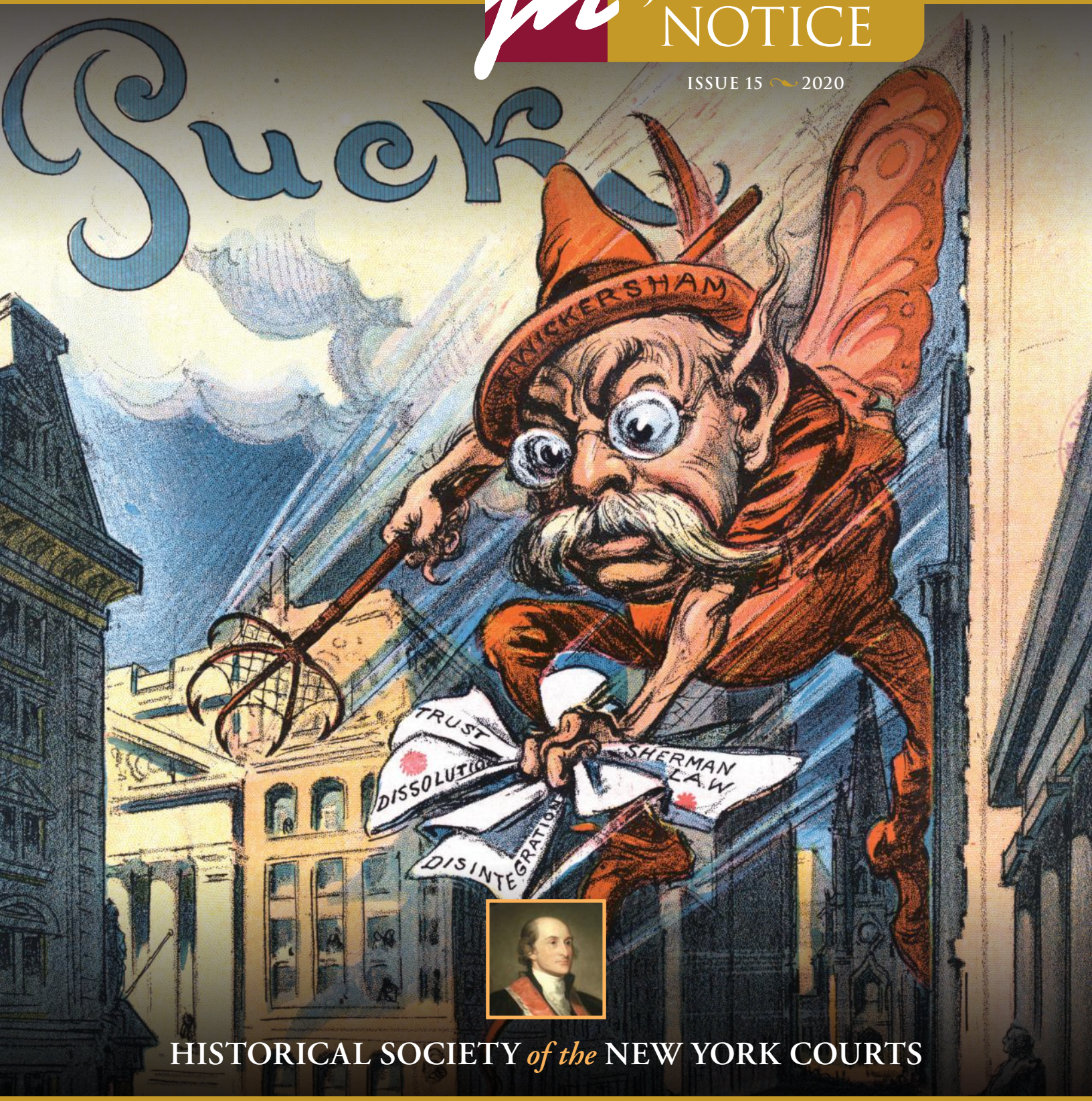
A PERIODICAL OF NEW YORK COURT HISTORY

in JUDICIAL NOTICE

ISSUE 15 ~ 2020



HISTORICAL SOCIETY *of the* NEW YORK COURTS

George Wickersham *by John Oller* ~ **Chief Justice John Jay** *by Hon. Mark C. Dillon* ~ **John Jay Trial Lawyer** *by Paul D. Rheinglod*
United States v. William Fullerton *by John D. Gordan, III* ~ **Elihu Root** *by Robert Pigott*

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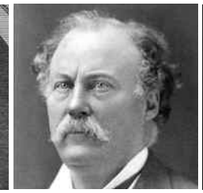


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Submissions
Judicial Notice accepts article submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously. ***Judicial Notice*** will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.

From the Editor-in-Chief

Dear Members,

New York lawyers have played a prominent role in both the legal and political life of the United States since its birth as a nation. The 15th Issue of *Judicial Notice* features three such lawyers who achieved national prominence and one whose reputation as a great trial lawyer remained unsullied despite the criminal proceedings brought against him by the United States government.

George Wickersham, founding member of New York's oldest still-existing law firm, was one of the most eminent lawyers in practice in New York City during the late 19th century. It was a time of tremendous industrial growth and the lawyers like Wickersham from "white shoe" firms served the expansionist-consolidationist interests of their wealthy corporate clients. However, Wickersham's views, inspired in part by humanitarian instincts and a sense of history, were more sophisticated and nuanced than those of most of his contemporaries. His knowledge of historical treatment of monopolies and the inherent dangers of concentrations of economic power led President Taft to appoint his brother's partner to be his Attorney General. It was in that position that Wickersham furthered the trust busting activities of Taft and his predecessor to the point that Wickersham became known as the "Scourge of Wall Street," having singlehandedly forced the break-up of Standard Oil.

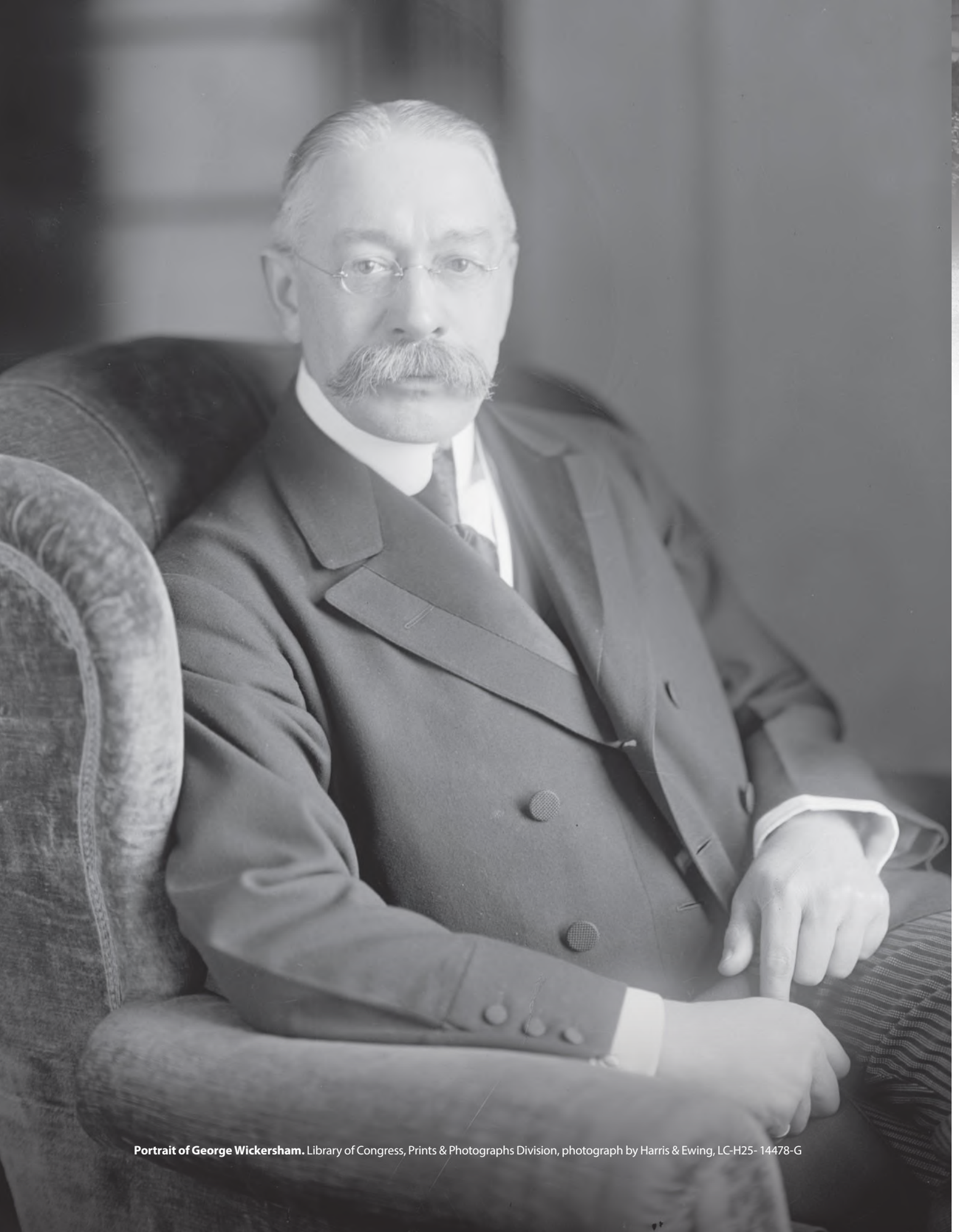
Although aspects of his life were featured in several earlier *Judicial Notice* articles, John Jay's role in New York legal history continues to fascinate scholars of New York history. In one of this issue's articles, Appellate Division Justice Mark C. Dillon, who has just authored a book on John Jay, looks at Jay's decision as Chief Justice, *Chisholm v. Georgia*, 2 U.S. 419, through a contemporary lens. While the 11th Amendment to the United States Constitution nullified the result, some of the reasoning still inspires judicial writing. In another article, Paul D. Rheingold delves into Jay's early law practice to examine whether it was in any way predictive of his later accomplishments, giving us a lesser-known view into the life of the Chief Justice with whom we are all so familiar.

William Fullerton, who had already served as an *ex officio* Judge of the New York Court of Appeals and whose cross-examination skills were legendary, found himself to be the most eminent target of the United States District Attorney for the Southern District of New York, Edwards Pierrepont, who later became United States Attorney General. The conspiracy charges lodged against Fullerton and his co-defendants involved bribery and extortion of distillers to help them evade the $2.00 a barrel whiskey tax, imposed to defray some of the costs of post-Civil War rebuilding. The trial took several unexpected turns, as described in John D. Gordan's absorbing article.

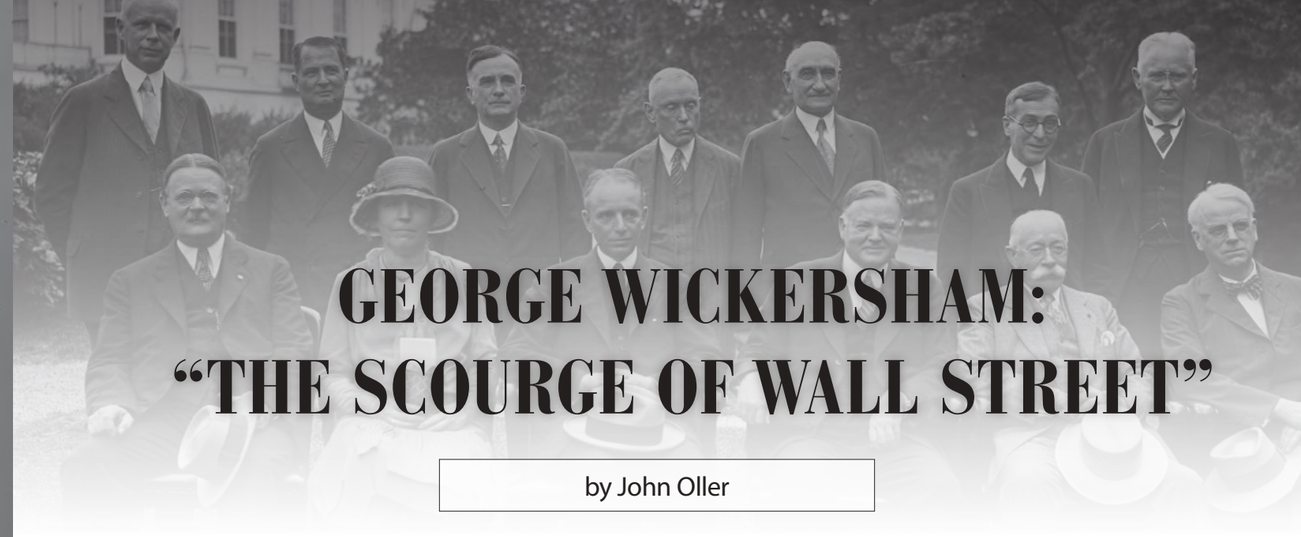
Elihu Root, after graduating from New York University School of Law in 1867, became one of the leading lawyers in New York during the Gilded Age. Root was a founding member of what became Winthrop Stimson Putnam and Roberts. Root is remembered for his extensive public service including his service as Secretary of War under McKinley and Roosevelt, as Secretary of State in 1905, United States Senator and winner of the 1912 Nobel Peace Prize. But first and foremost, he was a great New York lawyer, whose pioneering spirit with respect to Manhattan real estate is detailed by Robert Pigott.

We are grateful to each of our authors for their insightful articles. We again thank Marilyn Marcus as Managing Editor, Allison Morey as Associate and Picture Editor, David L. Goodwin as Associate and Style Editor, and Nick Inverso as Graphic Designer with the NYS Unified Court System's Graphics Department for all their hard work in producing the 15th Issue of *Judicial Notice*.

- Helen E. Freedman



Portrait of George Wickersham. Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-H25- 14478-G



GEORGE WICKERSHAM: "THE SCOURGE OF WALL STREET"

by John Oller

John Oller is an author and retired New York lawyer whose latest book is *White Shoe: How a New Breed of Wall Street Lawyers Changed Big Business—and the American Century* (Dutton, March 2019), from which this article is excerpted and adapted. His previous books include biographies of Revolutionary War hero Francis Marion (the "Swamp Fox"), Civil War socialite and political hostess Kate Chase, and Hollywood actress Jean Arthur. He lives in Manhattan, and may be found at www.johnollernyc.com.

Introduction

In New York legal circles today, the name Wickersham is most closely associated with the law firm of Cadwalader, Wickersham & Taft, the oldest in New York City. The actual man behind the name, George Wickersham, is less well known to current generations. Yet from roughly 1900 to his death in 1936, George Wickersham was one of the most renowned and influential lawyers of his time. He began his career creating and defending large corporations, then switched sides, as US attorney general under William Howard Taft from 1909 to 1913, to become known as "the scourge of Wall Street" for his aggressive prosecution of antitrust cases.[1] His crowning achievement, in the early 1930s, would be a famous national commission on law enforcement that popularly bore his name.

Early Life and Career

Born in Pittsburgh in 1858, George Woodward Wickersham supported himself through work as a telegraph operator and zookeeper's clerk. He started out at Lehigh University in Pennsylvania intending to become civil engineer. The 1870s were a time of interest in practical science and technology, and the great tendency of the age, as he later recalled, was toward "pure materialism."[2] But a literature professor who spotted in Wickersham a taste for letters persuaded him to "give up the study of calculus for that of Blackstone."[3] He obtained his law degree from the University of Pennsylvania in 1880 and, after a brief stint working for a Pennsylvania judge, moved to New York City in 1882 to take a clerkship with Chamberlain, Carter & Hornblower.

Later renamed Carter, Hornblower & Byrne, the firm was headed by Walter Carter, dubbed by one legal historian as "a collector of young masters" and "the progenitor of many law firms." Carter developed a reputation for attracting the best law school graduates, many of whom went on to illustrious careers of their own. Among "Carter's kids," as he called them, was Charles Evans Hughes, who married Carter's daughter and later served as governor of New York, US secretary of state, chief justice of the United States, and 1916 Republican candidate for president. Another was

Portrait of Henry W. Taft, 1908. Library of Congress, Prints & Photographs Division, LC-DIG-ggbain-03467

Paul Cravath, who created the "Cravath System" of law firm management still prevalent today.[4] Along with Wickersham and others, they were among the "white shoe" lawyers who would dominate the legal world for many decades of the twentieth century. The *Social Register,* the ultimate mark of elite status, included Wickersham, Hughes, and Cravath among other white shoe lawyers.

At Carter's firm, Wickersham befriended fellow clerk Henry W. Taft, brother of the future President, beginning a long association between the two men. Shortly after, Wickersham left to take a position with Strong & Cadwalader, the oldest law firm in New York City, founded in 1792. Henry Taft soon followed Wickersham to Strong & Cadwalader, where they both became name partners.

Of the two lawyers, it was actually Henry Taft who specialized in antitrust work at Strong & Cadwalader. Wickersham's practice focused on banks, railroads, and transportation companies, including August Belmont Jr.'s Interborough Rapid Transit Company, which built the first New York City subway that opened in 1904. But Wickersham developed a reputation as one of the most talented lawyers in the city and, given his connection through the brother of President Taft, he was offered the position of United States Attorney General.[5] As Taft would say of his choice of Wickersham, "He is a corporation lawyer, but why the United States should not have the benefit of as good a lawyer as the corporations, I don't know."[6]

Personality and Legal Philosophy

Wickersham was widely considered the strongest member of the President's cabinet on domestic affairs. His appearance conveyed a sense of quiet dignity: a large mustache; small, round spectacles; thin, graying hair; and conservative, well-tailored suits. But it was his charming, amiable personality that endeared Wickersham to his friends and colleagues.

Born to a Quaker family before turning Episcopalian, Wickersham had a lofty conception of law as the "expression of the will of God working through his people."[7] He brought a broadly humanistic, intellectual mindset to public service, based on his deep understanding of history and literature. Perhaps the most learned of all the white-shoe lawyers, he was a student of ancient Greece and Rome, the Renaissance, the French Revolution, and Anglo-American institutions and traditions. He could quote at will the historians Herodotus, Thomas Carlyle, and Lord Acton, as well as Homer, Cervantes, and Emerson. He was particularly knowledgeable about English legal history and the popular resentment of monopolies, the evils of which England had sought to curb by statute as early as 1436.[8]

Wickersham believed that during America's industrial development period, lawyers had met the needs of the hour by devising the legal machinery that allowed corporations to expand. But he thought the law had gone too far in allowing the accumulation of great wealth. The law, he said, had failed to consider the interests of those "who had but a humble share" of the overall pie.[9] Corporations had been given great power but were left with little accountability for their actions. Lawyers had suffered in reputation by becoming too closely associated with their business clients and interests, and had gained material success at the expense of public criticism.

On the positive side, Wickersham pointed out, it was lawyers who suggested remedies for the evils created by giant corporations and got legislation enacted to curb their abuses.[10] By providing such solutions, he said, lawyers could "redeem the profession from the reproach of being merely the trained experts of selfish forces."[11]

Photograph of President William H. Taft's cabinet; Taft is seated at center, and from left to right, his cabinet members are: Richard Achilles Ballinger, George von Lengerke Meyer, Philander C. Knox, Charles Dyer Norton, Frank Harris Hitchcock, James Wilson, Franklin MacVeagh, George W. Wickersham, Charles Nagel.
Published in *George von Lengerke Meyer: His Life and Public Services* by M.A. DeWolfe Howe, 1919

Trust Busting

Wickersham sought redemption and then some. During Taft's presidency, Wickersham instituted twice the number of antitrust actions, in half the time, as the administration of Theodore Roosevelt ("Teddy the Trust Buster") had brought during its tenure—some 89 in four years under Taft versus 44 in the eight years of Roosevelt's presidency. (William McKinley, by contrast, had instituted just three.)

The sheer breadth of the list of products and industries targeted by Wickersham is astonishing: paper and cardboard; plumbing supplies; meat, butter, and eggs; magazines and posters; New England milk; motion picture patents; lumber and kindled wood; coffee; shoe machinery; fertilizer; cash registers and adding machines; flour; thread; cotton; tar; sugar and candy; window glass; watches; horseshoes; oil and turpentine; copper wire; wallpaper; aluminum; stone; freight railways; and Kellogg's Corn Flakes.

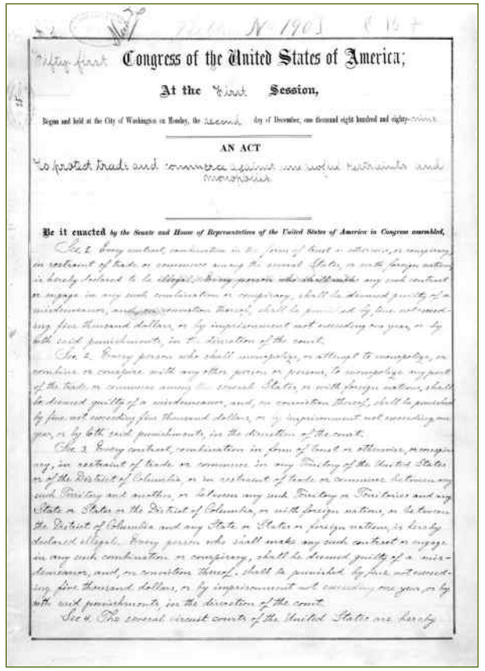
Not all the lawsuits were successful, but most ended up with either a government-compelled breakup, a criminal guilty plea or verdict, or a consent decree—a form of negotiated settlement pioneered by Wickersham, later commonplace, that allowed defendants to agree to cease their anticompetitive behavior without facing a court trial. Wickersham hired capable assistants regardless of their political affiliations and ran the Justice Department as he would a large metropolitan law office.[12]

Wickersham did not particularly care whose feathers he ruffled. A year into his office, he faced accusations that he was too close to the hated Sugar Trust, which his partner Henry Taft had defended in a lawsuit while they were together at the Cadwalader firm. Wickersham had not worked on the case but shared in the fees afterward. Wickersham's response, which finally silenced his critics, was to file a massive antitrust suit against the Sugar Trust and thirty-nine associated individuals.[13]

"Wickersham has out-radicaled the radicals," observed Frank Vanderlip, the president of National City Bank (now Citibank). Vanderlip noted "great disgust" on Wall Street with Wickersham's torrent of antitrust suits and speculated he might harbor political ambitions. Washington, DC, had produced "an absolute mental change" in Wickersham, who had become "really the most feared member of the Administration," Vanderlip thought.[14]

Despite Vanderlip's speculation about his motives, Wickersham never sought elective office. Nor had he changed his mental outlook; he just had acquired a chance to implement his longstanding views. He was a committed capitalist who believed the best way to protect the system was by spreading the wealth a bit. "A man who owns a little house worth twenty-five hundred dollars, on which he has paid five hundred

George Wickersham: "The Scourge of Wall Street"



Congress of the United States of America;

At the Third Session,

Begun and held at the City of Washington on Monday, the second day of December, one thousand eight hundred and eighty-nine.

