This is a dramatic change,” said David Frederick, a partner at Kellogg, Hansen, Todd, Figel & Frederick and author of a book about Supreme Court advocacy. Some advocates, accustomed to the hot bench, struggled to devise a two-minute opening statement. Justices also took time to adapt to the new policy. Several justices inadvertently

breached the new policy and interjected questions before the two minutes were up.

*Security Abroad:* On November 27, Congress passed a law titled the Reauthorizing Security for Supreme Court Justices Act. The bill expanded the jurisdiction of the marshal of the Supreme Court and the court's police force to protect justices "in any location." The earlier version of the relevant part of the U.S. code, 40 U.S.C. 6121, confined the authority to "any state." The bill also made the authority permanent, deleting the provision that would have sunset it on December 29. Another provision of the earlier law authorized law enforcement to protect "an official guest" of the court, and to carry firearms to provide that protection, if the chief justice or an associate justice authorizes it. The bill expanded that power beyond U.S. borders as well. "We live in volatile times and this bill will permanently reauthorize security for the Supreme Court Justices when they travel outside the grounds of the Court," bill sponsor Senator Lindsey Graham (R-South Carolina), said in a statement.

*Annual Report:* In his annual year-end report on the state of the federal judiciary, Chief Justice Roberts on December 31 stated that the courts should be celebrated as a "key source" of national unity. "But we should also remember that justice is not inevitable," he added. "We should reflect on our duty to judge without fear or favor, deciding each matter with humility, integrity, and dispatch . . . In our age, when social media can instantly spread rumor and false information on a grand scale, the public's need to understand our government, and the protections it provides, is ever more vital," He continued, "We should each resolve to do our best to maintain the public's trust that we are faithfully discharging our solemn obligation to equal justice under law." His remarks were dissected more than usual by pundits, in part because the court in 2020 may be facing several cases litigating issues related to President Donald Trump, and because Roberts was expected soon to preside over Trump's impeachment trial.





*Catherine Gellis & Wendy Everette<sup>†</sup>*

# THE YEAR IN LAW & TECHNOLOGY

## 2019

You can cram a lot of law and technology into a year. 2019 is no exception and is positively brewing with news about Section 230, machine learning, data breaches, and ransomware attacks on courts and law firms. Join us in exploring these and other developments from the last year before the roaring 2020s.

### JANUARY

There's no talking about law without talking about the courts. But it's hard to know what they are up to when the cost to access court documents can be so prohibitive. In January the Free Law Project, Syntexys, Justia, Casetext, Docket Alarm, Fastcase, the Internet Archive, and Ravel Law, assisted by students in the Julesgaard IP & Innovation Clinic at Stanford, filed an amicus brief in *National Veterans Legal Services Program v. United States* explaining how the fees to use PACER to access these documents hamper innovation

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<sup>†</sup> Wendy Everette is a Senior Security Advisor at Leviathan Security Group. Catherine Gellis is an internet lawyer and former internet professional in private practice in the San Francisco Bay Area. Copyright 2020 Wendy Everette and Catherine Gellis. Photograph copyright 2020 Brendan Francis O'Connor (used with permission).

and fairness.<sup>1</sup> The brief noted that the “fee policy contravenes the Act’s clear statutory language and Congress’s intent by charging fees well beyond what is necessary for reimbursing expenses of the PACER system.” • Speaking of court documents, this year’s first high-profile redaction failure appeared in a filing by Paul Manafort’s attorneys disputing that Manafort had violated a cooperation agreement by lying in the Mueller Special Counsel investigation. The public version of the filing appeared to be redacted, with black bars covering some of the text, but by copying and pasting from the document, reporters were able to read the redacted text.<sup>2</sup> Redacting PDFs or other documents requires the use of specialized PDF software that edits — not merely masks — the underlying text. In the interests of reducing the number of redaction failures in our industry, we remind you to follow a redaction guide when redacting a legal document.<sup>3</sup> • Also speaking of courts, in 2016 (our first edition) we highlighted changes to the way that warrants were issued for computer searches under FRCP Rule 41. In January the Department of Justice asked a magistrate judge to issue a warrant per those amendments in order to allow the DOJ to operate servers that appeared to be part of a North Korean botnet.<sup>4</sup> With that permission the DOJ kept the servers online, which allowed them to gather information leading to the disruption of the Joanap botnet. • And in other technology news, Evan Selinger and Brenda Leong presented their paper “Robot Eyes Wide Shut: Understanding Dishonest Anthropomorphism” at the ACM Conference on Fairness, Accountability, and Transparency.<sup>5</sup> Their work explores the consumer protection harms that might arise from “deceptive robots and artificial intelligences that exhibit the problem of dishonest anthropomorphism.”

## FEBRUARY

We can’t talk about law without talking about lawyers. For those readers who are lawyers, and who may want to do automated document generation and streamline client intakes, but who may not want to learn how to program, guided application generation tools are likely to be helpful. In particular, a free tool launched by Community Lawyer — The App Builder — is designed to automate repetitive tasks that many lawyers do daily: document creation and

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<sup>1</sup> <https://free.law/pdf/NVLSV-v-United-States-Amicus-Brief-Nextgen-Legal-Innovators.pdf>.

<sup>2</sup> <https://assets.documentcloud.org/documents/5677512/Manafort-20190108-Dc.pdf>.

<sup>3</sup> For example, <https://www.onelegal.com/blog/how-to-correctly-redact-a-pdf/>.

<sup>4</sup> <https://www.justice.gov/opa/pr/justice-department-announces-court-authorized-efforts-map-and-disrupt-botnet-used-north>.

<sup>5</sup> <https://dl.acm.org/doi/10.1145/3287560.3287591>.

client intake.<sup>6</sup> • Lawyers of course were once law students, and many law students are familiar with the iconic yellow boxes of Emanuel Law Flashcards. But now Wolters Kluwer and Gabriel Teninbaum's SpacedRepetition.com have teamed up to bring the flashcards online.<sup>7</sup> The SpacedRepetition.com algorithm tracks how well students have learned each card and cycles back in questions that students have struggled with. • Some lawyers also come from New Jersey. But not these alleged "lawyers" who impersonated the State of New Jersey's Attorney General's Office and sent a takedown notice for a 3D printed gun to Cloudflare. Cloudflare passed the notice along to the content host, who filed a lawsuit challenging the takedown, to which the State of New Jersey responded by asserting that they had not sent the notice: "The Attorney General's Division of Criminal Justice (DCJ) has concluded that a key document supporting Plaintiff's TRO application — a 'takedown notice' purportedly sent by DCJ to Cloudflare, Inc., which hosts one of the plaintiff's websites, CodeIsFreeSpeech.com — was not in fact issued by DCJ, and appears to have been issued by some entity impersonating the Attorney General's Office." • Cloudflare is also the subject of another February update, when its district court win against patent troll Blackbird was upheld by the Federal Circuit. Not only did it notch the win, but the court also ruled that Blackbird had to pay Cloudflare \$383k in attorney fees, which is vastly more than the \$80k Blackbird was hoping to extract from Cloudflare. • One issue with trolls is that the legal challenges they raise tend to be voluminous. But they aren't the only legal issues prone to arising in bulk: Bloomberg Law covered the proliferation of arbitration lawsuits, including 12,501 of them filed by Uber drivers, and around 10,000 filed by Chipotle employees. Employers, who have increasingly required arbitration to handle employment disputes, have seen many thousands more cases filed against them than they expected, often due to the use of automation software by attorneys on the plaintiff side.<sup>8</sup> Bloomberg Law reported that the attorneys may have been seeking leverage with the large number of suits, although they also reported that the settlement coordination needed at law firms to track thousands of arbitration suits required "expensive ad campaigns and time-consuming administrative coordination." • But while sometimes technology can increase the amount of legal work to be done, sometimes it can reduce it. Wilson Sonsini spun off a software subsidiary, SixFifty, to create tech solutions for law firms. Their first product is a privacy toolkit for General Data Protection Regulation

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<sup>6</sup> <https://community.lawyer/introducing-app-builder>.

<sup>7</sup> <https://www.spacedrepetition.com/law-in-a-flash>.

<sup>8</sup> <https://news.bloomberglaw.com/daily-labor-report/corporate-arbitration-tactic-backfires-as-claims-flood-in>.

(“GDPR”) and California Consumer Privacy Act (“CCPA”) compliance.<sup>9</sup> They have now moved into building apps that are aimed at members of the public without lawyers, with the latest being a tool for renters. The tool asks them a series of questions about their problem and leasing situation and then generates a customized letter for the renter to send to their landlord. But whether lawyers can be replaced by apps is an open question. There may be a place for apps to help streamline access to justice, and they can perhaps make the intake process more efficient, but users of apps like these still take on serious legal risk by depending on the information provided by these apps which cannot ensure it is actually the right advice. Perhaps someday lawyers will be replaced by apps, and app developers are working hard to make that day come soon, but we cannot yet report their having succeeded. • And, for the final note of interest from February, Parker Higgins (@xor) found what might be the first occasion when a Twitter bot was cited as an “other authority’ in a brief in federal litigation.” He spotted it in a filing in the PACER fees lawsuit, *National Veterans Legal Services Program v. United States*, referencing a reporter’s use of software to perform PACER scraping and tweet updates to assist with their reporting.<sup>10</sup> The brief cites the Twitter bot as a “Twitter account run by USA Today reporter Brad Heath that uses computer code to automatically scrape PACER for updates on certain newsworthy cases.”<sup>11</sup>

## MARCH

Another month, another PACER update. This time it’s the Electronic Court Records Reform Act of 2019,<sup>12</sup> which was introduced to try to improve the PACER electronic court records system. The Act would require court records to be available to the public free of charge and seek to consolidate the many individual instances of PACER into one system. • The rest of the updates from March cover a range of topics. For instance, DLA Piper has been in arbitration with its insurance company over payouts related to the NotPetya ransomware attack which struck the firm in 2017. The law firm had to incur 15,000 hours of extra overtime among IT staff to recover from the attack, which also affected shipping giant Maersk and many other companies. DLA Piper’s lawyers had limited to no access to their computer systems for at least two days following the attack, and the firm had to rebuild many systems during their recovery. • March was also the month for several appellate deci-

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<sup>9</sup> <https://www.sixfifty.com/solutions/privacy/>.

<sup>10</sup> <https://twitter.com/xor/status/1092455641845850113>.

<sup>11</sup> <https://www.rcfp.org/wp-content/uploads/2019/01/2019-01-24-NVLS-P-v-US.pdf>.

<sup>12</sup> <https://www.congress.gov/bill/116th-congress/house-bill/1164/all-info>.

sions interpreting § 230. While in *Homeaway v. City of Santa Monica*, the Ninth Circuit denied its protection to platforms allowing users to rent their homes (Homeaway, Airbnb, etc.), the Second Circuit found that it protected dating site Grindr from liability arising from others' misuse of its site. • And it was a month for several appellate decisions on compelled decryption and its relationship with the 5th Amendment. In *Commonwealth v. Jones*, the Massachusetts Supreme Judicial Court held that if the government can show that a device owner knows the password to a device beyond a reasonable doubt, then there is no 5th Amendment violation in requiring the device be unlocked. A Missouri court of appeals held similarly in *State v. Johnson*, finding that requiring a defendant to unlock a cellphone, after the State had previously witnessed them enter the passcode, did not violate the 5th Amendment due to the "foregone conclusion" doctrine. However, in *People v. Spicer*, an Illinois appellate court found that the State had not fulfilled the foregone conclusion exception, because it had not been certain that the passcode would unlock a phone. • Speaking of certainty, in *Fourth Estate Public Benefit Corp. v. Wall-Street.com* the U.S. Supreme Court ruled definitively that the copyright statute means what it says: if you want to sue for copyright infringement, you have to first have your copyright registered by the copyright office. This decision cleared up a circuit split because some courts had determined that you could sue as long as you'd merely filed for registration, but now lawsuits must wait for the Register to first act upon the registration. • Meanwhile, are search terms, when combined with an IP address, enough to identify an individual? And, if so, is their disclosure a "concrete harm" on which liability can be pinned? In *Frank v. Gaos*, several internet users sued Google under the Stored Communications Act for disclosure of their search terms and IP addresses to the operators of websites they reached through Google searches. The Supreme Court vacated and remanded the case to the Ninth Circuit this month to reconsider the standing problem in light of *Spokeo*, decided in 2016, which says that concrete harm is needed. • And in a world where software controls cars, smart homes, and more, how should negligence law deal with artificial intelligence? The author of *Negligence and AI's Human Users*, forthcoming in volume 100 of *Boston University Law Review*, posited that "inscrutable, unintuitive, and statistically-derived code" "disrupts our typical understanding of responsibility for choices gone wrong" because it removes the human actor from the events that occur. But what exactly is "inscrutable" code? We've seen some pretty gnarly code in our time, but, for someone who doesn't know how to code, all of it will be inscrutable. What does it mean if anyone, including non-technical attorneys, can declare most software "inscrutable"? To what extent should attorneys today familiarize

themselves with software programming? Is relying on the expertise of computer experts and translating their knowledge generally adequate, and how would attorneys discover when it's not? Stay tuned for future years' updates when we will presumably discuss some of the answers to these questions.

## APRIL

Section 230 remained a hot topic throughout the year. In April the Wisconsin Supreme Court found it protected the site Armslist, a platform that people can use to buy and sell guns, from liability arising from misuse of any such guns. • Meanwhile, *Twenty-Six Words That Created the Internet*, a book about § 230's impact on the early internet, was published this month by Jeff Kosseff. The law limits an online platform's liability regarding hosted user content and has allowed blogs, social media, memes, and other fun internet culture to flourish. • Speaking of publishing, James Grimmelman published a web page collecting technology-law-related open-access casebooks.<sup>13</sup> They run the gamut from intellectual property to advertising law to national security law to telecom law. He asks for updates, so if any of our readers have come across other open access casebooks that should be listed here, please let him know. • In the "sharing law" vein, Stanford's CodeX held their "FutureLaw 2019" conference, which included panels on "The Rise of Free Law and Its Implications," "Legal Data Commons" and keynotes from Dharmishta Rood and Julio Avalos. The conference explored new ways in which lawyers are using technology in legal education, legislative drafting, open source contract analysis, and bringing court dockets online. Videos from the conference were posted on YouTube.<sup>14</sup> • And speaking of one of the platforms § 230 has enabled — namely, Twitter — if you create a Twitter account to promote your employer, and then leave the employer for a competitor, change the Twitter handle to reference your new employer, and continue using it, have you committed theft? A court found that this scenario could be considered conversion in *Farm Journal v. Johnson* when the owner of the Twitter account @gregofthepacker left his employer, a publisher of agricultural publication *The Packer* for a competitor, titled *The Produce Blue Book* and retitled the Twitter account he used to @gregofthebluebook. His former employer sued, claiming the Twitter account belonged to it. The court found that the defendant had "'tortiously taken' the Twitter account, 'has used and appropriated the account to its own purposes'" and refused to dismiss the conversion claim.

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<sup>13</sup> <http://james.grimmelman.net/files/casebooks>.

<sup>14</sup> <https://www.youtube.com/watch?v=CDpGjxxceiI&list=PLAx1YswjkDmMPohTuirHCMhjfidoJiIcV>.

## MAY

May was a big month for law and technology making a big mess when put together. For instance, the Superior Court of New Jersey Appellate Division upheld a \$200,000 arbitration award after a lawyer for the defendant New York Sports Club (“NYSC”) failed to use the eCourts system to file a request for a new trial. The court noted that New Jersey attorneys were advised in 2017 that they would need an account on the eCourts system in order to electronically file documents with the courts going forward. NYSC’s attorney had an account on the system, but was confused about how to operate it, and failed to contact the court to ask for assistance. They further failed to follow up on their returned check corresponding to their attempt to file by paper with the court. • On the other hand, court systems can have issues of their own, as was the case when malware struck the computer systems of the First Judicial District in Philadelphia, shutting the electronic filing system for civil and criminal cases and some judicial email systems. It took until late June before access was restored to all systems. • The Caselaw Access Project Research Summit was held this month at Harvard Law School. The Summit celebrated five years of work (2013–2018) digitizing over 40 million pages of casebooks, a project which we’ve featured in past years as they brought more components of it to fruition. The celebration featured remarks from Jonathan Zittrain, talks on “link rot” (where online resources are taken down or move, leading to hypertext links that lead only to page-not-found errors), and presentations on research that had been done with the open case law corpus hosted by the project.<sup>15</sup> Heretofore, as an example of sort of data visualization possible with Caselaw corpus, we have declared that University of Washington School of Law student Nam Jin Yoon’s “heretofore”-use-by-state-in-court-opinions to be one of our favorite uses of the dataset this year. Readers can look up the “heretofore”-ness of their state’s judges at the “Legalese Tracker.”<sup>16</sup> • Meanwhile, Louisiana’s State Bar Association issued an ethics opinion holding that “[w]hen a lawyer uses technology in representing a client, the lawyer must use reasonable care to protect client information and to assure that client data is reasonably secure and accessible by the lawyer,” but also finding that “using technology in law practice is optional.” As e-discovery has become commonplace and client communication has increasingly shifted to email, we wonder just how “optional” the use of technology is in most law practices. • As discussed above, guided questionnaires that offer generalized legal advice around a topic are a growing area in legal innovation. In Utah, Greg Anjewierden

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<sup>15</sup> <https://case.law/>.

<sup>16</sup> <https://njyoon.github.io/legalese-tracker/index.html>.

built an application, DebtBrief, after learning that 98% of debt collection defendants in Utah did not have a lawyer to assist them.<sup>17</sup> DebtBrief guides defendants through document collection and the process of negotiating or filing answers in court. It has yet to be seen, however, whether using an app leaves users any better off than if they were without lawyers entirely, or whether it's just dangerous snake oil. • Of course, law and technology are going to merge one way or another, so we might as well pay attention to how. Towards that end the Corporate Legal Operations Consortium (CLOC 2019) was held in Las Vegas this month. Machine learning, “data driven decision making,” and automating legal operations were major focuses of the gathering, which featured sessions on increasing efficiency with software solutions, risk mitigations, and finding actionable insights through data mining and analytics. • Finally, also worth mentioning from May is the Supreme Court decision finding that consumers who had paid higher-than-competitive prices for iOS applications could sue Apple as an allegedly monopolistic retailer under antitrust law in *Apple, Inc. v. Pepper et al.* The presented was whether consumers bought the applications from developers who wrote the mobile applications and listed them for sale in the iOS app store, or were “direct purchasers” from Apple, which charged the consumers for the applications. Per *Illinois Brick Co. v. Illinois*,<sup>18</sup> only “direct purchasers” of an anti-competitively priced product can bring suit under antitrust law.

## JUNE

Privacy policies are “documents created by lawyers, for lawyers,” but even for attorneys, they can be dense and technical and difficult to parse. In “We Read 150 Privacy Policies. They Were an Incomprehensible Disaster,” the *New York Times*’ Privacy Project analyzed the reading level needed to understand various privacy policies, and found that most required a college or graduate education level of reading skill. They found a few notable standouts, including the BBC’s privacy policy, praised for its concision and clarity. We found that the animated graphs featured in the article were a delightful way to understand just how dense the policies were, and encourage our readers to explore them.<sup>19</sup> • Also in the privacy vein, the FTC held PrivacyCon 2019 at the Constitution Center in Washington, DC. Panels covered “Privacy Policies, Disclosures, and Permissions,” “Consumer Preferences, Expectations, and Behaviors,” “Tracking and Online Advertising,” and “Vulnerabilities, Leaks,

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<sup>17</sup> [debtbrief.com](http://debtbrief.com).

<sup>18</sup> 431 U.S. 720 (1977).

<sup>19</sup> <https://nyti.ms/2MTmF2W>.

and Breach Notifications,” and topics ranged from COPPA rulings to data breach notifications to smart home technologies. Researchers presented their papers in panels, followed by discussions led by FTC staff. The videos and transcripts of panels are available on the FTC website.<sup>20</sup> The next PrivacyCon will take place in Washington in July 2020. • Of course, the internet isn’t entirely about privacy. Sometimes it’s about publicity, and hijinks ensue as scammers try to manipulate Google Maps to show bad information for certain listings, particularly in some categories like locksmiths. In *Marshall’s Locksmith Service v. Google*, 14 actual locksmiths filed suit against Google, Yahoo, and other online map operators, alleging that they were injured by the online maps allowing the “scam” locksmiths who paid advertising fees to be featured in the map listings. But the dismissal of their lawsuit was upheld by the D.C. Circuit, which found that the lawsuit fell squarely within the purview of § 230, which insulates platforms like Google Maps from liability arising from the content third party users provide.

## JULY

July saw an addition to the body of jurisprudence on whether the 5th Amendment prevents state authorities from forcing people to unlock their devices. There is a discrete set of issues that arise when the devices use biometric (fingerprint, for example) locks, and courts have been reluctant to find that the 5th Amendment bars compelled unlocking of biometric devices. In the case *In the Matter of the Search of: A White Google Pixel 3 XL Cellphone in a Black Incipio Case*, a district court in Idaho held that, since the investigators were to select the fingers to be used to unlock a cellphone, the thought processes of the defendant were not implicated, and therefore the biometric unlock did not violate their 5th Amendment rights. • Speaking of biometric passwords, Harvard Law School’s Caselaw Access Project released their free “Historical Trends” tool.<sup>21</sup> Enter a search term, and it will graph the frequency of occurrence of your term across six million U.S. legal cases that have been digitized in their corpus. Would you like to know the first year that “biometric” appeared in a court opinion? According to a search on the Historical Trends tool, that would be 1978, while “password” appears in the repository documents dating back to the 1860s. • Online legal databases can be quite interesting. The Free Law Project, for instance, surpassed two million minutes of oral argument recordings in their archive. They began collecting the recordings when they noticed that circuit courts were removing

<sup>20</sup> <https://www.ftc.gov/news-events/events-calendar/privacycon-2019>.

<sup>21</sup> <https://case.law/trends/>.

them from their websites.<sup>22</sup> • Also, the Department of Justice’s website launched an API in July to allow for searches of public documents on file with the Foreign Agents Registration Act Unit.<sup>23</sup> • When software breaks during the paper-writing process, do editors catch the errors introduced? When links break in Microsoft Word, the software substitutes the text “bookmark not defined” for the original text. James Grimmelmann (@grimmelm on Twitter) noted the high number of these errors in Hein Online, likely detritus of shuffled footnotes from law review editorial processes, and proposed a survey article to our parent journal: “There are 330 hits in @HeinOnline for ‘bookmark not defined.’ That’s enough that someone should write a definitive literature review of this important legal topic. Paging @GB2d.”<sup>24</sup> • Cat Moon (@inspiredcat) highlighted a choice quote from Prism Legal’s Legal Innovation Survey: “‘There is a firmwide innovation committee that approves innovation initiatives which are submitted by individual Innovation committees’ — Law Firm,” to which Adam Ziegler (@abziegler) responded with a quote that captures our views on much of the state of legal innovation these days: “This is not inspiring. Where’s the crazy? Where’s the new? Where’s the ambition?” Of course, as we note with the attempts at lawyer-replacing apps, sometimes going with the crazy is itself crazy. • Meanwhile, in other law & technology news, the FTC announced a settlement with device manufacturer D-Link that required the development of a comprehensive computer security program, including threat modeling, security specific software verification, monitoring for security issues, automatic firmware updates, and a software vulnerability reporting program to accept reports of future security issues from security researchers. • The FTC also imposed a \$5 billion penalty on Facebook to settle charges that Facebook violated a 2012 consent order governing user privacy. The \$5 billion penalty was one of the largest data privacy fines imposed worldwide, and was accompanied by restrictions on Facebook’s business operations. The FTC alleged that users were unaware of the extent to which third-party applications used by users’ Facebook friends could access users’ personal data, and that Facebook failed to monitor or deal with applications violating their platform policies.<sup>25</sup> • Also of note was a case addressing

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<sup>22</sup> <https://www.courtlistener.com/audio/>.

<sup>23</sup> <https://efile.fara.gov/ords/f?p=1235:10>.

<sup>24</sup> <https://twitter.com/grimmelm/status/1156043255907270658>. See also *Bookmark Not Defined*, 23 Green Bag 2d 7 (2019), [http://greenbag.org/v23n1/v23n1\\_ex\\_ante\\_bookmark.pdf](http://greenbag.org/v23n1/v23n1_ex_ante_bookmark.pdf) (expressing hope that Grimmelmann’s observation “will be dealt with in . . . ‘The Year in Law & Technology’ in the 2020 edition of the *Green Bag Almanac & Reader*”). The *Green Bag* should also publish a paper on strange loops in citations.

<sup>25</sup> <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>.

§ 1201 of the Digital Millennium Copyright Act, which disallows circumventing technological measures that control access to a copyrighted work. In *Synopsys, Inc. v. Innogrit, Corp.*, the U.S. District Court for the Northern District of California, found that changing the MAC (“media access control”) address on a computer so that it matched the address of a computer authorized to access a particular resource constituted that sort of impermissible circumvention. MAC addresses are unique identifiers assigned to the networking hardware inside a computer, and individually identify computers on a network. They can be used as a form of access control, although, as this case shows, users can, with advanced tooling, change theirs. Here, software licensed by Synopsys used a license key system based in part on MAC addresses, which users bypassed by changing the address, thus circumventing the anti-piracy measures. • We hope you’ve been following along with our review so far. If you also wish to follow Donald Trump on Twitter, you can. The SDNY ruled, in *Knight First Amendment Institute v. Donald Trump*, that because he’s the president, and has used his Twitter account for his official presidential communications, he is not allowed to stop you.

## AUGUST

Our constitutional rights vis-à-vis our personal digital devices remain at the fore of legal issues. In *U.S. v. Cano*, the Ninth Circuit held that border agents may perform a manual search of a cellphone at the border without reasonable suspicion, but “forensic cell phone searches require reasonable suspicion.” Those searches, which use specialized software to retrieve and index all the information on a device, often including deleted data, are generally seen as more intrusive and thus require a higher standard than a general suspicionless search by an agent. • August was also a month of updates in legal technology. For instance, a startup spun off of the law firm Kohrman Jackson & Krantz launched ConnectIVITY at ILTACON.<sup>26</sup> The mobile application and cloud platform were built to complement law firm document management systems to help clients access to documents within those systems. • The winner of the Law School Admission Council’s (LSAC) inaugural Justice Innovation Challenge was an app made by Emilie Schwarz that helps provide immigrant domestic violence survivors with legal information, checklists, and pre-screening for VAWA self-petitions. The Justice Innovation Challenge awards “innovative, technology-based solutions” that are built “in collaboration with a nonprofit legal services organization.” It received more than 60

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<sup>26</sup> connectivecounsel.com.

submissions from law students around the country. • There are a lot of innovative ideas out there, and also some less innovative ones, but it seems that even the latter may be entitled to copyright protection. Which is the only thing that can explain the result in *Silvertop Associates v. Kangaroo Manufacturing*, where the Third Circuit upheld a lower court decision finding that the defendant's banana costume apparently infringed on the plaintiff's. • On the other hand, a New Jersey District Court found GoDaddy not liable for federal trademark infringement under 15 U.S.C. § 1114(2)(D)(iii) in *InvenTel Products, LLC v. Li*. A counterfeiting operation had registered a domain with GoDaddy, and used the website to sell counterfeit car security cameras. InvenTel, which makes the cameras being counterfeited, brought suit against GoDaddy for trademark infringement and other claims. The court wrote, “without a warning that the specific URL being registered would be used for an illicit purpose, GoDaddy did not have a ‘bad faith intent to profit’ from the automatic registration. . . . Plaintiff provides no basis for the proposition that GoDaddy must predict which URLs will be used for infringement purposes and proactively stop them from being registered.”

## SEPTEMBER

If you dig around in PACER, how far back do you think you can go? According to the Free Law Project, PACER includes a case from 1936. “Behold the various bankruptcies of the Dunning Brothers Company.”<sup>27</sup> • Of course, trolling through PACER is expensive, and that has gotten the attention of Congress. But at a House Judiciary Committee’s Subcommittee hearing a federal judge shared that the cost of running the PACER system was \$100 million a year, which caused the Free Law Project to respond on Twitter with skepticism: “The most unfortunate thing from today’s PACER testimony in the House Judiciary Committee was that a judge said it cost \$100M/year to run PACER, and nobody batted an eye. (Hint: Websites do not cost this much.)” • When it comes to digging around other people’s databases, or at least scraping their visible contents, August was the month where the Ninth Circuit decided *hiQ Labs, Inc. v. LinkedIn Corp.* It held that using software to “scrape” publicly available data from websites does not violate the Computer Fraud and Abuse Act (“CFAA”). It’s an important decision, because companies that publish data online have frequently used Terms of Service and other policies on their website to attempt to forbid such automated collection and then sue under the civil provisions of the CFAA to enforce these

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<sup>27</sup> <https://t.co/D8SqUUSoxT>.

prohibitions and block the data collection. Here, the court found that because the information being collected was publicly available, and “the default is free access,” the scraping did not violate the “without authorization” part of the CFAA. • But while there was no penalty for hiQ Labs, the same cannot be said for Google and YouTube, which paid a \$150 million penalty to the FTC and New York State to settle allegations that they collected personal information about children without their parents’ consent, in violation of the Children’s Online Privacy Protection Act (“COPPA”). COPPA requires the consent of a parent or guardian before a website or other technology can collect identifying information about any users under the age of 13. The FTC alleged that YouTube used persistent cookies to tag the browsers of children who watched children’s content on YouTube, allowing them to track the children across other websites and serve targeted advertising to them on other websites. Although YouTube claimed to be a general-purpose website, the FTC and New York classified several sections of it as “child directed” and therefore subject to the privacy and consent requirements of COPPA. • Speaking of penalties, attributing blame for online attacks often appears to outsiders as pure guesswork without any penalties for shoddy attribution or misattribution. Should attribution of cyberattacks be governed by legal standards? Kristen Eichensehr of UCLA’s School of Law argued in *The Law & Politics of Cyberattack Attribution*<sup>28</sup> that attribution should follow the customary international law requirement that states’ attributions of state-sponsored cyberattacks be supported by sufficient evidence, which she argues would help deter further attacks and conflict. • But lest we forget, in a case involving Google and the French privacy regulator CNIL, the Court of Justice for the EU ruled that European regulators enforcing deletion requests under what has been termed the “right to be forgotten” could not require those deletion orders to extend to other countries.

## OCTOBER

Should Sesame Street ads follow children around the internet after they watch an episode on YouTube? The FTC held a workshop on “The Future of the COPPA Rule” at the Constitution Center in Washington, DC. COPPA, originally passed in 2000, has been criticized by some for not keeping up with the proliferation of mobile applications and games. At the workshop, participants discussed potential privacy harms suffered by children when using internet-connected systems or submitting their personal identifying details

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<sup>28</sup> UCLA Law Review (forthcoming 2020).

to tracking databases, how to account for children's use of voice enabled assistants such as Siri or Alexa, and the collection of student data by schools and education technology. Of course, as some commentators have pointed out, kids use the internet whether they are technically old enough to or not, and too strong a rule breaks it for everyone. • While children's privacy is addressed by COPPA, courts continue to weigh in on the privacy the 4th Amendment may afford to any of the data collected by the computers in your car. In *Mobley v. State*, the Georgia Supreme Court held that police must get a warrant to collect data from a car's "event data recorder" (aka "black box"). After a fatal car crash, police downloaded the car's pre-accident speed and other telemetry from a car event data recorder without a warrant. The court found that extracting the data from the car's system was a search and seizure under the 4th Amendment, writing that "physical intrusion into a personal motor vehicle for the purpose of obtaining information for a law enforcement investigation generally is a search for purposes of the Fourth Amendment under the traditional common law trespass standard." • Privacy is also implicated by data breaches where data is stolen or leaked and lost. Law.com published an investigation in which they determined that over 100 law firms have suffered data breaches that exposed employee or client information.<sup>29</sup> The breaches ranged from a theft of employee tax forms at Jenner & Block and Proskauer Rose via phishing (a form of computer attack in which fraudulent emails purporting to be from legitimate parties, such as business partners or service providers, are sent to victims with the aim of stealing their login credentials to sophisticated attacks by Chinese nationals on law firms working on mergers and acquisitions. • The opposite of a data breach might be ransomware, in which a malicious computer software virus infiltrates computer networks and encrypts computer hard drives until a "ransom" is paid to the perpetrator deploying it. This month, case management platform TrialWorks disclosed that they were affected by a ransomware attack on October 14.<sup>30</sup> They were able to recover and provide access to files shortly afterwards, but attorneys who depended on the platform were affected, forcing some law firms to request extensions in deadlines for their cases, including Whittel & Melton of Spring Hill, Florida, which filed a motion in a gender discrimination case requesting an extension, stating "Since Oct. 11, 2019, plaintiff's counsel, as well as other TrialWorks clients, have been unable to access documents. As of Oct. 24, 2019, plaintiff's counsel remains unable to access all the necessary documents required to respond." • Meanwhile, in other big court actions in October, a

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<sup>29</sup> <https://at.law.com/xQp5Rc>.

<sup>30</sup> <https://www.miamiherald.com/news/local/article236645058.html>.

really big one was the D.C. Circuit's long-awaited ruling involving "Net Neutrality." In *Mozilla v. FCC*, the court considered the reclassification of broadband internet access service from a "telecommunications service," as defined in the Communications Act, to an "information service," with the repeal of the net neutrality provisions enacted in 2015. In enacting these provisions the FCC had disavowed most regulation of Internet access providers.<sup>31</sup> The reclassification was affirmed, but the FCC was tasked with reconsidering the impacts of that reclassification on public safety and lifelines, as information services do not have as many public safety requirements as telecommunications services do. With many consumers using cellphones and VOIP ("voice over internet") phones, traditional avenues of access to 911 and other public safety services have changed without regulation keeping up.

- And, finally, it wouldn't be the Year in Law and Technology without an update on legal emoji, and so we bring you a meta-analysis on the state of rendering and parsing emoji. Jennifer Behrens of Duke University Law Library reviewed the ability of various legal databases, including Westlaw Edge, Lexis Advance, Bloomberg Law, and Fastcase to search by emoji in *'Unknown Symbols': Online Legal Research in the Age of Emoji*.<sup>32</sup> Not only does searching by emoji simply not work yet, Behrens shares, but "basic display for emoji, emoticons, and even other visual materials in online research services could be fairly described as fragmented at best."

## NOVEMBER 2018

If you're a solo lawyer, do you have a website? The American Bar Association's Legal Technology Resource Center's 2019 Legal Technology Survey Report issued in November found that 43% of solo lawyers do not have a website for their practice.

- Also in November the team behind the parking-ticket "robot lawyer" Do Not Pay, featured in past years' reviews, rolled out a new user-friendly tool to help users understand license agreements. For \$3, the software highlights problematic clauses, like forced arbitration, in licenses and similar contracts. It uses machine learning (which is a type of software that does textual pattern matching) to flag up to 200 types of issues and present them to the user.
- Legal documents are of course a big deal. In fact, statements of work, master services agreements, and authorization forms used by penetration testers can be critically important to the safety of both the testers and the companies being assessed. Physical penetration security tests, similar to com-

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<sup>31</sup> [https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/\\$file/18-1051-1808766.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/FA43C305E2B9A35485258486004F6D0F/$file/18-1051-1808766.pdf).

<sup>32</sup> 38 Legal Reference Services Quarterly 155 (2019).

puter system penetration tests, are performed by security companies who are paid to break into locations and explain what techniques they used. But things went poorly for two CoalFire physical security penetration testers who were arrested this month in Iowa after performing a physical penetration test of a courthouse. CoalFire asserted that their testers had been granted permission for the work, but various branches of the Iowa government disputed the authorization. At the root of the issue was the problem of who had the right to grant authorization for access to the courthouse. It was also unclear whether the contract governing the work authorized their activity, even if the correct parties had signed it. TrustedSec, which does similar work, released their model contracts to help others who perform these tests to ensure that their contracts clearly authorize the work they are hired to do.<sup>33</sup> • Speaking of legal language governing people’s obligations, tech lawyer Jake Snow found himself in need of a “web-based, up-to-date with all the amendments, intricately hyperlinked reference text of the CCPA.” So, he made one, and shared it with all of us.<sup>34</sup> We’ve used it, it’s extremely helpful. Thank you Jake! • Also in November, the U.S. District Court for the District of Massachusetts added to the body of law growing around device searches and seizures. In *Alasaad v. McAleenan* it reviewed warrantless searches of “electronic devices at ports of entry to the United States” and held that “the non-cursory searches and/or seizures of Plaintiffs’ electronic devices, without such reasonable suspicion, violated the Fourth Amendment,” with reasoning similar to the Ninth Circuit’s holding in *U.S. v. Cano* in August. • 2019 was also the year of “specialized artificial intelligence,” or machine learning, automation, and just plain old-fashioned software-assisted lawyering. John Mayer, Executive Director of CALI, presented “*Why you should be skeptical of most AI hype in legal applications... or... your job is safe from the robots — mostly*” at the LLNE (Law Libraries of the Northeast) Fall 2020 conference. “General” artificial intelligence (in which software is able to reason about and act on any information presented to it, not just narrowly defined data in a specific field) is still on the horizon, Mayer said, which means that robots will not yet replace lawyers. Instead, specialized legal applications aimed to assist lawyers by providing curated information or guided interviews are growing more common, powered by advances in machine learning, text classification, and data analysis algorithms.

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<sup>33</sup> <https://github.com/trustedsec/physical-docs>.

<sup>34</sup> <https://theccpa.org/>.

## DECEMBER

We reach the end of 2019 with some news out of Maryland, where the “Online Electioneering Transparency and Accountability Act,” which regulated political ads in online mediums, was challenged in *Washington Post v. McManus*. The Fourth Circuit upheld an injunction against the act, finding that it was “content-based and subject to heightened scrutiny,” and was targeted at intermediaries, such as online social media platforms, rather than political candidates or political organizations instead.<sup>35</sup> • Another key case from December addressed how the particularity requirement for warrants applies to cell phone searches. In this case a warrant to search a cell phone without a date restriction was found to be overly broad by the New York County Supreme Court, because there were no allegations offered that evidence could be found in, for example, the defendant’s email or browser history in the period six months prior to alleged crime. “The pivotal question here,” the court writes, “is whether there was probable cause that evidence of the crimes specified in the warrant would be found in the broad areas specified. Notably, the warrant application alleged two discrete crimes and specified conduct that ‘began’ on September 1, 2016, and, as far as the available information indicated, occurred entirely on that date. While it was of course possible that defendant’s phone contained evidence of the specified offenses that predated September 1, there were no specific allegations to that effect.”<sup>36</sup> • Speaking of digital communications, does your law practice rely on legal materials on CD-ROM or on the sending and receiving of faxes? *Above the Law* featured “5 Legal Technologies You Thought Were Dead But Aren’t,”<sup>37</sup> as revealed by the ABA Tech Survey 2019.<sup>38</sup> It turns out that lawyers are not just relying on older technologies such as CD-ROMs or books to look up cases and other legal materials; 18% of lawyers surveyed noted that word-processing software WordPerfect is still in use at their firms, while only 9% of the lawyers reported that cloud-based document editing software Google Docs was in use at their firms. While your authors have used Google Docs to write this Year in Review summary for the *Green Bag*, we do note that no confidential client information is involved in our research, unlike in the regular practice of law at a firm. Protecting client confidential information is often cited as a key reason to avoid use of cloud-based software like Google Docs. (That it destroys formatting and exasperates its users is yet another.) •

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<sup>35</sup> <https://law.justia.com/cases/federal/appellate-courts/ca4/19-1132/19-1132-2019-12-06.html>.

<sup>36</sup> [http://nycourts.gov/reporter/3dseries/2019/2019\\_08772.htm](http://nycourts.gov/reporter/3dseries/2019/2019_08772.htm).

<sup>37</sup> <https://abovethelaw.com/2019/12/5-legal-technologies-you-thought-were-dead-but-arent/>.

<sup>38</sup> [https://www.americanbar.org/groups/departments\\_offices/legal\\_technology\\_resources/TechSurvey/](https://www.americanbar.org/groups/departments_offices/legal_technology_resources/TechSurvey/).

Wrapping up our year, we bring you some further reading. The Future of Privacy Forum announced their annual selection of “Must-Read Privacy Papers.”<sup>39</sup> The five selected papers looked at privacy from a variety of angles, including “dark patterns” in web design, data protection, and the recent Supreme Court 4th Amendment case, *Carpenter v. U.S.* The selected papers this year included *Antidiscriminatory Privacy* by Ignacio N. Cofone,<sup>40</sup> describing a framework for when personal information should be automatically shared by computer systems, and when it should be restricted in order to block instances of discrimination, and *Algorithmic Impact Assessments under the GDPR: Producing Multi-layered Explanations* by Margot E. Kaminski,<sup>41</sup> which looked at Data Protection Impact Assessments. These assessments, an accountability tool provided by Article 35 of the GDPR, are aimed at minimizing the impacts of algorithmic discrimination. • Also, “[l]aw student notes,” Jeff Kosseff (@jkosseff) shared on Twitter, “continue to be among the most impressive pieces of scholarship about cybersecurity and privacy law.”<sup>42</sup> He shares his recent favorites, including Graham Johnson’s *Privacy and the Internet of Things: Why Changing Expectations Demand Heightened Standards*,<sup>43</sup> which explores the recent rise of smart home devices and privacy, and Elias Wright’s exploration of facial recognition software, *The Future of Facial Recognition Is Not Facial Recognition Is Not Fully Known*.<sup>44</sup> • And in case none of those papers catches your interest, James Grimmelmann collected a set of 24 research topics in intellectual property and technology law that he wishes would be turned into papers. Topics ranged from computational history of legal informatics to “things every computer scientist knows (and every lawyer should)” to the “complicated relationship between ontological truth and functional reality on the Internet.” We concur with this list, and hope to feature papers based on some of these ideas in future years.<sup>45</sup>



<sup>39</sup> <https://fpf.org/2019/12/05/this-years-must-read-privacy-papers-fpf-announces-recipients-of-annual-award/>;

<sup>40</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3154518](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3154518).

<sup>41</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3456224](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456224).

<sup>42</sup> <https://twitter.com/jkosseff/status/1206299609934548994>.

<sup>43</sup> 11 Wash. U. Jur. Rev. 345 (2019), [https://openscholarship.wustl.edu/law\\_jurisprudence/vol11/iss2/8/](https://openscholarship.wustl.edu/law_jurisprudence/vol11/iss2/8/).

<sup>44</sup> 29 Fordham Intell. Prop. Media & Ent. L.J. 611 (2019), <https://ir.lawnet.fordham.edu/iplj/vol29/iss2/6/>.

<sup>45</sup> <https://james.grimmelmann.net/files/research-ideas>.

❖ EXEMPLARY LEGAL WRITING 2019 ❖  
JUDICIAL OPINIONS

## FOUR RECOMMENDATIONS



*Charmiane G. Claxton*<sup>†</sup>

Preface: There is a bit of a theme with my selections. As a U.S. Magistrate Judge for the Western District of Tennessee, I am in the Sixth Circuit and have more than a little bias towards the judges of our circuit. Following are some of the best opinions written in 2019. It is merely a passing coincidence that they are all from the Sixth Circuit.

*United States v. Tucci-Jarraf*  
939 F.3d 790 (6th Cir. 2019)

opinion for the court by Circuit Judge Jeffery Sutton,  
joined by Circuit Judges Deborah Cook and Amul Thapar

Two adages come to mind when reading this opinion — if it sounds too good to be true it probably isn't true and a man who represents himself has a fool for a client. Judge Sutton delightfully regales the reader of this opinion with the misadventures of Heather Tucci-Jarraf and Randal Beane. Beane spent much of his adult life working as an Air Force electrical engineer. Over time, however, he stumbled onto an intriguing theory that the Federal Reserve was holding an unspecified sum of money in trust for each citizen and that all he had to do was to complete the proper paperwork to access this treasure trove. Luckily (or not, given the ultimate results) Beane discovered the writings

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<sup>†</sup> Magistrate Judge, U.S. District Court for the Western District of Tennessee.

of Tucci-Jarraf explaining exactly how to access the “trust account.” Beane contacted her and with her guidance and that of a few YouTube videos he transferred over \$31 million dollars from the Federal Reserve to his personal bank account.

Within a week, Beane and Tucci-Jarraf were arrested. Beane was charged with bank and wire fraud and they were both charged with conspiracy to commit money laundering. One would think that Beane would have had enough of Tucci-Jarraf’s advice but he doubled down on his folly by electing to represent himself against the charges just as Tucci-Jarraf did. After extensive questioning by the district judge, the defendants were permitted to represent themselves with “elbow” counsel available to assist them. As a surprise only to the defendants, they were found guilty. At sentencing, Beane received 155 months, Tucci-Jarraf 57 months.

At this point our intrepid litigants realize that perhaps representing themselves was not such a good idea. Judge Sutton carefully explains how the Sixth Amendment is effectively a double-edged sword — the right to counsel paired with the right to decline counsel. “Membership in our democracy, sad to say, does not come with an unlimited trust fund, at least a financial one. But it does come with a view of the dignity of individuals to make weighty decisions for themselves.” The Sixth Circuit honored the defendants’ dignity and affirmed the sentences in all respects.

*U.S. v Wooden*

945 F.3d 498 (6th Cir. 2019)

opinion for the court by Circuit Judge Chad Readler  
joined by Circuit Judges Ronald Gilman and Raymond Kethledge

“But if you got a warrant, I guess you’re gonna come in”  
— *Truckin’*, by The Grateful Dead (1970)

Poor William Wooden. If only he had listened to the Dead and waited for a warrant rather than just letting some guy that knocked on the door into his house. Wooden’s day went downhill one cold November morning when he answered a knock at the door to find a man asking to speak to Wooden’s wife. Being the polite Tennessean that he is, Wooden invited the man in from the cold while he went to get his wife. Three things made this an unfortunate decision for Wooden — the man was an undercover officer searching for a fugitive that had been sighted near Wooden’s home, Wooden was observed by the officer picking up a rifle and Wooden was known by the officer to be a convicted felon. The officer and another officer that accompanied him arrested Wooden and, in the search incident to arrest, located a loaded revolver on

Wooden's person. A search of the home, with his wife's permission, resulted in the discovery of a third weapon. Wooden was charged and indicted with being a felon in possession of firearms and ammunition in violation of 18 U.S.C. § 922(g)(1). He was found guilty on all counts at trial and was sentenced to 15 years.

Wooden appealed the denial of his motion to suppress the search of the home as being the result of an unlawful entry to the home in violation of the Fourth Amendment. First, Wooden argued that he did not consent to the officers' entry into his home. On this point, the Sixth Circuit notes that "Wooden faces an uphill climb." The District Court credited the officer's testimony over Wooden's and the Sixth Circuit found no clear error in that decision. Wooden failed on his second point, which was that he was tricked by the undercover officers. This point was not raised at the District Court level. Judge Readler's discussion here is a most involved explanation of the distinction between waiver and forfeiture of an argument. It is well worth the read and incorporation into an appellee's brief in the near future.

*Gaetano, et al. v U.S., et al.*

942 F.3d 727 (6th Cir. 2019)

opinion for the court by Circuit Judge Jeffery Sutton

joined by Circuit Judges Deborah Cook and Amul Thapar

The plaintiffs, Richard and Kimberly Gaetano, are husband and wife operators of the cleverly named 420 Wellness Dispensary which sells, surprisingly enough, cannabis. The Gaetanos retained Gregory Goodman to represent them in transferring shares of their business to another cannabis company, AgraTek. Goodman had helped the Gaetanos with various business matters in the past. For reasons not explained in the opinion, the shares had already been purchased by a rival of AgraTek named Green-VisionTek. At some point during the negotiation of the deal, Goodman had been playing both sides of the field, including attempting to pursue employment with AgraTek. An ethics complaint was lodged against Goodman and he lost his license to practice law.

About three years later, the Internal Revenue Service began an audit of the Gaetanos and reached out to Goodman. Goodman, still simmering from the loss of his license, decided to threaten the Gaetanos that they would "go down in flames" if they didn't give him a "significant down payment" The Gaetanos didn't take the extortion bait and hired another attorney to negotiate with the IRS for them. But this didn't stop Goodman. He decided to call the IRS and tell them everything he knew about the Gaetanos — confidentiality to

the wind. After receiving another threatening email from Goodman, the Gaetanos contacted the IRS and were told that the IRS intended to continue talking to Goodman.

The Gaetanos initiated action to enjoin the IRS from discussing attorney-client privileged information with Goodman. This action was dismissed pursuant to the Anti-Injunction Act. On appeal, the Gaetanos argue that allowing the IRS to intrude into the attorney-client relationship violates their Sixth Amendment right to counsel. The only problem with this theory is that the Sixth Amendment protections attach where there is a criminal prosecution. In this case, the IRS is only conducting an investigation and has not started a criminal prosecution. The next theory offered is that the IRS is violating their rights under the Due Process Clause of the Fifth Amendment. That too fails, as there is no precedent to support this theory. Finally, the Circuit Court holds that the Gaetanos are not without other remedies at law — a fatal flaw in an injunctive relief case.

*Crosby, et al. v. Twitter, Inc., et al.*

921 F.3d 617 (6th Cir. 2019)

opinion for the court by Circuit Judge John Nalbandian,  
joined by Circuit Judges Julia Gibbons and Gilbert Merritt

In the wake of a tragedy, survivors want something to be done to prevent other families from enduring the same suffering that they are going through. The relevant question becomes just what that something is and how effective it can be. The plaintiffs in this case, victims and relatives of deceased victims of the June 2016 Pulse Night Club shooting in Orlando, FL, place responsibility for their losses on the defendants Twitter, Inc., Facebook, Inc. and Google LLC. Their reasoning is that the social media platforms provided the terrorist organization ISIS with a mechanism to reach people worldwide with their noxious propaganda. Among the people that ISIS reached via these platforms was the murderer.

Judge Nalbandian sensitively explains why the District Court's decision to dismiss their complaint must be affirmed. Plaintiffs rely on the Anti-Terrorism Act, 18 U.S.C. § 2339B, as the foundation for their complaint. The Act is ultimately the wrong instrument with which to pursue relief. It provides a civil remedy to persons injured "by reason of an act of international terrorism." The Circuit Court affirms the District Court's holding that the complaint fails because it does not plead an act of international terrorism and because there is no proximate cause between the acts of the defendants and the murderer's actions. To quote the opinion, "a defendant's liability

cannot also go forward to eternity. And a butterfly in China is not the proximate cause of New York storms.”

