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THE APPOINTMENT OF SUPREME COURT JUSTICES: III

JOHN P. FRANK

TWO HITS, ONE ERROR

The first representative of the New Freedom was to be the last apostle of the Old Deal on the Supreme Court. Hence the great mystery of James Clark McReynolds is how he ever came to be a Justice in the first place. Woodrow Wilson sincerely desired to put liberals on the Court, and the choices of John H. Clarke and Louis D. Brandeis mark two great successes in this attempt. Yet, perhaps by confusing a zeal for anti-trust law enforcement with liberalism, Wilson managed to choose the most conservative Justice since Stephen J. Field.

Born at Elkton, Kentucky, in 1862, McReynolds soon moved to Tennessee, where he became a successful lawyer and real estate dealer. He was secretary to Justice Howell Jackson during the latter’s short term on the Supreme Court in the 1890’s and from 1900 to 1903 he was a professor of law at Vanderbilt. From then until late in the Taft administration, when he split with his superior, Wickersham, because Wickersham, allegedly, thought the tobacco trust was being treated too leniently, McReynolds was an assistant attorney general in the anti-trust division. From Washington he went to a Wall Street law office where he stayed during the year 1912.

McReynolds was never an outstanding political liberal—in 1896 he deserted Bryan and ran for Congress as a Gold Democrat—but his reputation as a trust buster was sufficient to make him Wilson’s Attorney General. As Attorney General he instituted numerous anti-trust prosecutions and developed a system of informal agreements with Sherman Act violators under threat of prosecution which brought some criticism upon him from conservatives.2

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1 See Literary Digest, March 29, 1913, p. 734, “Our New Trust Fighter” for evidence of the popular acceptance of McReynolds as a warrior against the trusts.
The only incident during McReynold's attorney generalship which had any apparent effect on his confirmation was the exposé of the management of the New Haven Railway. Abusive practices cost investors in the New Haven from $65,000,000 to $90,000,000 and the road was being investigated by the Commerce Commission under authorization of a resolution by Senator Norris when the conflict with McReynolds arose. McReynolds contended that Charles S. Mellen, ex-president of the road, should not be examined under oath by the Commission because he might thus gain an immunity from prosecution by the Justice Department. When Norris, Senator Kern, the Democratic leader, Commissioner McChord, and Commission counsel Joseph Folk, ex-Governor of Missouri, called

The most sensational incident of McReynold's Cabinet tenure, despite its real unimportance and its lack of effect on the judicial confirmation, was the case of Farley D. Caminetti and Maury Diggs, 242 U.S. 470 (1917), two young libertines of Sacramento, California. The two men were both socially and politically prominent. Diggs had been state architect and was the nephew of a powerful local Democratic leader. Caminetti was the son of Wilson's Commissioner of Immigration. The men took two 19 year old girls of respectable Sacramento families to Reno, Nevada, where they rented a bungalow for a few days. Whether the men coerced the girls to accompany them by fanciful threats or whether they went with full willingness, and whether the men intended to stay at Reno long enough to divorce their wives and marry their companions are controverted issues. After four days the California police and the worried families of the girls caught up with the party and the group returned to California. All four denied illicit relations. One of the girls suffered a miscarriage. 50 Cong. Rec. 2884 (1913).

Prosecution of the men for violation of the Mann Act was begun by John L. McNab, hold-over Republican United States attorney. Pending the trial Secretary of Labor Wilson, in whose department was the office of Immigration Commissioner, asked McReynolds to have the case postponed from spring to fall because Immigration Commissioner Caminetti, father of one defendant, wanted to be present at his son's trial and could not be spared from Washington for a few months, McReynolds thereupon ordered McNab to postpone the prosecution. McNab seized the opportunity to make capital for his party. He resigned his office and sent public letters to President Wilson, McReynolds, and, of course, to the press. His charge that political pull was being used to shield "white slavers" hit the front pages. New York Times, June 25, 1913, p. 1. His charge of favoritism based on this and another, less important case, were considered grounds for a demand for the resignation of McReynolds by the New York Times, June 30, 1913, p. 6. As soon as McReynolds recognized the storm he informed the President of his intention to prosecute the case with the utmost vigor and Wilson publicly replied by approving of the course of his Attorney General and at the same time asking strong prosecution. New York Times, June 25, 1913, p. 1.

Partly because Rep. Mann was both the author of the White Slave Act and the Republican floor leader, the Caminetti case became the subject of a five hour debate in the House of Representatives in which McReynolds was damned freely for having sacrificed justice to influence. The House debate was strictly partisan in nature, the attack coming from Republicans and the defense from Democrats. 50 Cong. Rec. 2874-2906, 3006-3023 (1913).

on McReynolds to discuss the issue, McReynolds virtually ordered McChord and Folk out of the office. The Commission backed its representatives, although it was rumored that the President sided with McReynolds. The affair permanently alienated McReynolds and Norris who publicly criticized the rule of the Attorney General.

When Justice Lurton died in 1914, McReynolds was unanimously expected to be his successor. It was rumored that McReynolds did not care to leave the Cabinet with so many important anti-trust actions pending, but that as a "patriotic duty" he would consent. Other Cabinet members were considered, but Wilson was said to regard McReynolds as "the most promising material available." On August 19, 1914, McReynolds' name was sent to the Senate. It was predicted in the press that only Senators Norris and Bristow of the Republicans, with the possible addition of Cummins, and Senators Vardaman and Reed of the Democrats would vote against confirmation. The public reaction was one of indifference. The New York Times was mildly worried that McReynolds might be a little too severe on business, but "Mr. McReynolds will come within the radiance of the light of reason, and the President has said the war between government and business is about over."

On August 24, McReynolds' name came before the entire Judiciarv Committee for consideration. Senator Shields of Tennessee moved that the nomination be favorably reported. Senator Cummins

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8 New York Times, July 27, 1914, p. 1. Professor Wigmore of Northwestern University summarized the non-Cabinet possibilities in a meditative letter to the President. He suggested as "the greatest judicial mind on any state bench today" Chief Justice Winslow of the Wisconsin Supreme Court. Rousseau A. Burch of the Kansas Supreme Court was "the next most original thinker." Other state judges mentioned were Rugg of Massachusetts, Poffenberger and Robinson of West Virginia, Conner, Russell, Powell, and Lumpkin of Georgia, and others.

Wigmore saw fewer possibilities among the federal judges—"As I study the opinions of the various Federal Circuit and District Judges, I am a little disappointed at finding so few original and vigorous thinkers." The best of them he thought, was Francis B. Baker, circuit judge of the Seventh Circuit.

If a lawyer rather a judge were to be chosen, Wigmore suggested Frederick Lehmann—a man who could "always be relied upon to see fully and embrace ardently the progressive aspect and advance it in a forceful opinion afterwards." Wigmore thought Taft was completely unsuited—an ideal Justice, perhaps, but for the Nineteenth Century. Wigmore to Wilson, July 18, 1916.

9 New York Times, Aug. 19, 1914, p. 9. Folk and Brandeis were listed as joining Norris in opposition because of the New Haven matter.
interrupted to question the appointment of Charles F. Clyne as United States Attorney in Chicago. He contended that James M. Wilkerson, Clyne's predecessor, had been forced to resign by the interests he had indicted in an anti-trust proceeding and that McReynolds, as Attorney General, had condoned this perversion of justice. Cummins served notice that he intended to ask a committee of investigation on the Wilkerson-Clyne matter and that the appointment of McReynolds should be laid over meanwhile. Cummins relayed to the Committee a rumor he had picked up from Senator Kenyon that John Barton Payne, a man of influence, had stated that if the New York Central Railroad and Mr. William G. Brown were indicted, Mr. Wilkerson, the United States attorney, would "lose his head." A statement so sensational provoked a discussion of McReynolds' anti-trust record and, after the Committee had been in session for two hours and a half, Senator Shields moved a two hour recess during which Senator Kenyon could be invited to make a statement to the Committee.

When the Committee reconvened Senator Kenyon informed his fellows that he had been associated with McReynolds for many years and thought very highly of him. He saw no bridge from the Chicago situation to the appointee. Senator Chilton also defended McReynolds, and Senator Overman repeated for the Committee a telephone conversation he had had with McReynolds during the recess in which the Attorney General denied all knowledge of the Wilkerson removal. That was enough for Senator Borah, who felt that while "the Chicago situation" should be investigated, McReynolds surely deserved confirmation. Senator Chilton so moved and the Committee agreed, although Cummins reserved the right to object on the floor.

On three occasions the Senate met in executive session, primarily to hear Senator Norris attack McReynolds. Norris added to his complaint McReynolds' alleged failure to enforce the Standard Oil dissolution decree and had a resolution passed asking for information from the Attorney General on his handling of this matter. McReynolds refused to divulge the papers in his possession on the ground that their secrecy was essential to further prosecution of Standard Oil. Finally, on August 29, the appointment was confirmed by a vote of 44 to 6. Senators Norris, Clapp, Bristow, Cummins, and

31 Judiciary Committee Minutes, Aug. 24, 1914.
Poindexter of the Republicans, and Vardaman of the Democrats were in opposition.\footnote{\textit{New York Times}, Aug. 29, 1914, p. 11.}

Woodrow Wilson did not make the same mistake twice. His second appointee, Louis D. Brandeis, successor to Justice Lamar, was chosen because of his liberalism and remains a leader of liberal thought today. Indeed, Wilson chose almost too well. As President he was far in advance of the party he led, and the Republicans were quick to shout radicalism in a campaign year. The result was that Brandeis was appointed on January 26, 1916, and was not confirmed until June 1. Several volumes of Judiciary Committee hearings contain the story of his opposition and support.

There is nothing new to be said here about the Brandeis confirmation. The Committee records are available to all and are summarized by Brandeis' biographer.\footnote{Lief, \textit{Brandeis, A Personal History} (1936) 345-396; and see 6 Baker, \textit{Woodrow Wilson} (1937) 113-117.} The pre-appointment papers are still in the Department of Justice, which declined to release them on request in April, 1941. But a word can be said about another eager contender for the appointment. When Wilson appointed Louis Brandeis to the Supreme Court he disappointed William Howard Taft who not only thought that the selection was unwise, but wanted the position for himself.

The Taft boom, which its candidate heartily enjoyed,\footnote{2 Pringle, \textit{The Life and Times of William Howard Taft} (1939) 951.} resulted in a letter-to-the-President campaign of some proportions. The Augusta \textit{Chronicle}, which had a special interest in the man to be chosen to fill the vacancy left by an Augustan, thought it would be a "graceful thing" if Wilson would forget politics and send Taft to the Court.\footnote{Augusta \textit{Chronicle}, letter to the President, Jan. 5, 1916.} Many other Southern Democrats joined in the suggestion. A justice of the North Carolina Supreme Court, the receiver of a small Georgia bank, and the Commander of the Oklahoma Sons of Confederate Veterans were Taft endorsers. Respectable Southern economic interests such as the Chattanooga Manufacturers' Association and the Augusta Manufacturers' Association suggested the ex-President. As Taft once said: "I am sure the southern people like me. They would do anything but vote for me."\footnote{I Pringle, \textit{op. cit supra} note 14, at 537.} And that many of them did like him their support in 1916 evidenced.

The Bar's respectables were unanimously for Taft. Eugene W.
Daney, president of the California Bar Association, thought, in his innocence, that the appointment would be immensely popular. The president of the New York Bar Association spoke of Taft's "love of justice" and "urbanity," qualities which made him the man best "fitted by nature and training for that exalted position." The officers and committee chairman of the American Bar Association met in New York City on January 7th and 8th and prepared a petition for Taft's appointment which Alton B. Parker, the 1904 Democratic presidential candidate, submitted to Wilson.

The outcry of organized labor may have been a major factor in Taft's rejection by Wilson. Samuel Gompers, president of the American Federation of Labor, left no doubt as to where he stood on the question. "Through his decisions as a federal judge," said Gompers, "Mr. Taft demonstrated that he is not in harmony with newer ideals of human freedom and human justice... Mr Taft was known as the father of this abuse of the writ of injunction." William Green, then secretary of the United Mine Workers, sent to Wilson the resolution passed at the convention of that body which damned Taft as unsympathetic toward labor and this stand was followed by protests from central trade councils in many cities.

The Anti-Saloon League, which within a few years of the Brandeis appointment was able to cause the adoption of the 18th Amendment, and was a political force to be considered in 1916, thought that Taft was hopelessly "prejudiced against some important existing legislation and other legislation that is needed to solve the liquor problem" and that therefore he should not be appointed.

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17 Daney to Wilson, Jan. 1, 1916.
19 A copy of the list of petitioners was sent to the Attorney General by Thomas Shelton for the group under letter of Jan. 10, 1916. As broken down by the Department of Justice, the list showed 12 Democrats, 17 Republicans, 1 Progressive, and 2 unclassified.
20 Gompers to Wilson, Jan. 7, 1916. Gompers' estimate of Taft was a shrewd one: "I do not wish in any way to reflect upon the honor, integrity, or learning of Mr. Taft. As a man he has great parts and great charm. What I urge upon your consideration has to do only with his thought, his environment, and his lack of harmony with that spirit which is inflexible in its insistence upon the paramount importance of human rights and human needs."
21 Green to Wilson, Jan. 25, 1916.
22 Officers of the Executive Committee of the Anti-Saloon League to Wilson, Jan. 13, 1916. The Webb-Kenyon Act, penalizing the shipment of liquor in interstate commerce where the law of the state of destination prohibited the use or sale of liquor was vetoed by Taft as unconstitutional. 49 Cong. Rec. 4291 (1913). The bill was passed over the veto and its constitutionality was upheld in Clark Distilling Co. v. Western Md. Ry., 242 U.S. 311 (1917), opinion by White, C. J., McReynolds, J., concurring in the result and Holmes and Van Devanter, JJ. dissenting without opinion.
Perhaps Wilson never seriously considered appointing anyone but Brandeis or perhaps these protests influenced him. For whatever reason, Taft was not appointed. The Bar Association president and past presidents, seven of them including Taft, fulminated against the Brandeis selection, terming him unfit; oddly enough, their performance was not reckoned as the ignoble wail of the defeated job hunter and his friends.