AN ACT

To protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Sec. 4. The several circuit courts of the United States are hereby

The Sherman Anti-Trust Act of 1890, An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies. (1911). National Archives and Records Administration 5730371

dollars, and the balance of which he is gradually paying off through his savings, is the most potent bulwark against socialism that can be devised," he once wrote.[15]

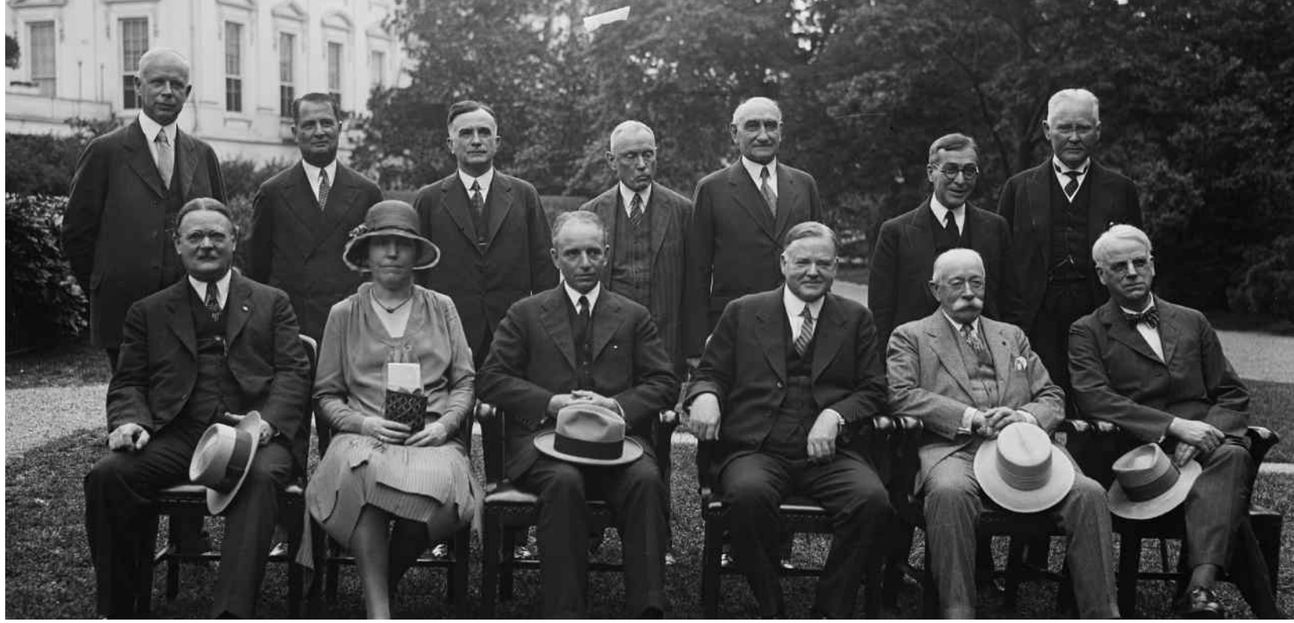
Privately, Wickersham was stung by the accusations by businessmen such as Vanderlip. Replying to a sympathetic letter from his old friend Francis Lynde Stetson (founder of the firm that became Davis Polk), Wickersham confessed that although he had expected criticism and opposition, he had not anticipated "the willful misrepresentation, the willingly accepted lies, which a portion of the press and of the community has treated me to." He recognized that as a representative of corporate interests Stetson was now on the other side, but Wickersham hoped that would not affect their relations. "I have looked up to you for so many years … [and] have turned to you so often for counsel and help … that it would indeed be a bitter blow were I to forfeit your friendship now when I need it more than ever before," he wrote. "Surely we may differ on economic questions without abating in any degree a friendship of many years."

For all the charges leveled at him by Wall Street—for all the sacrifices he had made in leaving private practice for the attorney generalship—Wickersham did not regret taking the job. "I felt," he explained to Stetson, "that the opportunity to devote oneself to the service of one's country does not always come to a man, and that when it does, he would be guilty of what Dante calls 'the great refusal' should he refuse to answer the call."[16]

The attacks continued. The popular magazine *Puck* put on its front cover an illustration showing a huge red flying insectlike creature labeled "Wickersham," wielding a pitchfork as he descended on a fleeing crowd of Wall Street men.[17] Publicly, Taft supported Wickersham's aggressive antitrust policy, but the President became so concerned with the political fallout that he privately assured businessmen that if reelected he would not include Wickersham in his new cabinet.[18]

In the meantime, Wickersham's two most important antitrust cases were holdovers from the Roosevelt administration. The first was a suit to break up John D. Rockefeller's Standard Oil of New Jersey, which by 1900, through various cutthroat business practices, had grown to control 90 percent of the nation's refined oil. The second lawsuit was to dissolve the American Tobacco Company, which controlled 95 percent of cigarette manufacturing in the United States.[19]

The cases generated more anxiety and suspense on the part of the nation than any previously taken up by the high court. It was not just that the fate of two giant companies was at stake. Even greater interest lay in the probability that the Supreme Court would decide—this time definitively—the momentous question of whether the Sherman Antitrust Act prohibited all restraints of trade or only unreasonable ones. A closely related question was whether the mere existence of a corporation's power to control the market with, say, more than a 50 percent share, made it an illegal monopoly whether it had acquired such power fairly or not. That is, in the law's eyes, was big by definition bad?



President Herbert Hoover's National Commission on Law Observance and Enforcement, also known as the Wickersham Commission; front row, seated, left to right: Roscoe Pound, Ada L. Comstock, William D. Mitchell, President Hoover, Commission Chairman George W. Wickersham, William S. Kenyon; back row, standing, left to right: Kenneth R. MacIntosh, Monte M. Lehman, Paul J. McCormick, William J. Grubb, Frank J. Loesh, Newton D. Baker, Henry W. Anderson. Library of Congress, Prints & Photographs Division, photograph by Harris & Ewing, LC-DIG-hec-35394

If the Supreme Court's answer to that question was yes, then as a practical matter it would put an end to virtually all large aggregations of capital. Businessmen would no longer be able to form gigantic business combinations, whether trusts, mergers, or holding companies. The likes of US Steel and General Electric would not be seen again, and emerging behemoths such as General Motors would be stopped dead in their tracks.

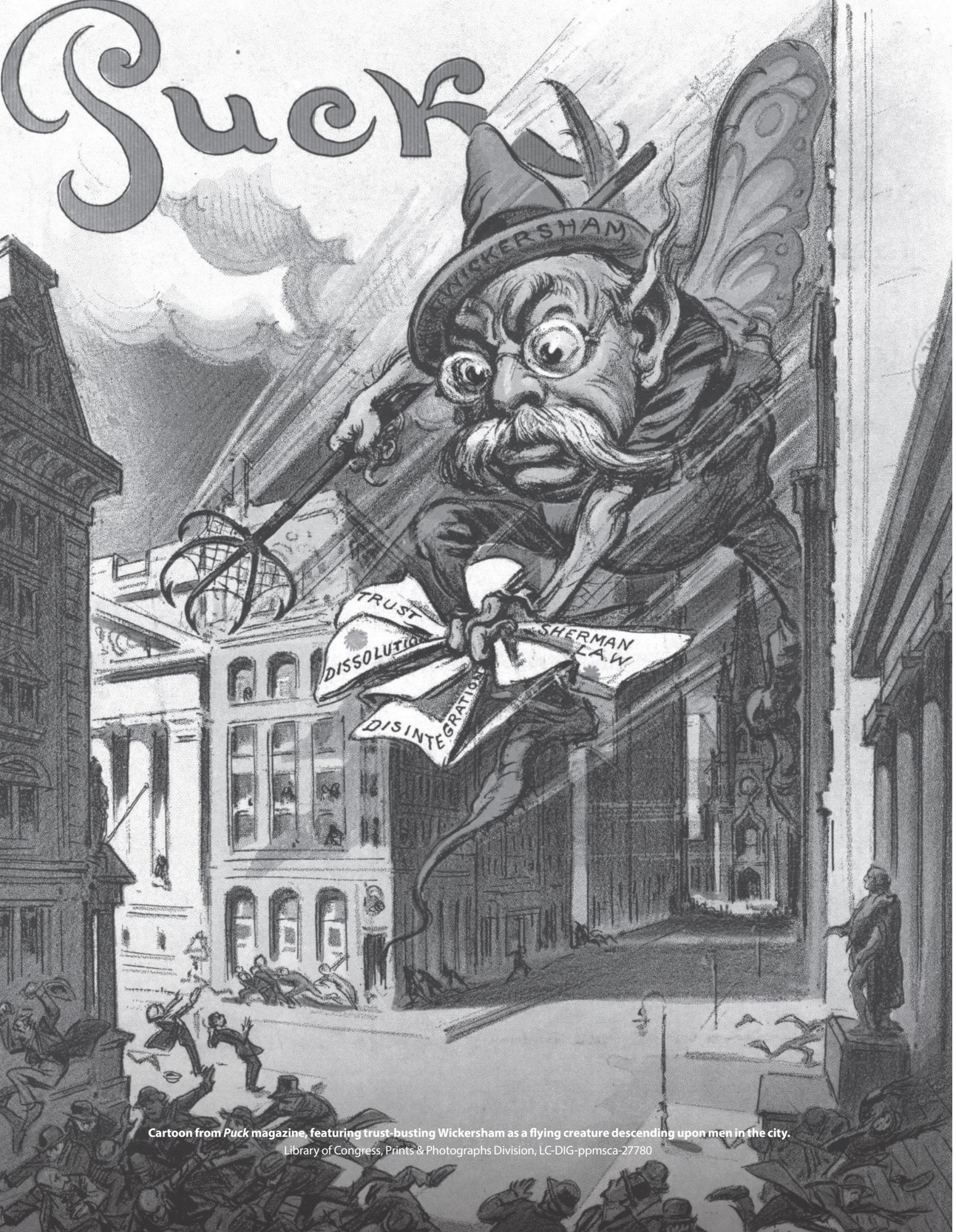
This was, in fact, what many populists hoped for: a return to the days when small producers; independent, self-employed proprietors; and farmers dominated the nation's economy. The legal questions to be decided in the oil and tobacco cases were thus not mere abstractions but would determine what kind of economic system—what kind of society—the United States would be in the twentieth century.

At the oral argument in January 1911, Wickersham conceded that mere power or size did not constitute an illegal monopoly, but he said the defendant companies were hardly idyllic enterprises. He entertained the courtroom by reading correspondence from the tobacco companies' top officers to local managers instructing them to sell below cost in certain localities to wipe out their competition, but not to spend a dollar more than necessary to accomplish that result. He ridiculed the testimony of the tobacco men who maintained they never had any idea of restraining trade. "With solemn visage and pious mien they would sugar the devil himself," Wickersham said.[20]

Throughout the early months of 1911, tension mounted in anticipation of release of the court's decisions in the oil and tobacco cases. On every Monday, the court's typical decision day, the business world held its collective breath. And on every Monday that passed without a ruling the stock market shot up or down based on speculation as to the outcome.[21]

On Monday, May 15, 1911, the Supreme Court chamber, then located in the Capitol building, was crowded with reporters and spectators, with a line stretching out the courtroom through the corridors all the way across the rotunda. When the large clock above the justices ticked past 4 p.m., the court's normal quitting time, the crowd began to disperse. Then Chief Justice White suddenly and matter-of-factly announced he had the opinion and judgment in Case No. 398, and everyone instantly recognized the Standard Oil decision was coming. Word quickly spread, and those who had left scurried back to be present for the historic occasion, with even senators struggling to gain admission. White then proceeded for almost an hour to synopsize the opinion.[22]

The *New York Times* headline the following day summed up the ruling: STANDARD OIL COMPANY



Cartoon from *Puck* magazine, featuring trust-busting Wickersham as a flying creature descending upon men in the city.
Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-27780

MUST DISSOLVE IN 6 MONTHS; ONLY UNREASONABLE RESTRAINT OF TRADE FORBIDDEN. It had been a victory for the government in the specific case, but a relief for corporate interests in general. The court ruled against Standard Oil, ordering that as an antitrust violator it had to be broken up into multiple pieces (some thirty-four separate companies would eventually emerge, including Exxon, Mobil, Amoco, and Chevron). That part of the decision pleased progressives. But the near-unanimous decision, from which only the aged Justice John Marshall Harlan dissented, also reassured the business world by holding that only "unreasonable" or "undue" restraints of trade were forbidden by the Sherman Act. Rockefeller's Standard Oil had driven out all competition by cutting prices, forcing railroad rebates, and buying up rivals, which made it easy to conclude it had unduly restrained trade.[23]

Two weeks later the court reaffirmed its Standard Oil ruling in the tobacco case. The court found American Tobacco guilty of anticompetitive conduct and ordered it to be broken up in six months as well. Out of it came R. J. Reynolds (makers of Camel and Winston cigarettes), Liggett & Myers (L&M and Chesterfields), and Lorillard (Newport and Kent), among others. The court condemned the tobacco trust not because it was big but because it had acted flagrantly, with the object of crushing competitors.[24] Henceforth the "rule of reason" would become the guiding principle for court review under the Sherman Act. For better or worse, large corporations were here to stay.

Wickersham called the Supreme Court decisions a sweeping win for the government. President Taft was more circumspect at first but soon heartily endorsed the high court's rule of reason approach.[25] In fact, as a federal appeals court judge, Taft had adopted a similar approach in an influential earlier case known as *Addyston Pipe*. There he stated that restraints merely "ancillary" to the main purpose of a lawful contract should be allowed.[26]

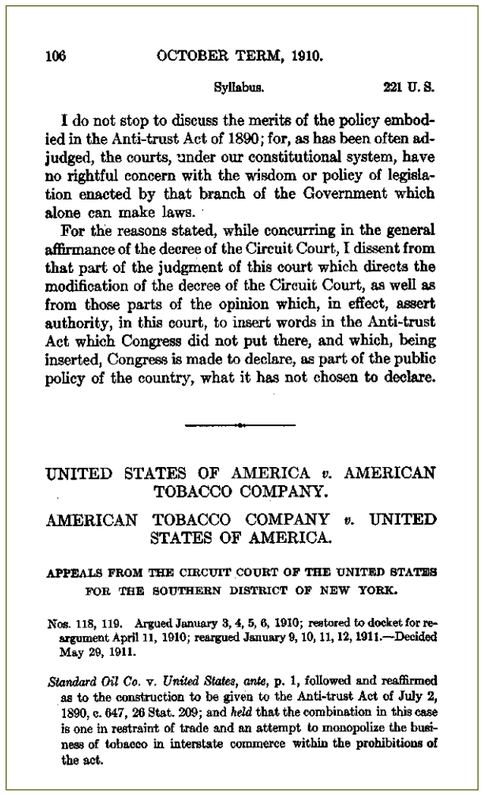
A year after the oil and tobacco cases, Wickersham won another big victory when the Supreme Court ruled that the late E. H. Harriman's merger of the Union Pacific and Southern Pacific Railroads in 1901 was an illegal combination under the Sherman Act and had to be broken up.[27] In later cases the court would provide additional clarity by holding that certain categories of business conduct, such as price-fixing, bid rigging, and geographic division of markets, were unreasonable *per se*, eliminating the need for extensive judicial inquiry.

Theodore Roosevelt, eager to reenter the political arena, conceded the Supreme Court's oil and tobacco decisions had accomplished a certain amount of good by breaking up those trusts. But what was urgently needed, he said, was enactment of drastic and far-reaching legislation to put the giant trusts under the same kind of tight controls the government exercised over the railroads and other common carriers under the Interstate Commerce Act. Taft and Wickersham could bring all the antitrust suits they wanted, he said, but only a federal corporation agency—similar to the Interstate Commerce Commission—could provide the kind of ongoing supervision and speedy enforcement that was needed.

Roosevelt added that in the end, government control of large industrial corporations might even have to go much further than existing government control over the railroads. Because the ICC, per Roosevelt's prior legislation, already had significant control over the setting of railroad rates, Roosevelt was hinting that the government—maybe even the President himself—might need to set prices on commodities manufactured and sold by regular businesses.[28] This was a bridge too far for Taft.[29] Although Wickersham thought the idea of federal price controls worth considering, he ventured that such a novel, radical idea likely would be impossible to implement. He believed that government lawsuits under the Sherman Act were an effective means of policing bad business behavior.[30]

Role in Taft-Roosevelt Split

It was one such lawsuit that brought about the final rift between Roosevelt and Taft. For some time after his return from his African big-game safari in 1910, the former president had been increasingly critical of Taft for not pushing more boldly for the progressive reforms Roosevelt had begun. Taft had promised to "complete and perfect the machinery" of government and law that the Roosevelt administration had put in place,[31] and he had achieved some



106 OCTOBER TERM, 1910.

Syllabus. 221 U. S.

I do not stop to discuss the merits of the policy embodied in the Anti-trust Act of 1890; for, as has been often adjudged, the courts, under our constitutional system, have no rightful concern with the wisdom or policy of legislation enacted by that branch of the Government which alone can make laws.

For the reasons stated, while concurring in the general affirmance of the decree of the Circuit Court, I dissent from that part of the judgment of this court which directs the modification of the decree of the Circuit Court, as well as from those parts of the opinion which, in effect, assert authority, in this court, to insert words in the Anti-trust Act which Congress did not put there, and which, being inserted, Congress is made to declare, as part of the public policy of the country, what it has not chosen to declare.

UNITED STATES OF AMERICA *v.* AMERICAN TOBACCO COMPANY.

AMERICAN TOBACCO COMPANY *v.* UNITED STATES OF AMERICA.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 118, 119. Argued January 3, 4, 5, 6, 1910; restored to docket for reargument April 11, 1910; reargued January 9, 10, 11, 12, 1911.—Decided May 29, 1911.

Standard Oil Co. v. *United States*, *ante*, p. 1, followed and reaffirmed as to the construction to be given to the Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209; and *held* that the combination in this case is one in restraint of trade and an attempt to monopolize the business of tobacco in interstate commerce within the prohibitions of the act.

U.S. Reports: *United States v. American Tobacco Co.*, 221 U.S. 106 (1911). Retrieved from the Library of Congress

notable successes. These included a new railroad law, the Mann-Elkins Act, drafted substantially by Wickersham, which strengthened the ICC's powers and extended its jurisdiction to telephones, telegraphs, cable, and wireless communications. But in the view of Roosevelt and other progressives, Taft had not gone far or fast enough, and had surrounded himself with big business owners, special interests, and corporate lawyers such as Wickersham and Taft's own brother Henry.[32]

Ironically, it was a decidedly anti-corporate action that caused Roosevelt to erupt. In late October 1911, with Taft's approval, Wickersham brought an antitrust suit against J. P. Morgan's U.S. Steel, as Roosevelt had once threatened to do.

In part, what incensed Roosevelt was that the suit was filed at all. Roosevelt had told Morgan in 1902 the government would not prosecute his US Steel Company unless it had done something illegal. Because Roosevelt had taken no action against Morgan's company in the succeeding seven years, Taft's lawsuit could be read as implicitly charging that Roosevelt had been lax in enforcing the antitrust laws.

But what enraged Roosevelt even more was what the lawsuit said. The government's petition reminded everyone that during the Panic of 1907, Roosevelt had allowed US Steel to acquire its rival, the Tennessee Coal, Iron & Railroad Company, as part of Morgan's plan to rescue the nation's economy. Wickersham's pleadings alleged Morgan had been motivated not only to stop the panic, but also to acquire control of a major competitor, which now needed to be stripped from the steel giant. The implication, which the press readily endorsed, was that Roosevelt had either been hoodwinked by Morgan or, worse, had actively facilitated an unlawful acquisition.

Taft did not read the petition before it was filed and afterward said it was too late to do anything about it. Roosevelt regarded it as an act of betrayal, or at least evidence of Taft's incompetence and Wickersham's malice. Most historians believe that Wickersham did not deliberately seek to embarrass the ex-president, but instead displayed a careless lack of political tact.[33] But there is also evidence that Wickersham, loyal to Taft and upset by Roosevelt's attacks on him, knew exactly what he was doing.[34]

Lawyer-statesman Elihu Root, Roosevelt's former secretary of state, called the snafu a "minor source of annoyance" that Roosevelt blew out of proportion.[35] Overreaction or not, it fed Roosevelt's growing desire to challenge the incumbent Taft for the 1912 Republican nomination.

Wickersham played a key role in another incident that prompted Roosevelt to renounce his successor. While Roosevelt was in Africa, what became known as the Ballinger-Pinchot affair erupted into a major controversy. A government land official named Louis Glavis accused Taft's interior secretary, Richard Ballinger, of improperly giving away valuable protected Alaskan coal lands to a private syndicate

led by J. P. Morgan and the Guggenheim family. After conferring with Wickersham and reviewing the evidence with him, Taft fired Glavis, who then took his allegations to the press. When US Forestry chief Gifford Pinchot, a progressive environmentalist originally appointed by Roosevelt, publicly sided with Glavis, Taft fired Pinchot, too, for going outside the chain of command.

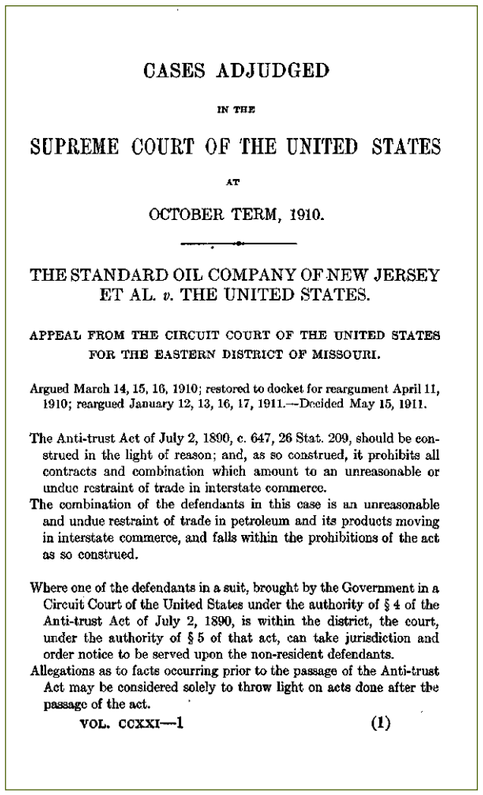
Harvard professor Louis Brandeis then became involved as a lawyer for Glavis and Pinchot. Brandeis uncovered the fact that Wickersham's formal report on the matter had been backdated to make it appear Taft had the report before him when he made the decision to fire Glavis. Although Taft had the benefit of Wickersham's thinking and notes, and statements from Interior Department officials exonerating Ballinger, the Attorney General's final report was not completed until some weeks later.

Wickersham belatedly admitted he had backdated the report, and Taft admitted to Congress that he had directed Wickersham to do so.[36] Even though Ballinger was cleared of any wrongdoing, and the misdating did not affect the outcome, the incident was embarrassing for both the President and his Attorney General. More significantly, the entire affair drove a wedge between conservationists and anti-conservationists, between progressives and conservatives, and ultimately between Roosevelt and Taft.

By late 1911 it was apparent that Roosevelt was eager to challenge Taft for the Republican nomination. After keeping his intentions secret for several months Roosevelt finally declared in February 1912: "My hat is in the ring."[37]

Two months later, Taft, increasingly estranged from Roosevelt, had Wickersham launch another antitrust suit that angered the ex-president. This time the target was International Harvester, a J. P. Morgan-backed company that controlled 85 percent of the agricultural equipment market.

When Wickersham brought suit against Harvester in April 1912, Taft made public several letters indicating that in 1907 Roosevelt had quashed a planned lawsuit against the conglomerate by Roosevelt's Attorney General. The embarrassing correspondence suggested Roosevelt had acted so as not to antagonize the Morgan interests, which had been largely friendly to his administration. Roosevelt countered that Taft,



CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1910.

THE STANDARD OIL COMPANY OF NEW JERSEY ET AL. *v.* THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Argued March 14, 15, 16, 1910; restored to docket for reargument April 11, 1910; reargued January 12, 13, 16, 17, 1911.—Decided May 15, 1911.

The Anti-trust Act of July 2, 1890, c. 647, 26 Stat. 209, should be construed in the light of reason; and, as so construed, it prohibits all contracts and combination which amount to an unreasonable or undue restraint of trade in interstate commerce.

The combination of the defendants in this case is an unreasonable and undue restraint of trade in petroleum and its products moving in interstate commerce, and falls within the prohibitions of the act as so construed.

Where one of the defendants in a suit, brought by the Government in a Circuit Court of the United States under the authority of § 4 of the Anti-trust Act of July 2, 1890, is within the district, the court, under the authority of § 5 of that act, can take jurisdiction and order notice to be served upon the non-resident defendants.

Allegations as to facts occurring prior to the passage of the Anti-trust Act may be considered solely to throw light on acts done after the passage of the act.

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U.S. Reports: *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Retrieved from the Library of Congress

as a member of his cabinet, had not protested at the time, and was only releasing the letters then, on the eve of the Massachusetts Republican presidential primary, for political advantage.[38]

The 1912 presidential election would be among the bitterest and most consequential in US history. It would be dominated by the "Trust Question," with Taft taking the moderately conservative position; Roosevelt the most radical, progressive one; and a Democratic governor and former university president, Woodrow Wilson, seeking a middle ground between the two.

For his part, Roosevelt continued to attack Wickersham, now saying his breakup of Standard

STANDARD OIL COMPANY MUST DISSOLVE IN 6 MONTHS; ONLY UNREASONABLE RESTRAINT OF TRADE FORBIDDEN

And of Such Unreasonable Restraint the Supreme Court Finds the Standard Guilty.

DECISION PLEASES TAFT

Decision Reads "Unreasonable" Into Law and Is What Trusts Wanted, Says La Follette.

LOWER DECISION MODIFIED

More Time Given and Injunction Against Doing Business Meanwhile Is Removed.

JUSTICE HARLAN DISSENTS

Objects to Limiting the Sherman Law by the Use of the Term "Unreasonable."

WHAT STANDARD WILL DO

Chicago Counsel Says It Will Go On as Usual After Changes Are Made.