“We sympathize with Plaintiffs — they suffered through one of the worst terrorist attacks in American history. ‘But not everything is redressable in a court.’” An elegant and sensitive dismissal with prejudice gives cold comfort. This opinion accurately and effectively communicates the limits of what our judicial system can do — even when we may want more to be done.



# HAPPY BIRTHDAY, MY DEAR CHIEF JUSTICE

THREE LETTERS FROM  
SAMUEL BLATCHFORD TO MORRISON R. WAITE

*Cattleya M. Concepcion*<sup>†</sup>

Much has been written on the legacy of Morrison R. Waite, the seventh Chief Justice of the United States, including his ability to preside over the Associate Justices who served during his tenure. With a bench full of forceful characters like Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, and John Marshall Harlan, Waite's relationships with the other Justices who served beside him have received less attention. One of his more obscure relationships was with Samuel Blatchford, a wealthy New Yorker who possessed "grace and courtesy and strict[ly] observ[ed] the first principles of amenity."<sup>1</sup> It is perhaps due to these characteristics that a small peek into their relationship exists today. Found among Waite's personal papers were three letters that Blatchford sent to him while they served together on the Supreme Court from 1882 to 1888. Addressed to "My dear Chief Justice" on the occasion of Waite's birthday, the letters reveal a warm and collegial friendship during the final years of Waite's life.

Blatchford joined Waite on the Court in 1882, but he wrote his first birthday letter to Waite two years later. On November 29, 1884, for Waite's 68th birthday, Blatchford presented Waite with a gift of roses,<sup>2</sup> along with an earnest note of appreciation for Waite's work as the Chief Justice and warm welcome of Blatchford as the newest Associate Justice:

I cannot allow the day to pass without adding my warm congratulations to those which greet you from many friends. May you long live to adorn the place you have so worthily filled. None know so

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<sup>†</sup> Head of Reference, Georgetown Law Library. Copyright 2020 Cattleya M. Concepcion.

<sup>1</sup> A. Oakey Hall, *Justice Samuel Blatchford*, 5 GREEN BAG 489, 490 (1893).

<sup>2</sup> Other Justices who received birthday flowers from a fellow Justice from around the period include Oliver Wendell Holmes and Charles Evans Hughes. *Justice Holmes' Birthday*, WASH. POST, Mar. 9, 1911, at 2 (Holmes found violets from John Marshall Harlan placed at his seat on the bench for his 70th birthday); *Justice Hughes Is 49*, N.Y. TIMES, Apr. 12, 1911, at 2 (Hughes found his seat on the bench decorated with flowers for his 49th birthday). According to an etiquette book from the time, "some trifling present . . . [was] much better than a costly gift." JULIA M. BRADLEY, MODERN MANNERS AND SOCIAL FORMS 309 (1889), available at <https://hdl.handle.net/2027/dul1.ark:/13960/t7bs2d802?urlappend=%3Bseq=315>.

well what you have done, and what you have been, as those who see the inner daily life of the Court. My path has been strewn with flowers since I came here, thanks to your kind and generous aid. Please accept these roses as a slight token of my sincere friendship and respect.<sup>3</sup>

When Blatchford was appointed to the Court, Waite led the Justices in welcoming him. Waite, along with John Marshall Harlan and Stanley Matthews, attended a celebration thrown in Blatchford's honor by the Bar Association of New York City. At the gathering, Waite announced that "he and his associates upon the Supreme Court bench were profoundly grateful to [New York] for the admirable contribution it had made to their number."<sup>4</sup> Waite thought Blatchford was "a good worker" and predicted he would "help [the Court] amazingly."<sup>5</sup> The aid that Waite extended to Blatchford likely included giving him a lighter workload while he adjusted into the role, allowing him to pick his first opinion to prepare, and inviting his participation to help the other Justices with cases.<sup>6</sup> During his years on the Court, Blatchford indeed proved to be a good worker, earning a reputation as a workhorse.<sup>7</sup>

Blatchford next honored Waite on the Chief Justice's 70th birthday on November 29, 1886. Blatchford's letter accompanied a gift, probably flowers once again. Blatchford reiterated his respect for the Chief Justice's role at the Court, acknowledging for a second time that only the Justices themselves could properly appreciate Waite's efforts, and Blatchford expressed his gratitude for Waite's friendship:

I beg to be allowed to add my congratulations to the many which will greet you today. To a successful career at the bar and in public service, you have added a distinguished administration of the duties of the highest judicial station in the country. But your brethren alone, in the intimacy of the conference room, and the privacy of

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<sup>3</sup> Letter from Samuel Blatchford to Morrison R. Waite (Nov. 29, 1884), Box 22, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, DC.

<sup>4</sup> *Honoring Judge Blatchford*, N.Y. TIMES, May 12, 1882, at 5. Blatchford filled the "New York seat" on the Supreme Court bench, which had been held by a New Yorker since 1806. Blatchford was the last New Yorker in the unbroken succession. Kathleen Shurtleff, *Samuel Blatchford: 1882-1893, in THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012*, at 211, 213-14 (Clare Cushman ed., 2013).

<sup>5</sup> C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 271 (1963) (citing letters from Morrison R. Waite to Amelia Waite (Mar. 9 & May 14, 1882), Boxes 17 & 18, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, DC).

<sup>6</sup> MAGRATH, *supra* note 5, at 263-64 (describing Waite's practices to welcome new Justices to the Court).

<sup>7</sup> D. GRIER STEPHENSON, THE WAITE COURT: JUSTICES, RULINGS, AND LEGACY 133 (2003).

the arcana, know the skill, the patience, the uniform good temper, and the high sense of the dignity of the Court, which have marked the discharge of your duties. For myself, with the warmth of fine affection, and an appreciation of your unfailing kindness to me ever since I entered the Court, I wish you many years of usefulness, peace and happiness, and beg you to accept the little gift I send as a memento of this occasion.<sup>8</sup>

For this milestone birthday, the country joined Blatchford in marking the occasion. Waite's 70th birthday was when he became eligible to retire from the Court with a full pension under the Judiciary Act of 1869, which provided that federal judges who reached the age of 70 and had served for at least ten years could retire with a pension equal to their annual salary.<sup>9</sup> News coverage of Waite's birthday focused on the political possibilities of his personal milestone.<sup>10</sup> Even though Waite had not announced any intention of stepping down from the Court,<sup>11</sup> newspapers speculated on — and sensationalized — his eventual departure. *The New York Herald*, which was founded by a Democrat, colorfully suggested that Waite, who had been appointed by a Republican president, would never voluntarily leave the Court under a president affiliated with the Democratic Party:

Chief Justice Waite has celebrated his seventieth birthday. Having served for over ten consecutive years he is also eligible for retirement. So, too, are Justices Bradley, Miller, and Field. . . .

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<sup>8</sup> Letter from Samuel Blatchford to Morrison R. Waite (Nov. 29, 1886), Box 25, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, DC.

<sup>9</sup> 16 Stat. 44, 45 (“[A]ny judge of any court of the United States, who, having held his commission as such at least ten years, shall, after having attained to the age of seventy years, resign his office, shall thereafter, during the residue of his natural life, receive the same salary which was by law payable to him at the time of his resignation.”). Waite joined the Court in 1874, so when he reached the age of 70 in 1886, his service totaled more than ten years.

<sup>10</sup> Newspapers were not alone in commenting on the best timing for the Chief Justice's retirement based on the political party affiliation of the sitting U.S. president. Closer to the Court, J.C. Bancroft Davis, the Reporter of Decisions, sent Waite belated greetings after learning of Waite's 68th birthday from Blatchford. Davis wrote that Waite should put off retirement “till you have reached 72 years and 4 months — at least that — and as much longer as you want to stay when we have another Republican President.” Letter from J.C. Bancroft Davis to Morrison R. Waite (Nov. 30, 1884), Box 22, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, DC. Davis had been an intimate friend of Waite's for over a decade. MAGRATH, *supra* note 5, at 254.

<sup>11</sup> When Waite turned 70 in 1886, four Justices had already retired under the Judiciary Act of 1869: Robert C. Grier, Samuel Nelson, William Strong, and Ward Hunt. Although Hunt did not meet the ten-year requirement, Congress passed legislation extending the benefits of the 1869 Act to him. EMILY FIELD VAN TASSEL, RESIGNATIONS AND REMOVALS: A HISTORY OF FEDERAL JUDICIAL SERVICE — AND DISSERVICE — 1789-1992, 142 U. PENN. L. REV. 333, 397, 401-02, 410-11 (1993).



Samuel Blatchford.

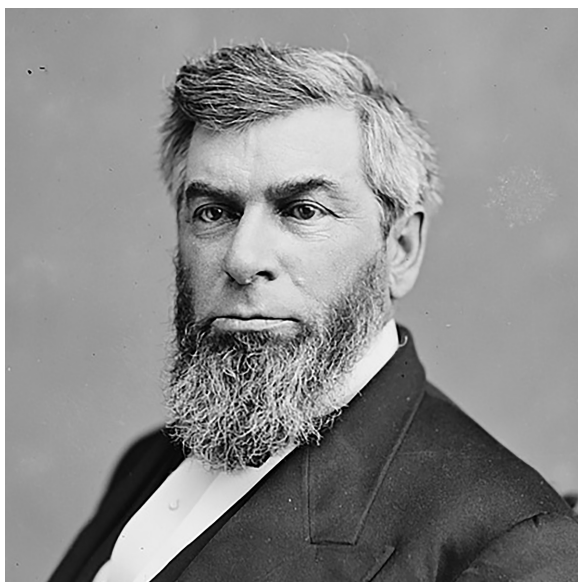
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Justice Field is the only Democrat of the nine members of the court. If after the election of 1888 it should appear that a Republican has been chosen President, it is probable Justice Field will tender his resignation, so as to allow [President Grover] Cleveland to fill his place with a Democrat. Neither Chief Justice Waite nor Justices Bradley or Miller has any idea of vacating his seat on the bench. They are in excellent health, exceedingly fond of the duties of the bench, and are altogether too loyal to their Republican principles to give a Democratic President an opportunity to fill their places with lawyers of the Bourbon<sup>12</sup> school. Even if the next Administration be Democratic they would be content to die in harness rather than surrender on account of age.”<sup>13</sup>

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<sup>12</sup> A contemporaneous English language dictionary from the time defined Bourbon as a “factious Democrat.” 1 ROBERT HUNTER & CHARLES MORRIS, *THE UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE* 666 (1897), available at <https://hdl.handle.net/2027/uc1.31175013940724?urlappend=%3Bseq=678>. A modern dictionary defines it as “an extremely conservative member of the U.S. Democratic party usually from the South.” *Bourbon*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/bourbon> (last visited Jan. 1, 2020).

<sup>13</sup> *Our Supreme Court Judges: They Are Eligible for Retirement and the Democrats Want Them to Go*, N.Y. HERALD, Dec. 16, 1886, reprinted in CHI. DAILY TRIB., Dec. 19, 1886, at 18.



Morrison R. Waite.

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*The Omaha Daily Bee*, a Republican newspaper, similarly reported on Waite's 70th birthday in a provocative manner, suggesting that the Chief Justice should continue in his very plum post — a post about which he surely could have no real complaints — until the next election when the party affiliation of the president could flip from Democrat to Republican:

There are now four members who are eligible to retirement, with full pay, by reason of having attained the age of 70 years. These are Chief Justice Waite, whose seventieth birthday was last Wednesday, and Justices Miller, Field and Bradley. . . . All of these distinguished jurists are in vigorous health and the full possession of their mental powers, so that there is nothing impelling them to retirement unless it be a desire to pass the remaining years of their lives in quiet and leisure, free from the demands and constraints of imperative duty. It is generally understood that the labors of a justice of the supreme court are not of the most arduous and exacting character. It is undoubtedly possible for the nine lawyers who constitute that great tribunal to arrange their duties from time to time so that they shall not be severely burdensome. They have none of the small details which annoy and perplex the judges of inferior courts, nor are they doomed to listen to so much of the wrangling

and disputation of attorneys, which to a layman seems the most intolerable requirement of a judicial career. From their exalted place in the temple of justice they can review with calm and patient deliberation the issues that are presented for their final and unimpeachable judgment, unterrified by any fears of political consequences to themselves or of ill-effects to their judicial reputations from a reversal of their decrees. Still the supreme court justices have a work and duty to perform which demands of them most careful attention, exhaustive research, patient and conscientious deliberation. . . . Every duty imposes some constraint, and it is not unlikely that some or all of the four justices who may retire on full pay will within the next year or two elect to do so, securing a merited and honorable release from further necessary labor while yet they are physically and mentally in a condition to enjoy life.

In their political affiliations the majority of the members of the supreme bench are republicans. In the event of any of them retiring during the term of this administration they would of course be succeeded by democrats, and if the four who are eligible to retirement should accept their privilege the political complexion of the court would undoubtedly be reversed. It is not improbable that this fact will have some weight in inducing a part or all of the septennarian justices to continue on at least until after the next presidential election, when in any event doubtless all of them will retire.<sup>14</sup>

While the politics of Washington swirled around the Chief Justice, Waite carried on with his own plans for the day. He celebrated his 70th birthday at home with his whole family.<sup>15</sup> “[T]his is a very happy day for me as all my children and grandchildren are here,” he told a *Washington Post* reporter who called on him during his family celebration. “We had a very jolly dinner party all to ourselves.”<sup>16</sup>

The following year, newspapers covered Waite’s 71st birthday, but instead of reporting when he might retire, they applauded Waite, along with Bradley, Miller, and Field, for choosing to continue their work at the Court.<sup>17</sup> One newspaper reported:

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<sup>14</sup> *The Supreme Court*, OMAHA DAILY BEE, Dec. 3, 1886, at 4, available at <https://chroniclingamerica.loc.gov/lccn/sn99021999/1886-12-03/ed-1/seq-4/>.

<sup>15</sup> SUN (New York), Dec. 2, 1886, available at <https://chroniclingamerica.loc.gov/lccn/sn83030272/1886-12-02/ed-1/seq-2/>.

<sup>16</sup> *His Seventieth Birthday*, N.Y. TIMES, Nov. 30, 1886, at 2.

<sup>17</sup> Of the three Justices, only Field ultimately retired under the Judiciary Act of 1869. He stepped down from the Court in 1897. VAN TASSEL, *supra* note 11, at 397, 412. Like Waite, Miller and Bradley died in office.

Chief Justice Waite, of the Supreme Court, celebrated his seventy-first birthday this week, but he does not look a day over sixty years. One year ago the venerable jurist was eligible to retirement, and he could then have resigned his commission and demanded a salary of 10,000 per annum the remainder of his life. The same may be said of Associate Justices Field, Miller, and Bradley. Perhaps in no other country of the world can be witnessed four septuagenarians vigorously working every day, when they could receive precisely the same compensation for doing nothing whatever.<sup>18</sup>

Inside the Court, Blatchford remembered Waite's birthday for a third time. Neither knew it that day, but it was the last birthday letter that Waite would receive from Blatchford. Waite died in March 1888, just four months after his 71st birthday. Once again gifting flowers to the Chief Justice, Blatchford wrote on November 29, 1887:

Though your path may not always be strewn with flowers, I beg your acceptance of these as a reminder of the day, with the expression of my best wishes for your health and happiness and of my hope that you will long continue to occupy the place which you fill so satisfactorily to your colleagues and so acceptably to the country.<sup>19</sup>

Blatchford's final birthday letter to Waite turned to a popular expression that he had previously used in his first letter to describe his own time serving on the Court. But while Blatchford's "path [was] strewn with flowers" in 1884, Blatchford acknowledged that Waite's road as the Chief Justice by 1887 "may not always be strewn with flowers." Indeed, it was not. Contrary to what newspapers may have reported about the ease of the job,<sup>20</sup> in the time between Blatchford's 1884 and 1887 birthday letters to Waite, Waite experienced a serious health issue due to overwork amidst the Court's heavy workload and his extra duties as the Chief Justice. He took a leave from the Court to recuperate shortly after his 68th birthday, from December 1884 through March

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<sup>18</sup> *Our Washington Letter*, S. HERALD (Miss.), Dec. 10, 1887, available at <https://chroniclingamerica.loc.gov/lccn/sn87007277/1887-12-10/ed-1/seq-2/>. Another newspaper announcing Waite's 71st birthday echoed the observation, saying "these hale old men present the rare and refreshing spectacle of working every day, when they might receive the very same pay for doing nothing." *Washington Letter*, DEMOCRATIC NW. (Ohio), Dec. 15, 1887, available at <https://chroniclingamerica.loc.gov/lccn/sn84028296/1887-12-15/ed-1/seq-6/>.

<sup>19</sup> Letter from Samuel Blatchford to Morrison R. Waite (Nov. 29, 1887), Box 27, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, D.C.

<sup>20</sup> See *supra* note 14 and accompanying text.

1885.<sup>21</sup> While there is no record of a birthday letter from Blatchford to Waite after Waite returned to the Court,<sup>22</sup> Blatchford had written earlier in the year, while Waite was still recuperating, to urge the Chief Justice not to come back prematurely. On behalf of himself, Harlan, and Matthews, Blatchford wrote, “[W]e all feel that it is more desirable for the country & the Court to have you for Chief Justice than that you should do a *little* more work, too soon.”<sup>23</sup>

A second shift appeared in Blatchford’s language from his first letter in 1884 to his last letter in 1887. While Blatchford’s first letter in 1884 already included his wish for Waite’s longevity in office, his letter in 1887 suggested different beneficiaries of the Chief Justice’s tenure. In 1884, Blatchford’s wish for Waite’s continued service was because Waite “so worthily filled” — or, in other words, was deserving of — his place as Chief Justice. In 1887, Blatchford’s wish for Waite to remain was for the benefit of his “colleagues” and “country.”

Blatchford himself appears to be the colleague who appreciated Waite the most.<sup>24</sup> When the Chief Justice fell ill before his death in 1888, Waite asked Blatchford to fill in to announce the Court’s decision in *The Telephone Cases*,<sup>25</sup> which Waite had written for the majority.<sup>26</sup> After Waite died several days later, Blatchford, as well as Matthews and Miller, paid visits to the Chief Justice’s grieving family.<sup>27</sup> During Waite’s funeral, all of the Justices, including Blatchford, participated as pallbearers<sup>28</sup> and six of the Justices, including Blatchford, accompanied Waite’s body on a special train to the burial place in Ohio.<sup>29</sup> When the Washington, D.C. bar organized a fund to

<sup>21</sup> MAGRATH, *supra* note 5, at 273; David N. Atkinson, *The Problems of Disabled Justices: Supreme Court Deaths and Resignations: 1865–1900*, 38 DRAKE L. REV. 903, 916 (1988–89).

<sup>22</sup> The Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, D.C., did not contain a letter from Blatchford to Waite for the Chief Justice’s sixty-ninth birthday.

<sup>23</sup> MAGRATH, *supra* note 5, at 274 (quoting Letter from Samuel Blatchford to Morrison R. Waite (Feb. 15, 1885), Box 23, Morrison R. Waite Papers, Manuscript Division, Library of Congress, Washington, D.C.).

<sup>24</sup> For more on Waite’s closeness with Bradley, Harlan, Matthews, and Horace Gray, and Waite’s initially colder but improved relationships with Miller and Field, see MAGRATH, *supra* note 5; D. Grier Stephenson, *The Chief Justice as Leader: The Case of Morrison Remick Waite*, 14 WM. & MARY L. REV. 899 (1973).

<sup>25</sup> 126 U.S. 1 (1888).

<sup>26</sup> *Chief-Justice Waite Seriously Ill*, CHI. DAILY TRIB., Mar. 23, 1888, at 2; *The Supreme Court’s Loss: Death of Chief-Justice Morrison R. Waite*, N.Y. TIMES, Mar. 24, 1888, at 1.

<sup>27</sup> *Morrison R. Waite Dead*, WASH. POST, Mar. 24, 1888, at 1.

<sup>28</sup> *From Washington: A Great Jurist’s Funeral*, SUN (Baltimore), Mar. 29, 1888, at 1.

<sup>29</sup> George A. Christensen, *Here Lies the Supreme Court: Gravesites of the Justices*, 1983 Y.B.: SUP. CT. HIST. SOC’Y 17, 21 (“[A]ll the Justices except Bradley and Matthews accompanied the body of their fallen leader on a special train to Toledo, Ohio.”).

financially assist Waite's widow, for whom Waite was unable to leave much due to the high cost involved in holding the office of Chief Justice, Blatchford and Matthews each gave \$1,000. Blatchford even served as the sole trustee of the fund.<sup>30</sup> Far beyond remembering Waite's birthday, Blatchford's behavior towards the Chief Justice — in life and after death — showed true affection and respect.

Blatchford also recognized the admiration that Waite had earned from the country through the Chief Justice's proven dedication to his office. According to *The American Magazine*, in an article on the Supreme Court that was published a few months before Waite's final birthday:

Chief Justice Waite can hardly be said to have had a national reputation when he was called by President Grant to preside on the Supreme Court bench. . . . There was more of a lottery about it than about the appointment of any previous Chief Justice in the history of the court. Nobody felt sure that he had the learning or possessed the judicial cast of mind that would fit him to wear the robes of Jay and Marshall and Chase . . . .

But, if it was a lottery, it was one in which the nation drew a prize. Most unassuming, cool in judgment, but of tireless industry, Chief Justice Waite very soon convinced, not only his colleagues and the bar, but Congress and the people, that no mistake had been made.<sup>31</sup>

The appreciative sentiment was repeated in tributes after Waite's death. For example, one newspaper wrote:

Unlike most of his predecessors he had his reputation to make after he got to the top of the ladder, and, perhaps, every one now admits that he won a name honestly and without chicanery. He did not advertise himself before the public; he did not, as some of his predecessors had done, try to use his high position as a stepping-stone to the Presidency, but went quietly along doing his duty faithfully, attending to the business of the Nation, and making a reputation that will compare favorably with that of Marshall, Chase, and Taney.<sup>32</sup>

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<sup>30</sup> Ira Brad Matetsky, *The Waite Funds*, 18 GREEN BAG 2D 173, 182, 187 n.39 (2015). For more on the Chief Justice's expenses, including those related to riding circuit and participating in social obligations, see MAGRATH, *supra* note 5, at 301-03.

<sup>31</sup> Z.L. White, *The Supreme Court*, 6 AM. MAG. 432, 442 (1887), available at <https://hdl.handle.net/2027/mdp.39015068413445?urlappend=%3Bseq=66>.

<sup>32</sup> *Morrison Remick Waite: Sketch of the Life of the Distinguished Jurist*, CHI. DAILY TRIB., Mar. 24, 1888, at 10.

In the end, overwork contributed to Waite's death. He had pushed himself to catch up with the work of the Court, which he inherited with a backlog of over two years. He did this without even allowing himself the aid of a secretary, as other Justices did, because such an assistant "would only be in his way."<sup>33</sup> "One of the Justices, in speaking of him, said: 'Mr. Waite worked each year as if his salvation depended upon his making a record of one or two more cases than were considered the preceding year. The result was that he put too great a strain upon his capacity for endurance, and broke down under the work.'<sup>34</sup> On March 23, 1888, Waite died of pneumonia.

Blatchford died five years later in 1893. Like Waite, Blatchford died in office even though he had previously become eligible to retire with a full pension.<sup>35</sup> Blatchford, the wealthiest member of the Court, did not need the money. As the *New York Times* explained at the time of his death, "[h]e was born rich, and became richer, as his wife brought him a fortune, and he never lived extravagantly."<sup>36</sup> When Blatchford died, he was still serving as the trustee of the fund for Waite's widow.<sup>37</sup> There were numerous flowers at his funeral.<sup>38</sup>



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<sup>33</sup> *Washington Letter*, DEMOCRATIC NW. (Ohio), Dec. 15, 1887, available at <https://chroniclingamerica.loc.gov/lccn/sn84028296/1887-12-15/ed-1/seq-6/>.

<sup>34</sup> *Morrison Remick Waite: Sketch of the Life of the Distinguished Jurist*, CHI. DAILY TRIB., Mar. 24, 1888, at 10.

<sup>35</sup> *Justice Blatchford Dead*, N.Y. TIMES, July 8, 1893, at 1 ("He had passed by three years the age at which he might have left the bench with a life pension, but he preferred to remain till the last an active worker in the profession he had followed for so many years.").

<sup>36</sup> *Honors to Judge Blatchford*, N.Y. TIMES, July 9, 1893, at 3.

<sup>37</sup> See Matetsky, *supra* note 30, at 187 n.39.

<sup>38</sup> *Will Rest To-day in Greenwood*, N.Y. TIMES, July 12, 1893, at 8.

1132 H. Street, N. W.  
Washington, Nov 29<sup>th</sup> 1884

My dear Chief Justice

I cannot allow the day to pass without adding my warm congratulations to those which greet you from many friends. May you long live to adorn the place you have so worthily filled. None know so well what you have done, and what you have been, as those who see the inner daily life of the Court. My path has been strewn with flowers since I came here, thanks to your kind and generous aid. Please accept

Samuel Blatchford to Morrison Waite, November 29, 1884 (page 1 of 2).

These cases as a slight token  
of my sincere friendship and  
respect.

Very faithfully yours  
Samuel Blatchford

Chief Justice Waite

Samuel Blatchford to Morrison Waite, November 29, 1884 (page 2 of 2).



1132 W. Street, N. W.  
Washington, Nov 29<sup>th</sup> 1886

My dear Chief Justice

I beg to be allow-  
-ed to add my congratulations to  
the many which will greet you  
to day. In a successful career  
at the bar and in public ser-  
-vice, you have added a distin-  
-guished administration of the  
Duties of the highest judicial  
station in the country. But your  
brethren alone, in the intimacy  
of the conference room, and the  
privacy of the arcana, know the  
skill, the patience, the uniform  
good temper, and the high sense

Samuel Blatchford to Morrison Waite, November 29, 1886 (page 1 of 2).

of the dignity of the Court, which  
have marked the discharge  
of your duties. For myself,  
with the warmth of true af-  
fection, and an appreciation of  
your unfailing kindness to  
me ever since I entered the  
Court, I wish you many years  
of usefulness, peace and hap-  
-piness, and beg you to accept  
the little gift I send as a  
memento of this occasion.

Very faithfully yours  
Saml. Blatchford

Chief Justice Waite

Samuel Blatchford to Morrison Waite, November 29, 1886 (page 2 of 2).

1632 N. Street, N.W.  
Washington, Nov 29<sup>th</sup> 1887

My dear Chief Justice

Though your path-  
- way may not always be strewn  
with flowers, I beg your accep-  
- tance of these as a reminder of  
the day, with the expression of  
my best wishes for your health  
and happiness, and of my hope  
that you will long continue to oc-  
- cupy the place which you fill so  
satisfactorily to your colleagues  
and so acceptably to the country.

Very faithfully yours  
Saml Blatchford

Chief Justice Waite

Samuel Blatchford to Morrison Waite, November 29, 1887 (page 1 of 1).

BOOKS

FIVE RECOMMENDATIONS



*Lee Epstein*<sup>†</sup>

Gunnar Grendstad, William R. Shaffer,  
Jørn Øyrehagen Sunde, and Eric N. Walternburg  
*Proactive and Powerful: Law Clerks and the  
Institutionalization of the Norwegian Supreme Court*  
(Eleven International Publishing 2020).

(Please note: I wrote the foreword to this book but only because I liked it so much.)

In a classic article on the development of the U.S. Supreme Court, Kevin McGuire shows that its transformation from an “unassuming tribunal of little consequence” to “an integral part of the national government” traced in no small part to the institutionalization of the law-clerk position — though that was hardly by design. When Justice Horace Gray hired the first clerk in 1882, it was at his own expense. Only decades later did Congress provide funds for legally trained assistants.

The story Grendstad and his colleagues tell about Norway’s clerks is also one of empowerment and professionalization, but haphazard the process was not. Actually the opposite. In the 1970s, Carsten Smith, a Norwegian law

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<sup>†</sup> Ethan A.H. Shepley Distinguished University Professor at Washington University in St. Louis. Copyright 2020 Lee Epstein.

professor (and future Chief Justice), developed a plan to transform the Court from a “passive receiver of appeals to a proactive policy maker.” Crucial to Smith’s vision was a dramatic increase in the number of clerks so that the justices could devote their time to cases most consequential for law and policy. When Smith’s plan came to pass, he was proven right, as Grendstad and his colleagues ably demonstrate.

This is a great story. But more than that *Proactive and Powerful* is a great book, covering all the bases from the history of clerks, to their demographics and responsibilities, to their impact on the justices’ decisions and on the Court’s legitimacy. No doubt too the book will spur research throughout Europe and elsewhere if only because explanations of judicial behavior will be incomplete without accounting for law clerks — as we in the United States know all too well.

Chris Hanretty

*A Court of Specialists: Judicial Behavior on the UK Supreme Court*  
(Oxford University Press 2020)

On page 1 of his book — the first deep and rigorous analysis of the UK Supreme Court — Hanretty tells it like it is: Believing that their judges are legalists, influenced neither by politics nor other extra-legal considerations, the systematic study of judicial behavior has never held much appeal for UK lawyers or even social scientists there. Slowly but surely, Hanretty unmasks this belief for what it is: partially right but mostly wrong.

The sorta right part is that “legalism,” in the form of expertise, is alive and well in the UK: “Although the court may sit in panels of five, seven, or nine, the bulk of its work in any given case is carried out by [judges specializing in the areas of] tax law, family law, criminal law, or public law,” which, in turn “reduces the scope for disagreement.” The mostly wrong part comes in the many interesting findings meticulously presented in each chapter: the Court’s tendency to favor certain kinds of litigants (especially the government and the well-resourced), the presiding judges’ inclination to select like-minded colleagues to write lead opinions, and the emergence of left-right voting patterns.

These results are hard to dismiss. Not only does Hanretty develop them using case examples and high-quality data; he writes so darn well explaining complex concepts with great clarity that even the most social-science-skeptic lawyer should find *A Court of Specialists* thought-provoking and compelling, if not downright useful.

Mary L. Volcansek  
*Comparative Judicial Politics*  
(Rowman & Littlefield 2019)

Textbooks rarely appear on the *Green Bag's* recommended book lists, but this one merits inclusion. That's because many scholars of U.S. judicial behavior lack even a basic understanding of concepts crucial to the study of judging worldwide: legal traditions, models of constitutional review, the role of international courts, the appointment of judges, decision-making processes, and on and on. I know; I was one of those scholars.

Learning about legal systems and judging elsewhere was, at least for me, not so easy. Sure, you could (and should!) pick up Grendstad, et al.'s wonderful work on Norway or Hanretty's terrific book on the UK, but those won't help much with European constitutional courts, hybrid models, or even American-type systems in Latin America and Asia.

For this reason, Volcansek's book is a rare find. She wrote it because she wanted to teach a course on comparative judicial behavior but couldn't find a suitable text. The end-result, though, is just as useful for researchers as it is for students — and not only for researchers thinking about studying courts elsewhere. All of us, even those entirely committed to the analysis of U.S. courts, should give *Comparative Judicial Politics* a read with an eye toward considering how practices elsewhere help illuminate judging in our corner of the world.

Paul M. Collins, Jr. and Matthew Eshbaugh-Soha  
*The President and the Supreme Court:  
Going Public on Judicial Decisions from Washington to Trump*  
(Cambridge University Press 2019)

On the day the U.S. Supreme Court invalidated the line-item veto, President Bill Clinton expressed his deep “disappointment.” The decision, he declared, “is a defeat for all Americans — it deprives the President of a valuable tool for eliminating waste in the Federal budget and for enlivening the public debate over how to make the best use of public funds.” Nearly a decade later, Bush 2 echoed Clinton's complaint: “Congress gave the President a line item veto — an important tool to limit wasteful spending — but the Supreme Court struck [it down].”

It turns out that Clinton and Bush were hardly alone. Collins and Eshbaugh-Soha document over 900 instances of modern U.S. presidents referencing a decision — almost always after the Court has issued it, though more often to praise than condemn it.

Why go public? Using an original dataset of all (public) presidential mentions of Supreme Court cases, the authors investigate a range of answers both obvious and not. In the former category are presidential efforts to gain political momentum to overturn decisions they don't like. Bush 2 didn't simply criticize the Court's invalidation of the line-item veto, he went on to offer a fix: "My proposed legislation . . . would provide a fast-track procedure to require Congress to vote up-or-down on rescissions proposed by the President." Less obvious explanations center on the media. Collins and Eshbaugh-Soha, for example, show that attention to court decisions in presidential speeches increases news coverage (but does little to affect the tone of that coverage).

As with Hanretty's book, *Going Public* was written with a range of audiences in mind. The data analysis is smart but pitched at non-specialists and, better still, is illustrated with great examples drawn from early U.S. history through today's tweeting culture.

Nancy Maveety

*Glass and Gavel: The U.S. Supreme Court and Alcohol*  
(Rowman & Littlefield 2019)

Another scholar's review of this book opens with a line that will likely resonate with many *Green Bag* readers: "When I first learned that Nancy Maveety was [writing on] two topics near and dear to several of my vital organs — brain, heart, and liver — I went on Amazon and . . . ordered the book."

You should consider doing the same if only for the fun factoids scattered throughout *Glass and Gavel*: John Jay positioning himself near the punch bowl at "a social gathering of any sort"; Jefferson likely composing the Declaration of Independence in a tavern with a "glass of madeira at his side"; Chief Justice White drinking away at private clubs while upholding dry laws presaging prohibition; Douglas "breaking out scotch bottles" to celebrate *United States v. Nixon* (1974); Rehnquist drinking one beer (and smoking one cigarette) every day at lunch; O'Connor inviting the Blackmuns et al. to a barbeque promising "fajitas and frivolity" (likely margaritas) and suggesting dress of "country Western or Effete Eastern;" and Kennedy bringing Opus One to the justices' annual pre-SOTU dinner (leading to the notorious RBG's catnap).

Then there's the story Maveety recounts about John Marshall. Because the boarders at the house where the justices lived allowed wine only on wet days, the Chief, a "great devotee" of "vinous drink," would occasionally ask Justice Story to see if it was raining. If wasn't, Marshall would say "All the

better, for our jurisdiction extends over so large a territory . . . that it must be raining somewhere.” Yeah, well, it’s always 5 pm somewhere too.

But more than all of this: Who knew just how much Supreme Court doctrine touches, in one way or another, on alcohol. Tax and commerce of course but also libel, intellectual property, criminal procedure, gender discrimination, and free expression.

In deciding cases in these and other areas, were the justices influenced by prevailing sentiment on alcohol regulation (think: Prohibition versus *Mad Men*)? Maveety hints as much with anecdotes from each Court era. One about Justice Field — “a notoriously intemperate imbiber” and “perennial presidential candidate” — may be particularly telling. In the midst of concerted efforts to prohibit alcohol, Field, writing for the majority, held against a retail liquor dealer denied a new license. The opinion could have reflected legalistic considerations, but Maveety suggests otherwise: Field’s “utter dismantlement” of the pro-wet position aligned well with the powerful “vote dry” pressure groups of the day. Whether this story generalizes across the Court’s many dealings with alcohol merits a *Glass and Gavel II*.

(The scholar whose line I quote is Ryan Black, at Michigan State, writing in the *Law and Politics Book Review*.)



# THE EMPTY CHAIR

## REFLECTIONS ON AN ABSENT JUSTICE

*Jennifer L. Behrens*<sup>†</sup>

### *Introduction*

An empty chair behind the bench of the United States Supreme Court may occur for several reasons: a recusal for a conflict of interest;<sup>1</sup> illness or injury;<sup>2</sup> the death of a justice;<sup>3</sup> an unfilled vacancy.<sup>4</sup> An absent justice can create ripple effects on American case law, elevating the risk of a 4-4 deadlock that holds no precedential weight.<sup>5</sup> In some instances, as with Justice Lewis Powell's lengthy 1985 absence while recovering from prostate surgery, a missing justice leaves open the question of what the outcome from a full-strength Court might have been.<sup>6</sup>

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<sup>†</sup> Duke University School of Law, Associate Director for Administration & Scholarship, J. Michael Goodson Law Library. The author wishes to thank Timothy Behrens, Joseph Blocher, Sean Chen, and Hiroki Nishiyama for their helpful comments and suggestions, as well as Julie Mayle (Rutherford B. Hayes Presidential Library), Mutahara Mobashar (Library of Congress), and Rebecca Sharp (National Archives & Records Administration) for expert assistance with archival materials. Copyright 2020 Jennifer L. Behrens.

<sup>1</sup> See, e.g., James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95 (2013); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657 (2005).

<sup>2</sup> See Mark Sherman, *Justice Ginsburg Illness Casts Spotlight on Long-term Court Absences*, PBS NEWSHOUR (Feb. 13, 2019, 10:48 AM), <https://www.pbs.org/newshour/politics/justice-ginsburg-illness-casts-spotlight-on-long-term-court-absences> [<https://perma.cc/35CQ-839F>]. Justices who miss oral argument for these reasons may still opt to participate in the votes for that case. *Id.*

<sup>3</sup> Following Associate Justice Antonin Scalia's death in February 2016, his chair as well as the bench itself and courtroom door were draped in black crepe, a tradition for memorializing sitting justices that the Court's press office noted could be dated back to at least the death of Chief Justice Salmon P. Chase in 1873. See U.S. Supreme Court, Press Release (Feb. 16, 2016), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_02-16-16](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_02-16-16) [<https://perma.cc/RZ95-P2XN>].

<sup>4</sup> While the 422-day vacancy between Scalia's death and the April 2017 swearing-in of Associate Justice Neil Gorsuch set a record for the modern nine-member Court, the longest vacancy in Supreme Court history lasted more than two years. See Alana Abramson, *Neil Gorsuch Confirmation Sets Record For Longest Vacancy on 9-Member Supreme Court*, TIME.COM (Apr. 7, 2017), <https://time.com/4731066/neil-gorsuch-confirmation-record-vacancy/> [<https://perma.cc/B4J9-Q3XZ>]; BARRY J. MCMILLION, CONG. RES. SERV., R44773, THE SCALIA VACANCY IN HISTORICAL CONTEXT: FREQUENTLY ASKED QUESTIONS 4-6 (2017).

<sup>5</sup> See STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 1.2(d) (11th ed. 2019).

<sup>6</sup> Compare Susan M. Fitch, Note, *National Gay Task Force v. Board of Education of Oklahoma City*, 19 AKRON L. REV. 337, 347-48 (1985) (suggesting that Powell's views on the importance of education would have compelled him to affirm the Tenth Circuit), with JOYCE MURDOCH & DEB PRICE, COURTING JUSTICE: GAY MEN AND LESBIANS V. THE SUPREME COURT 259 (2001) (speculating that Powell would have sided with the school board in overturning the Tenth Circuit's opinion). Powell's personal case file for this opinion is a tantalizingly blank copy of the slip opinion, compared to

Of course, there is no way to confirm with certainty how the timeline of American jurisprudence might have been altered by the presence or absence of a justice in a particular case. This is as true now as it was one 19th-century day in Washington, DC, when Chief Justice Morrison Waite received a brief message from Associate Justice Stanley Matthews:

Jan 12 1888

My dear Chief Justice:

I have a request from Mrs Parker to act as a pall bearer tomorrow at the funeral of her husband. I should like to testify my respect for the good Doctor in that way if you thought I could properly absent myself from the Court during a portion of the session. I wait your answer before acceding to the request.

Yrs truly

Stanley Matthews

To The Chief Justice<sup>7</sup>

### *The Good Doctor*

Justice Matthews hoped to attend the funeral of Dr. Peter Parker, a renowned medical missionary and erstwhile diplomat whose family residence at Lafayette Square was a stone's throw from the White House. From this vantage point at the center of Washington, Dr. Parker's social circle included members of the Court as well as Congress; during his presidency, it was said, Abraham Lincoln could also occasionally be found in the Parkers' parlor, balancing the couple's young son on his knee.<sup>8</sup>

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his extensively annotated files for other cases. See Board of Education of the City of Oklahoma City v. National Gay Task Force, Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1219&context=casefiles> [https://perma.cc/WGM2-UGXZ].

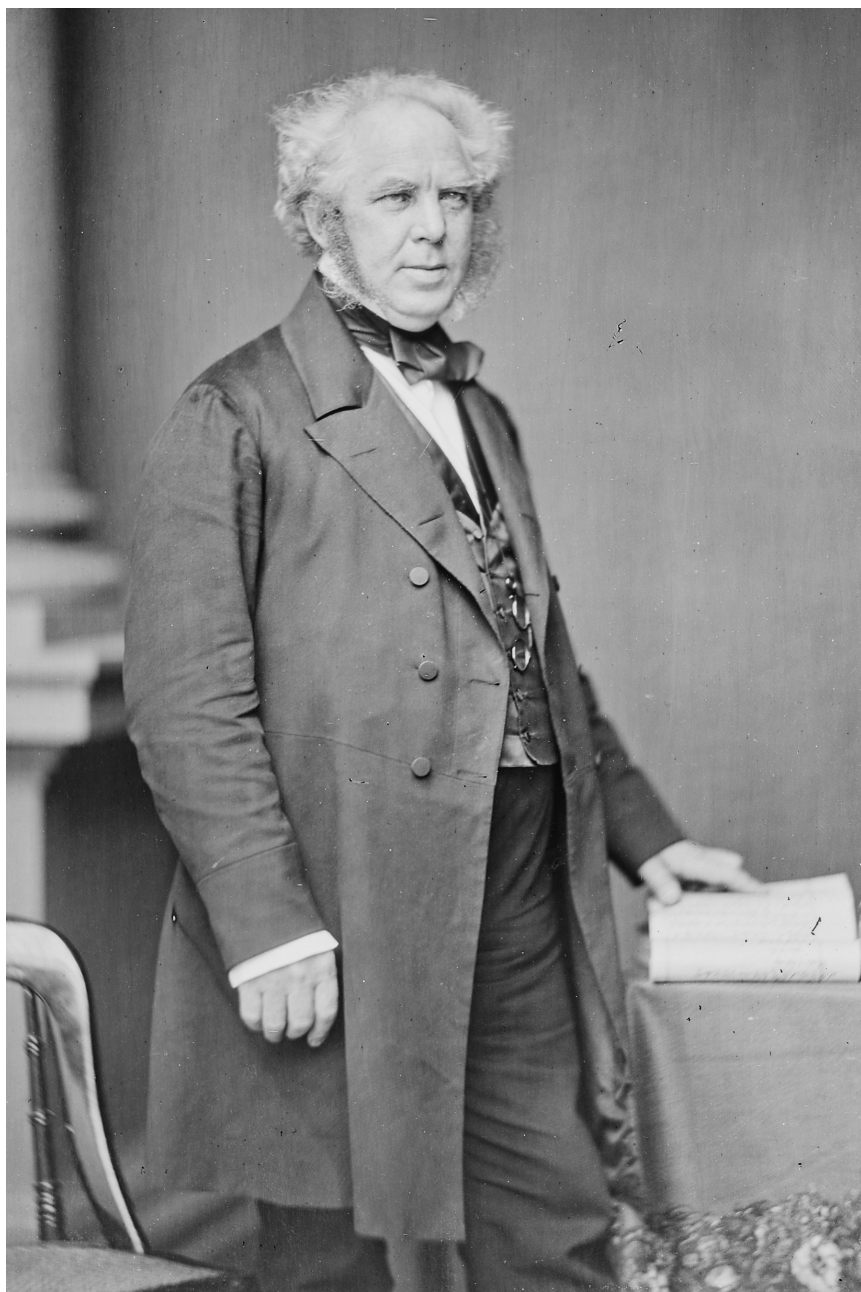
<sup>7</sup> Letter from Stanley Matthews to Morrison Waite (Jan. 12, 1888), Library of Congress, Morrison R. Waite Papers, Box 27 (on file with author). The "1888" appears to have been added in pencil later, likely when Waite's correspondence was being organized.

<sup>8</sup> See EDWARD V. GULICK, PETER PARKER AND THE OPENING OF CHINA 197-98 (1973). At the time, Parker's townhouse at 700 Jackson Place abutted Blair House, the family residence of newspaperman Francis Preston Blair. Blair was the former *Washington Globe* editor who went on to publish the *Congressional Globe*, containing the debates and proceedings of Congress from 1833 to 1873. See KATHARINE ELIZABETH CRANE, BLAIR HOUSE, PAST AND PRESENT: AN ACCOUNT OF ITS LIFE AND TIMES IN THE CITY OF WASHINGTON 14 (1945). The federal government would purchase and renovate Blair House and its neighbor to the opposite side, the Lee House, in the early 1940s for use as an official presidential guest house. See *id.* at 13-14. The Peter Parker House, purchased by the government in 1970, would be absorbed into the Blair House complex in the 1980s, during an extensive renovation. See Judith Weinraub, *All the President's Guests*, WASH. POST (June 19, 1988), at SM16.



Stanley Matthews.

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Peter Parker.

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Born in 1804 to a devoutly religious Massachusetts family, Peter Parker spent three years of undergraduate study at Amherst College before completing his B.A. at Yale, where he went on to pursue graduate studies in both medicine and theology. By 1834, Parker held an M.D. from Yale Medical College and had been ordained as a minister by the Presbyterian Church. That summer, Dr. Parker departed on a missionary trip to Canton, where he opened the first Western-style hospital in China, providing free surgery and other medical services to patients. The success of this hospital led to the creation of a missionary society, helmed by Parker, which established more hospitals in China and beyond.<sup>9</sup>

The Opium War forced Parker back to the States in 1840, where he met and married wife Harriet Webster. By 1842, the couple returned to Canton, this time with more formal diplomatic responsibilities for Dr. Parker. He played a role in negotiating the 1844 Treaty of Wanghsia and by the mid-1850s was appointed the commissioner of the American Legation to China.<sup>10</sup>

The Parkers resettled in Washington by 1858, the doctor's health permanently compromised by a series of sunstrokes abroad. After nearly two decades without children, the couple welcomed son Peter Parker, Jr. in 1859, just five days before his ailing father's 55th birthday.<sup>11</sup> Despite his infirmities, Peter Parker, Sr. continued to work, acting as Regent to the Smithsonian Institution and serving on various charitable boards. Dr. Parker died at home in Lafayette Square on January 10, 1888, survived by wife Harriet and their son.<sup>12</sup> His funeral service was scheduled for the morning of Friday, January 13 at his residence, with burial in Oak Hill Cemetery.<sup>13</sup>

Although it is unclear when and how the two men originally met, Dr. Parker would likely have at least been aware of Stanley Matthews by early 1877. Both men appear (albeit with scores of other Washington notables) in

<sup>9</sup> See Amalie M. Kass, *Peter Parker*, in 17 AMER. NAT'L. BIOG. 40, 41 (John A. Garraty & Mark C. Carnes eds., 1999).

<sup>10</sup> *Id.* An extensive treatment of Parker's life, featuring entries from his journals, was published with the cooperation of his family in 1896. See GEORGE B. STEVENS, *THE LIFE, LETTERS, AND JOURNALS OF THE REV. AND HON. PETER PARKER, M.D.: MISSIONARY, PHYSICIAN, AND DIPLOMATIST* (1896). Copies of the original journals can be found in the Yale Cushing/Whitney Medical Library's Peter Parker Papers digital collection, <http://whitney.med.yale.edu/greystone/collect/pppapers/> [<https://perma.cc/M94J-GSMU>].

<sup>11</sup> See GULICK, *supra* note 8, at 197.

<sup>12</sup> *Dr. Peter Parker Dead: A Life of Usefulness Brought to a Quiet Close*, WASH. POST (Jan. 11, 1888), at 3. A competing paper's obituary noted, a bit more sensationally, that Parker "had been ever since his return from China an invalid. It has only been during the last few months, however, that he has been confined to his room, and his death was the result of the gradual exhaustion of the physical powers — the weakness of advanced years." *Death of Dr. Peter Parker*, EVENING STAR (Washington, DC) (Jan. 11, 1888), at 5.

<sup>13</sup> See *Death of Dr. Peter Parker*, *supra* note 12, at 5.

Cornelia Adèle Fassett's portrait of the Electoral Commission of 1877, the 15-member body of Senators, Representatives, and Supreme Court justices that was appointed to resolve the bitterly disputed Hayes-Tilden presidential election of 1876. Matthews was counsel for the Republican victor, Rutherford B. Hayes; a few seats away in the artist's depiction, Dr. Parker watches from the audience of the Capitol's crowded Supreme Court Chamber.<sup>14</sup>

Matthews had arrived in Washington after an eclectic political and legal career in his native Ohio. Born in 1824, he went on to attend Kenyon College, where he became acquainted with the future U.S. president whose political destiny would entwine with his own.<sup>15</sup> After graduation, Matthews studied law in Tennessee, married first wife Mary Ann Black (known as Minnie), and returned to Ohio, where he became the editor of the antislavery newspaper *Morning Herald*. His writings caught the attention of local politicians and lawyers, including future Chief Justice Salmon P. Chase.<sup>16</sup>

Matthews nearly abandoned his burgeoning political career in 1849 to join the North American Phalanx, one of the more successful utopian communities that dotted the United States in the mid-19th century. Matthews wrote to Minnie in February 1849, carefully outlining the pros and cons of accepting the preliminary membership that they had been offered; the couple appeared poised to move to the New Jersey commune until a subsequent letter informed them that the community was filled to capacity. By the time additional spaces opened, Matthews had abandoned the communal dream in favor of an Ohio county judgeship.<sup>17</sup>

By the 1850s, Matthews was a rising star in Ohio's Democratic Party, moving from county judge to state senator to a U.S. Attorney in short order. Stanley and Minnie Matthews welcomed ten children during their marriage, although four of the eldest six did not survive a devastating scarlet fever out-

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<sup>14</sup> See Charles Cowley, *The Minority Report of the Electoral Commission*, 27 MAG. AMER. HIST. 81, 85-86 (1892). A history of the painting is provided at *The Florida Case before the Electoral Commission*, [https://www.senate.gov/artandhistory/art/artifact/Painting\\_33\\_00006.htm](https://www.senate.gov/artandhistory/art/artifact/Painting_33_00006.htm) [<https://perma.cc/P5Z6-F4GU>], which notes that Fassett employed artistic license by inserting some prominent Washingtonians regardless of their actual attendance at the proceedings. For more background on the Electoral Commission's work, see CHARLES FAIRMAN, 7 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (1988 supp.).

<sup>15</sup> See PAUL KENS, *THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888* 112-13 (2010).

<sup>16</sup> See *Stanley Matthews 1881-1889*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-2012* (Clare Cushman ed., 2013), at 203 [hereinafter Cushman].