John H. Clarke, Ohio federal district judge, had been considered by Wilson for the appointment which finally went to Brandeis. At that time Newton D. Baker, later Wilson's Secretary of War, told Joe Tumulty, Wilson's secretary, that Clarke had great ability and was a loyal friend of the administration as well, and the Cleveland Bar Association unanimously recommended Clarke's appointment. The suggestion lingered in Wilson's mind, and six months later when Charles Evans Hughes resigned from the Court to be the Republican party's candidate for the Presidency, Wilson chose Clarke for the vacancy. James Cox, Wilson's successor as titular head of the Democratic party, expressed the pleasure of Ohioans when he congratulated the President on the appointment, although he fell into understandable error when he predicted "years of useful service" for Clarke, who resigned in 1922. Even a Republican such as Ohio's Senator Harding said of Clarke: "A fine man, a great lawyer, an able and highly respected judge. I believe him eminently fit and worthy of a place on the Supreme Bench of the United States." The appointment was confirmed without significant opposition.

**NORMALCY'S CHILDREN**

Sixty-eight hours in the work week, a twelve hour day, labor spies and low pay resulted in the strike of 200,000 steel workers in 1919. Men died and troops moved as Judge Gary of U.S. Steel shouted "American institutions," fostered race hatreds among his striking employees, and broke the strike. Strikes of all kinds

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28 Lief, op. cit. supra note 13, at 346, gives this impression. Several attorneys of New York City suggested Benjamin N. Cardozo of the New York Court of Appeals as an excellent possibility.
29 2 Pringle, op. cit. supra note 14, at 953.
30 Baker to Tumulty, Jan. 12, 1916.
31 Cox to Wilson, July 19, 1916.
32 Harding's note of July 17, 1916, to the Judiciary Committee recorded in the Committee minutes.
called four million men from work in 1919, one and a half million in 1920, and one million in 1921. The most sensational strike occurred in Boston in 1919 when 1100 policemen struck against discharge of the leaders for union affiliation. This labor distress at home, the sporadic activities of the I.W.W., and the Russian revolution were shaken together and handed to the American public by press and politicians as "Bolshevism." Bolshevism meant bombs in Wall Street, free love, ten hour day agitation, the destruction of religion, novelty in art, and equal rights for Negroes. It was a unifying symbol of every horror attached to change.

The war years had hardened Americans to suppression of dissent, and repression was the answer to 1920's Bolshevism. After the Armistice thirty-two states passed criminal syndicalism laws and in 1920 the New York legislature expelled five members because they were Socialists. The National House of Representatives, in view of his war record, repeatedly refused entry to Milwaukee's Socialist Congressman, Victor Berger, and the Department of Justice, valiantly attempting to rid the country of "the alien menace," undertook a series of "Red raids." In December, 1919, the ship Buford carried 249 deported Russians, and the next month more than 4,000 persons were arrested. The most sensational tragedy of the era was the Sacco-Vanzetti case in which two Italians, arrested on a flimsy charge of robbery and murder, were executed, their anarchist philosophy the main proof of their guilt. This was the post-war repression which gave birth to the Klan, whose masks in the middle Twenties hid ugly hates as well as little men. This was the mental climate which fostered religious fundamentalism and the anti-evolution legislation, culminating in the crowning absurdity of the Scopes "Monkey Trial" in 1925.

This was the America of the early Twenties—an America which chose as the symbol of its spirit the man who said:

"America's present need is not heroics, but healing; not nostrums, but normalcy; not revolution, but restoration."

The Supreme Court could no more escape the impact of Normalcy
than could any other American institution. Warren G. Harding appointed William Howard Taft, George Sutherland, Pierce Butler, and Edward T. Sanford, perhaps the most conservative group of four successive selections in the Court's history. But while these men represent the spirit of an age, Supreme Court justice appointments can endure too long. Two of Normalcy's Justices lingered on to a new era, in which, embittered anachronisms, they could only struggle and die.

Harding's first appointment to the Supreme Court was William Howard Taft, selected to succeed Chief Justice White. Harding's hesitancy in making the appointment, the negotiations leading to it, and Taft's almost plaintive desire for the position are well described by Pringle.\textsuperscript{34} The nationwide endorsement of Taft aided his candidacy, for to an amazing extent Taft in 1921 was the choice of all America. Of course Republicans wanted Taft. Joseph Fordney, chairman of the House Ways and Means Committee, relaxed long enough in his labor of drawing the new Republican tariff to recommend "in the strongest way possible" Taft's appointment,\textsuperscript{35} and he spoke for many. But some of the greatest enthusiasm came from Democrats. Louisiana's constitutional convention passed a resolution of endorsement; Norman Mack, 1908 chairman of the Democratic National Committee, thought Taft the best possible selection; and the chairman of South Carolina's Democratic party expressed similar regard. The thoughts of many of his party members were well put by one of today's leading Democrats:\textsuperscript{36}

You will probably not have the opportunity during your entire administration as President to do a more fitting thing in every way than to appoint ex-president Taft to succeed the late Chief Justice White. Mr. Taft is one of the most esteemed, respected, and loved men in our great nation and undoubtedly is qualified and suited in every way to fill the all important place of Chief Justice.

Jesse H. Jones.

The support of lawyers, and especially Democratic lawyers, was cheerfully forthcoming. The members of the supreme courts of Arkansas and Tennessee wanted Taft. So did twenty judges of various courts in California. So did the bar associations of Georgia,

\textsuperscript{34} Pringle, \textit{op. cit. supra} note 14, Chapter 50.
\textsuperscript{35} Fordney to Harding, June 13, 1921.
\textsuperscript{36} Telegram, Jones to President Harding, May 23, 1921.
Dallas, Little Rock, and Louisiana. And a great many little businessmen, people who could not possibly have understood what the Supreme Court meant to them but who had a vague feeling that friendly Bill Taft would look after their interests, wanted him too. A York, Pennsylvania, business man, a Charleston utility executive, a Memphis apothecary suggested Taft to Harding. Conservatives throughout the country still shuddered when they thought of Brandeis on the Court, and many of them shared the sentiments of the president of the Minneapolis Tribune.37

Mr. Taft is not a radical but on the contrary he is thoroughly American without being over-conservative. It would not be proper to argue as to the wisdom of certain previous appointments; but . . . the nation's Supreme Court needs strengthening against the tendency toward radicalism and Socialism.

There was one criticism, but it came too late and too early. Too late because it did not get to Washington until after Taft had been nominated and confirmed; too early because such a criticism would not be accepted in high places until after Normalcy's era. This criticism came from Federal Judge Charles F. Amidon of North Dakota. Judge Amidon was Taft's age and had been on the bench since Cleveland's second administration. He thought Taft was too old to understand the real needs of Constitutional justice.38

The court out not to be made up of Pharisees concerned with its traditions, but of living, free prophets charged with the great duty of interpreting the Constitution and applying it to American life in such a way as to make it a blessing and not a blight . . . A young man should be chosen, certainly under fifty, and better if he is near forty. He ought to come to the Court with a powerful mind untrammeled by its traditions . . . . If such a man disturbs the Court, that will show it needs disturbing.

Judge Amidon's letter never went beyond the clerks of the Department of Justice, but of course it would have made no difference if it had come before Harding. Taft's critics were too few to be effective, and his appointment was confirmed, after a sharp debate, on June 30, 1921, the day it reached the Senate. There, too, as they

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37 Rome G. Brown to Harding, May 21, 1921.
38 Amidon to Harding, June 29, 1921.
had with their pre-nomination endorsement, his Southern Democratic friends stood him in good stead.\textsuperscript{39}

The first appointment during Taft's chief justiceship was that of George Sutherland, former United States Senator from Utah, to succeed Justice Clarke, who resigned. Had Justice Clarke remained on the Bench, the history of the Supreme Court might have been far different. Why he resigned at the age of 65 when he was one of the younger men on the Bench is not clear.\textsuperscript{40} If he had stayed on the Court the liberal bloc, with the accession of Stone, would have had four instead of three members and would have had a fighting chance to dominate. \textit{Adkins v. Children's Hospital},\textsuperscript{41} at least, would never have been decided as it was. But the choice of Sutherland gave the conservative faction of the Court a dominance which lasted till 1937. Sutherland, because he had formerly been a Senator, was confirmed by the Senate on September 5, 1922, the day of his nomination, without reference to Committee.\textsuperscript{42}

Harding's third appointment, that of Pierce Butler, is discussed at length below. His fourth selection was Edward T. Sanford, Tennessee federal district judge, to succeed Justice Pitney. Sanford was an assistant attorney general in the second Roosevelt administration and was a district judge from 1908 until his advancement in 1923. As a district judge he seemed "sometimes . . . to be slow in coming

\textsuperscript{39} The Taft nomination was considered in executive session and hence the debate is not in the public records. However, former Senator Henry F. Ashurst of Arizona prepared a memorandum on the debate which he keeps as a personal record. Senator Ashurst permitted me a glance at a portion of this document in 1939, but decided that it would be indiscreet to allow a detailed perusal. Perhaps some future biographer will prevail upon the Senator to allow the use of his notes.

\textsuperscript{40} In his letter of resignation to the President, Justice Clarke said: "I shall be 65 years old on the 18th day of this month. For a long time I have promised what I think is my better self that at that age I would free myself as much as possible from imperative duties to the end that I may have time to read many books which I have not had time to read in a busy life; to travel and to serve my neighbors and some public causes in ways in which I cannot serve them while I hold public office." \textit{New York Times}, Sept. 5, 1922, p. 1. Clarke soon clarified his phrase "public causes" as meaning advocacy of United States entry into the League of Nations \textit{(New York Times, Sept. 7, 1922, p. 10)} and he strongly disavowed any intention of seeking another public office. This was in answer to the rumors that he would be a presidential candidate in 1924. \textit{New York Times}, Sept. 22, 1922, p. 16.

\textsuperscript{41} 261 U.S. 525 (1923). In this case Justice Sutherland, for the Court, held that an employee's freedom of contract was infringed by a minimum wage law. Reversed in \textit{West Coast Hotel Co. v. Parrish}, 300 U.S. 379 (1937). In the \textit{Adkins} case Justices Taft, Sanford, and Holmes dissented, and Justice Brandeis disqualified himself.

\textsuperscript{42} Taft favored Governor Miller of New York, but he was well satisfied with the choice of Sutherland. 2 Pringle, \textit{op. cit. supra} note 14, at 1058.
to a decision" but this flaw was not so serious as to be a major defect. Sanford won his proportion with the aid of a veritable torrent of letters from his friends directed to the President and the department of Justice. The campaign began with the Day vacancy, and when Butler got that appointment, Sanford's friends aimed to make him the successor of Pitney. Some of his endorsements came from figures of at least minor note, such as Augustus E. Wilson, Governor of Kentucky from 1907 to 1911, and Edwin P. Morrow, the incumbent Governor; a former president of the University of Tennessee; the manager of the Chattanooga Times; Clark Howell of the Atlanta Constitution; the Chattanooga postmaster; the Bishop of Atlanta; a federal circuit judge; and the Tennessee legislature by resolution. But for the most part the recommendations came from the most nondescript group of unimportant little people ever organized to impress the President of the United States with the Supreme Court caliber of a candidate. Among the respectable nonentities who responded to the request that they write the President were a Knoxville banker; a Fayetteville, Tennessee, lawyer ("in my humble way I urge . . ."); a college classmate practicing law in Chicago ("Ed Sanford, as I have always known him. . ."); and another classmate who had risen to the eminence of speaker of the Vermont legislature; a Mississippi school board member ("President Pro Tem of the Board"); a former United States marshall in Sanford's district; and an Arkansas Republican.

But Sanford had some friends of influence and, at least, he had few enemies. Harding established to his own satisfaction that no one on whom he needed to lean politically would mind the appointment. When Wayne B. Wheeler, the Anti-Saloon League's lobbyist, dropped in at the White House, Harding asked him if there was any objection to Sanford. Wheeler's immediate reaction was that Sanford would not be satisfactory, but when he returned to his office he found that his recollection had been unfair. He looked over his records, consulted with friends, and finally told Harding

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43 Memorial Proceedings in the Supreme Court, 285 U.S. xlvi (1930). Sanford carried his share of the burden of the Supreme Court, writing 130 opinions in seven years.
44 This statement assumes that the thirty-two letters found in the files of the Department of Justice are a fair sample of all that were sent and lost since their receipt.
45 Taft attributed to Attorney General Daugherty the selection of Sanford. 2 Pringle, op. cit. supra note 14, at 1058.
that “Judge Sanford is fundamentally and thoroughly loyal to prohibition and its enforcement on the bench and in private life.”

On January 24, 1923, Harding sent the nomination of Sanford to the Senate. Tennessee’s Senator’s Shields and McKellar, gave their approval and confirmation followed speedily. For Sanford there was only one detail to be arranged before he could enjoy his promotion, and that was to determine the date from which his salary should begin. He took his oath of office in Knoxville on February 5, 1923, the day he received his commission, and went to Washington at once. But the Court had recessed and he was not formally to take his place on the Bench until February 19th. Sanford promptly went to the Marshall of the Court to inquire whether his salary should start from the 5th or 19th, and upon being informed that the 5th was proper he at once conveyed the information personally to the appointment clerk of the Justice Department. His diligence was well rewarded by a salary check which recompensed him for services from the date of the oath.