Special to The New York Times.

WASHINGTON, May 15.—Final decision was returned late this afternoon by the Supreme Court of the United States in one of the two great trust cases which have been before it for so long—that of the Standard Oil Company. The decree of the Circuit Court for the Eighth Circuit directing the dissolution of the Oil Trust was affirmed, with minor modifications in two particulars. So far as the judgment of the court is concerned the

President Taft himself, in messages to Congress and in public speeches, has declared himself earnestly in favor of retaining the economy and efficiency of combinations and of destroying merely those practices which unduly restrained inter-State commerce and stifled competition. There was a time when the President was in favor of some amendment to the Sherman law in the effort to reach this situation. But he finally came to the conclusion that it was impracticable to write the word "unreasonable" into the law, and pointed out that more and more the Supreme Court was tending toward the point where its decisions in trust cases would be based on that construction of the statute.

Way Out for Corporations.

Now it seems to have been done, and the forceful personality of Chief Justice White has so impressed itself upon the court that he has carried seven of the other Justices with him. Representatives of "big business" who heard him this afternoon did not hesitate to declare emphatically that the decision was all that the big corporations could ask. They regarded with especial favor the establishment of the proposition that a combination must be in "unreasonable" restraint of commerce to be unlawful.

This they believe points out the way by which the big corporations in the country can continue to exist. They recalled with satisfaction the fact that President Taft has specifically declared that it is not mere size which puts a corporation or combination under the ban of the law; it is not the breadth or scope of its operations, or the amount of its capitalization, but whether or not it does two things; fixes prices and controls output.

The representatives of corporations here to-day find in Chief Justice White's decision a practical agreement with the position of President Taft. They have been satisfied with that position and have realized for a long time that business must conform to such standard. Now they find relief in the decision of the highest court in the country, and some of them expressed the opinion this evening that the effect on the general business situation would be good.

There is very little difference in the views of the progressives and those of big business men here as to the effect of the decision. But whereas the corporation representatives regard it with favor, the progressives find in it cause for distrust and dissatisfaction. This view was especialy emphasized by Senators La Follette and Kenyon.

OPINIONS ON THE DECISION.

Attorney General Wickersham: "Substantially every proposition contended for by the Government is affirmed."

Frank B. Kellogg, counsel for Government: "It is a complete victory for the Government."

Senator Kenyon, formerly Assistant Attorney General: "I think the court has amended the anti-trust law, and it will lead to trouble."

Senator La Follette: "I fear that the court has done what the trusts wanted it to do, and what Congress has steadily refused to do."

Alfred D. Eddy, Standard Oil counsel in Chicago: "The business of the Standard Oil Company will go on as usual, although changes will be made."

affirmed by the Supreme Court. In the reasoning by which the Chief Justice reaches the conclusion in which the whole court concurs he expresses the view that only contracts, combinations, &c., which in any way unreasonably or unduly restrain inter-State trade and commerce or which are unreasonably restrictive of competitive conditions are within the prohibition of the first section of the Sherman act. Justice Harlan, on the other hand, dissents from this view and contends that every contract, &c., which does restrain trade and commerce is within the inhibition of the statute, but he concurs with the whole court in the decree of affirmance.

"The Chief Justice further holds that the second section of the act seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the ends prohibited by the first section that is, restraint of trade by any attempt to monopolize or monopolization thereof, even although the acts by which such results are attempted to be brought about, or are brought about, be not embraced within the general enumeration of the first section. He further hold that the criterion by which it is to be determined in all cases, whether a contract, combination, &c., is a restraint of trade within the meaning of the law, is the direct or indirect effect of the acts involved."

The New York Times, May 16, 1911. Copyright The New York Times

Oil and American Tobacco had been a "make-believe strangle" that accomplished less than nothing.[39] Like many progressives, Roosevelt thought the plans of dissolution approved by Wickersham were too lenient and still allowed the new, separate companies too much power. What was needed now, Roosevelt believed, was a federal commission with authority to regulate general industrial corporations—including their pricing—similar to the ICC and its power over railroads.

With the Republicans split between Taft and Roosevelt, Wilson won the election easily. In his first term, he enacted major progressive legislation such as the Federal Reserve Act, the Federal Trade Commission Act, and the Clayton Antitrust Act. But little more than a year into Wilson's first term, war broke out in Europe and dominated the national debate.

World War I and Other Issues

After Great Britain entered the war against Germany on August 4, President Wilson formally proclaimed the United States neutral and said Americans "must be impartial in thought as well as in action."[40] That was something George Wickersham and his white shoe brethren would never be able to abide.

By ancestry, friendships, travel experience, and worldview, the leading Anglo-Saxon lawyers of Wall Street unreservedly favored the Allied cause from the beginning of the war. They perceived the war as a struggle between good and evil—between the liberal Western democracies, represented by England and France, and the despotic, militaristic German and Austro-Hungarian Empires. To men such as George Wickersham, one side was right, the other wrong, and there was no room for neutrality. Now back in private practice, Wickersham, along with other leading Wall Street lawyers, advocated military "preparedness" for the European conflict they expected the United States eventually to enter.[41]

In the meantime, Wickersham found time for other matters of importance, some of which saw him taking positions that today would be considered antiquated, if not retrograde. One was the question of women's suffrage.

In 1915, Elihu Root presided over a New York State constitutional convention to consider a series of amendments, mostly designed to improve state government through modest reforms. Wickersham was the majority floor leader for the amendments, which Root described as a "conservative constructive program." One of the proposed amendments was to give New York women the right to vote. Root was personally opposed to the amendment but agreed to have it submitted separately to the state's voters in a November referendum.

George Wickersham also opposed the suffrage amendment in a letter he signed, with several other Wall Street lawyers, three days before the November referendum. Only a small minority of women wanted the vote, they asserted. New York State voters rejected the suffrage amendment in November 1915 by 57 to 43 percent, and the other proposed constitutional changes, which attracted a variety of opposition, were defeated as well. But the suffrage amendment would pass in 1917, over continued opposition by Wickersham and some of his colleagues.[42]

Two months after the 1915 referendum, Woodrow Wilson, fresh off his honeymoon with the second Mrs. Wilson, nominated Louis Brandeis to fill a vacancy on the United States Supreme Court. The news came as a thunderbolt, and sparked virulent opposition from Wall Street and Republicans. Six former presidents of the American Bar Association, including Root and William Howard Taft, signed a letter stating that taking into consideration Brandeis's "reputation, character and professional career," he was unfit to serve on the Supreme Court.[43] Root had drafted the protest at the behest of George Wickersham, who, like Taft, had never forgiven Brandeis for publicly embarrassing them by exposing their backdating of a report during the 1911 Ballinger-Pinchot affair.[44] Nonetheless, Brandeis was confirmed and became the first Jewish justice to serve on the Supreme Court.

Wickersham also went on record as opposing greater immigrant influence in the legal profession. He warned the bar association against allowing membership to "a pestiferous horde" of immigrants who did not speak English or have a full understanding of American law historically. "To think that those men, with their imperfect conception of our institutions, should have an influence upon the development of

our constitution … is something that I shudder when I think of," he said.[45] At that time the term "immigrant" was a code word for Eastern European Jews, who were making up an increasing percentage of large city lawyers, practicing as part of what was considered to be the "lower bar."[46] But Wickersham's nativist sentiments were not uncommon among elite members of the bar of his day.

Wickersham continued giving himself over to patriotic public service. After the US entered the war in 1917, he served under Charles Evans Hughes on the New York City draft appeals board, which was deluged with requests for exemptions and noncombatant status. (Hughes had lost the 1916 presidential election to Wilson.) Although as hawkish as any of his legal brethren, Wickersham proposed federal legislation to prevent all the sons of one family from being drafted into the army. (This *Saving Private Ryan*-like rule was not adopted.) Wickersham was later appointed by Wilson to the War Trade Board, which controlled US exports and imports of war supplies. In that position he made a confidential investigation of alleged irregularities in the purchase of materials for use in Cuba.[47]

League of Nations and Post-War Red Scare

At the conclusion of World War I, George Wickersham, along with his internationalist colleagues, supported a League of Nations. But like others, Wickersham expressed reservations about the particular League negotiated by President Wilson. As befit their profession, Wickersham and other leading Wall Street lawyers favored arbitration of international disputes, development of a body of international law, and a world court. But they did not want to commit the United States to collective military action against any and all future aggressor nations. That placed them at odds with the version of the League advocated by Woodrow Wilson.

The crux of the dispute was over the famous Article X of the League Covenant. It required League members to protect the territorial integrity and political independence of any member attacked or threatened by military aggression. The Republican "reservationists" wanted it removed.[48] Wilson's insistence on the clause ultimately led to the US Senate's rejection of the Treaty of Versailles that had created the League.

In the aftermath of World War I, the United States also went through a major Red Scare. The "Palmer Raids" of November 1919 and January 1920, organized by US Attorney General A. Mitchell Palmer's young assistant, J. Edgar Hoover, were well known for their arrests and deportations of hundreds of socialists, communists, and anarchists, almost all of them aliens. The threat was not imaginary; the year 1919 had seen a series of anarchist mail bombings targeted at prominent Americans, including Palmer himself, who was nearly killed in an explosion at his home. But the government's response, including thousands of warrantless arrests and brutal treatment of suspects, was wildly indiscriminate and disproportionate

The hysteria extended to the state level. In January 1920, the New York State Assembly took the unprecedented step of refusing to seat five socialist assemblymen elected the previous November. That was finally too much for Charles Evans Hughes, who led a plea by the New York State Bar Association and the New York City Bar Association to reinstate the five suspended assemblymen. He was joined in protest by George Wickersham. They secured a resolution from the city bar, by a vote of 174–117, calling the assembly's action un-American for excluding duly elected representatives merely because of their membership in the Socialist Party and not because of any personal unfitness. The state bar association also voted for reinstatement, by 131–100. Nonetheless, the Albany legislature expelled the socialists and passed a law outlawing the Socialist Party.[49]

Post-War and Later Activities

The most erudite of the prominent white shoe lawyers, and the best liked among his peers, George Wickersham was constantly in demand as an after-dinner speaker and toastmaster. His competence and leadership skills also landed him a steady stream of positions as the head of many significant organizations and causes. As his law partner Henry W. Taft said, Wickersham "was never content to be a passenger in the boat, but was always willing either to row or to steer."[50]

In 1922 Wickersham organized and then served as longtime president of the American Law Institute, created to introduce greater certainty into the law; its many treatises on the common law, known as Restatements, are familiar to every law student, lawyer, and judge. Wickersham later served as president of both the Council on Foreign Relations, which he helped found, and the Japan Society, which promoted conciliation between the United States and the Far East power. He was a president of the Hungarian-American Society and the American Society of the French Legion of Honor. He headed an international arbitration panel to resolve disputes arising under negotiated plans to reduce German reparations in the 1920s. A senior warden and vestryman in the Episcopal Church, Wickersham led the fundraising effort to build the Cathedral of Saint John the Divine in New York City, the fifth largest Christian church in the world.[51]

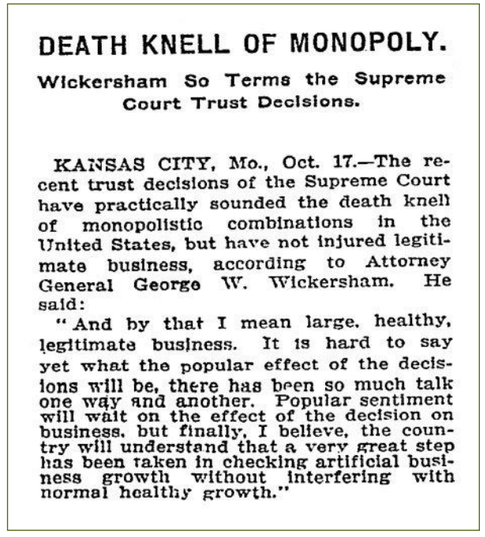
When Reginald Vanderbilt, great-grandson of the Commodore, died in 1925, he left behind a $7 million estate, a twenty-year-old wife, and an eighteen-month-old daughter, Gloria. Wickersham was named the child's guardian and oversaw her $4,000-per-month allowance for the next decade. His service ended after a guardianship fight ensued between Gloria's neglectful mother and the girl's aunt, Gertrude Vanderbilt Whitney, who prevailed in a celebrated court case.[52]

The crowning point of Wickersham's career came in 1929 when President Herbert Hoover appointed him to chair the National Commission on Law Observance and Enforcement, popularly known as the Wickersham Commission. The expert panel, the first presidential commission of its kind, was formed to investigate the rise of organized crime during the Roaring Twenties (the Saint Valentine's Day Massacre in Chicago had taken place earlier that year). Among its charges was to determine whether Prohibition, which had spawned bootleggers, speakeasies, and violent gangsters, should be repealed.

After two years of study, the Wickersham Commission released a multivolume report, which, at more than a million words, was so voluminous that Will Rogers joked that people were using it to feed goats in Texas. The report recommended numerous improvements in law enforcement, including ending the practice of "third degree" interrogations, better professional training for police forces, and greater use of probation and parole over incarceration. But the report's conclusions in those areas were dwarfed, in the public mind, by the harsh comments directed at Prohibition.

Although the Commission did not advocate immediate repeal, it found that the Prohibition Act was widely disregarded, had been inadequately enforced, and possibly was unenforceable. It castigated the police for failing to detect and arrest criminals guilty of murders and sensational bank robberies. For the time being, the Commission recommended more aggressive enforcement of the anti-alcohol laws.[53] But the report provided ammunition to the many critics of Prohibition, and two years later the "noble experiment" came to an end.

George W. Wickersham died in January 1936, at age seventy-seven, little more than two years after the repeal of Prohibition. He was riding in a taxicab in midtown Manhattan when he collapsed of a fatal heart attack. He was on his way to lunch at the Century Club, whose members would greatly miss their convivial and learned friend.[54]



DEATH KNELL OF MONOPOLY.

Wickersham So Terms the Supreme Court Trust Decisions.

KANSAS CITY, Mo., Oct. 17.—The recent trust decisions of the Supreme Court have practically sounded the death knell of monopolistic combinations in the United States, but have not injured legitimate business, according to Attorney General George W. Wickersham. He said:

"And by that I mean large, healthy, legitimate business. It is hard to say yet what the popular effect of the decisions will be, there has been so much talk one way and another. Popular sentiment will wait on the effect of the decision on business, but finally, I believe, the country will understand that a very great step has been taken in checking artificial business growth without interfering with normal healthy growth."

The New York Times, October 18, 1911.

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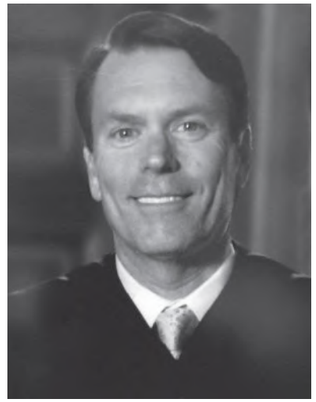
49. Dexter Perkins, *Charles Evans Hughes and American Democratic Statesmanship* 68–70 (1956); *N.Y. Times,* Jan. 14, 15, 18, 20, 21, 26, 27, Feb. 20, 21, Mar. 31, Apr. 2, 1920
50. *Century and a Half, supra* note 5, at 282, 294–297; *N.Y. Times,* Jan. 26, 1936.
51. *Century and a Half, supra* note 5, at 291–292, 294; *N.Y. Times,* Jan. 26, 1936.
52. Gardner, *supra* note 5, at 17–18; *N.Y. Times,* Apr. 20, 1926, Feb. 21, 1933, July 26, 27, 1934, Jan. 13, 1935, Jan. 26, 1936.
53. Robertson, *supra* note 46, at 88–89; *Century and a Half, supra* note 5, at 292–293; *N.Y. Times,* Jan. 26, 1936; Mark E. Benbow, "The Wickersham Commission: The Wets Gather Support," Rustycans.com, 2017, http://www.rustycans.com/HISTORY/Wickersham.html.
54. *N.Y. Times,* Jan. 26, 1936.

George Wickersham: "The Scourge of Wall Street"

U.S. Chief Justice John Jay: When All Judges Were Originalists

by Hon. Mark C. Dillon



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There has been a debate amongst scholars about the definition of originalism. Does originalism, in interpreting the Constitution, refer to the *intent of the drafters* of the document produced by the Constitutional Convention on September 17, 1787, or alternatively, does it refer to the intent of the document reflected by its *plain language* as understood and ratified by the states? For many issues there is no daylight between the two schools of thought. However, there was one nationally-divisive case decided by U.S. Supreme Court in 1793 where the expressed intent of the constitutional drafters and the plain language of the Constitution were at odds with one another. The case was *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419. In the 1790s, all issues brought to the U.S. Supreme Court were by definition of first impression under the newly-developing American jurisprudence. All jurists at the time were "originalists," but *Chisholm* forced the justices of the Supreme Court to choose whether their brand of originalist thought was tied to the intent of the founding fathers as drafters, or to the words that the founding fathers actually wrote.

John Jay was our nation's first Chief Justice, serving in the office from 1789 to 1795.[1] During those years, Jay presided over only eleven reported and unreported cases decided after oral argument, all under the new Constitution. *Chisholm* was the third case of the eleven. There is a misimpression that the first great case of constitutional significance was *Marbury v. Madison*,[2] decided under the fourth Chief Justice, John Marshall, in 1803. This misimpression is fed by the fact that in law schools, *Marbury v. Madison* is typically the first case read by students in the introductory course on constitutional law. The first case of far-reaching constitutional dimension was actually *Chisholm*, which, in my opinion, is overlooked only because its holding was thereafter nullified by ratification of the 11th Amendment.

A significant issue in the late 1780s was whether a citizen of a state would be permitted to commence a lawsuit in federal court against another state. At the Constitutional Convention in Philadelphia, the states fought mightily to each retain their sovereign immunity and not be subject to suits in the federal courts. The issue was not just philosophical, but monetary. The original thirteen states had borrowed over $200 million during the Revolutionary War, which was a dizzying amount of debt

John Jay, in his official portrait as Chief Justice of the United States, painted by Gilbert Stuart, 1794, oil on canvas. The Supreme Court had not yet adopted any form of judicial clothing like the black robes that are commonplace for judges today. Jay used the academic regalia that had been given to him when he received an honorary degree from Harvard College, which he wore during the Harvard ceremony and then wore again for his Supreme Court portrait. Jay posed for that portrait only for so long as it took for the artist to draw his face, and a body double filled in for the rest of the portrait including the drawing of the Harvard robes.
Courtesy of National Gallery of Art, Washington

Portrait of Justice James Iredell of North Carolina, c. 1798. Some prominent North Carolinians had incorrectly predicted that Iredell would be appointed by President Washington as the nation's first Chief Justice. Library of Congress, Prints & Photographs Division, LC-DIG-pga-13209

Edmund Randolph, the first Attorney General of the United States, and later, President Washington's second Secretary of State after Thomas Jefferson resigned from the position. Edmund Randolph (1753-1812), Oil Painting by Flavius Fisher, acquired in 1874. State Artwork Collection, Library of Virginia

for the time, and many states were near bankruptcy and unable to pay the debts of their creditors.[3] If debt collection suits were permitted against the states, those financial pressures would only be made worse.

The primary focus of governmental debate was the state, rather than the federal, level. People did not necessarily define themselves then as "Americans," but as "New Yorkers," "Virginians," or citizens of whatever state where they resided. Unlike today, the limited and slow forms of transportation enhanced the separateness of and sheer physical distances between the individual states. Significant political power resided at the state capitals. State independence and sovereignty were central disputes at the Constitutional Convention between the Federalists, who believed in a stronger unified form of continentalist government, and the Anti-federalists, who wished for the individual states to retain as much political and economic authority as possible.

The initial draft of the proposed constitution, at Article III, section 2, provided that federal courts be jurisdictionally authorized to hear suits "between a State and Citizens of another State."[4] The Articles of Confederation, which the 1789 federal constitution was to replace, permitted little federal intrusion into state sovereignty. Anti-federalists, protective of state sovereignty and distrustful of expanding political power, objected to the draft language of Article III, section 2 to the extent that it seemed to permit suits by individuals against the states.

To appease the Anti-federalists on this issue, prominent Federalists, such as Alexander Hamilton, James Madison, and John Marshall, argued that the language of federal courts hearing suits "between a State and Citizens of another State" meant only that the states could sue citizens, but not *vice versa*. After all, the phraseology expressly listed the state first, followed by the citizen second. The *Federalist Papers* written by Hamilton, Madison, and Jay were among the tools that were used to persuade the states that the proposed federal constitution be adopted. In *Federalist Paper* Number 81, Alexander Hamilton went so far as to expressly reject the notion that individual citizens of one state could be permitted under Article III, section 2 to sue another state. He wrote, "How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State," a result that Hamilton described as "unwarrantable."[5]

The Anti-federalists were satisfied with the good faith assurances given by their Federalist counterparts. The Constitution was ratified by the states with the

John Jay's father, Peter Jay. Father and son bore some physical resemblances including their slim builds, prominent noses, and receding hairlines. Courtesy of Wikimedia Commons, via Minard38 CC BY-SA 4.0

Massachusetts governor John Hancock, more famously known for having been the first signer of the Declaration of Independence. He was so physically weak when addressing his legislature about the *Chisholm* and *Vassall* cases that his remarks were read on his behalf by the commonwealth's secretary of state. Hancock died on October 8, 1793. John Hancock, oil on canvas by John Singleton Copley, c. 1770, Massachusetts Historical Society

arguably ambiguous language of Article III, section 2 unchanged from its original draft.

Article III, section 2 could have been more clearly written to express the actual intent of the Federalists and Anti-federalists, but it was not. The first Congress had an opportunity to concretize the agreed-upon meaning of Article III, section 2 when it enacted the Judiciary Act of 1789, but it did not.[6] Inevitably, the creditors who were owed money by the states would test the availability of collection suits in the federal courts and force the judiciary to address the true meaning of Article III, section 2. *Chisholm v. Georgia* was the case that brought that all-important issue to a head.

Chisholm was a debt collection suit commenced in the Circuit Court for the Southern Circuit. The Circuit Courts had original jurisdiction under the then-existing Judiciary Act, authorized to hear cases whenever there was diversity of citizenship and the case in controversy exceeded $500 in value.[7] There were no dedicated Circuit Court justices at the time, as circuit panels consisted instead of jurists drawn from both the Supreme Court and the District Court of the state where the cause of action arose.

The *Chisholm* suit involved a claim for money owed by the State of Georgia to Robert Farquar, who had sold to Georgia a quantity of cloth for 64,000 pounds sterling.[8] Farquar died after the transaction, but the litigation was brought by Alexander Chisholm as both the executor of the estate and a resident of South Carolina. Thus, there was a diversity of citizenship. Process was served upon Georgia's governor, Edward Telfair, and the state Attorney General, Thomas P. Carnes, who refused to authorize an appearance in court on the ground that the state enjoyed sovereign immunity from the suit.[9]

Irrespective of Georgia's default, a two-judge panel consisting of Supreme Court Justice James Iredell, who was riding the Southern Circuit, and Judge Nathaniel Pendleton of the District of Georgia, held that as a matter of subject matter jurisdiction, neither the U.S. Constitution nor the Judiciary Act of 1789 conferred upon individuals of one state the right to sue another state in federal court.[10] Alexander Chisholm's complaint was therefore dismissed.

Alexander Chisholm appealed the adverse determination to the U.S. Supreme Court, where John Jay was Chief Justice. Chisholm hired U.S. Attorney General Edmund Randolph to argue his case in a private capacity, as federal officeholders who were attorneys were not prohibited at the time from representing private clients in courts. The U.S.