<sup>17</sup> See William Robert Wantland, *Jurist and Advocate: The Political Career of Stanley Matthews, 1840-1889* 59-62 (1994) (unpublished PhD dissertation, Miami University).



Cornelia Adèle Fassett's portrait of the Electoral Commission of 1877.

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break in 1859.<sup>18</sup> During the Civil War, Matthews and Hayes served together in the Union Army. After his discharge, Matthews then became a superior court judge in Ohio for two years — having by now shifted political parties — before returning to private law practice.<sup>19</sup> In 1869, Matthews gained national prominence for his involvement in the Cincinnati Bible Case, defending a school board that had opted to remove the Bible from public schools.<sup>20</sup>

During the election of 1876, Matthews was also on the ballot in Ohio for the U.S. House of Representatives, while his old friend Hayes campaigned for the presidency. While the outcome of the presidential election would eventually tilt in Hayes's favor, by an 8-7 vote of the Electoral Commission,

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<sup>18</sup> See Linda Przybyszewski, *Scarlet Fever, Stanley Matthews, and the Cincinnati Bible War*, 42 J. SUP. CT. HIST. 257, 259-61 (2017). Daughter Isabella, one of the two Matthews children to survive the 1859 scarlet fever outbreak, died in 1868 at the age of sixteen. See *id.* at 260.

<sup>19</sup> See Cushman, *supra* note 16, at 204. Matthews's political allegiances began to shift during his military service, eventually landing on the Republican Party after a stint with the wartime Union Party. See Wantland, *supra* note 17, at 100-01.

<sup>20</sup> See Przybyszewski, *supra* note 18, at 263-69.

Matthews narrowly lost his own congressional election.<sup>21</sup> Matthews did soon return to Washington, as a U.S. Senator in 1877, having won a legislative election in his home state of Ohio. President Hayes reportedly influenced state party leaders to put Matthews on the ballot, although he would later privately express disappointment in Matthews's unremarkable Senate career.<sup>22</sup>

Sometime after his move to Washington, Matthews became acquainted with Dr. Parker, possibly through their shared Presbyterian faith. While the two men attended different houses of worship (Parker, the historic New York Avenue Presbyterian Church; Matthews, the Church of the Covenant, which siphoned several dozen of the New York Avenue's congregants upon its opening), it is plausible that at one time there was overlap between their church memberships.<sup>23</sup> The pastor of the Church of the Covenant, Rev. Dr. Teunis S. Hamlin, would officiate at both men's funerals.<sup>24</sup>

If their connection was not forged through the churches, Matthews and Parker would have likely become acquainted once Matthews joined the U.S. Supreme Court. Parker had maintained friendships with numerous other justices dating back to his diplomatic days, as he reflected in a melancholy 1873 journal entry:

How many of the prominent actors I have personally known have passed away! The death of Mr. Justice Nelson, announced this day, reminds me of the death changes in the bench of judges of the Su-

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<sup>21</sup> See Cushman, *supra* note 16, at 205. The margin of victory by the Ohio Democratic incumbent was a mere 75 votes. See MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788-1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESSES 239 (1998).

<sup>22</sup> See C. PETER MAGRATH, MORRISON R. WAITE: A TRIUMPH OF CHARACTER 243-44 (1963). Until 1913, all U.S. Senators were elected by state legislatures. See DUBIN, *supra* note 21, at xv.

<sup>23</sup> Parker was recorded as a member of the New York Avenue Presbyterian Church, at least in the 1860s. See FRANK E. EDGINGTON, A HISTORY OF THE NEW YORK AVENUE PRESBYTERIAN CHURCH: ONE HUNDRED FIFTY-SEVEN YEARS, 1803 TO 1961 137 (1962); GULICK, *supra* note 8, at 199. Matthews's obituary noted him as an "attendant" of the Church of the Covenant. *Justice Matthews Dead*, WASH. POST (Mar. 23, 1889), at 2. It seems likely that Matthews attended the New York Avenue Presbyterian Church prior to the opening of the Church of the Covenant, at which he was one of 53 original members. See FOURTH ANNUAL REPORT OF THE SESSION AND THE BOARD OF TRUSTEES OF THE CHURCH OF THE COVENANT, WASHINGTON, D.C. 5 (1890). The Matthews family lived at 1800 N St. NW, near what is now Witherspoon Park, about a half-mile away from the New York Avenue church. See CHARLES FAIRMAN, 7-2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-1888 540 (2010). The Church of the Covenant would have been an attractive option, due to its convenient location at 18th and N Streets; Justice Matthews was elected to the newly-formed church's board of trustees in 1883. See CHARTER, CONSTITUTION, AND BY-LAWS OF THE CHURCH OF THE COVENANT 7 (1886).

<sup>24</sup> See *Death of Dr. Peter Parker*, *supra* note 12, at 5 (listing the Rev. Dr. Hamlin as assisting the officiant); *Justice Matthews Dead*, WASH. POST (Mar. 23, 1889), at 2 (listing Rev. Dr. Hamlin as conducting the funeral services).

preme Court of the U.S. Thirty-three years ago (lacking a few months), I was present at the funeral obsequies, in the chamber of the Supreme Court, of Mr. Justice Barbour; since then the associate Justices McLean, Story, Wayne, Catron, Grier, and Nelson, and the Chief Justices Young [*sic*] and Chase, all personal friends, are gone from the Supreme Court of Earth to the High Court of Heaven.<sup>25</sup>

President Hayes nominated Matthews to the Supreme Court in January 1881, to scathing editorials by the popular press expressing concern about potential allegiance to the railroad companies that Matthews had often defended in his legal practice. The Senate Judiciary Committee, stacked with several of Matthews's political rivals, took no action on the nomination during the 46th Congress. President James Garfield re-nominated Matthews in May 1881, to the surprise — and suspicions — of many.<sup>26</sup> In a parallel to the Electoral Commission outcome for the president who had originally nominated him to the Court, Matthews was ultimately confirmed in the Senate by a single vote — a distinction that has yet to be repeated (as of this writing).<sup>27</sup> Thomas Nast memorialized the controversial Court appointment in a *Harper's Weekly* cartoon, showing Matthews tipping the balance of a board labeled “U.S. Supreme Court Bench,” captioned “On — By the Skin of His Teeth.”<sup>28</sup>

Matthews was confirmed by the Senate in May, and the Court's new term opened in October 1881, with a still-threadbare bench of six justices. Nathan Clifford had resigned in the spring and died over the summer; Ward Hunt had long since been sidelined by illness; Stephen Field was vacationing in Europe until December.<sup>29</sup> Shortly after the start of Matthews's tenure, his own first absence was necessitated, with the newest justice recusing himself from the dwindling bench due to a conflict of interest. Ward Hunt returned temporarily, for the first time in two years, to achieve the needed quorum of six justices.<sup>30</sup>

Of the 234 opinions that he authored during his eight-year tenure on the Court, Matthews's best-remembered contribution is *Yick Wo v. Hopkins*, which

<sup>25</sup> Journal 10 of Peter Parker (Dec. 14, 1873), Peter Parker Collection, Historical Library, Cushing/Whitney Medical Library, Yale University, at 27-28 (on file with author), *reprinted in* STEVENS, *supra* note 10, at 333 (with a few transcription errors).

<sup>26</sup> See MAGRATH, *supra* note 22, at 243-46 (1963).

<sup>27</sup> See Kristine Phillips, *The Justice Who Divided the Senate More than Brett Kavanaugh*, WASH. POST (Oct. 9, 2018), at B5.

<sup>28</sup> Thomas Nast, *On — By the Skin of His Teeth*, HARPER'S WEEKLY (June 11, 1881), at 387.

<sup>29</sup> See FAIRMAN, *supra* note 23, at 522-23; Ross E. Davies et al., *Supreme Court Sluggers*, 13 GREEN BAG 2D 465, 466-67 (2010).

<sup>30</sup> See Davies et al., *supra* note 29, at 468.

invalidated, on Equal Protection Clause grounds, a facially neutral statute that had been enforced in a racially discriminatory manner.<sup>31</sup> As was typical of the Reconstruction-era Court, though, Matthews was often reluctant to extend the reach of the Fourteenth Amendment, and could be as friendly to the railroad interests as the opponents of his nomination had feared.<sup>32</sup>

### *The Empty Chair*

The entreaty from Matthews to Waite to attend Parker's funeral came in an era when the Supreme Court was buckling under the weight of an unprecedented workload. The 1888 Court docket contained 1,563 cases, more than six times its caseload in 1850 and more than double its 1870 docket.<sup>33</sup> In addition to the relentless caseload in Washington, justices faced the further strain of "riding circuit" to hear cases in their assigned regions of the country.<sup>34</sup>

The main item on the docket for the day of Dr. Parker's funeral was the third day of argument in *California v. Central Pac. R. Co.*, a consolidation of six lawsuits brought by the state of California against four railroad companies seeking the invalidation of tax assessments by the State Board of Equalization. The Court first admitted Buffalo attorney Seward Adams Simons to practice, and docketed (then dismissed) a case called *Helbing v. California*. The engrossed minutes for the Court do record Matthews as "present" for the day, although it is not clear from this final version of the minutes whether he might have arrived later than the scheduled 12 o'clock opening of the session.<sup>35</sup>

If he did attend Parker's funeral for part or even much of the day, Matthews's temporary absence would have had little impact on Court business.

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<sup>31</sup> See 118 U.S. 356 (1886).

<sup>32</sup> See, e.g., FAIRMAN, *supra* note 23, at 719 (in which "the possibility of a railroad being torn apart led to the altered stand" by Matthews and several other justices on the acceptance of bond coupons for tax collection purposes); MAGRATH, *supra* note 22, at 198-200 (in which Matthews's correspondence influenced the Chief Justice to add language to an opinion that more explicitly foreclosed the government's power to confiscate railroads).

<sup>33</sup> See PAUL KENS, *THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888* 166 (2010). The bench had been down to eight members since the May 1887 death of Justice William B. Woods from dropsy at the age of 64. See *Death of Justice Woods: His Last Hours Marked by an Unconscious Condition*, WASH. POST (May 15, 1887), at 5. Woods's successor, Lucius Q.C. Lamar, would not take the seat until January 18, the week after Parker's funeral. See *The Courts*, WASH. POST (Jan. 19, 1888), at 7.

<sup>34</sup> *Id.* at 13. Matthews was assigned to the Sixth Circuit, which then encompassed (as now) Kentucky, Michigan, Ohio, and Tennessee. See FAIRMAN, *supra* note 23, at 524.

<sup>35</sup> See Minutes of the Supreme Court (Jan. 13, 1888), Nat'l Archives Microfilm Publication M215, reel 17 (on file with author). No reply from Waite to Matthews survives in the archives of either man's correspondence (Waite at the Library of Congress and Matthews at the Rutherford B. Hayes Presidential Library). Rough minutes, consisting of the daily notes made during the Court's session, similarly do not indicate arrival times for the Justices recorded as "present" for the day. See Email from Rebecca Sharp to author (Jan. 24, 2020, 11:18 AM EST) (on file with author).

Chief Justice Waite's docket book for October Term 1887 records Matthews as a reliable vote to affirm in each of the consolidated suits, including those that had been argued on January 13; each was affirmed by a margin of at least two justices' votes.<sup>36</sup> Justice Joseph P. Bradley's opinion for the Court, issued on April 30, disposed of the matter briskly, noting at the outset that the cases were "substantially similar" to a set heard by the Court just two years before.<sup>37</sup> Reiterating the Court's prior holding that a partially-invalid tax assessment on the railroad companies must be voided in its entirety, Bradley stated plainly, "[t]his is so well settled that it needs no citation of authorities further than to refer to the opinion of this court in the former cases."<sup>38</sup>

While Matthews's requested leave of absence on January 13, 1888 ultimately amounted to little, more empty chairs would plague the overworked Waite Court well into the future. The Chief Justice's service came to an end following his completion of the opinion of the Court in the Alexander Graham Bell *Telephone Cases*, a mammoth patent ruling that occupies an entire volume of the *U.S. Reports*.<sup>39</sup> Battling exhaustion from pneumonia on the Monday the finished opinion was due for announcement, "Waite insisted on appearing in Court for fear that his wife, who was vacationing in California, would read of his absence in the press and be alarmed."<sup>40</sup> Justice Samuel Blatchford announced the lengthy opinion instead for the ailing Chief Justice, who died at home that Thursday morning at the age of 71.<sup>41</sup> Waite's seat was filled 199 days later, upon the installation of new Chief Justice Melville Fuller.<sup>42</sup>

Matthews, too, would be gone in barely a year, the 75-year-old justice succumbing in March 1889 to complications from an illness contracted during New York's Great Blizzard of 1888.<sup>43</sup> Front matter in the *U.S. Reports* vol-

<sup>36</sup> See Docket Book OT 1887, Nos. 660, 661, 662, 663, 664, 1157, Library of Congress, Morrison R. Waite Papers, Box 34 (on file with author). Chief Justice Waite and Justice Samuel Miller would have voted to reverse in all six suits; Justice Samuel Blatchford joined the minority in two and did not vote in another (in which Justice Horace Gray also did not vote). *Id.* The railroad cases would be reported as *California v. Central Pac. R. Co.*, 127 U.S. 1 (1888).

<sup>37</sup> 127 U.S. at 26. The decision in the previous cases had been published as *Santa Clara County v. So. Pac. R. Co.*, 118 U.S. 394 (1886).

<sup>38</sup> 127 U.S. at 29.

<sup>39</sup> See KENS, *supra* note 33, at 167. The opinion is reported at 126 U.S. 1 (1888). The Court's *In Memoriam* tribute to Waite follows at 126 U.S. 585.

<sup>40</sup> Morrison R. Waite 1874-1888, in Cushman, *supra* note 16, at 193.

<sup>41</sup> See MAGRATH, *supra* note 22, at 309-10.

<sup>42</sup> See *A New Chief Justice: Mr. Fuller Formally Placed at the Head of the Supreme Court*, WASH. POST (Oct. 9, 1888), at 5. Fuller had been confirmed by the Senate in July, but had opted to delay taking his judicial oath. See *Not to Be Sworn in Now: Chief Justice Fuller Will Return to Washington in September*, WASH. POST (July 30, 1888), at 2.

<sup>43</sup> See *Stanley Matthews 1881-1889*, in Cushman, *supra* note 16, at 206. Matthews was survived by

umes for the October 1888 term noted that “by reason of illness,” Matthews had taken no part in the included opinions, save for those that had been argued or submitted during the prior term.<sup>44</sup> After his death, Matthews’s seat on the bench would remain vacant for 271 days until David Brewer was confirmed by the Senate, although it would be 290 days until Brewer took his judicial oath.<sup>45</sup>

The Court’s docket continued its malignant growth, until it reached “the absurd total of 1800” in 1890.<sup>46</sup> By then, Matthews’s fellow justice Samuel Miller would leave another empty chair, suffering a “paralytic shock” on his way home from the Capitol one Friday in October that would end his life by Monday.<sup>47</sup> Miller’s seat would remain empty for 85 days, until Henry Billings Brown took his oath the following January.<sup>48</sup>

A few weeks later, the Judiciary Act of 1891 provided some welcome relief to the Supreme Court docket, adding the intermediate Circuit Courts of Appeals and eliminating the justices’ circuit-riding duties.<sup>49</sup> This change immediately reduced the filings and docket size for the Supreme Court,<sup>50</sup> albeit too late for our 1888 correspondents and several of their contemporaries.

his second wife Mary Theaker, whom he had married in 1887, two years after the death of first wife Minnie. *Id.* He was also survived by five of his ten children with Minnie: Mortimer, Grace, Jane, Eva, and Paul. *See Justice Matthews Dead*, *supra* note 24, at 2. At the time of Matthews’s death, daughter Jane Matthews was less than three months away from marrying his fellow Justice Horace Gray. *See FAIRMAN*, *supra* note 23, at 540. The wedding proceeded as scheduled, by all accounts a happy match despite the couple’s three-decade age difference. *See* Stephen Robert Mitchell, Mr. Justice Horace Gray 231 (1961) (unpublished PhD dissertation, University of Wisconsin).

<sup>44</sup> 128 U.S. iii n.2 (1888); *see also* 129 U.S. iii n.1 (1888). By volume 130, Matthews had taken no part in any of the opinions published within, and the “Justices” page noted his death. *See* 130 U.S. iii n.1 (1889). A brief tribute to Matthews can be found in the next volume, indicating that four of his brethren from the Court — Justices Harlan, Gray, Blatchford, and Lamar — traveled to Ohio for Matthews’s interment. 131 U.S. 457 n.1 (1889).

<sup>45</sup> *See* McMillion, *supra* note 4, at 6. McMillion’s figures considered Supreme Court vacancies to be filled on the date of the successor’s Senate confirmation. *See Judge Brewer’s Nomination: It Was Debated at Length Yesterday, But Will Be Confirmed To-day*, WASH. POST (Dec. 18, 1889), at 7. Justice Brewer’s swearing-in took place on January 6, 1890. *See Took the Vacant Seat*, WASH. POST (Jan. 7, 1890), at 6.

<sup>46</sup> FELIX FRANKFURTER & JAMES MCCAULEY LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 86 (1927).

<sup>47</sup> *The Late Justice Miller*, WASH. POST (Oct. 14, 1890), at 4; *see also General News*, CHRISTIAN UNION (Oct. 16, 1890), at 488. His tribute in the official reporter volumes can be found at 137 U.S. 701 (1890). Chief Justice Fuller and Justice Brewer accompanied the body to Iowa for burial. *Id.*

<sup>48</sup> *See Justice Brown Seated: The Ceremony of Installation in the Old Court-room Yesterday*, WASH. POST (Jan. 6, 1891), at 4.

<sup>49</sup> Act of Mar. 3, 1891, 26 Stat. 826.

<sup>50</sup> *See* FEDERAL JUDICIAL CENTER, CASELOADS: SUPREME COURT OF THE UNITED STATES, 1878-2017, <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-1878-2017> [<https://perma.cc/PDC8-BF2J>?type=image].

Eighteen Hundred N Street,  
Washington, D.C.

January 12 1888

My dear Chief Justice:

I have a request from  
Mr Parker to act as a  
full bearer tomorrow  
at the funeral of her  
her band. I should  
like to testify my re-  
spect for the good  
Doctor in that way  
of you though I could  
properly absent myself

Stanley Matthews to Morrison Waite, January 12, 1888 (page 1 of 2).

self from the Court  
during a portion of  
the session. I wait  
your answer before  
acceding to the request.

Yours truly  
Stanley Matthews

To  
The Chief Justice

Stanley Matthews to Morrison Waite, January 12, 1888 (page 2 of 2).

BOOKS

FIVE RECOMMENDATIONS



*Cedric Merlin Powell*<sup>†</sup>

Steve Luxenburg

*Separate: The Story of Plessy v. Ferguson, and  
America's Journey from Slavery to Segregation*  
(Norton 2019)

Panoramic, Powerful, Provocative, and Prescient. All of these words describe *Separate*. Steve Luxenburg's book is much more than a history of our tortured, racist past, it is a sobering reminder of where we are and where we must go if America is what it claims to be, a Nation whose central founding principle is not only freedom, but substantive equality.

The book is panoramic in its breadth, depth, and comprehensive exploration of the many people involved in the story. They stretch across history from the end of Reconstruction to the midst of the 21st century's Third Reconstruction, a period of retrogression and retrenchment that is hauntingly familiar. *Separate* is also powerful; the story truly resonates. Luxenburg's book gives us the formative context around *Plessy* and what would come in its wake. *Separate* is provocative; it provides an important link to the present-day effects

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<sup>†</sup> Wyatt Tarrant & Combs Professor of Law, Louis D. Brandeis School of Law, University of Louisville. Copyright 2020 Cedric Merlin Powell.

of past discrimination — not only what happened after slavery was abolished, but also what happens when slavery is the commercial lifeblood of American capitalism.

Finally, *Separate* is prescient. As Luxenburg concludes, “History is made, not ordained.” America is all about contradictions, we espouse lofty principles oftentimes without reaching them. *Separate* exposes this quintessentially American contradiction in a compelling and engaging historical work that is an exemplary addition to the canon.

Paula C. Austin  
*Coming of Age In Jim Crow DC*  
(NYU Press 2019)

Nestled in the shadow of all of the majestic monuments of liberty and equal justice lies a separate Washington DC on the other side of the colorline. *Coming of Age in Jim Crow DC* illustrates that this past still resonates to this day. Its central focus is how African-Americans, from all avenues of life, navigated the colorline. What were the thoughts, opinions, and experiences of the poor and working class African-Americans who traversed the colorline in their everyday lives? Drawing upon a multi-disciplinary approach rooted in slavery and post-colonial studies, literary theory, and labor histories of women, Austin skillfully constructs a complex historical narrative of early 20th century Black urban life.

What is particularly compelling about *Coming of Age in Jim Crow DC* is how there are commonalities and distinct differences in how African-Americans conducted their daily struggle to survive under the weight of the racial caste of Jim Crow. They navigated their separate world based on how this context shaped their life experiences. Austin has offered an innovative and searing account of life on the colorline, and the added paradox that this oppression occurs *within* our nation’s capital gives the book a unique resonance and pathos.

Brian Purnell and Jeanne Theoharis with Komozi Woodard  
*The Strange Careers of the Jim Crow North:  
Segregation and Struggle Outside of the South*  
(NYU 2019)

Revising the title (*The Strange Career of Jim Crow*) of C. Vann Woodward’s classic study of caste-based oppression, Purnell, Theoharis, and Woodard’s *The Strange Careers of the Jim Crow: North Segregation and Struggle Outside of the South* disrupts the traditional two-dimensional approach of historical

depictions of the “good” North and the “bad” South. The focus here is on the complexity, adaptability, and permanence of racism in the North. The essays in *The Strange Careers of the Jim Crow North* offer a comprehensive and nuanced critique of neutrality.

Neutrality — the promotion of liberal individualism, an ostensibly open society and political system, and colorblindness — helped to form and maintain structural inequality in the North. Specifically, the book “helps us to reconsider and reject the idea of northern racism as episodic and transplanted, rather than state-sponsored and indigenous.” This important contribution to the field will prove invaluable in assessing the present-day effects of past discrimination, and in unpacking the complexity of structural inequality as a system unconfined by geographic place.

Ruha Benjamin

*Race After Technology: Abolitionist Tools for the New Jim Code*  
(Polity 2019)

In the decade since the publication of Michelle Alexander’s path-breaking *The New Jim Crow*, scholars have reimagined the structural parameters of inequality. With the rapid and ever-expanding scope of technology, neutral and efficacious assessments are the guiding principles of a vibrant technological world open to all. Ruha Benjamin explodes this pervading societal myth by offering an insightful and provocative critique of the allure of neutrality and the digital tools that actually replicate and reify racial subordination in society. *Race After Technology* offers a sobering reflection on the impact of technology in the 21st century, and how discrimination must be reinterpreted in the context of technology.

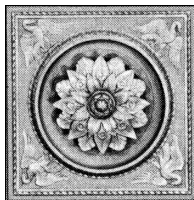
Benjamin aptly refers to this as “The New Jim Code.” Race is encoded on to new technologies that mirror, amplify, and reproduce extant inequalities; but, this effect is masked by the purported neutrality that technology offers. To Benjamin, this neutrality is inherently suspect because codes operate “within powerful systems of meaning.” Thus, “[a]lgorithmic neutrality reproduces algorithmically sustained discrimination.” A defining feature of structural inequality is that it reforms in response to new societal developments, and Benjamin offers a comprehensive analysis of how the post-racial nature of technology actually obscures the lasting legacy of subordination which has been transformed from the New Jim Crow to the New Jim Code. *Race After Technology* prompts the reader to ask what lies ahead.

Caroline Fredrickson  
*The Democracy Fix: How to Win the Fight for Fair Rules,  
Fair Courts, and Fair Elections*  
(The New Press 2019)

With *The Democracy Fix*, President of the American Constitution Society Caroline Frederickson makes her contribution to the burgeoning canon of books on the democratic process, impeachment, and the courts. What is compelling about this book is that it offers a wide ranging critique of the polity on three levels: the rules of the political process; accessibility and fairness in the judicial system; and elections that are open, transparent, and fair with votes that are fully counted and meaningful.

Envisioning an engaged and vibrant democracy, Frederickson presents six ideas to advance progressive values as a direct response to the Right: (i) embracing small-d democracy; (ii) investing financial resources in progressive outcomes; (iii) winning elections in state politics that will be the foundation for national elections; (iv) embracing the concept of the greater good as a defining principle of our polity; (v) reforming voting laws to ensure full participation by all segments of the citizenry and political community; and (vi) ensuring the election and appointment of well-qualified, impartial, and temperamentally fit judges.

Adopting these ideas, Frederickson posits, will move us toward a fully transformed democracy where people have political power and a voice in the policy debates that shape their lives. Winning the fight for fair rules, fair courts, and fair elections means that all citizens will have faith in every aspect of a democracy that does not tip the scales in favor of a particular group or category of interests, but actually encourages engaged participation to reach progressive and transformative outcomes.



1601 F Street  
Washington,  
D.C.

May 5/93.

Dear Chief Justice,

Have you written anything  
or come to any conclusion in  
the status of funds case? .

Excuse this inquiry, which I  
would not have made <sup>had</sup> <sub>it</sub> not  
been <sup>by</sup> my  
secretary, who has worked on this  
case in looking up authorities,  
and was tomorrow to prepare  
for his law school examination.

Respectfully,  
H. Gray

Melville Weston Fuller

Horace Gray to Melville Weston Fuller, May 5, 1893.

# A SECRETARY'S ABSENCE FOR A LAW SCHOOL EXAMINATION

*Todd C. Peppers*<sup>†</sup>

The May 5, 1893 letter from Justice Horace Gray to Chief Justice Melville Weston Fuller touches upon several different strands of Supreme Court history. To place the letter in context, we need to briefly discuss the creation of the law clerk position as well as the different functions of this first generation of law clerks. And we need to talk about the untimely death of a young Harvard Law School graduate named Moses Day Kimball.

During the eight years that Horace Gray was the chief judge of the Massachusetts Supreme Judicial Court (1873 to 1881), he hired recent Harvard Law School graduates to serve as his legal secretaries (hereinafter “law clerks”). Gray relied on his half-brother, Harvard Law School Professor John Chipman Gray, to select the clerks. Professor Gray was skilled at spotting high-quality students, and the men tapped to clerk for Horace Gray included future Supreme Court Justice Louis Brandeis. Gray and Brandeis spent many mornings discussing the substantive merits of pending cases, an experience which Brandeis biographer Melvin Urofsky writes that the young man “treasured.”<sup>1</sup> Gray himself was impressed by Brandeis, later writing that his former clerk was “the most ingenious and most original lawyer I have ever met.”<sup>2</sup>

Gray never publicly discussed his motivation for hiring law clerks, but the most likely explanation for the decision turned on his work style. Simply put, Gray “delighted to go to the fountains of the law and trace its growth from the beginning,” for he “believed that an exhaustive collection of authorities should be the foundation of every judicial opinion on an important question.”<sup>3</sup> Gray’s devotion to legal research might well explain the necessity of hiring assistants to help him drink from these fountains of the law.

When Gray took the United States Supreme Court bench in 1882, he continued his practice of hiring law clerks and assigning them substantive

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<sup>†</sup> Professor and Henry H. & Trudye H. Fowler Professor in Public Affairs at Roanoke College, and visiting professor of law at the Washington and Lee School of Law. Portions of this article have previously appeared in Todd C. Peppers, “Birth of an Institution: Horace Gray and the Lost Law Clerks,” *Journal of Supreme Court History* Vol. 32, No. 3 (2007): 229-248.

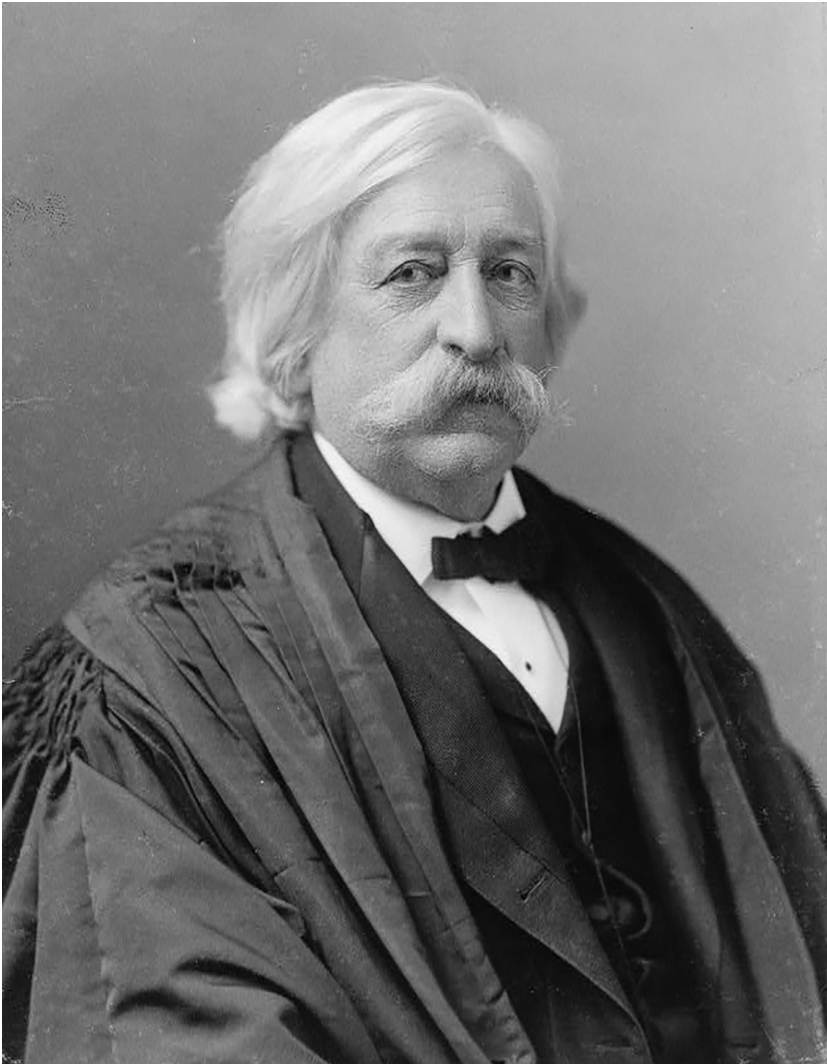
<sup>1</sup> Melvin I. Urofsky, *Louis D. Brandeis: a Life* (New York: Pantheon Books, 2009): 47.

<sup>2</sup> *Ibid.*, 51.

<sup>3</sup> Elbridge B. Davis and Harold A. Davis, “Mr. Justice Horace Gray: Some Aspects of His Judicial Career,” *American Bar Association Journal* 41 (May 1955): II.



Horace Gray.



Melville Weston Fuller.

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duties. Former law clerk Samuel Williston (October Term 1888), who went on to fame as a contracts professor at Harvard Law School, writes that “[t]he secretary was asked to do the highest work demanded of a member of the legal profession — that is the same work which a judge of the Supreme Court is called upon to perform.”

After oral argument, Gray would give his young clerk the applicable briefs and legal pleadings, and ask them to review the “novelettes” and report back to the Justice with their independent thoughts. Gray did not initially share his own opinion of the case with his clerk, but “[i]t was then the duty of the secretary to study the papers submitted to him and to form such opinion as he could.” Gray and his clerk would also sit down before the Court’s Saturday conference and discuss pending cases — first Gray would ask his clerk to “state the points of the case as best he could,” with Gray closely examining and challenging the clerk’s “conclusions.”<sup>4</sup> “When I made them [the reports],” Williston writes, “the Judge would question me to bring out the essential points, and I rarely learned what he thought of a case until I had been thoroughly cross-examined.”<sup>5</sup>

Former law clerk Langdon Parker Marvin (October Term 1901) also recalled Gray’s oral examinations:

After he had settled himself in front of the fire with his black skullcap on his head and a five-cent Virginia cheroot in his mouth, he would say to me, “Well, Mr. Marvin, what have you got for me today?” So then I would tell him, having fortified myself with a little bluebook in which I had made notes of the various cases. Of course, I couldn’t read all of the records, or even all of the briefs, but I made an analysis of the cases and I would tell him what the facts in each case were, where it started, how it had been decided in the lower courts, how it got to the Supreme Court of the United States, and what the arguments on either side were.<sup>6</sup>

Through his tenure on the Supreme Court, Gray permitted his clerks to offer opinions as well as case recitations. Williston writes that Gray “invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views,”<sup>7</sup> while Marvin confesses that “he rather astonished me early in the year by saying ‘How do you think it ought to be decided.’”

Former Gray clerk Ezra Thayer (October Term 1891) echoes Williston and Marvin’s comments about the intellectual give-and-take between Gray and his young charges. Thayer writes that Gray “liked best to do his thinking aloud, and develop his own views by discussion.” During these discussions

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<sup>4</sup> Samuel Williston, “Horace Gray,” ed., William Draper Lewis, *Great American Lawyers: A History of the Legal Profession in America* (Philadelphia: J.C. Vinson, 1909): 158-59.

<sup>5</sup> Samuel Williston, *Life and Law: An Autobiography* (Boston: Little, Brown and Company, 1940): 92.

<sup>6</sup> “Oral History Project: The Reminiscences of Mary V. and Langdon P. Marvin,” Columbia University.

<sup>7</sup> Williston, *Life and Law*, 93.

Gray “would patiently and courteously listen to the crudest deliverances of youth fresh from the Law School.”<sup>8</sup>

Gray then adjourned to the Saturday conference. Williston writes:

When . . . the Judge returned, he would tell the conclusions reached and what cases had been assigned to him for opinions. *Often he would ask his secretary to write opinions in these cases*, and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavor.<sup>9</sup>

Marvin also recalls assisting with the drafting of opinions, but only to a limited extent. “When the Court went into recess, Mr. Justice Gray would begin his work on the opinions allotted to him. I would help him on that, looking up law, and sometimes preparing statements of fact which appeared in the Court records — but, of course, he wrote the opinions himself — in long-hand, with a stub pencil.”<sup>10</sup>

Gray and his clerk worked in the library of Gray’s home at 1601 I Street in Washington, the one-year clerkship beginning in the summer before the next term of Court. Williston describes the second-floor library as composed of two rooms.

The walls of the library rooms were entirely covered with law books, except the spaces for windows and those over the mantel pieces. In the larger room, a portrait of [Chief Justice John] Marshall by Jarvis had the place of honor, surrounded by quite small portraits of all the other chief-justices of the United States. In [the] connecting room, the portrait over the mantel was a replica of Stuart’s well-known representation of [George] Washington.<sup>11</sup>

A desk for the law clerk was placed in the larger of the two library rooms, a spot from which the clerk observed social calls by the other Supreme Court justices. Williston adds that Gray’s bedroom was on the third floor of the home. He wryly observes that Gray “was unmarried at the time, and the house seemed designed for a bachelor. He had some antipathy to closets.”<sup>12</sup>

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<sup>8</sup> *Proceedings of the Bar and of the Supreme Judicial Court of Massachusetts in Memory of Horace Gray* (Jan. 17, 1903): 36, 38.

<sup>9</sup> Williston, “Horace Gray,” 159 (emphasis added).

<sup>10</sup> “Reminiscences of Mary V. and Langdon P. Marvin.”

<sup>11</sup> Williston, *Life and Law*, 91.

<sup>12</sup> *Ibid.*



Gray's home at 1601 I Street.

As for Gray's personal relationships with his law clerks, Williston remarked that Gray "was of most genial disposition" and "a patient man" who "invited the frankest expression of any fresh idea of his secretary."<sup>13</sup> Marvin commented that Gray was a "delightful person" who regaled his law clerks with stories of hunting buffalo in his youth. Marvin would often have lunch or coffee with Gray, and in the afternoon he took drives with Gray in his brougham ("I had to huddle in the corner, as he took up most of the seat") to the local zoo.<sup>14</sup>

During his first three years at the Court, Gray personally paid his law clerks' salary. This changed in 1886, when Congress authorized funds for the hiring of a "stenographic clerk for the Chief Justice and for each associate justice of the Supreme Court, at not exceeding one thousand six hundred dollars each."<sup>15</sup> While the justices differed in who they hired to serve as their

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<sup>13</sup> Ibid, 93.

<sup>14</sup> Reminiscences of Mary V. and Langdon P. Marvin.

<sup>15</sup> 24 Stat. 254 (1886).

stenographic clerk — some justices hired lawyers or law students, while a few hired professionally trained stenographers — within 50 years the position had evolved into what we recognize as the modern law clerk.

At some point in 1892, Professor Gray tapped Harvard Law School student Moses Day Kimball for the clerkship position. A native of Massachusetts and the son of a wealthy merchant, Kimball graduated first in his class at Harvard College in 1889.<sup>16</sup> Kimball himself was unimpressed with his undergraduate achievements, writing at the time of his graduation that “[m]y life has been uneventful so far.” While Kimball considered becoming a minister, he subsequently enrolled in Harvard Law School in the fall of 1889. Kimball proved to be a top student, became a member of the *Harvard Law Review*, and was awarded the honor of speaking at the law school commencement in June of 1892. Kimball chose to address his classmates on the topic of “Employer’s Liabilities to Their Servants.”<sup>17</sup>

We know nothing about Kimball’s clerkship with Gray. He would have started the clerkship by the fall of 1892, and throughout his time in Washington Kimball roomed with his brother, Marcus Morton Kimball. In late March of 1893, Kimball developed a cold that rapidly turned into pneumonia. By April 1, the 25-year-old Kimball was dead.<sup>18</sup> Prior to his burial, a small memorial service was held at his brother’s home.

Regarding Kimball’s early demise, former law school classmate Prescott F. Hall offers some insight. After summarizing Kimball’s studies at Harvard Law School as “a splendid example of what can be one by one who adds to a good mind the untiring and conscientious will to achieve the best,” and describing him as a friendly and helpful classmate who was willing to assist his fellow students with their academic difficulties, Hall writes that Kimball’s “love for the law” may have been his undoing. “This devotion to his profession blinded him . . . to the proper measure of his physical strength, and deprived the State of his most promising life and service.”<sup>19</sup>

We can only speculate as to the emotional impact that Kimball’s death had on Gray, but there was a clear work-related impact: Gray needed a new law clerk. In his letter of May 5, written approximately one month after

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<sup>16</sup> “Obituary: Moses Day Kimball.” *The Harvard Crimson*, April 4, 1893.

<sup>17</sup> “Very Last Act: Scenes at the Harvard Commencement.” *The Boston Globe*, June 29, 1892.

<sup>18</sup> “Death of M. Day Kimball: Was Private Secretary to Judge Gray of Supreme Court.” *Boston Daily Globe*, April 2, 1893. There is some confusion as to whether Kimball died on March 31 or April 1. The latter seems to be the most accurate date.

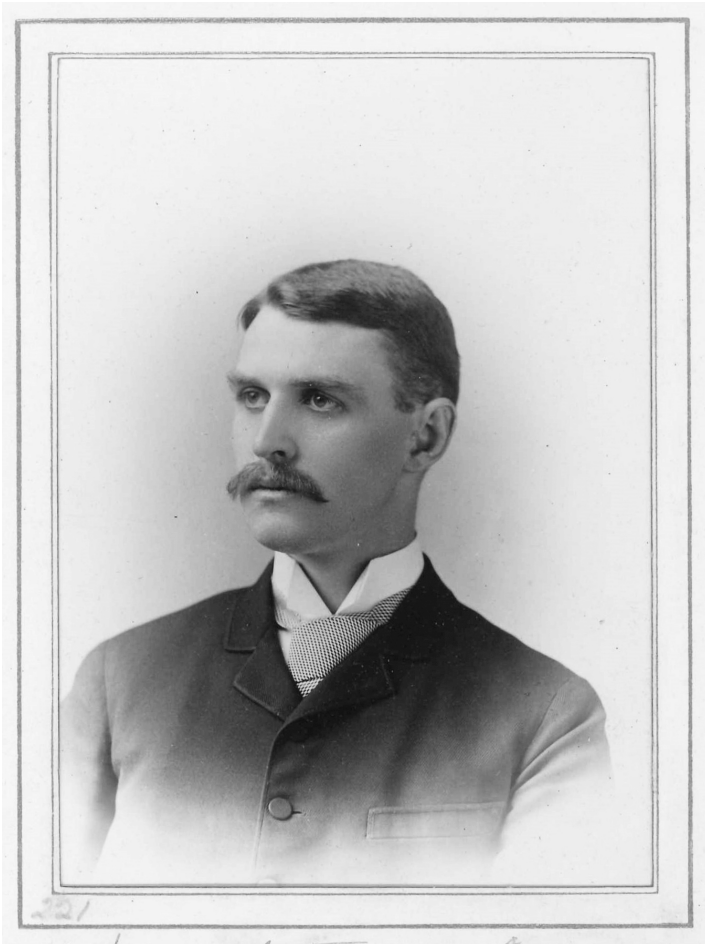
<sup>19</sup> *Harvard College Secretary Report No. III, Class of 1889* (Cambridge: E.W. Wheeler, 1898): 48.



Moses Day Kimball.

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Kimball's death, Gray references the fact that his clerk had to discontinue his legal research on a statute of frauds case in order to return to law school for his examinations. Although Gray doesn't mention the law clerk by name, it is undoubtedly James Montgomery Newell — a Phi Beta Kappa graduate of Harvard College who would graduate from Harvard Law School in June of 1893 and clerk for Gray until the spring of 1894. Given the fact that Kimball died late in his clerkship, it's likely that Newell had already been tapped as his successor.



James Montgomery Newell.

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The statute of frauds case mentioned by Gray is *Dalzell v. Dueber Watch-Case Manufacturing Company*, which was argued before the Court on April 18 and 19, 1893 and decided on May 10, 1893.<sup>20</sup> The case involved the applicability of the statute of frauds doctrine to an oral contract in which a watchmaker allegedly agreed to assign his patent rights to his employer. Gray would write the majority opinion for the Court, holding that the employer had no right to the patent held by an employee because there was not an express

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<sup>20</sup> 149 U.S. 315 (1893).

agreement assigning such rights. The lone dissenter in the case was Justice David Brewer, who did not write a dissenting opinion.

Unfortunately, we don't know exactly what Gray wanted from the Chief Justice. If one considers only the first sentence of the letter, a logical guess would be that Gray was inquiring whether Fuller was going to write a concurring or dissenting opinion. The second sentence of the letter, in which Gray explains that his law clerk's research had been interrupted because the clerk needed to prepare for his law school exams, suggests that Gray himself was unsettled — either as to the outcome of the case or the relevant legal authority — and wanted to know what Fuller thought of the merits of the case.

Any written response from Fuller has been lost to history. If, however, the Chief Justice had his own legal research to share, it was likely gathered by his long-term law clerk, Clarence Melville York. A graduate of National University Law School, York worked for the Fuller for 16 years and was highly regarded for his legal research skills. Like Kimball, York's life would end prematurely. He either jumped or fell to his death from a hospital window.<sup>21</sup>

James Montgomery Newell would complete his year-long clerkship with Gray before entering private practice in Boston. Fifty years after graduating from Harvard College, Newell looked back on his life and career with a cool detachment. "There is no outstanding accomplishment in my life which I can recite," he wrote. "Along the cool, sequestered vale of life I have kept the noiseless tenor of my way, to my own satisfaction for the most part, and, I trust, without disturbance to others." As for his legal career, Newell was equally taciturn. "[A] recital of it in detail would bore any reader to tears."<sup>22</sup> He died in his hometown of Boston, Massachusetts on December 1, 1939. As for Moses Day Kimball, his name remains familiar to residents of Putnam, Connecticut. After his death, Kimball's mother, Susan Tillinghast Morton Kimball, donated 9,000 dollars to build a new hospital in Putnam and name it in honor of her late son. Today the Day Kimball Hospital is part of the sprawling Day Kimball Health Care System. And Moses himself has not been forgotten by the staff at the hospital. Every year, per the conditions of his mother's original gift, the staff gather to celebrate the birthday of the young man who once worked at Justice Horace Gray's side.<sup>23</sup>

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<sup>21</sup> Todd C. Peppers. "The Supreme Court and the Curse of the Gypsy: The Tragic Tale of Clarence Melville York." *The Green Bag* 2d. Vol. 13, No. 2 (Winter 2010): 173-186.

<sup>22</sup> *Harvard College Class of 1889: Fiftieth Anniversary Report*: 296.

<sup>23</sup> "Day Kimball Hospital Marks 150th Anniversary of Namesake." *Norwich Bulletin*, February 13, 2018. As with the date of death, there is additional confusion as to the actual date of Kimball's birthday. The hospital has traditionally celebrated it on February 14, although birth records show that Kimball was actually born on February 13, 1868.

# GROUNDHOGS, THE SUPREME COURT, AND THE EMPEROR OF THE UNITED STATES

*Jack Metzler*<sup>†</sup>

Ormond, Florida,  
Feb. 3d/06

To Hon M.W. Fuller:  
My dear C.J.

I observe that *Missouri v. Illinois* has been argued and is now in the hands of the court for decision. I would much like to have copies of the respective briefs and be greatly obliged if you would request Mr. McKenney for me to mail me here such copies.

Weather here has been cold and cloudy, but we are hoping to have a change for the better with the new Month. Yesterday was “*groundhog*” day, called Candlemas Day by the ignorant — a day regarded by rustic Pennsylvanians as indicative of the weather to come. The congressional measures demanded by the Emperor of America, otherwise known as “Teddy,” will furnish your court with plenty to do in the future.

Sincerely Yours  
George Shiras Jr.<sup>1</sup>

In this note, retired Justice George Shiras, Jr. writes to Chief Justice Melville Fuller from his home in Ormond Beach, Florida on February 3, 1906, requesting copies of the briefs in a case pending before the Court and chit-chatting about weather and politics.

Shiras was born in Pittsburgh, Pennsylvania and spent his childhood working in his father’s peach orchard about 20 miles from the city.<sup>2</sup> He graduated from Yale and stayed on for law school, but left without graduating to read law back in Pittsburgh.<sup>3</sup> After qualifying for the bar, he practiced for a short time in Dubuque, Iowa before returning once again to Pittsburgh,

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<sup>†</sup> Jack Metzler is a lawyer practicing in Washington, DC. He tweets @SCOTUSPlaces. Copyright 2020 Jack Metzler.

<sup>1</sup> Box 9, Melville Weston Fuller Papers, Manuscript Division, Library of Congress, Washington, DC.

<sup>2</sup> Arnold M. Paul, *George Shiras, Jr.*, 2 *The Justices of the United States Supreme Court 1789-1969* 1577, 1577 (1969); Clare Cushman, *George Shiras Jr.*, *The Supreme Court Justices: Illustrated Biographies* 234-238 (2013).

<sup>3</sup> *Cushman, supra* n.2 at 234-235.

where he spent 37 years in private practice before Benjamin Harrison picked him for the Supreme Court. Shiras was well regarded as a lawyer but did not have any judicial experience and had never held public office before his appointment.<sup>4</sup> Unlike most would-be Justices, Shiras's modest resume worked to his benefit. When Justice Joseph P. Bradley died in early 1892, Harrison wanted to replace him with a Pennsylvania Republican, but Harrison was in some sort of squabble with both of that state's Senators.<sup>5</sup> Shiras's sterling reputation at the bar and his lack of political connections to his home state Senators made him an ideal candidate.<sup>6</sup> When Harrison nominated Shiras without consulting them, the Senators tried to mount a campaign to defeat the nomination, but that effort backfired when it became clear that their only basis for opposing Shiras was political sour grapes.<sup>7</sup>

Shiras served as an Associate Justice from 1892 to 1903, retiring after ten years on the Court to fulfill a pledge he had made before taking the bench.<sup>8</sup> Although he was not particularly flamboyant, Shiras was still a pretty weird dude. He never smoked or used the telephone, refused to attend weddings or funerals, and his mutton chops were a thing to behold.<sup>9</sup> But despite his eccentricities, he was known to have a "relaxed manner," "calm temperament," and "droll wit."<sup>10</sup> He wrote 259 majority opinions for the Court and just 14 dissents.<sup>11</sup> According to one commenter, "[h]is opinions were conventionally written, without rhetorical flourish or evident emotion, and they emphasized huge arrays of precedents and traditional rules of interpretation; but the logic of his analysis was often unanswerable."<sup>12</sup> Shiras was best known not for his opinions, however, but for supposedly changing his vote in *Pollock v. Farmers' Loan & Trust Co.* to join Chief Justice Fuller's decision that the income tax was a direct tax and therefor unconstitutional for lack of apportionment.<sup>13</sup> After retirement, Shiras spent his winters in Ormond Beach, Florida, which is where we find him writing a note to his old boss in February 1906. Shiras's note raises a few questions worth exploring, discussed below in the order in which they appear.

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<sup>4</sup> *Id.* at 235-236.

<sup>5</sup> *Paul, supra* n.2 at 1579.

<sup>6</sup> *Id.* at 1579-1580.

<sup>7</sup> *Id.*; *Cushman, supra* n. 2 at 236.

<sup>8</sup> *Paul, supra* n.2 at 1577.

<sup>9</sup> *Cushman, supra* n.2 at 236; *Paul, supra* n.1 at 1580.

<sup>10</sup> *Paul, supra* n.2 at 1580.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> 157 U.S. 429 & 158 U.S. 601. It's not clear whether Shiras actually changed his vote. *See Paul, supra* n.2 at 1587.



George Shiras.

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First, what case was Shiras so interested in? In *Missouri v. Illinois*, Missouri sued Illinois, alleging that sewage from Chicago was polluting the Mississippi River and causing typhoid fever all the way in St. Louis, some 357 miles away.<sup>14</sup> According to Missouri, Chicago was dumping raw sewage in an artificial channel between Lake Michigan and the Desplaines River.<sup>15</sup> Missouri alleged that the sewage entered the river from the channel, traveled down the Desplaines, emptied into the Illinois River, and from there went on to the

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<sup>14</sup> 200 U.S. 496, 523 (1906).

<sup>15</sup> *Id.* at 517.

Mississippi River, arriving north of St. Louis and making the water unfit to drink.<sup>16</sup> The case was argued on January 2-4, 1906 and was, as Shiras says, in the Court's hands for decision.