The Butler Appointment

Pierce Butler, Harding’s third appointee to the Supreme Court, won confirmation after a hard fight. The final vote was not a close one, but Butler’s opponents were vigorous and sincere, and the tussle, while it lasted, was a good one. The cause was blackened in the public mind by the association in opposition of several Klansman Senators, but the real struggle was between Midwestern liberals and the advocates of Normalcy.

Butler was the son of moderately prosperous Irish immigrants. He was born March 17, 1866, in a log cabin at Northfield, Minnesota, which soon gave way to a comfortable frame house. He went to Carleton College in Northfield where he took a particular interest in mathematics, debating, and boxing. In 1887 he was graduated from Carleton College, and began to read law in St. Paul. The

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46 Wheeler to Harding, Jan. 3, 1923.
47 Memorandum by the appointment clerk of the Department of Justice, Feb. 8, 1923.
48 The story of the Butler appointment is related at special length because of the large number of documents found concerning the appointment, and because almost all of the factors involved in choice and confirmation are displayed here. A more full account is the author’s “The Confirmation of Pierce Butler,” an unpublished Master’s thesis in the library of the University of Wisconsin. These papers include biographical sketches, summaries of some of Butler’s important cases, and a great number of statements in support of, or in opposition to, the nomination.
first years of practice were devoted to establishing himself as a local Democratic politician; for political services rendered he became assistant county attorney in 1891 and for the next two terms he was elected county attorney. He thus gained experience which was to make him an outstanding trial lawyer and was even fortunate enough, from the ambitious young politician's point of view, to have two murder trials. A good deal of his work was petty drudgery, but even mine-run breaches of the peace could bring excitement. One such case involved a certain D. J. Leary who was in and out of jail and on the verge of commitment for insanity several times during Butler's term of office. Leary subsequently threatened to kill Butler and, thirty years later, he was able to cause considerable annoyance by his obstruction of Butler's confirmation to the Court.

In 1897 Butler returned to private practice and began his long service for railroad clients. For several years he was full time counsel for the Chicago, St. Paul, Minneapolis, & Omaha Railway. During the next twenty years he had many cases for clients other than railroads but the most lucrative part of his practice came from them. Probably the most important of his cases was Ex parte Young which later returned to the Court as the Minnesota Rate Cases. In the atmosphere of such litigation he developed his theories of public utility valuation.

In 1913 the Interstate Commerce Commission's Bureau of Valuation began the valuation of all the country's roads for the purpose of aiding the Commission in rate making. Butler represented the Western group of railroads in this gigantic study. Two of the four briefs he filed dealt generally with the valuation problem and two specifically with the Texas Midland Railroad. In these briefs he expressed his concept of valuation: "It is difficult to improve on the statement in Smyth v. Ames." Not all of Butler's work, however, brought him into conflict with the government. During Taft's administration he served as a special assistant to the Attorney General in several anti-trust prosecutions. Nor were all of his railroad associations in behalf of rail-

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49 In a personal injury case Butler recovered one of the largest judgments ever obtained against his local street railway system, and he represented St. Olaf College, a Lutheran institution, in an important will case. He also represented several farm cooperatives.
50 209 U.S. 123 (1908).
51 230 U.S. 352 (1913).
52 169 U.S. 466 (1898).
roads. He represented the Canadian government in the Grand Trunk arbitration in which the government took over the major roads of the Dominion; William Howard Taft, one of the arbiters, was much impressed with Butler's work.

From 1907 until his appointment to the Court, Butler was a regent of the University of Minnesota and during the latter part of his years as a regent, three particularly important matters came before the Board. They involved three men, Professor William A. Schaper, Professor John H. Gray, and Stanley Rypins, an instructor in English. Each case came before the Senate Judiciary Committee at the time of Butler's appointment.

Professor Schaper, head of the department of political science at Minnesota, was born in Wisconsin of German parentage. He was an active opponent of America's entry into the World War but upon the actual declaration of war he advised many of his students to enter the army. He was an easy target for charges of disloyalty when, in July, 1917, J. F. McGee of the Minnesota Commission of Public Safety, whose spies hunted treason in all corners of the state wrote President Snyder of the Minnesota Board of Regents a letter dealing with pro-Germanism on the faculty. His letter dealt with the German department only, and he attached to it an anonymous memorandum from a person "acquainted with every member of the German department." The memorandum dealt exclusively with the German department except for the last sentence, which read: "There are two other rabid pro-Germans in official positions at the University, —— and W. A. Schaper." This afterthought to an anonymous communication was the whole of the charge of the Public Safety Commission against Schaper. McGee did not even think this tag worth mentioning in his covering letter. The cursory character of the reference accounts for the fact that shortly after his discharge Schaper received a letter from John Lind, Chairman of the Public Safety Commission, stating that he had never even heard of Schaper until his discharge got into the press.

Two months after the McGee letter, and with only a few minutes notice, Schaper was summoned before the Regents to defend himself. He was given no opportunity to prepare a statement, nor was he informed of any charges against him either before or at the

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53 McGee to Snyder, July 13, 1917.
54 All copies of the memorandum in Committee files contain a blank line in place of the name of the other suspect.
Upon invitation to clarify his position toward the war he stated that he had been opposed to it, but that once war was actually declared he felt it the duty of every citizen to abide by the law. He admitted that he could not "boost for the war" since he had many relatives in both the German and American armies. Butler then, according to Schaper, began to harass him with accusations, charging him with attempting to stay just within the law. After a short cross-examination of Schaper the Regents considered the case among themselves for an hour or two and then read Schaper his dismissal. Schaper requested that he be given some formal charge and Butler replied, "His answer is in. His answer is in." Nothing being said by the other Regents, the request was refused.

The same day the Board released a resolution which stated that at the instance of the Public Safety Commission the Regents had examined Professor Schaper and that "his attitude of mind ... and his expressed unwillingness to aid the United States in the present war render him unfit and unable rightly to discharge his duties. . . ." On the same day Butler made the following statement to the press:

His removal is in harmony with the present tendency to silence disloyal communities, institutions, publications, officials, and individuals. We must see that sincere loyal Americans are made the instructors of our youth, and not "blatherskites" such as this man.

Immediately upon his discharge Professor Schaper began an unceasing effort to win vindication. His first appeal was to the President's Mediation Commission, of which Felix Frankfurter was counsel. The Commission sent Max Lowenthal to Minnesota to investigate. Lowenthal called on Pierce Butler Jr., but there is no evidence that he carried his investigation further. Not for twenty years did Schaper win his apology from the University, but on January 28, 1938, upon petition from several sources including Gov-

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55 The account of the events of the meeting is drawn from Schaper's press release of September 18, 1917, in Committee files; Minneapolis Journal, Sept. 18, 1917, clipping in Committee files; and Schaper's supplemental statement filed with the Committee and allegedly based on a memorandum made in 1917. There is no stenographic record from which a check can be made.

56 Butler "then shouted, 'Don't you believe the Kaiser, the Crown Prince, and the other Hohenzollerns should be wiped out root and branch and the government of Germany be destroyed?" Schaper thought this was a bit extreme and Butler "shouted 'You are the Kaiser's man, you want the Kaiser and the Crown Prince to dominate the world, don't you?" From Schaper statement filed with the Judiciary Committee.

ernor Benson of Minnesota, the Board of Regents passed a resolution stating that since no charges were presented against Schaper and since he was not given an opportunity to prepare a defense, his dismissal was unjustified. The Board restored Schaper to his position as Professor Emeritus and awarded him $5000 as the amount due on his 1917 salary.58

The second incident of subsequent importance during Butler's years as a regent involved John Henry Gray of the department of economics. Gray was appointed head of the department of economics and politics in 1907, and when the department was divided he became chairman of the economics division. During the years 1913-14 and 1917-20, Gray absented himself from the University to act as Commerce Commission examiner in railroad valuations. One of Butler's chief cases while representing the railroads was the Texas-Midland valuation in which Leslie Craven, Butler's partner, appeared in Texas before Gray. Butler himself never appeared personally before Gray, and, indeed, was never in Texas. This fact became important during the confirmation dispute when charges were made touching on Butler's alleged anger at Gray for adverse rulings.

Gray did not have the respect of the University authorities. His salary of $3500 was not raised during his entire tenure; and the administration record card rated his reputation for efficient administration as "not high" while he was described generally as "rather crude."59 For whatever reason, when the economics department was merged into a new department of business in 1919, Gray was not named head of the new department. He did not stay at Minnesota long after his demotion, going to Carleton College, Butler's alma mater, in 1920.60 Had it not been for the charges at the time of Butler's Court appointment based on Gray's departure from the University, this would have been the last contact between the two men.

The third incident during Butler's tenure as regent which came to the attention of the Senate after Butler's Court appointment, was

59 Copy of file card of president of University of Minnesota on file with the Committee. As the discussion of the Rypins incident, infra, shows, the standards of "crudeness" of the Minnesota authorities in 1920 were somewhat unusual.
60 President Fred Snyder of the Minnesota Board of Regents stated that the president of Carleton told him that Butler had endorsed the Gray appointment or it would not have been made. Telegram, Snyder to Nelson, Dec. 12, 1922; subcommittee hearing on Butler, p. 86.
the case of Stanley Rypins. Rypins, son of a Minneapolis rabbi, was a Rhodes Scholar during the early years of the World War but was enrolled at Harvard in April, 1917, where he entered the service. It was rumored that he was barred from England after the war because, during his Oxford years, he had refused to cooperate in the British hospitalization program and because of his radicalism.\textsuperscript{61} Rypins was associated with the Committee of 48, a liberal organization, and the American Civil Liberties Union.

After the war Rypins became an instructor at Minnesota and promptly incurred the suspicion of Butler. Upon Butler's request for information, Marion L. Burton, University president, reported that Rypins had been "guilty" of certain "indiscretions" at Oxford three years previously.\textsuperscript{62}

In general, I think, it may be said that our Mr. Rypins, the instructor, is somewhat opinionated, if not obstinate. Mr. Thomas tells me that while he was an Oxford student he endeavored in a sense to reform Oxford. For example, he did not like tea, and therefore insisted upon serving coffee and cocoa; he himself did not smoke, and, therefore, would not serve cigarettes to his guests. These are insignificant facts, but I think they indicate something of the temper of the man.

Butler kept close watch on the young instructor. When a student came to his office to report that he had attended a meeting of an organization known as "The Seekers," with which Rypins was allegedly connected, and that at this meeting "direct action," "support of the I.W.W.," and "free love" had been advocated, Butler carefully filed away the information. During the spring 1920, stenographic notes of what Rypins said in a political speech were brought to Butler and forwarded by him to the president of the Regents. Over Butler's protest, Rypins was re-appointed in 1920, and shortly thereafter the instructor began to take an active interest in the La Follette-for-President campaign of that year. Various of his speeches were quoted in the Chicago \textit{Tribune} and F. W. Murphy, president of the Minnesota State Agricultural Society, sent a \textit{Tribune} clipping to Butler and said:\textsuperscript{63}

Such sentiments are in line with the teachings of the radical reds and if he is to be their spokesman let him have his salary from them and not from the State.

\textsuperscript{61} Telegram, William D. Mitchell to Sen. Kellogg, Nov. 29, 1922, in Committee files. There is no further evidence on this point.

\textsuperscript{62} Burton to Butler, Oct. 28, 1919.

\textsuperscript{63} Murphy to Butler, June 16, 1920.
This was too much for the Regents and Rypins was notified that his contract would not be renewed again. The card in the University file giving the reason for this action was perhaps less than frank. It said: "His appointment was not renewed because of his personality. He was very aggressive."

Butler's activities as a regent brought him criticism as well as praise. Upton Sinclair, in his book "The Goose Step," devoted some attention to "The University of the Ore Trust." There Butler is identified as a "railroad attorney, hard-fisted and aggressive agent of plutocracy," the "Grand Duke of the University." In Sinclair's version of Gray's demotion, Gray was an advocate of municipal ownership of public utilities and therefore was "humiliated" out of his position. It may be assumed that criticism from the very sources which he was fighting brought more pleasure than pain to Butler.

Why Harding chose Butler is not completely clear. In appointing Taft and Sutherland, he had chosen two Republicans, and the death of White removed the only Catholic from the Court. This combination of circumstances made it politic to appoint a Democratic Catholic. The choice was a surprise to the public for the occasional predictions had centered around Senator Pomerene of Ohio and ex-Senator Saulsbury of Delaware. A few men with no understanding of Harding's standards for a Supreme Court Justice suggested Benjamin N. Cardozo, then a judge of the New York Court of Appeals. Thomas Swan, Dean of the Yale Law School and later a federal judge on the Second Circuit, wrote Harding that "it is the unanimous

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*Professor A. W. Rankin of the department of education, in a letter prepared for the Minneapolis Journal in December, 1919, charged Butler with "dominating" the Regents and with attacking the Association of University Professors as a union. He charged that Butler carried the bull-dozing tactics of criminal law interrogation over to the inquisitions of faculty members.

The charge that Butler "dominated" the Regents is probably not true. Professor Charles Bunn of the University of Wisconsin Law School, one of the foremost liberals of that faculty, was an attorney in the office of Pierce Butler at the time of the Court appointment. He states that the other members of the Board of Regents were men of as strong personality as Butler himself. (Statement to author.) Butler as regent was surrounded by friends who saw eye to eye with him on important issues.

*When I gathered materials for this article originally, I was given access to all papers in the Department of Justice touching Justices then deceased. Butler had not died at that time. In April, 1941, after Butler's death, the Department refused to allow the use of the Butler papers; this refusal suggests that there are papers in Department files which will repay careful examination by any biographer of the Justice.

opinion of the members of the Law faculty of Yale University" that Cardozo "is pre-eminently fitted by scholarship, temperament, and experience for this appointment." Ten years later President Hoover was more receptive to this suggestion.

Taft suggested John W. Davis, Morgan attorney, as his first choice and Butler as his second. Upon Davis' refusal, Harding chose Butler. There was little public reaction to the appointment. The New York Times tucked its expression of surprise away on page four, and the Washington Post filed its story still farther back toward the want ad section.