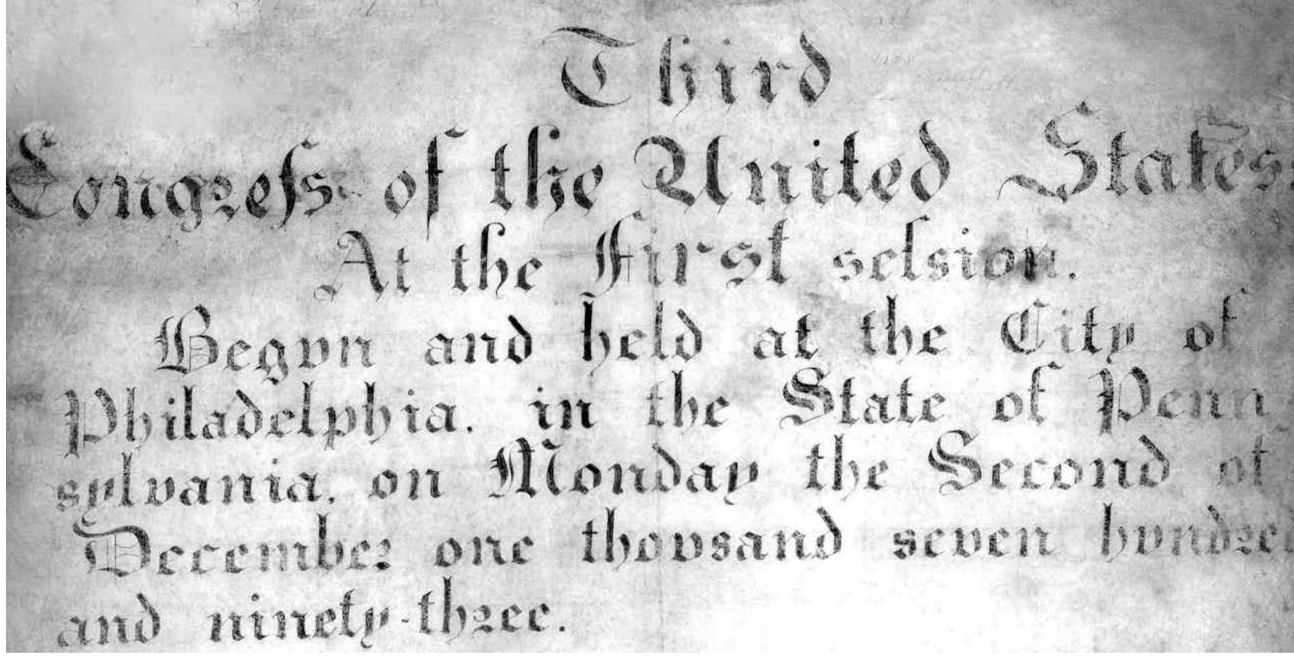
Supreme Court convened in Philadelphia during the months of February and August each year at that time,[11] in the east wing of what is today known as Old City Hall.[12] The case was first docketed for the August 1792 Term of Court, but no one appeared on behalf of Georgia because of its continuing claim to sovereign immunity. The matter was adjourned to the February 1793 Term, when Georgia once again failed to appear. The court normally consisted of six justices, but Justice Thomas Johnson of Maryland resigned from the court as of January 16, 1793 and his vacancy could not be filled in time for the February 1793 Term.[13] The remaining five members of the court included James Iredell, who had already ruled against Alexander Chisholm in the Circuit Court. Justice Iredell observed that "[a] general question of great importance here occurs,"[14] and Justice James Wilson likewise described *Chisholm* as "a case of uncommon magnitude."[15]

Edmund Randolph orally argued the appeal against Georgia's "empty chair" on February 5, 1793, observed by a large audience.[16] First, he argued to the Jay Court that nothing in the plain language of Article III, section 2, limited the federal courts' jurisdiction to circumstances where only the states were plaintiffs.[17] Second, he argued that under the Judiciary Act of 1789, the Supreme Court was given jurisdiction over "all cases where a state shall be a party," and that the inclusive references to "all" and "party" necessarily included cases where the state is postured as either a plaintiff or a defendant.[18] Finally, Randolph argued that if the states were truly immune from civil liability in the federal courts, they could "enjoy the high privilege of acting thus eminently wrong, without controul [sic]," and that an a matter of public policy "some [judicial] check should be found" to render a state's wrongful conduct punishable.[19] When Randolph was asked how any judgment against Georgia could be enforced against it, Randolph acknowledged the "painful possibilities" that enforcement could be lacking. But he eloquently and optimistically said, "let me hope and pray, that not a single star in the American constellation will ever suffer its lustre to be diminished by hostility against the sentence of a court, which itself has adopted."[20] Georgia's "empty chair" had nothing to add to the argument.

The practice in the 1790s was for each justice of the Supreme Court to render a separate opinion on each case, and the prevailing party to an appeal was determined by mathematically counting which party had the greater number of opinions in its favor.[21] The opinions in *Chisholm* were read by the justices in open court on February 18, 1793 in the order of the least senior (Justice Iredell) to the most senior (Chief Justice Jay). Justice Iredell adhered to his view expressed at the Circuit Court that the states were immune from suits as the British Crown had been when the colonies were first settled, and that states could only be sued if there was a voluntary waiver of immunity which had not occurred here.[22] Iredell's "originalism" focused upon the intent of the *drafters* of the Constitution, that it was understood the states could not be sued by citizens in the federal courts without their consent.

Nonetheless, Iredell's view was a sole dissent in what became a 4-1 decision of the Supreme Court. Justices John Blair of Virginia, James Wilson of Pennsylvania, William Cushing of Massachusetts, and Chief Justice John Jay of New York read their opinions in rising seniority and defined their originalism in terms of the *plain language* of the Constitution itself. Justice Blair held that the actual constitutional language drew no distinction between the states as plaintiffs or defendants.[23] Justice Wilson, who was among the constitutional drafters and a member of the Constitutional Convention's Committee of Detail, relied upon the text of Article III, section 2, and agreed with Edmund Randolph that states could not be permitted to enter into contracts with no intention of honoring them.[24] Justice Cushing likewise relied upon the plain language of the Constitution, that it "is expressly extended to 'controversies between a State and citizens of another State,'" and Alexander Chisholm's claim qualified as such a controversy.[25]

In his opinion, John Jay framed the issue of the case in its simplest terms: "Is a State suable by individual citizens of another State?"[26] Jay's answer to the question was more complex than those of his colleagues, noting that the sovereignty of the British Crown transferred to the federal government upon the ratification of the Constitution in 1789. Jay reasoned that since the states were sub-sets of sovereign people in a federalized union, they were not entitled to the immunity that was exclusively reserved to the federal


Third
Congress of the United States
At the first Session.
Begun and held at the City of
Philadelphia, in the State of Penn
sylvania, on Monday the Second of
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and ninety-three.

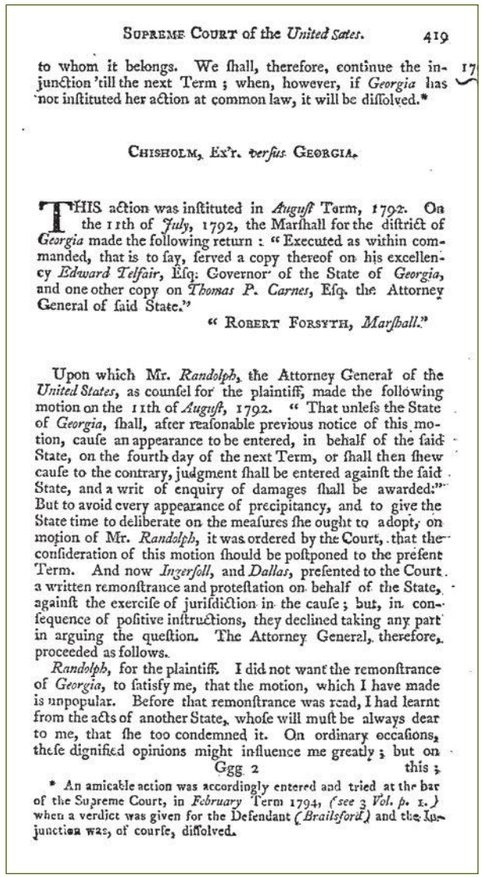
U.S. Constitution, Amendment XI. Retrieved from the U.S. National Archives and Records Administration

government. Jay contrasted the United States with European nations; Europeans were the subjects of the sovereign, whereas in the United States the sovereigns were without subjects and acted merely as agents of the people. Therefore, according to Jay, citizens of a state could not sue their own state, but suing another state in federal court was a different and permissible matter. Jay concluded that his construction was consistent with the plain language of Article III, section 2 of the Constitution.[27]

Jay's constitutional view, that persons be permitted to sue foreign states, was consistent with his family's history and his overall view that creditors be able to collect upon debts. Jay's father, Peter Jay, who had been a successful transatlantic trader, retired in 1745 when John Jay was a boy.[28] Peter Jay spent the first three years of his retirement collecting most of the 4,000 British pounds that was owed to him by British merchants,[29] which was equal to approximately $1.1 million by today's metrics.[30] Later in life, a good portion of John Jay's law practice was devoted to clients seeking to collect upon commercial debts.[31] In 1782-83, when Jay, Benjamin Franklin, and John Adams negotiated the Treaty of Paris that officially ended the Revolutionary War, specific provision was made in the treaty that each country honor the legitimate debts owed to the citizens of the other.[32] Thus, while Jay's opinion in *Chisholm* focused strictly upon constitutional language and meaning, the result that he reached happened to be consistent with his personal and professional life experiences that debtors be held accountable for their debts.

Chisholm v. Georgia was the first reported decision of the U.S. Supreme Court to not have a unanimous outcome.[33] It was highly unpopular amongst the states, as it exposed them to significant war debt liability that could truly bankrupt many of them. Anti-federalists felt particularly aggrieved and lied to, as they had accepted the assurances of their Federalist counterparts during the drafting and ratification process that the new constitution would not subject the states to the jurisdiction of the federal courts. It did not help matters that all of the justices on the Jay Court were Federalists. Uncertain whether Georgia would defy the ruling and trigger a constitutional crisis of national dimension, the Supreme Court gave Georgia a further opportunity to appear and be heard at the inquest on money damages. The matter was scheduled for the August 1793 Term, then rescheduled for the February 1794 Term, and further adjourned to the February 1795 Term.[34]

One of the reasons for the Supreme Court's delays in calendaring *Chisholm*'s inquest was the serious proposal that its holding be nullified by a proposed 11th Amendment to the Constitution. Initial efforts at seeking an amendment of the federal Constitution to assure the sovereign immunity of the states were spearheaded by Massachusetts governor John



SUPREME COURT of the *United States*. 419

to whom it belongs. We shall, therefore, continue the injunction 'till the next Term; when, however, if *Georgia* has not instituted her action at common law, it will be dissolved.*

CHISHOLM, Ex'r. *versus* GEORGIA.

THIS action was instituted in *August* Term, 1792. On the 11th of *July*, 1792, the Marshall for the district of *Georgia* made the following return: "Executed as within commanded, that is to say, served a copy thereof on his excellency *Edward Telfair*, Esq. Governor of the State of *Georgia*, and one other copy on *Thomas P. Carnes*, Esq. the Attorney General of said State."

"ROBERT FORSYTH, *Marshall*."

Upon which Mr. *Randolph*, the Attorney General of the *United States*, as counsel for the plaintiff, made the following motion on the 11th of *August*, 1792. "That unless the State of *Georgia*, shall, after reasonable previous notice of this motion, cause an appearance to be entered, in behalf of the said State, on the fourth day of the next Term, or shall then shew cause to the contrary, judgment shall be entered against the said State, and a writ of enquiry of damages shall be awarded:" But to avoid every appearance of precipitancy, and to give the State time to deliberate on the measures she ought to adopt, on motion of Mr. *Randolph*, it was ordered by the Court, that the consideration of this motion should be postponed to the present Term. And now *Ingersoll*, and *Dallas*, presented to the Court a written remonstrance and protestation on behalf of the State, against the exercise of jurisdiction in the cause; but, in consequence of positive instructions, they declined taking any part in arguing the question. The Attorney General, therefore, proceeded as follows.

Randolph, for the plaintiff. I did not want the remonstrance of *Georgia*, to satisfy me, that the motion, which I have made is unpopular. Before that remonstrance was read, I had learnt from the acts of another State, whose will must be always dear to me, that she too condemned it. On ordinary occasions, these dignified opinions might influence me greatly; but on

Ggg 2 this;

* An amicable action was accordingly entered and tried at the bar of the Supreme Court, in *February* Term 1794, (*see* 3 *Vol. p.* 1.) when a verdict was given for the Defendant (*Brailsford*) and the Injunction was, of course, dissolved.

***Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, (1793).**
Retrieved from the Library of Congress

Hancock, who was dying and would not live to see the fruits of his labor.[35] Shortly after the Supreme Court rendered its determination in *Chisholm v. Georgia*, the Commonwealth of Massachusetts was sued in federal court in a matter entitled *Vassall v. Massachusetts*,[36] and there was an informed belief that the proverbial floodgates were about to open to law suits against the states. Governor Hancock and the Massachusetts legislature determined that the Commonwealth would refuse to appear in the *Vassall* case in open defiance of *Chisholm*, perhaps risking a constitutional crisis, and instructed their representatives in the U.S. Senate and House of Representatives to push for a constitutional amendment recognizing states' immunity from law suits initiated by citizens of other states.[37]

Other state legislatures followed Massachusetts' lead by passing resolutions, appointing committees, and directing their appointed Senators and elected Congressmen to support passage of an 11th Amendment in the U.S. Congress.[38] Not to be outdone, the State of Georgia was so distressed by the Supreme Court's majority holding in *Chisholm* that its House of Representatives passed a Resolution threatening anyone who might prosecute a case against the state to be "declared guilty of a felony, and suffer death, without the benefit of clergy, by being *hanged*."[39]

Within a year from when *Chisholm* was decided, Congress approved the 11th Amendment providing that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by the Citizens of another state, or by Citizens or Subjects of any Foreign State."[40] The proposal recognizing the sovereign immunity of the states was passed in the Senate on January 14, 1794 by a lopsided vote of 23-2, and in the House of Representatives on March 4, 1794 by an almost equally lopsided vote of 81-9.[41] Congressional passage of the amendment also had a salutary effect of saving the necks of Georgia's creditors from the threat of deadly nooses.

The proposed amendment, once passed by Congress, needed approval of at least three-fourths of the states, as constitutionally required both then and now.[42] There were fifteen states by 1794, meaning that the 11th Amendment needed to be approved by at least twelve to become the law of the land. New York became the first state to ratify it on March 27, 1794, followed by Rhode Island, Connecticut, New Hampshire, Massachusetts, Vermont, Virginia, Georgia, Kentucky, Maryland, and Delaware. North Carolina became the twelfth state to give its assent, which was on February 7, 1795.[43]

On March 2, 1797, Congress passed a Resolution asking President John Adams to inquire of the states whether they had ratified the 11th Amendment, even though everyone knew that a sufficient number of states had done so. On January 8, 1798, President

Philadelphia's Old City Hall, where the Supreme Court heard oral argument in *Chisholm v. Georgia* and conducted other business in February of 1793. It's located next door to what is today known as Independence Hall.
Library of Congress, Prints & Photographs Division, HABS, Survey Number: HABS PA-1431

Adams stated in his annual Message to Congress that the amendment had been approved and was part of the Constitution, and for that reason, historical literature sometimes refers to the 11th Amendment has a product of 1798 rather than 1795.

The 11th Amendment had the effect of nullifying the Supreme Court's holding in *Chisholm v. Georgia*, and resuscitated Justice Iredell's dissent as a matter of new constitutional policy.

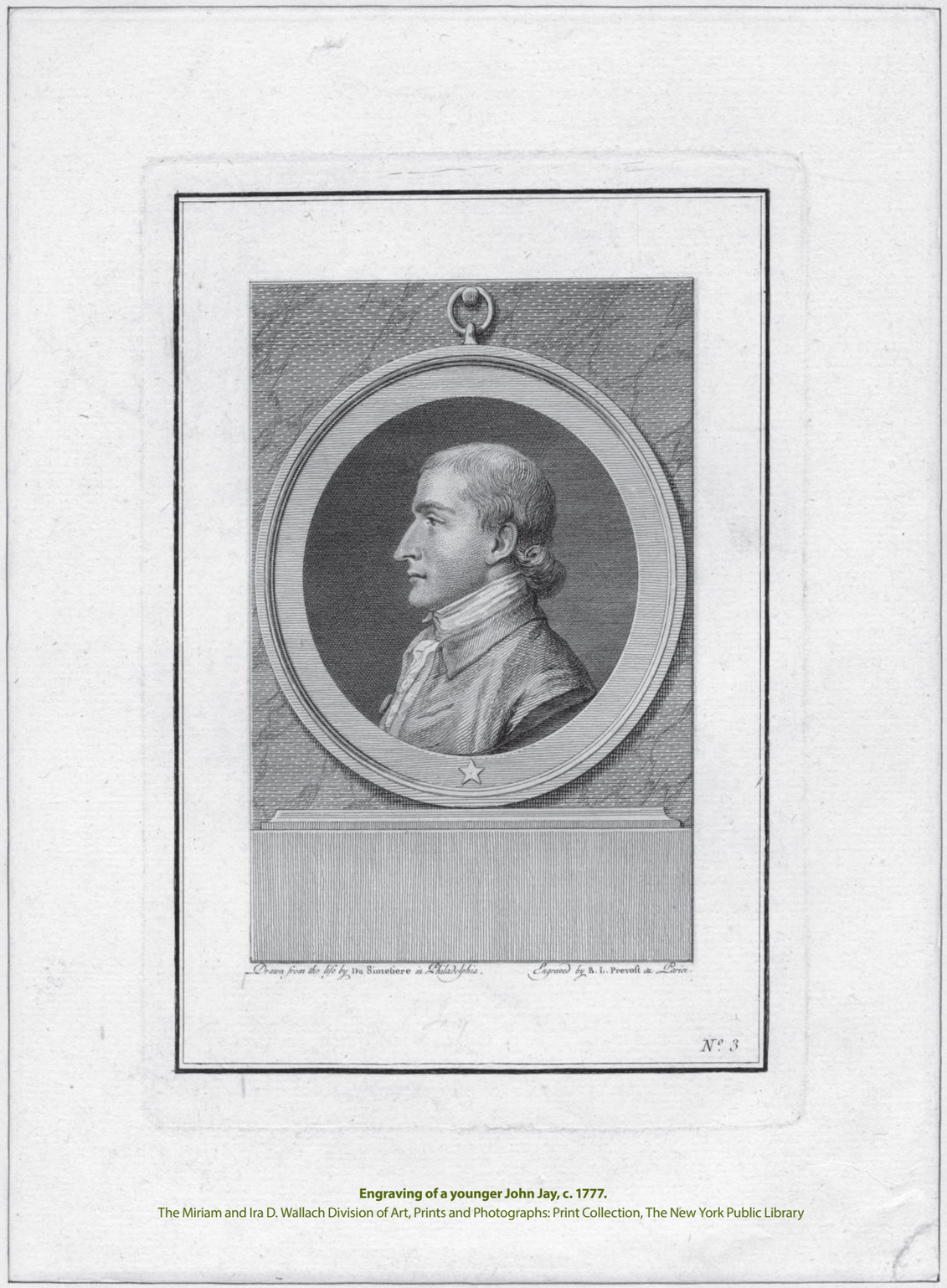
There was initial uncertainty as to whether the 11th Amendment was to be applied retroactively.[44] Regardless, the State of Georgia refused to pay any money to Alexander Chisholm. By so doing, Georgia answered Edmund Randolph's rhetorical eloquence by allowing the lustre of its star to be diminished in the American constellation. Georgia's continued refusal to satisfy any portion of Alexander Chisholm's claim was perhaps less condemnable by the fast progress toward passage and ratification of the 11th Amendment. Alexander Chisholm, having won the issue at the U.S. Supreme Court that Georgia could be sued, never collected a penny of the money damages that he had sought for Robert Farquar's estate.[45]

What *Chisholm* tells us in terms of constitutional originalism is that John Jay, and all but one of his Supreme Court colleagues, were not persuaded by the *intentions of the drafters* of the Constitution, no matter how those intentions were expressed, memorialized, or understood in interpreting the meaning of a disputed constitutional provision. Instead, Jay and most of his colleagues defined their originalism by focusing on the *plain language* of the Constitution that was ratified by the various states, even where that language appears to have been in conflict with the intention of the drafters as reflected by such sources as *Federalist Papers* Number 81. A competing philosophical approach, that the Constitution is a living, breathing document adaptable to changing times, did not begin to emerge until the early 20th century.[46] The approach of the Jay Court in placing "textualism" above the drafters' intent has continuing currency 227 years after *Chisholm* was decided, as it has defined the precise philosophical approach of Justice Antonin Scalia[47] and other prominent strict constructionist lawyers and jurists in our own lifetimes. *Chisholm*, despite its abrogation by the 11th Amendment, still emits a defining originalist echo today.

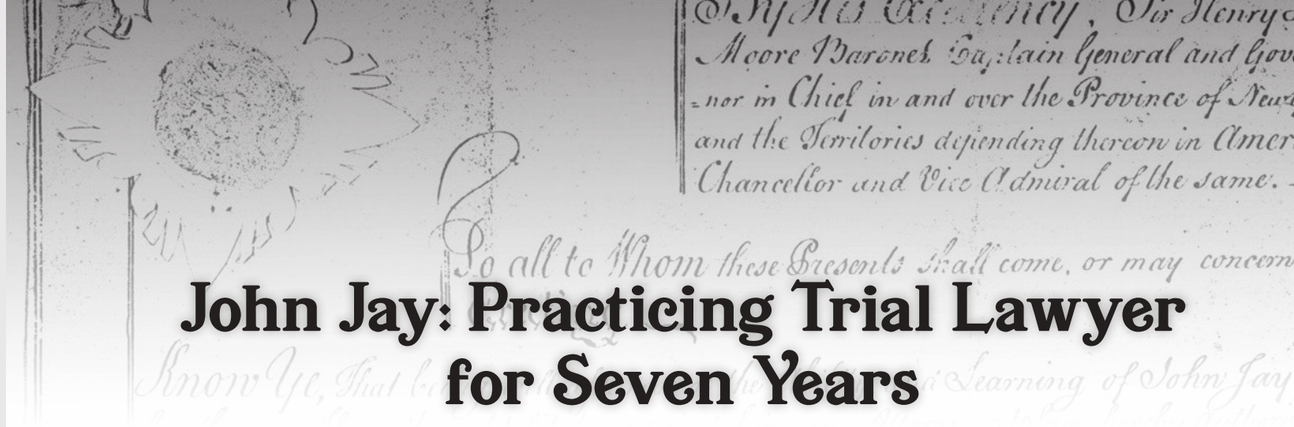
ENDNOTES

1. Supreme Court of the United States, "Justices 1789 to Present," *available at* https://www.supremecourt.gov/about/members_text.aspx (accessed May 28, 2019).
2. 5 U.S. (1 Cranch) 137 (1803).
3. Bradford R. Clark, "The Eleventh Amendment and the Nature of the Union," 123 Harv. L. Rev 1817, 1863 (2010).
4. U.S. Const., art. III, § 2.
5. The Federalist No. 81 (Alexander Hamilton).
6. Section 13 of the Judiciary Act of 1789 excluded from the Supreme Court jurisdiction to hear disputes between a state and citizens of another state, but did not address whether the District Courts or Circuit Courts had trial-level jurisdiction over such matters. *See* Jud. Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–8 (1789).
7. *Id.* § 11, 1 Stat. at 78–79.
8. William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 188 (1995).
9. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); Richard B. Morris, *John Jay: The Nation and the Court* 49–50 (1967). Governor Telfair's surname is misspelled in the Supreme Court decision with an "s" instead of an "f."
10. Federal Judicial History Office, "Debates on the Federal Judiciary: A Documentary History: Vol. 1: 1787–1785" (Bruce A. Ragsdale ed., 2013), https://www.fjc.gov/content/debates-federal-judiciary-documentary-history-volume-i-1787%E2%80%931875.
11. Jud. Act of 1789, ch. 20, § 1, 1 Stat. 73, 73 (1789).
12. The Supreme Court Historical Society, "Homes of the Court," *available at* https://supremecourthistory.org/history of the court/home of the court/ (accessed May 28, 2019).
13. Supreme Court of the United States, "Justices 1789 to Present," https://www.supremecourt.gov/about/members_text.aspx (accessed May 28, 2019). Justice Johnson's tenure on the Supreme Court was only 163 days, the shortest in the history of the court. Johnson's vacancy was filled by the appointment of William Paterson of New Jersey, but Paterson was not confirmed by the Senate until March 4, 1793, after the Supreme Court's February 1793 Term had concluded. John E. O'Connor, *William Paterson: Lawyer and Statesman* 1745–1806, at 267 (1979).