I do not know whether Fuller passed Shiras's request on to Mr. McKenney — presumably J.H. McKenney, who served as the Court's Clerk from 1880 to 1913 — or whether McKenney mailed copies of the briefs in the *Missouri* case to Shiras, but I do know there was only a short window in which they would have been relevant: On February 19, Justice Oliver Wendell Holmes delivered the Court's opinion dismissing the case without prejudice. Justice Holmes first concluded, with some caution, that the Court had jurisdiction over Missouri's claim.<sup>17</sup> Turning to the merits, Holmes found that the Show-Me state failed to show that the typhoid virus survived all the way from Chicago to St. Louis in sufficient quantities to the cause the city's increase in typhoid cases.<sup>18</sup>

Shiras's note next turns to the weather in Florida, describing it as “cold and cloudy” while hoping that it might improve as (presumably) predicted the day before; *i.e.*, Groundhog Day.<sup>19</sup> Given his upbringing, Shiras was surely familiar with the beliefs of “rustic Pennsylvanians” surrounding the holiday even if he didn't count himself in that category. Pittsburgh is only 80 miles from Punxsutawney, Pennsylvania, which has been officially celebrating Groundhog Day since 1887.<sup>20</sup> It seems likely that word of the holiday reached Shiras while he was in private practice before joining the Court.<sup>21</sup> Indeed, Shiras speaks with authority about the holiday, describing as “ignorant” those who call it “Candlemas Day.”<sup>22</sup>

<sup>16</sup> *Id.*

<sup>17</sup> *Missouri v. Illinois*, 157 U.S. at 519-520.

<sup>18</sup> See *id.* at 524-526. My . . . er . . . extensive research has not uncovered any reason why Shiras might have been so keen to read the briefs on the dispute between Missouri and Illinois.

<sup>19</sup> Note: I am reliably informed that there are no groundhogs in Florida. See <https://www.orlandorats.com/orlando-groundhog-control.htm> (“There's no groundhogs in Florida. Instead, we have armadillos. If you've got a large burrow near your home, with a lot of dirt thrown out, it's a dillo, not a woodchuck. So stop looking for information about groundhogs, and head on over to the dillo page!”).

<sup>20</sup> See <https://www.groundhog.org/legend-and-lore>. Apparently an unofficial announcement of Groundhog Day had appeared in local paper the year before. See *id.*

<sup>21</sup> Shiras's note may well be the first recorded instance of a Justice referring to Groundhog Day, but it was not the last. See *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring) (“Welcome to Groundhog Day.”) and Justice Breyer discussing “a partial-Groundhog-Day statute” during the oral argument of *Cuozzo Speed Techs., LLC v. Lee*, No. 15-446 (April 25, 2016). Most judicial references to Groundhog Day, however, refer not to the holiday itself, but rather to the 1993 movie with the same name, starring Bill Murray as a TV meteorologist doomed to relive the same day over and over. See, e.g., *Dawn T. v. Saul*, No. 18 CV 50101, 2019 U.S. Dist. LEXIS 144427, at \*1 & n.1 (N.D. Ill. Aug. 26, 2019).

<sup>22</sup> Shiras's note may well be the first recorded instance of a Justice referring to Groundhog Day, but it was not the last. See *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring) (“Wel-

For those who aren't familiar with the latter term, Candlemas is "a Christian Holy Day commemorating the presentation of Jesus at the Temple. It is based upon the account of the presentation of Jesus in Luke 2:22-40." The celebration, held on February 2, involves a mass to which congregants bring candles to be blessed and then used for the rest of the winter.<sup>23</sup> According to the Punxsutawney Groundhog Club, that celebration evolved to one involving weather prediction, as reflected in an old English folk song:

If Candlemas be fair and bright,  
Come, Winter, have another flight;  
If Candlemas brings clouds and rain,  
Go Winter, and come not again.<sup>24</sup>

This tradition eventually made its way to Germany, where they introduced a hedgehog seeing its shadow as the bellwether of the weather.<sup>25</sup> And — again, according to the Groundhog Club — when German settlers came to America and found it lacking for hedgehogs, they settled on the closest hibernating mammal at hand and thus we have Groundhog Day.<sup>26</sup> Given that context, it seems likely that Shiras used the word "ignorant" to mean "uninformed," and was simply describing people who still called the holiday "Candlemas Day" as uninformed of the superior tradition involving groundhogs.<sup>27</sup>

But back to 1906. On February 2 of that year, Punxsutawney Phil "Saw Shadow," predicting six more weeks of winter.<sup>28</sup> But of course Shiras would have had no way to know about that prediction<sup>29</sup> and would reasonably have relied on his experience of the "cold and cloudy" weather in Ormand Beach.

come to Groundhog Day.") and Justice Breyer discussing "a partial-Groundhog-Day statute" during the oral argument of *Cuozzo Speed Techs., LLC v. Lee*, No. 15-446 (April 25, 2016). Most judicial references to Groundhog Day, however, refer not to the holiday itself, but rather to the 1993 movie with the same name, starring Bill Murray as a TV weatherman doomed to relive the same day over and over. See, e.g., *Dawn T. v. Saul*, No. 18 CV 50101, 2019 U.S. Dist. LEXIS 144427, at \*1 & n.1 (N.D. Ill. Aug. 26, 2019); see also what I just did there.

<sup>23</sup> <https://en.wikipedia.org/wiki/Candlemas>.

<sup>24</sup> <https://www.groundhog.org/legend-and-lore>.

<sup>25</sup> Because of course they did.

<sup>26</sup> <https://www.groundhog.org/legend-and-lore>. There is no indication that Shiras actually tried to find a groundhog to determine the course of the weather in 1906. Had he been so inclined, and given both the German precedent and the lack of any groundhogs in Florida, see *supra* n.19, Shiras would have been fully justified to establish "Armadillo Day" or even "Dillo Day" for his adopted state.

<sup>27</sup> A celebration involving groundhogs — or any marmot for that matter — is superior to a non-groundhog celebration as a matter of law.

<sup>28</sup> Punxsutawney Groundhog Club, Groundhog Day Predictions, [https://www.groundhog.org/Files/Admin/history/UpdatedGroundhog\\_Day\\_Predictions.pdf](https://www.groundhog.org/Files/Admin/history/UpdatedGroundhog_Day_Predictions.pdf).

<sup>29</sup> Certainly nobody would have called to tell him since he never used the telephone.

Indeed, Shiras's report is confirmed by accounts of an event held the week before in his town; namely the Ormand Beach Speed Tournament, at which Fred Marriott drove the Stanley Steamer "Rocket" to a record-setting 127 mph, leading the town to earn its nickname as "The Birthplace of Speed."<sup>30</sup> Unfortunately, weather records for 1906 are pretty sketchy, so I have been unable to determine whether Punxsutawney Phil's prediction for six more weeks of winter in Pennsylvania or Shiras's prediction for an early spring in Florida panned out.<sup>31</sup>

And speaking of predictions, the last topic on Shiras's mind was a prediction that the legislative proposals of President Theodore Roosevelt — whom he calls "the Emperor of America, otherwise known as "Teddy" — would be likely to keep the Court busy. Shiras may well have been referring to Roosevelt's fifth State of the Union address, delivered to Congress in December 1905, in which Roosevelt called for a wide range of legislative initiatives, including proposing to expand federal regulation of railroads, corporations, insurance companies, and labor disputes, to expand the Monroe Doctrine, to address corruption and bribery in federal elections, to revise the copyright law, and to revise federal immigration and criminal laws.<sup>32</sup> In light of the breadth of Roosevelt's speech, one can understand why Shiras might joke that Roosevelt had crowned himself "Emperor."<sup>33</sup> As for whether Roosevelt's proposals would keep the Court busy, Shiras did not need to see his shadow to predict that they would.

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<sup>30</sup> See <https://www.ormondbeach.org/87/Birthplace-of-Speed>. *Automobile Magazine* described the weather as "intensely disagreeable"; see also newspaper accounts collected at <https://www.firstsuper-speedway.com/articles/ormond-beach-1906>; <https://www.news-journalonline.com/article/LK/20121216/News/605078807/DN>. Marriott made his record-setting run on January 26, 1906, which was also Shiras's 74th birthday. See If Shiras was aware of the historic event that had just happened in his neighborhood, he did not mention it in his note to Fuller.

<sup>31</sup> The authorities tend to agree that Punxsutawney Phil's predictions are wrong more often than not. See, e.g., Jenni Fink, *How Accurate Is Groundhog Day? See Punxsutawney Phil's Record On Spring Predictions*, Newsweek (Feb. 1, 2020).

<sup>32</sup> And much much more. The full text of Roosevelt's address, which clocks in just over 25,000 words, is available here: [https://en.wikisource.org/wiki/Theodore\\_Roosevelt%27s\\_Fifth\\_State\\_of\\_the\\_Union\\_Address](https://en.wikisource.org/wiki/Theodore_Roosevelt%27s_Fifth_State_of_the_Union_Address). As a comparison, Barack Obama's fifth state of the union address was just 6,457 words. See [https://en.wikisource.org/wiki/Barack\\_Obama%27s\\_Fifth\\_State\\_of\\_the\\_Union\\_Address](https://en.wikisource.org/wiki/Barack_Obama%27s_Fifth_State_of_the_Union_Address).

<sup>33</sup> Roosevelt famously disliked the nickname "Teddy." As a fellow Theodore, I can relate, which is why I'm called "Jack."

An. Manselot

Omond, Florida,  
Feb 3/06

To Hon. M. W. Fuller:

My Dear C. J.

I observe that Albion & Albion has been signed, and is now in the hands of the com. for delivery. I should much like to have copies of the reporter briefs and be greatly obliged if you would request Mr. Beckenry for me to mail me here such copies.

Weather here has been cold and cloudy, but we are hoping to have a change for the better with the new month. Yesterday was "porcupine" day, called our German boy by the ignorant - a day regarded by certain Pennsylvania as indication of the weather to come.

The impressionable masses demanded by the Emperor of America, otherwise known as "Teddy", will furnish you with plenty to do in the future.

Sincerely Yours

George Shiras

George Shiras to Melville Fuller, February 3, 1906.

# A CHANGED COURT

## SUMMER GREETINGS FROM JUSTICE MCKENNA TO JUSTICE DAY

*Ross E. Davies*<sup>†</sup>

On June 10, 1916, U.S. Supreme Court Justice Charles Evans Hughes resigned from the Court so that he could campaign full-time for the Presidency of the United States on the Republican ticket. The move turned out, eventually, to be a double blessing for sitting President Woodrow Wilson of the Democratic Party. First, in the summer, Wilson nominated John H. Clarke — like Wilson, a Democrat and a Progressive — to replace Hughes at the Court. Clarke was promptly confirmed and commissioned, and he took office on July 24. Second, in the autumn, Wilson ran for reelection and defeated Hughes on November 7.

“Among his former colleagues, Hughes apparently left behind nothing but good will,” writes Alexander M. Bickel in volume 9 of *The Oliver Wendell Holmes Devise History of the Supreme Court*.<sup>1</sup> Bickel quotes comments by Chief Justice Edward Douglass White and gives excerpts from friendly notes written to Hughes by Justices William R. Day and Oliver Wendell Holmes. Alas, Bickel provides no citations to sources that a curious reader might study to get a sense of the context of those bits of friendliness, or even to check the accuracy of Bickel’s quotes. Nor does Bickel provide information about the sentiments of Hughes’s other five former colleagues on the Court — Justices Joseph McKenna, Willis Van Devanter, Mahlon Pitney, James McReynolds, and Louis D. Brandeis. Bickel’s failure to provide broader, more scholarly support for his claim does not make it a wrong claim, but it might make a reader wonder whether Bickel’s judgment was based on careful research, or at least in part on something else — perhaps his own good will toward Hughes.

In any event, if Bickel had read a note Justice McKenna sent to Justice Day after Justice Hughes opted to stop being a Justice — the note reproduced and transcribed on the next five pages — he probably would have qualified his claim about the unanimity of good feeling among the Justices following Hughes’s departure.

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<sup>†</sup> Professor of Law, George Mason University; editor-in-chief, the *Green Bag*.

<sup>1</sup> Alexander M. Bickel and Benno C. Schmidt, Jr., *The Judiciary and Responsible Government 1910-21* at 396 (1984).

Medfield  
Mass Aug  
9th 1916  
Dear Day.  
I have reached  
this place in my  
summer wagon =  
derrings where  
I shall stay  
until next week,  
then to Pettauket  
(Zabelo home) and

Joseph McKenna to William R. Day, August 16, 1916 (page 1 of 4).

after to Washington.  
The summer has  
been uneventful -  
diversified by  
two applications  
for writs of error.  
I know that  
you are eager  
to attack these  
and will do  
so with all  
your old strength

Joseph McKenna to William R. Day, August 16, 1916 (page 2 of 4).

and presumption.

In the joy of seeing  
you at it I will  
forgive you.

By the way, you  
will come to  
a changed Court,  
but to a pleasant  
one I am sure.

Our former  
brother H. is

Joseph McKenna to William R. Day, August 16, 1916 (page 3 of 4).

making politics lively.  
We shall have no  
more of his being  
cold and reserved.  
How is your  
golf? I achieved  
the distinction of  
beating Pitney, and  
I am stuck up  
about it.  
I am near the  
end of my paper  
and there is just enough  
left to send you Mrs  
McKenna's love & my own  
sincerely  
McKenna

Joseph McKenna to William R. Day, August 16, 1916 (page 4 of 4).

Medfield  
Mass Aug  
9th 1916

Dear Day,

I have reached this place in my summer wanderings where I shall stay until next week, then to Setauket (Isabel's house) and after to Washington.

The summer has been uneventful, diversified by two applications for writs of error.

I know that you are eager to attack them and will do so with all your old strength and presumption.

In the joy of seeing you at it I will forgive you.

By the way, you will come to a changed court, but to a pleasant one I am sure.

Our former brother H. is making politics today.

We shall have no more of his being cold and reserved.

How is your golf? I achieved the distinction of beating Pitney and I am stuck up about it.

I am near the end of my paper and there is just enough left to send you Mrs. McKenna's love & my own.

Sincerely  
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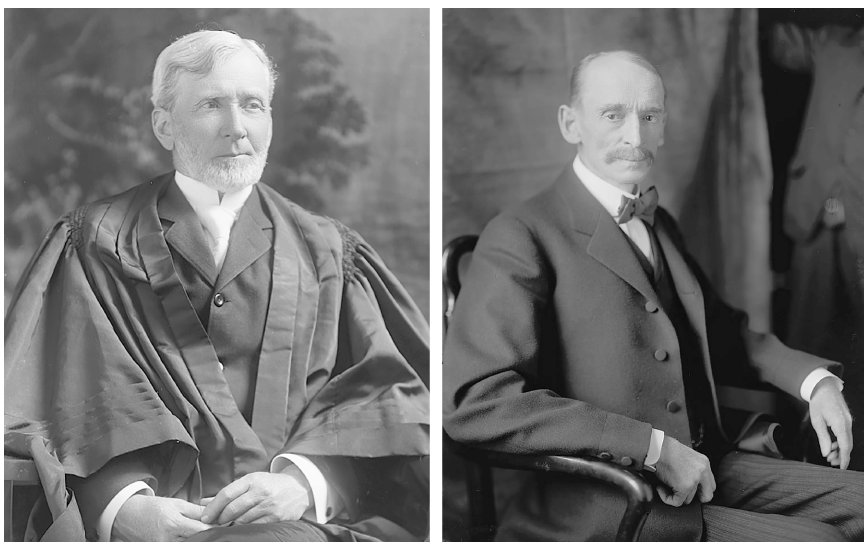
McKenna seems to have been a bit sour on Hughes. He refers to a "changed court, but . . . a pleasant one." The only significant changes at the Court between June 12, 1916, when it adjourned for the summer,<sup>2</sup> and August 9, when McKenna wrote to Day, were the departure of Hughes and the arrival of Clarke. That might be taken as pretty clear evidence that McKenna viewed Clarke as an upgrade, at least in congeniality, from Hughes.

But then again, maybe not. There is also a chance that McKenna was referring to earlier developments. Day's health was not good, and he had been absent from the Court since long before it rose on June 12. His last appearance there during the 1915 Term was on January 3, and the Court conducted no business that day. Justice Joseph R. Lamar had died the night before, and after delivering the sad news in open court, the Chief Justice announced that "[a]s a mark of the affection we bore him and of respect for his memory, the court will stand adjourned until Thursday morning next."<sup>3</sup>

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<sup>2</sup> Journal of the Supreme Court of the United States 251, 268 (June 12, 1916) (hereafter "Journal, 1915 Term").

<sup>3</sup> Journal, 1915 Term at 94 (Jan. 3, 1916). Day's last two opinions for the 1915 Term were announced on January 10 by Chief Justice White. *Id.* at 102 (Jan. 10, 1916).



Justices Joseph McKenna (left) and William R. Day.

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President Wilson promptly nominated Louis D. Brandeis to replace Lamar. This triggered a famously long, contentious, and troubling confirmation process.<sup>4</sup> As a result, Brandeis was not confirmed until June 1 and did not take his seat on the Court until June 5.<sup>5</sup>

Meanwhile, in January there had been some optimism in the newspapers about an early return to work for Day. The *Washington Post* for January 15 reported that

The condition of Justice Day, of the Supreme Court, who has been confined to his home, 1301 Clifton street, for the last few days with the grip [aka the grippe, aka influenza, aka the flu], and who is being attended to by Dr. B.L. Hardin, is improving and he is expected to be well enough in the course of a few days to take up again his official duties.<sup>6</sup>

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<sup>4</sup> See Melvin I. Urofsky, *Louis D. Brandeis: A Life* ch. 18 (2009).

<sup>5</sup> *Journal*, 1915 Term at 241 (June 5, 1916). This would turn out to be the one and only occasion on which Associate Justices Hughes and Brandeis would sit together on the Court. Hughes was absent on June 12, and when he returned to the Court in 1930 it was as Chief Justice.

<sup>6</sup> *Justice Day Rallies*, *Wash. Post*, Jan. 15, 1916, at 2; see also, e.g., *Justice Day Much Better*, *Wash. Post*, Jan. 19, 1916, at 2.

By February, however, some papers were sounding contrapuntally pessimistic. The February 23 *Washington Herald*, for example, worried that

Associate Justice William R. Day, of the United States Supreme Court, is seriously ill with the grip and may never again be able to assume his seat on the bench. He has been in ill health for several years. He is 67 years old.<sup>7</sup>

In fact, Day's condition was neither as good as the *Post* hoped nor as bad as the *Herald* feared. As the *Washington Times* reported on March 31, in an article titled "Justice Day to Return To the Bench Next Fall,"

Associate Justice William R. Day will not resume work on the Supreme Court bench until next fall. He will leave soon for his home in Canton, Ohio, where he hopes to recuperate.

Justice Day recently returned to Washington from Atlantic City, where he had gone for his health [times do change, don't they?], but he has not improved as rapidly as his physicians had hoped. They advised an absolute cessation from all work until fall.<sup>8</sup>

Day seems to have taken the advice. Thus, when Hughes accepted the Republican presidential nomination in June, "[a]mong the first callers at [Hughes's home in Washington, DC] was Rufus S. Day, son of Justice Day, of the Supreme Court, with a message from his father, who is ill in Canton, Ohio."<sup>9</sup> News reports about where Day spent the summer months varied, some suggesting that he spent them at the customary Day family vacation spot on Mackinac Island in Michigan,<sup>10</sup> while others placed him in Canton.<sup>11</sup> More importantly, when the Court opened its 1916 Term on October 9, Day was on the bench,<sup>12</sup> having "entirely recovered" from the grip.<sup>13</sup>

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<sup>7</sup> Justice Day Seriously Ill, *Wash. Herald*, Feb. 23, 1916, at 1; but see, e.g., Denies Judge Day's Illness Is Serious, *Pittsburgh Daily Post*, Feb. 24, 1916, at 4 ("Reports that the condition of his health was causing anxiety to the relatives of Justice W.R. Day . . . were denied today by members of the Day family in this city [Canton], their home.").

<sup>8</sup> Justice Day to Return To the Bench Next Fall, *Wash. Times*, Mar. 31, 1916, at 13. Other newspapers put Day in Canton even earlier. See, e.g., Many Decisions Expected, *Boston Globe*, Feb. 21, 1916, at 8 ("Justice Day, who is ill at his home in Canton, O, will be the only member of the court absent.").

<sup>9</sup> Hughes Obeys Call to Lead His Party, *Wash. Post*, June 11, 1916, at 1, 8.

<sup>10</sup> Events of Interest in and Out of Town, *Wash. Evening Star*, Oct. 6, 1916, at 8; see also, e.g., Society, *Wash. Post*, May 30, 1909, at 3.

<sup>11</sup> Chief Justice and Mrs. White Return, Entire Supreme Bench Is Now in Washington for Opening Next Monday, *Wash. Times*, Oct. 6, 1916, at 9.

<sup>12</sup> *Journal of the Supreme Court of the United States* 1 (Oct. 9, 1916) (hereafter "Journal, 1916 Term").

So, when McKenna wrote his friendly note to Day in August 1916, he might have been referring to the replacement of Lamar by Brandeis, as well as — or even instead of — the replacement of Hughes by Clarke. However, another line in that note does weigh in favor of the replacement of Hughes as the main factor, at least: “We shall have no more of his [Hughes’s, that is] being cold and reserved.” (In fairness, it must be said that McKenna was not above reproach for that sort of manner himself.<sup>14</sup>) So, there is much to weigh when imagining what Day might have felt when he read McKenna’s note in August, or when he rejoined his colleagues in October. And imagining is what it must remain, at least for this writer. I know of no evidence indicating whether Day felt that the “changed court [was] . . . a pleasant one” in 1916. He did opt to carry on with that crowd for several more years, until late 1922, when he, Pitney, and Clarke all left the Court within a few weeks of each other.

. . . .

McKenna’s remarks about Hughes and the changed Court were the only negative lines in what was, really, a note bubbling with joy, optimism, and affection.

First, there were the summer visits to family. The address at the top of the first page of his note shows that McKenna was writing from Medfield, Massachusetts, home of his daughter Marie and her spouse Davenport Brown.<sup>15</sup> In the first line of the note McKenna says that Medfield is “where I shall stay until next week, then to Setauket (Isabel’s house) and after to Washington.” Setauket, on New York’s Long Island, was home to daughter Isabel and her spouse Pitts Duffield,<sup>16</sup> and it was from Setauket that Justice and Mrs. McKenna returned to Washington that September.<sup>17</sup>

Second, there were the writs of error — “[t]he summer has been uneventful, diversified by two applications for writs of error.” They were a routine part of

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<sup>13</sup> Supreme Court Members Plan Opening of Fall term Monday, Wash. Herald, Oct. 6, 1916, at 8.

<sup>14</sup> See McKenna Dies at 83; To Be Buried Today, Baltimore Sun, Nov. 22, 1926, at 1 (“While regarded by his friends as possessing an engaging personality, and held by them in the highest esteem, the general demeanor of Justice McKenna was austere, severe and distant.”). But aren’t we all, sometimes? John 8:7.

<sup>15</sup> See Mrs Balch a Speaker: Garden Party Held at Home of Mrs Davenport Brown at Medfield, Boston Globe, June 15, 1916, at 13; see also In the Social World, Wash. Herald, Oct. 1, 1910, at 5; To Wed Davenport Brown: Engagement of Justice McKenna’s Daughter to Boston Man, Boston Daily Globe, Nov. 6, 1905, at 5.

<sup>16</sup> See Men of 1914: An Accurate Biographical Record of Prominent Men in All Walks of Life Who Have Achieved Success in Their Chosen Vocations in the Various Civil, Industrial and Commercial Lines of Activity 219 (1915); David Converse, The World of To-Day, Boston Home Journal, Jan. 9, 1904, at 4, 5.

<sup>17</sup> Events of Interest In and Out of Town, Wash. Evening Star, Sept. 14, 1916, at 8.

the summer work of the Justices, back when action by them individually used to be required or permitted on many occasions, including on litigants' applications for writs of error. McKenna does not say a word about the substance of the underlying controversies (which is not surprising, since they were a matter of routine), or why Day might be likely to attack McKenna's decisions (which is also not surprising since the full Court, including Day, would have an opportunity in the autumn to review any writs McKenna or any other Justice might have granted).<sup>18</sup> In this context, it may well be that McKenna was merely using the writs as a vehicle for expressing his high and friendly hopes for Day's recovery and his anticipation of Day's return to their collegially combative collaborations at the Court.

Third, there was golf: "How is your golf? I achieved the distinction of beating Pitney and I am stuck up about it." In those days, the Court was well-stocked with golf enthusiasts, including McKenna, Day, and Pitney, who frequently played at the tony (and still-tony) Chevy Chase Club in suburban Maryland.<sup>19</sup> McKenna was widely portrayed as the greatest golf enthusiast on the Court — a status bestowed on him after the departure of Justice John Marshall Harlan, long the grand and colorful leading golfer on the Court, who died in office in 1911. A *Washington Post* society page note in that year said "Justice McKenna makes it a practice to play each day."<sup>20</sup> Alas, passion and proficiency did not walk hand-in-hand for the sporting McKenna. One widely told golf-and-the-Court anecdote had Harlan (who may have introduced McKenna to the game<sup>21</sup>) telling the junior golfer, "Your form is faultless; the trouble is, you can't hit the ball."<sup>22</sup> Pitney, in contrast, was equally widely and (by all accounts I can find) seemingly accurately portrayed as the most accomplished golfer among the Justices, and good enough to compete outside his golfing coterie on the Court. For example:

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<sup>18</sup> See, e.g., Sup. Ct. R. 36.1 (1913); see also Ross E. Davies, *When Justice Began at Home in Washington, DC, Circa 1900*, *Green Bag Single Sheet Classic #6* (2017); 7 *Journal of Law* (2 *Journal of In-Chambers Practice*) 33 (2017); Daniel Gonen, *Judging in Chambers*, 76 *U. Cincinnati L. Rev.* 1159, 1223 (2008) ("[t]he practice of allowing a single Justice to act [under Rule 36] rather than the full court was based on the pointlessness of burdening the full Court with these applications since there was little or no benefit from having more than one person process them").

<sup>19</sup> Other golfers included Van Devanter (*Behind the Scenes at the Nation's Capital*, Phila. Inquirer, June 28, 1920, at 12 ("Of the Supreme Court, Justices Van Devanter, Pitney, and McKenna form a little coterie that plays much together.")), and McReynolds (*Journal of the Supreme Court of the United States* 206 (Mar. 31, 1948) ("He loved duck hunting and golf.")).

<sup>20</sup> *Fashion's Fads and Fancies*, *Wash. Post*, June 5, 1911, at 7.

<sup>21</sup> See Ross E. Davies, *The Judicial and Ancient Game: James Wilson, John Marshall Harlan, and the Beginnings of Golf at the Supreme Court*, *J. Sup. Ct. Hist.* 122, 129-30 (2010).

<sup>22</sup> See, e.g., *The Human Side of the Highest Court*, *Dayton Daily News*, May 21, 1916, *Supp.* at 9.

**IMPROVEMENT IN GOLF**

**United States Will Soon Produce Greatest Golfers.**

John Ward, Old-Time Giant Shortstop and Expert With Driver and Niblick Thinks Players Are Improving Rapidly.

That the United States will soon produce the greatest golfers in the world is the opinion of John Ward, old-time Giant shortstop and an expert with the driver and niblick.

This prediction is based on the vastly improved form of American players which to Ward was the feature of the 1916 golf season. If this improvement in playing form continues, says the veteran, American golfers as a class should at least be the equal if not the superior of the English and Scotch players.

"I have competed in many tournaments this season and watched a number of others," declared the champion of the Garden City club. "What surprised me most was the improved playing style of the majority of golfers. It was only a short time ago that only about one golfer in ten played in correct form. The others would simply club their way around without regard

**U. S. SUPREME COURT AS NOW CONSTITUTED**



CLIPPING T

This new group photograph of the Supreme court of the United States shows that tribunal with its two new members. Front row left to right: Justice McKenna; Chief Justice White; Justice Holmes; Justice Van Devanter. Back row left to right: Justice Brandeis; Justice Pitney; Justice McReynolds; Justice Clarke.

A golf-Court coincidence too good to pass up, from the *Barber County Index* {Kansas}, Nov. 15, 1916, at 6.



Justice Joseph McKenna (left), an unidentified caddy, and Justice Mahlon Pitney (retired by the time this photograph was taken, which means it must have been in 1923 or 1924) on the golf course.

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United States Supreme Court Justice Mahlon Pitney, of the Chevy Chase club, Washington, D.C., led a field of 234 golfers with a net score of 70 for the first round of 18 holes in the annual senior's tournament at the Apawamis Golf club, near here [Rye, New York, that is], today. This two-day tournament consist[s] of a handicap round of 18 holes medal play each day, and Justice Pitney was a prize winner with his score today.<sup>23</sup>

Pitney, though not a great athlete, had been interested in sports since youth and had even played some baseball when he was in college at Princeton,<sup>24</sup> which may have contributed to his success when he picked up golf later in life. McKenna might even have been just a tiny bit galled to read comments from Pitney such as this one:

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<sup>23</sup> Justice Pitney Wins at Golf, *Atlanta Const.*, Sept. 24, 1914, at 8.

<sup>24</sup> McKenna's connection to baseball is more limited, but also more intriguing. He is the subject of the most intriguing mention — and the most annoying footnote — in all of sports law, also courtesy of Bickel. Bickel writes, "His [that is, McKenna's] return to Holmes' opinion in *Federal Baseball Club of Baltimore v. National League* was: 'I voted the other way but I have resolved on amiability and concession, so submit. I am not sure that I am not convinced.'" Bickel and Schmidt, *The Judiciary and Responsible Government* at 238. And then, like any good scholar, Bickel gives the reader a citation to the source for the quoted passage: "*Federal Baseball Club of Baltimore v. National League*, 259 U.S. 200 (1922), *Holmes Papers*." *Id.* n.107. Argh.

... Mr. Pitney explained how he came to take up golf. "Until a few years ago I thought it a silly game because I didn't know anything about it. Then I became ill and was ordered by my doctor to go to Hot Springs, Virginia, and play golf. I've been a lover of the game ever since."<sup>25</sup>

Thus, Day would not have been at all surprised to see McKenna writing about golf, and even less surprised at his pride and joy at a win versus Pitney (quite possibly a once-in-a-lifetime experience).

And, finally, just in case the intended reader might have had any doubts about the writer's warm feelings for Day, McKenna sends his love. Very nice.

All of which suggests that the Court to which Day was to return was, whether changed or not, indeed a pleasant one.



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<sup>25</sup> Mahlon Pitney at Close Range, Trenton Evening Times, Mar. 22, 1912, at 11.

JUDICIAL OPINIONS

# FOUR RECOMMENDATIONS



*Stephen Dillard*<sup>†</sup>

*People v. Mead*

503 Mich. 205 (2019)

opinion for the court by Chief Justice Bridget M. McCormack

One hallmark of a talented writer is the ability to explain complicated or specialized subject matter in a straightforward manner. Chief Justice McCormack has this rare gift, which is on full display in this opinion reversing the denial of a defendant's motion to suppress. McCormack has a breezy and conversational writing style, and she's a skilled storyteller. This is evident throughout her opinion in *Mead*, which she uses to educate the people of Michigan about one of the important interests safeguarded by the United States and Michigan Constitutions (i.e., the right of a citizen to challenge a constitutional violation under the reasonable-expectation-of-privacy test). It's a wonderful read, and a perfect example of how these all-too-common cases can be explained to the public in a way that any citizen can easily understand.

*Arias Leiva v. Warden*

928 F.3d 1281 (11th Cir. 2019)

opinion for the court by Judge Britt C. Grant

Judge Grant's meteoric ascension to the Eleventh Circuit is nothing short of remarkable. After a prestigious judicial clerkship and a brief stint in private

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<sup>†</sup> Chief Judge, Court of Appeals of Georgia. Copyright 2020 Stephen Dillard.

practice, Grant spent two years serving as the solicitor general of Georgia and just over a year as a justice on the Supreme Court of Georgia before her appointment to the federal bench at the tender age of 40. And now, she's a potential candidate for the next vacancy on the Supreme Court of the United States. Grant is, to it plainly, a judicial prodigy. This is apparent from her opinion in *Arias Leiva*, which shows off her superb writing skills in a complicated and intriguing separation-of-powers case.

*Green v. Howser*

942 F.3d 772 (7th Cir. 2019)

opinion for the court by Judge Amy Coney Barrett

Prior to her appointment to the Seventh Circuit, Judge Barrett was a widely respected law professor at the Notre Dame Law School and a prolific legal scholar, specializing in constitutional law, federal courts, and statutory interpretation. She is also, by all accounts, the current frontrunner for the next vacancy on the Supreme Court of the United States. This isn't surprising to anyone familiar with her formidable intellect and extraordinary writing abilities. Suffice it to say, Judge Barrett is a once-in-a-generation jurist, who has already published a considerable number of thoughtful and scholarly opinions. Even so, her sparkling and incisive prose is evident even in more routine cases, like the § 1983 action at issue in *Green v. Howser*, in which she skillfully tells the tragic and all-too-familiar story of an estranged family battling for control over who raises a child.

*Salcedo v. Hanna*

936 F.3d 1162 (11th Cir. 2019)

opinion for the court by Judge Elizabeth L. "Lisa" Branch

Before joining the Eleventh Circuit, Judge Branch spent five years on Georgia's intermediate appellate court, authoring 351 published opinions during that time period, as well as numerous concurrences and dissents. She had a sterling reputation as a thoughtful jurist, committed textualist, and a gifted writer, and this, no doubt, led to her appointment and confirmation to the federal bench. And Judge Branch wasted no time picking up where she left off at the Court of Appeals of Georgia, publishing a slew of elegant and scholarly opinions in her first two years on the Eleventh Circuit. Her opinion in *Salcedo* is a perfect example of her exceptional writing skills, and demonstrates her deep and abiding commitment to the separation of powers.

# TAFT, VAN DEVANTER, AND THE SUMMER OF 1922

*Greg Goelzhauser*<sup>†</sup>

On August 19, 1922, Chief Justice William Howard Taft wrote to Justice Willis Van Devanter relaying a summer's worth of miscellany. The message encapsulates fallout from the Taft Court's first term, including a fluctuating cast of characters and blowback to its most visible decisions. It also captures a blossoming relationship between sender and recipient. Taft would later call Van Devanter "my strength" and "my chancellor,"<sup>1</sup> but the two did not know each other well when Taft joined the Court in 1921, despite Taft having nominated Van Devanter to the position as president in 1910.<sup>2</sup> On the bench, Taft's "winning personality" and "distinctive managerial outlook"<sup>3</sup> contrasted with Van Devanter's orientation as a "very reserved"<sup>4</sup> person who displayed "extreme conscientiousness and thoroughness in endeavoring to get to the bottom of every question of fact and law."<sup>5</sup> Together, "It was almost inevitable that [they] would share the Court's leadership — Taft as social leader and Van Devanter as task leader — for each needed what the other had."<sup>6</sup>

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Taft wrote to Van Devanter from his summer home in Pointe-au-Pic, then a village municipality just outside of (now merged with) Murray Bay (now La Malbaie) in Quebec, Canada. The area was, and remains, "a vacation

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<sup>†</sup> Associate Professor, Department of Political Science, Utah State University. Copyright 2020 Greg Goelzhauser.

<sup>1</sup> Walter F. Murphy, *In His Own Image: Mr. Chief Justice Taft and Supreme Court Appointments*, 1961 *Sup. Ct. Rev.* 156, 166 (1961) (quoting Taft).

<sup>2</sup> M. Paul Holsinger, *The Appointment of Supreme Court Justice Van Devanter*, 12 *Am. J. Legal Hist.* 324, 331 (1968). Van Devanter, who like Taft long coveted the high bench, owed his position more to "years of careful planning, constant political maneuvering, and the support of the 'right' people in high offices." *Id.* at 335. Upon his own nomination in 1921, Taft wrote to Van Devanter, "I am glad to come into close personal and official relations with you." David J. Danelski, *The Influence of the Chief Justice in the Decisional Process of the Supreme Court Revisited: Personality and Leadership*, in *The Chief Justice: Appointment and Influence* 71 (David J. Danelski and Artemus Ward eds., 2016) (quoting Taft).

<sup>3</sup> Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft*, 1998 *J. Sup. Ct. Hist.* 50, 53 (1998).

<sup>4</sup> Herbert Wechsler, *Clerks of the Court on the Justices*, in *The Making of the New Deal: The Insiders Speak* 53 (Katie Louchheim ed., 1983).

<sup>5</sup> *Supreme Court Bar Honors Late Justice Van Devanter*, 28 *A.B.A.J.* 239, 239-240 (1942).

<sup>6</sup> Danelski, *supra* note 2, at 74.



William Howard Taft.

spot for the privileged.”<sup>7</sup> Taft spent his early years in Murray Bay “play[ing] golf and tennis, frolic[king] with his children, [and] tak[ing] long walks.”<sup>8</sup> He often shared the links with Justice John Marshall Harlan,<sup>9</sup> who also spent summers in Murray Bay and fondly recalled playing with the “rolly-polly youngster.”<sup>10</sup> Later, with every grandchild “an additional room was added” until the house “ended up sleeping [26], including servants, with seven bathrooms.”<sup>11</sup> Around town he was affectionately known as “petit juge” and locals “raised their caps, as to a seigneur, when he drove down the steep roads.”<sup>12</sup>

<sup>7</sup> Philippe Dube, *Charlevoix: Two Centuries at Murray Bay 2* (1990).

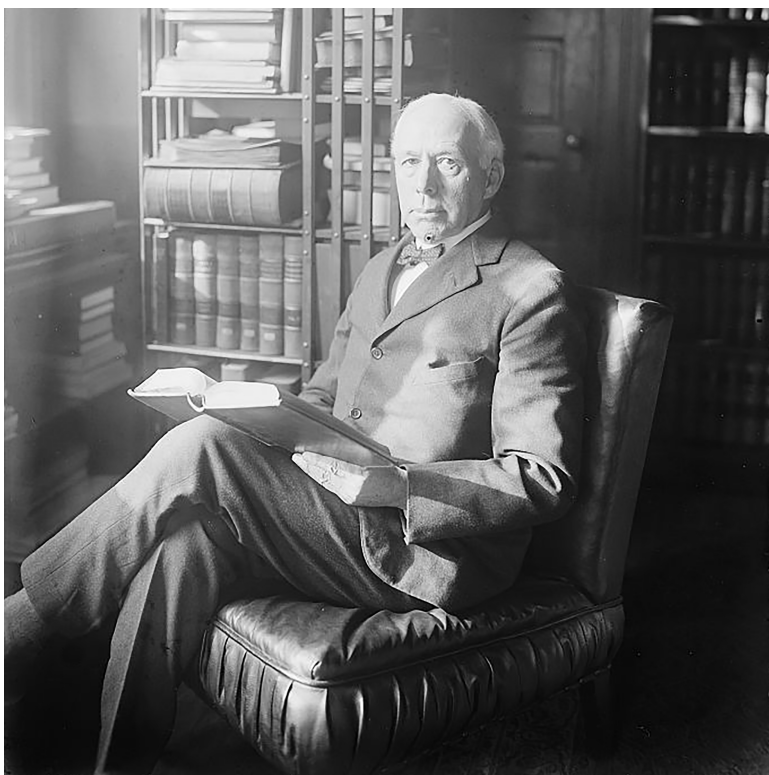
<sup>8</sup> Robert Lee Dunn, *William Howard Taft: American* 43-44 (1908).

<sup>9</sup> Ross E. Davies, *The Judicial and Ancient Game: James Wilson, John Marshall Harlan, and the Beginnings of Golf at the Supreme Court*, 35 *J. Sup. Ct. Hist.* 122, 124 (2010).

<sup>10</sup> Dunn, *supra* note 8, at 49.

<sup>11</sup> Charles P. Taft, *My Father the Chief Justice*, 1977 *Y.B. Sup. Ct. Hist. Soc'y* 5, 7 (1977).

<sup>12</sup> I Henry F. Pringle, *The Life and Times of William Howard Taft: A Biography* 123-124 (1964).



Willis Van Devanter.

After a pleasant greeting, Taft tells Van Devanter he “had a great time in England,” promising, “I’ll tell you about it when I see you.” At the end of the 1921 term, Taft sailed to England for three weeks “to make a comprehensive study of the English judicial system with a view to applying its best features to our own courts.”<sup>13</sup> Taft had long been interested in English judicial administration, which he considered more efficient in several particulars.<sup>14</sup> During the trip he watched court proceedings and met with members of the bench and bar, while also enjoying numerous “receptions, luncheons, dinners [and] other entertainments.”<sup>15</sup> Taft returned home in time to deliver an address at the American Bar Association’s annual meeting, using insights gleaned abroad

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<sup>13</sup> Taft Asks Britons not to be Misled by Factions Here, N.Y. Times, June 20, 1922, at 2 (quoting Taft).

<sup>14</sup> See, e.g., William H. Taft, Inequalities in the Administration of Justice, 20 Green Bag 441 (1908), reprinted in 2 Green Bag 2d 315 (1999) (referencing English practice to support proposed reforms).

<sup>15</sup> Taft to Meet King at Harvey Dinner, N.Y. Times, June 15, 1922, at 6.

to advance his call for reforms such as creating a federal judicial conference, adopting procedural rules unifying law and equity, and eliminating much of the Supreme Court's mandatory jurisdiction.<sup>16</sup>

Taft next shares news with Van Devanter about two unwell colleagues. Justice Louis Brandeis informed Taft that Justice Oliver Wendell Holmes "had to be operated on for his prostate gland" but "went through all right and is progressing favorably," while Holmes separately sent "a lead pencil note . . . written in a hospital bed" declaring that "the pincers of the gods had got hold of him at last but that he would be ready for work on October 1st." At age 81, Holmes recognized his relatively good health fortune since being shot three times during the Civil War.<sup>17</sup> Holmes had been indisposed during the 1921 term, and Taft told his brother Horace that Holmes "ought to retire," including him among a group of justices who were "weak members of the Court to whom I cannot assign cases."<sup>18</sup> Holmes, however, recovered sufficiently to join his colleagues on the bench in October, though he could not be described as "clearly on the mend" until spring.<sup>19</sup> Far from retiring, Holmes outlasted Taft on the Court by nearly two years and outlived him by nearly five despite being more than 16 years his elder.

Justice Mahlon Pitney's wife Florence Shelton reported to Taft that her husband "had an operation for the removal of a cyst from his jaw, and then had had a rest cure in a sanitarium." Pitney wanted it known that he "expected to be on board rested and efficient October 1st," but Taft noted that Shelton's conveyance "lacked her personal assurance on this point." Toward the end of the 1921 term, Pitney was diagnosed with "arteriosclerosis affecting the cerebral arteries."<sup>20</sup> Taft told Horace that Pitney's "nervous breakdown" made him another of "the weak members . . . to whom I cannot assign cases."<sup>21</sup> About one month after Taft wrote Van Devanter, the press reported Pitney was "a patient at [a] private sanitarium" but that "his condition is not serious."<sup>22</sup> Days before this news broke, however, Shelton relayed to Taft that Pitney's doctors thought he should resign, though he was reluctant because he did not yet qualify for a full pension.<sup>23</sup> In turn, Taft lobbied for a special bill to

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<sup>16</sup> William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A.J. 601 (1922).

<sup>17</sup> G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 456 (1993).

<sup>18</sup> Richard D. Friedman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 Yale L.J. 1283, 1307 n. 147 (1986) (quoting Taft).

<sup>19</sup> White, *supra* note 17, at 457.

<sup>20</sup> Murphy, *supra* note 1, at 177.

<sup>21</sup> Friedman, *supra* note 18, at 1307 n. 147 (1986) (quoting Taft).

<sup>22</sup> Justice Mahlon Pitney III, *N.Y. Times*, September 22, 1922, at 12.

<sup>23</sup> Murphy, *supra* note 1, at 176-177.

allow his former nominee to retire with full benefits.<sup>24</sup> The legislation passed in December 1922 and Pitney resigned effective at year's end.<sup>25</sup>

Next, Taft tells Van Devanter that Justice William R. Day sent news of his pending appointment as “umpire in the mixed claims commission under the treaty of peace with Germany.” After the Senate refused to ratify the Treaty of Versailles, the U.S. and Germany signed a bilateral peace treaty. By agreement, the Mixed Claims Commission would adjudicate claims brought by the U.S. or its nationals seeking redress from Germany or its nationals.<sup>26</sup> Each country appointed one commissioner and agreed on an “umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings.”<sup>27</sup> With respect to the umpire, Germany “requested President Harding to designate an outstanding American jurist.”<sup>28</sup> Day was a natural choice because he had experience with international affairs, including having served as secretary of state, and intended to retire due to illness in any event. During the previous term, Taft told Horace that “Day had the grip,” adding him to the lengthy list of “weak members . . . to whom I cannot assign cases.”<sup>29</sup> Taft’s letter to Van Devanter closes with the postscript, “We shall miss dear old Day much. His experience, wise counsel and real wit have made him a fine colleague.”

Separately regarding Day’s departure, Taft notes, “[George] Sutherland will doubtless be named to succeed Day[.] He will be a good man and a hard worker. He will be one of our kind I think.” Taft was correct that Sutherland would be the next nominee, but it would be to replace Justice John Clarke rather than Day. Not long after Taft wrote the letter, Clarke stepped down after six years on the bench. He told Brandeis, “I would die happier if I should do all that is possible to promote the entrance of our government into the League of Nations than if I continued to devote my time to determining whether a drunken Indian had been deprived of his land before he died or whether the digging of a ditch in Iowa was constitutional or not.”<sup>30</sup> Although President Woodrow Wilson hoped Clarke would continue working with “Brandeis to restrain the Court in some measure from [its] extreme

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<sup>24</sup> *Id.* at 177.

<sup>25</sup> Walter F. Pratt, *Judicial Disability and the Good Behavior Clause*, 85 *Yale L.J.* 706, 720 n. 64 (1976).

<sup>26</sup> *Mixed Claims Commission, U.S.-Germany*, August 10, 1922, 42 *Stat.* 2200.

<sup>27</sup> *Id.*

<sup>28</sup> Joseph Conrad Fehr, *Work of the Mixed Claims Commission*, 25 *A.B.A.J.* 845, 846 (1939).

<sup>29</sup> Friedman, *supra* note 18, at 1307 n. 147 (1986) (quoting Taft). Joseph McKenna also made the list.

<sup>30</sup> *The Supreme Court Justices: Illustrated Biographies, 1789-2012*, at 307 (Clare Cushman ed., 3rd ed. 2013).

reactionary course,”<sup>31</sup> Clarke lamented that he was “agreeing [with Brandeis] less and less.”<sup>32</sup> Hearing and heart ailments left him indisposed.<sup>33</sup>

As for expecting Sutherland to be the next nominee, “Seldom in the history of the Court has a successor-candidate been so universally obvious.”<sup>34</sup> It was especially obvious to Taft because he had just overcome President Warren Harding’s commitment to seat Sutherland at the first opportunity. After G. Edward White’s death unexpectedly opened the center chair, which Taft had previously told Harding was the only seat on the Court he would accept,<sup>35</sup> the president “procrastinated, hoping for [Clarke’s] rumored impending resignation” so he could nominate Taft and Sutherland.<sup>36</sup> Meanwhile, Taft was “[a]lmost beside himself with anxiety” and “pulled out all the stops . . . through intermediaries [to convince Harding] that no additional vacancy would occur.”<sup>37</sup> Neither Taft nor Van Devanter would have doubted that Sutherland would be a “good man . . . hard worker . . . [or] one of our kind” since both had been close to him for years.<sup>38</sup> Nonetheless, Sutherland proved Taft correct on all fronts. Brandeis observed to then-Professor Felix Frankfurter that Sutherland was “a mediocre Taft,”<sup>39</sup> but had “fine character,”<sup>40</sup> while Holmes entertained the conference with his affectionate greeting, “Sutherland, J., tell me a story.”<sup>41</sup> Moreover, Sutherland was known to “drive himself unmercifully to get his opinions out”<sup>42</sup> and later became “intellectual leader” of the Four Horsemen under Chief Justice Charles Evans Hughes.<sup>43</sup>

Taft closed his paragraph on Day’s departure with related thoughts on a pending case:

<sup>31</sup> *Id.* (quoting Wilson).

<sup>32</sup> *Id.* (quoting Clarke).

<sup>33</sup> *Id.* at 308.

<sup>34</sup> Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II* 147 (5th ed. 2008).

<sup>35</sup> During a pre-inaugural meeting, Harding asked Taft if he would accept an appointment to the Court but also informed him that he planned to put Sutherland on the bench. Taft said that a position on the Court “was and always had been the ambition of my life” but that he “could not accept any place but the Chief Justiceship” after “having been President, and having appointed three of the present Bench and three others, and having protested against Brandeis.” Robert C. Post, *Mr. Taft Becomes Chief Justice*, 76 *U. Cin. L. Rev.* 761, 772 (2008) (quoting Taft).

<sup>36</sup> Abraham, *supra* note 34, at 147.

<sup>37</sup> *Id.*

<sup>38</sup> Joel Francis Paschal, *Mr. Justice Sutherland: A Man Against the State* 115 (1951).

<sup>39</sup> Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 *Sup. Ct. Rev.* 299, 310 (1985) (quoting Brandeis).

<sup>40</sup> *Id.* at 338 (quoting Brandeis).

<sup>41</sup> Paschal, *supra* note 38, at 116.

<sup>42</sup> Alpheus Thomas Mason, *Chief Justice Taft at the Helm*, 18 *Vand. L. Rev.* 367, 381 (1965).

<sup>43</sup> Robert W. Langran, *Why Are Some Supreme Court Justices Rated as ‘Failures?’*, 1985 *Y.B. Sup. Ct. Hist. Soc’y* 8, 9 (1985).

We ought to decide the West Virginia gas case before [Day] goes off because we need his vote and we ought not to have the case reargued a second time. You said that you expected to stay in Washington a few weeks and work on that case, but I know how easy it is in vacation to ignore resolutions made before. I write now to ask whether you think you could have the opinion for circulation when we meet.

Taft was referring to *Pennsylvania v. West Virginia*, in which the Court ultimately invalidated a West Virginia law requiring its natural gas producers to satisfy in-state demand before selling out-of-state.<sup>44</sup> Due to turnover, and despite Taft's hope, the Court went on to hear a third round of oral arguments in 1923. Notwithstanding Taft's ability to forge unanimity and encourage dissent suppression,<sup>45</sup> Holmes, Brandeis, and Justice James McReynolds wrote separate dissents in the "gas case." Moreover, there is indication of a taxing internal debate, with Brandeis telling Frankfurter, "The most terrible thing [the Court] did [all term] was [the] assumption of jurisdiction" in the gas case, adding that "Van D[evanter] by general phrases glides over [the] total absence of jurisdictional bases in [the] Record."<sup>46</sup> Even if Taft's preferred disposition was secure, he would have valued Day's vote because narrow winning coalitions were thought to harm the Court's prestige.