Opposition, although scattered, was vehement. The day after the appointment the Minneapolis City Council passed a resolution by a 12 to 6 vote condemning the appointment because it made a railroad attorney a judge on railroad cases and Samuel Gompers, American Federation of Labor president, prepared an article for the Federationist charging that Butler was a "reactionary" with a corporation-tinged viewpoint. Religious prejudice accounted for part of the criticism. A "Christian citizen with the love of God and my country at heart" thought that a Catholic would be a bad influence on the Bench and another writer of similar bias moaned that "It may create happiness in Tammany and other Pope domains in the U.S. to have an Irish Catholic appointed to the Supreme Court."

The bulk of the criticism, however, was directed at Butler's economic views and it was met by Butler's friends with a well-arranged, and nonetheless sincere, burst of applause aimed at the Committee. Many of Butler's associates during his years as a regent echoed the words of the University of Minnesota's president, L. D. Coffman, who thought Butler would "reflect a large measure of

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6 Swan to Harding, Nov. 3, 1922. Samuel Seabury, New York judge and Democratic leader, knew Cardozo well and said of him "His is a character as unique as it is splendid." Seabury to Harding, Nov. 8, 1922.

6a Pringle, op. cit. supra note 14, at 1058.


7 Samuel M. Adams, Johnstown, Pennsylvania, to Committee, Nov. 24, 1922.

7a John Walso, Minneapolis attorney, to Committee, Nov. 28, 1922. The volume of the religious protest, as measured by letters in Committee files, was far less in Butler's case than in the appointment of Felix Frankfurter, infra. However, in terms of opposition as measured by Senate votes, the religious prejudice was, as is shown below, more influential in Butler's case.
distinction on the office."

The spirit of the America of 1922, the spirit of "Normalcy," was as well caught in the words of the superintendent of schools of Crosby-Ironton, Minnesota, as by anyone else:

My reasons why Mr. Butler is one of the big Americans today. He has made a great success as a lawyer. He has always been honest and sincere in all his business. He has had the experience that a man ought to have as a judge. Senator-elect Shipstead is a radical; unfortunately he is our representative now. Shipstead talks about our Mr. Butler being warped? Shipstead's mind is warped because it never had a chance to develop (except with a few Socialists).

I trust that Mr. Butler will be selected for this place—this I'm sure is the wish of all good people who have our Country at heart. Wishing you many years of good health.

Harding nominated Butler on November 23, 1922, during a special session of Congress. The appointment was referred to the Judiciary Committee by the Senate and from the Judiciary Committee to a special sub-committee whose chairman was Knute Nelson, Minnesota conservative Republican, and whose other members were Senator Cummins, liberal Republican of Iowa, and Senator Walsh, a liberal Democrat. Between Nelson and Butler there was a relation of great friendliness, and as chairman Nelson was Butler's partisan rather than his judge.

The sub-committee met on November 27th to find first, that Senator La Follette of Wisconsin and Senator Ladd of North Dakota wanted an investigation, Ladd pointing to Butler's record as a regent as an indication of incapacity and citing as evidence the criticisms by Professor Rankin; second, that there was a protest from a St. Paul lawyer; and finally, that they had a sensational offer from a man in Butte, Montana, who assured the Senators that he could prove that their prospective Justice was a member of the "infamous Butler-O'Brien gang who have encouraged and protected vice and prostituted justice in the City of St. Paul for more than 25 years."

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"J. Pettijohn, assistant to Coffman, to Senator Nelson, Nov. 28, 1922. Others who endorsed Butler were Donald J. Cowling, president of Carleton College; Marion L. Burton, president of the University of Michigan who had been president of the University of Minnesota during most of Butler's regency; J. A. A. Burnquist and J. A. O. Preus, a former Governor and the 1922 Governor of Minnesota respectively; Everett Fraser, dean of the Minnesota Law School.


"Supra, note 64, and New York Times, Nov. 28, 1922."
The writer offered to post a thousand dollar bond to be turned over to the Salvation Army if he could not prove his case.\footnote{Leary to Committee, Nov. 25, 1922.}

The maker of this offer was D. J. Leary, the same Leary whom Butler had prosecuted thirty years before, and who had made intermittent threats against him ever since. It took the Senators four days to prove to their own satisfaction that Leary was completely irresponsible, and as late as twelve days after the “offer” Pierce Butler Jr. was still sending proof of Leary’s delinquencies to the Committee. But while Leary’s charges came to nothing, their investigation caused delay and gave Butler’s critics an opportunity to collect their strength.

On November 29th the Judiciary Committee approved the Butler appointment but the Senate postponed all appointments until December 4th, the last day of the special session, and the Progressive Republicans then insisted that the nomination go over to the regular session.\footnote{New York Times, Dec. 5, 1922.} On December 5th the regular Lame Duck session opened and Harding sent Butler’s name in again.

When the Committee met again there were two new opponents on the scene. One was William A. Schaper, set to avenge himself for his dismissal from the University in 1917. The other was Henrik Shipstead. In December, 1922, Shipstead was the Senator-elect from Minnesota who was to take office the following March. A Farm-Laborite, he had defeated Nelson’s fellow Republican, Frank Kellogg. Thereafter the chief antagonist and the chief proponent of the Butler appointment were these bitter political enemies, Shipstead and Nelson. All the formal objections came from Shipstead and Schaper. Stanley Rypins telegraphed his desire to be heard, but never actually appeared.\footnote{Although Rypins did no more than send a telegram, the Butler forces made every effort to establish a case against him. A 400 word telegram presenting the Butler view of Rypins’ biography and character came from William D. Mitchell and this was followed by lengthy supporting documents.}

Pierce Butler Jr. and Butler’s partner, William D. Mitchell, carried the campaign in behalf of Butler. Pierce Butler himself did not appear in Washington but he sent several letters and telegrams to Senator Nelson who kept him constantly informed on the flow of affairs. Nor did Pierce Butler Jr. or Mitchell find it necessary to go to Washington, although they stood ready to do so, or to send before the Committee “a body of representative men from St. Paul,
Minneapolis, other parts of Minnesota... who know Mr. Butler."

This friendly parade was never called to march across the witness stand.

Thus the scene was set, with Butler, his son, and Mitchell on one side, and Schaper, Shipstead, and a few assistants on the other. In between hovered Senator Nelson, trying to look like an umpire as he strove to make victory certain for Butler.

The Committee met on December 8th and heard Shipstead's charges. They were, first, that Butler was hopelessly biased in favor of railroads,81 a bias which would unfit him for all "corporation v. public" cases and especially those involving utility valuation; second, that the railroad valuation cases on which Butler had been retained as counsel would deserve a full Court of nine when it finally came to its ultimate decision, and Butler would not be able to hear the case; third, that Butler had represented an extremely wicked client in a Minneapolis utility acquisition proceeding,82 fourth, that Butler had revealed a lack of judicial temperament as a regent at Minnesota. To support this charge Shipstead asked that certain dismissed professors and also Max Lowenthal,83 and Felix Frankfurter be summoned.

Because of Senator Walsh's shrewd conviction that it would be hopeless to wait for Harding to appoint a liberal to the Court84 the attack on Butler because of his conservatism was largely ignored and the Committee gave its main attention to investigating charges of actual perversion of justice. Another reason for ignoring the charge of "the corporation-tinged viewpoint" was that Shipstead could not prove it. No one had prepared factual evidence for him, and he could only meet the half-hour interrogation of the Committee with evasive answers.85

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80 Mitchell to Nelson, Dec. 9, 1922.
81 "The appointment of Judge Gary, Chairman of the Board of Directors of the United States Steel Corporation, to the Supreme Court, would not in our opinion be more unfitting or improper than the appointment of Mr. Butler." Shipstead statement to Committee.
82 This "charge" evaporated so quickly that it does not even merit a footnote of explanation.
83 War-time investigator of the Schaper dismissal for the President's Mediation Commission under the direction of Felix Frankfurter, counsel for the Commission.
84 Butler Hearings, p. 13.
85 The Shipstead-Schaper attack on Butler was, on the whole, fervid but incompetent. One explanation is that Shipstead knew nothing of Butler or the problem until he came to Washington.
Professor Schaper was the first witness to appear before the Committee. His objection was that Butler, as a dominant regent, had caused him to be dismissed as a rabid pro-German without giving him any opportunity to defend himself. The resolution of the Regents dismissing Schaper had stated that the action was being taken "at the instance of the Public Safety Commission" and Schaper produced the letter of Lind, Public Safety Commission chairman, stating that the Commission had never considered Schaper at all. This apparent falsity in the dismissal resolution seemed serious to Senator Walsh, and the Committee adjourned with the understanding that Schaper would present the charge more formally at the next meeting. The question of calling the witnesses requested by Schaper was meanwhile taken under advisement.86

Pending the next Committee meeting Senator Nelson requested a Federal Bureau of Investigation study of the Schaper incident. The report, which contained nothing of significance, was not completed until the nomination was on the floor of the Senate, but William D. Mitchell prepared a lengthy statement supporting the Regents' stand and this document was in the Senators' hands on December 13th when Schaper presented his case fully. Schaper offered his 1917 press release and a supplemental statement outlining Butler's part in the dismissal, including the Butler "blatherskite" statement subsequent to the Regent's action.

After Schaper left the Committee room, Senator Nelson as Butler's advocate presented the other side of the case. He offered the letter of the Public Safety Commission in which the anonymous, off-hand reference had been made to Schaper, and the Senators, finding that it gave them some reason to support the Regents' action, were willing to drop further consideration of the matter. As Senator Cummins put it to his fellows:87

It is sufficient to say that they had grounds upon which to proceed and it would be absurd to claim that Butler would not be a decent Associate Justice because he joined in turning him

86One of the witnesses requested by Schaper was Professor Felix Frankfurter, who later served with Butler on the Supreme Court for a short time. The day after the hearing Mr. Frankfurter wrote to Pierce Butler Jr. denying that he had any connection with the opposition or that he had any information to give. He later sent a similar message to Senator Nelson.

87Butler Hearings, p. 78. The stenographer continued to transcribe the discussion in the executive session. Cummin's use of the word "they" indicates that he was already a firm Butler supporter.
out; and you will not find that they will make any use of that. In any argument that they make before the Senate on this matter, they will not make any use of that.

Senator Shipstead had filed with the Committee a statement which he thought covered the Gray case, and the Senators turned next to this problem. Shipstead's statement alleged that Butler had appeared before Gray when Gray was sitting as examiner in the Texas Midland valuation case in Texas; that Gray made "numerous rulings" adverse to Butler; and that as a result Butler used his influence at the University to force Gray out. The statement added that Butler "also came to Washington and made the rounds of the officers of the Interstate Commerce Commission and lodged personal private complaints among these members against Dr. Gray because of his rulings in the Texas Midland case."

Senator Nelson considered this the "most serious" of the charges against Butler, and Senators Shipstead and La Follette both asked that Gray be summoned to Washington. But the main phases of the charge were disproved so quickly that the whole charge was promptly abandoned. It was speedily shown that Butler had never been in Texas, much less argued a case before Gray there. Letters from Interstate Commerce Commissioners and the testimony of the head of the Bureau of Valuation were laid before the Committee which proved conclusively that Butler had never made any complaint against Gray at all.

To the Senators this left but one complaint, that Butler had made up his mind about railroad valuation and was therefore not a suitable choice for the Court. Butler filed a memorandum attempting to show that his work in the valuation cases had never gone beyond the preliminary stage of fact determination, but the memorandum itself showed that Butler had expressed himself at length on value factors. Senator Cummins had read the briefs in those cases and he assured his fellow Senators that Butler had opinions on valuation, but that this was, in his opinion, no disqualification. The following dialogue then ensued:

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\[8\]
8To balance the charges of railroad favoritism Butler Jr. offered the endorsements by many farm cooperatives and the approval of Charles E. Elmquist, a former member of the Minnesota Railroad and Warehouse Commission.

\[89\]
9Butler Hearings, 96. On both copies of this portion of the hearings, the typed page was pasted to another sheet of paper and inserted into the booklet. Both had the word "rewrite" pencilled at the top. This was the only page of the 96 which had such treatment. Whether the word "rewrite" was a noun,
Sen. Walsh: I feel sure that he is disqualified to act in those cases and I am sure he thinks so, himself.

Sen. Cummins: I did not use the word “disqualified” in that sense. I am speaking about its disqualifying him for a place on the Supreme Court Bench.

Sen. Walsh: I do not think anything like that. Of course we all have some very definite opinions in these matters.

This passage is the only evidence in any of the papers bearing on the rumor that Pierce Butler had to promise Senator Walsh not to sit on valuation cases to get Walsh’s support for the nomination. The phrase “those cases,” as used by Senator Walsh, might have been construed to cover all valuation problems, but there is no supporting evidence to indicate so wide a meaning. A prominent Senator still in Washington in 1939 who was in the Senate in 1922 and who was a good friend of Walsh stated that it was his understanding Butler promised only not to hear those cases in which he participated as counsel. In view of the fact that a promise of such a nature would have been superfluous, as a Justice of course would not sit on cases he argued, it seems unlikely that any such rumor is true.

At the end of its hearing on December 13th the sub-committee voted to recommend confirmation. On December 18th, the recommendation was adopted by the unanimous vote of the whole Judiciary Committee with the exception of absentees Borah, Norris, Reed of Missouri, and Shields.

Senator Nelson went into the Senate on December 21st to lead the debate in behalf of Butler well prepared on all branches of his case. There was one charge, however, which no documents could

signifying that the sheet was a rewrite, or a verb, signifying an admonition to the typist to rewrite the page, is not known. It is possible that there was a first draft which would give a different meaning to the discussion. An attempt in 1939 to find the original stenographer in Washington proved fruitless.