14. *Chisholm*, 2 U.S. at 432.
15. *Id.* at 453.
16. Morris, *supra* note 9, at 50.
17. *Chisholm*, 2 U.S. at 420–21.
18. *Id.* at 426–27.
19. *Id.* at 422; *see also* Walter Stahr, *John Jay: Founding Father* 294 (2005).
20. *Chisholm*, 2 U.S. at 427.
21. Casto, *supra* note 8, at 111.
22. *Chisholm*, 2 U.S. at 445–46.
23. *Id.* at 450.
24. *Id.* at 465–66.
25. *Id.* at 467.
26. *Id.* at 469.
27. *Id.* at 471–73, 479.
28. Herbert Alan Johnson, *John Jay 1745–1829*, at 2 (1976); Stahr, *supra* note 19, at 4.
29. Stahr, *supra* note 19, at 5.
30. Historicalstatistics.org, "Historical Currency Converter," www.historicalstatistics.org/Currencyconverter.html (accessed June 6, 2019).
31. Stahr, *supra* note 19, at 29.
32. Definitive Treaty of Peace, U.S.-Gr. Brit., art. 4, Sept. 3, 1783, 8 Stat. 80, 81.
33. The two prior reported opinions were unanimous: *West v. Barnes*, 2 U.S. (2 Dall.) 401 (1791), and *Hayburn's Case*, 2 U.S. (2 Dall.) 410 (1792).
34. *Chisholm*, 2 U.S. at 478 (as to the August 1793 Term); Morris, *supra* note 9, at 53.
35. Kurt T. Lash, "Leaving the Chisholm Trail: The Eleventh Amendment and the Background Principle of Strict Construction," 50 Wm. & Mary L. Rev. 1577, 1581 (2009).
36. 5 *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 364 (Maeva Marcus ed., 1998) [hereinafter "*DHSC*"]; Clark, *supra* note 3, at 1888.
37. "Resolution of the Massachusetts General Court, dated Sept. 27, 1793," *in* 5 *DHSC* at 440; "Debates on the Federal Judiciary," *supra* note 10.
38. "Proceedings of the Virginia House of Delegates, Nov. 28, 1793," "Resolution of the Connecticut General Assembly, dated Oct. 29, 1793," "Resolution of the North Carolina General Assembly, dated Jan. 11, 1794," "Proceedings of a Joint Session of the New Hampshire General Court, dated Jan. 23, 1794," "Proceedings of the South Carolina Senate, dated Dec. 17, 1793," "Proceedings of the Maryland House of Delegates, dated Dec. 27, 1793," "Proceedings of the Delaware Senate, Jan. 10, 1794," all found in 5 *DHSC* at 338–39, 609–613, 615–16, 618.
39. Earnest Sutherland Bates, *The Story of the Supreme Court* 56 (1936); *Augusta Chronicle*, Nov. 19, 1793. The Georgia House formally passed the Resolution on November 21, 1793, but the state's Senate did not take it up for a vote because of the progress being made on passage of the 11th Amendment. *See* Ulrich Bonnell Phillips, "Georgia and States Rights: A Study of the Political History of Georgia from the Revolution to the Civil War, With Particular Regard to Federal Relations," *in* 2 *Annual Report of the American Historical Association for the Year 1901*, at 15, 28 (1902).
40. U.S. Const. amend. XI; Morris, *supra* note 9, at 65.
41. "Proceedings of the United States Senate, Jan. 14, 1794" and "Proceedings of the House of Representatives, Mar. 4, 1794," *in* 5 *DHSC* at 620–23.
42. U.S. Const. art. V.
43. South Carolina approved the 11th Amendment on December 4, 1797. The remaining states—New Jersey, Pennsylvania, and Tennessee (which became a state on June 17, 1796)—never took action, nor was there any need for them to.
44. The question of whether the 11th Amendment was retroactive was decided by the U.S. Supreme Court in 1798 in the case of *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798). There, the Supreme Court held that the 11th Amendment was not an *alteration* of the constitution that would be prospective only, but instead an *explanation* of the original constitution which rendered it retroactive. After *Hollingsworth*, all federal suits by citizens of one state that were pending against other states were summarily dismissed.
45. Johnson, *supra* note 28, at 37.
46. Woodrow Wilson was the first person of national stature to popularize the concept, in his book *Constitutional Government in the United States*, which was published in 1908 (later reprinted in New Orleans by Quid Pro, LLC, in 2011).
47. Joe Carter, "Justice Scalia's Two Most Essential Speeches," The Ethics and Religious Liberty Commission of the Southern Baptist Convention (Feb. 18, 2016), https://erlc.com/resource library/articles/justice scalias two most essential speeches (describing a speech delivered at Catholic University of America delivered Oct. 18, 1996).

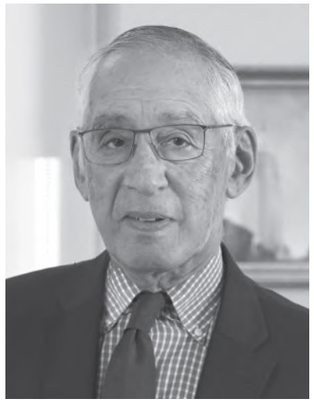


Engraving of a younger John Jay, c. 1777.
The Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library



John Jay: Practicing Trial Lawyer for Seven Years

by Paul D. Rheingold



Paul D. Rheingold is Of Counsel to Rheingold, Giuffra, Ruffo and Plotkin, LLP, New York City, a firm he founded. His practice has been confined to representing plaintiffs in personal injury suits. He graduated from Harvard Law School cum laude in 1958. He is the author of *Litigating Mass Tort Cases*, a Thomson Reuters publication. He has long served on the Board of Overseers of the Institute for Civil Justice at the RAND Institute. With his wife Joyce, Rheingold wrote the article, "The Courthouses of Westchester County," *Quarterly of the Westchester County Society*, Vol. 61, No. 4, p. 92 (1985).

When a lawyer becomes as famous as John Jay was—first Chief Justice of the U.S. Supreme Court, framer of the Jay Treaty, Governor of New York, co-author of the *Federalist Papers*—his earlier career as a private practitioner is of interest. We may see in his developing legal skills the springboard to his later illustrious career, an evaluation of which comes at the end of this article.[1]

The examination of John Jay's career as a New York private practitioner also provides insight into how law was practiced in pre-Revolutionary War America. It is also a study of the period. His seven years of actual practice, 1768–1775, came at a particularly tumultuous and disruptive time in the American colonies, as the restive set of provinces moved toward rupture from Great Britain.

Although the best way to analyze Jay's law practice would be to examine his files and legal papers, they unfortunately do not exist; it is likely that they were destroyed when lower Manhattan, where his office was, was invaded by the British in 1776. Fortunately, two notebooks he kept, detailing each of his over-350 cases, exist and are available. They show the names of parties, the steps he took, and, for the most part, the outcome of the cases. Also many show the fees he was paid. Most of the entries are in his handwriting, but some have additional notes which no doubt were added by his clerks.[2]

In addition, legal papers in Columbia University's archives of Jay papers, most of which have been digitized,[3] and books which have been written about Jay, including most significantly a Ph.D. thesis by Herbert Johnson in 1965, provide supplemental material for this article.[4]

Education Before Admission To Practice In 1768

After being educated at home in Rye, N.Y. and at a school in New Rochelle, Jay attended King's College (later to become Columbia University) between 1760–1764. He was 14 when he entered college. After graduating, at age 18, Jay began an apprenticeship or clerkship under a well-known and active New York City lawyer, Benjamin Kissam, commencing June 1, 1764.[5] For this he had to pay Kissam 200 pounds.[6] It was the practice at the time in the province of New York to clerk for five years

John Jay: Practicing Trial Lawyer for Seven Years

in order to be admitted to practice,[7] but Jay fulfilled that prerequisite in four years and five months.

This apprentice system involved large amounts of copying documents, but Kissam had an active practice as a litigator in the various courts of the day, affording Jay opportunities to learn his trade. All documents were handwritten; printed forms were not then in use. Even appellate briefs were handwritten. Jay would also, of course, have educated himself on English common law, which was the source of law in New York, from a number of British treatises then in vogue.[8]

Practice

Jay was admitted to practice Oct. 6, 1768, on the order of the Governor of New York, a British appointee, and then officially recognized by an appearance in the New York County Supreme Court.[9] He was admitted to practice before the "Supreme Court of Judicature, and all His Majesty's lower courts." The Supreme Court was then, as now, the state's court of general jurisdiction (with a monetary threshold for filing cases). The license stated that Jay was practicing under the law and customs of Great Britain and the Province of New York.

Jay was only one of two admitted to practice that year, the other being Robert R. Livingston. Livingston had also graduated from King's College. As of 1765 it appears that there were only 36 lawyers practicing before the Supreme Court.[10] It should be noted, however, that others who had lesser credentials were allowed to practice in lower courts, such as the Mayor's Court.[11]

In what was an unusual arrangement in the practice of law in this period, Jay and Livingston become partners, an arrangement that lasted until 1771.[12]

The nature of their practice can be divided into two parts: litigation—matters handled in court—the Supreme Court and the lower courts; and office work, such as deeds, wills, mortgages, loans and the like. It is likely that the type of in-office work Jay did was on behalf of the wealthy class of families with whom Jay and Livingston were part. In fact, a major source of work for the young partners, both in the office and in the courts, came from these families and relatives, including Stuyvesant, DeLaney, and Van Cortlandt, often involving debt-collection cases. The litigation work is more interesting.

When Jay clerked for Kissam, Kissam's office was on "Golden Hill" in lower Manhattan. That was a small rise in the region of where William and John Streets cross today. It is likely that Jay and Livingston had a law office in the same area. Or it may have been in the home of Livingston's father, Judge Robert R. Livingston.[13] Also, no doubt Jay worked out of his parent's home in Rye.

The courts in which Jay practiced were the Supreme Courts of New York, Kings and Queens; the Mayor Court in NYC; and Common Pleas courts in Westchester County as well as various upstate counties, all the way up to Albany. His practice also took him occasionally to special courts, such as Chancery (on equity issues) and Prerogative (for probate).

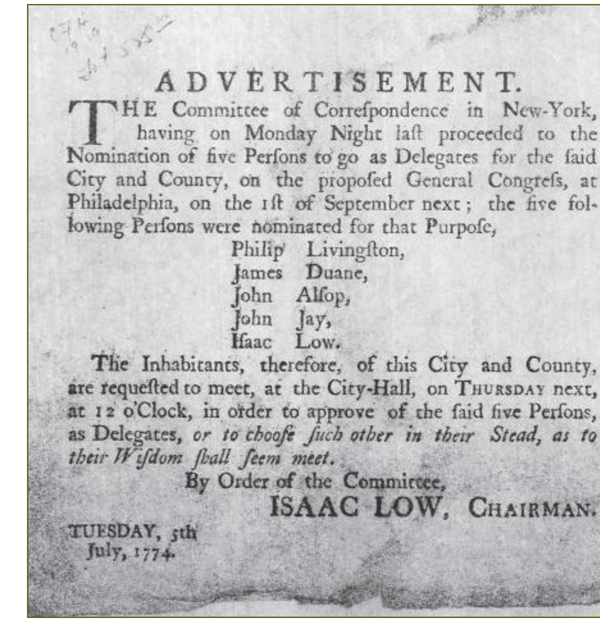
Analysis of the type of litigation Jay handled can be extracted from his notebook. It appears that the most common cause of action was for debt on a bond and mortgage foreclosure (here he almost always appeared for the plaintiff). Others were assumpsit actions (that is, breach of oral contract), trespass and ejectment (determination of title to land), assault and battery, slander, and trover and conversion. Here his practice was evenly balanced between representing the plaintiff and the defendant. He also engaged in some appellate practice.

Where Jay was appearing for the defendant in an action, he lists plaintiff's counsel in his notebook. Sometimes it was Gouverneur Morris, himself a young lawyer, who went on to play a major role as did Jay in the new republic. Sometimes it was John Tabor Kempe, a more established lawyer, who was also the Attorney General of New York Province but engaged in private practice as well.

Jay also assisted his former mentor, Benjamin Kissam. For example, in a letter to Jay from Kissam dated November 6, 1769 (addressed "Dear Jack"), Kissam asks for help on cases on a White Plains docket since he has a lame leg. He mentions certain pending matters, including a possession case on Captains Island (in Long Island Sound), an "eloped wife," and a horse race with a cheat involved.[14]

In his notebook, Jay often records his fees, either a retainer he took or amounts paid, for example, in prevailing in a debt collection action. Where he represented a plaintiff collecting on a debt, Jay usually has the client acknowledge in his own handwriting that he had been paid the sum due. This writing was placed right on the case page in his case notebook. On

"Dear Jack," the letter from Benjamin Kissam described in the article, requesting Jay's help with Kissam's caseload. *The Papers of John Jay*, Columbia University, Rare Book and Manuscript Library



ADVERTISEMENT.

THE Committee of Correspondence in New-York, having on Monday Night last proceeded to the Nomination of five Persons to go as Delegates for the said City and County, on the proposed General Congress, at Philadelphia, on the 1st of September next; the five following Persons were nominated for that Purpose,

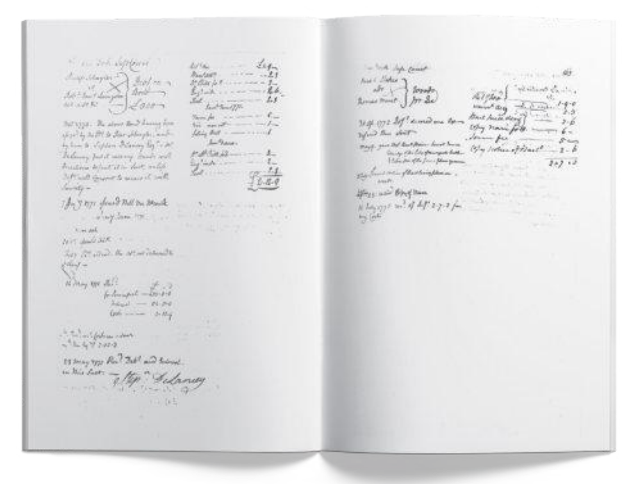
Philip Livingston,
James Duane,
John Alsop,
John Jay,
Isaac Low.

The Inhabitants, therefore, of this City and County, are requested to meet, at the City-Hall, on THURSDAY next, at 12 o'Clock, in order to approve of the said five Persons, as Delegates, *or to choose such other in their Stead, as to their Wisdom shall seem meet.*

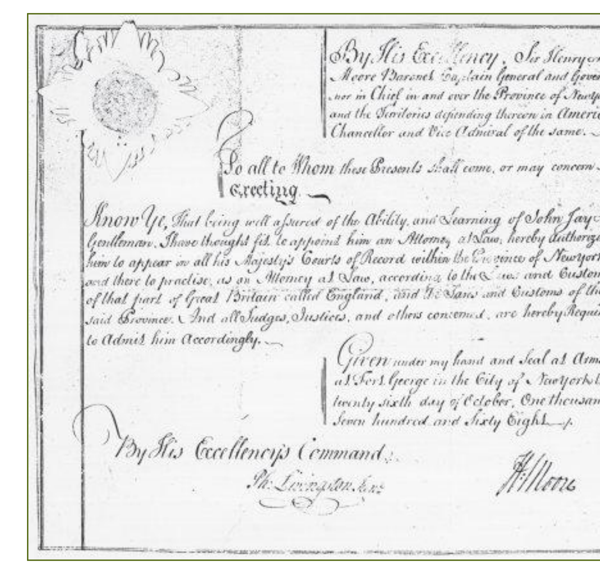
By Order of the Committee,
ISAAC LOW, CHAIRMAN.

TUESDAY, 5th
July, 1774.

A 1774 notification providing the names of New York's delegates to the General Congress in Philadelphia, which included Jay. *The Papers of John Jay*, Columbia University, Rare Book and Manuscript Library



One of Jay's Supreme Court cases, as outlined in his notebook, identifying payments made for his services. On the bottom of the left page, left column, Jay noted the debt collected, and in the right column, his fees and expenses – filing a writ was one shilling. The right page began with Jay's standard notion, "defendant desired me to defend this suit." *The Papers of John Jay*, Columbia University, Rare Book and Manuscript Library



By His Excellency Sir Henry Moore Baronet Captain General and Governor in Chief in and over the Province of New York and the Territories depending thereon in America Chancellor and Vice Admiral of the same.

To all to Whom these Presents shall come, or may concern Greeting

Know Ye, That being well assured of the Ability and Learning of John Jay Gentleman I have thought fit to appoint him an Attorney at Law, hereby Authorizing him to appear in all his Majesty's Courts of Record within the Province of New York and there to practise, as an Attorney at Law, according to the Laws and Customs of that part of Great Britain called England, and the Laws and Customs of the said Province. And all Judges, Justices, and others concerned, are hereby Required to Admit him Accordingly.

Given under my hand and Seal at Arms at Fort George in the City of New York the twenty sixth day of October, One thousand Seven hundred and Sixty Eight.

By His Excellency's Command

John Jay's license to practice law in the colony of New York, signed by Governor Sir Henry Moore. The license was written in a standardized form, with a space to write the appropriate attorney's name, as illustrated by the decorative flourish to the right of Jay's name. *The Papers of John Jay*, Columbia University, Rare Book and Manuscript Library

occasion, at the very end of a page devoted to the case, Jay would write some Latin indicating the outcome.

There were physically demanding aspects of being a litigator in New York in the 1770s. One traveled by horseback, or perhaps on occasion in carriages, and in winter in sleds. Even getting from his home in Rye to his law office or the court in Manhattan would take a day. He attended hearings and trials in circuits in various outlying counties, even traveling as far as Albany.[15]

Specific Litigation

The best and most interesting way to study Jay's actual practice is to examine some of the specific cases he handled, where there is sufficient information to describe the action.

Budd v. Tompkins 1770

Budd v. Tomkins was an assault and battery case in Westchester Supreme Court, in which Jay defended Tomkins. It demonstrates Jay's experience and skill. In 1770, Tomkins and other were alleged to have beaten Budd, a schoolteacher whom they had hired. Part of his pay was goods, and Budd, not receiving them, had taken some corn without permission—leading to the attack. Jay's first step in the defense had been to have the case removed from New York County where it was filed to White Plains, where the defendants resided. The plaintiff's lawyer was John Tabor Kempe (the Attorney General for New York Province). At trial Jay argued to the jury that Budd was at fault in stealing the corn. Jay's skilled handling of evidence ended in a defense verdict.[16]

Canfield v. Dickerson 1771

Jay represented a plaintiff seeking damages for the sale of an "unsound Negro." (New York did not abolish slavery until 1827.) The suit was brought in White Plains ("the Plains" in his notebook).[17] Plaintiff sought 90 pounds, presumably what he had paid. Kempe was represented the defendant. Trial took place in September 1771. Jay prevailed and his client was awarded 90 pounds, jointly against several defendants. Jay entered in his case notebook that the plaintiff received 80 pounds and he received 10 pounds as fee. It is noteworthy Jay got paid at the end of the case, implying that the case was taken on a contingent fee!

Deane v. Vernon 1772

Jay represented the plaintiff in this slander action in New York County in 1772. Nesbit Deane was a hat maker and Thomas Vernon is alleged to have said of him that he was a bad hat maker and wouldn't know a good hat if he saw it. Jay set forth the precise slanderous words in the in the complaint, and pleaded that the plaintiff had sustained damage to his reputation and loss of business. Vernon did not answer the complaint. Due to the default, the jury was asked to assess damages, and it awarded only a small amount, 6 pounds, plus costs. Even that evidently was not collected.[18]

King v. Underhill 1773

This was a significant criminal case pitting the Crown against Nathaniel Underhill, "Mayor of the Borough of Westchester" in 1773 and 1774. As discussed by Pellew, an early biographer of Jay,[19] and expanded upon somewhat by the papers in the Columbia University depository,[20] this was a voting rights issue, in which the Crown sought to limit voting in Westchester. Kempe represented the Crown. For the defense, Jay first sought and was granted a delay in trial as a key witness was out of the country. Although it appears the case was never tried, and Underhill remained as Mayor, Johnson points out this and another voting rights case Jay brought "must have vastly increased Jay's popularity."[21]

Anthony v. Franklin 1775

Theophilus Anthony sued John Franklin, claiming damages of $500 pounds in Supreme Court of New York 1775. Jay represented Franklin, who was accused by Anthony of assaulting and beating him on the New York dock. The assault occurred after a dispute over the defendant's use of a wharf. Anthony at first refused to fight but after pushing Franklin "accidentally," he was beaten unmercifully. The plaintiff's plea also alleged that Franklin called him a "dirty mean Fellow, a liar and made use of other provoking and abusive Expressions."[22]

On behalf of Franklin, Jay maintained that the case should be dismissed because it was a matter of self-defense. One of the papers is a handwritten "Declaration," setting forth that defense. Jay provided a witness list, with summaries of each witness's expected testimony. The trial was held 1 April 1775 with John T. Kempe representing Anthony. (Unfortunately, there is no record of who won!)

What is thought to be an early portrait of Gouverneur Morris, a law contemporary of Jay. General Research Division, Auction Catalogs, Numbered, The New York Public Library

Portrait of Robert R. Livingston, Jay's law partner until 1771. The Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library

Rapalje v. Brower 1775

John Rapalje sued Jeremiah Brower in Kings Supreme Court at the Flatbush courthouse in 1775 for trespass based on a pleading asserting that in 1773 defendant had dug up 1000 cart loads of ground from plaintiff's salt meadow in Brooklyn. Damages of 200 pounds was sought. Kempe represented the plaintiff, Jay the defendant.[23]

The papers here are extensive, including a map of the premises and a list of prospective jurors. Kempe sought to have the jury see the premises, and trial was set for Sept. 20, 1775. Probably the case was settled as the last document has a note from Kempe to the court stating that the notice for trial is countermanded.

Two ejectment cases 1774

Jay was involved in ejectment litigation in two cases in Westchester Supreme Court, involving land in Bedford, *John Doe ex dem. Philip Verplanck v. Ezekiel Griffin;* and *Peter Quiet ex dem. Susannah Warren v. Frances Van Cortlandt*.[24] Jay defended the landowners and did extensive research in titles going back to original purchases from the Indians.

Jay's handwritten notes in his two notebooks indicate the types of the fees he was charging. Often there is a running list of fees and of court costs, in pounds, shillings and pence, with an indication of payment or reimbursement by the client.[25] In the event of a successful debt collection suit, Jay would have the plaintiff, in his own handwriting, acknowledge receipt of the debt collected, and the sheet of paper would be pasted into Jay's case notebook.

While this article has concentrated on Jay as a private practitioner, in the period from 1768 to 1775 he engaged in other public and professional activities, including serving as clerk on the Boundary Commission of New York and New Jersey; in a law club called The Moot; and as a New York representative to the Continental Congress in Philadelphia in 1774. And during this time, he married Sarah Van Brugh Livingston in 1774.[26]

Looking at these seven examples of litigation which Jay handled, we see his developing skills as a trial lawyer, in both his thorough preparation of his side of the case and his ability to persuade the judge and jury of the correctness of his client's position. While some of these cases may have been minor matters (except of course to the client!), in others he was making precedents. This was most notable in the *Underhill* case where he was defending voting rights that the Royal Governor was seeking to curtail. Here he was contributing to the growing movement among the colonists for self-government.

Ending Private Practice and Becoming a Public Figure

Jay's career as a private practitioner came to a rather sudden end in 1774. The shadow of the Revolution was upon all of the people, lawyers included. The courts slowed down their work in response. Jay himself was often away at the meetings of the Continental Congress in Philadelphia. While not a radical, Jay sided with the patriots, not the loyal-

ists, and he was turning from law practice to politics. It seems to have fallen to his clerks to try to carry on his practice, and some of his pending trials were handled by other lawyers as "of counsel" to him.

As the Revolutionary War approached, he was 30 years old.

In Retrospect

As stated by a contemporary of his who observed his career, "Jay was remarkable for strong reasoning powers, comprehensive views, indefatigable comprehension, and uncommon firmness of mind."[27] Pellew states that Jay was not noted for magnetic oratory but for "a quiet, limpid style, without gesture."[28] The most complimentary words were those of Judge Thomas Jones, who said that Jay was a gentleman of eminence in the law.[29]

The ultimate question that this article poses is: what role did Jay's early years as a private lawyer have on his later tremendous successes as a judge, diplomat, negotiator, and author? While I do not think early experiences directly taught him how to perform the tasks he later undertook, the meticulous and thorough work habits that he cultivated in his early years served him well in performing the arduous tasks he later undertook. Moreover, trial court experience as a litigator is helpful for making appellate decisions. Further, as every lawyer knows, studying law and then practicing law at its individual basis of representing individual clients in a great variety of situations, and often dealing with last minutes surprises, prepares one for any task which will involve logic, reasoning, advocating a position, solid judgment, analysis, and compromise—all of which traits Jay went on to display gloriously over the next 25 years until he retired from public life to his home in Westchester County in 1801.[30]

ENDNOTES

1. In fact, every aspect of Jay's life has been chronicled. Cited are some main sources of information about his career, including material covering his law career, often skimmed over.