Taft's gentle encouragement for Van Devanter to complete his draft opinion would likely become a regular occurrence. Taft had long been aware of what Sutherland later called Van Devanter's "pen paralysis."<sup>47</sup> When Taft was president, he had been reluctant to nominate Van Devanter to the Supreme Court after learning about his lack of opinion productivity on the Eighth Circuit.<sup>48</sup> Relenting, Taft wrote:

I took Van Devanter only after a long investigation in which I found that he had been sick and his wife ill, and after a full letter of explanation from him. I think perhaps the dilatory habit in respect to turning out opinions could be corrected by close association with a court that sits all the time in the same city, and where the

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<sup>44</sup> 262 U.S. 553 (1923).

<sup>45</sup> See, e.g., Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 Sup. Ct. Rev. 345 (2015); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 Minn. L. Rev. 1267 (2001).

<sup>46</sup> Urofsky, *supra* note 39, at 312 (quoting Brandeis).

<sup>47</sup> Alexander Bickel, *Mr. Taft Rehabilitates the Court*, 79 Yale L.J. 1, 35 (1969) (quoting Hughes attributing the comment to Sutherland).

<sup>48</sup> Holsinger, *supra* note 2, at 332.

comparison between him and the other judges will be constant, and when he knows why it is that I seriously hesitated before taking him.<sup>49</sup>

Taft had been too optimistic about Van Devanter's "dilatatory habit." During their first term together, Van Devanter tied the ailing Pitney for fewest majority opinions with 11, while Taft wrote the second most with 27.<sup>50</sup> Aside from Van Devanter, the only justices who wrote fewer than 20 majority opinions were all ill and named to Taft's list of "weak members . . . to whom I cannot assign cases."<sup>51</sup> Holmes, who also made that list, led the Court with 29 majority opinions. In total, during 26 full terms on the bench, Van Devanter wrote the fewest majority opinions 21 times.<sup>52</sup> Later, Taft concluded that his dear friend's high standards made him "opinion-shy."<sup>53</sup> Nonetheless, Van Devanter remained highly regarded by his colleagues because, as Hughes put it, "his careful and elaborate statements in conference, [along] with his accurate review of authorities, were of the greatest value."<sup>54</sup>

Toward the end of the letter, Taft adds, "I suppose you have noted the yawping of Gompers and La Follette over the Child Labor and Coronado cases, but I have not ~~seen~~ heard much of an echo. I think we did good work in those cases." The "Child Labor" case was *Bailey v. Drexel Furniture*.<sup>55</sup> In *Bailey*, Taft wrote for an 8-1 Court invalidating the Child Labor Tax Law, which taxed net profits at ten percent for firms found to be unlawfully employing children. The measure was a direct response to *Hammer v. Dagenhart*,<sup>56</sup> with "Congress . . . acting upon the belief that it could do under the taxing power what the Supreme Court had said it could not do under the commerce power."<sup>57</sup> In *Bailey*, however, the Court found that the law's "prohibitory and regulatory effect and purpose" made it a penalty rather than a tax.<sup>58</sup> To call it otherwise, the Court argued, "would be to break down all constitu-

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<sup>49</sup> Bickel, *supra* note 47, at 39 (quoting Taft).

<sup>50</sup> Data compiled from the Supreme Court Database, available at <https://scdb.wustl.edu>.

<sup>51</sup> Friedman, *supra* note 18, at 1307 n. 147 (1986) (quoting Taft).

<sup>52</sup> Data compiled from the Supreme Court Database, *supra* note 50. This count excludes justices who did not serve a full term but includes those who missed time without resigning. In four of those twenty-one years, Van Devanter tied for the lowest number of majority opinions. Van Devanter is also among the leading justices in producing noted dissents. Madelyn Fife et al., *Concurring and Dissenting without Opinion*, 42 J. Sup. Ct. Hist. 171, 177 (2017).

<sup>53</sup> Murphy, *supra* note 1, at 166 (quoting Taft).

<sup>54</sup> Bickel, *supra* note 47, at 35 n. 145 (quoting Hughes).

<sup>55</sup> 259 U.S. 20 (1922).

<sup>56</sup> 247 U.S. 251 (1918).

<sup>57</sup> William A. Sutherland, *The Child Labor Cases and the Constitution*, 8 Cornell L.Q. 338, 338 (1922).

<sup>58</sup> *Bailey*, 259 U.S. at 37.

tional limitation of the powers of Congress and completely wipe out the sovereignty of the States.”<sup>59</sup>

The “Coronado” case was *United Mine Workers of America v. Coronado*.<sup>60</sup> It arose out of a labor dispute that grew into “a drama of spectacular proportions,” with “citizens . . . savagely beaten, even murdered, others . . . imprisoned on criminal charges, nearly half a million dollars worth of local property . . . destroyed, and United States regular army troops . . . dispatched . . . to quell the violence.”<sup>61</sup> Taft’s opinion for a unanimous Court advanced two key conclusions. First, the Court held that unincorporated labor organizations could be sued under federal law. It is this aspect that led one contemporary commentator to observe, “Few decisions of the United States Supreme Court since the famous Dred Scott case of 1857 have called forth as much discussion on the part of the man in the shop or the street.”<sup>62</sup> Second, the defendant labor organizations could not be held liable under federal law for conspiracy — as they had been at trial — because coal mining, the target of their protest, did not directly implicate interstate commerce.<sup>63</sup>

Samuel Gompers and Robert La Follette were longtime Taft antagonists. Indeed, the definitive Taft biography singles out both as leaders of the political “revolt” that plagued Taft’s career in office.<sup>64</sup> Gompers was founder and president of the American Federation of Labor (AFL). His persistent criticism of “Injunction Judge Taft”<sup>65</sup> dated back to at least 1893, when he critiqued the Eighth Circuit judge for issuing labor injunctions in an “attempt to bounce the people out of their liberty and their privileges” while imposing a “system of semi-slavery.”<sup>66</sup> Responding to his active opposition during the 1908 presidential campaign, Taft accused Gompers of making “fustian and buncombe . . . appeals . . . to his supposed followers” in “as audacious an act of political effrontery as has ever occurred in the history of politics.”<sup>67</sup> Even

<sup>59</sup> Id. at 38.

<sup>60</sup> 259 U.S. 344 (1922).

<sup>61</sup> Samuel A. Sizer, ‘This is Union Man’s Country’: Sebastian County 1914, 27 Ark. Hist. Q. 306, 306 (1968).

<sup>62</sup> W. Lewis Roberts, Labor Unions, Corporations — The Coronado Case, 5 Ill. L.Q. 200, 200 (1923).

<sup>63</sup> Taft initially took the opposite view at conference, and had a court for the position, but was ultimately convinced otherwise by Brandeis, who had written a draft dissent developing the argument the previous term before White’s death led to the case being put over. Alexander Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work 77-99* (1957). When Taft’s allies went along with the switch despite having disagreed with Brandeis the previous term, Brandeis remarked, “They will take it from Taft but wouldn’t take it from me.” Id. at 97 (quoting Brandeis).

<sup>64</sup> Pringle, *supra* note 12, at 99.

<sup>65</sup> Gompers Answers Roosevelt on Labor, N.Y. Times, October 27, 1908, at 5.

<sup>66</sup> President Gompers Talks, N.Y. Times, April 4, 1893, at 8.

<sup>67</sup> Bryan-Gompers Pact Attacked by Taft, N.Y. Times, October 31, 1908, at 3.

out of office in 1915, Taft charged Gompers with favoring “discriminatory” policies and being “beset with the evil of being intoxicated with power.”<sup>68</sup>

La Follette was a political adversary who as a Wisconsin senator had led “Republican insurgents” in opposition to the Taft administration.<sup>69</sup> Most notably, with tariff reform having been a key plank in Taft’s 1908 platform, La Follette spearheaded “a brilliant and bitter attack” on a president-backed bill in 1909.<sup>70</sup> In 1910, La Follette refused Taft’s invitation to meet to discuss judicial nominations, choosing instead to send a public letter conveying his “one suggestion” to select people whose jurisprudential philosophies showed “due regard to the interest of the people” and excluded those who demonstrated “bias[] toward special interests.”<sup>71</sup> Taft later withheld patronage from the insurgents, including La Follette’s preferred pick for U.S. Attorney,<sup>72</sup> because of their “attitude in general,” while La Follette responded by obstructing Taft’s bureaucratic nominees.<sup>73</sup> Then in 1912, La Follette challenged Taft in the Republican primary, joining Theodore Roosevelt in what Taft supporters considered a “conspiracy” to deprive him of the nomination.<sup>74</sup>

Taft’s foes wasted little time attacking two of his first term’s most visible decisions. After *Bailey*, Gompers announced that he would lead a coalition seeking a constitutional amendment to abolish child labor.<sup>75</sup> He then called *Coronado* the “climax” in a series of anti-labor decisions issued “since the ascension to the Chief Justiceship of Mr. Taft.”<sup>76</sup> Gompers was particularly incensed by the Court’s use of the word “regret” to describe its view toward overturning the jury award on jurisdictional grounds.<sup>77</sup> Attributing the language to Taft, Gompers denounced the sentiment as “gratuitous, bitter and unforgivable.”<sup>78</sup> The next day La Follette called *Coronado* “ominous in what it foreshadows for the future of union labor,” adding, “No doubt our Supreme Court feels secure behind the bulwark of a written constitution, the meaning of

<sup>68</sup> Taft Cautions Labor, N.Y. Times, August 27, 1915, at 10.

<sup>69</sup> Taft to Give Jobs Only to Loyal Ones, N.Y. Times, January 6, 1910, at 7 [hereinafter Taft to Give Jobs].

<sup>70</sup> Stanley D. Solvick, William Howard Taft and the Payne-Aldrich Tariff, 50 Miss. Valley Hist. Rev. 424, 430 (1963).

<sup>71</sup> La Follette Refuses to Talk with Taft, N.Y. Times, December 9, 1910, at 1 (quoting La Follette).

<sup>72</sup> Harlan Hahn, President Taft and the Discipline of Patronage, 28 J. Pol. 368, 385 (1966).

<sup>73</sup> Taft to Give Jobs, supra note 69.

<sup>74</sup> Taft Men Cry Conspiracy, N.Y. Times, December 16, 1911, at 5.

<sup>75</sup> Organizers for Law to End Child Labor, N.Y. Times, June 2, 1922, at 1.

<sup>76</sup> Gompers Attacks Coronado Decision, N.Y. Times, June 7, 1922, at 4 [hereinafter Gompers Attacks].

<sup>77</sup> 259 U.S. at 413 (“The circumstances are such as to awaken regret that, in our view of the federal jurisdiction, we can not affirm the judgment.”).

<sup>78</sup> Gompers Attacks, supra note 76. This language may have been proposed by Brandeis, who wrote Frankfurter, “I pounded on jurisdictional observance [and was] glad to get Taft to say what he did in [the] last [paragraph].” Urofsky, supra note 39, at 305 (quoting Brandeis).

which that court has arrogated to itself the function of finally determining.”<sup>79</sup> Not to be outdone, two days later Gompers spoke of *Coronado* when he said, “Just as slavery had a demoralizing influence upon the industry and politics of the South, so will involuntary servitude imposed upon the workers of our country have its baneful influence upon all the people regardless of what their situation in life may be.”<sup>80</sup>

The rhetoric reached its pinnacle at the AFL’s annual convention in Taft’s hometown of Cincinnati, Ohio from June 12 through June 24. On convention eve, Gompers, appearing “[m]ilitant and apparently determined to wage war,” used *Bailey* and *Coronado* as rallying cries:

Twice within a few days the Supreme Court of our land has rendered decisions fitting only to the dark days of old. There is a brazen movement at work to destroy every progressive institution and to submerge human rights for the sake of profiteers and industrial autocrats. Our consideration of industry and of industrial problems will be from the point of view of service to the masses of our people. Our consideration of political problems will be from the point of view of freedoms and progress for humanity.<sup>81</sup>

La Follette waited on deck. On June 14, he appeared at the convention as “principal speaker at the ‘child labor protest session.’”<sup>82</sup> Introduced by Gompers, La Follette gave a stirring speech while “[d]elegates stood on chairs, pounded tables, and shouted at the top of their voices as he attacked the Federal courts.” When Taft was mentioned, “Hoots, jeers and hisses greeted [his] name.”<sup>83</sup> La Follette emphasized that Taft “had been repudiated by the voters . . . [a]fter they . . . studied his attitude, his acts, [and] his sympathies on public questions for four years.”<sup>84</sup> He added, “No one will contend that he could have been elected Chief Justice by vote of the people, and yet Chief Justice Taft wrote the opinion that annulled the Child Labor law. He wrote the opinion in the *Coronado Coal Company* case.”<sup>85</sup>

After excoriating *Bailey* and *Coronado*, along with the “judicial oligarchy” more broadly, La Follette concluded:

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<sup>79</sup> La Follette Scores Coronado Decision, N.Y. Times, June 8, 1922, at 37.

<sup>80</sup> Gompers Assails Supreme Court, N.Y. Times, June 10, 1922, at 10.

<sup>81</sup> Labor Convention Will be Militant, N.Y. Times, June 12, 1922, at 13.

<sup>82</sup> La Follette Lashes Federal Judiciary, N.Y. Times, June 15, 1922, at 1.

<sup>83</sup> Id.

<sup>84</sup> Id. at 8.

<sup>85</sup> Id.

We have never faced the fundamental issue of judicial usurpation squarely. The time has come when we must put the axe to the root of this monstrous growth upon the body of our Government, the usurped power of the Federal courts must be taken away and the Federal judges must be made responsive to the popular will.<sup>86</sup>

He then announced a proposed constitutional amendment permitting Congress to override the Court's invalidation of federal laws by re-passing legislation. While La Follette found the convention audience receptive, few others took notice and he did not bother introducing a corresponding bill.<sup>87</sup> For the time being, Taft was justified in claiming that he could not hear an "echo" reverberating from the "yawping," though "his frequent references to La Follette in his correspondence betray at least a modicum of anxiety."<sup>88</sup>

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Enjoying a firm majority and minimal public opposition, the future looked bright for Taft and Van Devanter heading into the 1922 term. Ever determined for the Court to "go on about its business" in the face of "threats against its existence,"<sup>89</sup> Taft weathered the remaining progressive onslaught of the 1920s, including one last salvo by La Follette during his 1924 presidential campaign.<sup>90</sup> Taft's jurisprudential views mostly prevailed throughout his tenure, but his longtime mission "to prevent the Bolsheviki from getting control" eventually failed.<sup>91</sup> Taft presided until various ailments forced his resignation in 1930 just before he died; Van Devanter stayed on until 1937 and passed away in 1940. During this time, the "yawping" grew to a crescendo culminating in a constitutional course correction. As colleagues, Taft and Van Devanter developed an intimate relationship. Writing near the end, Taft told Van Devanter he was one of only three people, including his wife, "permitted to call on me."<sup>92</sup> He signed off, "You are a thing of joy forever!"<sup>93</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937 196-197* (2014).

<sup>88</sup> *Id.* at 201. See also Post, *supra* note 45, at 1316 n. 155 (quoting a letter from Taft to Sutherland discussing La Follette).

<sup>89</sup> Post, *supra* note 45, at 1316 n. 155 (quoting Taft).

<sup>90</sup> Running on the third-party Progressive ticket with Gompers's support, La Follette's most prominent attack on the Court and Taft personally — both as president and chief justice — came in a speech at Madison Square Garden. See Full Text of La Follette's Speech Attacking Supreme Court, *N.Y. Times*, September 19, 1924, at 2.

<sup>91</sup> II Henry F. Pringle, *The Life and Times of William Howard Taft: A Biography* 967 (1964) (quoting Taft).

<sup>92</sup> Danelski, *supra* note 2, at 74 (quoting Taft).

<sup>93</sup> *Id.* (quoting Taft).

Pointe à Pic  
Prima of Quebec  
Supreme Court of the United States, Canada  
Washington, D.C.

Aug. 19<sup>th</sup> 1922

Dear Judge,

I hope you and Mrs. Taft  
have had a restful summer and  
that you are both feeling fit  
and vigorous.

Mrs. Taft and I had a  
great time in England. I'll  
tell you about it when I see you.  
The only ones of the Brethren from  
whom I have heard since my  
return are Brandeis, Holmes and  
Day. B. wrote me of Arthur's con-  
dition. He had Dr. operated on  
for his prostate gland. He was

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 1 of 6).

through all right and is progressing favorably. Then I had a lead-pencil note from Holmes himself written in a hospital bed. He said the prisoners of the gods had got hold of him at last but that he would be ready for work on ~~the~~ October 1st. He said that while the restrictions were many, he, at least, could surmount.

Then I heard from Mrs. Pitney under date of Aug 14<sup>th</sup>. She said that Pitney had had an operation for the removal of a cyst from his jaw, and then had had a rest cure in a

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 2 of 6).

and  
~~saustarum~~ that at the date of the  
 letter they were living at Mountain.  
 She wrote ~~down~~ the message  
 from him that he expected to  
 be on hand rested and efficient  
 October 1st. I hope this is so but  
 the letter lacked her personal  
 assurance on this point.

Then I have had a letter  
 from Day dated Aug 10<sup>th</sup> in  
 which he said that he had  
<sup>by the Pres & Sec. Hughes</sup>  
 been offered the place of ~~Inspector~~  
 in the Mixed Claims Commission  
 under the treaty of peace with  
 Germany and had accepted.  
 The matter had been delayed

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 3 of 6).

- by the assassination of Rathbun  
 that he had just heard from  
 Hughes that the matter would  
 be consummated. He wrote that  
 he thought he ought to stay in  
 the court till October 10<sup>th</sup> because  
 of several matters. I regretted  
 him in this. He ought to decide  
 the West Virginia gas case before  
 he goes off because we need  
 his vote and we ought not to  
 have the case argued a second  
 time. You said that you expected  
 to stay in Washington a few weeks  
 and work on that case, but I  
 know how easy it is in vacation

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 4 of 6).

Supreme Court of the United States.  
Washington, D.C.

To ignore resolutions made before.  
I will now dash whether you  
think you could have the  
opinion for circulation when  
we meet.

I suppose you have noted  
the yawping of Loupers and  
Fafnette on the Child Labor  
and Colorado cases, but I  
have not ~~seen~~ <sup>heard</sup> much of an  
echo. I think we did good  
work in those cases.

Sutherland will doubtless  
be named to succeed Day

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 5 of 6).

He will be a good man and a  
hard worker - He will be one of  
the kind I think.

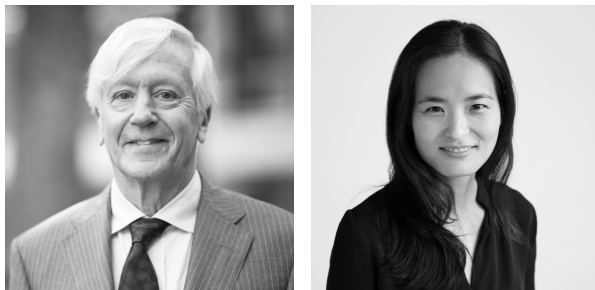
For my love to Mrs. Brewster  
and believe me always  
affectionately yours  
Wm. H. Taft

We shall miss her very  
much - His experience, wise  
counsel and real wit have  
made him a fine colleague.

William Howard Taft to Willis Van Devanter, August 19, 1922 (page 6 of 6).

BOOKS

# FIVE RECOMMENDATIONS



*G. Edward White*<sup>†</sup> & *Sarah A. Seo*<sup>\*</sup>

Jill Elaine Hasday  
*Intimate Lies and the Law*  
(Oxford University Press 2019)

In the song “Natalie Cook” from the musical podcast “36 Questions,” a married couple deals with the fallout from the husband’s discovery that his wife is really an individual named Judith, who “built a past / Made up a history / Details that fit this person named / Natalie.” When the husband accuses the wife, “You’re the one who made her up,” Natalie/Judith responds, “It was a bit more collaborative than you’re remembering.” Deception in intimate relationships is complex and pervasive, ranging from innocent white lies (“you look great, honey”) to outright fraud. It’s difficult for the individuals involved to unpack the layers of dishonesty upon layers of emotion, let alone for those on the outside to make sense of those layers. But time and again, people deceived have petitioned for legal redress and, as a result, deception among the ties that bind is profoundly shaped by law. This is the point of Jill Hasday’s fascinating book *Intimate Lies and the Law*, which explores the history, psychology, and social practices of intimate deception, which all intersect with the law. The book provides seemingly made-for-TV stories of fathers inventing

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<sup>\*</sup> Associate Professor of Law, University of Iowa College of Law.

careers, mothers withholding the truth about paternity, siblings misrepresenting financial arrangements, and partners lying about their education, marital status, sexuality, or even race, and more. Most of the cases involve lovers, betrotheds, and married couples, so the book is also a study of gender and American law's complicated relationship between women's rights and the need to protect women (although, to be clear, men are not the only deceivers).

Hasday argues that the law inadequately protects the deceived and that legislators and judges should extend them the same protections that apply to deception outside intimate relationships. Those skeptical of this proposal might contend that bestowing more protections would intrusively insert the law into private relationships and that doing so would amount to a radical change. But Hasday shows that the law has not always been so resistant to intimate deception claims and that our current laws, by making deception easy to carry out, do not leave our relationships untouched. In other words, the question is not *whether* the law should regulate intimate deception; rather, the question is *how* we want the law to govern our personal lives.

Eric P. Perramond

*Unsettled Waters: Rights, Law, and Identity in the American West*  
(University of California Press 2018)

This book is not an easy read. It is a detailed analysis of the process by which the state of New Mexico, pursuant to the enactment of a "water code" in 1907, has sought to account for all existing uses of water in all the watersheds of the state. That process is called "general stream adjudications." It begins with state engineers mapping out land parcels with water rights, the points where flows of water diverge, the crops grown on the parcels, the first date there was "beneficial use" of water on the parcels ("beneficial use" being equated with the utilization of water to the advantage of humans), and the water use of the parcels, in acre-feet, each year. The adjudication process presumes that although the state of New Mexico owns all the water in it, individuals have private rights in portions of that water and may treat those portions as commodities to buy or sell. Although the adjudication of water use began shortly after New Mexico enacted the 1907 water code, it has been completed only in a few areas and is expected to continue for many more generations.

State officials involved with the adjudication process think of it as benign. The state is not seeking to appropriate any of the water it surveys; it is simply attempting to map it, recording where it exists and what private individuals are involved in water use in particular areas. The theory of adjudication, from the perspective of those officials, is to give the state a good understanding of

where water exists within its boundaries and who has private rights in it, with a view to making use of that knowledge in an environment in which water is a scarce commodity — New Mexico is largely arid and lacks a significant snowpack — and may get more scarce in the future. Engineers employed by the Office of the State Engineer, when charged with gathering information about water use, frequently express surprise at the hostility their presence engenders among local residents. They view adjudication not as an adversarial process, like a trial in a court, but simply as one comparable to charting an ocean or mapping out a mountain range. Adjudications are not designed to “take anyone’s water,” they believe, but the reverse: to confirm the identity of individuals who have private rights to water in various localities.

And yet numerous New Mexico residents who live in areas with discernible water supplies have a hostile view of adjudication, and seek to resist participating in it in various ways. Many indigenous tribes in New Mexico attempt to bypass the adjudication process altogether, engaging in “settlements” where the state pays them money to redirect their water uses in ways the state regards as beneficial. Other communities in the state, particular ones populated by persons of Latino origin, have resisted complying with adjudication, delaying the process. Interviews with “mayordomos” or “mayordomas,” individuals centrally involved with the use of “acequias” (ditches used to facilitate the flow of water along which some residents settle) reveal a deep suspicion that adjudication will serve to fragment the communal ethos of water use in those communities, and thereby discourage future settlement alongside the acequias, because once private rights in the water flowing through the acequias have been established, some “owners” of water might be inclined to sell those rights, disrupting the expectation that all residents along an acequia have free and equal use of its water.

Perramond is a geographer based in an environmental studies department at Colorado College, whose initial exploration of New Mexico’s water adjudication process stemmed from his disciplinary interest in how the state was identifying and making use of the water in it. But he recognized, early on, that understanding adjudication required recourse to the history of populations in the state and to the traditional treatment of water rights in the American southwest, as well as to the legal skills necessary to implement the state’s 1907 water code. As he probed more deeply into the historical and legal issues connected to adjudication, he came to recognize that the process raises questions akin to those Robert Ellickson explored in *Order Without Law*: how do communities, confronted with the prospect of legal proceedings that threaten to regulate their lives in new and potentially threatening ways, respond to those proceedings? One answer emerging from Perramond’s

studies of water adjudication is that sometimes communities act in the way Ellickson's ranchers acted, by seeking to defy the legal system or to make use of it to bypass their perceived obligations.

The result is a fascinating cast of characters and historical issues, each connected to the adjudication of water rights in New Mexico but unearthing numerous other themes in the history, geography, and ethnography of the state and region. One is continually struck, throughout *Unsettled Waters*, by the contrast between the well-intentioned aspirations of state engineers participating in adjudication, who view the process as helping not just the state but also its citizens, and the deep apprehension fostered by the prospect of adjudication in communities accustomed to traditional, communal uses of water. One wonders, in the end, whether any effort on the part of a western state to determine, let alone regulate, the use of water by its residents could fail to engender that sort of apprehension. Water is critical to arid states, but it is also deeply cherished, and some of the populations of those states believe that sharing water is necessary for survival and one cannot trust state governments or officials to recognize that. *Unsettled Waters* makes those points in admirable if sometimes excruciating detail.

Kathryn D. Temple

*Loving Justice: Legal Emotions in William Blackstone's England*  
(NYU Press 2019)

The relationship between law and emotion is an exciting, new field of inquiry within the Law and Humanities movement, and Kathryn Temple's *Loving Justice* provides an exquisite example of this cutting-edge scholarship. Her argument is not that the law should pay more attention to human emotions but that it already does. *Loving Justice* closely examines Blackstone's *Commentaries on the Laws of England* (1765-69) to explain that much of their success and staying power stem from how they guided readers to feel about the English common law. For instance, the *Commentaries* described Eastern despotism (personified by extravagant and whimsical "Eastern queens") with disgust. Then it instructed readers to desire the "harmonic justice" of the common law as a better alternative. According to Temple, "harmonic justice," which is not the same as "justice," refers to balance, communal peace, and the status quo, where everyone resides in their proper place. Harmonic justice thus "resists change and justifies oppression" (169). But Blackstone quieted unease about the conservative pull of harmonic justice by evoking feelings of happiness, not in the individualistic sense but in the 18th-century political sense of ordered liberty. As Temple explains, "When the *Commentaries* rep-

resents English law as just, as balanced, in harmony with its own past and with the world, readers respond by feeling happy and thus become attached to the common law” (149). In short, the *Commentaries* played to readers’ emotions in order to cultivate their loyalty to English law.

Temple’s analysis has implications for contemporary American law, given how enthusiastically Americans embraced the *Commentaries*. To make this point, Temple offers an intriguing analysis of *To Kill a Mockingbird*, highlighting how Blackstonian harmonic justice appears in the novel through, for instance, Calpurnia’s reading of the *Commentaries* to learn “fine English” and the “sagging” courthouse in the town of Maycomb “stuck in time” (173, 175). The idea of harmonic justice mirrors Harper Lee’s themes of gradualism, where racial progress happens slowly — so slow, in fact, that scenes of happiness, which take place when the residents of Maycomb remain within established race, class, and gender hierarchies, belie any progress. In light of the “harm” in harmonic justice, where are we then to find justice? Temple suggests that we look to our emotions. We should be wary if the law seeks to make us happy, and instead of satisfaction, we should seek disruption and agitation.

William Twining  
*Jurist in Context: A Memoir*  
(Cambridge University Press 2019)

Twining “anticipate[s] several kinds of readers” of this book: “academic lawyers”; “specialists” in “Jurisprudence, Evidence, Legal Education, and Globalisation”; and “non lawyers,’ especially academics in other disciplines, but also anyone interested in law.” There is in fact a little something for all of those audiences in the book. Twining has had a remarkable and varied academic career, being at several universities on three continents. He has made significant contributions to all of the specialized fields he names. And he has been a persistent reformist voice in legal education.

I treated myself to spending time with the features of Twining’s life and career that I have found most interesting, while largely ignoring some others. The latter tended to be the “heavier” portions of Twining’s narrative, which include charts for teaching jurisprudence, “rethinking” Evidence, and “globalisation theory.” I preferred two other subjects. One was the details of his peripatetic life and the academic institutions with which he has come in contact. Twining was born in Kampala, Uganda, spent World War II marooned on Mauritius, attended public schools in England and Braesnose College at Oxford, and from there traveled back and forth between England and Chicago before eventually accepting a Lectureship in Private Law at the University

of Khartoum in the Sedan at the age of 24. From Khartoum he would go to a Senior Lectureship at the University of Dar es Salaam in Tanganyika (now part of Tanzania) in 1961, a professorship in Jurisprudence at Queen's University in Belfast in 1966, a professorship at Warwick in 1972, and the Quain Professorship of Jurisprudence at University College, London in 1982. Along the way he spent intervals at Chicago and Yale Law Schools, held visiting professorships of law at Northwestern and Virginia, and began a 40-year association with Miami Law School in 1971.

All of this drew Twining into contact with some of the great and good in the U.K. and U.S. legal academies. H.L.A. Hart was one of his tutors at Braesnose; Ronald Dworkin a colleague at University College; Robert Stevens his sponsor on a fellowship to Yale and later co-editor of the "Law in Context" series of books; Karl Llewellyn his principal jurisprudential mentor; Soia Mentschikoff responsible for his organizing Llewellyn's papers and eventually writing *Karl Llewellyn and the Realist Movement*, still one of the leading studies of American Legal Realism; Neil MacCormick and Terry Anderson close friends and colleagues at University College and Miami; Patrick Atiyah, whom he first met at Khartoum, a longtime friend and co-devotee of "law in context."

I found it intriguing, having known Twining and a fair number of the other persons he portrays, to learn why he might have formed close relationships with some, such as Atiyah, Llewellyn, and MacCormick; more distant ones with others, such as Dworkin; and an antagonistic view of a few, such as Aaron Director and William Winslow Crosskey at Chicago, the former of whom Twining thought a closed-minded ideologue and the latter he characterizes as "the worst teacher that I ever had during my legal education."

A final treat for me was Twining's views on being an English visitor at an American law school. I believe that affiliating leading U.K. academics with American law schools often amounts to a "win-win." Established U.K. academics are paid far less than their American equivalents, but at the same time typically have less demanding teaching loads, often providing them with opportunities to spend time at U.S. law schools without having to take leave from their home institutions. Their presence at American law schools is often stimulating to many resident faculty, not just to those who do comparative work. Their visibility also adds prestige to U.S. law faculties.

Twining's relationship with Miami was in some respects ideal. Initially he visited as a "guest" of Mentschikoff when she was Dean; later, after "retiring" from UCL (he became a Research Professor in 1999), he came as a spring-semester Visiting Professor, avoiding "the hurricane season" in Florida's fall and escaping from the sometimes unfortunate English weather during the

late winter and early spring. Because Twining had “retired,” which in his case meant freedom from administration as well as teaching, he had more time to write, and was quite productive in the early decades of the 21st century.

At one point the faculty of Miami unanimously voted that Twining should be offered a half-time tenured position, and, incredibly, the then Dean vetoed the arrangement. In recalling the event, Twining states that he “was ambivalent, but I would probably have accepted.” He then says:

My first reaction was: if you treat me like a visitor, I shall behave like a visitor. If I had been appointed I would have gained financially . . . but I would have felt an obligation to teach mainstream courses and to work to improve the institution, including fighting hard to make the Law School distinctive.

I see that passage as capturing the calculus of many U.K. visitors on American law faculties and also revealing some of Twining’s distinctive qualities. The seeming benefits to U.K. visitors at American law schools are the absence of committee responsibilities and pressure to teach “mainstream” courses; the seeming costs may involve a perceived expectation that visitors shouldn’t concern themselves with the internal politics or professional goals of the school. The latter may be welcomed by some visitors, but it can result in their remaining somewhat detached from some of the central issues affecting their colleagues. Many U.K. visitors might hesitate to accept half-time tenured offers because of the prospective institutional engagement accompanying the offer, but others may feel, as Twining says of his time at Miami, that he did not quite belong: “Was I a perennial guest? Or a full member? Or an intriguing foreigner? Or just a hanger on?”

Twining also refers in the quoted passage to “work[ing] to improve the institution, including fighting hard to make it distinctive.” That was characteristic of his stance toward every law school at which he was a full-time faculty member. Whether it was imbuing African students with a sense of the heritage of English law, or developing the idea of “law in context” at Queen’s and Warwick, or attempting to encourage UCL to modify some of its hoary approaches to scholarship or teaching, Twining was a compulsive “fighter” to change his home institution for what he regarded as the better. And he invariably had, and still has, a clear vision of what “better” meant, whether it was a four-year undergraduate program for Queen’s or Warwick or making Miami into a distinctive regional school with an international emphasis. Twining was, and still is, a compulsive reformer of legal education. I find that dimension of his career exhausting, even when (as in the case of a four-year requirement of those studying law in the U.K.) I agree with his goals. But

when one thinks of William Twining, one thinks not only of the broad-ranging scholar and international traveler but also of someone who is incapable of not thinking about and tinkering with the goals and programs of legal education. That is an essential part of his legacy, and *Jurist in Context* brings it home.

Anthony Kronman  
*The Assault on American Excellence*  
(Free Press 2019)

This is an impressively reasoned, beautifully written, and deeply felt book. It may have been inspired by two incidents that introduce and close it. The first was a decision by the master of Pierson College at Yale University, in the summer of 2015, no longer to use that title to refer to himself because some students had complained that it reminded them of the plantation culture of the antebellum South and slavery. The second was the decision, over a period stretching from the fall of 2015 to December 2016, to change the name of another residential college at Yale, Calhoun College, because when the Yale Corporation named that college in 1930, it had done so in recognition of John C. Calhoun, a Senator from South Carolina from the 1830s to the 1850s who had been a vigorous defender of “states’ rights” within the framework of the American Constitution, especially the rights of slave states to perpetuate the institution of slavery.

Kronman, a former Dean of Yale Law School who has remained on the Yale law faculty since leaving the Deanship in 2004, initially found it hard to take the Pierson College master’s gesture seriously, since he felt that it was so plain, in an academic community, that the term “master” had a different meaning, one in keeping with the expectation that in such communities students are taught academic subjects by persons with a “mastery” of those subjects based on a combination of expertise and experience. But soon Yale acquiesced in the Pierson College master’s decision and announced that it would no longer use the term “master” to refer to the heads of its residential colleges. At the same time, the President of Yale gave a speech to the incoming freshman class urging the university community to start a “conversation” about whether Calhoun College should be renamed. After initially concluding that it should not, on the ground that John Calhoun and his connection to slavery was part of Yale’s history and ought to be reflected upon rather than erased, the President reversed his position after “howls of protest” from some students and appointed two committees to study the matter, establish “principles” for renaming, and ultimately decide the Calhoun College issue. The latter of those committees eventually resolved to rename the college. Kronman found

the President's action inappropriate and the renaming process, which advanced no reasons for why Calhoun College should be renamed but other Yale colleges named for persons who had held views now thought to be racist or otherwise deplorable not, farcical. He also found the episodes "representative expressions of a whole way of thinking about the aims of higher education that has captured the imagination of faculty and administrators at Yale and countless other schools across the country and done real damage to our colleges and universities."

*The Assault on American Excellence* is an attack on that way of thinking. Kronman describes the way of thinking as an effort to replace an "aristocratic ideal" of higher education with an ideal based on democratic principles and vocational training. He singles out three features of the effort. One is a restricted view of speech in college and university communities which seeks to curtail speech perceived as being offensive to some members of those communities, particularly those belonging to historically disadvantaged or marginalized groups. The second is an overriding commitment to "diversity," by which is principally meant diversity of race, ethnicity, gender, and sexual orientation, without a corresponding inclination to entertain "diverse" views on whether that particular conception of diversity is good or bad for higher education. The third is what Kronman calls "the campaign for renaming," which "seeks to reshape campus life in the light of a political ideal," one driven by equality. That campaign attempts to "flatten or level . . . reminders that our predecessors subscribed to values sharply different from our own."

In *The Assault on Academic Excellence* Kronman levels trenchant criticism at each of those positions. His critique is premised on a defense of an "aristocratic" ideal of higher education. Kronman uses the term "aristocratic" in Plato's and Aristotle's sense, not as a belief that power and wealth should be equated with high social rank and foster class-based deference but as a description of a process in which individual humans are encouraged to cultivate their intellectual and moral faculties so as to become more refined, curious, and ultimately freer and more autonomous beings. The aristocratic ideal is one that sees higher education as designed to develop, especially in persons of college age, greater capacity to think independently, to reason, to clarify their intellectual, political, and spiritual views, and to acquire knowledge to aid them in those efforts. Aristocratic higher education is not an exchange of information or ideas by equals. It is a hierarchical process, in which young and inexperienced persons in the process of intellectual growth are taught by older and more experienced persons. The teaching is not just about the mastery of academic

subjects but about how to think, how to reason, and how to examine and justify one's feelings.

The principal forum of aristocratic higher education is the conversation. Kronman contrasts controlled conversations in colleges and universities, which typically take the form of course seminars or lectures, with two other forums: "Speakers' Corner," where speakers advance ideas into a "marketplace" of listeners, and listeners are not expected to converse with the speakers, but merely to signal their approval or disapproval of the ideas (sometimes through heckling the speaker); and with a home "dinner table," at which sometimes conversations need to be stopped or altered because their subject matter is upsetting to members of a family and the ideal of "love" among those members functions to make the feelings of the upset members paramount to the conversation itself. In conversations in higher education, by contrast, heckling of another student's views is not permitted, nor is it appropriate for a student to shut off another's views simply because he or she finds them offensive. The purpose of the conversation is not simply to *assert* views or to *decline to hear them*, but to critique and to defend the views being discussed. In that fashion those taking part in the conversation are encouraged to explore, reflect upon, and refine their intellectual and philosophical positions and thus to grow as human beings in the process.

Kronman contrasts the aristocratic ideal of higher education with what he calls a vocational ideal, in which "the principal means of human fulfillment" is defined as "that of work, as distinct from everything we do outside it or in our leisure time." The vocational ideal "establishes a particularly close connection between what we do for a living and our sense of purposefulness in life." It "shifts our judgments about the relative status of human beings from who they *are* — from their character and competence in the art of living — to what they *do* — to the jobs they perform and the position they occupy in the economic division of labor." Today's colleges and universities, Kronman feels, are "in thrall to the vocational ideal." In his view, this is primarily because the vocational ideal implicitly reinforces the idea that there is something odious about treating human beings differently because of their "character and competence in the art of living"; that somehow valuing some people more highly than others because they adapt better to the exercises of aristocratic higher education — such as grades and class rankings — offends against an "anti-subordination principle" designed to prevent humans from treating some individuals or groups as superior to others. Shifting the focus from "competence" in aristocratic exercises to "skills training" makes aristocratic-based distinctions among students seem less pointed. For Kronman that is an effort to minimize one of

the central purposes of human life, the growth and cultivation of one's intellectual and moral sensibility, which may have little to do with one's work.

It is from these starting points — the positing of an aristocratic ideal of higher education and the corresponding rejection of a vocational ideal — that Kronman launches his critique of the assault on American excellence. I will not summarize the details of his attack on the foundational propositions of that assault, listed above. Suffice it to say that his critiques are trenchant, well expressed, and worthy of serious attention. That is especially so, in my view, because they should have the cumulative effect of asking those apparently committed to the positions Kronman attacks to depart from their lemming-like posture of political correctness and defend their positions in the same manner Kronman advances his.

In his epilogue Kronman states that although in politics, "I still endorse progressive positions on the whole," when "it comes to the academy . . . my views have become steadily more conservative." There may be a risk that those labels will be misunderstood. Elsewhere Kronman maintains that "our colleges and universities are not political institutions; . . . that they belong to a different order of values and expectations; and that their first responsibility is to themselves and their undemocratic way of life." To me that is a "conservative" stance only in the sense that it seeks to "conserve" a view of higher education in place in America from the founding generation, under assault from those seeking to "democratiz[e] the inner life of our colleges and universities so that the rule of equality which prevails outside them comes to be the norm in the now masterless world of teaching and learning as well." "Enough is enough," Kronman concludes. "It is time to rally round." Rallies are not my style, but I am joining this one.



# CHIEF JUSTICE HUGHES AND MARTIN MANTON'S APPEAL

*Ira Brad Matetsky*<sup>†</sup>

THE PLAZA  
Fifth Avenue at 59th Street  
New York

September 18, 1939

My dear Mr. Solicitor General,

I have received your letter of September 14th. I think that it will be practicable to construct a court to hear the appeal. Before taking definite action, I should like to consult with Justice Stone, the Circuit Justice. I shall do so at the first opportunity. I shall return to Washington next Monday.

With cordial regards, I am,

Very sincerely yours,  
Charles E. Hughes

Mr. Robert H. Jackson,  
Solicitor General<sup>1</sup>

From March 18, 1918 until February 7, 1939, the Honorable Martin Thomas Manton was a judge of the United States Circuit Court of Appeals for the Second Circuit.<sup>2</sup> From August 1926 to February 1939, Manton was the Senior Circuit Judge, roughly equivalent to the position today called Chief Judge. Although “[Learned] Hand and his fellow circuit judges had never held Manton in high esteem,”<sup>3</sup> Manton was repeatedly considered for appointment to the United States Supreme Court. He came closest to filling the Court’s so-called “Catholic seat” in 1922, although President Harding ultimately chose

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<sup>1</sup> Letter from Chief Justice Charles Evans Hughes to Solicitor General Robert H. Jackson, Sept. 18, 1939, Papers of Robert H. Jackson, Manuscript Division, Library of Congress, Box 84.

<sup>2</sup> See, e.g., Manton’s entry in the Federal Judicial Center’s BIOGRAPHICAL DIRECTORY OF FEDERAL JUDGES, available at <https://www.fjc.gov/history/judges/manton-martin-thomas> (all webpages cited were last accessed June 22, 2020).

<sup>3</sup> GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 431 (2d ed. 2010).

Pierce Butler instead.<sup>4</sup> Until Learned Hand became more famous, Manton was perhaps “the best-known federal judge after the nine on the Supreme Court.”<sup>5</sup>

Manton’s career ended in disgrace, with his status changed from federal judge to federal prisoner. After an investigation led by New York County District Attorney Thomas E. Dewey and threats of an impeachment inquiry, Manton resigned from the Bench early in 1939. His judicial misconduct, induced by financial reverses during the Great Depression, took several different forms. One of these was self-interested interference with receiverships in the District Court. As Manton contrived with increasing desperation to keep control over these lucrative sources of patronage, these became the subject of a long and unseemly struggle between Manton and several other judges that twice reached the Supreme Court.<sup>6</sup> Another was Manton’s misuse of his assigning powers to designate another corrupt federal judge from Connecticut to sit by designation in New York and “fix” a criminal case. Ultimately, Manton was prosecuted by the U.S. Attorney for the Southern District of New York and convicted for yet another form of corruption: conspiracy to receive bribes in return for his votes in a series of appeals heard by Second Circuit panels over which he presided.<sup>7</sup>

Because Manton committed his crimes in Manhattan, his indictment and trial took place in the United States District Court for the Southern District of New York, on which he had briefly served (1916–1918) before his elevation to the Court of Appeals, and whose decisions he had been reviewing as a circuit judge for the past 20 years. And “[s]ince all the federal judges in New York City had some acquaintance with [Manton], none of them could properly preside. Accordingly, it was requested that Chief Justice Charles Evans Hughes assign a judge from outside New York to hear the case.”<sup>8</sup> The

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<sup>4</sup> See generally Ross E. Davies, *Leg, Culp, and the Evil Judge*, 2012 GREEN BAG ALM. 321, 324, and authorities cited therein; see also DAVID J. DANIELSKI, *A SUPREME COURT JUSTICE IS APPOINTED* (1964).

<sup>5</sup> GEORGE MARTIN, *CCB: THE LIFE AND CENTURY OF CHARLES C. BURLINGHAM, NEW YORK’S FIRST CITIZEN* 403 (2005).

<sup>6</sup> See, e.g., *Jobson v. Manhattan Railway Co.*, 289 U.S. 479 (1933); Allan D. Vestal, *A Study in Perfidy*, 35 INDIANA L. REV. 17, 27 (1959) (“Manton’s withdrawal [from the District Court receivership proceedings] came only after a restraining order had been issued by Associate Justice Harlan F. Stone, pending action by the full Supreme Court on an application . . . to divest Manton of all jurisdiction in the proceedings.”).

<sup>7</sup> There are many accounts of Manton’s crimes and trial, including those cited in Davies’ article. Another well-written account, in a book by a leading member of the New York Bar that should be better known, is MILTON S. GOULD, *THE WITNESS WHO SPOKE WITH GOD AND OTHER TALES FROM THE COURTHOUSE*, ch. 12 (1979).

<sup>8</sup> GUNTHER at 434; accord MARTIN at 405; GOULD at 204.

assignment power fell to Hughes because in situations where no judge from within a circuit should hear a given case, the Judicial Code provided for the Chief Justice of the United States to select a judge from elsewhere to sit by designation.<sup>9</sup> Hughes selected long-time Judge W. Calvin Chesnut, of the U.S. District Court for the District of Maryland, to travel to New York and hear the case.<sup>10</sup>

Manton's trial before Chesnut and a jury took place from May 22 to June 3, 1939. The prosecution called witnesses and presented documentary evidence establishing Manton's corruption in connection with several patent appeals. During the defense case, Manton subpoenaed four of his Second Circuit colleagues — Judges Learned Hand and Augustus N. Hand of New York, Thomas Swan of Connecticut, and Harrie Chase of Vermont — to the stand. They were not called as character witnesses (Manton also had plenty of those), but as fact witnesses: Each of them testified that when they sat with Manton on the panels that considered the appeals in question, they did not observe anything that led them to believe that Manton's decision-making in the relevant cases had been improperly influenced.<sup>11</sup>

Despite this testimony, the jury convicted Manton on all counts, and on June 20, 1939, Chesnut sentenced him to two years in federal prison and a \$10,000 fine. Manton appealed. To what court did he appeal? Necessarily, to the United States Court of Appeals for the Second Circuit — the same court on which he had sat for more than two decades. Next, which judges would hear the appeal? In the ordinary course of events, then as now, the Clerk's Office of the Second Circuit is responsible for assembling three-judge panels for each sitting day to hear the appeals scheduled for that day. In this instance, the ordinary course would not do.

By the time Manton's appeal was to be heard, the Second Circuit had six judgeships. Four of the six seats were occupied by Learned Hand, Augustus Hand, Swan, and Chase. Not only had these men sat as Manton's judicial colleagues for many years, but they had sat with him in the very cases that were the subject of Manton's criminal convictions, and they had just testified

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<sup>9</sup> Judicial Code of 1911, § 13, 28 U.S.C. § 17 (1934) ("Whenever it is found impracticable to designate and assign another district judge within the same judicial circuit . . . and a certificate of the needs of any such district is presented by said senior circuit judge or said circuit justice to the Chief Justice of the United States, he . . . shall designate and assign a district judge of an adjoining judicial circuit if practicable, or if not practicable, then of any judicial circuit, to perform the duties of district judge and hold a district court in any such district. . . ."). The current Judicial Code contains a similar provision, 28 U.S.C. § 292(d).

<sup>10</sup> See W. CALVIN CHESNUT, *A FEDERAL JUDGE SUMS UP* 261-62 (1947).

<sup>11</sup> GUNTHER at 433; GOULD at 227.



Charles Evans Hughes.

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at his trial. No specialized expertise in judicial ethics was required to conclude that these four judges could not be assigned to hear Manton's appeal.

A fifth seat on the court had been Manton's own seat, which had recently been filled by his successor, Robert P. Patterson.<sup>12</sup> Patterson, however, had been a District Judge in the Southern District of New York for nine years before being elevated to the Second Circuit. Throughout this time, Patterson worked in the same courthouses as Manton, his decisions were reviewed by Second Circuit panels that included Manton, and the two served together several times on statutory three-judge district courts. Patterson could not sit on Manton's appeal either.

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<sup>12</sup> See <https://www.fjc.gov/history/judges/patterson-robert-porter-sr>.



Robert H. Jackson.

The Second Circuit's sixth seat had only recently been established,<sup>13</sup> and had just been filled by a newly appointed judge, Charles E. Clark.<sup>14</sup> Clark had never worked with Manton; he was eligible to, and would, sit on the Manton appeal. But that still left two seats on the panel to fill. Once again, the Chief Justice would be asked to intervene.

As reflected in the letter quoted at the head of this article, the Solicitor General of the United States, Robert H. Jackson, became aware of the need for special appointments to constitute the panel and raised the subject with

<sup>13</sup> Act of May 31, 1938, ch. 290, § 1, 52 Stat. 584, *codified at* 28 U.S.C. § 213 (1940). *See also* <https://www.fjc.gov/history/courts/u.s.-court-appeals-second-circuit-legislative-history>.

<sup>14</sup> *See* <https://www.fjc.gov/history/judges/clark-charles-edward>.

Hughes. Jackson was a logical person to communicate with Hughes on this issue of judicial administration. Although Jackson, as Solicitor General, was part of the Executive Branch rather than the Judicial Branch, his role was to act as the United States' principal representative in the Supreme Court and he thus was a familiar figure to the justices. One might think that because the interbranch communications between Hughes and Jackson involved Manton's federal criminal appeal, and the United States (the Solicitor General's full-time client) was one of the parties to the appeal, Manton's lawyers should have been copied on the correspondence. However true that might be by modern standards, it apparently did not occur to anyone in 1939.

As Hughes had assured Jackson, it was indeed "practicable to construct a court to hear [Manton's] appeal."<sup>15</sup> In his letter to Jackson, Hughes stated that he intended to consult with the Circuit Justice for the Second Circuit, Harlan Fiske Stone.<sup>16</sup> When the two justices spoke, one of them must have suggested that Stone himself sit on *United States v. Manton*. As the Circuit Justice, he was eligible to do so. Even though Supreme Court Justices no longer "rode circuit" by the 1930s, the Judicial Code provided (as it does today) that the Circuit Justice could sit as a judge of the Circuit Court of Appeals for his circuit — and indeed, that when doing so, he had seniority over the circuit judges.<sup>17</sup> Stone had no disqualifying connections with Manton: he had not been a lower-court judge before he was appointed to the Supreme Court in 1925, and hence had never served with Manton. The appointment of a Supreme Court justice to sit on the Court of Appeals in the special circumstances of *United States v. Manton* was consistent both with this appeal's significance and with a desire to invest the proceedings, which were a serious black eye to the federal courts' reputation, with as much dignity as possible.