For a reference to such a rumor see Charles A. Beard, “Scholarly Objectivity,” in The New Republic, Feb. 8, 1939, p. 36.

The Senator is kept anonymous at his own suggestion. He charged that while Butler kept his promise not to sit on the immediate case in which he was counsel, Butler decided the case nonetheless since the ultimate decision was based on doctrines developed in previous Butler decisions. For consideration of this charge see note 96, infra.


Papers taken by Senator Nelson to the Senate were: The Shipstead statement; biographical statement about Butler and Butler’s letter and biographical telegram of Nov. 24; wire from Butler on his work in railroad valuation; letter from Twin Cities Milk Producers’ Association of St. Paul, Nov. 28, endorsing Butler; documents from University of Minnesota officials on Schaper and Gray;
meet. That was the "charge" that Butler was a Catholic. 1922 was in the midst of the Klan ascendancy, and Klan opposition is the only possible explanation for the opposition to Butler of several conservative Southern Democrats.\(^{93}\) After three hours and forty minutes of debate, the motion to recommit failed by a vote of 61 to 7 and the motion to confirm carried, 61 to 8. Senators expressing their opposition to Butler in one vote or the other or paired against him were Senators Brookheart, Iowa; George, Georgia; Harris, Mississippi; Heffin, Alabama; La Follette, Wisconsin; McKellar, Tennessee; Norbeck, South Dakota; Norris, Nebraska; Shepard, Texas; and Trammell,\(^{94}\) Florida. Of these it may be presumed that Senators Brookheart, La Follette, Norbeck, and Norris were opposed to Butler because of his social outlook.\(^{95}\) Other Senators of a reputation for liberalism who did not vote were Borah, Idaho; Couzens, Michigan; and Ladd, North Dakota. Butler's enemies had been able to delay confirmation, but they never seriously menaced it. In 1922 conservatism was a ladder, not a barrier, to the Supreme Court.\(^{96}\)

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\(^{94}\) 64 Cong. Rec. 813 (1922).

\(^{95}\) While Butler's Catholicism cost him some support, it won others to him. Indeed, he would never have been appointed had it not been for Harding's desire to woo Catholic voters. A Senator's secretary who was in Washington in 1922 in the same capacity told me in 1939 that only Senator Walsh's desire to see a fellow Catholic on the Bench enabled him to overcome his repugnance to the Butler appointment. There is no other evidence on this point.

\(^{96}\) Had Butler been appointed five years later after the Supreme Court, in Gitlow v. New York, 268 U.S. 652 (1925), took upon itself the duty of protecting civil liberties against state encroachment, the nature of the opposition might have been different. In 1922 Butler's critics failed to prevent confirmation because they could not prove he was dishonest; the attempt was a manifest absurdity. Today a critic could more effectively use the same evidence to prove an appointee's disqualification for lack of respect for civil rights.

Butler was substantially the Justice a 1922 critic might have expected. He was diligent. In his seventeen years he averaged twenty majority opinions a year and his work covered a wide range. In 1926-27, for example, he wrote twenty-one majority opinions. Of these five were closely related to criminal law and seven dealt with commerce or rate regulation. The rest were scattered among tax, eminent domain, negligence, practice, and other problems.

Butler did not sit on the railroad valuation case, which reached the Court six years after his appointment; St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461 (1929). The opinion, read by McReynolds, held that the cost of reproduction method of valuation must be considered in all valuations. Justices
McReynolds in Reverse

The appointment of a Supreme Court Justice can result in a surprise to the appointer. A President may make a choice for reason of certain of an appointee's views and later learn that those views diverge greatly from the anticipated pattern. These errors of judgment happen seldom, for most Presidents know the men with whom they are dealing. The wonder is that the greatest upsets have come, not when the President did not know his appointee, but when he knew him best. Since 1864 three appointees of the 43 who went to the Court consistently took stands different from those which might have been anticipated and those three men—Chief Justice Chase, Justice McReynolds, and Justice Stone—are three of the six Cabinet members who have gone to the Court in this period. The men whom the Presidents might have been expected to know best, they have known least well.

One of the oddities of Supreme Court history from 1925 to 1941 was that it had two “surprise members” whose views were so

Brandeis, Holmes, and Stone dissented. McReynolds relied largely upon two opinions written by Butler in which Butler expressed substantially the valuation views he had formed while working for the railroads: Bluefield Waterworks v. Public Service Commission, 262 U.S. 679 (1923), Brandeis, J., concurring on different grounds; and McCardle v. Indianapolis Ware Co., 272 U.S. 409 (1926), Brandeis and Stone dissenting and Holmes concurring in the result.

Butler almost invariably stood on the side of repression in the great civil liberties cases which came before him. In Near v. Minnesota, his was the dissenting opinion; 283 U.S. 697, 723 (1931). In Herndon v. Lowry, 301 U.S. 242 (1937), perhaps the longest step taken by the Court up to the time of its announcement, he joined four dissenters, and in Hague v. C.I.O., 307 U.S. 496, 533 (1939), he and Justice McReynolds dissented. In a noteworthy opinion Butler held, over the dissents of Justices Brandeis, Holmes, and Sanford, that a 49 year old woman who refused to pledge to bear arms in defense of the United States could not be naturalized. United States v. Schwimmer, 279 U.S. 644 (1929).

Butler also read the opinion of the Court holding that a Pacifist attending a state university could be compelled to take compulsory military training or be expelled, Justice Cardozo for Brandeis and Stone, concurring in a more moderate opinion. Hamilton v. Regents, 293 U.S. 645 (1934).

During the early days of the New Deal, Butler invariably stood with the majority in overruling the new legislation. Even after his more tactful brethren had joined the liberals in the face of the Court enlargement program, Butler stayed with the conservatives until, at last, he and Justice McReynolds stood alone. Finally, as he saw his constitutional and economic doctrines abandoned, he bitterly attacked the policies of the administration in strongly worded dissents. See, e.g., Butler, J., dissenting in Tennessee Electric Power Co. v. T.V.A., 306 U.S. 118, 147, 149 (1939); Mulford v. Smith, 307 U.S. 38, 51 (1939); and see McReynold's dissent in which Butler joined in N.L.R.B. v. Fainblatt, 306 U.S. 601, 609 (1939).

Justice Holmes is omitted from this list because, while he did vote contrary to Roosevelt's hope in the Northern Securities case, 193 U.S. 197 (1904), he consistently followed the liberal course which T. R. expected.

The other three are Justices L. Q. C. Lamar, Moody, and Murphy.
diverse that they virtually cancelled each other out. Justice McReynolds, appointed by a liberal President, became one of the most conservative Justices in history, while Justice Stone, appointed by a conservative President, greeted gleefully by conservative brethren, and opposed by the liberal bloc in the Senate, has become one of the foremost liberal Justices.

Harlan Fiske Stone was born in New Hampshire in 1872. He went to college at Amherst and studied law at Columbia, where he later became Dean of the Law School. While Dean, he also practised law in New York. In 1924 he became Coolidge's Attorney General and on January 5th, 1925, he was appointed to the Supreme Court as successor to Justice McKenna. While the conflicts which arose in the struggle for the nomination can not yet be described, the post-appointment explosion was readily observable to the public.

One reason for the outburst over the Stone appointment was that it came at a time of intense political bitterness. Coolidge had just been re-elected President, but Senator Robert M. La Follette, heading the La Follette-Wheeler Progressive ticket, had polled over 5,000,000 votes. In recrimination, Senate committee assignments were withdrawn from Republican Progressives, and President Coolidge undertook to discriminate against them in patronage distribution. The result of these factors was that there was a strong group of Senators who were hostile to Coolidge and who would have opposed anything he did which could possibly be called reactionary.

There were three major charges against Stone. One was that as Attorney General he had harassed Senator Wheeler with a dilatory prosecution for alleged corruption for no other purpose than to embarrass the Senator and smear Progressives; the second was that Stone, while in practice, had been guilty of unethical conduct in the case of Owenby v. Morgan; the third that Stone had been a "Morgan attorney" and was thereby rendered unfit to hold high office. And in the background was the fact that Coolidge had chosen as Stone's successor Charles B. Warren of Michigan, a man identified in Progressive eyes with the "Sugar Trust." One way to keep

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99 Pringle, op. cit. supra note 14, at 1060.
100 The Department of Justice has declined to allow the use of any papers covering Justices alive in 1939. The pre-appointment records on the Justices remaining to be considered except Cardozo are therefore not available.
101 256 U.S. 94 (1921).
Warren out of the Cabinet was to keep a vacancy from existing by refusing to confirm Stone.\textsuperscript{102}

On January 10th, five days after Stone’s nomination, the Owenby charges came before the Judiciary Committee. The case arose in the following manner: In a proceeding in Colorado, Morgan interests caused the Wooton Land and Fuel Co., a coal company, to be put into receivership. This was done about February, 1915. In December, 1915, an attachment proceeding was brought in Delaware under the Delaware statute for attachments against non-residents against the 33,000 shares, par value $5.00, which Owenby held in the Wooton Co. The Delaware statute, descended from the Custom of London, required defendants in attachment proceedings to put up special bail to the extent of the value of the amount claimed before any defense to the attachment could be filed. Allegedly because the company was in receivership, the defendant could not raise the necessary $200,000. It was held by the Delaware court that the statute, which in substantial effect caused Owenby to forfeit his $200,000 worth of stock, was constitutional,\textsuperscript{103} and this decision was affirmed by the Supreme Court with Justices White and Clarke dissenting.\textsuperscript{104} Delaware promptly repealed its statute.

The Owenby charge against Stone was that the proceedings in Colorado and Delaware, viewed as one, were a colossal fraud arranged by Stone. Stone admitted that the various problems in the case had been brought to the firm of Satterlee, Canfield, and Stone during his membership in that firm, but pointed out that the Colorado case had been sent to a Colorado firm, that the Delaware case had been sent to a former Senator Saulsbury of that state, and that only the fact that the Saulsbury partner in charge of the case had been appointed to a federal judgeship caused the case to come back to Stone at all. Stone’s argument of the constitutional issue in the Supreme Court was the sole contact he personally had with the litigation.\textsuperscript{105} But with one Cabinet member of Harding’s administration, Secretary of the Interior Fall, on the way to the penitentiary, another, Secretary of the Navy Denby, forced out of the Cabinet for

\textsuperscript{102} The anti-Warren Senators stalled the nomination until March 10th, a month after Stone’s confirmation, when they rejected Warren. Coolidge then appointed John G. Sargent of Vermont who was promptly confirmed.

\textsuperscript{103} 6 Boyce (Del.) 379, 100 Atl. 411 (1916), and 7 Boyce 297, 105 Atl. 838, 849 (1919).

\textsuperscript{104} Note 101, \textit{supra}.

\textsuperscript{105} These facts are drawn from pp. 117 \textit{et seq.} of the Stone hearings by the Judiciary Committee.
almost criminal stupidity, and a third, Daugherty, under greatest suspicion, some Senators found it not difficult to suspect the worst of Stone. On January 12th the Judiciary Committee overruled its subcommittee and determined to learn more about Owenby's charge. But on January 19th the nomination was approved by the full Committee, Senators Walsh and Borah stating that they found nothing improper in the case.

And then, when it appeared that nothing could halt confirmation, Stone, as Attorney General, announced the pendency of indictment proceedings in the District of Columbia courts against Senator Wheeler for participation in an oil land fraud. The origins of the Justice Department's relations to Wheeler went back to April, 1924, when Senator Walsh of Montana was completing his Teapot Dome oil scandal exposé, and when Wheeler was demanding the investigation of Daugherty, the Attorney General. Partly at the instance of a member of the Republican National Committee,107 Daugherty retaliated by indicting Wheeler for having taken compensation for an appearance before the Interior Department's Land Office in behalf of the oil claims of one Gordon Campbell. The indictment was based on a statute which forbade members of Congress from using their influence with Departments for pay. That action, for one reason or another, did not come to trial in 1924 at all and was still pending in 1925 at the time of the Stone appointment. Senator Walsh was Wheeler's counsel.

The government's original case, brought in Montana, was an indictment of Campbell for using the mails to defraud by selling stock in his oil syndicate. The second indictment was that already mentioned of Wheeler, and this, too, was brought in Montana. The Department then concluded that it had been defrauded of the lands originally, and proceedings against Wheeler under a third indictment, connecting him with the fraud, were brought; this proceeding was begun not in Montana but in the District of Columbia. This decision by the Department was reached while Stone's name was before the Judiciary Committee, and on January 16th, 1925, Stone wrote Senator Walsh, as Wheeler's counsel, that the fraud charge would be laid before a District of Columbia grand jury early in February. Walsh misconstrued this letter of the Attorney General and wrote

107 For a summary of the evidence on the relation of the Republican National Committee to the Wheeler prosecution, see remarks of Senators Sterling and Heflin, including quotation from the Committee's agent, 65 Cong. Rec. 9084 (1924).
him on January 19th in the tone of one who believed that the forthcoming third indictment in the District of Columbia was to be a substitute for the Montana case against Wheeler. To this there was apparently no objection. This letter by Walsh was mailed the very day the Judiciary Committee approved Stone’s nomination. On January 22nd, Stone informed Walsh that he had no intention of dropping the Montana proceedings, and that the District case was separate and additional.

Walsh called on Stone to protest violently against proceeding in the District on the grounds that it was unfair to try a case so far from the vicinage of the defendant and that District juries were hopelessly prejudiced in favor of the Government. Stone retorted sharply that he had a duty to proceed against Wheeler in the District and that “I certainly could not dismiss the proceedings merely because Senator Wheeler did not care to have his case tried in the District.”