   Walter Stahr, *John Jay: Founding Father* (2005)

   Frank Monaghan, *John Jay: Defender of Liberty against Kings and Peoples* (1935)

   George Pellew, *John Jay* (1890)

   William Jay, *Life of John Jay* (1833)

   Indeed, this very journal has several times reviewed aspects of his more mature career:

   Walter Stahr, "John Jay as New York's First Chief Justice," 5 Jud. Notice 1 (2007), https://history.nycourts.gov/wp-content/uploads/2019/01/Judicial-Notice-05.pdf

   Judith S. Kaye, "Kaye on Jay: New York's First Chief - The Family Man," 8 Jud. Notice 3 (2012), https://history.nycourts.gov/wp-content/uploads/2019/01/Judicial-Notice-08.pdf#page=4

2. Columbia University maintains The John Jay Papers Image Database, accessible at https://dlc.library.columbia.edu/jay. This includes not only papers handwritten by Jay but also Jay materials in other libraries. The various papers are numbered. With regard to the two notebooks in which Jay lists his cases, these are actually located in the New York State Library in Albany but are among the Columbia digitized documents. Book one is found at EJ: 03620, and is labeled "New York Supreme Court Register." Book two is at EJ: 03619 and is labeled "New York Supreme Court - Calendar of Cases." (This latter book is marked "#3" in Jay's handwriting, so there may have been a third volume.) The titles are misleading since the cases, usually one per page, are for all of the courts in which he was practicing. For reference purposes in this article, these items are referred to as "Jay's notebooks."

   The author appreciates the assistance of the Associate Editor of the Jay Papers at Columbia, Robb K. Haberman, Ph.D.

   Before the age of digitization, Columbia had published many of Jay's papers in book form. *See* 1 *The Selected Papers of John Jay, 1760–1779* (Elizabeth M. Nuxoll, Mary A.Y. Gallagher, & Jennifer E. Steenshorne eds., 2010); *John Jay: The Making of a Revolutionary; Unpublished Papers, 1745–1780* (Morris, Richard B. ed., 1975); *see also* 1–4 *The Correspondence and Public Papers of John Jay* (Henry P. Johnston ed., 1890–93).

3. *See supra* text accompanying note 2. Although Jay's law firm papers are lost, the Columbia papers have digitized papers from Jay's years of practice which originally appeared in the files of lawyers whom he was opposing in certain cases. Most notably, this collection includes the legal papers of John Kempe (1728–1782), which were found in the collections of the New-York Historical Society.

4. The results of Johnson's research were first published in "John Jay: Lawyer in A Time of Transition, 1764–1775, 124 U. Pa. L. Rev. 1260 (1976), and then enlarged upon in a book, *John Jay, Colonial Lawyer* (1989). I cite to the 2006 paperback edition from Beard Books (as "Johnson, *Colonial Lawyer*").

   Herbert A. Johnson afterwards became a Professor of Law at the University of South Carolina, retiring a decade ago. The author of this article tracked him down to happy retirement in North Carolina, and has profited in talking with him. Johnson published many studies of the practice of law and the work of the courts in the Colonial period. These studies, and his career, are reviewed in Harry N. Scheiber, "Herbert Johnson and the Writing of American Legal History," 56 S. C. L. Rev. 429 (2005)

5. For more information on Kissam, *see* Edward Kissam, *The Kissam Family in America from 1644 to 1825* (1892), *available at* https://archive.org/details/kissamfamilyinam00kiss/.

6. Pellew, *supra* note 1, at 13.

7. Johnson, *Colonial Lawyer,* at 12. It is noteworthy that for a period of time just before he started his apprenticeship (1756–1763), no clerkships were allowed, as a method of preventing competition from new lawyers. Hence most of the practicing lawyers had training in England. Then, during the time that Jay was serving his clerkship, the time of training was reduced to three years.

8. It is recorded that the first law book Jay bought was Jacob's Law Dictionary. Paul Hamlin, *Legal Education in Colonial New York* 70 (1939). His law library and that of his son, Peter Augustus, who was also a lawyer, are housed in the Treasure Room of the Columbia University Law Library. Johnson itemized them in his book, *Colonial Lawyer.*

9. The document is illustrated in Morris, *supra* note 2, at 95.

10. Johnson, *Colonial Lawyer,* at 60.

11. Those interested more generally in the colonial courts in New York, the development of law and legal practice may consult:

    William Edward Nelson, *The Common Law in Colonial America: Law and the Constitution on the Eve of Independence 1735–1776* (2018)

    Jay F. Alexander, "Legal Careers in Eighteenth Century America," 23 Duq. L. Rev. 631 (1985).

    Herbert A. Johnson, "Civil Procedure in John Jay's New York," 11 Am. J. Legal Hist. 69 (1967).

    The Colonial Laws of New York from the Year 1664 to the Revolution (James B. Lyon ed., 1894), *available at* https://archive.org/details/coloniallawsnew01johngoog/.

    1 Anton-Hermann Chroust, *The Rise of the Legal Profession in America: The Colonial Experience* (1965).

    Arthur Wilcox, *The Bar of Rye Township* (1918), *available at* https://archive.org/details/barofryetownship00wilc/. Jay is discussed at page 33 and his portrait is the frontispiece.

12. *See* Matthew H. Williamson, "The Networks of John Jay, 1745–1801: A Historical Network Analysis Experiment" (Apr. 2017) (unpublished Ph.D. dissertation, Northeastern University) (analyzing the networks that Jay had with family, Huguenots, gentry, other lawyers), *available at* https://repository.library.northeastern.edu/files/neu:cj82ps497/fulltext.pdf.

13. After the Revolution, his office was at 133 Broadway in Manhattan, according to our recent historian, Robert Pigott, *New York's Legal Landmarks: A Guide to Legal Edifices, Institutions, Lore, History, and Curiosities on the City's Streets* 30 (2014).

14. William Jay, *supra* note, 1, at 21 (this is about all his son covers as far as Jay's private practice goes).

15. In the Rye City Post Office there is a mural showing Jay departing by horse from his house in Rye to "ride circuit," although this is as a judge compared to practitioner. It was painted in 1938 by Guy Pène du Bois.

16. Jay's Notebooks, Columbia Papers, *supra* note 2, document number 03610; Johnson, *Colonial Lawyer,* at 98. (Throughout his papers, Jay spelled trial "tryal.")

17. Jay's Notebooks, *supra* note 2, document number 03610.

18. Jay's Notebooks, *supra* note 2, document number 03610; Johnson, *Colonial Lawyer,* at 101. This is based on the judgment roll found in New York City Hall of Records (parchment 178 A-7).

19. Pellew, *supra* note 1, at 18.

20. Documents are in Columbia Papers, *supra* note 2, document number 03607.

21. Johnson, *Colonial Lawyer,* at 106.

22. Columbia Papers, *supra* note 2, document number 03609.

23. Columbia Papers, *supra* note 2, document number 03611 (some of the papers are addressed to the New York Supreme Court).

24. For lawyers under 100 years of age, "ex dem," is short for ex demissione—on the demise of. One can guess that the plaintiff "Peter Quiet" is an alias like John Doe—quieting the title. *See* Johnson, *Colonial Lawyer,* at 106. The Columbia Jay archives have a fascinating document, Jay's notes for his summation in the "Doe" case. *Supra* note 2, document number 08188; the litigation is also listed in Jay's Notebook, document number 03620, *supra* note 2.

25. Columbia papers, *supra* note 2, document number 02620. He has kept a running list of his fees, per activity and the payment by the client (such as 3 pounds for making a motion). In debt collection actions, he has recorded the receipt of payments from the defendant and the payment on to the client. One pound then computes roughly to 160 now.

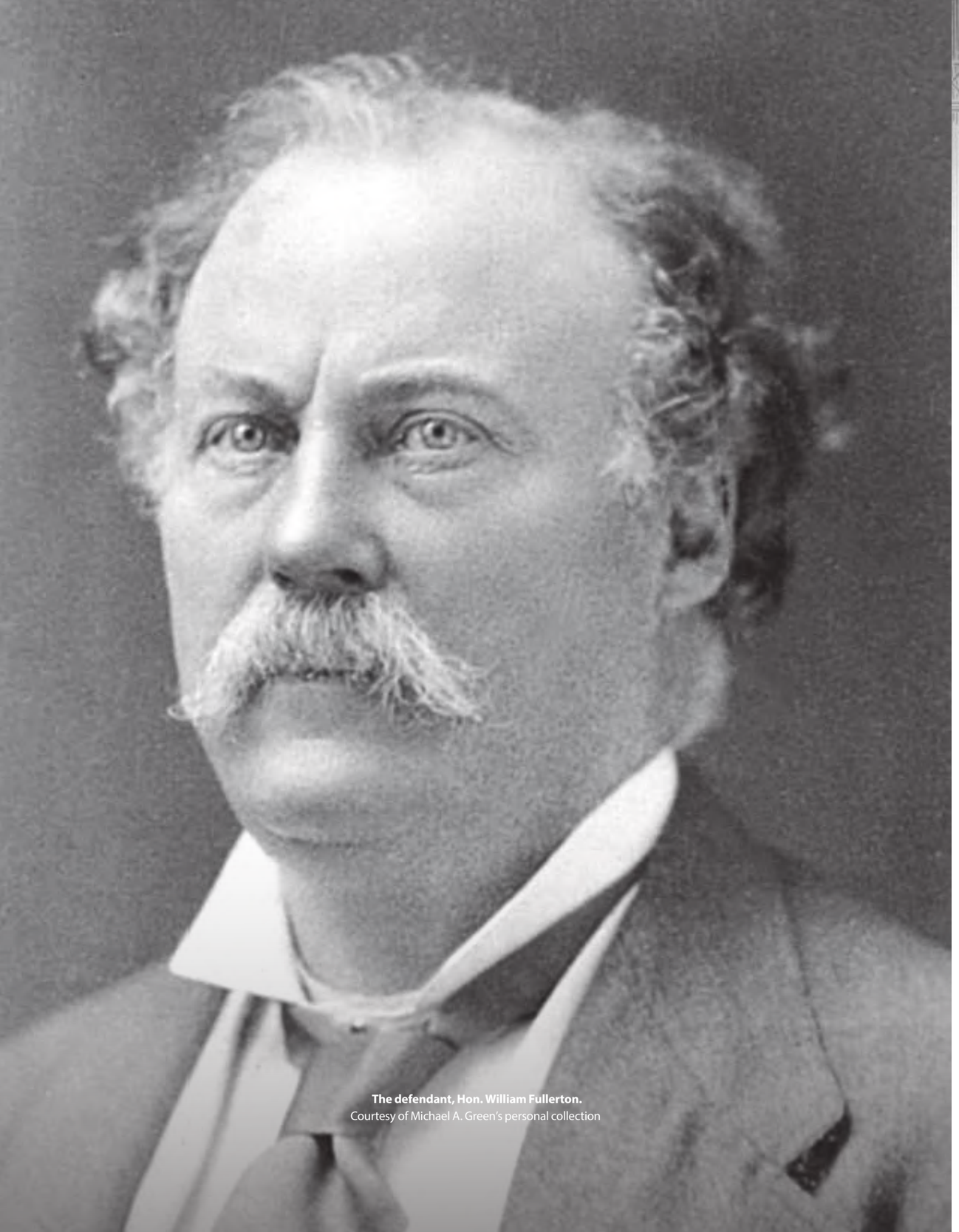
26. Kaye, *supra* note 1.

27. Pellew, *supra* note 1, at 14.

28. *Id.* at 17.

29. Johnson, *Colonial Lawyer,* at 110.

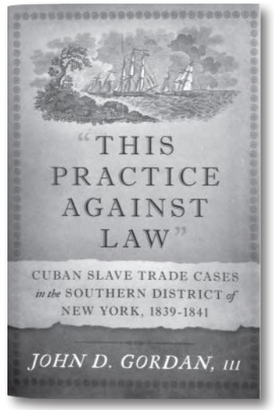
30. Biographers of Jay often break his life into thirds. From birth in 1745 to his public career commenced around 1775; public life until his retirement in 1801 to become a gentleman farmer in Katonah, N.Y., and from then to his death in 1829.



The defendant, Hon. William Fullerton.
Courtesy of Michael A. Green's personal collection

An All-Star Criminal Trial in the Gilded Age: *United States v. William Fullerton* (March 1870)

by John D. Gordan, III



John D. Gordan, III, is a graduate of the Harvard Law School and clerked from 1969-1971 for the Hon. Inzer B. Wyatt, U.S. District Judge (S.D.N.Y.). From 1971-1976 he was an Assistant U.S. Attorney for the Southern District of New York and thereafter engaged in full-time private practice in New York City until 2011. He was one of the founders of the Historical Society of the New York Courts and a member of its board; several of his articles have previously been published in *Judicial Notice*. Illustrated here is his most recent book, entitled: *"This Practice Against Law" – Cuban Slave Trade Cases in the Southern District of New York, 1839-1841*.

The author would like to thank his friends, Judge Jed S. Rakoff, Professor Christian G. Fritz, Justice Anthony Payne of the Supreme Court of New South Wales, and Conrad K. Harper, also his constant editor, for the review of an earlier edition of this article.

The forgotten case of *United States v. William Fullerton* is an early example of the struggle which results when authority to prosecute a particular offense or related offenses is simultaneously shared by independent, mutually antagonistic groups in the Executive Branch of the federal government—one statutorily empowered and the other specially appointed. The *Fullerton* problem was exacerbated by the fact that, in 1868, federal law enforcement was fragmented, placed in the hands of the United States district attorneys for each judicial district, who in turn were loosely supervised by the Secretary of the Treasury. This was the state of affairs under the Judiciary Act of 1789. The United States Department of Justice was not even established until 1870, and before then, in the words of the biographer of William M. Evarts (Attorney General from July 1868 until the end of Andrew Johnson's presidency on March 4, 1869):

> *Not only was the legal business of the government scattered and uncoordinated, but an excessive amount of labor was expected of the attorney general. Besides giving legal opinions he was expected to appear in cases in the Supreme Court. His staff comprised only two assistants and nine clerks.*[1]

The *Fullerton* case arose in the context of the efforts of President Andrew Johnson, Attorney General Evarts, and Secretary of the Treasury Hugh McCullough to strengthen enforcement of the Internal Revenue Act of 1864, and specifically the tax of $2.00 a barrel it imposed on whiskey, an amount which was a multiple of the cost of manufacture. The tax was necessary to enable the federal government to rebuild following the expense of the Civil War, and the "criminal statutes for enforcing the excise were the first permanent, peacetime federal criminal laws to practically intrude on the conduct of millions of ordinary people."[2] A further complication contributing to the underlying events of the *Fullerton* case was that, under Section 41 of the Act, the enforcement of registration and tax obligations was the duty of the local Collectors, whom the statute contemplated would retain outside counsel rather than apply to the local United States district attorney.

United States v. William Fullerton was a retaliatory criminal prosecution brought by the United States district attorney against the counsel for the United States specially appointed by President Johnson on September 14, 1868, on Treasury Secretary McCullough's recommendation to prosecute whiskey fraud cases in New York City. The defendant, William Fullerton, was a prominent lawyer who had served the year before his indictment on the New York Supreme Court and by appointment of the Governor from August to December 1867 *ex officio* as a judge of the New York Court of Appeals.[3] His opinions are for the most part reported in Volume 37 of the *New York Reports*.[4]

Fullerton was the second person to hold such an *ad hoc* position in New York; his immediate predecessor was John N. Binckley, who had recently served as Assistant Attorney General in 1867–68 and as Acting Attorney General of the United States. Corruption and these structural statutory discontinuities had led to a breakdown in the enforcement of the Revenue Act in the southern district of New York. Part of the problem was the recalcitrance of the Commissioner of Internal Revenue, E. A. Rollins, whose "unseemliness"—as Attorney General Evarts put it—led Evarts, after a mere seven weeks in office, to encourage the President to replace Rollins with someone who "should not be, in the least, a candidate of his selection or of the suggestion of any of his advisers."[5]

In addition, Binckley and Fullerton successively reported to Washington that Samuel G. Courtney, the United States district attorney for the southern district of New York,[6] was collaborating with whiskey tax evaders. Binckley had quit in disgust. Courtney's subsequent indictment of Fullerton—for allegedly participating in a shakedown of a local tax collector in June 1868, prior to his appointment—occurred in November 1868.

Controversies in the enforcement of the Internal Revenue Act of 1864 in New York City were nowhere as dramatic as the "Whiskey Ring" trials in the mid-1870s in the United States district court for the eastern district of Missouri in St. Louis, at one of which favorable deposition testimony for the defense by President Ulysses S. Grant led to the acquittal of his former aide-de-camp and private secretary as President, Orville Babcock, accused of being the leader of the Ring. Although the prosecutions of the "Whiskey Ring" in St. Louis and his involvement are a subject addressed in several recent biographies of General Grant and in the conflicting autobiographies of the participants on both sides of the law,[7] the *Fullerton* trial and related cases, earlier in New York, go unmentioned in works about the period, even in the occasional biographical essays about a participant, except for a brief paragraph in the history of Cravath, Swaine & Moore.

Fullerton's trial, dramatic in its venue and its participants, deserves more extensive treatment than it has received in histories of the period. The proceedings were actually held in what had been a theatre; in 1870, the United States circuit and district courts for the southern district of New York sat in buildings on the north side of Chambers Street that had originally been Palmo's Opera House and then became Burton's Theatre.[8] The trial had an all-star cast, drawing on once and future judges of the New York Court of Appeals; its predecessor as New York's highest court, the Supreme Court; and a future Attorney General of the United States.

For the first half of March 1870, the presiding judge on the bench of the United States circuit court for the southern district of New York was Lewis B. Woodruff. Appointed under the Judiciary Act of 1869 and inducted January 12, 1870, Judge Woodruff had been a judge of the New York Court of Appeals for the two years immediately preceding his federal appointment.[9] Sitting with him was Samuel Blatchford, United States district judge for the southern district of New York, appointed in 1867, formerly a partner of Blatchford, Seward & Griswold, and the first—and apart from Justices Charles E. Whittaker and Sonia Sotomayor, the only—person ever to serve as a district judge, a circuit judge, and a Justice of the Supreme Court of the United States.[10]

In December 1868, three weeks after the indictment came down, a pretrial motion filed by the defense was denied by Justice Samuel Nelson of the United States Supreme Court, the circuit justice. Prior to his appointment to that Court by President Tyler in 1845, Justice Nelson had served as a New York circuit judge from 1823, an Associate Justice of the New York Supreme Court from 1831 and as Chief Justice of that Court from 1836.[11]

The prosecutor was Edwards Pierrepont, United States district attorney for the southern district of New York from 1869–70. In 1875–76, Pierrepont served as Attorney General of the United States and was deeply involved in the St. Louis "Whiskey Ring" prosecutions.[12] At Fullerton's trial, Pierrepont's co-counsel was B. F. Tracy, the United States district attorney for the eastern district of New York, who was said to have drafted the indictment and who gave the prosecution's opening statement at the trial. Tracy served from 1881–82 as a judge of the New York Court of Appeals and later as Secretary of the Navy, which he is credited with modernizing into what it is today.[13]

The lead defense attorney among the four at trial was John K. Porter, who had served as a judge of the New York Court of Appeals from 1865–67.[14] He was assisted by Clarence Seward, nephew and adopted son of the Secretary of State and at the time a member of the recently renamed Blatchford, Seward, Griswold & Da Costa, today Cravath, Swaine & Moore, whose firm history claims for him (in its single paragraph about the trial) the credit for the directed verdict of acquittal that ended the trial.[15]

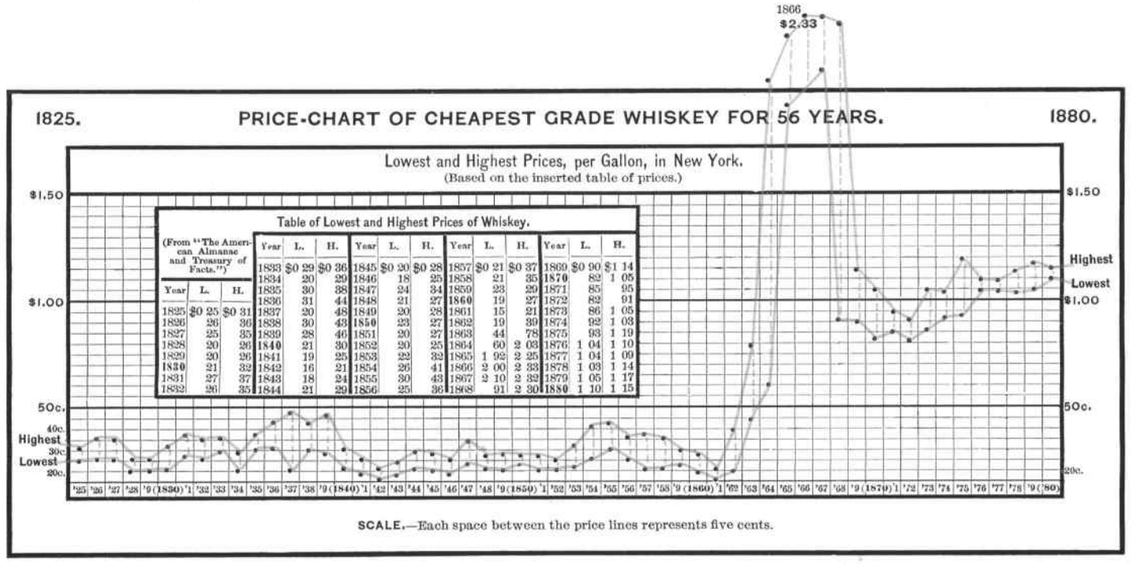
United States Secretary of Treasury Hugh McCulloch, c. 1860. Brady-Handy photograph collection, Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-00978

Assistant Attorney General of the United States John M. Binckley, undated. The Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library

The Charge Against Fullerton

On November 23, 1868, a nine-count indictment was filed in the United States circuit court for the southern district of New York against six defendants. Alfred A. Belknap was a supervisory officer of the United States Treasury charged with enforcement of the Internal Revenue Act of 1864 ("the Act").[16] Next was William Fullerton himself, followed by Daniel C. Birdsall, another New York lawyer; Alvah Blaisdell, part owner of a New York City distillery; Jacob Depuy (or variously De Puy and Du Puy); and Edward Windust.

The indictment alleged a conspiracy. According to the charges, on June 11, 1868, the defendants conspired to obtain money from Thomas E. Smith, an Internal Revenue Collector, by having Windust arrest him without authority on June 12, 1868, on a warrant, surreptitiously secured by Fullerton from the United States Commissioner,[17] that was based on an affidavit by Depuy claiming that Smith took bribes from distillers to disregard their evasion of the whiskey tax. Then, according to the indictment, the defendants concealed Smith's irregular arrest from the United States marshal and the United States district attorney and purported to settle the charges directly with him, which they had no authority to do, in return for Smith's payment to them of ten thousand dollars "and other property of value." Smith was then encouraged to flee to Canada, which he did—although, as we will see, he did not stay very long.



Price-Chart of Cheapest Grade Whiskey for 56 Years, 1825-1880.
Courtesy of David Rumsey Map College and copyright Cartography Associates

Events Leading to Fullerton's Indictment and Trial

President Johnson had appointed John M. Binckley "Solicitor, Internal Revenue Bureau" on August 25, 1868 to look into a particular matter in Brooklyn, widening his commission on September 19, 1868 to the investigation of revenue frauds generally in New York.[18] It appears that Binckley had already widened it himself, having arrested that same local collector, Thomas E. Smith, back from Canada, for bribery, and having obtained arrest warrants for Rollins, the Commissioner of Internal Revenue, and his Deputy Commissioner, Thomas Harland.[19] This brought him into collision with the United States district attorney for the southern district of New York, Samuel G. Courtney. Although retaining his own lawyer, Binckley claimed to have cooperated with Courtney until he became uncertain whose side Courtney was on and had an actual physical altercation with him in public. Amidst accusations from a third party—later repudiated and blamed on Binckley—that Courtney was conspiring with the lawyers for Smith and Rollins to obtain their acquittal, Courtney attempted to withdraw from these prosecutions, but the Court ordered Binckley to withdraw instead and the Assistant Attorney General authorized Courtney to terminate them except, as Binckley put it, "as far as Mr. Courtney might be pleased, to continue it against his own particeps criminis." Claiming that he had evidence that Courtney had been bribed, the thus-thwarted Binckley resigned.[20]

Courtney followed up with a long letter to the President on October 1, 1868, denouncing Binckley:

> *Without any communication with me, whom official courtesy and decency should certainly have impelled him to, at least, advise of his proceedings, he caused a prosecution to be instituted against the two chief officers of his own bureau, [and] an ex-collector … charging them with a conspiracy to defraud the United States.*
>
> *It was not till these charges had been made, and some of the defendants already arrested, that … I then found that a man, without the slightest authority to do so, of his own motion, had sneaked surreptitiously into my district, and attempted, in total ignorance of both law and fact, to usurp functions, which your Excellency and the Senate of the United States had seen fit to devolve upon me.*

Courtney continued that he had "cooperated with Mr. Binckley as cordially as his offensive and arrogant manner would permit" but "could not discover that he had any knowledge whatever of the simplest principles of criminal law." The prosecution Binckley had brought was dismissed by the United States Commissioner after several days of hearings on October 7, 1868.