Hughes's less predictable, but equally well-inspired, selection for the third seat on the panel was a recently retired Associate Justice of the Supreme Court, George Sutherland. If Manton's appeal had arisen just three years

<sup>15</sup> Letter from Hughes to Jackson, *supra* note 1.

<sup>16</sup> Stone, who hailed from New York and had been the Dean of Columbia Law School, served as Circuit Justice for the Second Circuit from March 1925, when he was appointed to the Supreme Court, until October 1941, when he was elevated to the Chief Justiceship. See <https://www.fjc.gov/history/courts/circuit-allotments-second-circuit>.

<sup>17</sup> Judicial Code of 1911, § 120, 28 U.S.C. § 216 (1934) ("The Chief Justice of the United States and the associate justices of the Supreme Court assigned to each circuit . . . shall be eligible to sit as judges of the circuit court of appeals within their respective circuits. In case the Chief Justice or an associate justice of the Supreme Court shall attend at any session of the circuit court of appeals, he shall preside."). The current Judicial Code similarly provides that "[t]he circuit justice and justices or judges designated or assigned shall be competent to sit as judges of the court [of appeals]" and that "[t]he circuit justice . . . shall have precedence over all the circuit judges and shall preside at any session which he attends." 28 U.S.C. §§ 43(b), 45(b).

earlier, the Chief Justice could not have appointed a retired justice such as Sutherland to serve on a court of appeals panel. Before 1937, when a Supreme Court justice retired, he left the federal judiciary completely, for all purposes.<sup>18</sup> There was no provision for retired justices to retire from active service, thus creating a vacancy that would be filled by a new justice, but still continue to serve part-time as a member of the judiciary for some purposes. This privilege, which today is referred to as “taking senior status,” was granted to experienced district and circuit judges in 1919, but was not extended to Supreme Court justices at that time because Congress feared creating uncertainty as to how many justices were in office.<sup>19</sup>

In 1937, however, in an effort to induce aging Supreme Court justices (several of whom were consistently striking down New Deal legislation and bringing the country near to a constitutional crisis) to step down, Congress sought to make retirement a more attractive option for these justices. As an economy move during the Depression, Congress had reduced the pensions that would be paid to retiring justices — thereby reportedly dissuading at least two of the older justices, Willis Van Devanter and George Sutherland, from leaving the Bench.<sup>20</sup> Within a few years, however, the Roosevelt Administration and congressional leaders saw voluntary retirements from the Supreme Court as worth encouraging. In 1935 and again in 1937, Chairman Hatton Sumners of the House Judiciary Committee sought to create an incentive, or at least remove a barrier, to such retirements, by proposing new legislation guaranteeing that future retired justices would receive pensions at least equal to their salary at the time they retired, without risk of post-retirement reduction.<sup>21</sup> To justify the contention that retiring justices were still judicial officers of the United States, and thus constitutionally protected against diminution of their compensation,

Sumners explained both the old problem of the varying size of the Supreme Court and a new solution. Sumners argued that he and others had only recently realized that Supreme Court justices had two jobs, one at the actual Supreme Court, another riding circuit and attending lower court cases. Though the circuit court riding

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<sup>18</sup> Regarding retirement of Supreme Court justices during an earlier era, see Ira Brad Matetsky, *The Retirement of Justice Stephen Field*, 23 GREEN BAG 2D (forthcoming summer 2020), and authorities cited therein.

<sup>19</sup> See Judge Glock, *Unpacking the Supreme Court: Judicial Retirement, Judicial Independence, and the Road to the 1937 Court Battle*, 106 J. AM. HIST. 47 (2019).

<sup>20</sup> *Id.* at 55-58.

<sup>21</sup> Minor Myers III, *The Judicial Service of Retired United States Supreme Court Justices*, 42 J. SUP. CT. HIST. 46, 47-48 (2007); Glock, 106 J. AM. HIST. at 58-68; ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 136-37 (2003).

was purely optional and had not been used by the justices for decades, it was still technically part of their duties. He told Congress that “I think that part was thought out after the law granting” the right to retire to other judges was passed back in 1919. Therefore, the new “retirement” act would remove Supreme Court justices from the highest bench, but would keep them on the second part of their nominal job, on lower courts, thus keeping them as “Supreme Court” justices under the constitution with full and protected pay.<sup>22</sup>

Sumners’ bill was voted down in 1935, but passed two years later, influenced at least in part by a congressional desire to achieve the aims of the “court-packing” proposal without adopting its more extreme methods.<sup>23</sup> The new statute provided:

Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court . . . , and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake.<sup>24</sup>

This Retirement Act was signed into law on March 1, 1937. Three months later, on June 2, 1937, Van Devanter, one of the “Four Horsemen” at whom the legislation was aimed, became the first justice to retire from the Supreme Court while authorized to continue performing judicial work. Shortly after that, he became the first retired justice to serve on a lower federal court after leaving the Supreme Court, serving by Hughes’ designation as trial judge in at least two criminal cases in the Southern District of New York.<sup>25</sup>

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<sup>22</sup> Glock, 106 J. AM. HIST. at 59 (citations omitted).

<sup>23</sup> *Id.* at 59-60, 66-68.

<sup>24</sup> Retirement Act of March 1, 1937, ch. 21, §§ 1, 2, 50 Stat. 24, *codified at* 28 U.S.C. § 375a (1940). Comparable provisions regarding retired justices are currently found at 28 U.S.C. § 371 (containing provisions applicable to the retirement of both justices and lower-court judges) and § 294(a) (“Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.”).

<sup>25</sup> Myers, at 49; *see also* GOULD, *supra* note 7, at 165-66 (stating that a federal prosecutor in New York “found his ‘strong judge’ [for a difficult case] in the person of Willis B. Van Devanter, who had just retired from the U.S. Supreme Court. Just how McMahon managed to get Van Devanter assigned is

Sutherland, who was another of the “Four Horsemen” and considered the intellectual leader of the group,<sup>26</sup> retired from the Supreme Court seven months after Van Devanter, on January 17, 1938. His retirement was interrupted when Hughes asked him to serve on the Second Circuit panel that would hear *United States v. Manton*. This is the only known instance in which Sutherland sat as a judge between his retirement in 1938 and his death in 1942.

On October 4, 1939, Hughes’ appointments to the *Manton* panel were announced.<sup>27</sup> On October 27, 1939, the panel heard three hours of argument on the appeal.<sup>28</sup> And on December 4, 1939 the panel of “STONE and SUTHERLAND, Circuit Justices, and CLARK, Circuit Judge” handed down its unanimous decision affirming the conspiracy convictions of Manton and his co-defendant in a well-known, detailed opinion by Sutherland.<sup>29</sup> Manton’s petition for certiorari was unceremoniously denied.<sup>30</sup>

Manton served 19 months of his two-year sentence at Lewisburg Federal Penitentiary in Pennsylvania, was released in 1941, and died in 1946. In the meantime, the embarrassed Second Circuit was reconsidering its decisions in the cases now known to have been tainted by Manton’s bribe-taking, in which the losing litigants understandably found grounds for complaint about the quality of justice they had received. Newly constituted Second Circuit panels in these cases noted laconically that “[w]e have since sustained a petition for review and the cause again comes before us for a rehearing”<sup>31</sup> or “[w]e decided

not quite clear. One of his aides has told this writer that [Assistant U.S. Attorney Brien] McMahon made a pilgrimage to the Supreme Court and induced the Chief Justice to designate Van Devanter under the provisions of a statute that made retired Supreme Court justices available for duty in the district courts.”). In both cases heard by Van Devanter, the Second Circuit upheld his authority under the 1937 legislation to sit as the trial judge. *United States v. Moore*, 101 F.2d 56 (2d Cir. 1939); *United States v. Graham*, 102 F.2d 436, 444 (2d Cir. 1939), cert. denied, 307 U.S. 643 (1939).

<sup>26</sup> See generally, e.g., HADLEY ARKES, *THE RETURN OF GEORGE SUTHERLAND* (1997); Samuel R. Olken, *Justice Sutherland Reconsidered*, 62 VANDERBILT L. REV. 639 (2009)

<sup>27</sup> *High Judges to Sit in Manton’s Appeal: Stone, Sutherland and Charles E. Clark Are Designated by Chief Justice Hughes*, N.Y. TIMES, Oct. 5, 1939, at 22, col. 3.

<sup>28</sup> *3-Hour Argument on Manton Appeal Heard*, N.Y. TIMES, Oct. 28, 1939, at 17, col. 7. Even as a convicted felon, Manton still displayed a special brand of *chutzpah* on the day of the argument. It is remembered in Second Circuit lore that no-longer-Judge Manton offended his former judicial colleagues by taking the judges’ reserved private elevator to the floor housing the Second Circuit’s courtroom to hear the argument of his own appeal. Davies, *supra* note 4, at 327 (quoting Bennett Boskey).

<sup>29</sup> *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939).

<sup>30</sup> 309 U.S. 664 (1940). The vote to deny certiorari was 7 to 0. Two justices took no part in the decision: Stone, because he had sat on the case below, and recently appointed Justice Frank Murphy, who was Attorney General when Manton was prosecuted.

<sup>31</sup> *Art Metal Works, Inc. v. Abraham & Straus, Inc.*, 107 F.2d 940, 940 (2d Cir. 1939), vacating 70 F.2d 639 (2d Cir. 1934); see also *Art Metal Works, Inc. v. Abraham & Straus, Inc.*, 107 F.2d 944, 944, vacating 70 F.3d 641 (1934).

these appeals in 1935 but granted a rehearing because of the disqualification of one member of the original court, not known at the time.”<sup>32</sup>

Milton Gould closes his account of Manton’s rise and fall by discussing a colloquy that took place at a Senate committee hearing on ethics in public life in 1951. Learned Hand was the witness:

JUDGE HAND: There lingers in the back of my memory some things that happened very close at home, but they shall not be mentioned.

SENATOR FULBRIGHT: If there is anything wrong, it has been better concealed. At least, I am not aware of anything wrong.

JUDGE HAND: All right, then, I will not bring it to your attention. I could a tale unfold.

SENATOR DOUGLAS: There is a former judge from New York who is serving in the penitentiary.

JUDGE HAND: He is gone now. I would not say to a greater penitentiary.<sup>33</sup>

Interestingly, *United States v. Manton* was not the last time that a “Second Circuit” panel had to be specially designated by the Chief Justice from judges from outside the circuit. In 1952, the Second Circuit heard the appeal in *A.B. Dick Co. v. Marr*,<sup>34</sup> in which all the judges were disqualified because the Second Circuit’s Chief Judge, Thomas Swan, “was the son-in-law of the company’s father and owned company stock.”<sup>35</sup> Chief Justice Fred Vinson designated a panel comprising circuit judges from the First, Fourth, and Fifth Circuits who visited New York to hear and decide the appeal. Another “the whole Second Circuit is recused” situation arose more than 60 years later when the Second Circuit heard an appeal in an action against Yale University.<sup>36</sup> One of the Yale personnel involved in the underlying events was the university’s then Deputy General Counsel, Susan Carney. By the time the appeal was docketed, Deputy General Counsel Carney had become Judge Carney of

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<sup>32</sup> *Electric Auto-Lite Corp. v. P. & D. Mfg. Co.*, 109 F.2d 566, 567 (2d Cir. 1940), *vacating* 78 F.2d 700 (1935); *see also* *General Motors Corp. v. Preferred Electric & Wire Corp.*, 109 F.2d 615 (2d Cir. 1940), *vacating* 79 F.2d 621 (2d Cir. 1935).

<sup>33</sup> Quoted in GOULD, *supra* note 7, at 245. The senators in this colloquy were J. William Fulbright, Democrat of Arkansas, and Paul H. Douglas, Democrat of Illinois.

<sup>34</sup> 197 F.2d 498 (2d Cir. 1952).

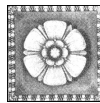
<sup>35</sup> LEONARD SCHICK, *LEARNED HAND’S COURT* 146-47 n. (1971).

<sup>36</sup> *Dongguk Univ. v. Yale Univ.*, 734 F.3d 113 (2d Cir. 2013).

the Second Circuit. All of the circuit's judges stepped aside and Chief Justice John Roberts designated three judges from the neighboring Third Circuit to sit as the "Second Circuit" panel that heard and decided the appeal.<sup>37</sup>

Nor, unfortunately, would Martin Manton's appeal be the last time a Chief Justice had to designate a special appellate panel because all the circuit's judges were recused from the appeal of a criminally convicted colleague. In 1973, Otto Kerner Jr. was convicted in the U.S. District Court for the Northern District of Illinois on federal corruption charges relating to his conduct as Governor of Illinois. Awkwardly, by 1973, Kerner was no longer the Governor of Illinois; he was a Circuit Judge in the Seventh Circuit, the court that would hear his appeal. As a result, Chief Justice Warren Burger designated three senior circuit judges from other circuits to hear Kerner's appeal.<sup>38</sup>

Although successive Chief Justices did not designate either sitting or retired Supreme Court justices to sit in any of these conflict-laden cases, they could have done so. The Judicial Code continues to authorize retired justices to serve on lower federal courts, and since Van Devanter and Sutherland, at least ten retired justices have heard such cases.<sup>39</sup> Although the power is rarely invoked, current Supreme Court justices may also be designated to serve on a panel, and with much greater frequency, either active or senior circuit or district judges from other circuits can also be named. This variety of assignment options available to the Chief Justice ensures that no matter how difficult and conflict-laden a given case may be, "it will be practicable to construct a court to hear the appeal."<sup>40</sup>



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<sup>37</sup> Similar situations occasionally continue to arise from time to time. See, e.g., *Skirika v. Wettach*, 811 F.3d 99 (3d Cir. 2016) (appeal affected financial interests of a Third Circuit judge); *United States v. Casellas-Toro*, 807 F.3d 380 (1st Cir. 2015) (son of a district judge in the circuit was a criminal defendant). In each case, the Chief Justice designated three circuit judges from other circuits to decide the appeal.

<sup>38</sup> *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974).

<sup>39</sup> Myers, *supra* note 20, and Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1830 (2003), each list Justices Stanley Reed, Harold Burton, Tom Clark, Potter Stewart, Lewis Powell, William Brennan, Thurgood Marshall, and Byron White as having sat on lower courts after retiring from the Supreme Court. In more recent years, Sandra Day O'Connor and David Souter have also done so.

<sup>40</sup> Hughes letter to Jackson, *supra* note 1.



THE PLAZA  
FIFTH AVENUE AT 59<sup>TH</sup> STREET  
NEW YORK

43 (6)

September 18, 1939

My dear Mr. Solicitor General,

I have received your letter of September 14<sup>th</sup>. - I think that it will be practicable to constitute a court to hear the appeal. - Before taking definite action, I should like to consult with Justice Stone, - the Circuit-Justices.

Charles Evans Hughes to Robert H. Jackson, September 18, 1939 (page 1 of 2).

I shall do so at the first  
opportunity. - I shall return  
to Washington next Monday.

With cordial regards,  
I am -

Very Sincerely yours,

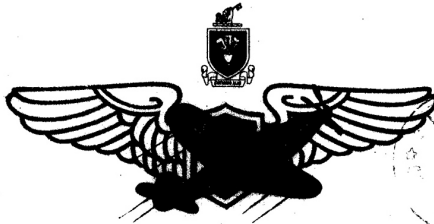
Charles E. Hughes

Mr. Robert H. Jackson  
Attorney General

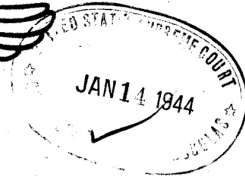
Charles Evans Hughes to Robert H. Jackson, September 18, 1939 (page 2 of 2).

Vern Countryman to William O. Douglas, January 12, 1944 (page 1 of 4).

*Countryman*



ARMY AIR FORCES TECHNICAL SCHOOL  
SEYMOUR JOHNSON FIELD  
NORTH CAROLINA



*Jan 12, 1944*

Dear Mr. Justice,

First let me express my sincere gratitude for your very generous letter of recommendation. I had intended to delay my reply until I could report definitely on my future status, but I just received your inquiry about health form, so I will report on affairs as they

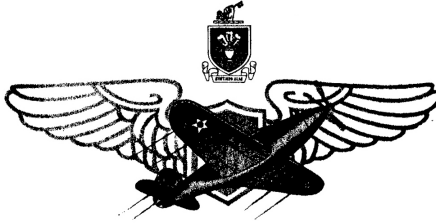
I have passed the Flight Physical exam and a general aptitude exam given to all applicants. My next move will be to appear before a board of officers - I am awaiting call on that now.

If they find me a suitable candidate I will then be sent to a Classification Center (where I know not) to take the two-day battery of exams which I

previously described to you. Those claims will finally determine whether or not I am to be a Lieut. and, if so, whether I am to receive training as a Lieut., Navigator, or Bombardier.

Regarding Miss Turner, I do know her fairly well. She was a first year student during my last year in law school. From what I observed that year, together with what I heard from talks with the Dean and with her last summer, I would heartily recommend what her former mathematics professor has to say about her. She is a very intelligent woman and she is also an indigestible worker. She appears to be a very healthy young woman, with stamina enough to keep on working long and busy hours. In addition, she is a very pleasant soul, and gets along well with everyone.

Vern Countryman to William O. Douglas, January 12, 1944 (page 2 of 4).



ARMY AIR FORCES TECHNICAL SCHOOL  
SEYMOUR JOHNSON FIELD  
NORTH CAROLINA

As to how a girl could fare on the job, I can't see that the red would make any difference except on the point of maintaining contact with the other officers - on that score, she would not be able to keep as well informed on what your brethren were doing as a man could, unless, of course, your brethren also employ female clerks. But I doubt if that point is of any great importance - certainly not enough to warrant choosing a man instead unless you are satisfied that the man is absolutely first rate, because I'm sure your woman is just that.

I will write again when I find out, for sure whether or not I make the grade on

Vern Countryman to William O. Douglas, January 12, 1944 (page 3 of 4).

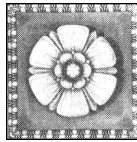
this Secret Service. I thank you again  
for the assistance you have given  
me on it. I will not forget  
that I owe this opportunity entirely  
to you.

Sincerely

Vern Countryman

P.S. Congratulations on married life and  
it bears the appearance of having  
produced quite a fight.

Vern Countryman to William O. Douglas, January 12, 1944 (page 4 of 4).



Army Air Forces Technical School  
Seymour Johnson Field  
North Carolina

Jan. 12, 1944

Dear Mr. Justice,

First let me express my sincere gratitude for your very generous letter of recommendation. I had intended to delay my reply until I could report definitely on my future status, but I just received your inquiry about Lucile Lomen, so I will report on affairs to date.

I have passed the Flight Physical exam and a general aptitude exam given to all applicants. My next move will be to appear before a Board of officers — I am awaiting call on that now. If they find me a suitable candidate I will then be sent to a Classification Center (where, I know not) to take the two-day battery of exams which I previously described to you. Those exams will finally determine whether or not I am to be a cadet and, if so, whether I am to receive training as a pilot, navigator, or bombardier.

Regarding Miss Lomen, I do know her fairly well. She was a first year student during my last year in law school. From what I observed that year, together with what I gleaned from talks with the Dean and with her last summer I would heartily second what her former Whitman professor has to say about her. She is a very intelligent woman and she is also an indefatigable worker. She appears to be a very healthy young woman, with stamina enough to keep on working long and busy hours. In addition, she is a very pleasant girl, and gets along well with everyone.

As to how a girl would fare on the job, I can't see that the sex would make any difference except on the point of maintaining contact with the other offices — on that score, she would not be able to keep as well informed on what your brethren were doing as a man could, unless, of course, your brethren also employ female clerks. But I doubt if that point is of any great importance — certainly not enough to warrant choosing a man instead unless you are satisfied that the man is absolutely first rate, because I am sure that Miss Lomen is just that.

I will write again when I find out for sure whether I make the grade on the cadet business. Thanks again for the assistance you have given me on it. I will not forget that I owe this opportunity entirely to you.

Sincerely,  
Vern Countryman

P.S. congratulations on *Mercoide Corp. et al.*, it bears the appearances of having produced quite a fight.\*

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\* *Mercoide Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (Jan. 3, 1944). Douglas wrote for the Court; four Justices concurred in the result.

# DOUGLAS HIRES A WOMAN TO CLERK

Mary Whisner<sup>†</sup>

After this correspondence between Justice William O. Douglas and his former clerk, Vern Countryman, Douglas hired Lucile Lomen for the 1944 Term, the first woman to serve as a law clerk to a Supreme Court Justice. She later served as an assistant attorney general in Washington State and then enjoyed a long career as the first woman in General Electric's law department. Others have written about Lomen's life and her experience as a clerk.<sup>1</sup> I will add some historical context and other reflections to the story.

A few months after Douglas was sworn in as a Justice, he visited the University of Washington School of Law, the first time a Supreme Court Justice had done so.<sup>2</sup> "He said he hoped to have a law clerk from the University, in line with the precedent set by Harvard graduates who [attained] the bench in having Harvard graduates for law clerks."<sup>3</sup> Years later, he said that he liked to hire clerks from the Ninth Circuit, because he was the Justice assigned to that circuit.<sup>4</sup> He was not inflexible about sourcing his clerks from the Ninth Circuit, though: his clerk for the 1943 Term was "a Yale man" from Mount Holly, NJ.<sup>5</sup> When he was looking for a clerk for the 1944 Term, he contacted the UW's dean, Judson F. Falknor, who had sent him four of his last five clerks.<sup>6</sup> At first Falknor said he had no one to recommend, but Douglas

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<sup>†</sup> Public Services Librarian, Gallagher Law Library, University of Washington School of Law. I thank my friends and colleagues who reviewed a draft of this essay: Jeff Feldman, Cindy Fester, Mary Hotchkiss, Nancy Unger. Copyright 2020 Mary Whisner.

<sup>1</sup> See Jennie Berry Chandra, *Lucile Lomen: The First Female United States Supreme Court Law Clerk*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 198 (Todd C. Peppers & Artemus Ward eds., 2012); David J. Danelski, *Lucile Lomen: The First Woman to Clerk at the Supreme Court*, 24 J. Sup. Ct. Hist. 43 (1999). I particularly recommend Chandra's 33-page chapter, because it is informed by Lomen's papers and interviews with family members and others.

<sup>2</sup> *New Justice Speaks to U. Law Classes*, SEATTLE DAILY TIMES, July 27, 1939, at 12.

<sup>3</sup> *Id.* Why wouldn't he have hired clerks from Columbia (where he was a student and teacher) or Yale (where he taught)?

<sup>4</sup> Chandra, *supra* note 1, at 199 (citing a 1977 letter by Douglas). In 1946, Douglas "asked his friend Max Radin, of the law school at Berkeley, to take over the selection process and enlarge it to include all the schools in the Ninth Circuit." Melvin I. Urofsky, *William O. Douglas and His Clerks*, 3 W. LEGAL HIST. 1, 3 (1990).

<sup>5</sup> *Miss Lomen to Be First Girl Aide to Justice*, SEATTLE TIMES, Apr. 27, 1944, at 4 [hereinafter *First Girl Aide*].

<sup>6</sup> Both Chandra, *supra* note 1, at 199, and Danelski, *supra* note 1, at 44, say that Falknor "had supplied"

opened the door to women: “When you say that you have ‘no available graduates’ whom you could recommend for appointment as my clerk, do you include women? It is possible that I may decide to take one if I can find one who is absolutely first-rate.”<sup>7</sup> Falknor “highly recommended” Lucile Lomen.<sup>8</sup> It was the first time he’d recommended a woman — many of the men in Lomen’s entering class had left to join the military, and she was the best student. In fact, she was the only “Honor Graduate in Law” and member of Order of the Coif in her (very small) class.<sup>9</sup> He also sent Douglas a copy of Lomen’s law review article on the Privileges and Immunities Clause.<sup>10</sup>

Falknor apparently knew Lomen well. Not only was she a star student, but she had also worked for Falknor. I confess that when I read that “she worked as a part-time secretary in the dean’s office at the law school,”<sup>11</sup> I dismissed it as a few hours here and there, answering the phone and typing a few letters. But the job was much more substantial (and substantive):

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four of Douglas’s last five clerks. A contemporaneous newspaper article said that she was Douglas’s fifth clerk from the UW. *First Girl Aide*, *supra* note 5. But *Wikipedia*’s list of Douglas clerks lists her as only the third. List of Law Clerks of the Supreme Court of the United States (Seat 4), WIKIPEDIA (last edited Sept. 2, 2019), [https://en.wikipedia.org/wiki/List\\_of\\_law\\_clerks\\_of\\_the\\_Supreme\\_Court\\_of\\_the\\_United\\_States\\_\(Seat\\_4\)](https://en.wikipedia.org/wiki/List_of_law_clerks_of_the_Supreme_Court_of_the_United_States_(Seat_4)). I tried to sort out the discrepancy.

*Wikipedia* cites MANUSCRIPTS DIV., LIBRARY OF CONGRESS, WILLIAM O. DOUGLAS PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (rev. Feb. 2018). But the finding aid doesn’t have list of all the clerks, just the ones with correspondence files. I turned to Newsbank’s digital *Seattle Times* collection. When Justice Douglas hired Vern Countryman for October Term 1942, a story listed three prior UW Law grads: Stanley Carl Soderland (OT 1939), Donald G. Simpson (OT 1940), Snyder Jed King (OT 1941). *Countryman New Clerk for Justice Douglas*, SEATTLE TIMES, July 19, 1942, at 11. *Wikipedia* can be very useful for lists and dates, but I’m satisfied that Lomen really was Douglas’s fifth UW hire.

<sup>7</sup> Ruth Bader Ginsburg, *The Washington College of Law Founders Day Tribute*, 5 AM. U. J. GENDER & L. 1, 2 (1996) (citing Letter from William O. Douglas to Judson P. Falknor (Mar. 24, 1943), in THE DOUGLAS LETTERS 46 (Melvin I. Urofsky ed., 1987)).

<sup>8</sup> Letter from William O. Douglas to Vern Countryman (Jan. 10, 1944) [hereinafter Douglas letter].

<sup>9</sup> Chandra, *supra* note 1, at 199, 202.

<sup>10</sup> Chandra, *supra* note 1, at 205; Lucile Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. & ST. B.J. 120 (1943). Yes, an article. Even though Lomen was a student, this was published in the articles section of the *Washington Law Review*. While she was a student she also wrote: Lucile Lomen, Comment, *Recovery of Damages for Private Nuisance*, 18 WASH. L. REV. & ST. B.J. 31 (1943); Lucile Lomen, *Union Security in War-Time*, 19 WASH. L. REV. & ST. B.J. 138 (1944); Lucile Lomen, *Union Security in War-Time — Part 2*, 19 WASH. L. REV. & ST. B.J. 188 (1944); and Lucile Lomen, Comment, *Resolving Ambiguities Against the Conditional Sale*, 20 WASH. L. REV. & ST. B.J. (1945).

<sup>11</sup> Danelski, *supra* note 1, at 43.

Lomen worked thirty hours per week as a secretary for University of Washington Law School dean Judson F. Falknor. Due to Falknor's position as a War Production Board compliance commissioner, Lomen typed countless opinions — and learned a good deal of administrative law, as the dean briefed her on his decisions.<sup>12</sup>

Thirty hours is a big commitment, especially with a heavy course load and law review.<sup>13</sup>

After Falknor's recommendation, Douglas contacted Chester Maxey, Lomen's undergraduate thesis adviser at Whitman College (she'd written about the limits of presidential power<sup>14</sup>), who was "a close friend and fraternity brother."<sup>15</sup> I'm not quite sure where their friendship developed, since Maxey graduated from Whitman eight years before Douglas and earned his Ph.D. at Columbia before Douglas started his legal studies there.<sup>16</sup> Wherever they met, their common education at Whitman then Columbia — as well as their shared fraternity — must have helped them bond. Maxey was very enthusiastic about Lomen, so Douglas's next step in his vetting was to check with his recent clerk, Vern Countryman, who was then in the Army Air Force. He particularly wondered "how a girl would fare as a law clerk in these surroundings which you now know so well."<sup>17</sup>

Countryman replied that he knew Lomen "fairly well." That's evidence both of a small school — since she was in her first year while he was in his last — and that Lomen stood out. He had also talked with Falknor and Lomen the previous summer. And he had strong praise: "She is a very intelligent woman and she is also an indefatigable worker. She appears to be a very healthy young woman, with stamina enough to keep on working long and busy hours. In addition, she is a very pleasant girl, and gets along well with

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<sup>12</sup> Chandra, *supra* note 1, at 202.

<sup>13</sup> Over a decade ago, I cut my own work schedule to 6.5-hour days (32.5 hours a week). I feel fully invested in my work, so I am often surprised when I'm asked: "Are you still working part-time?" True, it's a reduced schedule, but it's more than "part-time" might imply.

<sup>14</sup> Chandra, *supra* note 1, at 201-02.

<sup>15</sup> Danelski, *supra* note 1, at 44.

<sup>16</sup> Maxey earned an A.B. from Whitman in 1912, an A.M. from the University of Wisconsin in 1914, and a Ph.D. from Columbia University in 1919. Catalogue of Whitman College 1941, at 14 (1941), <https://arminda.whitman.edu/object/arminda30067> [hereinafter WHITMAN 1941]. Coincidentally, the copy digitized by the Whitman library might have been Maxey's own: his name is penciled on the front cover. Douglas earned his A.B. from Whitman in 1920 and an LL.B. from Columbia in 1925. *Douglas, William Orville*, Biographical Directory of the Federal Judiciary, Federal Judicial Center (last visited Jan. 29, 2020), <https://www.fjc.gov/history/judges/douglas-william-orville> [<https://perma.cc/68NF-BLZX>].

<sup>17</sup> Douglas letter, *supra* note 8.

everyone.”<sup>18</sup> Countryman didn’t think that Lomen’s sex would make much difference, with the possible exception that it might be easier for a man to maintain contact with other chambers to help Douglas keep up with other Justices’ activities. “But,” said Countryman, “I doubt if that point is of any great importance — certainly not enough to warrant choosing a man instead unless you are satisfied that the man is absolutely first rate, because I am sure that Miss Lomen is just that.”<sup>19</sup> Douglas was a famously hard taskmaster — “Douglas’s clerks had little to do with the others, because they worked so hard”<sup>20</sup> — so the disadvantage that a “girl” might have in gathering news from other chambers was probably minor in his eyes. Whatever his calculus, he did decide to hire her and he let Dean Falknor know. Falknor told Lomen.

Here let me observe how foreign the process seems in these days when students decide which judges to apply to (and apply to dozens). It was a different time, of course. And part of the difference involved communication and transportation technology. When I applied for a clerkship in 1981, I think I had a preliminary interview by telephone, when long-distance calls were a standard part of business and personal life. When the judge asked me to visit her chambers for an in-person interview, it was a financial stretch for me to buy a plane ticket to fly from Seattle to Tulsa, but it was doable. In 1944, with wartime shortages and limited commercial flights, no one would have expected Lomen to fly to Washington, DC, for an interview. And how long would a round trip by train have taken, even if she could have arranged it? So the technology used — letters to and from Falknor, Maxey, and Countryman — makes sense. But it is still striking that there weren’t letters to and from Lomen herself. It was all worked out by the people around her.

Lomen was the first woman to clerk for a Supreme Court Justice, but her hiring did not open the floodgates. The next woman, Margaret J. Corcoran, wasn’t hired until 1966. The fact that Lomen was hired during World War II,

<sup>18</sup> Letter from Vern Countryman to William O. Douglas (Jan. 12, 1944) [reproduced above].

<sup>19</sup> *Id.* I thank Sarah Griffith of the U.S. Courts Library in Seattle for help transcribing Countryman’s letter. Countryman’s penmanship was challenging, and he knew it. He acknowledged in one of his books:

My chief obligation, however, is to my wife, Vera, who labored with modest skill and great persistence to convert a highly illegible, handwritten, first draft into a typescript from which more expert but less devoted typists could work, and who then tolerated my preoccupation with later drafts.

VERN COUNTRYMAN, UN-AMERICAN ACTIVITIES IN THE STATE OF WASHINGTON: THE WORK OF THE CANWELL COMMITTEE viii (1951).

<sup>20</sup> Urofsky, *supra* note 4, at 19; accord Bruce Allen Murphy, *Fifty-Two Weeks of Boot Camp*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 179, 185 (Todd C. Peppers & Artemus Ward eds., 2012) (“Because of their crushing workload, Douglas’s clerks had little time to eat lunch and socialize with the other clerks and exchange views about the Court and its work.”).

when there was a paucity of eligible men to clerk, led one author to say that Lomen “cannot be regarded as the first true female clerk.”<sup>21</sup> Would we also say that the women who worked in heavy manufacturing were not “true riveters”? Didn’t they build actual planes? What we can say is that Supreme Court Justices — like many other employers — only considered hiring women when there was a shortage of men. But hire them they did, and the women did do the work.

The three main characters in this story — Douglas, Countryman, and Lomen — were all westerners, originally from small towns. Douglas was born in Maine Township, Minnesota, but when he was very young the family moved to Southern California and then to near Yakima, Washington, where he grew up.<sup>22</sup> Years later, when there was a Supreme Court vacancy, western senators wanted a candidate from the West. Douglas, as a Yale law professor, seemed as eastern as Felix Frankfurter, the recently confirmed Harvard law professor, so Douglas’s allies worked to emphasize his Washington roots.<sup>23</sup> Countryman was born in Roundup, Montana, and moved with his family to Longview, Washington. When Countryman first taught at Harvard Law School, the student paper emphasized his geographic roots:

Born in Montana, Prof. Countryman was raised in the West, and in many ways he seems the archetype of the Westerner. He is spare and austere in his person, yet his manner is direct and warm. Intellectually, he masters the detail of the law as it is, yet there is always the hint of the heterodox, the touch of the independent mind, a trace of the maverick.<sup>24</sup>

Lomen was born in Nome, Alaska; she moved to Seattle when she was a teenager.<sup>25</sup> Going to high school in Seattle, Lomen had the most big-city

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<sup>21</sup> Angela Onwuachi-Willig, *When Different Means the Same: Applying a Different Standard of Proof to White Plaintiffs Under the McDonnell Douglas Prima Facie Case Test*, 50 CASE W. RES. L. REV. 53, 68 n.68 (1999).

<sup>22</sup> L.A. Powe Jr., *Douglas, William O.*, AMERICAN NATIONAL BIOGRAPHY (online ed. 2000), <https://doi.org/10.1093/anbi/9780198606697.article.1100251>. Powe was the last University of Washington graduate to clerk for Justice Douglas, in October Term 1970. *Lucas A Powe Jr.*, UNIV. OF TEXAS AT AUSTIN SCH. OF LAW, <https://law.utexas.edu/faculty/lucas-a-powe-jr/> (last visited Jan. 28, 2020) [<https://perma.cc/4YFH-J7A6>].

<sup>23</sup> BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 166, 171 (2003). Not all were persuaded: the chairman of the Washington State Democratic Central Committee did not consider Douglas “a ‘Western Man’” and would prefer “a man from the West ‘with western views.’” *William O. Douglas Family*, SEATTLE DAILY TIMES, March 21, 1939, at 24.

<sup>24</sup> Walter V. McLaughlin, Jr., *A Man from the West Country*, HARV. L. RECORD, Dec. 12, 1963, at 7.

<sup>25</sup> Lomen’s parents wanted her older brother “to be exposed to life outside of Alaska before starting college at the University of Washington” and sent her along; the family followed later. Chandra, *supra* note 1, at 217.

experience of the three before college, but when she was a child Nome was very remote indeed.<sup>26</sup> She was five years old during the diphtheria outbreak that necessitated a relay of sled dog teams carrying precious antitoxin 674 miles to Nome.<sup>27</sup> A less harrowing memory from Lomen's Nome days was Santa Claus driving through town on a reindeer-drawn sleigh, distributing fruit — a special treat — to the children.<sup>28</sup>

Lomen's family was prominent in Nome. One grandfather, Gudbrand J. Lomen, was mayor and served as district judge for the Second Judicial Division from 1921 to 1932.<sup>29</sup> Watching him inspired Lomen's childhood ambition to become a lawyer, so she, too, "could read to my heart's content without anybody bothering me."<sup>30</sup> Her other grandfather, Thorulf Lehmann, had organized a group of 14 men to join the Alaska Gold Rush in 1899, and stayed on as a merchant and a miner.<sup>31</sup> "Lucile's father, Alfred J. Lomen, was a was a well-known Alaskan entrepreneur who hoped to get rich by selling reindeer meat and clothing items."<sup>32</sup>

<sup>26</sup> See Chandra, *supra* note 1, at 200, for a description of 1920s Nome. When I have time, I might continue my reading with PRESTON JONES, *EMPIRE'S EDGE: AMERICAN SOCIETY IN NOME, ALASKA, 1898-1934* (2007).

<sup>27</sup> *Iditarod Trail Sled Dog Race*, WIKIPEDIA (last edited Dec. 29, 2019), [https://en.wikipedia.org/wiki/Iditarod\\_Trail\\_Sled\\_Dog\\_Race](https://en.wikipedia.org/wiki/Iditarod_Trail_Sled_Dog_Race) [<https://perma.cc/ZNQ5-UC35>]. For more on this gripping tale, see GAY SALISBURY & LANEY SALISBURY, *THE CRUELEST MILES: THE HEROIC STORY OF DOGS AND MEN IN A RACE AGAINST AN EPIDEMIC* (2003). I read this book when it first came out and don't have it handy as I write. But Google Books enabled me to search for "Lomen." One of the town leaders was "G.J. Lomen, the former mayor of Nome and now a judge, whose family was one of the most prominent in town." *Id.* at 47. That was Lucile's grandfather. Someone on the outside, trying to get the federal government to help, was "Carl Lomen, son of the former Nome mayor, who was in [New York] on business." *Id.* 182. That was Lucile's uncle.

<sup>28</sup> *Junior Assistants Named for Queen Anne Annual*, SEATTLE DAILY TIMES, Dec. 26, 1936, at 10.

<sup>29</sup> Chandra, *supra* note 1, at 200, 217. "The district courts of both Alaska and Hawaii [were] 'legislative' courts, created by Congress in the exercise of its territorial power, as contrasted with the 'constitutional' district courts created under Article III of the Constitution." Marcos E. Kinevan, Comment, *Alaska and Hawaii: From Territoriality to Statehood*, 38 CALIF. L. REV. 273, 285 (1950). All of Alaska was divided into just four divisions, each covering a vast area. In 1920 the Second Judicial Division's population was 10,890. U.S. BUR. OF THE CENSUS, DEP'T OF COMMERCE, *POPULATION OF STATES AND COUNTIES OF THE UNITED STATES: 1790-1900*, at 12 (1996), <https://www.census.gov/population/www/censusdata/PopulationofStatesandCountiesoftheUnitedStates1790-1990.pdf> [<https://perma.cc/E7MC-JY9T>].

<sup>30</sup> *Id.* at 200.

<sup>31</sup> *Gold Rusher's Estate Tops \$125,000*, SEATTLE TIMES, Aug. 17, 1965, at 78. Lucile inherited \$25,000.

<sup>32</sup> Chandra, *supra* note 1, at 200. Lomen's reindeer operations are discussed at length in 36 Survey of the Conditions of the Indians in the United States: Hearings Before a Subcomm. of the S. Comm. on Indian Affairs at 20,087-260 (1939). Reindeer were big business for the Lomens, and their operations were not without critics. An official from the Bureau of Indian Affairs wrote:

It is impossible to read the testimony of the Lomens themselves without coming to the conclusion that here is a group that were determined by hook or by crook to get possession of native deer; that defied and denounced government representatives engaged in protecting the interests of

The family was also well-off after its move to Seattle. Newspapers used to publish home addresses much more often than they do now, so it's easy to look up photos and descriptions of the houses on Zillow.<sup>33</sup> The first was built in 1916 and has four bedrooms and two bathrooms. The second, built in 1910, has five bedrooms, six bathrooms, and views of the harbor and the city.

Amid legal elites — Harvard and Yale grads in Washington, DC — Douglas, Countryman, and Lomen must have seemed to come from very far away. When another clerk heard Lomen was from Seattle, he said, "Oh, you'll like it here. We have another westerner. Kabot's from Wisconsin."<sup>34</sup> A generation later, when I went East for law school in 1979, I told people I met that I'd gone to the University of Washington, only to have some of them ask if I meant "the one in St. Louis" (Washington University) or "the one in DC" (George Washington University). Perhaps it was parochial of me not to consider the possible confusion with those other universities, but I had thought that a large state university that had sent football teams to the Rose Bowl would be recognized even in Massachusetts.

Although Douglas and Lomen never discussed Whitman College,<sup>35</sup> they did have that small liberal-arts college in common. And it was small: Douglas had 40 students in his senior class,<sup>36</sup> Lomen had 88 in hers.<sup>37</sup> Whitman is still small, but not *that* small: it now has about 1,450 students in all.<sup>38</sup> When I was in law school, I knew a couple of students (a law student and a graduate student in linguistics, both from Montana) who participated in a Whitman alumni group at Harvard: thousands of miles from Walla Walla, Whitman could bring them together.

natives; that would go to almost any lengths to achieve their particular brand of business success. It is important to be fair to this group, but it is necessary to recognize it for what it is, an aggressive, domineering, cynical outfit, made bitter by the partial thwarting of many of its grandiose schemes.

*Id.* At 20,087 (Confidential Report by Dr. W. Carson Ryan, Jr., Director Division of Education, Bureau of Indian Affairs, Department of the Interior). Lucile's uncle replied: "This report of Dr. Ryan's is a libel on the work of his own Department, on the integrity of his former superiors in the Department and is a libel on the Lomen family." *Id.* At 20,104 (Statement of Carl J. Lomen).

<sup>33</sup> *Scholarly*, SEATTLE SUNDAY TIMES, June 27, 1937, at 9 (listing Seattle students awarded scholarships to Whitman College) (Lomen's address listed as 2418 Nob Hill Ave.); *Lucile Lomen Named Clerk for Douglas*, SEATTLE SUNDAY TIMES, Feb. 13, 1944, at 25 (123 Prospect St.). Visit <https://www.zillow.com/> and search for the addresses.

<sup>34</sup> Danelski, *supra* note 1, at 47.

<sup>35</sup> Chandra, *supra* note 1, at 209.

<sup>36</sup> CATALOGUE OF WHITMAN COLLEGE 1920, at 115 (1921), <https://arminda.whitman.edu/object/arminda30082> [<https://perma.cc/2DBT-ZDRV>].

<sup>37</sup> WHITMAN 1941, *supra* note 16, at 130.

<sup>38</sup> *About Whitman College*, WHITMAN COLLEGE, <https://www.whitman.edu/about> (last visited Jan. 28, 2020) [<https://perma.cc/K4CK-YQSZ>].

World War II is central to this story. Lomen was only in the running to clerk because so many men had gone to war. If it weren't for the war, Countryman probably would have been practicing law, rather than writing from the Army Air Forces Technical School. But these basic facts are only part of what it must have meant to be in Lomen's and Countryman's generation. Less than five miles from Lomen's home the Army's Fort Lawton was a Port of Embarkation for the Pacific Theater and Alaska, with hundreds of thousands of troops passing through in both directions; it also held German POWs and Italian prisoners.<sup>39</sup> Sand Point Naval Air Station was two-and-a-half miles from the UW, with a daily population of 8,000 civilian and military personnel.<sup>40</sup> By the time Lomen finished law school, Boeing employed nearly 50,000 people building warplanes.<sup>41</sup> Seattle and nearby cities had naval supply depots,<sup>42</sup> and shipyards were turning out ships for the war effort.<sup>43</sup> The Lomens would have seen battleships from their home.

Countryman and Lomen were both in law school on February 19, 1942, when President Roosevelt issued Executive Order 9066, authorizing military authorities to exclude persons from prescribed military areas — the order that led to Japanese Americans and Japanese citizens being sent to relocation camps.<sup>44</sup> Before they were removed altogether, Japanese-Americans had to observe a curfew. One UW student, Gordon Hirabayashi, obeyed it for a while, packing up his books and rushing from the library to get to his dorm. One night he decided to stay, thinking that he had just as much right to continue studying in the library as the other students.<sup>45</sup> That library was next to the law school. Hirabayashi was never arrested for the curfew violation, but when he refused to register for removal, the curfew violation was added

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<sup>39</sup> Duane Colt Denfeld, *Fort Lawton to Discovery Park*, HISTORYLINK.ORG (Sept. 23, 2008), <https://www.historylink.org/File/8772> [<https://perma.cc/M64U-MTPS>]. For an account of a riot and mass court-martial of African Americans that took place at Fort Lawton just after Lomen left Seattle, see JACK HAMANN, *ON AMERICAN SOIL: HOW JUSTICE BECAME A CASUALTY OF WORLD WAR II* (2005).

<sup>40</sup> David Wilma, *Sand Point Naval Air Station: 1920-1970*, HISTORYLINK.ORG (Apr. 3, 2000), <https://www.historylink.org/File/2249> [<https://perma.cc/8AQ6-AJGY>].

<sup>41</sup> Jim Kershner, *Boeing and Washington's Aerospace Industry, 1934-2015* (Sep. 8, 2015), HISTORYLINK.ORG, <https://www.historylink.org/File/11111> [<https://perma.cc/334B-LJDJ>].

<sup>42</sup> Duane Colt Denfeld, *Washington Naval Depots (World War II)*, HISTORYLINK.ORG, <https://www.historylink.org/File/10175> [<https://perma.cc/SB3K-9X89>].

<sup>43</sup> James R. Warren, *World War II Home Front on Puget Sound*, HISTORYLINK.ORG (Sept. 13, 1999), <https://www.historylink.org/File/1664> [<https://perma.cc/P4BL-F73M>].

<sup>44</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

<sup>45</sup> GORDON HIRABAYASHI, JAMES A. HIRABAYASHI & LANE RYO HIRABAYASHI, *A PRINCIPLED STAND: THE STORY OF HIRABAYASHI V. UNITED STATES* 57 (2013). As a librarian, I love it that Hirabayashi's defiance of the curfew was to stay later studying in the library.

as a second count in his indictment.<sup>46</sup> His case went to the Supreme Court when Countryman was clerking.<sup>47</sup> Countryman “had been deeply troubled by the problems faced in the spring of 1942 by his Japanese-American classmates in law school,” but was unable to persuade Douglas to rule for Hirabayashi.<sup>48</sup> Douglas later regretted joining the majority in the case.<sup>49</sup> Two Terms later, Lomen worked on *Ex Parte Endo*,<sup>50</sup> which led to the closing of the internment camps. It wasn’t just Gordon Hirabayashi: 440 students had their UW educations interrupted by their incarceration in camps.<sup>51</sup>

I’d like to close by appreciating the vastly expanded resources available to researchers because of digitization. Douglas, Countryman, and Lomen did all their research in print sources, taking notes by hand. I have been able to search the *Seattle Times* (a NewsBank database licensed by the University of Washington Libraries) and old law journals (via HeinOnline, licensed by the University of Washington Gallagher Law Library). Thanks to libraries’ digital collections, I can look at Whitman College catalogs<sup>52</sup> from when Douglas and Lomen were students, and I’ve seen a University of Washington yearbook photo of the law review board when Lomen was a student.<sup>53</sup> The non-profit HistoryLink.org has built up an amazing online encyclopedia of Washington State history. Ancestry.com, designed for genealogists, can be a boon for researching individuals who are *not* members of your own family, as well as those who are. Through the University Libraries subscription, I looked at census records for the Countryman family and the Lomen family, among other things. My library has a full set of *Martindale-Hubbell Law Directory* (and its predecessors, *Martindale’s American Law Directory* and *Hubbell’s Legal Directory*) in print, but I found it very convenient to look at the digitized versions on HeinOnline (covering up to 1963). (Have you ever hauled around several of the print volumes?) I’ve looked at a wide variety of materials from my desk and my couch at home. Dozens of documents are saved in a OneDrive

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<sup>46</sup> *Id.* at 57, 69

<sup>47</sup> *Hirabayashi v. United States*, 320 U.S. 81 (1943).

<sup>48</sup> MURPHY, *supra* note 23, at 206.

<sup>49</sup> *Id.* at 234.

<sup>50</sup> *Ex Parte Endo*, 323 U.S. 283 (1944) (opinion of the Court by Douglas, J.); Chandra, *supra* note 1, at 207.

<sup>51</sup> Bob Roseth, *World War II Era Japanese American Students Get Honorary Degrees*, UW NEWS (Feb. 28, 2008) [<https://perma.cc/5JJB-HBLS>]. Judson Falknor, for whom Lomen worked as a secretary, chaired a board that conducted hearings for interned “enemy aliens” to recommend whether they should be released. *Second Alien Board Is Named*, SEATTLE TIMES, March 20, 1942, at 10; *Alien-Hearing Board Returns*, SEATTLE TIMES, March 17, 1943, at 5.

<sup>52</sup> <https://arminda.whitman.edu/collections/whitman-college-catalog>.

<sup>53</sup> UNIVERSITY OF WASHINGTON, TYEE 150 (1943), <https://digitalcollections.lib.washington.edu/digital/collection/uwdocs/id/34247/rec/42>

folder that I have accessed from different PCs at work (for I've worked on this essay while on duty at the Information Desk), my home laptop, and my iPad. If it hadn't been so incredibly easy to search for "lomen" in newspapers, I would never have found the story about Lomen's grandfather being a prospector in the Alaskan Gold Rush — or much of the other material I've cited.

Powerful as online searching is, it usually won't provide the results you need when sources have spelling errors. I discovered one scholar who misspelled both of Lucile Lomen's names: Lucille Loman.<sup>54</sup> Even "the Notorious RBG" put an extra "l" in "Lucile."<sup>55</sup> Despite spelling variants, Lomen's name is a good search term. In contrast, "countryman" appears as an ordinary noun and "douglas" is a common first name, so one gets many more irrelevant hits.