Meanwhile, as Stone and Walsh exchanged progressively chillier letters, the Senate, which in its own investigation had completely cleared Wheeler, recommitted the Stone appointment to the Judiciary Committee to allow a complete investigation of the reasons behind the delay in the original Wheeler prosecution and an explanation of the policy of the Justice Department throughout the case. For the first time in United States history a Supreme Court nominee came before the Judiciary Committee to be examined, and the chief interlocutor for the Committee was Wheeler’s counsel, Senator Walsh.

On January 28th the Committee examined Stone for four hours. About 85% of the time went to the Wheeler case and the rest the Senators divided between the Owenby case and the general question of Stone’s affiliation with “the Morgan interests.” Stone began his testimony with a statement of his relation to the Wheeler litigation. The correspondence he read was bitter and set a background for un-

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108 Walsh to Stone, Jan. 19, 1925.
109 Stone, statement to Judiciary Committee, Hearings, p. 11.
110 This unusual action was taken upon a unanimous consent agreement proposed by the Republican leader of the Senate, after consultation with President Coolidge, Senator Butler (Chairman of the Republican National Committee), and Attorney General Stone. . . . The object in sending the nomination back to the committee was said to be to avoid a “trial” of Wheeler in the Senate.”
111 All the New Deal appointees from Senator Black to Attorney General Murphy have been present at the Committee hearings and have been available for examination had any Senator cared to ask questions. Mr. Frankfurter was the only one actually examined.
The resultant questioning wandered back and forth over two main issues, with many a side excursion up winding trails. Senator Walsh was one of the best cross-examiners in the country, and the Attorney General was one of the shrewdest witnesses. The result was impasse.

The two main issues were the questions of why the original action against Wheeler in Montana, started in April, 1924, had not been speeded, and why the conspiracy charge, pending in the District, had not been brought in Montana. Questioning brought out the fact that as early as May, 1924, Senator Wheeler had written Stone asking for a speedy trial. Stone referred the request to the Montana United States attorney who saw a fine chance for a stump speech and replied that Wheeler could expect no such “whitewashing” from a constitutional tribunal as he had received from his fellow Senators and that about thirty days were necessary for further investigation. Thirty days came and went without a trial. The Montana judges both disqualified themselves, and a share of the delay came in choosing a substitute.

As these questions were asked and answered, the Walsh-Stone dialogue was serving two purposes. It was both an examination of a prospective appointee and a sparring for position in a legal battle. Finally the two men dropped all pretence of being Senator and Court nominee, and, as two lawyers, agreed on a date for the Montana trial:113

Stone: I state here and now that if Senator Walsh's client desires to come to trial before February 15th I will make every reasonable effort to bring it about... Walsh: I apprehend that it will be impossible now to empanel a jury at that time. Nevertheless I express my gratitude for the offer upon your part and I beg to assure you that we shall be glad to be ready to go to trial at that time if the jury can be impanelled.

Stone: I will make inquiries by wire tonight and communicate to you the results.

112 "I felt that the inferences from your letter might easily place both myself and Senator Wheeler in a false, if not a somewhat discreditable, light." Walsh to Stone, Jan. 27, 1925. Or, Stone to Walsh, Jan. 27, 1925: "You state that my memory is at fault when I assert that you requested that the proceedings before the Grand Jury in this district be discontinued. On the occasion of your visit to me, I assumed that the vigorous protest you made had some object. The only possible object was to influence my decision. Otherwise your visit would have been without purpose."
113 Stone Hearings, p. 61, 116, 117.
(It may be added that the Wheeler case did come to trial in Montana in April when a jury, after ten minutes of deliberation, found the Senator not guilty.)

The other issue was why the conspiracy charge was brought in the District of Columbia instead of in Montana. Questioning brought out the fact that there was no necessity for trying the case so far from the home of the defendants, who all lived in Montana. There were probably two reasons why the conspiracy case was brought in the District. One was that Stone was, perhaps, being overscrupulous to save the rights of the defendants from possible improper practices by the politically-minded Montana United States attorney. The other was the desire to win the case. The right of an Attorney General to bring his cases where he is most likely to win them, if there is an option as to location, presents a hard-fought ethical question. Stone’s view was that “within reason” the Government might pick its location:

Senator Reed: You think the Government has a right to pick the best place for the Government?
Attorney General Stone: Within reason, yes.
Sen. Reed: If we apply the rule of reason it is so nebulous I can not follow it out.
Attorney General Stone: That is the one I will apply.

Questioning could develop this difference of opinion but it could not resolve it. The upshot of the hour’s inquiry was complete disa-

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114 New York Times, April 25, 1925. For lengthy excerpts from the testimony in the case see Hearings before Senate Committee on Judiciary on S. Res. 171, 69th Cong., 1st Sess. (1926).
115 Senator Reed of Missouri asked most of the questions on this point.
116 “One of the reasons which actuated me to bring it here was the very grave concern I had that the process of the courts and the agencies of the government should not be used oppressively. I do not mean in saying that to criticize at all what has taken place in Montana, but there have been some charges and counter-charges about the proceedings in Montana, and I have felt that if there were any further proceedings in these matters they should be conducted in such a way that I had personal assurance that such criticisms could not justly be made.” Stone Hearings, 116. This was in no sense throwing the Montana attorney to the wolves; Stone refrained from making this criticism until the very end of his examination and then brought it forth only after a most searching examination.
117 For a more recent exposition by a Department of Justice representative that the Government should, where possible, choose favorable jurisdictions, see examination of Robert H. Jackson when under consideration by the Judiciary Committee for the post of Solicitor General. Hearings before Subcommittee of the Judiciary Committee on the Nomination of Robert H. Jackson for Solicitor General, 75th Cong., 3d Sess. (1938) 31-35, 39.
118 Stone Hearings, 91.
greement on the wisdom of the policy. No more could be said and the Wheeler problem dropped out of the discussion.

This left for hurried consideration the Owenby case, on which most of the members had already satisfied themselves. Senator Overman conducted the examination and elicited the fact that Stone knew substantially nothing of the Colorado receivership proceeding and very little about the ramifications of the Delaware case. He had argued the constitutional issue before the Supreme Court and that was all: "The brief and the record probably are on file in the Supreme Court and constitute a complete record of my connection with the case."

As portrayed by Stone, most of Owenby's misfortune came not from the wickedness of his adversaries but from the ineptitude of his own Delaware counsel. As evidence of the propriety of his personal role, Stone introduced a letter from Louis Marshall, Owenby's attorney in the Supreme Court, in which Marshall denounced any suggestion that Stone was at fault: "It is, of course, preposterous to suggest that the fact that you argued before the Supreme Court a constitutional question of the character involved in this case, can in any way be the subject of criticism. . . . I admired your clear, fair, and lawyerlike presentation of the case."

And thus, on a flat denial by the Attorney General of any wrong, the Owenby matter disappeared. Only one "issue" remained—Stone's connection with "the Morgan interests." The question was put to Stone by Senator Reed and the answer given was that with the exception of the Owenby case and one other, the firm of Satterlee, Canfield, and Stone handled no Morgan work. Stone was also a member of Sullivan and Cromwell for a year prior to his entry into the Cabinet, and he doubted whether that firm had any Morgan clients. The Committee, which had no more rabbits to chase, adjourned.

On February 2nd the Committee for the second time approved the Stone nomination but the fight was not yet over. Since 1929 all Senate confirmation proceedings have been conducted in open executive session but prior to that date a rule of secrecy prevailed unless, by a two-thirds vote, the Senate determined to open the doors in a particular case. On February 3rd the Senate fought

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10 Id. at 125.
11 Louis Marshal to Stone, Jan. 9, 1925.
12 Stone Hearings, 133.
13 Haynes, op. cit. supra note 110, at 780.
for two hours in a closed session over whether the Stone nomination should be considered openly or privately. Finally, by a vote of 60 to 27, it was voted to open the debate to the public.\footnote{\textit{Id.} at 3053.}

On February 5th the six hour debate over confirmation began. It threshed old straw and is a summary rather than an addition to the story.\footnote{\textit{Id.} at 3032-3057.} Senator Walsh began the discussion with a defense of himself against newspaper attacks made upon him for his cross-examination of Stone; and he criticized Stone at length for bringing the Wheeler conspiracy indictment in the District of Columbia. On this latter ground, Walsh had even Stone's friends with him. Senator McKellar, Borah, and Bruce all stated that while they would vote for Stone, they did not approve of needlessly bringing indictments away from the home of the defendant, whether Wheeler or any other. When Walsh had finished, Alabama's Heflin made as wearisome and aimless an address as has ever bored the Senate, criticizing Stone for the Owenby case. No one else cared.

Senator Norris made the basic argument against Stone. He contended that Supreme Court decisions flow fundamentally from the viewpoints of the Justices, and be believed Stone's views were biased by virtue of his Morgan associations. He listed Warren, the forthcoming Attorney General, as an agent of the "Sugar Trust"; Woodlock, a \textit{Wall Street Journal} editor, an Interstate Commerce Commissioner; Humphrey, "one of the greatest reactionaries," a Federal Trade Commissioner. Taken with these the Stone appointment was too much for Norris, and as a symbol of his opposition to the interests represented by the men he had named, Norris announced that he would vote against Stone.\footnote{\textit{Ibid.}}

Senator Borah, who had come to know Stone since his entry into the Cabinet, flatly answered that Norris was wrong on his facts.\footnote{\textit{Ibid.}}

I want to call the attention of my friend, the Senator from Nebraska, to the fact that in my opinion the Attorney General is one of the most liberal-minded men who has been in the Attorney General's office for many years. He is not only a man of extraordinary ability, but he is a man of liberal mind and of a high sense of public duty.

\footnote{66 Cong. Rec. 3000 (1925).}
\footnote{\textit{Id.} at 3032-3057.}
\footnote{\textit{Id.} at 3053.}
\footnote{\textit{Ibid.}}
No one subscribes more heartily than Senator Norris to this expression today, but in 1925 Senator Borah was the only man publicly to make such a judgment.

At last, late in the afternoon of February 5, 1925, the Senate voted; non-assent was recorded by Senators Heflin and Trammell, Southern Democrats, and Frazier, Norris, Shipstead, and Johnson of the liberal bloc. Senator Norris informed the Senate that Senator La Follette would also have voted “No” had he been present. 71 Senators voted in favor of confirmation. Senators Wheeler and Walsh abstained. Thus the nomination of Harlan F. Stone, foremost craftsman of today’s Court, was confirmed.

**The Economic Approach Comes to the Senate**

On February 3rd, 1930, President Herbert Hoover nominated Charles Evans Hughes, a former member of the Court, former Republican Presidential candidate, and former Secretary of State to be Chief Justice of the Supreme Court to succeed William Howard Taft. The nomination touched off one of the loudest debates on an appointee since 1916 and the choice of Brandeis. The Hughes appointment was the first to the Supreme Court under the “no closed executive session” rule of 1929, and the privilege of open debate was freely used. On February 10th, 11th, 12th, and 13th the Senate debated the appointment, and on the 14th, the day after confirmation, that body heard its final oratory on the subject. Since the primary object of this article is to make available new materials for biographers, the Hughes debate, which is in the Congressional Record, will be only briefly summarized.

The most significant feature of the Hughes, and in the same year the Parker, debates, was the emergence in complete form of the economic interpretation of the significance of the court. This trend toward economic consciousness has been shown in this discussion to have begun with the appointment of Matthews in 1881 and to have gathered strength through the Twentieth Century. By the time of the Hughes and Parker appointments this concept was not only on the stage, as in Stone’s case; it dominated the whole theater. Senator Norris set the frame of the debate in his first remarks when he said: “Perhaps it is not far amiss to say that

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128 See 72 Cong. Rec. 3372, 2448, 2499, 3553, 3643 (1930).
no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes."

On the second day of the debate Senator Borah took as his touchstone a recent case in which a railroad rate had been held confiscatory. The decision was 5-3 with Brandeis, Holmes, and Stone dissenting. The Idaho Senator said:

Bear in mind, Mr. President, that at the present time coal and iron, oil and gas, and power, light, transportation, and transmission have all practically gone into the hands of a very few people. . . . I am deeply imbued with the wisdom and justice of the viewpoint of the minority. I do not wish to strengthen the viewpoint of the majority. . . . Justice Hughes is associated in his views with the contention that is sustained by the majority and which in the end, if carried to its logical conclusions, must result in great economic oppression to the people of the United States.

In similar fashion the argument was put by other opposition Senators: Dill, Brookheart, Connally, Wheeler, Blaine, Nye, La Follette, Hawes, and Walsh. They did not prevail, the Senate confirming by a vote of 52 to 26. But by their recognition of the fundamental nature of the task of the Supreme Court they took a long stride toward making the judiciary a branch of the government responsible to the legislative and administrative branches for cooperation in effecting a unified policy.

Judge John J. Parker, Hoover's choice to succeed Justice Sanford, fell before the type of argument which had been aimed at

129 Id. at 3373.
131 "As one of those who believe that the future of mankind depends upon the elevation of human rights above property rights, I do not want to see another man placed on that court who takes the property rights view." Id. at 3503.
132 "Mr. President, the Supreme Court of the United States is now divided into two political parties. The progressive party is headed by that grand old humanitarian, Oliver Wendell Holmes. He is followed by Mr. Justice Brandeis and Mr. Justice Stone. The other members of the court belong to the conservative or reactionary party." Id. at 3505.
133 "I am unwilling to vote to put in the chief position on that court a man who, though he be personally honest, though he be an accomplished and talented lawyer, yet entertains by reason of his environment and by reason of his background ideas as to the sanctity of corporate property. . . ." Id. at 3515.
134 "The struggle is on in this country to ascertain whether the Government of the United States shall regulate and control these vast aggregations of capital or whether they, through the Supreme Court of the United States, are to control and run the Government of this country." Id. at 3564.
Hughes. Hoover appointed Parker March 21, 1930, and two months later, on May 7th, the Senate rejected the nomination by a 41-39 vote. It was the first rejection in the Twentieth Century. A major difference between the Hughes and Parker cases was that Parker was unsatisfactory to many Negro leaders because of a statement evidencing his refusal to accept racial equality. Hence Senators such as Wagner and Copeland, who supported Hughes partly out of home-state pride, swung into opposition on Parker.