United States District Attorney for the Southern District of New York, and future United States Attorney General, Edwards Pierrepont, c. 1870. Brady-Handy photograph collection, Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-04425

United States Attorney General William M. Evarts, c. 1870.
Brady-Handy photograph collection, Library of Congress, Prints & Photographs Division, LC-DIG-cwpbh-05065

Meantime, McCullough had recommended William Fullerton as additional counsel to prosecute whiskey tax fraud cases, and President Johnson appointed Fullerton on September 14, 1868 with Courtney's concurrence since, as Courtney explained in his letter to the President on October 1, he wished counsel to be associated with him in the prosecution Binckley had brought to avoid any claim that he had acted improperly when the case was dismissed.[21]

The problem was that Binckley was not alone in questioning Courtney's performance. In his book, Henry Lauren Clinton says:

> *In the following autumn [of 1868] there was no little excitement with regard to the whiskey cases. Mr. Courtney was criticised for not pressing more earnestly their prosecution.*[22]

Early November 1868 found Fullerton in Washington, D.C. meeting with the President and Attorney General Evarts in an effort to obtain Courtney's dismissal, which failed based on Evarts's advice to the President.[23] The hostility between Fullerton and Courtney appears to have been a matter of public notoriety. As reported in the November 14, 1868 issue of the *New-York Daily Tribune:*

> *District-Attorney Courtney is not to be suspended from office just yet. After numerous conferences yesterday between the President and Mr. Fullerton and Mr. Evarts and Mr. McCullough, and an examination of Mr. Courtney, the President came to the conclusion that Mr. Fullerton's charges were insufficient ground for the suspension of the District-Attorney. Fullerton thereupon posted off for New-York to get the requisite evidence against Courtney. When the case of Fullerton vs. Courtney shall have been settled, the Government interests will probably be attended to.*

In a commentary on the same page of the paper, after applauding the appointment of Fullerton:

> *When he was appointed a Justice of the Supreme Court … last year, no one lisped a doubt of his capacity or his integrity. We never heard a syllable uttered to his prejudice till he accepted this trust, and set to work to discharge its heavy responsibilities.*

Mr. Fullerton having set to work, symptoms of agitation are soon visible. "Things is working." There are whispers that Mr. F. is going to be indicted for something he did, or said, or advised as counsel in respect to the compromising of a revenue suit, long before he was retained by the President.… We have sadly misjudged Mr. F. if they make anything by this bold move.…

Fullerton's indictment was nine days away. When court opened on the day it came down, Courtney advised Judge Blatchford that he had received instructions from Attorney General Evarts to bring the some thirty pending whiskey indictments to trial immediately, and Judge Blatchford set them down for trial starting December 7.[24]

One of these was the January 1869 trial of Blaisdell and two others for an entirely different offense: evading the tax by operating a distillery from which the whiskey was transferred by an underground pipe to an adjacent building, instead of to a bonded warehouse as required by law. Upon their conviction on January 25, Courtney demanded the immediate imposition of sentence, which defense counsel, Fullerton's junior partner, opposed on the ground that their convictions were based on evidence that they had provided to Fullerton and Belknap on assurance that they would not be prosecuted.

This led to an angry outburst by Courtney in open court against Blaisdell, Blaisdell's lawyer, and Fullerton. First, he asserted that "of all the great swindlers and defrauders of the internal revenue of the United States for the last two years and a half these men, Blaisdell and Eckel, were the principals." Then he claimed that the information that Blaisdell supplied had been embodied in an affidavit prepared by his trial counsel "for the purpose of procuring the arrest of an officer who had the honesty and the manhood to perform his duty faithfully and fearlessly." Moving on to Fullerton, Courtney asserted that Fullerton knew that, on July 11, 1868, Blaisdell and others had been arrested for "unlawful, corrupt and deliberate perjury and for subornation of perjury" against this revenue collector and yet:

[T]his very Mr. Fullerton goes to work under some assumed or pretended power and authority into association and connection with these branded perjurers, with these whiskey thieves – with, I say, these perjurers and felons – for the purpose of endeavoring, as counsel informs us, to ferret out further frauds against the government. What a combination! What a set of disinterested patriots we have here!

Courtney concluded by arguing the underlying allegations of the indictment that had been returned against Fullerton, ending with the assertion:

To make a long story short in this matter the collector was then blackmailed to the tune of $30,000, and then told to hasten off to Canada, while the proper officers were never informed of the issuance of such a warrant.

He advised Judge Blatchford that in Fullerton's case "I have also been directed by the Attorney General to proceed without delay." Blaisdell was sentenced to three years in Sing Sing Prison.[25]

The "officer" with "honesty and manhood" and "revenue collector" whom Courtney was fulminating about was Joshua F. Bailey, who was exposed to several separate arrests in the summer of 1868 on Commissioners' warrants issued on perjured affidavits made by four different persons using false names and charging Bailey with official misconduct. Bailey, who was discharged on arraignment, made a point of immediately reporting what was happening to his superiors in Washington and obtained permission to employ counsel to represent him at government expense. All four affiants were indicted, and three were tried in the first half of 1869, convicted of perjury, and sentenced to five years each in the penitentiary. Blaisdell, Belknap and three other individuals were indicted for putting two of the four up to it, but that indictment does not appear to have been tried. Bailey's investigation was memorialized in a published pamphlet which implicated Blaisdell, Belknap, Fullerton, and Birdsall in efforts to procure evidence against him.[26]

United States District Judge for the Southern District of New York, Hon. Samuel Blatchford. Published in *The Cravath Firm and Its Predecessors 1819-1847*, by Robert Taylor Swaine

Presiding Judge of the United States Circuit Court for the Southern District of New York, Hon. Lewis B. Woodruff. Litchfield Historical Society Repository, Litchfield Historical Society, Helga J. Ingraham Memorial Library, P.O. Box 385, 7 South Street, Litchfield, CT 06759

Pre-Trial Proceedings in the *Fullerton* Case

When Fullerton was indicted, the lower federal courts were several months away from their redesign in the Judiciary Act of 1869, effective April 10, 1869. Until then, a right to appeal a criminal conviction existed only when there was a disagreement between the district judge and the Supreme Court Justice sitting together in the circuit court on a dispositive legal issue, which would then be embodied in a certificate of division.

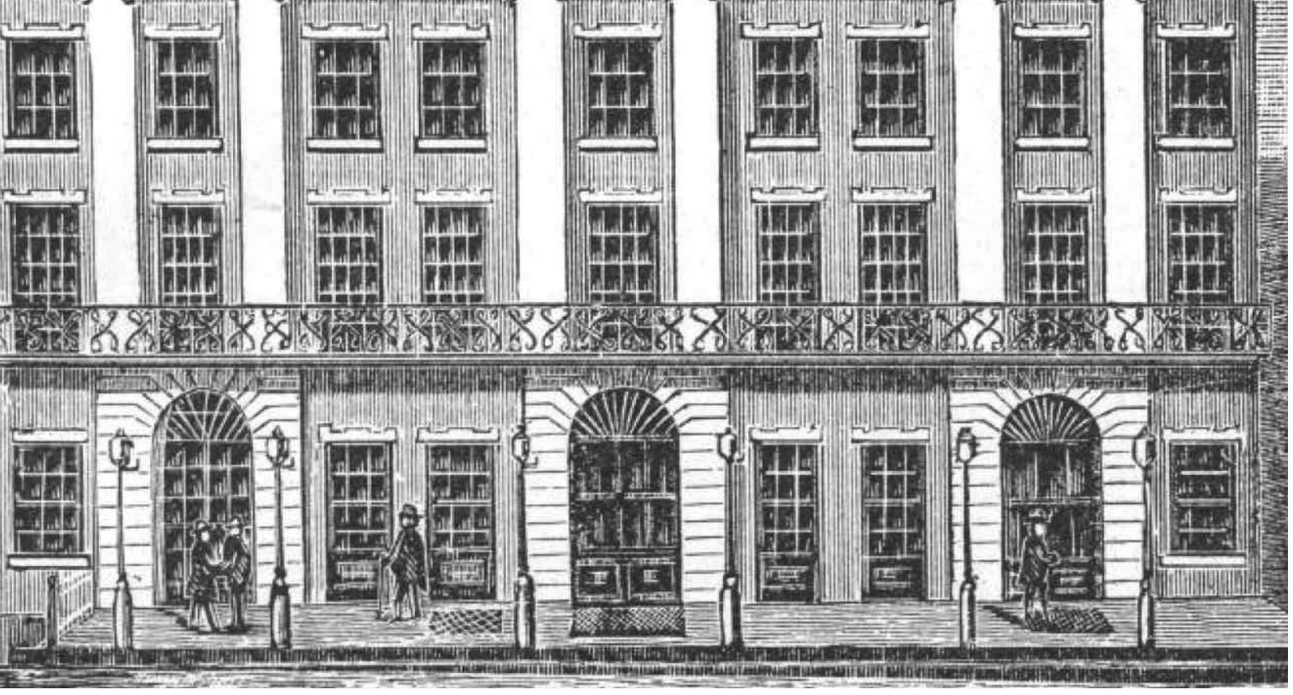
Fullerton's first reported feint was to seek a postponement of his trial until Justice Samuel Nelson was available to sit in the circuit court with the district judge, both in order to preserve the possibility of an appeal from a conviction and because of prejudicial pretrial publicity. Upon the filing of the motion, Justice Nelson took the case off Judge Benedict's trial calendar, leading Courtney to appeal to Attorney General Evarts to intercede with Justice Nelson. Two days later, he received the following rebuff:

In my official capacity as Attorney-General I do not represent the conduct of the criminal cases in the various districts, and I am sure nothing could be less suitable than that I should interfere personally in such cases while I hold my present position.[27]

But on December 28, 1868, Justice Nelson denied Fullerton's motion on the grounds that Fullerton's rights could be as well protected by a motion for a new trial or in arrest of judgment.[28]

In January 1869, the trial was first postponed for a week because of the illness of Charles O'Conor, Fullerton's lead counsel, and then again on the 25th on motion of Birdsall because of the unavailability of exculpatory testimony from Smith, the alleged victim, due to his illness documented in a doctor's letter.[29] The case was set for trial February 10, 1869.[30]

Attorney General Evarts's representation to the Senate in his transmittal of February 22, 1869, that the cases discussed there "are the only instances in which I have directed the 'suspension' or 'delay' of proceedings against parties prosecuted in New York city for frauds upon the internal revenue"[31] is difficult to reconcile with his letter of February 6, 1869, to Courtney, instructing him to send him a copy of the Fullerton indictment, the evidence and any briefs filed in the case, to be prepared to come to Washington to discuss the case with him, and that "my present instructions will simply require that you should not call on the trial until I have passed on the matters submitted to me." Courtney's reply of February 9, dripping with irony, explained to Evarts that he was too busy attending current proceedings in the circuit



Palmo's Opera House, the location of the trial, 1844.
Published in *The New York Clipper Annual,* courtesy of Columbia University Libraries

court to come to Washington,[32] and shortly thereafter Courtney announced in open court that Evarts had ordered him to postpone the trial.[33]

Four days after the inauguration of President Grant, E. A. Rollins, still the Commissioner of Internal Revenue, wrote to him to request that the suspension of the *Fullerton* trial by, as he understood it, President Johnson, be revoked. The next day Acting Attorney General Hubley reported the President's instructions to Courtney to proceed to trial at the earliest possible moment.[34] Courtney immediately applied to Judge Benedict for a trial date, but was informed that May was the earliest he could schedule a long trial before the circuit justice.[35]

Having succeeded Courtney as United States district attorney, Edwards Pierrepont's "first official act", according to the *New York Times*, was to move for an immediate trial, but that was not possible due to the illness of Justice Nelson; June 14 was scheduled as the trial date. The *New York Times* then predicted another adjournment of the case because of the illness of Justice Nelson, and two days later the case was adjourned to September.[36] Finally, on February 28, 1870, an application for a further adjournment based on the ill health of Charles O'Conor was denied, given the opposition of Edwards Pierrepont, who advised the Court that he had assembled his witnesses through great effort and that President Grant had instructed that the case should be tried.[37] Trial was set for March 7 and went forward on that date.[38]

The Trial[39]

The trial, held in a courtroom which filled to capacity as soon as the doors were opened, lasted for nine days. The first was a day of major events. When the case was called, Belknap failed to appear and his bail was forfeited. Then Edwards Pierrepont announced that his review of the case had led him to dismiss the charges against Daniel C. Birdsall, the other lawyer charged in the indictment with Fullerton; Pierrepont would instead call him as a witness. Finally, Fullerton moved successfully for a severance and a separate trial, which began immediately. A jury was empaneled.

The Government's case was opened by B. F. Tracy, the U.S. district attorney for the Eastern District of New York. He reminded the jury that as a result of the Internal Revenue Act, whiskey which cost $.40 a barrel to manufacture was taxed at $2.00 a barrel, thus providing an effective incentive for tax evasion

United States Supreme Court Justice, Hon. Samuel Nelson, c. 1860. Brady-Handy photograph collection, Library of Congress, Prints and Photographs Division, LC-DIG-cwpbh-02020

Fullerton's lead counsel Charles O'Conor, c. 1870. Brady-Handy photograph collection, Library of Congress, Prints and Photographs Division, LC-DIG-cwpbh-05061

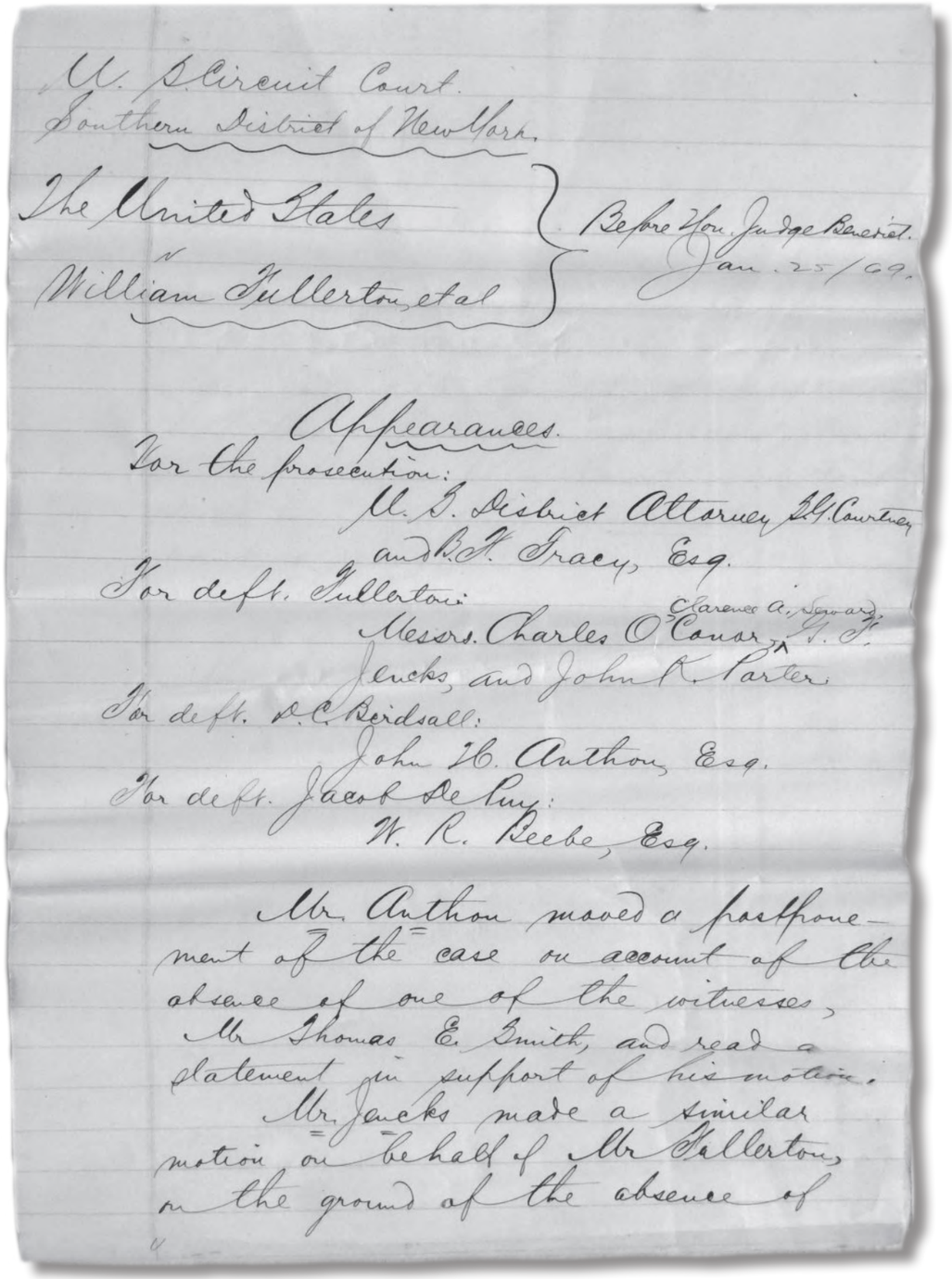
on a massive scale. He alleged that Belknap, having been appointed a "Special Agent of the Revenue Department" in January 1868, recruited Fullerton as his counsel and Blaisdell as a collaborator; Blaisdell owned a distillery Belknap had seized and had recently served as president of the Distiller's Association. Belknap fixed on Thomas E. Smith, a Collector, as their first victim, and arranged to get an affidavit from Du Puy—apparently an informant by profession when not in prison—that alleged official misconduct by Smith. On June 11 Fullerton took Du Puy before Osborn, a United States Commissioner who had known and respected Fullerton all his life, and obtained both a warrant based on Du Puy's affidavit and also Osborn's acquiescence in his insistence that the matter be kept confidential from the U.S. district attorney and the U.S. marshal. Windust used the warrant to take Smith into custody the next day.

Smith was apprehended on Chambers Street by Windust, who was accompanied by Birdsall. He was taken to Birdsall's office, where they were joined by Fullerton. Belknap arranged with Smith to receive $10,000 in cash and another $20,000 in railroad securities, which were fetched from Smith's home. Smith was then released by Commissioner Osborn on a bond guaranteed by James Gulick, a sometime client of Birdsall who was a guarantor on Smith's bond as Collector, and, as agreed, fled to Canada. But there was the requirement that the bond be filed with the Court. Fullerton dealt with this the next day by persuading Osborn that since Windust was not a deputy marshal, Smith's arrest had been illegal, the bond was thus meaningless and should not be filed.

Smith, concluding he had been victimized, returned to New York. This the conspirators dealt with on July 1 by swearing new affidavits by one Gropp before Commissioner Osborn, who this time refused to surrender the warrants to Fullerton. The two of them then proceeded to the marshal's office, where Fullerton was able to secure possession of the warrants. These were not executed, but Fullerton had them with him at a meeting on July 3 at Birdsall's house with Smith, who fled once again after the meeting. Fullerton received $6000.00 of Smith's cash and fabricated a mortgage as a cover for his having received this money from Birdsall. When Smith was arrested the following month in connection with Binckley's enforcement activities, Fullerton acted as the prosecutor but allowed him to be released.

According to the *New York Tribune* Tracy's opening concluded by raising a totally new issue:

> *Having succeeded so well with Mr. Smith, they think they will try another victim, Joshua F.*



U. S. Circuit Court.
Southern District of New York.

The United States
v
William Fullerton, et al

Before Hon. Judge Benedict.
Jan. 25/69.

Appearances.
For the prosecution:
U. S. District Attorney B. G. Courtney
and B. F. Tracy, Esq.
For deft. Fullerton:
Messrs. Charles O'Conor, Clarence A. Seward, E. J.
Jencks, and John K. Porter.
For deft. D. C. Birdsall:
John H. Anthon, Esq.
For deft. Jacob DeLuy:
W. R. Beebe, Esq.

Mr. Anthon moved a postponement of the case on account of the absence of one of the witnesses, Mr Thomas E. Smith, and read a statement in support of his motion.
Mr. Jencks made a similar motion on behalf of Mr Fullerton, on the ground of the absence of

Handwritten transcript of the January 25, 1869 hearing in *The United States v. William Fullerton*.
Courtesy of the author

Pierrepont's co-counsel and United States District Attorney for the Eastern District of New York B.F. Tracy, c. 1910. Library of Congress, Prints & Photographs Division, LC-DIG-ggbain-18204

Lead attorney for the defense Hon. John K. Porter.
From the Collection of the New York State Court of Appeals

> *Bailey, also a Collector. Mr. Bailey becomes aware that affidavits are prepared against him and he sends his deputy to William Fullerton, a man whom he had known and respected, supposing it would only be necessary to prove the falsity of the charges in order to have them dismissed. This he offered to do, but Mr. Fullerton replied that he had nothing to do with considerations of that kind, and if the evidence made out a case he must prosecute. Mr. Bailey was accordingly arrested, and three of the perjured witnesses against him are now in the State Prison; for, happily for the public service, the conspirators found in Joshua F. Bailey a man ready to fight his own battles and face, if necessary, all the thieves in New York City.*

A similar statement appears in the *New York Times* but at a different point in the opening. In that paper the conclusion, missing from the *New York Tribune*, is:

> *It would transpire during the trial that Mr. Fullerton originally contemplated getting rid of Mr. Courtney, the District-Attorney, the more easily to accomplish his ends, and it became his especial object to do so when the circumstances of his connection with this transaction became known.…*

The Court received in evidence Belknap's commission as a Special Agent of the Department of the Treasury, signed by McCullough and dated June 10, 1868. By its terms it was good for 30 days upon Belknap's taking the oath, which he did on June 11 before Commissioner John Osborn.

On the stand, Osborn acknowledged his long acquaintance and high regard for Fullerton, who had helped him get his appointment as Commissioner. He testified to his initial meeting with Belknap and Fullerton in early June, in which Fullerton explained:

> *[I]t was well known in Washington that there were many violations of the Revenue law in the City of New-York, and the officers of the Government were delinquent in the discharge of their duties; that the then District Attorney was very lukewarm in the discharge of his duty, and the Secretary of the Treasury had no confidence in him, and that he had specially authorized Mr. Belknap to institute proceedings against them, and he was appointed his counsel.*

Osborn's testimony on both direct and cross-examination then followed the outline of the case in Tracy's opening so far as it concerned him. On cross-examination he acknowledged his continuing respect and esteem for Fullerton and that Fullerton's

statements, together with "the rumors I had heard, prior to this time, with reference to Mr. Courtney's connection with certain distilleries," satisfied him that the matter should be kept secret.

After Marshal Murray testified that Osborn's warrant for Smith had not been filed in the Marshal's office after execution, Gulick testified how, after Smith's arrest, he had gone with him, Belknap and Birdsall to Birdsall's office, where they were joined by Fullerton. Belknap told Smith, "who was very much excited," that they could settle the matter for $50,000, but Fullerton, who said he was Belknap's counsel, interjected that Belknap "had no right to make any such settlement" and then, while Birdsall, Belknap and Smith were meeting in another room, Fullerton wrote a letter on the spot to Birdsall, which Gulick identified on cross examination and which said in pertinent part:

> *Put a stop at once to this talk about a settlement; for no one has authority to settle such a matter here. It must be done in Washington, if at all.…*

However, Birdsall, who was representing Smith at Gulick's request, negotiated a compromise that Smith would provide Birdsall $10,000.00 in cash and $20,000.00 in railroad bonds, to be used at Birdsall's discretion to settle the matter; the evidence that Fullerton heard that discussion was weak. Smith was taken to his home to collect these assets and then to Commissioner Osborn to be bailed, where Fullerton was waiting.