Personally, I've loved this project. Although 1944 is "history," years before I was born, I still feel a connection. My parents were both born in 1920, the same year as Lucile Lomen, and I grew up hearing their stories. They were also from the West, my mother from Butte, Montana, and my father from Tacoma, Washington. My mother was working in the Fort Lawton PX while Lomen was in law school. My father enlisted in the Army Air Forces a couple of years before Countryman, but they both ended up stationed in Italy by war's end. When I looked at digital images of newspaper pages, I recognized many of the businesses in the advertisements. And of course I work at the University of Washington School of Law. I regularly walk my dog at the former Sand Point Naval Air Station, now Magnuson Park. (Senator Warren G. Magnuson, too, was a graduate of UW Law, by the way.) I never met Douglas, Countryman, or Lomen, but I did hear Gordon Hirabayashi speak at a symposium on campus. But because many of today's law students are about 40 years younger than I am, their connection to World War II is much more attenuated. Have they heard stories from their grandparents or great-grandparents? Women no longer have to wait for the men to leave in order to have a shot at good jobs — but it's worth remembering that they once did.



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<sup>54</sup> Urofsky, *supra* note 4, at 3 n.10.

<sup>55</sup> Ginsburg, *supra* note 7, at 2; Ruth Bader Ginsburg, *The Supreme Court: A Place for Women*, 32 Sw. U. L. Rev. 189, 193 (2003).

BOOKS

FIVE RECOMMENDATIONS



*Femi Cadmus<sup>†</sup> & Casandra Laskowski<sup>\*</sup>*

Chanel Miller

*Know My Name: A Memoir*  
(Viking 2019)

*It is better that ten guilty persons escape than that one innocent suffer.*

*Know My Name* casts a spotlight on the dark bargain required to provide defendants their presumption of innocence — that innocents do suffer, often invisibly. From the first moments of the book, Chanel Miller demands that we see her. She takes the reader with her as she pieces together what happened the night Brock Turner sexually assaulted her, and processes what that means for her future.

The assault was a whirlwind that took with it her former life. There was no careful calculation of her accomplishments up and until that terrible moment or of the effect it would have on her moving life forward. Brock Turner’s sentence, in contrast, was carefully calculated, considerate of his past, and concerned for the impact on his future — making “the incident,” as the judge called it, seem minor in comparison.

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<sup>†</sup> Archibald C. and Frances Fulk Ruffy Research Professor of Law, Associate Dean for Information Services and Technology, and Director of the J. Michael Goodson Library at Duke Law School. Copyright 2020 Femi Cadmus and Casandra Laskowski.

<sup>\*</sup> Technology and Research Services Librarian, Lecturing Fellow at Duke Law School.

In telling her story, Chanel proves that it was not some minor blip in someone's otherwise flawless resume, but also, that she is more than that moment. She calls on the reader to examine our broken systems. The story provides a glimpse into a survivor's journey to process trauma, get justice, demand accountability, and move forward. By naming herself, she is healing and reclaiming her power. *Know Your Name* is a beautifully written, impactful memoir that should be required reading for anyone working in our legal and education systems.

Martha Minow

*When Should Law Forgive?*

(W.W. Norton & Company, 2019)

Lamenting an "unforgiving age" and "an age of resentment," Minnow thoughtfully analyzes the complexities of forgiveness and law in our current context. After all, the aggrieved come to the law with the expectation that justice will be exacted on wrongdoers. When and how can forgiveness be applied without jeopardizing the rule of law? She explores this quandary in various contexts, including debt forgiveness, amnesties and pardons, and forgiving youth. In the latter, using the child soldier combatant context, Minnow analyzes culpability and accountability for atrocities committed by children, who while not always entirely innocent, are often forced into criminal behavior. She discusses alternatives to punishment, including restorative justice tools which "offer practical avenues for breaking cycles of violence and trauma." In her final reflections, she emphasizes that law and forgiveness is not a refusal to acknowledge wrongdoing, "rather it is to widen the lens . . . to work for new choices that can be enabled by wiping the slate clean."

Neil M. Gorsuch with Jane Nitze and David Feder

*A Republic, If You Can Keep It*

(Crown Forum, 2019)

Justice Gorsuch's *A Republic, If You Can Keep It* draws inspiration from events surrounding his Supreme Court confirmation process during which he realizes that much of the public perceives judges as enforcers of their own personal preferences and policy leanings. He laments that "our civic understanding . . . about the Constitution and the proper role of the judge under it may be slipping away." The book opens with deep personal reflections on events leading to his nomination to the Supreme Court. Throughout the book, he frequently draws the curtains open so that readers can experience special moments in his life's journey, from his childhood years, Supreme

Court clerkship under Justice Byron White, and judging on the U.S. Court of Appeals for the 10th Circuit, to his final ascent to the nation's highest court. The central focus of the book is on originalism in the application of the Constitution and textualism in the interpretation of statutes. He examines the separation of powers triangle, the separation of legislative and judicial powers, and the executive-legislative and executive-judicial divides. Gorsuch's clear writing, interspersed with illustrative cases and speeches makes for a good primer on originalism and textualism, while serving as a useful overview for those with deep knowledge of the Constitution.

Haben Girma

*Haben: The Deafblind Woman*

*Who Conquered Harvard Law*

(Twelve, 2019)

Haben Girma's inspirational memoir vividly captures the experiences of the deaf blind in a sighted hearing society. The reader cannot but come to a fresh appreciation and deeper understanding of the challenges faced by those with disabilities. Haben in a stirring fashion, describes her multi-cultural experiences from childhood, adolescence, life in college, and her groundbreaking acceptance into Harvard Law as the very first deaf blind student. There are significant milestones in her journey, including her education at the Louisiana Center for the Blind, where she sharpens her blindness skills and acquires more independence. This is where she also learns to appreciate a positive blindness philosophy, rejecting the notion of inferiority in the disabled within a dominant ableism culture. In her words "with the right tools and training, blind people can compete as equals with sighted peers." Her future foray into the law and advocacy for the disabled are fomented in experiences in college, such as the time she canvasses to make a menu available for the visually impaired. By the time she graduates from law school, Haben has been exceptionally prepared for her work in disability rights advocacy, particularly with providing access to digital reading services for blind students.

Mike Chase

*How to Become a Federal Criminal:*

*An Illustrated Handbook for the Aspiring Offender*

(Atria Books 2019)

*How to Become a Federal Criminal* is a satirical guide to violating some of the odder federal crimes. Expanding on his @CrimeADay Twitter account, Mike Chase adds a bit of history and imagery to the snark. With short sec-

tions and an entertaining style, this is an easy read you pick up before bed or binge while relaxing on the couch.

Teachers will find this book to be a great source for ideas, as the author manages to make lawmaking interesting. Use the ham-and-cheese sandwich example to highlight the impact of regulations. Teach legislative history with the Woodsy Owl Act. Or provide a fun historical anecdote with bootlegger smoke screens.

From bartering flamingos to carrying too many nickels over the border, one might think, "There is no way we would make such odd laws today!" That is until you reach the section on margarine, which had to be pink or served in triangular pads to avoid confusing it with butter. With the FDA considering regulating nut milk labeling, you realize that Mike will have no shortage of material in the years to come.





Earl Warren (left) and Sherman Minton.

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## MY DEAR CHIEF —

*Lyonette Louis-Jacques*<sup>†</sup>

The Library of Congress has archived correspondence between Supreme Court Justices related to football (and baseball) in the boxed papers of Chief Justice Earl Warren.<sup>1</sup> They are mostly on Supreme Court letterhead stationery and addressed to “My dear Chief” or “Dear Chief.” Of particular interest are the letters from Justice Sherman A. Minton (aka “Shay”) to the Chief Justice because they reflect his sometimes sad post-retirement life and how he continued to bond with Warren through their common love of sports.

Minton wrote sports-related letters to Warren from 1955 to 1960.<sup>2</sup> All

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<sup>†</sup> Foreign and International Law Librarian and Lecturer in Law, the University of Chicago Law School. Copyright 2020 Lyonette Louis-Jacques.

<sup>1</sup> Papers of Earl Warren, 1864-1974 (hereafter “Warren Papers”).

<sup>2</sup> Warren Papers, Box 357. The first one, dated Sept. 6, 1955, reads as follows:

My dear Chief —

I was delighted to get your letter. I had the feeling you were “kidding” me a bit about my appearance with Harry. I did meet him at the aeroport when he flew into my home community

from “N.A., Ind.” (New Albany, Indiana). He wrote most of the letters after he had left the court (he resigned on October 15, 1956 due to ill health — he’d been diagnosed with pernicious anemia almost ten years earlier in 1943). Several of the letters were about arranging to see football and baseball games with their wives. Or commenting on sports teams — local and national — the Court, politics, and sundry other matters.

This is an excerpt from a typical letter, handwritten as they all were, and dated November 21, 1956:

My dear Chief —

Gertrude & I are planning to join you all for the Army Navy Game. We plan to reach Washington on Nov. 30th. I will call you when I get in.

I have been very busy doing nothing. It is surprising when you have nothing you must do how much time you can spend just piddling around. I often find myself wondering what the Court is doing at the Moment. I do miss you all more than I can tell you . . .

. . . Looking forward to seeing you soon & with our affectionate good wishes to you & Mrs Warren,

Sincerely yours,  
Shay.

This letter is a good example of the content of the typical correspondence between Minton and Warren.<sup>3</sup> Minton is usually accepting an invitation to an Army-Navy game or mentioning a football or baseball game he saw on “T.V.” or attended. Sometimes he bemoans how not-great Indiana football

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& rode to French Lick with him but I turned right around & came back home. I did not attend the political meeting. I received one nasty letter from some guy in New Jersey about it.

I breathed easier when I heard on the T.V. you were safely back in Calif. I know you must have had a great trip.

We haven’t been out of the old home town. I have done nothing but loaf & visit with my old Cronies. Not very exciting but relaxing. It hasn’t been as hot here as Calif.!

I received a package of Cert Memos a foot high. I have been too lazy to tackle them. If all the Court were as tough on Certs as I am I don’t think we could discourage the lawyers from filing them.

I got your card from Stuttgart. Thanks for thinking of us land bound Hoosiers.

I know you are not interested but I run into a lot of sentiment for you as President.

We are planning on seeing one Indiana football game Sept 24th – then we will push off for Washington.

Mrs Minton joins me in affectionate good wishes to Mrs Warren –

Sincerely  
Shay

<sup>3</sup> There are only a few typewritten letters from Warren to Minton in the “Football” file, and a couple of notes that Warren had called Minton.

teams were.<sup>4</sup> Or remarks on a Major Leaguer getting to be MVP or an NFL player retiring.<sup>5</sup>

And he is mostly “very busy doing nothing.” He watches television a lot.<sup>6</sup> He listens to the radio. He seems to have withdrawn from politics after leaving the Supreme Court.<sup>7</sup> And he seems to stay mostly homebound, not leaving New Albany, Indiana too often. He does tell Warren of plans to travel from time to time.

Minton seldom comments on the activities of the Court, but in one letter, he pokes fun at Justice Tom Clark for mimicking Justice Felix Frankfurter to the point of using his exact phrasing in a case.<sup>8</sup> He seems to find the work of the Court boring, but is always looking forward to seeing Warren. He misses the social aspects of being on the Court. And is always appreciative of Warren continuing to correspond with him after his retirement, and as his health got worse.<sup>9</sup>

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<sup>4</sup> In a letter to Warren dated November 12, 1957, Minton writes that he’s going to the November 27th Army-Navy Game and that “I haven’t seen any games except Indiana and they hardly qualify as games — what a bunch of misfits they are . . . .”

<sup>5</sup> Letter from Sherman Minton to Earl Warren, Feb. 17, 1960: “I see in this morning’s paper Eddie LeBaron has hung up #14 — Great little guy — I hate to see him go.”

<sup>6</sup> Letter from Sherman Minton to Earl Warren, Dec. 31, 1956:

My dear Chief —

I got the biggest kick out of seeing you on T.V. at the East-West game in Frisco. Mrs Minton was in the rest room and came running when I called, but your response was all too short.

You looked like you had a fine day. I would have loved being with you!

I have the next best thing a big new Zenith T.V. that gives me the finest picture possible. Then that . . . . “Space Commander” that turns it off and on & changes stations from any position in the room by pressing a button is just like magic. Yesterday I watched the Giants clobber the Bears & saw plays ahead of the announcer & some he didn’t see.

I am going to Texas after the first of the year for a short visit. The next big project is a trip to Europe beginning the last of April & ending the last of June. After that I think I will stay home with the “Refugees”.

I will be looking for you on the T.V. at the inauguration. I will see more of it than you will but it will have that “left out” feeling as I have attended for the past twenty years.

I know you had a grand time on the Coast. I will be looking for you at the Rose Bowl too—

Mrs Minton joins me in affectionate good wishes to Mrs Warren and you for the New Year

Sincerely

Shay

<sup>7</sup> See, Letter, Sept. 6, 1955, *supra* note 2; Letter from Sherman Minton to Earl Warren, Feb. 17, 1960: “From here politics looks a bit drab. As far as the Democrats are concerned no prospective candidate has got off the ground. As for Nixon he may have got off too soon — I think I will be more interested in spring training than the presidential primaries.”

<sup>8</sup> *Supra*, Letter, Feb. 17, 1960: “I read with great interest the cases Tom [C. Clark] wrote as an aftermath of Covert #2 that John [M. Harlan II] wrote after he regurgitated on Covert #1. I was amused as Tom seemed to be rubbing Covert #2 into Felix [Frankfurter] & John even to the extent of using some of Felix’ pet phrases “too episodic, etc.” [Reid v. Covert, 354 U.S. 1 (1956, 1957)].

<sup>9</sup> Letter from Sherman Minton to Earl Warren, Nov. 9, 1959:

The letters reflect how a life on the Court means socializing with other Justices and their wives. The invitations to sporting events are always for the couples and the RSVPs are from the Justices and their spouses too.

In her 1982 article on the epistolary novel, Françoise Meltzer states that, while correspondence between the actors provides an immediacy and intimacy with the reader, the novel of letters needs a narrator to direct the reader and help the reader understand the totality of what is going on in the work. The letter-novel genre anticipates a reader. And containment — everything is explained, contextualized within the framework of the letters.<sup>10</sup>

Unlike the epistolary novel, the Minton-Warren letters, while written on U.S. Supreme Court stationery, which would imply they were meant for public viewing, were private, personal notes between two friends and former colleagues. There is no author to fill in the information left out that only Minton and Warren know. There is no presumed outside reader such as a book editor. All the information needed to understand the contexts and meanings of the letters is not provided in these letters as you would have in an epistolary novel. One cannot be certain of the type of relationship and bond Minton and Warren had based on the letters alone.

However, one can interpret the text of the letters. There is a deference to Warren in Minton's letters that seems more than the relationship of an Associate Justice to a Chief Justice. Minton is retired. Why does he still refer to Warren as "My dear Chief" in his letters? Yet the "My dear" implies a deeper bond than a colleague or an acquaintance. Minton, even though he was on the Court a few years with Warren as a colleague, still values the friendship they have, and looks up to him it seems. Alas, there is no author to fill in the blanks to let us know why Minton feels such a strong bond.

There is no author or narrator to let us know why the Justices are sending each other letter invites when they could have called each other. Was it the norm back then? Were outings to Army-Navy games such formal social events that they required invitations on official Supreme Court letterhead?

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My dear Chief —

Your calls to Gertrude [Minton's wife] and I & your letter in your own hand [Warren's letters are usually typed while Minton's are always handwritten] comforted me as I lay in that hospital bed — you will never know how much I appreciate your thoughtfulness. It was wonderful and so like you to remember me.

Sorry I can't write much as I am just home from the hospital but I did want you to know how very much Gertrude and I appreciated your thoughtfulness...I have been able to watch the games on T.V.

Letter from Sherman Minton to Earl Warren, Dec. 23, 1959: "We will be looking for you on T.V. at the Rose Bowl & Shrine games."

<sup>10</sup> Françoise Meltzer, "Laclos' Purloined Letters," 8 *Critical Inquiry* 515, 517 (1982).

And, who won the game?<sup>11</sup> What did Mrs. Minton and Mrs. Warren wear to the game and at any parties after? And were they friends?

There is very little written about Minton, while there are many works on Warren and his opinions, including a recently-published book by University of Chicago constitutional law scholars, Geoffrey R. Stone and David A. Strauss called *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court*.<sup>12</sup> In *Hamilton: The Musical*, your legacy depends on “Who lives, who dies, who tells your story?” and very few people are telling Minton’s story.

To inform the textual approach to deciphering the judicial bond between Minton and Warren, one can look at biographical information. Minton took the oath of office on October 12, 1949. He retired from the Supreme Court on October 15, 1956 due to health reasons. He said that, after he left, it would be as if he were “an echo.”<sup>13</sup> By that, he seems to imply that he would not have left a lasting, distinctive legacy, but that he and his judicial decisions would be remembered as undistinguished, repetitive, and similar to others, and the memory thereof would fade away in time. He would leave no impression, as if he were never on the Court. In terms of real-life impact, he would not be cited or his opinions would have negative treatment. He could be correct.

In *Democracy and Equality*, other Justices such as Tom Clark who served on the Supreme Court at the same time as he did have index entries. “Minton” does not show up in the book’s index. An article on Minton’s philosophy of judicial restraint starts unpromisingly with “Sherman Minton was not a great U.S. Supreme Court Justice . . . .” The author mentions that Bernard Schwartz “classified Minton as one of the ten worst Justices” and quotes him as saying that Minton “was below mediocrity as a Justice. His opinions, relatively few for his tenure, are less than third-rate, characterized by their cavalier approach to complicated issues.”<sup>14</sup>

<sup>11</sup> From checking Bob Boyles & Paul Guido, *The USA TODAY College Football Encyclopedia 2008–2009: A Comprehensive Guide*, the Army–Navy game was in Philadelphia and the final score was Navy 27 Army 20. The source also mentioned there were 100,000 spectators, like the NFL “Super Bowl” of the 1950s for football fans.”

<sup>12</sup> (Oxford University Press, 2020) (Inalienable Rights Series).

<sup>13</sup> John J. Agria, in his introduction to his thesis on Minton’s decisions (wherein he analyzes Minton’s records on civil liberties, government’s role in the economy, and judicial review), states that, “[Sherman Minton] will not be recorded in history as an outstanding justice. He, himself, realized this: ‘There will be more interest in who will succeed me than in my passing . . . I’m an echo.’” *A Comparison of the Legislative and Judicial Records of Sherman Minton: A Dissertation Submitted to the Faculty of the Division of the Social Sciences in Candidacy for the Degree of Master of Arts, Department of Political Science* (The University of Chicago, Chicago, Illinois, September, 1961).

<sup>14</sup> Linda C. Gugin, “Sherman Minton: Restraint Against a Tide of Activism,” 62 *Vand. L. Rev* 757, 757 (2009).

But, to be a Supreme Court Justice is to be unique. Very few people have earned the spot. How did Minton come to feel that his judicial legacy was mediocre at best?

Minton was born in 1890 in Georgetown, Indiana (New Albany, Indiana in some biographies).<sup>15</sup> He passed away in 1965 at the age of 74. The son of poor farmers, he managed to work while in school and excel in sports and academics. He was a mischievous kid, and perhaps a bit of a troublemaker. One of his brushes with the law set him on a career as legislator and judge. While in college at Indiana University, he was a varsity athlete, and on the debate team. He earned law degrees from Indiana (LL.B, 1915) and Yale (LL.M. 1916).<sup>16</sup> While in law school, he worked as a librarian!<sup>17</sup> He served in the Army during World War I, reaching the level of Captain, but never saw action.<sup>18</sup> While in the Army, he took courses at the University of Sorbonne, Paris, France, including international law, Roman law, and jurisprudence.

He loved sports — playing varsity football, baseball, basketball,<sup>19</sup> running track, and hunting. He was so good at baseball, he could have made a professional career out of it, but he chose the law.

Once the war was over, he practiced law with law firms in New Albany, Indiana and Miami, Florida from 1922 to 1928.<sup>20</sup> He was involved in Indiana politics while in school, but his first government position was with the Indiana Public Service Commission as an appointee of Democratic Governor, Paul V. McNutt.

He was a U.S. Senator (1935-1941), and in the Senate he got to know Harry S. Truman. As junior Senators, they had seats right next to each other. In the Senate, Minton was an enthusiastic New Dealer, advocating for more government regulation of the economy. Per one of his biographers, Minton thought “government regulation necessary because of the collapse of the economy.”<sup>21</sup>

<sup>15</sup> Most of the biographical information about Minton included herein is comes from Clare Cushman, *The Supreme Court Justices: Illustrated Biographies, 1789-2012* (3d ed. 2013).

<sup>16</sup> Michal R. Belknap, *The Vinson Court: Justices, Rulings, and Legacy* 82-84 (ABC-CLIO, 2004). He was a baseball outfielder, and an end and fullback on Indiana University's 1912 and 1913 football teams. “Indiana Legend Sherman Minton: A Power-Hitting Justice,” Bob Hammel & Kit Klingelhoffer, *Glory of Old IU, Indiana University* 30 (Sports Publishing LLC, 1999).

<sup>17</sup> Minton is listed as “Law Librarian” along with Samuel S. Dargan as “Curator, Law Library” in the “Faculty of the School of Law” section of the *Indiana University Bulletin*, July 1915, Catalog Number 1915, at 267.

<sup>18</sup> He was an Army Captain from 1917-1919. <https://www.trumanlibrary.gov/library/personal-papers/sherman-minton-papers> (visited Feb. 4, 2020).

<sup>19</sup> William Franklin Radcliff, *Sherman Minton: Indiana's Supreme Court Justice* 18 (1996).

<sup>20</sup> <https://www.trumanlibrary.gov/library/personal-papers/sherman-minton-papers> (visited Feb. 4, 2020).

<sup>21</sup> *Agria*, at 15.

Minton loved fighting for policy he believed in in Congress. It seems that he loved being a Senator more than any other job he held — “We were in a revolution, and I was close to the throne.”<sup>22</sup>

Although he was a liberal Democrat in Congress, Minton became a conservative Justice, who tended to side with the government. One biographer writes that, while on the Supreme Court,

Minton was a hard worker who wrote his fair share of majority opinions that covered every category of law . . . Further, he took on the task of writing some of the less glamorous opinions. For example, he wrote every opinion on tax lien cases heard during his time on the Court, sparing his colleagues this less-than-desirable task.<sup>23</sup>

Minton was also a principled Justice. His judicial decisionmaking approach was based on “an almost unbending adherence to precedents, deference to the elected branches of government, and a literal interpretation of the Constitution and statutes.”<sup>24</sup>

Several passages from the Supreme Court in memoriam proceedings for Minton put his life in perspective:

Justice Minton played the game of life as he played the game of football. He hit the line hard. He played according to the rules. He was a sportsman at heart.<sup>25</sup>

And, from a letter he wrote to the U.S. Senate when he was nominated to the Supreme Court:

When I was a young man playing baseball and football I strongly supported my team. I was then a partisan. But later when I refereed games I had no team. I had no side. The same is true when I left the political arena and assumed the bench. Cases must be decided under applicable law and upon the record as to where the right lies. I have never approached a case except to try to find the answer in the law to the question presented on the record before me.<sup>26</sup>

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<sup>22</sup> *Cushman*, Minton chapter.

<sup>23</sup> *Gugin*, at 761. Other writings on Minton’s judicial record include a longer treatment co-written by the same author — Linda C. Gugin — and James E. St. Clair, *Sherman Minton: New Deal Senator, Cold War Justice* (1997); David N. Atkinson, “Opinion Writing on the Supreme Court, 1949-1956: The Views of Justice Sherman Minton,” 49 *Temp. L.Q.* 105 (1975); Harry L. Wallace, “Mr. Justice Minton — Hoosier Justice on the Supreme Court,” 34 *Ind. L.J.* 145 (1959); and *Agria*.

<sup>24</sup> *Gugin*, at 769.

<sup>25</sup> *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Minton*, 384 U.S. v, xxiv (1965).

<sup>26</sup> *Proceedings*, at xxv.

Going outside the letters to fill in the information that the author of an epistolary novel would provide, and flesh out this private correspondence between U.S. Supreme Court Justices, one learns that Minton was a great varsity athlete who participated on winning debate teams and was a fiery young Senator in Congress. He was very learned, and, unlike many Justices, had law degrees, and experience in all branches of government.<sup>27</sup>

One of his former law clerks, from his time serving on the U.S. Court of Appeals for the Seventh Circuit, wrote that Minton wanted to be a “loyal Senator” and retire “to the security of a federal judgeship.”<sup>28</sup>

Per one of his biographers, once Minton reached the Supreme Court, Warren was his closest friend:

Chief Justice Warren interacted socially with Justice Minton more than with any other Justice on the Court at that time. Not long before his retirement, Justice Minton confided to the Chief Justice his growing inability to sleep well, which was perhaps attributable to his worsening health. The two had in common an enthusiasm for politics and athletics which transcended occasional professional disagreement. Even after Justice Minton’s retirement, the Chief Justice frequently urged him to come to Washington to attend football games. These invitations were declined because Justice Minton was confined to a wheelchair. “I’d have pushed his wheelchair,” the Chief Justice once reminisced, “but I think he may have been sensitive about appearing in public in a wheelchair.” To the end of Justice Minton’s life, these two men — so alike in temperament — remained close and good friends.”<sup>29</sup>

Justice Minton’s letters to Chief Justice Warren reflect a man who did not find fulfillment with his work on the Supreme Court, yet who missed the camaraderie of sharing a love of sports with one of the greatest to hold the position of Chief Justice, Earl Warren.

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<sup>27</sup> *Agria*, at 3.

<sup>28</sup> Alan T. Nolan (Minton’s law clerk in Circuit Court, 1947-48), “Defense of Minton,” *New Republic*, CXXI (October 10, 1949) 4. Carlisle Barger, “The New Senate Prosecutors,” *Nation’s Business*, XXV (December, 1939), 119, 120. U.S. Congress, Senate, Committee on the Judiciary, Hearing, Nomination of Sherman Minton, 81st Congress, 1st sess., 1949, pp. 21-22.

<sup>29</sup> *Atkinson*, at 111.

U. A. JWS  
Supreme Court of the United States  
Washington, D. C.

Sept 6/55

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief - I was delighted  
to get your letter. I had  
the feeling you were  
"kidding" me a bit about  
my appearance with Harry.  
I did meet him at the  
airport when he flew into  
my home community & rode  
to French lick with him  
but I turned right around  
& come back home. I did

Sherman Minton to Earl Warren, September 6, 1955 (page 1 of 3).

not attend the political meeting. I received one nasty letter from some guy in New Jersey about it.

I breathed easier when I heard on the N.V. you were safely back in Calif. I know you must have had a great trip.

We haven't been out of the old home town. I have done nothing but loaf & visit with my old Cronies. Not very exciting but relaxing. It would be as hot here as Calif.!

I received a package of Cert Memos, a foot high - I have been too lazy to tackle them. If all the Court were as tough on Certs as I am I don't think we could discourage the lawyers from filing them.

I got your card from Stuttgart.  
Thanks for thinking of us poor  
bearded Hokies.

Sherman Minton to Earl Warren, September 6, 1955 (page 2 of 3).

I know you are not interested but I have run into a lot of sentiment for you for President.

We are planning on seeing one Indiana-foot ball game Sept 24<sup>th</sup> then we will fresh off for Washington.

Mr Minton joins me in affectional good wishes to you + Mrs Warren -

Sincerely  
Hoz

Sherman Minton to Earl Warren, September 6, 1955 (page 3 of 3).

Supreme Court of the United States  
Washington D. C.

CHAMBERS OF  
JUSTICE SHERMAN MINTON

W.A. D.D. Nov 21/56

My dear Chief -  
Leatrice & I are planning  
to join you all for the Army Navy  
Game. We plan to reach Washington  
on Nov 30<sup>th</sup>. I will call you when I  
get in.

I have been very busy doing nothing. It  
is surprising when you have nothing  
you must do how much time you  
can spend just paddling around -  
I often find myself wondering what  
the Court is doing at the moment. I  
do miss you all more than I can  
tell you.

I have only seen one football  
game - *Indiana v. Marquette* and it  
was nothing to write home about. The  
It here seldom has any of fight.

Sherman Minton to Earl Warren, November 21, 1956 (page 1 of 2).



Supreme Court of the United States  
Washington, D. C.

Mr. G. Ind  
Dec 31/56

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief - I got the biggest kick out of seeing you on TV at the East. First time in Fresno. Mrs Minton was in the next room & came running when I called, but your response was all too short.

You looked like you had had a fine day - I would have loved being with you!

Sherman Minton to Earl Warren, December 31, 1956 (page 1 of 3).

I have the most best thing a big new  
Zenith T.V. that gives me the finest  
picture possible. Then that "Space  
Commander" that turns it off & on  
& changes stations from any position  
in the room by pressing a button, is  
just like magic. Yesterday I watched  
the Hearts Clubber & the Beers & how  
they played of the announcer & some  
he didn't see.

I am going to Texas after the  
first of the year for a short visit.  
My next big project is a trip to  
Europe beginning the last of April &  
ending the last of June. After that  
I think I will stay home with the  
"Refugees".

I will be looking for you on  
the T.V. at the inauguration. I will  
be more of it than you will but it  
will have that "left out" feeling as  
I have attended for the past twenty  
years.

Sherman Minton to Earl Warren, December 31, 1956 (page 2 of 3).

I know you had a grand  
time on the Coast. I will be  
looking for you at the Rose  
Bow too—  
Mrs Minton joins me in  
affectionate good wishes to  
Mrs Warren & you for the  
New Year. Sincerely  
Sherman

Sherman Minton to Earl Warren, December 31, 1956 (page 3 of 3).

MINTON-WARREN CORRESPONDENCE, 1955-1960

Supreme Court of the United States  
Washington 13, D. C.

N.A. Ind  
Aug 23/57

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief - Thank you so much  
for your letter and card from Ireland.  
I am sure you had a great time &  
wish I could have been with you  
Tom & plant your wires - I read in  
the paper about your appearance in  
the brown suit & I said to Gertrude  
some one has failed to give the Chief  
the order of the day - we visited  
Rumney Mide this last Spring & saw the  
Memorial that was to be dedicated -  
Gertrude & I are quite fond of  
England & Scotland especially - we  
havent been to Ireland since 1937  
At that time it looked very poor &  
wretched - I agree with your statement  
about the beauty of that Country

Sherman Minton to Earl Warren, August 23, 1957 (page 1 of 2).

as you travel to & from Edinburgh.  
I follow with baited breath the  
race in the big leagues. It looks  
like the Braves but I remember that  
terrible finish last year when they  
faltered in the stretch - with Russell  
hurt the Cards are bleeding & that may  
be about the damper for them - you  
can never count out the old pros of  
Brooklyn. My pick for the most valuable  
player of the National goes to Red  
Shamquist who had just about  
kept the Braves up there. As for the  
Americans our friend Casey and his  
innocent knuckle buster will be ~~able~~ to  
field him through.

We will be looking forward to the  
Navy Game and to seeing you all -  
with all good wishes to you & Mrs  
Warren, I am  
Sincerely yours  
Shog

Sherman Minton to Earl Warren, August 23, 1957 (page 2 of 2).

H.A. Du

Supreme Court of the United States  
Washington, D. C.

Nov 12/57

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief - I am very  
sorry I shall be unable  
to be there for your  
luncheon for the King  
of Morocco. Thanks so  
much for thinking of me -  
I am very disappointed that  
I can't make it but we  
have so many rooms in the  
firm here. We expect to

Sherman Minton to Earl Warren, November 12, 1957 (page 1 of 2).

arrive in Washington Nov 27th  
raring to go to the Army Navy Games -  
I haven't seen any games except at  
Indiana, & they hardly qualify as  
games - what a bunch of misfits  
they are -

Looking forward to seeing you  
soon -

Sincerely  
Shoy

Sherman Minton to Earl Warren, November 12, 1957 (page 2 of 2).

MINTON-WARREN CORRESPONDENCE, 1955-1960



Supreme Court of the United States  
Washington 13, D. C.

11/9/59  
RECEIVED  
NOV 10 1959

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief - your call to Gertie & your letter in your own hand comforted me as I lay in that hospital bed - you will never know how much I appreciate your thoughtfulness - It was wonderful & so like you to remember me -

Sorry I can't write much as I am just home from the hospital but I did want you to know how very much Gertie & I appreciate your thoughtfulness.

I also wanted to get in in time to be a Charter Member of your Terry Museum Club! I have been able to watch the games on TV -

Remember me to your office staff & with affectionate good wishes to you & Mrs. Warren from Gertie & me -

Sincerely your friend  
Sher

Sherman Minton to Earl Warren, November 9, 1959 (page 1 of 1).

*Ma Sub*

Supreme Court of the United States  
Washington 25, D. C.

*12/23/59*

CHAMBERS OF  
JUSTICE SHERMAN MINTON

My dear Chief & Mrs. Warren -  
we will be looking for  
you on TV at the Rose  
Bowl & Shrine games and  
always wishing you & yours  
the best of everything for  
Christmas & the New Year.

Chief Justice & Spectator club  
talked to  
Justice Minton  
on phone - 1/16/60

*Hoag & Gertrude*

Sherman Minton to Earl Warren, December 23, 1959 (page 1 of 1).

Mr. A. And  
2/17/60

My dear Chief - I am pushing  
off on a little trip to Texas -  
I thought I would go down  
& see how Lyndon Johnson is  
moving in his own state. Of  
course he isn't running any better  
there than he is in Indiana  
he is not running at all -  
I wouldn't be surprised if  
he & Dick Russell didn't hear  
all under standing about that  
Civil rights work of Lyndon -  
So my trip to Texas goes

Sherman Minton to Earl Warren, February 17, 1960 (page 1 of 3).

out about what I am coming down for the  
 Gridiron Dinner March 17<sup>th</sup> & stay a few  
 days for a visit with you all -

I never have politics books a bit  
 doubt as for on the Democrats, she  
 concerned his prospective candidates  
 has got off the ground. As for Nixon  
 he may have got off too soon - I  
 think I will be more interested in  
 helping training than the Presidential  
 primaries -

I see by this morning's paper Eddie  
 LaParo has hung up #14 - Great  
 little guy - I hate to see him go - He  
 evidently has tied into some Texas  
 Oil as that is all there is at Midland  
 Texas where he is going -

I read with great interest the cover  
 Tom wrote as an aftermath of  
 Court #2 that John wrote after he  
 reargued on Court #1. I was amused  
 as Tom seemed to be rebuking Court #2 -

Sherman Minton to Earl Warren, February 17, 1960 (page 2 of 3).

into Julie + John even to the  
extent of using some of  
John's pet phrases "too  
episodic etc"  
I am looking forward to  
seeing you March the 17<sup>th</sup>  
With affectionate regards  
Sincerely  
Roy

Sherman Minton to Earl Warren, February 17, 1960 (page 3 of 3).



BOOKS

# FOUR RECOMMENDATIONS



*Jed S. Rakoff<sup>†</sup> & Lev Menand<sup>\*</sup>*

Eric Foner

*The Second Founding: How the Civil War and  
Reconstruction Remade the Constitution*  
(W.W. Norton 2019)

Part of the purpose of recommending exemplary law books of the past year to readers of the *Green Bag* is to bring to their focus books even such erudite readers may not have noticed that nonetheless deserve their attention. But when a book as splendid as Eric Foner's *The Second Founding* appears on the scene, the fact that it has already been so fully noticed and its author has won the Pulitzer Prize does not mean that it can be ignored here.

But in many ways, this brilliant, insightful, careful, well-crafted, and well-written book is also painful to read, for what it demonstrates is how even the great amendments to the Constitution that followed in the wake of the bloody Civil War have never, to this day, realized their full promise. The 13th, 14th, and 15th Amendments were not simply supposed to do away with slavery, but also to guarantee all persons, and most especially persons of color, full due process and equal protection. And it was the federal government, triumphal on the battlefield, that would enforce these rights.

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<sup>†</sup> U.S. District Judge, Southern District of New York. Copyright 2020 Jed S. Rakoff and Lev Menand.

<sup>\*</sup> Academic Fellow and Lecturer in Law, Columbia Law School.

But almost immediately there was backsliding, led, alas, by the U.S. Supreme Court. The so-called *Civil Rights Cases* of 1883 pretty much scuttled Reconstruction, and later cases like *Plessy v. Ferguson* (1896) assured persons of color a second-class citizenship and life of subservience that has still not wholly disappeared. And, as Foner shows, history itself was re-written to justify these racist results. Indeed, as late as the 1940s, public school history textbooks — in the North as well as the South — portrayed Reconstruction as a vengeful imposition on white southerners that had to be eliminated in order to bind up the nation's wounds.

It was only after another traumatic event, World War II, that things began to change. Historians like John Hope Franklin began to set straight the actual record of the transformation of the ideals of Reconstruction into the reality of “Jim Crow” legislation. And the vicious reaction to *Brown v. Board of Education* (1954) exposed for all who cared to look the rampant racism practiced in the United States. Foner is a worthy follower of such ground-breaking historians, for he shows how the clear intent of the post-Civil-War constitutional amendments was betrayed, not least by the Supreme Court. But in his vivid account of the interrelationship between these amendments and the development of U.S. society, Foner also demonstrates how they may still provide the bedrock on which future progress can be built.

Elizabeth Papp Kamali  
*Felony and the Guilty Mind in Medieval England*  
(Cambridge University Press 2019)

To a remarkable extent, Anglo-American law, and especially its criminal law, turns on states of mind. Yes, there must be a wrongful act (the “actus reus”), but punishment is largely reserved for those who acted with a wrongful intent (the “mens rea”). Indeed, just planning a wrongful act can be enough to send one to prison, as in the law of conspiracy, if the wrongful intent is present. And most jurisdictions vary the term of imprisonment depending on whether the wrongful act was committed “willfully” (i.e., purposely or intentionally), “knowingly” (i.e., with knowledge of the likely consequences), “recklessly” (i.e., with conscious disregard of the likely consequences), or simply negligently.

All of this presupposes a view of what goes on in the human mind that Steven Morse of Penn Law School has described as “folk psychology” and that may or may not accord with reality. But as Elizabeth Papp Kamali, an assistant professor at Harvard Law School, demonstrates in this marvelous book, the concept of mens rea, of a guilty mind, has very deep roots in the

development of English law. In particular, after the Catholic Church announced early in the 13th century that it would no longer participate in trials by ordeal (such as throwing the bound accused in a stream to see whether he floated, in which case he was guilty, or sank, in which case he was innocent), the common law might have simply reverted to punishing those who committed bad acts, regardless of their state of mind. But, instead, English judges and juries very quickly developed the requirement that no one could be punished for any felony, that is, any serious crime, unless they acted with a wrongful intent.

One of the many great virtues of Kamali's book is to show that this development was itself an application of moral and cultural values then current, as reflected in the religious writings and popular literature of the time. It may have also reflected a desire for mercy in a period when conviction of a felony mandated the death penalty. For, as Kamali also shows, a substantial number of felony trials in medieval England resulted in acquittal, based on a finding that there was no *mens rea*.

Determining a defendant's state of mind when he allegedly committed a wrongful act remains a principal focus of criminal law today. Often, it is no easy task. But as Kamali convincingly demonstrates, it nonetheless became the heart of criminal law as early as the 13th century, because people then, as now, felt that punishment should be reserved for those who acted with "bad" intentions.

Katharina Pistor  
*The Code of Capital:*  
*How the Law Creates Wealth and Inequality*  
(Princeton University Press 2019)

In much of the world the first day of May is called "May Day," commemorated by socialists as "International Workers' Day" or "Labor Day." In 1958, locked in a Cold War with the communist Soviet Union, President Eisenhower decided to enact a bit of counterprogramming. He proclaimed that in the United States May 1 would be known as "Law Day." Although Eisenhower undoubtedly meant to extoll the virtues of the "rule of law," in her provocative new book, *The Code of Capital*, Katharina Pistor shows how the rule of law may sometimes seem like the rule of capital. This is because, as Pistor puts it, "Capital Rules by Law."

The idea that law and capital are close cousins is not new. Pistor, however, deepens the analysis — showing how law creates and defines various forms of property, allowing certain people to amass wealth and preserve it over time. She identifies four ways in which capital is "coded": by establishing

“priority,” one person’s right to exclude another from using or controlling an asset; “durability,” one person’s ability to extend priority over long periods of time; “universality,” one person’s ability to establish priority against all others; and “convertibility,” the ability to exchange an asset for the state’s money. In four magisterial chapters, Pistor surveys how lawyers code these properties into land, debt, and ideas, and how they use the corporate form to protect capital from other claimants like workers, creditors, and governments. Pistor then takes her analysis global — showing how governments have enabled lawyers to shop for law — to use the corporate form of Ireland, the intellectual property regime of the United States, and the tax rules of Panama.

Because one of her primary audiences is lawyers and law students, Pistor focuses on the ways partners and associates at big firms exacerbate wealth inequality. On her account, much of today’s divergence can be traced to what goes on in their private offices. But, as Pistor notes, lawyers can play this role in large part because of choices made by governments to recognize these legal modules and enforce their terms. As a result, reversing wealth inequality, which Pistor tackles in her final chapter, will surely require more than just discriminating lawyers. It will require lawmakers to change the background enabling statutes, which let lawyers turn the tax code into swiss cheese or starve the public domain of creative works and useful knowledge.

Sarah A. Seo  
*Policing the Open Road:*  
*How Cars Transformed American Freedom*  
(Harvard University Press 2019)

Most of us encounter state authority primarily, if not exclusively, in our cars. True, we sometimes interact with government officials while passing through customs — answering inquiries about where we’ve been and what we are carrying with us. But the number of trips we take in and out of the country sum to a fraction of the number of trips we take along the country’s many streets, boulevards, and highways. Each time we use one of these concrete paths, Sarah Seo teaches us in her absorbing new book, *Policing the Open Road*, we inhabit a hybrid space — we are inside private property but traveling on public land. We want the government to protect us from harm — on the road ordinary negligence can be fatal — but we also expect to be able to go about our business uninterrupted and undisturbed.

Seo explores this tension and its effects on the law over the past hundred years, showing how cars have changed the way we relate to our government and how our government relates to us. In the horse and buggy days, policing

was focused on marginalized groups, and police rarely encountered the “respectable” classes. Law enforcement was local, and communities engaged in self-policing. Seo argues that cars unsettled these pre-modern patterns — allowing people to live, work, and relax in different jurisdictions. “Locality has been annihilated,” she quotes Herbert Hoover as saying, “distance has been folded up into a pocket piece.” With the advent of the auto, the neighborhood, Seo explains (this time quoting Roscoe Pound, the longtime dean of Harvard Law School), ceased to be a “social and economic unit” and “neighborhood opinion” no longer served as an effective social control mechanism. Cars also gave millions of Americans ways to kill and maim each other. The result was an institutionalized modern police force, which developed to meet the challenge of “automobility.”

Seo’s tale is essential reading not just for those interested in the fourth amendment and police reform, one of the most pressing issues in the country today. It also contains lessons for policy makers focused on tackling other disruptive technologies. Twitter, Google, and Facebook, for example, resemble in many respects Ford and General Motors one hundred years ago. Social media, like cars, are unsettling existing social patterns.

It took the police and the courts decades to adjust to mass driving, and we are still struggling with the consequences of expanded police forces and enlarged police discretion. If Seo’s work is any guide, we can expect it to take just as long to come to terms with the traffic on our new information highways.



# INSIDE BASEBALL

## JUSTICE BLACKMUN AND THE SUMMER OF '72

Savanna L. Nolan<sup>†</sup>

Now that I live in northern Virginia, I drive past the exit for Nationals Park (home of the 2019 World Series Champions, the Washington Nationals) every morning. Most mornings I hardly notice, especially since traffic gets a little dicey right there. Shortly after St. Patrick's Day last year, the morning commute was different. It was the first nice Spring day we'd had, my drive into the city was finally during daylight hours, and as I crossed the bridge into the city the sign for Nats Park whispered, "Baseball starts next week." It was automatically a good day.

Did Justice Harry Blackmun have a similar moment of baseball-related peace on his commute into the city from Arlington one March morning 47 years before mine?<sup>1</sup> If so, he wasn't pondering taking a day off to go to the home opener like I was. Even if his busy schedule would have allowed for such a luxury, Robert Short had just broken the hearts of Washington Senators fans by moving the team to Texas for the 1972 season, thus creating the Texas Rangers.<sup>2</sup> Instead, on March 20, 1972 Blackmun would have to make do with having baseball be a part of his work day, as the Court would be hearing the oral arguments in *Flood v. Kuhn* and ultimately determining whether refusing to allow players to negotiate their own employment contracts violated antitrust laws.<sup>3</sup>

The subsequent opinion is one of Justice Blackmun's more notorious.<sup>4</sup>

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<sup>†</sup> Reference Librarian and Adjunct Professor of Law, Georgetown University Law Center. This piece is dedicated to Mark, Kathleen, and Matthew Nolan. How 'bout those Braves? Copyright 2020 Savanna L. Nolan.

<sup>1</sup> It seems the Justice and his wife lived in Arlington, Virginia from the summer of 1970 up until the Justice's death in 1999. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 55 (2005); Ben A. Franklin, *Shot Fired Through Window of Blackmun Home*, N.Y. TIMES, Mar. 5, 1985, <https://www.nytimes.com/1985/03/05/nyregion/shot-fired-through-window-of-blackmun-home.html>; Joan Biskupic, *Retired Justice Blackmun Dies at 90*, WASH. POST (Mar. 4, 1999), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/blackmun030499.htm>.

<sup>2</sup> Rocco Zappone, *Safe at Home: As Nationals Park is Set to Open, One Fan Delivers a Love Letter to RFK Stadium*, WASH. POST, Mar. 23, 2008, Magazine, at W08.

<sup>3</sup> *Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>4</sup> Eldon L. Ham, *Aside the Aside: The True Precedent of Baseball in Law*, 13 MARQ. SPORTS L. REV. 213, 216 (Refers to Part I of *Flood v. Kuhn* as "over 700 astonishing words of editorial ranting" and a "self-indulgent baseball diatribe."); Roger Abrams, *Blackmun's List*, 6 VA. SPORTS & ENTERT. L.J. 181, 182 (2007) ("Many have criticized Justice Blackmun's majority opinion as stare decisis run amok.

Part I of the opinion is particularly unusual and traces from the dawn of baseball in 1846 Hoboken, through a list of 88 heroes of the sport (not including those from recent years, footnote 3 caveats), and ends with a footnote detour lauding the popularity of Ernest L. Thayer's poem *Casey at the Bat*.<sup>5</sup> Even the more serious elements of the opinion have a touch of ridiculousness. Blackmun walks the reader through the relevant precedent, primarily focusing on the antitrust exemptions left open specifically for baseball in *Federal Baseball*<sup>6</sup> and *Toolson*<sup>7</sup> and closed off to football, basketball, boxing, and presumably hockey and golf through quirks of deference to precedent.<sup>8</sup> After that recitation of legal history, Blackmun's legal analysis rests on the general principle that "more than 50 bills" concerning antitrust legislation and baseball had been introduced in Congress since *Toolson*, and those that "passed one house or the other . . . would have expanded, not restricted, the reserve systems exemptions to other professional league sports."<sup>9</sup> In his closing sentence, Blackmun drops the proverbial mic with "what the Court said in *Federal Baseball* in 1922 and what it said in *Toolson* in 1953, we say again here in 1972: the remedy, if any is indicated, is for congressional, and not judicial, action."<sup>10</sup> Blackmun out.

*Flood v. Kuhn* is a thoroughly odd, playful opinion. However, as I've researched Blackmun and his life in 1971 and 1972, I've begun to think the silliness of this opinion may have been him trying to grab the specific joy of a Saturday afternoon in a baseball park with a cold beer wherever he could.<sup>11</sup>

Blackmun, like many in the legal profession,<sup>12</sup> was a notorious baseball fan.<sup>13</sup> In his early days at the Supreme Court, he and fellow mid-westerner

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Admittedly, it was an unusual piece of judicial writing." When discussing the opinion in 1995 with a former law clerk, even Justice Blackmun reflected that Part I gave him "a chance to indulge in a sentimental journey." The Justice Harry A. Blackmun Oral History Project 184 (Transcript, Manuscript Division, Library of Congress, <https://memory.loc.gov/diglib/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09>) [hereinafter Oral History].

<sup>5</sup> *Flood v. Kuhn*, 407 U.S. at 260-64.

<sup>6</sup> *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

<sup>7</sup> *Toolson v. New York Yankees*, 346 U.S. 356 (1953).

<sup>8</sup> *Flood v. Kuhn*, at 269-83.

<sup>9</sup> *Id.* at 281.

<sup>10</sup> *Id.* at 285.

<sup>11</sup> Oral History, *supra* note 4, at 184 ("Well, many times, if I'm giving a speech somewhere, particularly to young people, some youngster will say, 'Is it any fun writing opinions? Have you ever had any fun? And, which case did you enjoy working on most?' And I always say it's *Flood against Kuhn* because it was the baseball case, and their eyes light up right away.").

<sup>12</sup> Robert C. Berring, *The Macmillan Baseball Encyclopedia, The West System, and Sweat Equity*, 2010 GREEN BAG ALMANAC & READER 318, 318.

<sup>13</sup> Blackmun had a unique ritual of breakfasting with his clerks in the Supreme Court cafeteria every morning they worked. While sources differ as to whether he talked about the law at breakfast, baseball was definitely a common topic. TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE*

Chief Justice Warren Burger were often referred to as “the Minnesota Twins,” both because they were old, close friends and because the Twins were among their favorite baseball teams.<sup>14</sup> Justice Potter Stewart was also an avid fan of the sport, and during the playoffs he instructed his three clerks to watch the game on a small television in his chambers and update him on the score of his beloved Cincinnati Reds every half inning via notes sent to the bench.<sup>15</sup> When Blackmun’s personal papers opened to the public in 2004, researchers discovered he had kept one of these score updates of Stewart’s. On October 10, 1973, the Court was in the middle of hearing oral arguments while the Reds were playing the Mets for the National League Championship. Shortly after 2:30 p.m., Stewart passed Blackmun the update he had just gotten from his clerks: “VP Agnew just resigned!!” and, at the bottom of the note, “Mets 2 Reds 0.”<sup>16</sup> It seems this was a common practice between the two — another note from Blackmun’s papers memorialized a four-dollar bet on the 1975 World Series between the two justices.<sup>17</sup>

Blackmun’s second term on the Court had not been an easy one thus far. Justices John Marshall Harlan and Hugo Black had retired for health reasons in September,<sup>18</sup> and the number of certiorari petitions reaching the Court was at a new high.<sup>19</sup> Even though they were down two justices, the Court had still heard oral arguments in *Roe v. Wade* and *Doe v. Bolton* on December 13, 1971.<sup>20</sup> When asked in later years, Blackmun recalled that he and Stewart had been asked by Burger to select which cases could be heard in October and November and would be likely to have a majority of at least five justices

RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK 184 (2006); Randall P. Bezanson, *Good Old Number Three: Harry Blackmun and his Clerks*, in IN CHAMBERS: STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 335 (Todd C. Peppers & Artemus Ward, eds., 2012); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHERN: INSIDE THE SUPREME COURT 181 (1979).