At the Parker hearing the principal witnesses were William Green for the American Federation of Labor, and Walter White for the National Association for the Advancement of Colored People. White quoted Parker’s rejoinder in the 1920 campaign, in which Parker was the Republican candidate for governor of North Carolina, to the charge that Republicans were organizing the Negro vote. Parker said:

\[\text{The negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so... The participation of the negro in politics is a source of evil and danger to both races and it is not desired by the wise men in either race or by the Republican Party of North Carolina.}\]

This quotation was the sole ground of White’s objection; he was unable to find any other evidence of Judge Parker’s anti-Negro attitude.

Green’s objection to Parker was that he had decided the case of United Mine Workers v. Red Jacket Coal Co. and decided it wrongly. In that case Judge Parker approved an injunction substantially restraining the union from attempting to organize plaintiff’s employees on the grounds that the company and its employees had signed contracts prohibiting the employees from joining unions for the duration of their employment. Judge Parker held that, under the authority of the Hitchman case in the United States Supreme Court, he was compelled to uphold these “Yellow Dog” contracts and grant the injunction. Green contended first, that the Red Jacket case might have been distinguished from the Hitchman case; and second, that even if Parker had been compelled to follow the Hitchman rule, he needn’t have been so pleased about it. The charge fundamentally.
was not that Parker followed the Hitchman case but that his personal policy judgment approved it. Parker’s own defense to the Committee was that as for the Red Jacket case he felt bound by the Supreme Court and, substantially, that the Negro comment in the 1920 campaign was at worst “campaign oratory.”

Letters of opposition from labor unions and Negroes all over the country accompanied the criticisms at the hearing. Somehow, in the midst of the uproar, Parker as a man was almost forgotten and only Parker as a symbol was debated in the country and in the Senate. Senator Borah saw in the defeat of Parker a blow at the validity of the Yellow Dog contract, and it was to this view that Parker was a sacrifice. Had he been a man of such outstanding merit that he could rise over the economic abuse which he symbolized, he might have been confirmed. But because men like Senator Ashurst of Arizona, who had supported every Supreme Court nominee from McReynolds through Stone, could say in consecutive breaths that Parker was a “weakling” and that “No one is fit to sit as a justice of the United States Supreme Court ... who upholds the ‘yellow dog’ contract,” Parker met defeat.

This triumph of symbolism over reality worked both ways. Parker supporters such as Senator Fess spoke of the “destruction of judicial institutions” if the candidate should be rejected, and some of the Senate’s lesser intellects, such as Coleman Blease of South Carolina, appealed to the prejudices of their fellow Southerners and asked that Parker be confirmed lest his rejection appear a Negro triumph; to this end Blease introduced the criticisms of Parker from the Negro press. On the other hand, the confirmation of Parker would have meant an appearance of labor defeat, an appearance of Negro defeat, and the appearance of a Hoover administration victory. The result was a union of enough Democrats, liberals, and conservative Republicans with large numbers of Negro constituents to reject Parker.

A few days later President Hoover sent to the Senate the name of Owen J. Roberts, Pennsylvania Republican who made his reputation

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140 Stated in a letter to Sen. Overman.
141 72 Cong. Rec. 7793 (1930). It is obvious from Judge Parker’s statements during the confirmation proceedings that he deeply wanted confirmation. It is equally obvious that he was determined to do nothing undignified or ungraceful in the effort to get it. Thus in this letter he avoided any criticism of the Hitchman case, although an expression of such criticism, even thus belated, might have improved his confirmation chances.
142 Id. at 7950.
143 Id. at 8337; and cf. Blease’s views. Id. at 8567.
144 For the Senate roll call see id. at 8487.
as a Government prosecutor in the Teapot Dome scandals. The Senate was too exhausted to debate. After a speedy reference to the Judiciary Committee, Roberts was confirmed on May 20, 1930, with no discussion at all. From that date, at least until 1937, Judge Parker, had he been confirmed, would hardly have been more conservative than the man chosen in his place.

In 1932, when Justice Holmes retired, President Hoover was of no mind for another judicial dispute. Upon the insistence of Senator Borah and other Senate liberals, Chief Judge Benjamin Nathan Cardozo of the New York Court of Appeals was appointed.\textsuperscript{146} The only witness to appear before the Committee to testify on Cardozo was one William H. Anderson, who outlined his complaint through fifty pages of the typed record. His grievance was that he had been convicted of a criminal offense in the lower courts of New York and that his conviction was confirmed by the Appellate Division. When he appealed to the Court of Appeals that court, in a memorandum opinion by Judge Cardozo, refused to give a certificate of reasonable doubt and hear the case again. There was no suggestion of anything personal in Cardozo's memorandum.\textsuperscript{146} The Senators heard Anderson through with mingled impatience and amusement and promptly approved the appointment. On February 24, 1932, Cardozo was confirmed without debate.

**The New Deal**

Between 1934 and 1937 the Supreme Court declared unconstitutional the New Deal's general industrial program, its coal program, its oil program, its railroad pension program, and, in the unhappiest decision of the day, its agricultural program. At the same time that the national effort to meet the depression was being strangled at the Bench, the Court restated the impotency of the states to meet their economic problems by forbidding minimum wage legislation. The result was the Court Plan of 1937, the propitious resignation of Justice Van Devanter at the height of the Court battle, and thereafter a nominal Presidential defeat.

\textsuperscript{146} For an account of Senator Borah's insistence on the nomination see Claudius Johnson, *Borah of Idaho* (1936) 452-453; for an account of the unanimous and enthusiastic public approval of the Cardozo nomination, see 112 Literary Digest, February 27, 1932, p. 9.

\textsuperscript{146} There is no lunacy test required for appearance at Congressional hearings. The Butler appointment, \textit{infra}, was delayed for days because of communications from a man of doubtful mental balance and a Crackpot Convention turned out to oppose Frankfurter, \textit{infra}.
When Justice Van Devanter resigned it was generally understood that Senator Joseph P. Robinson, Arkansas Democrat and Senate majority leader, would take his place. But when Robinson died during the Court fight, the President was forced to look elsewhere and, after much deliberation, he chose Senator Hugo Black of Alabama. To those who saw the fight on the court plan as a struggle against New Deal legislation, this was the harshest blow that could fall. To what purpose the battle if the war should be lost? As a Washington, D.C., resident put it in a despairing wire to the Senate:

We vigorously protest against the nomination of Senator Black for Justice of the Supreme Court. It means packing the Court, against which we have fought for six months.

When the nomination got to the Senate on August 12, 1937, Senator Ashurst invoked Senatorial Courtesy and asked immediate confirmation. But Senator Burke of Nebraska had been fighting the New Deal too long to be open to appeal on the amenities and on his objection it was necessary to refer the appointment to Committee. The Judiciary sub-committee approved the nomination after a short debate among its own members and without calling any witnesses. Black’s Klan membership, was not considered at all. In the Committee the anti-Black argument, outlined by Republicans Austin and Borah, was that when Van Devanter left the Court at full pay under the 1937 act, he retired and did not resign. Therefore there was no vacancy on the Court. A second argument was that the boost in retirement pay was an increase of the emoluments of office during Black’s terms as a Senator, which would disqualify him. The related contention was that, on the theory that the retirement act kept Van Devanter on the Court though not in active service, Black was a tenth Justice and was therefore taking an office which had been created.

See, e.g., Alsop and Catledge, The 168 Days (1938) 156; and for Republican acceptance of this certainty see the Bridges-Schellenback discussion, 81 Cong. Rec. 8965 (1937).

Alsop and Catledge discuss the circumstances of the appointment in The 168 Days, 295 et seq. They offer a more detailed account than can be given here. The leading candidates are listed as three federal circuit judges, Sibley, Hutcheson, and Bratton; North Carolina’s Chief Justice Stacy; Solicitor General Reed; and Senators Minton and Black.


The sub-committee was composed of Senators Neely, Logan, McGill, Dietrich, Borah, and Austin.
during his term in the Senate. But while Austin wanted delay for legal investigation of these theories, Senator Borah, who held some of the same scruples, refused to sanction delay since he had already made up his mind on the legal issues. Hence Austin was the only member to vote against immediate confirmation.

During the days between the appointment and the Senate debate the country applauded, protested and observed with an understanding of the significance of the Court which had been heightened by the previous months of debate on the President's proposal. Criticisms were based on Black's alleged radicalism, his "lack of judicial temperament," and his rumored Klan affiliation. The Klan doubts were founded on hunches, not facts, and conservatives were not the only ones to worry. In behalf of the Socialist party Norman Thomas asked the Senate:

... to inquire into the facts and implications of Senator Black's endorsement by the Ku Klux Klan at an earlier period of his career; into his silence as a political leader in Alabama on the issues raised by the Scottsboro case; ... into his threat to filibuster against anti-lynching legislation on which he might be asked to pass as a judge in some future case. ... In a similar vein the National Association for the Advancement of Colored People; which had done so much to cause the rejection of Parker in 1930, protested against confirmation prior to investigation of "the rumor Senator Black himself was at one time a member of the Klan." Labor unions had every reason to appreciate Senator Black's constant efforts in their behalf and they were all for speedy confirmation. William Green told Senator Ashurst that he would be "tremendously disappointed" if the confirmation were delayed, and in one way or another that thought was expressed by the dressmakers of San Francisco, the garment workers of Seattle and Portland, the textile workers of Utica, the C.I.O. unions of Birmingham, and John L. Lewis.

151 The constitutional clause is Article I, § 2: "No Senator or Representative shall, during the term for which he is elected, be appointed to any civil office under the authority of the United States that shall have been created or the emoluments whereof shall have been increased during such term. . . ."
152 Telegram, chairman of the board of directors of the National Association for the Advancement of Colored People to Ashurst, Aug. 16, 1937.
The Senate debate, which took place on August 16th and 17th, afforded a sounding board for opponents of Black while the proponents, preferring not to cooperate in tactics of delay, sat silently by. The arguments were a reiteration of those brought forth in the Committee on the existence of a vacancy. The Klan question was raised by Senator Copeland, who was a candidate for Mayor of New York against Fiorello LaGuardia and who, while he had not a fact on Black's membership, knew that he needed Harlem's votes. Copeland cited excerpts from 1926 newspapers which stated that Black was either a Klan member or a Klan friend at the time of his first election to the Senate in that year, to which Senator McGill of Kansas replied that mere newspaper attacks were never significant. Copeland's remarks were easily discounted as serving a purpose for the New York election only.

Senator Borah, who would have opposed any nominee on the theory of lack of a vacancy and hence voted against Black, but who was otherwise sympathetic to the nomination, made the only statement in Black's behalf on the question of Klan membership:

There has never been at any time one iota of evidence that Senator Black was a member of the Klan. No one has suggested any source from which such evidence could be gathered. . . . We know that Senator Black has said in private conversation, not since this matter came up but at other times, that he was not a member of the Klan, and there is no evidence to the effect that he is. . . . If I knew that a man was a member of a secret association organized to spread radical antipathies and religious intolerance, I should certainly vote against him for any position.

This is the passage which later gave rise to the charge that either Black had misled Borah or Borah had misled the Senate. On the day, six weeks after his confirmation, when Black made his speech admitting former membership in the Klan but disavowing its doctrines, Senator Borah stated publicly: "I understood he had been a member of the Klan but had not been a member since about eleven years."
Finally, after two days debate and with a last plea from Senator Johnson of California that the vote be on the “merits” not on Senatorial Courtesy, the nomination was confirmed. The vote was 63 to 16, ten Republicans and six conservative Democrats voting against the nominee. One month later the proof of Black’s former Klan affiliation was laid before the public and caused a furor which was not abated until, on October 1, Black made the radio address in which he admitted his former membership but denied any lingering affection for Klan-style prejudices. His work as a Justice has adequately supported his own statement.

Confirmation of Stanley Reed, appointed by President Roosevelt on January 15, 1938, to succeed Justice Sutherland, was more in the nature of an accolade than an investigation. Reed attended the hearing on his nomination and had the pleasant experience of hearing himself lauded by Attorney General Cummings and Senator Logan, the chairman of the Judiciary sub-committee and Reed’s fellow Kentuckian and old friend. Cummings outlined Reed’s career, from his education at Yale, Virginia, and Columbia, his work as a Kentucky attorney, particularly as counsel for the enormous Burley Tobacco Co-operative, his years in the state legislature, his work for the Farm Board, the R. F. C., and, in New Deal days, his solicitor generalship. Logan stepped down from his position as chairman to say of Reed:

It is my judgment that if he had searched the whole nation over the President could not have found a man who would measure up to the high standard required of the United States Supreme Court more than does Stanley F. Reed.

Opposition was almost non-existent. One letter of criticism, the only one received, was read in part to the Committee. One witness appeared to suggest that Reed be asked about possible Klan affiliations in view of the fact that he had come to Washington in 1929, just after the Hoover-Smith election. Senator Logan answered that Reed’s wife was head of the Women-for-Smith campaign in

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160 The Democrats were Senators Burke, Byrd, Copeland, Gerry, Glass, and King. 81 Cong. Rec. 9103 (1937).

161 For examples of Black opinions contributing substantially to the preservation of Negro rights see Pierre v. Louisiana, 306 U.S. 354 (1939); Chambers v. Florida, 309 U.S. 227 (1940); White v. Texas, 310 U.S. 530 (1940); Avery v. Alabama, 308 U.S. 444 (1940).

162 Reed Hearings, 10. This hearing is recorded in typed form only in Committee files.
Kentucky. And that was all. None of the Senators had any questions for Reed and the next day, January 25, the Senate confirmed the nomination without debate and without a formal vote.