<sup>14</sup> Skip Card, *Court of Dreams*, 77 N.Y. ST. B.A. J. 11 (2005); WOODWARD & ARMSTRONG, *supra* note 13, at 188, 190.

<sup>15</sup> Card, *supra* note 14; Oral History, *supra* note 4, at 218; WOODWARD & ARMSTRONG, *supra* note 13 at 302n; Monroe E. Price & Contributors, *Clerking for Potter Stewart*, in OF COURTIER AND KINGS: MORE STORIES OF SUPREME COURT CLERKS AND THEIR JUSTICES 265 (Todd C. Peppers & Clare Cushman, eds., 2015)

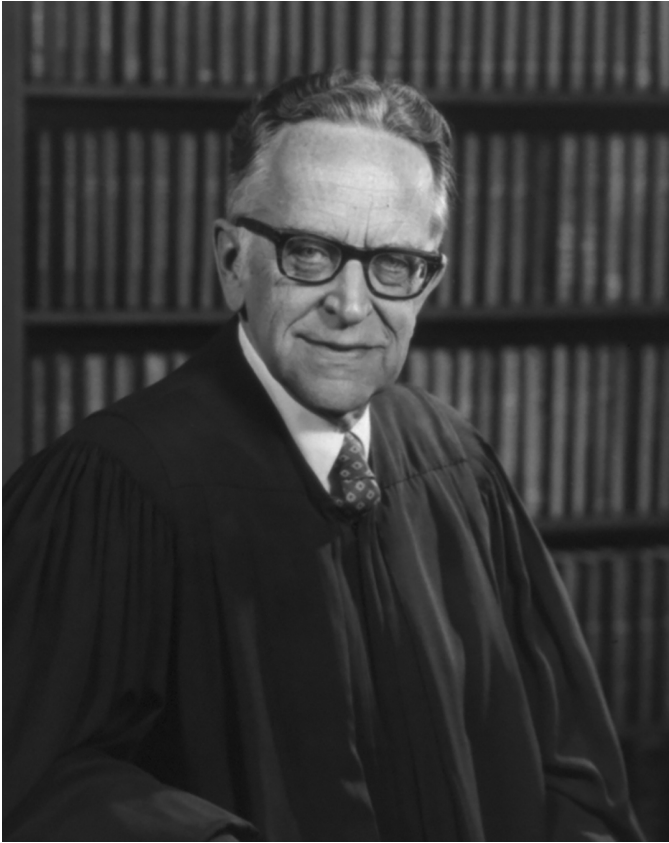
<sup>16</sup> Card, *supra* note 14, at 12.

<sup>17</sup> Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP. 10637, 10660 (2005) (Blackmun bet on the Red Socks, who lost to Stewart’s Reds).

<sup>18</sup> Oral History, *supra* note 4, at 181 (noting both died within a year of retirement).

<sup>19</sup> DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 137-38 (2017). See also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 270-71 (1994) (Powell suggesting pooling the work of certiorari review among clerks of multiple Justices to reduce redundancy and increase efficiency).

<sup>20</sup> *Roe v. Wade*, Oyez, <https://www.oyez.org/cases/1971/70-18> (last visited Jan 20, 2020); *Doe v. Bolton*, Oyez, <https://www.oyez.org/cases/1971/70-40> (last visited Jan 20, 2020).



Harry A. Blackmun.

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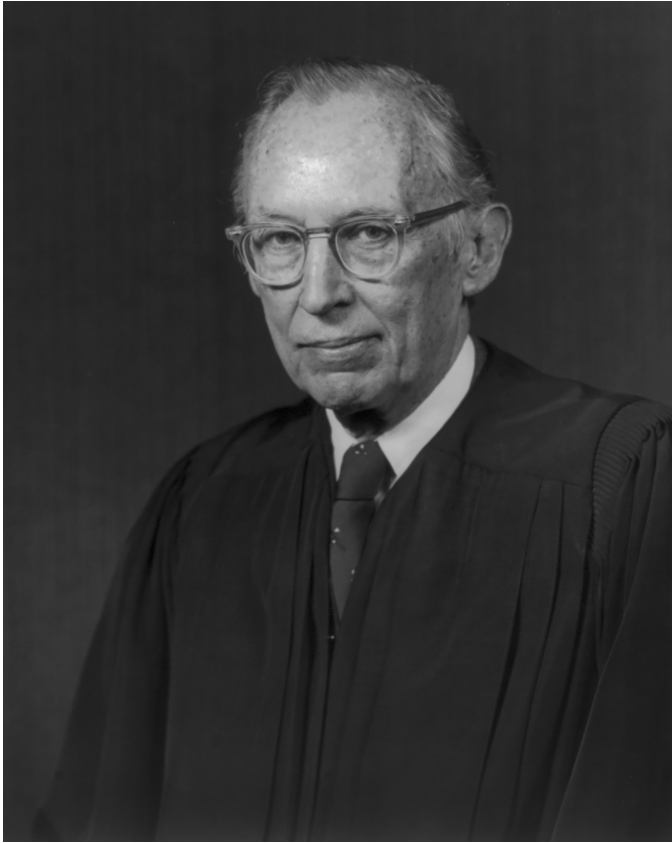
before new justices could be sworn in. On two separate occasions, Blackmun said that he and Potter didn't do a "good job" with that task, and chose to hear the abortion cases in December because they didn't expect them to be controversial.<sup>21</sup> Fortunately, Lewis F. Powell Jr. and William H. Rehnquist were both confirmed by the Senate in December 1971 and sworn in on January 7, 1972.<sup>22</sup>

It seems Blackmun regretted hearing *Roe* and *Doe* with only seven justices almost immediately. He was assigned the majority opinion for both cases

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<sup>21</sup> Oral History, *supra* note 4, at 181; GREENHOUSE, *supra* note 1, at 80.

<sup>22</sup> THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS 415 (5th ed., Lee Epstein et al. eds., 2012); Oral History, *supra* note 4, at 183; GREENHOUSE, *supra* note 1, at 85.



Lewis F. Powell, Jr.

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in December 1971,<sup>23</sup> but on January 18, 1972, he sent a memo to Burger and the other justices suggesting that *Roe* and *Doe* be reargued because “the importance of the issues is such that the cases merit full bench treatment.”<sup>24</sup> The Court was simultaneously working through a case concerning vaginal foam as a non-prescription birth control for unmarried people, *Eisenstadt v. Baird*,<sup>25</sup> which would also deal with issues of sexual privacy and the applica-

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<sup>23</sup> GREENHOUSE, *supra* note 1, at 80-82.

<sup>24</sup> Letter from Justice Harry A. Blackmun to Chief Justice Warren E. Burger (Jan. 18, 1972), in Lewis F. Powell, Jr. Supreme Court Case Files, *Roe v. Wade* 2, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=casefiles>.

<sup>25</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

tion of *Griswold v. Connecticut*.<sup>26</sup> On March 7, 1972, Burger passed a note to Blackmun during oral arguments on another case stating that he was “closing in” on his dissent for *Eisenstadt* and encouraging Blackmun to “take a closer look” at Justice Byron White’s concurring opinion.<sup>27</sup> Blackmun biographer Linda Greenhouse notes that this informal lobbying was “unusual, a clear violation of the Court’s social norms.”<sup>28</sup> Ultimately Blackmun joined White when the decision in *Eisenstadt* was announced on March 22, leaving Burger as the sole dissent.<sup>29</sup>

And then, among all these complex and undoubtedly consequential abortion cases, March’s oral arguments included *Flood*, a fairly straightforward case about baseball. At the March 24 conference, Stewart allegedly assigned the majority opinion to baseball nut Blackmun.<sup>30</sup> Finally, an easy opinion and a bit of fun. Around this time, Blackmun began to spend long hours in the Court’s library. Once Blackmun circulated the first draft of his *Flood* opinion, it was clear that some of that time had been spent reading the *Baseball Encyclopedia* and compiling his extensive list for Part I. Supposedly Justice William Brennan was shocked, as he assumed Blackmun had been researching for *Roe* and *Doe*, not “playing with baseball cards.”<sup>31</sup>

Between Blackmun’s first draft and the official decision on June 19, discussing the List became something of a game, with Justice Thurgood Marshall pointing out the dearth of African-American players, clerks calling to lobby for their favorite players, and Stewart joking that he’d give Blackmun his vote if Blackmun added a Cincinnati Red.<sup>32</sup> After the opinion was announced, a clerk noted Blackmun had left out Giants outfielder Mel Ott, and supposedly Blackmun said that he would never forgive himself.<sup>33</sup> One of

<sup>26</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also references to *Griswold* in the oral arguments of *Roe* and *Doe*, *supra* note 21, and *Eisenstadt v. Baird*, *Oyez*, <https://www.oyez.org/cases/1971/70-17> (last visited Jan 20, 2020).

<sup>27</sup> GREENHOUSE, *supra* note 1, at 87.

<sup>28</sup> *Id.*

<sup>29</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 1972.

<sup>30</sup> WOODWARD & ARMSTRONG, *supra* note 13 at 189–90. *The Brethren* is a somewhat controversial book, as Woodward and Armstrong have not disclosed their inside sources and former clerks have spoken out about inaccuracies. See David J. Garrow, *The Supreme Court and the Brethren*, 18 CONST. COMMENTARY 303 (2001); Stephen R. McAllister, *Justice Byron White and The Brethren*, 15 GREEN BAG 2D 159 (2012); O’BRIEN, *supra* note 19, at 122. When Justice Blackmun’s oral history was recorded he couldn’t remember who assigned the case. Oral History, *supra* note 4 at 185, 473. However the Oral History is also a touch problematic, as scholars have noted Blackmun’s advanced age and lack of ease in front of a camera may have hindered his memory. See Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUPREME CT. REV. 307 at note 2.

<sup>31</sup> WOODWARD & ARMSTRONG, *supra* note 13 at 190.

<sup>32</sup> *Id.*; Oral History, *supra* note 4 at 184

<sup>33</sup> WOODWARD & ARMSTRONG, *supra* note 13 at 192; Oral History, *supra* note 4, at 2.

the first things Blackmun discussed with former clerk and Yale Law professor Harold Koh while recording Blackmun's oral history in 1994 was a baseball bat in the Justice's chambers. It was a Louisville Slugger bat made specifically to Mel Ott's specifications with a small plaque on top that read "I'll never forgive myself."<sup>34</sup>

Blackmun was finally ready to circulate a first draft of his *Roe* opinion on May 18, 1972,<sup>35</sup> and his first draft of *Doe* circulated on May 25.<sup>36</sup> Though I haven't been able to corroborate the story,<sup>37</sup> *The Brethren* alleges that Saturday of the next week, May 27, Burger met with Blackmun, leaving his armed chauffeur-bodyguard in the outer office. After Burger left, Blackmun "departed without a word to his clerks."<sup>38</sup> *The Brethren* implies that this visit was related to two events in the following week — Blackmun's formal proposal to reargue *Roe* and *Doe* in the following fall,<sup>39</sup> and Burger joining Blackmun's majority for *Flood* the following week.<sup>40</sup>

Justice William O. Douglas was furious and supposedly convinced that Burger had somehow gotten to Blackmun;<sup>41</sup> he threatened to release his already-drafted dissent in *Roe*.<sup>42</sup> He promptly left for his vacation home in Goose Prairie, Washington, where he was generally unreachable,<sup>43</sup> but by June 19, the day *Flood* was announced,<sup>44</sup> Douglas had called Brennan and agreed to not release the dissent.<sup>45</sup> On June 26, the last day of the October

<sup>34</sup> Oral History, *supra* note 4, at 2.

<sup>35</sup> Memorandum to the Conference Re: No. 70-18, *Roe v. Wade* (May 18, 1972), in Lewis F. Powell, Jr. Supreme Court Case Files, *Roe v. Wade* 3, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=casefiles>; GREENHOUSE, *supra* note 1, at 88.

<sup>36</sup> Memorandum to the Conference Re: No. 70-40, *Doe v. Bolton* (May 25, 1972), Lewis F. Powell, Jr. Supreme Court Case Files, *Doe v. Bolton* 6, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1016&context=casefiles>

<sup>37</sup> See *supra* note 31.

<sup>38</sup> WOODWARD & ARMSTRONG, *supra* note 13 at 186.

<sup>39</sup> Memorandum to the Conference (May 31, 1972) in Lewis F. Powell, Jr. Supreme Court Case Files, *Roe v. Wade* 32, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=casefiles>; GREENHOUSE, *supra* note 1, at 89.

<sup>40</sup> WOODWARD & ARMSTRONG, *supra* note 13 at 186, 192. Ultimately the Chief Justice filed a concurring opinion, *Flood v. Kuhn* 407 U.S. 258 (1972).

<sup>41</sup> GREENHOUSE, *supra* note 1, at 89; JEFFRIES, *supra* note 19 at 337; WOODWARD & ARMSTRONG, *supra* note 13, at 186-188.

<sup>42</sup> William O. Douglas, 6th Draft Nos. 70-18 and 70-40 (June 13, 1972), in Lewis F. Powell, Jr. Supreme Court Case Files, *Roe v. Wade* 40, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=casefiles>.

<sup>43</sup> JEFFRIES, *supra* note 19 at 339; WOODWARD & ARMSTRONG, *supra* note 13, at 188-89; GREENHOUSE, *supra* note 1, at 90.

<sup>44</sup> *Flood v. Kuhn*, 407 U.S. 258.

<sup>45</sup> William O. Douglas, 6th Draft Nos. 70-18 and 70-40 (June 13, 1972), in Lewis F. Powell, Jr. Supreme Court Case Files, *Roe v. Wade* 40 <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1015&context=casefiles> (handwritten note: "We were advised on 6/19 that Douglas will

1971 Term, the Court issued an opinion restoring *Roe* and *Doe* to the calendar for reargument, with only the notation that “Mr. Justice Douglas dissents in Nos. 70-18 and 70-40.”<sup>46</sup>

In late July, Blackmun spent ten days at the Mayo Clinic library in Rochester, Minnesota.<sup>47</sup> Among other things, Blackmun researched historical views towards abortion, though he later claimed he didn’t speak with medical professionals while at the Clinic.<sup>48</sup> Eventually, he and Mrs. Blackmun were able to get to their family vacation spot in Spider Lake, Wisconsin, though the work of cert review and the upcoming term continued.<sup>49</sup> During this brief August break, Blackmun penned a letter to Powell. It did not mention work, and instead warmly thanked Powell for sending him *The Boys of Summer* — presumably the book by Roger Kahn centering on the Brooklyn Dodgers and the 1955 World Series.<sup>50</sup>

John C. Jeffries, who clerked for Powell during the October 1973 Term, wrote in his biography of Powell that the Justice initially struggled with the workload and contemplated quitting,<sup>51</sup> though Blackmun didn’t recall seeing him visibly under any more strain than the rest of his compatriots.<sup>52</sup> Like Blackmun, Powell seems to have also spent his summer researching abortion in preparation for the return of *Roe* and *Doe*, and by fall 1972 had decided to join Blackmun’s majority.<sup>53</sup> Though Powell’s biographers paint it in a different light than Blackmun’s, the two undeniably worked closely on the abortion cases that fall.<sup>54</sup>

Powell and Blackmun reportedly began to drift apart in the late 1970s, especially as Blackmun became a more liberal voice on the Court and Powell led the arguments for the Court to refuse to require the government to pay for abortions.<sup>55</sup> However in Powell’s undigitized papers there is another relaxed letter from Blackmun to Powell written from Wisconsin over the 1978

not file this dissent”).

<sup>46</sup> *Roe v. Wade*, 408 U.S. 919 (1972).

<sup>47</sup> GREENHOUSE, *supra* note 1, at 90; Oral History, *supra* note 4, at 197.

<sup>48</sup> Oral History, *supra* note 4 at 201.

<sup>49</sup> Oral History, *supra* note 4 at 190. *See also*, GREENHOUSE, *supra* note 1 at 248; Oral History, *supra* note 4 at 10.

<sup>50</sup> Letter from Harry A. Blackmun to Lewis Powell (Aug. 14, 1972). Lewis F. Powell, Jr. Papers, Powell Archives, W&L University School of Law, box 3.

<sup>51</sup> JEFFRIES, *supra* note 19 at 334-35.

<sup>52</sup> Oral History, *supra* note 4 at 199.

<sup>53</sup> WOODWARD & ARMSTRONG, *supra* note 13, at 230; JEFFRIES, *supra* note 19 at 346-47; GREENHOUSE, *supra* note 1, at 94-95.

<sup>54</sup> GREENHOUSE, *supra* note 1, at 96-97; JEFFRIES, *supra* note 19, at 339-42.

<sup>55</sup> JEFFRIES, *supra* note 19, at 366-70.

summer break.<sup>56</sup> Like the 1972 letter, this one also thanks Powell for a book recommendation (*Trail of the Fox*, which I assume to indicate David Irving's history of World War II commander Erwin Rommel).<sup>57</sup> Powell seems to have told Blackmun about talking with Bowie Kuhn, fifth commissioner of Major League Baseball and the respondent from *Flood v. Kuhn*, and Blackmun jokes that he's glad Kuhn "did not resent — as [the Chief Justice and Justice White] apparently did — [Blackmun's] 'sentimental journey.'"<sup>58</sup>

No one will ever fully be able to explain an unbiased truth of what happened in the "marble palace" during the spring of 1972 and the subsequent years' litigation of abortion. Maybe Blackmun was pressured by Burger (but perhaps not), maybe there was an initial scandal over the time spent on Part I of *Flood*, maybe Powell disagreed with Blackmun's logic in the ultimate *Roe* decision. However, I like the glimpse of Blackmun that I see in *Flood* and these two letters — someone who finds some time to be polite, do some leisure reading, and talk about baseball for a bit.



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<sup>56</sup> Letter from Harry A. Blackmun to Lewis Powell (Aug. 5, 1978). Lewis F. Powell, Jr. Papers, Powell Archives, W&L University School of Law, box 3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

August 14, 1972

Dear Lewis,

"The Boop of Summ'r" arrived safely.  
I am well into it and find some good  
laughs and new aspects of Americana.  
It is good reading for summer evenings.  
Your thoughtfulness means much to me.

I hope you are getting some well-  
deserved rest and release from the pressure  
that besieges us so relentlessly. It must  
seem good to be in Richmond again for  
a time. I trust your visit with the  
friends from England proved to be most  
pleasant and the A.B.C. not too strenuous.

My office tells me that great progress  
is being made in your new chambers. I miss  
you and look forward to seeing you "with  
soon" before too long.

Gratefully,

Harry

Harry Blackmun to Lewis Powell, August 14, 1972.

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

8/9/78  
WRP  
Near Hayward, Wisconsin  
August 5, 1978

Dear Lewis,

I was pleased to have your letter. I would have enjoyed hearing Bowie Lahn. But his comments about the opinion in the 1972 antitrust case must be taken with a grain of salt. After all, he prevailed! Nonetheless, it is good to know he did not recant - as the CJ and BW apparently did, - my "sentimental journey." That was one opinion I really enjoyed working on - but they would not join Part I.

I have started the "Trail of the Fox" and so far it is fascinating. No time before. I appreciate your placing it in my hands.

The A.B.A. I hope, is not proving too strenuous. Are you not giving the dissertation at the Prayer Breakfast this year? It will go well, I know.

What a term we had and what a relief to have it behind us! The days are cool, almost cold, here, but the sun is warm. Work occupies a good part of each day, but there is time for <sup>early</sup> swims, some sailing (I am poor at it), soaking up the atmosphere of the woods, walking, and reading (which I need). I am grateful for and appreciate the summer.

My very best to you and Jo.

Sincerely and with affection,  
Harry

Harry Blackmun to Lewis Powell, August 5, 1978.

JUDICIAL OPINIONS

FIVE RECOMMENDATIONS



*Harold E. Kahn*<sup>†</sup>

*Dobbs v. City of Los Angeles*  
41 Cal. App. 5th 159 (2019)

opinion for the court by Associate Justice John Wiley

Since the creation of written appellate opinions, trial judges and others have likely complained that appellate decisions are too long.<sup>1</sup> Justice John Wiley of California’s Second District Court of Appeal has a fondness for concision. Many of his published decisions are quite short — admirably so. *Dobbs* exemplifies Wiley’s embrace of Shakespeare’s dictum that “brevity is the soul of wit.” The plaintiff sought damages for her slip and fall as a result of her walking into an unobstructed concrete pillar 17.5 inches wide by 17.5 inches tall protecting the Los Angeles Convention Center from car bombs. Wiley quickly dispatches plaintiff’s case: “The rule deciding this case is look where you are going. . . . Tort law incorporates common sense. When one walks into a pillar that is big and obvious, the fault is one’s own.” Another “cut to the chase” 2019 opinion written by Wiley is *Kanovsky v. At Your Door*

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<sup>†</sup> Judge, Superior Court of California, County of San Francisco .

<sup>1</sup> See, e.g., Palmer, “A Trial Judge Looks at the Appellate Courts,” 13 F.R.D. 155, 158-160 (1952) (a California trial judge politely implores a 1952 conference of appellate judges to write shorter opinions); Note, “Judicial Opinions Long Drawn Out,” 9 Harvard Law Review 537 (1896) (“the judge who condenses his opinions . . . is conferring a benefit on the entire profession”).

*Self Storage*.<sup>2</sup> There, the plaintiffs stored their goods in a self-storage locker after signing a contract providing that the storage was at the customer's sole risk, specifying that the company was not responsible for any water damage to the goods. Plaintiffs also expressly declined the offer in the contract to purchase property insurance. As Wiley notes, "[s]ure enough, water did damage the property." Wiley explains that his court affirmed summary judgment for the storage company "because one may not contract to accept risk, decide to be self-insured, and then retroactively demand to be paid by the other side *after* there is a loss." (Emphasis in original.) With decisions like *Dobbs* and *Kanovsky*, beleaguered trial judges now have time for other pursuits, such as reading the commendably short pieces in *The Green Bag Second*.

*Gamble v. United States*

139 S.Ct. 1960 (2019)

dissenting opinion by Associate Justice Neil Gorsuch

A hallmark of many great dissents is a compelling opening sentence. Justice Neil Gorsuch surely knows that. In his dissent to the Court's reaffirmation of its precedents holding that the Double Jeopardy Clause does not apply to prosecution of the same crime by state and federal governments, Gorsuch leads off with a humdinger: "A free society does not allow its government to try the same individual for the same crime until it's happy with the result." Gorsuch expresses his indignation at the Court's permitting Alabama to sentence Terance Gamble to one year in prison followed by the United States' sentencing him to a further prison term of 46 months for the same crime of felon in possession of a firearm. Gorsuch cogently explains why the text of the Fifth Amendment, the structure of the Constitution, the common law, and *stare decisis* do not support a "separate sovereigns" exception to the Double Jeopardy Clause. Focusing on the language of the Double Jeopardy Clause, Gorsuch writes that "Most any ordinary speaker of English would say that Mr. Gamble was tried twice for 'the same offence,' precisely what the Fifth Amendment prohibits." Gorsuch further observes that the "Double Jeopardy Clause doesn't say anything about allowing 'separate sovereigns' to do sequentially what neither may do separately." Rejecting the Court's position that federalism establishes "two sovereigns" of federal and state governments, and citing John Marshall and Alexander Hamilton, Gorsuch proclaims, "Under our Constitution, the federal and state governments are but two expressions of a single and sovereign people." Gorsuch sums up his review of the "common law from which the Fifth Amendment was drawn" by chastising the Court's

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<sup>2</sup> 42 Cal. App. 5th 594 (2019).

“attempts to explain away so many uncomfortable authorities” and pointing out that there is not “a *single* preratification common law authority approving a case of successive prosecutions by separate sovereigns for the same offense.” (Emphasis in original.) In casting aside *stare decisis*, Gorsuch concludes: “The separate sovereigns exception was wrong when it was invented, and it remains wrong today.”

*Markham Concepts, Inc. v. Hasbro, Inc.*  
355 F.Supp.3d 119 (D. R.I. 2019)

opinion for the court by Chief District Judge William Smith

Perhaps because there is no need for their authors to obtain input from or be constrained by others, federal district court opinions are often more interesting and fun to read than opinions produced by multi-judge courts. A good example is Rhode Island District Judge William Smith’s copyright decision about the popular board game the Game of Life. Smith pulls us in at the outset:

To people of a certain age . . . where television meant three channels and shows like *Bonanza* . . . the Game of Life was a gangbuster hit found (it seemed) in every household . . . alongside Twister, Clue and Monopoly. In the Game of Life, the winner retires to “Millionaire Acres.” In this suit, life imitates art as the heirs of toy developer Bill Markham have sued over what they see as proceeds from the exploitation of the Game that they have been wrongfully denied.

At least for those of us eligible for Social Security and who fondly recall playing the Game of Life in our youth, after reading these lines we are eager to learn more. Judge Smith does not disappoint. His findings of fact tell the story of how a game invented in 1860 called the Checkered Game of Life was transformed in 1959 to the Game of Life, becoming an “instant classic” which “sold like crazy.” Quoting “passive-aggressive letters,” Smith provides details of royalty disputes from the 1960s and 1980s. Though necessarily more legalistic in content and style, Smith’s conclusions of law are an easy-to-follow discussion of technical Copyright Act issues. In his conclusion, Smith returns to his life-imitates-art theme and his apt use of the Game’s lingo: “Like the Game of Life itself, this fifty-nine-year tug-of-war for renown and royalties has followed a long, circuitous path. And one that — on this ‘Day of Reckoning,’ to use the Game’s parlance — ends essentially where it began . . . the success that met the Game of Life was, in fact, nothing if not the

result of collective effort,” requiring the defeat of plaintiffs’ claim — or, as stated earlier in the decision, plaintiffs losing “this turn.”

*People v. Rodriguez*

40 Cal. App. 5th 206 (2019)

opinion dissenting in part by Associate Justice Maria Stratton

Common sense, simple logic, basic fairness, and well-turned phrases are what make California Second District Court of Appeal Justice Maria Stratton’s pithy dissent an exemplary one. The two-judge majority affirmed a sentence that — due to a quirky feature of California’s byzantine sentencing laws — provided for a longer minimum prison term before the defendant (who was acquitted of a premeditation enhancement allegation) would be eligible for parole than the sentence the defendant would have received had he been convicted of the premeditation allegation. Stratton could not abide that result. She writes:

Any way you slice it, defendant is serving more minimum prison time before he is eligible for parole because he successfully exercised his right to trial on the premeditation allegation. So, even though he is legally less culpable without a finding of premeditation, he faces more minimum time in custody. There is no doubt that he is suffering adverse consequences because he decided to go to trial and succeeded.

Stratton then poses the rhetorical question: “Who among us thinks it is logical and usual to keep defendant imprisoned longer on an unpremeditated crime than for the same premeditated crime?” Supplying the obvious answer to her own question — that “[c]ommon sense dictates that it is not normal or usual” to sentence the defendant to a longer minimum term than he would have received if he had been convicted of the premeditation allegation — Stratton concludes her dissent by stating that she would remand for resentencing to a minimum prison term no greater than what the defendant would have received “had he not successfully defended against the premeditation allegation.”

*Taylor v. County of Pima*

913 F.3d 939 (9th Cir. 2019)

opinion dissenting in part by Circuit Judge Mary Schroeder

No gloss or analysis by a commentator can improve on Judge Mary Schroeder’s powerful words expressing her profound disagreement with a Ninth Circuit panel’s refusal to award compensation per 42 USC 1983 to a

man who spent 42 years in prison based on a wrongful conviction. Schroeder writes:

This decision magnifies an already tragic injustice. At the time of Tucson's Pioneer Hotel fire in 1972, Louis Taylor was an African American male of sixteen. Arrested near the hotel, he was convicted on the basis of little more than that proximity and trial evidence that "black boys" like to set fires. He has spent a lifetime of 42 years in prison following his wrongful conviction. When he filed his state court petition the county that had prosecuted him did not even respond to his allegations of grievous deprivations of civil rights, including the withholding of evidence that the fire was not caused by arson at all, and the indicia of racial bias underlying the entire prosecution. Instead of responding, the county offered Taylor his immediate freedom in return for his pleading no contest to the original charges and agreeing to a sentence of time served. He accepted the offer, since his only alternative was to stay in prison and wait for his petition for collateral relief to wend its way through the courts, a process that could take years. Because his original conviction had been vacated and all of the prison time he had served was as a result of that invalid conviction, he filed this action to recover damages for his wrongful incarceration. Yet the majority holds that he can recover nothing. . . . In my view our law is not that unjust.

Schroeder's opinion explains why Taylor's claim is not barred by *Heck v. Humphrey*,<sup>3</sup> as held by the majority. She then writes:

We should not tolerate such coercive tactics [of the County's offer to plead no contest for a sentence of time served] to deprive persons of a remedy for violations of their constitutional rights. To say such a plea justifies the loss of 42 years, as the majority asserts, is to deny the reality of this situation and perpetuate an abuse of power that § 1983 should redress.



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<sup>3</sup> 512 US 477 (1994).

# A LETTER BETWEEN FRIENDS

*Taryn Marks*<sup>†</sup>

In a time before email, when long-distance calls still cost something and personal computers were few and far between, a gentleman in Richmond, Virginia, dictated a letter to his friend in New Hampshire. A cordial message, it conveyed the gentleman's admiration for his friend's recent press conference, and also expressed his appreciation for a dinner shared between their families. After the letter was typewritten, but before it was sent, a bit of news broke — news worthy enough that the gentleman added a handwritten P.S. to his letter before sending it off to New Hampshire.

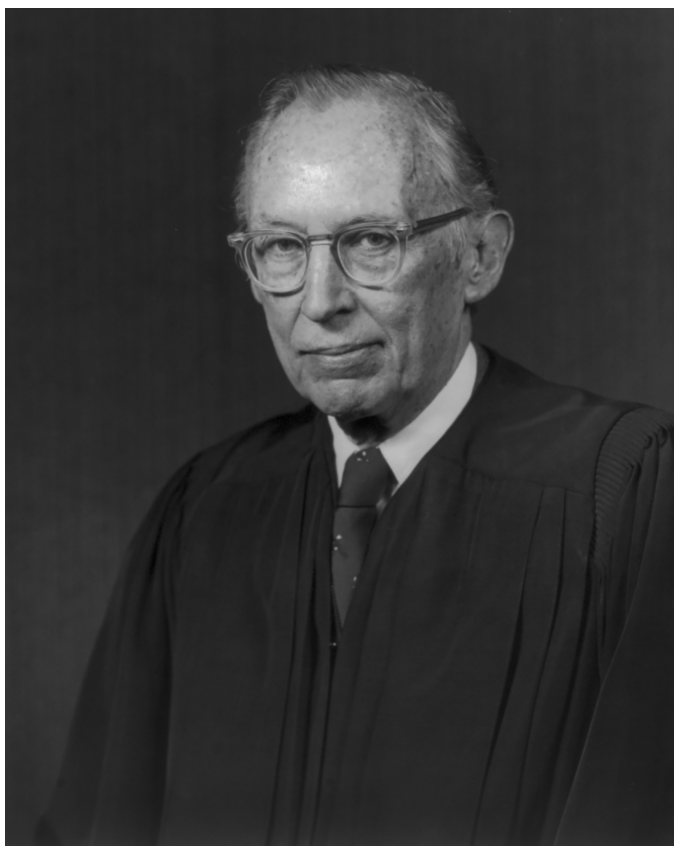
This letter and its handwritten P.S., now housed in the Yale University Library archives, became the subject of this article because the gentleman who dictated the letter and penned the P.S. was Justice Lewis Powell. The recipient in New Hampshire was his recently-retired friend and colleague Potter Stewart. And the handwritten P.S. referred to President Ronald Reagan's nomination of Sandra Day O'Connor to the Supreme Court; Reagan's announcement, which occurred the morning of July 7, 1981, coincided with the date of Justice Powell's letter. A copy of the letter is included at the end of this article.

When reviewing a letter written from Powell to Stewart that mentions the nomination of the first women Supreme Court Justice, it's easy to focus on the handwritten postscript and Powell's prescient note about how it would be "good to have a woman on the court." Likewise, the letter was written at an interesting time historically, and thus could easily have been placed with the drama of the Iran hostage crisis, Reagan's first few months in office, or tensions between the USSR and the US and the ultimate détente reached between the two nations.

But what I found most interesting about the letter, and when asked to put the letter into context, what stood out to me was how it illustrated the relationships that could develop between Justices during their times on the Court. It is easy to forget that these lofty nine men and women — who wield so much power and, who, to most lawyers, seem like out-of-reach celebrities — are still people. They are people who work together, who forge relationships with each other, and who share the knowledge of what it's like to be one of the nine who decide the law of the land.

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<sup>†</sup> Head of Research and Instructional Services, Stanford Law School. Copyright 2020 Taryn Marks.



Lewis F. Powell, Jr.

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Read the letter at the end of this article, and ignore the header that mentions the Supreme Court of the United States. The warm tone and friendship between the writer and receiver are clear; it's something that we forget exists in an institution that too often is described by its dissents. Indeed, just a year before this letter was written, Powell wrote about the “genuine cordiality” that exists at the Court between the Justices, noting that they “visit in one another’s homes, celebrate birthdays, and enjoy kidding one another.”<sup>1</sup> It’s a collegiality that appears to still exist today: take Ruth Bader Ginsburg and Antonin Scalia. While much has been said about the “best buddy” relation-

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<sup>1</sup> Lewis F. Powell, Jr., *What Really Goes on at the Supreme Court*, 66 ABA J. 721, 722 (1980).



Potter Stewart.

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ship between Ginsburg and Scalia,<sup>2</sup> this letter, to me, highlights the fact that other close relationships between Justices have developed, even if they do not always garner much attention or commentary.

Let's start with the relationship between Powell and Stewart, a relationship that had begun almost ten years earlier, when Powell was nominated to the Supreme Court on October 21, 1971.<sup>3</sup> At the time, Powell was a partner at a southern law firm in Richmond who had also served as president of the

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<sup>2</sup> See, e.g., Ginsburg And Scalia: 'Best Buddies', ALL THINGS CONSIDERED (Feb. 15, 2016), <https://www.npr.org/2016/02/15/466848775/scalia-ginsburg-opera-commemorates-sparring-supreme-court-friendship>.

<sup>3</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 228 (1994).

American Bar Association.<sup>4</sup> Powell was a “reluctant Justice;” he turned down the nomination several times and eventually had to be convinced to accept it.<sup>5</sup> When he finally did accept and had started down the nomination process, he reached out to, among others, Stewart, to get his thoughts on the necessary financial disentanglements one must go through to be on the United States Supreme Court.<sup>6</sup> In time, Stewart and Powell became close friends: “kindred spirits,” even.<sup>7</sup> The two saw each other socially and dined with one another and their wives once a month,<sup>8</sup> including the “delightful dinner” at the Sulgrave alluded to in Powell’s letter.<sup>9</sup> Powell called Stewart “a congenial, thoughtful, and generous colleague,” as well as a “quintessential judge.”<sup>10</sup>

So, when Stewart announced his retirement in the spring of 1981, Powell anticipated a “gap” in his life at the Court.<sup>11</sup> A short time later, in early July 1981, Powell sat in his summer chambers at the U.S. Court of Appeals for the Fourth Circuit in Richmond. Stewart had held a press conference on June 19 to announce and explain his decision to retire. Powell obtained a copy of the transcript and reviewed it. I suspect it was a bittersweet moment for Powell, reminiscing about the ten years he and Stewart had served together on the Court. Then, he dictated a fond letter to his friend.

What the letter does not reveal is that Powell struggled with Stewart’s decision to retire, unable to understand why Stewart chose to leave the Supreme Court before health or death forced him. Stewart was looking forward to retirement, eager to spend time with his family and grandchildren.<sup>12</sup> Powell saw retirement almost as something to be feared.<sup>13</sup> Indeed, he considered the idea of retiring in 1983, but rejected it in favor of continuing to work and contribute to his country.<sup>14</sup> When Powell finally did retire in 1987, he did so reluctantly, calling it an “irreparable loss,” with the day of his announcement “one of my worst moments.”<sup>15</sup> This stood in stark contrast to Stewart, who

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.* at 2-7.

<sup>6</sup> *Id.*, at 231-32.

<sup>7</sup> *Id.* at 262, 433.

<sup>8</sup> *Id.* at 263.

<sup>9</sup> Letter from Justice Powell to Justice Stewart, paragraph 5.

<sup>10</sup> Lewis F. Jr. Powell, *Justice Stewart*, 95 HARV. L. REV. 1, 1, 5 (1981).

<sup>11</sup> JEFFRIES, *supra* note 3, at 263.

<sup>12</sup> George Bush, *Potter Stewart*, 95 YALE L.J. 1323, 1324 (1986). *See also* Potter Stewart, *A Retirement Press Conference*, 55 TENN. L. REV. 21, 21 (1987).

<sup>13</sup> JEFFRIES, *supra* note 3, at 504-05, 542.

<sup>14</sup> *Id.* at 536-37.

<sup>15</sup> *Id.* at 546.

when he gave his press conference announcing his retirement, appeared “relaxed, even cheerful.”<sup>16</sup>

But, on July 7, 1981, Powell was still several years from his wrestling with whether to retire. Powell reviewed Stewart’s press conference transcript, no doubt contemplating who would take Stewart’s place. Many in the country had the same question — indeed, the first question asked of Stewart at his retirement press conference was whether Reagan should nominate a woman as his replacement.<sup>17</sup> Powell perhaps nodded when he read Stewart’s response; it stuck with him so that he quoted Stewart back to himself: “As you stated, the relevant considerations are ‘quality and competence, and temperament, character and diligence.’”<sup>18</sup>

Shortly thereafter, Reagan announced that then-Judge O’Connor was his nomination to replace Stewart, and Powell added a handwritten P.S. to his letter: “she may be a good appointment. If she meets your qualifications, it will be good to have a woman on the Court.”<sup>19</sup> O’Connor would later sail through her nomination proceedings (the first to be televised), making her the first woman appointed to the position of a U.S. Supreme Court Justice.

Ultimately, O’Connor met Powell and Stewart’s qualifications in ways I suspect none of them anticipated. O’Connor was more than a competent replacement Justice; she was also a replacement friend and confidant to Powell. Powell and O’Connor shared a “deep friendship;”<sup>20</sup> upon Powell’s retirement, O’Connor called him her “best friend” on the Court; even her role model.<sup>21</sup> Like Powell and Stewart before, Powell and O’Connor developed a close relationship.

Almost immediately after she joined the Court, Powell arranged to have his second secretary transferred to O’Connor’s chambers to help with the learning curve of becoming a Supreme Court Justice.<sup>22</sup> Just as Stewart had mentored Powell upon his arrival at the Court, Powell stepped in to mentor O’Connor, teaching her the many unwritten policies and procedures that echoed through its walls.<sup>23</sup> O’Connor slipped seamlessly into the role left by Stewart; indeed, Powell even sponsored O’Connor and O’Connor’s husband,

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<sup>16</sup> Linda Greenhouse, *Justice Stewart on His Retirement: ‘Better to Go Too Soon’*, N.Y. TIMES, June 20, 1981, at A9.

<sup>17</sup> Stewart, *supra* note 12, at 21.

<sup>18</sup> Letter from Justice Powell to Justice Stewart, paragraph 3.

<sup>19</sup> *Id.*, handwritten postscript.

<sup>20</sup> EVAN THOMAS, FIRST: SANDRA DAY O’CONNOR 159 (2019).

<sup>21</sup> *Id.* at 233, 388.

<sup>22</sup> *Id.* at 159.

<sup>23</sup> JEFFRIES, *supra* note 3, at 505.

John, for membership in country clubs, gentleman's clubs, and boards.<sup>24</sup> And in the same way that Powell saw a gap when Stewart retired, O'Connor saw a gap when Powell retired in 1987.

This article, and its accompanying letter, I hope will serve to highlight the disconnect that must sometimes come with being a Supreme Court Justice and to restore a bit of humanity to these critically-important people. Like most people who attended law school, the names of the Justices became familiar to me, and to some in my circles, the Justices became obsessions of a sort. One need only go so far as the Notorious RBG to see the kind of celebrity status that Supreme Court Justices can attract. And while they wield substantial power as the nine men and women who decide issues of critical importance to the country, at the end of the day they are still that — men and women. Men and women who build relationships with each other, who decide to retire, who miss each other when they do, and who scribble handwritten P.S.'s on letters to friends. While most of our letters (or, these days, emails) and P.S.'s will likely never find their way into the Yale archives like Powell's letter to Stewart did, the letter provides a touchpoint to connect us with those figures on high at the Supreme Court and to remind us of their humanity.



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<sup>24</sup> THOMAS, *supra* note 20, at 185, 324.

Justice LEWIS F. POWELL

**Supreme Court of the United States**  
**Washington, D. C. 20543**

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

July 7, 1981

Dear Potter,

Before leaving for Richmond, I obtained from Barrett McGurn a copy of the transcript of your press conference.

I read it over the week end with special interest and admiration. It should be required reading for every new Justice of the Supreme Court - indeed, for every new judge, federal or state.

I particularly liked your response to the question whether consideration of race or sex should be appropriate in choosing a Supreme Court Justice. As you stated, the relevant considerations are "quality and competence, and temperament, character and diligence". I do hope the President shares your views.

We returned to Richmond on Friday, and I am now settled again in my CA 4 chambers where I have a most pleasant view of the Capitol grounds of Virginia, and the facade of the State Capitol designed by Jefferson. As pleasant as this is, I would trade it for the view that you have of the New Hampshire mountains. I would particularly like to trade the weather.

We returned to Richmond with warm memories of the Stewarts and of the delightful dinner with you at the Sulgrave.

COPY  
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Lewis Powell to Potter Stewart, July 7, 1981 (page 1 of 2).

Mr. Justice Stewart

- 2 -

With no cert petitions or briefs, I am sure  
this will be a uniquely pleasant summer. Affectionate  
best to you both.

As ever,

Mr. Justice Stewart  
Bowen Brook Farm  
Franconia, New Hampshire 03580

*P.S. The above was dictated & typed  
before the news of Judge O'Connor's  
nomination. In view of what  
Bill Rehgunt said about her,  
she may be a good appointment.  
If she meets your qualifications,  
it will be good to have a woman  
on the Court.*

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Lewis Powell to Potter Stewart, July 7, 1981 (page 2 of 2).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE RUTH BADER GINSBURG

December 26, 1996

To Tony Mauro

Re: Highs and Lows, *Legal Times*,  
December 23 and 30, 1996

Here's my take on the blizzard week, a  
paragraph I have used in recent talks.

Greengage plums are delicious, don't you  
agree?

Best wishes for a bright 1997.



Ruth Bader Ginsburg

Enclosure

Ruth Bader Ginsburg to Tony Mauro, December 26, 1996.

# THE PLUM LETTER

*Tony Mauro*<sup>†</sup>

Justice Ruth Bader Ginsburg didn't write this note to me in December 1996 just to make a whimsical remark about plums. When I opened the letter, I knew immediately what she was talking about, and laughed out loud.

Earlier that month, I witnessed and wrote about one of the most raucous and unsuccessful Supreme Court oral arguments in my decades of covering the court. It was a First Amendment case titled *Glickman v. Wileman Brothers & Elliott, Inc.*, originally brought by California fruit growers who challenged a government checkoff program that forced them to pay for advertising they did not like.

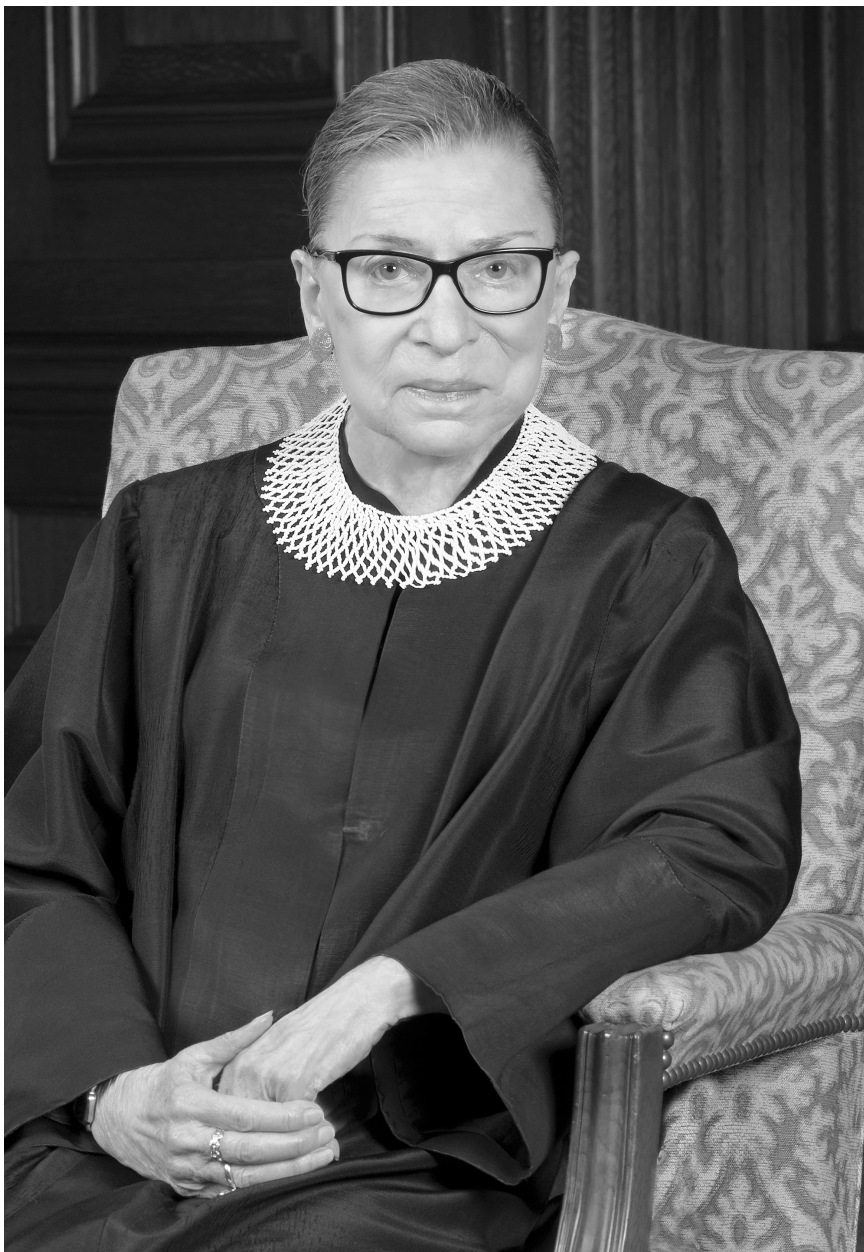
The advertising was meant to promote growers' products, somewhat like the "Got Milk?" and "Beef: It's What's for Dinner" promotions of years past, except this one was meant for peaches, nectarines and plums. The protesting producers disliked paying for ads that promoted varieties they didn't grow and conveyed messages about the fruit that they did not agree with, arguing that the program was a form of government-compelled speech.

Before the oral argument took place, a dispute erupted among the lawyers representing the fruit growers. Thomas Campagne, a Fresno lawyer who had handled the growers' case at lower courts, wanted to argue at the high court — his first argument there. But Dan Gerawan of Gerawan Farming and other growers, mindful of the complex First Amendment issues involved, hired Michael McConnell, a Mayer Brown lawyer who later became a judge on the U.S. Court of Appeals for the Tenth Circuit, and then a Stanford Law School professor.

Both Campagne and McConnell wanted to argue before the Supreme Court, and both began filing briefs and other documents with the court. As the argument date approached, clerk of the court William Suter intervened and told the two that if they could not agree on who would argue, he would flip a coin. No agreement ensued, so Suter dug a quarter out of his pocket and flipped it. Campagne won and would argue the case. Other lawyers tried to help Campagne prepare for the First Amendment questions he would surely be asked, but when argument day came, the First Amendment was barely discussed.

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<sup>†</sup> Lead writer, ALM'S Supreme Court Brief.



Ruth Bader Ginsburg.

Instead, as local lawyers are sometimes wont to do, Campagne dwelled on the facts of the case — not what the justices usually want to hear. He told the court about the flaws and disparate treatment of different fruit and different regions under the program. He launched into a technical discussion of “promulgation records,” “Exhibit 297,” and “Stipulation 57 — I’m sorry, 59.” That irritated Chief Justice William Rehnquist, who scolded Campagne. “That isn’t terribly helpful to simply hold up a brief and say that Stipulation 59 — we don’t know what — if you want to make a point, make it so we can all understand it.”

But the most memorable exchange during the argument — for Ginsburg and everyone else in attendance — came when Campagne discussed green plums. Because the forced advertising featured red or purple plums, Campagne seemed to suggest that most people view green plums as unripe.

“You ought to buy green plums and give them to your wife,” Campagne said, addressing Justice Antonin Scalia for an unknown reason, “and you’re thinking to yourself right now you don’t want to give your wife diarrhea.”

Amid nervous laughter in the chamber, Scalia sputtered, “Green plums? I would never give my wife a green plum.” Scalia was inadvertently proving Campagne’s point. “I’ve never even seen a green plum,” Scalia said. Soon, Campagne’s half hour was over, and six months later, the growers lost in a 5-4 decision.

Scalia’s longtime friendship with Ginsburg is well known, and she has said that she sometimes had to bite her tongue to keep from laughing when he said something funny. It was in that lighthearted vein, I am sure, that she wrote me the letter. I’ve cherished it ever since (though unfortunately, I managed to smudge and damage it.) And no, I don’t have or recall whatever enclosure she may have included.

But the unforgettable oral argument was not the end of the story. Gerawan sued Campagne in California Superior Court, leveling several charges against him, including malpractice, fraud, breach of contract, and the novel tort of “failure to refer to a specialist.” The lawsuit was ultimately settled, but it stood as a milestone in the trend toward the dominance of specialists in Supreme Court advocacy.

After the argument, Campagne seemed to understand what he was up against. “I felt perfectly capable of arguing for 30 minutes on a case that I have lived with for nine years,” he said in an interview. “There seems to be a club among the Supreme Court advocates, and if you don’t give in to the club, they rally together.”

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