When Felix Frankfurter was nominated for the Supreme Court in January, 1939, the Judiciary Committee’s mail bags bulged under a load of sheer hysteria. The anti-Semites were writing their Senators. The “Protocols of Zion” were dusted off and shipped in with lengthy commentaries about “the vulture army of the venal, the unpatriotic, the corrupt.” The legendary denunciation of the Jews by Benjamin Franklin came back to life, and all who doubted its validity were as bad as “the radical pro-Jew Prof. Charles R. Beard.” And there was the mathematical argument, which runs something like this: There are nine Justices and 130,000,000 people. Therefore each Justice represents about 14\(\frac{1}{2}\) million people, so that one Jewish Justice represents all the Jews in the country and as many more non-Jews too. “If we put another Jew on the Court, then the Jew element in the Court will represent 29 million of the population. . . . Would you put two Negroes on the Court, or two Chinese on the Court, or two Japanese?”

This appeal to the multiplication table was made time and again. Occasionally the anti-Semitic argument was made by acknowledged Fascists such as Ernst Goerner, Milwaukee Nazi. Frankfurter, said Goerner, was a spiritual colleague of Brandeis, and Brandeis was the man whom Wilson had been forced to put on the Court under threat of blackmail, the man who had started the Russian revolution, the World War intriguer who “had at his disposal a secret cable that connected him with the various battlefronts.” Other protests on non-religious grounds, objected to Frankfurter as a “radical,” as an associate of the American Civil Liberties Union, and as foreign born. The most unusual protest came from a Seattle resident who was apparently worried over the declining institution of marriage:

> Is Frankfurter, who is a bachelor at fifty-six, exemplary therefrom to young Americans and worthy for the Supreme Court?

This assertion of fact may have surprised Mrs. Marion Denman Frankfurter.

There was also praise. Even Republican newspapers acknowledg-
edged that Frankfurter was a suitable successor to Holmes and Cardozo,\textsuperscript{166} and many former students wrote affectionately to the Committee of their former teacher. The Law Society of Massachusetts and the Boston Bar Association each passed resolutions in favor of speedy confirmation and Jewish ladies aid societies let juridical matters interrupt needlepoint long enough to agree that the Frankfurter selection was a wise one.

As usual the nomination went to the Judiciary Committee and since several people wanted to be heard, public hearings were scheduled. Mr. Frankfurter responded to the invitation of the sub-committee's chairman, Senator Neely of West Virginia, to be present in person or by counsel by selecting Mr. Dean Acheson of the District bar as his representative. Frankfurter of course did not care to make a statement in his own behalf and hence planned not to attend the hearings. The hearing, held on January 10th, 11th, and 12th, provided the best show in the District during their run. Senator Borah quickly shut off any aspiring anti-Semites, but every other theory even remotely bearing on Frankfurter's qualifications was open for witnesses' speculation.

For the most part the critics were both obscure and unimportant. On the first day the Committee heard humanity's friend, in the person of a self-styled representative of "the interests of consumers, taxpayers, the unemployed and old-age pensions"; a District of Columbia lawyer with a prejudice against the American Civil Liberties Union; and a District resident who had been a litigant once and had lost. The second day the Committee listened to the chairman and self-admitted sole member of a League for Constitutional Government; a New Yorker who denied anti-Semitic prejudices for himself and merely wanted to save America's Jews from the "uprising" that would follow confirmation;\textsuperscript{167} a representative of some Indians who opposed Frankfurter because the nominee was a sponsor of the American Civil Liberties Union and the Union had somehow adversely affected Indians; and one or two others. They also heard Mrs. Elizabeth Dilling, author of \textit{The Red Network}, who indicted the nominee, most of the Senators present and particularly Senator Norris, and five Supreme Court Justices as Communists. Best passage of the interview:\textsuperscript{168}

\textsuperscript{166} See, \textit{e.g.}, editorial in Frank Knox's Chicago \textit{Daily News}, Jan. 6, 1939.
\textsuperscript{167} This witness was allowed to testify only over the warmest objection of Senator Borah.
\textsuperscript{168} Hearings before the Committee on the Judiciary on the Nomination of Felix Frankfurter, 76th Cong., 1st Sess. (1939) p. 45.
Sen. Neely: Is it not a fact that in your book *The Red Network*, you criticize Chief Justice Hughes, Justice Brandeis, Justice Cardozo, Justice Roberts, and Justice Stone as vigorously as you have criticized Dr. Frankfurter?

Mrs. Dilling: I didn't know Hughes was in it. I knew the rest of them were. I don't keep all these radicals in my mind.

It was no wonder that when one of the witnesses informed the Committee that he had facts which were "really surprising," Senator Neely replied: "The Committee does not want you to restrain yourself because of any fear of its being startled. The committee became shock-proof long before you appeared."

On January 12th, Mr. Frankfurter appeared as a witness. He was thoroughly conscious of the unusual nature of his position, in that, except for Stone, he was the first nominee ever examined by the Committee. He announced that he did not care to "express his personal views on controversial issues affecting the Court" and asked the Committee to make its judgment on the basis of his expressions throughout the years rather than on those of the moment. The Senators then asked such questions as they desired. Senator Borah encouraged Mr. Frankfurter to give a lengthy summary of the work of the American Civil Liberties Union and Frankfurter's connection with it. The Senator also inquired about the nominee's role in the Mooney case and the Bisbee deportation cases which Frankfurter had investigated for President Wilson during the war.

The questioning by Senator Borah was friendly; that by the next interlocutor, Senator McCarran, was not. McCarran obviously thought that membership in the Civil Liberties Union was discreditable, and he drew from Mr. Frankfurter the fact that he had not read the report of the Dies Committee, the Fish Committee, the Lusk Committee, and the American Legion on Communism in the A.C.L.U. To the inference of neglect of duty Mr. Frankfurter replied tartly, "There are only 24 hours in a day." McCarran next dug hopefully into the possibility that Frankfurter's father had not been properly naturalized and that Frankfurter was thus not a citizen, but the facts were against him and he was forced to turn to the nominee's political philosophy. Here was a field in which McCarran was un-equipped to deal with subtleties and absurd questions necessarily brought vague answers. Finally, the badgering became too much and

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28 Frankfurter Hearings at 88.
in response to the Senator's request for his views on "the doctrine of Marxism" the nominee replied:170

    Senator, I do not believe that you have ever taken an oath to support the Constitution of the United States with fewer reservations than I have or would now, nor do I believe you are more attached to the theories and practices of Americanism than I am. I rest my answer on that statement.

    Senator McCarran was still worried, and while Mr. Frankfurter was refusing Senator Austin's invitation to comment on the President's Court Plan, Senator McCarran struggled to word a question which would pin down the nominee once and for all. Finally he thought he had it:171

    Sen. McCarran: Doctor, going a little further into your explanations of these matters, do you believe in the Constitution of the United States.
    Dr. Frankfurter: Most assuredly.
    Sen. McCarran: I am very glad to get that positive answer from you.
    Dr. Frankfurter: I infer that your question does not imply that you have any doubt of it.

    Senator Neely was determined to allow no opportunity for the McCarrans of the Senate to remake the argument of the Dillings before the Committee. As a result the historian of the future who runs upon this dialogue will be greatly confused by what he may call The New Deal Jitters:172

    Sen. Neely: Are you a Communist or have you ever been one?
    Dr. Frankfurter: I have never been and I am not now.
    Sen. McCarran: By that do you mean that you have never been enrolled as a member of the Communist party?
    Dr. Frankfurter: I mean much more than that. I mean that I have never been enrolled, and have never been qualified to be enrolled, because that does not represent my view of life nor my view of government.

    McCarran was silenced, if not satisfied. The sub-committee unanimously, including McCarran, approved the nomination. On February 17th, Frankfurter was confirmed without debate and without a record vote.

170 Id. at 126.
171 Id. at 128.
172 Ibid.
President Roosevelt chose as the successor to Justice Brandeis William O. Douglas, Chairman of the Securities and Exchange Commission. Douglas' colorfulness and brilliant record caused his choice to be greeted with the greatest popular enthusiasm of any of the Roosevelt choices. The only letter of criticism came from the Prohibition party, which felt that it deserved a representative on the Supreme Court and therefore opposed all non-prohibitionists on principle. On March 24, 1939, the Committee met with Douglas and Attorney General Murphy present. The Senators had for their consideration a biographical sketch and selected endorsement letters presented by Senator Bone of Washington, Douglas' state of origin, but except for the written materials there were no witnesses to be heard nor were there any questions for the nominee. After a few minutes the Committee unanimously approved the nomination. The Senate debate on April 3 and 4, 1939, consisted largely of an oration in opposition by Senator Frazier of North Dakota who somehow developed the theory that Douglas was a reactionary friend of Wall Street. His or some other argument convinced Republican Senators Lodge, Nye, and Reed, and when the vote was taken the four opposed confirmation. 62 Senators voted for Douglas.

The last New Deal appointee, appointed since these materials were collected, was Attorney General Frank Murphy, successor to Pierce Butler. Mr. Murphy was appointed January 4, 1940, was approved by the Judiciary Committee on January 15th, and was confirmed without debate on January 16th.

That Mr. Douglas, perhaps the most liberal of the Roosevelt appointees, should have been so pleasantly greeted is surprising. It is the writer's recollection that the pre-appointment talk, which centered around Senator Schwellenbach of Washington who was believed by conservatives to be an extreme radical, so frightened the conservative press that it greeted the Douglas nomination with real relief. Schwellenbach was mentioned even before Douglas as the most likely appointee (New York Times, Feb. 14, 1938, p. 1) and this report was so widely accepted that a few days later his friends in the Senate greeted him as "Mr. Justice." New York Times, Feb. 18, 1938, p. 3. After Douglas was nominated Arthur Krock, conservative columnist for the Times, praised Douglas mildly, saying, "Of the names before Mr. Roosevelt for consideration that of Mr. Douglas was the most reassuring in many ways." New York Times, Mar. 21, p. 22. That Schwellenbach was Krock's concept of the dangerous alternative is evident from his description a month later of the conservative pressure in Congress, to which he ascribed the forcing of the choice of Douglas over Schwellenbach, as "Restoring the Balance of Government." New York Times, Apr. 13, 1938, p. 22.

Douglas Hearings, March 24, 1939. The only record of this hearing discovered is a typed copy in the files of the Judiciary Committee.
Since the preparation of the foregoing portion of this article, Justice McReynolds and Chief Justice Hughes have resigned. The President has chosen Senator James Byrnes of South Carolina to succeed McReynolds, Justice Stone has been promoted to the vacancy left by Hughes, and Attorney General Jackson has been nominated for the position left by the Stone transfer. That this conclusion should center around the selection of a successor to Justice McReynolds, whose selection is described at the beginning of this article, is a coincidence which gives fortuitous unity to the whole for Justice McReynolds was the last Justice of the 1914 Court to leave the Bench, he was the last conservative extremist on the Court, and his resignation marks the ultimate extension to Court personnel of the revolution in constitutional doctrine which began with *Jones & Laughlin Steel Company v. NLRB.*

The appointment and confirmatory processes in the choices of McReynolds’ and Hughes’ successors were markedly different from what they were in 1860. The President has made choices which are politically satisfactory but the criteria of availability, even the choice of so popular a politician as Senator Byrnes, has been less in simple political terms, as was the slavery issue, than in clear cut economic language. In his choice of the new Justices, the President has satisfied himself that his selections support the New Deal down to the last experiment. Geographical considerations have been ignored, for the current Supreme Court is completely unrepresentative in this respect, with one Justice each from Kentucky, Alabama, Pennsylvania, Connecticut, Massachusetts, and Michigan, and two from New York. There is not a representative of the area west of the Mississippi and yet Senator Byrnes, a third Southerner, and Attorney General Jackson, a third New Yorker, were the new appointments.

Confirmation of Senators without reference to Committee, as in the cases of Justice White and Sutherland, has not been abandoned, despite the sketchy hearing given Justice Black, and the fact the Senate confirmed Byrnes immediately. The names of both Stone and Jackson were referred to the Judiciary Committee and hearings were held in both cases, the proceedings in the case of Jackson, particularly, causing some delay. The extent of hearings in the future

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175 *301 U.S. 1 (1937).*
will depend upon current political considerations and the vulnera-
bility of the nominee to attacks for "radicalism." An open hearing
with examination of the nominee by any Senator of question-asking
mind may be expected.\textsuperscript{176}

In modern times the confirmation process has become of dimin-
ishing significance. The extent to which the President guides his
choice by the necessity of satisfying the Senate is impossible to esti-
mate, but experience of the last fifty years shows that his decision is
almost certainly final; Judge Parker's was the only rejection since
1894. The days of equal participation by the Senate with the President
in choosing Justices, typified in the Grant administration by the re-
jection of three appointees and lengthy consideration of another, is
apparently gone forever. The largest dissenting vote from 1914 to
date, except for Parker's, was 26 in the case of Chief Justice Hughes,
and the usual number, even in the most vigorous fights, has been less
than ten.

The chief function of the confirmation process today is periodic-
ally to focus public attention on the Supreme Court. There are almost
always some senatorial dissenters, some critics who will carry a
fight to the newspaper headlines. The day by day work of the Court
is generally too technical and too dull for laymen to comprehend,
but the dash of a personality brings this least known branch of gov-
ernment for a moment to the light of public observation. Hence the
chief effect of senatorial scrutiny is public enlightenment. Still the
everlasting possibility of rejection gives vitality to the proceedings
which would not be present if the Senate could not occasionally rebel.*

\textsuperscript{176} Communications with the Committee members by letter and telegram,
as in the cases of nominees Harlan, Fuller, or Williams, for example, or informal
contact by phone, as in the case of McReynolds, are unnecessary in the modern
practice.

* Editor's Note: This is the last of a series of three articles by Mr. Frank on
Supreme Court Justice Appointments.