The testimony of Birdsall, the next witness, was consistent with Osborn's and Gulick's, and included identifying the letter Fullerton had written to him in his office. Birdsall further testified that Smith had said that "there was no reasonable ground for his arrest, and he would rather pay any amount of money rather than have the scandal or publicity of a trial or examination."

The following week, Fullerton and Birdsall were engaged in an unrelated trial together, and Birdsall brought up the need to resolve Smith's situation, saying that he had ten thousand dollars to settle with in hand. Fullerton told him they needed to finish the trial first, but then in Fullerton's office asked if he could borrow $1,000, which Birdsall paid, and a week later asked for and received $2,000 more, two days later $2,300 more and on July 7 another $1,000, totaling $6,300.

Birdsall told Fullerton that Smith had written him from Toronto that he could make revelations of revenue frauds, and Fullerton encouraged him to have Smith return to New York to talk to him. Birdsall found out after Smith had come back and met with Fullerton that there were other warrants outstanding for him, which enraged Birdsall and of which Fullerton claimed ignorance.

In August, Fullerton advanced $1,500 to Blaisdell at Birdsall's prompting, and on September 11 met with Birdsall, calculated his outstanding obligation, and gave Birdsall a bond and a mortgage made by G. S. Mott he had gotten from Blaisdell in an unrelated transaction and against which he had advanced the $1,500. Birdsdall testified to further exchanges of checks and bonds with Fullerton—documented on October 9, 1868, as an advance of $2,000 in return for a bond and the Mott mortgage—and to his settlement with Smith by returning to him his bonds and $3,000 in cash.

The defense asked one question on cross-examination, eliciting from Birdsall that he and Fullerton had no understanding about and never discussed the disposition of the moneys received from Smith.

Finally, Alvah Blaisdell was called, the Court overruling the defense objection to his testimony because he was currently serving a 3-year sentence in Sing Sing. He testified to his initial meeting at Fullerton's office with Belknap and Fullerton where he was recruited to obtain testimony against distillers and revenue officers who had committed fraud, Smith being selected as the first target. He and Belknap approached Du Puy for an affidavit against Smith which was drafted by Knox.

Fullerton was displeased with the handling of Smith's arrest and related what had happened at Birdsall's office after it occurred, repeating that he did not think that was the time or place to settle such a matter and that he had written a letter to Birdsall accordingly. Fullerton later told him that Smith had settled and that Birdsall had the money, and there was a further discussion of what should be done with it. Blaisdell pointed out that his recruits were entitled to be paid—among them Moses and Jacob Dupuy and Windust—and was told to see Birdsall about it,

which he did, successfully. Blaisdell received $1,500 from Fullerton for the work he had done, identifying on cross an August 6 letter to Birdsall from Fullerton agreeing to make the $1,500 advance to him secured by the Mott mortgage but asserting that this was the first he had heard of such an intended arrangement.

The fifth day of trial, Friday, March 11, brought cameo appearances by many witnesses, among them:

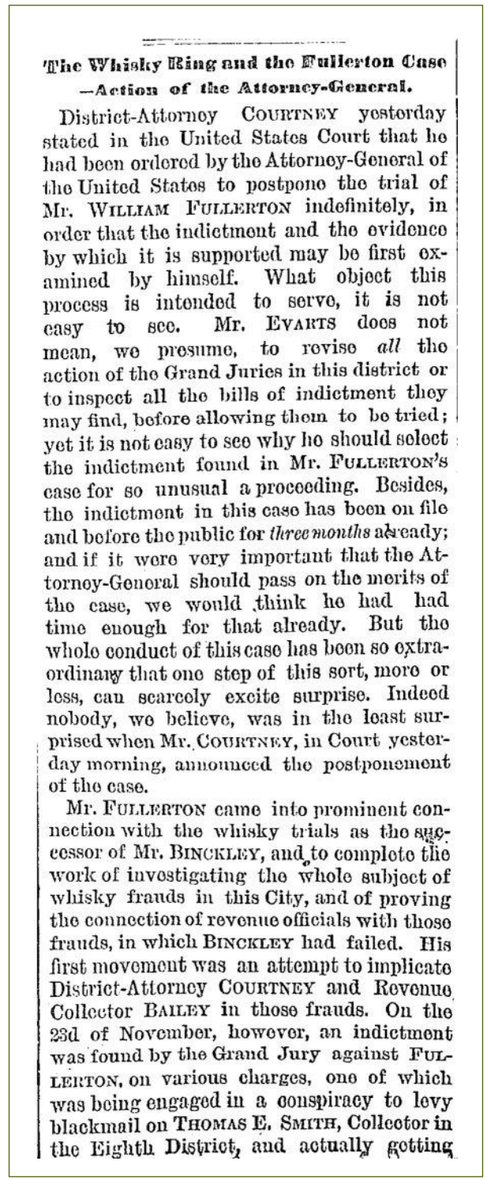
- Moses Dupuy, son of Jacob who had given the June declaration against Smith, testified about its preparation.[40]

- E. A. Rollins, sometime Commissioner of Internal Revenue, identified a letter he had sent to Fullerton and Knox under date of July 18, 1868, with McCullough's concurrence, advising that the firm had not been retained to act against Collector Bailey "or any other parties" and that any evidence should be turned over to the Treasury Department or to Courtney. On cross, he was confronted with a letter dated September 19, 1868, from Attorney General Evarts to Fullerton, addressing him as "special counsel for the United States" in the prosecution of Commissioner E. A. Rollins and asserting that professional responsibility for the cases "rests with you and the District Attorney."

- Hugh McCullough, former Secretary of the Treasury, who denied that he had said he had no confidence in Courtney and testified that he had not authorized Belknap to hire Fullerton and did not remember meeting Fullerton before September 1868.

- Former Commissioner Gutman, who testified about the hearing in the Rollins prosecution brought by Binckley, in which Fullerton acted for the Government.

- Courtney, who testified that he had not seen the June affidavit or warrant for Smith until November, and that Osborn refused to discuss the matter with him. He also identified efforts by Fullerton to have a continuing role in the whiskey cases.

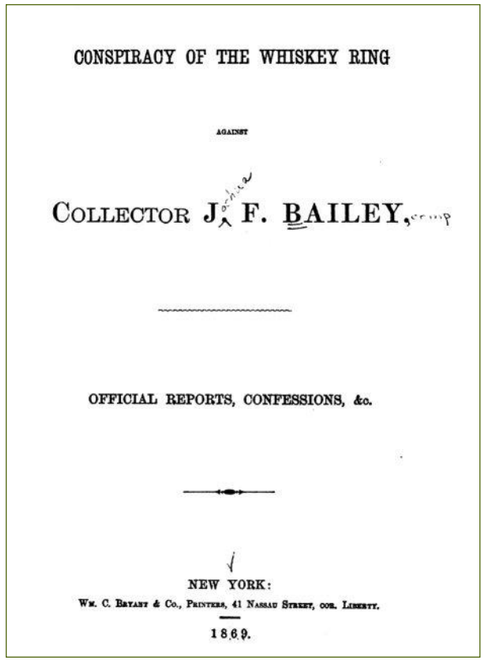


The Whisky Ring and the Fullerton Case —Action of the Attorney-General.

District-Attorney COURTNEY yesterday stated in the United States Court that he had been ordered by the Attorney-General of the United States to postpone the trial of Mr. WILLIAM FULLERTON indefinitely, in order that the indictment and the evidence by which it is supported may be first examined by himself. What object this process is intended to serve, it is not easy to see. Mr. EVARTS does not mean, we presume, to revise *all* the action of the Grand Juries in this district or to inspect all the bills of indictment they may find, before allowing them to be tried; yet it is not easy to see why he should select the indictment found in Mr. FULLERTON'S case for so unusual a proceeding. Besides, the indictment in this case has been on file and before the public for *three months* already; and if it were very important that the Attorney-General should pass on the merits of the case, we would think he had had time enough for that already. But the whole conduct of this case has been so extraordinary that one step of this sort, more or less, can scarcely excite surprise. Indeed nobody, we believe, was in the least surprised when Mr. COURTNEY, in Court yesterday morning, announced the postponement of the case.

Mr. FULLERTON came into prominent connection with the whisky trials as the successor of Mr. BINCKLEY, and to complete the work of investigating the whole subject of whisky frauds in this City, and of proving the connection of revenue officials with those frauds, in which BINCKLEY had failed. His first movement was an attempt to implicate District-Attorney COURTNEY and Revenue Collector BAILEY in those frauds. On the 23d of November, however, an indictment was found by the Grand Jury against FULLERTON, on various charges, one of which was being engaged in a conspiracy to levy blackmail on THOMAS E. SMITH, Collector in the Eighth District, and actually getting

The New York Times, February 11, 1869.



CONSPIRACY OF THE WHISKEY RING

AGAINST

COLLECTOR J. F. BAILEY.

OFFICIAL REPORTS, CONFESSIONS, &c.

NEW YORK:
WM. C. BRYANT & CO., PRINTERS, 41 NASSAU STREET, COR. LIBERTY.
1869.

Title page of *Conspiracy of the Whiskey Ring Against Collector J.F. Bailey,* 1869. Courtesy of Google Books/ Indiana University Libraries – Bloomington

Edwards Pierrepont then read a letter written by Fullerton to Blaisdell dated May 5, 1869, reporting his intention to obtain a pardon for him, acknowledging "the injustice of your imprisonment" and asserting that 'I will leave no effort to get you out" and that he would call him as a witness at his trial.

Thomas A. Harlan, sometime Deputy Commissioner of Internal Revenue, and a clerk from the Treasury Department both testified to the receipt on July 14, 1868 of Belknap's report, backdated to June 18, 1868, of the arrest of Smith based on accusations of bribery and turning a blind eye to unpaid taxes, alleged to contain Fullerton's handwriting.

Fred V. Tapley, a "United States detective" who had been instrumental in Bailey's efforts to establish that he had been framed, testified that he had made very diligent but unsuccessful efforts for two weeks with three men to find and arrest Belknap on the bench warrant.

Finally, over objection, Norman N. Finley identified "a letter of protection" written to him by Fullerton on November 6, 1868, in return for information incriminating Courtney or Marshal Murray.

The sixth day of the trial was given over to Edwards Pierrepont's lengthy review of the proof so far in support the admissibility of conduct by Belknap not involving Fullerton on the theory that it was part of the overall conspiracy. The exchanges of counsel at the end of the day illustrated the core of the issues: Fullerton's pointed out that the prosecution had been forced to drop its charges against one of the purported conspirators and to bring a second one from Sing Sing, but neither had incriminated Fullerton; Pierrepoint responded that if Fullerton intended that the case be settled in Washington, as his letter to Birdsall had said, no effort had been made to do so. When the trial resumed on Monday, March 14, the Court ruled in the prosecution's favor but spent the rest of the day excluding almost of that evidence as it was offered.

Finally, on March 15, the eighth day of trial, Birdsall was recalled, testifying on direct to payments he made to Belknap (of $2,000) and Blaisdell with Smith's money at Belknap's direction. He identified two letters from Fullerton, one dated August 4, 1868, and the other undated. The first insisted that Birdsall tell him what happened to Smith's money and referred to Belknap's "blunder in having Smith arrested by a person not a United States officer and then following it up by foolish offers to settle the affair for money," and the second urged him "to go to Washington without delay" in light of Belknap's accusation that "you do not intend to make an effort to adjust the matter with the Government, but bag the money." Birdsall testified on cross examination that Belknap had told him that he did not want Fullerton to know what was happening about Smith's money.

At this point the prosecution rested, without calling Smith, the victim of the alleged extortion scheme on trial. Collector Joshua F. Bailey, who had been present for the entire trial, walked out of the courtroom.

In light of the lack of evidence against Fullerton, as defense counsel saw it, a defense opening was waived, and the rest of the day was spent proving Fullerton's business relationship with the Mott family and contradicting the Government's single witness's

testimony that Fullerton's handwriting was on Belknap's backdated report.

The next day the defense called three witnesses, including Courtney's predecessor, E. Delafield Smith, to testify that none of the handwriting on Belknap's report was Fullerton's. Additional witnesses provided benign explanations for the Mott mortgage transactions.

When the defense rested and the prosecution announced that it had no further evidence, John K. Porter moved for a directed verdict of acquittal based on the undisputed facts. After his argument and some exchanges about the judges' power to enter a directed verdict, the judges directed the jury to acquit Fullerton, which it immediately did. Judge Woodruff then specified that this disposition of the case on legal grounds reflected no doubt of what the jury's verdict would have been:

> *[Although t]he progress of the trial showed that there were facts which it was fit should be explained … even the proof offered by the prosecution is … in harmony with the purest integrity of the accused.… No case has been made out which would at all warrant the jury in finding a verdict of guilty.*[41]

After the jury's verdict, "[i]t was extremely difficult to restrain the enthusiasm of Judge Fullerton's many friends, and when the Court adjourned, their pent-up emotion broke forth in repeated rounds of cheers for the honorably-acquitted defendant and his indefatigable counsel."

What happened to other defendants, particularly Belknap, has not been ascertained. William Fullerton continued as a leader of the bar, securing such conspicuous engagements as the representation of Theodore Tilton at the trial in 1875 of his action against Henry Ward Beecher for adultery with Tilton's wife, at which Fullerton received lasting fame for his cross examination of the defendant.[42] Fullerton also served as one of the defense counsel at the historic trial of Harrison Tweed in 1873, where he and other counsel were held in contempt for questioning the impartiality of the judge.[43] Biographical essays do not mention his own 1870 prosecution.[44] Indeed, except for the reference in the Cravath firm history noted above, no reference to the trial has been located in any source other than newspapers and law reports.

After he walked out of the Fullerton trial on March 15, 1868, Joshua F. Bailey, the valiant and much-abused Collector praised by Courtney and, in his opening, by Tracy, kept on going—to Buenos Aires and Rio de Janeiro. While he may have been innocent of the crimes he had until then been accused of, later that week it was discovered that he had been a major embezzler from whiskey taxes he had collected.[45] In an acrimonious debate years later in the United States Senate, his career was summarized thus:

> *Joshua F. Bailey, collector of internal revenue in the fourth district of New York, a defaulter for $603,951, who was transferred afterward by President Grant to the thirty-second district of New York, and turned out in that district to be a defaulter for $586201.46, and who absconded March 15, 1870, without paying a dollar of either sum.*[46]

He was pardoned by President Grant in 1876.

ENDNOTES

1. Chester L. Barrows, *William M. Evarts, Lawyer, Diplomat, Statesman* 169 (1941); Homer Cummings and Carl McFarland, *Federal Justice, Chapters in the History of Justice and the Federal Executive* 218–29 (1937); James Handelsman Shugerman, "The Creation of the Department of Justice: Professionalism without Civil Rights or Civil Service," 66 Stanford L. Rev. 121, 129, 131–32, 159 (2014).
2. Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940*, at 274 (2013).
3. Judith S. Kaye, "There Shall be a Court of Appeals…," 94 (1997). Fullerton's service on the Court of Appeals earns him only the paragraph allocated to an *ex officio* Judge in *The Judges of the New York Court of Appeals* 1000 (Albert M. Rosenblatt ed., 2007) [hereafter *Rosenblatt*].

   In its configuration from 1847 to 1870, the Court of Appeals consisted of four judges elected statewide for eight-year terms and four justices of the Supreme Court appointed for one-year terms. Francis Bergan, *The History of the New York Court of Appeals, 1847–1932*, at 19, 35 (1985); *Rosenblatt*, xxxii.

4. To compile a complete collection of Judge Fullerton's opinions, recourse to other sources is necessary, specifically to Volumes I and II of *Reports of the Decisions of the Court of Appeals of the State of New York, Not Hitherto Reported Under Official Sanction* (Austin Abbott ed., 1878). The Preface, at iii, to Volume I explains:

   > *From various causes (rarely relating to the value of the decisions), a large number of cases were omitted from the current reports during 1863 to 1868, and a few in earlier periods. Among these were more than half of the opinions of the court on important legal questions, delivered at eight regular quarterly terms.*

   A footnote to that sentence elaborates that "[t]he opinions in a number of these omitted cases were printed in the seven volumes of the file of opinions of the court, known as the Transcript Appeals," more formally, volumes 3 and 4 of Joel Tiffany, State Reporter, *Transcript Appeals – The File of Opinions in Cases Argued before the Court of Appeals of the State of New York during the June Term, 1867" and "the September Term, 1867"* (1868). Opinions by Judge Fullerton missing from the *New York Reports* may be found in those two sources.

5. *The Papers of Andrew Johnson, Vol. 15, September 1868–April 1869*, at 12–13 (Paul H. Bergeron ed., 1998) [hereafter *Johnson Papers*]. The month before Evarts sent this letter of September 3, 1868 to Johnson, he had been forced to advise the President that the resignation Rollins had purported to tender was ineffective to create a vacancy in the position. *The Internal Revenue Record and Customs Journal* 7, 54 (1868) [hereafter *Internal Revenue Record*]. Rollins remained in this position until replaced by President Grant.

6. Second Circuit Historical Committee, *The First 100 Years (1789–1889): The United States Attorneys for the Southern District of New York* 74–75 (1987).

7. *See* David P. Dyer, *Autobiography and Reminiscences* (1922); John A. Joyce, *A Checkered Life* (1883); Gen. John McDonald, *Secrets of the Great Whiskey Ring and Eighteen Months in the Penitentiary* (1880). Dyer, under a recess appointment as United States district attorney during these trials, convicted McDonald, the highest ranking Internal Revenue agent in St. Louis, for being one of the operators of the "Ring" there; Joyce, McDonald's subordinate, was also convicted, among others. There are striking parallels between the St. Louis cases and Fullerton's, among which were President Grant's discharge of John B. Henderson, a former U.S. Senator recruited to try the cases with Dyer, for a summation suggesting Presidential interference with the Act's enforcement, later documented at length in McDonald's book. Dyer's prosecution of Babcock cost him the nomination to his position for a four-year term. Grant pardoned McDonald.

8. Spencer Byard, "The Successive Locations of the United States District and Circuit Courts in the Borough of Manhattan," at 9–12 (Installation at Foley Square Courthouse).

9. Daniel J. Paisley, "Lewis Bartholomew Woodruff," *in Rosenblatt* 116–120; Elizabeth Duwe, "Lewis Bartholomew Woodruff 1809–1875," *in The Judges of the Second Circuit* 3–13 (2014).

10. Emer M. Stack, "Samuel M. Blatchford 1820–1893," *in The Judges of the Second Circuit, supra* note 9, at 23–28 & n.8.

11. Howard T. Sprow, "Samuel Nelson," *in The Oxford Companion to the Supreme Court of the United States* 676–77 (Kermit L. Hall ed., 2005). The motion is discussed in its place in the chronology of the proceedings, *infra*.

12. *The First 100 Years, supra* note 6, at 76–78.

13. Susan S. Dautel, "Benjamin Franklin Tracy," *in Rosenblatt* 215–25; *see also* B. C. Cooling, *Benjamin Franklin Tracy: Father of the Modern American Fighting Navy* (1973).

14. Albert M. Rosenblatt, "John Kilham Porter," *in Rosenblatt* 93–98. Judge Porter was also the founder and first president of the New York State Bar Association.

15. 1 Robert T. Swaine, *The Cravath Firm and Its Predecessors 1819–1947*, at 256–57 (2007). In the pretrial stage of the case, Fullerton was represented by two additional counsel: Charles O'Conor, who had been Fullerton's law partner, and David Dudley Field. O'Conor had been United States district attorney for the southern district of New York in 1853–54.

16. "An Act to provide Internal Revenue to support the Government, to pay Interest on the Public Debt, and for other Purposes," ch. 173, 13 Stat. 223 (June 30, 1864). This 84-page statute established an elaborate bureaucracy and procedures for the imposition and enforcement of excise taxes on many manufactured products, including alcoholic beverages.

17. A United States Commissioner issued warrants and arraigned and bailed persons arrested on them, functions now performed by United States Magistrates. The position of Commissioner was abolished in 1968.

18. *Johnson Papers* 39, 65.

19. *Id.* at 38–44.

20. *Id.; see also id.* at 51–53. And one of his witnesses—against Deputy Commissioner Thomas Harland—was convicted of perjury. *United States v. McHenry*, 26 F. Cas. 1097 (C.C.S.D.N.Y. 1869) (No. 15,681).

    But Binckley did not give up. He filed a lawsuit against Rollins for causing him to lose his job. N.Y. Times, May 3, 1870. Also, a report in the *Baltimore Sun* of March 11, 1869, picked up by other papers (such as the *Daily Alta California*, April 19, 1869), said that, accosted by Binckley in the street in Washington, D.C., Rollins raced to refuge in the Internal Revenue Bureau, despite Binckley's shouts of "Stop, you coward!" However, when Binckley confronted Harland next, he responded "Oh, Yes, I'll fight," and, according to the newspaper account: "The words were scarcely uttered, when 'whack' went Binckley's fist in Harland's neck, and down into the gutter went the Deputy Commissioner, Harland under and Binckley on top.…" Of Binckley the *New York Daily Tribune* (November 14, 1868) said: "We … concluded that he was in deeper water than was good for him. He seemed a well-meaning man, intent on doing his duty; but fewer words and more shrewdness were absolutely requisite in his position."

21. *Johnson Papers* 59–60, 104–105.

22. Henry L. Clinton, *Celebrated Trials* 323 (1897). This statement appears in his report of a whiskey tax case in early November, 1868 in which an assistant United States attorney, having allowed the a jury to be empaneled when he was unable to go forward, after several adjournments allowed a juror to be withdrawn which, on motion of the defendants, forced dismissal of the indictment.

23. *Johnson Papers* 236 n.1. Evarts's correspondence with Courtney was delivered to Congress, along with an explanatory cover letter from Evarts, in February, 1869. Ex. Doc. No. 51, U.S. Senate, 40th Cong., 3d Sess. Evarts had written to Courtney on November 2, 1868, instructing him to suspend certain whiskey tax prosecutions, including Blaisdell's, because, as his letter to the Senate explained, Fullerton had brought to the President's attention "sundry depositions and certificates imputing flagrant official misconduct,

as well as violations of the criminal law" requiring Courtney's removal from office. Fullerton also alleged that Courtney was prosecuting individuals to whom Fullerton had promised the Government's protection in return for information about criminal activity. However, Courtney's response, in person and later in writing, which included a demonstration that the indictment of Blaisdell could not have been based on any information that Blaisdell had provided Fullerton, convinced Evarts, who instructed him by letter of November 21, 1868, to proceed to trial on the Blaisdell indictment.

24. The next day Fullerton published a notice "to the Public" which began:

    > *The parties implicated in what are known as the whiskey frauds, under the leadership of S. G. Courtney, the United States District-Attorney, have succeeded, after an effort of more than two weeks' duration, in procuring an indictment against me for an alleged conspiracy to defraud a revenue officer. I do not know upon what evidence this has been obtained, but I do know that, whatever it is, it is wholly false.*

25. IX *The Internal Revenue Record and Customs Journal* 32–35, 82–87 (1869); *see also United States v. Blaisdell,* 24 F. Cas. 1162, 1174 (S.D.N.Y. 1869) (No. 14,608).

26. *Conspiracy of the Whiskey Ring against Collector J. F. Bailey: Official Reports, Confessions &c.* (1869), *available at* https://books.google.com/books?id=2npTAEtCsvgC.

27. Courtney's December 17, 1868 letter, and Evarts's December 19 reply, were published with others to be reviewed *infra* in the *New York Times* on March 9 and 10, 1869. The reader will have in mind that there was a change in national administration on March 4, 1869 with the inauguration of Ulysses S. Grant.

28. *United States v. Fullerton*, 25 F. Cas. 1224 (C.C.S.D.N.Y. 1868) (No. 15,175); IX *Internal Revenue Record* 3–4.

29. In contrast to the first two motions, the motion papers on Birdsall's motion appear in the National Archives and Records Administration case file, and a copy of an incomplete transcript of the oral argument of that motion exists in the papers Edwards Pierrepont left behind.

30. N.Y. Times, Mar. 14, 1869.

31. *See supra* text accompanying note 23.

32. N.Y. Times, Mar. 10, 1869.

33. N.Y. Times, Feb. 13, 1869. Two days before, the *New York Times* had published an editorial alleging that:

    > *the most direct and earnest efforts were made by Mr. Fullerton's friends to procure an abandonment of the prosecution. Personal intercession, and, unless we are mistaken, pecuniary inducements were resorted to for purpose of securing this result.*

    The editorial alleges that from November 24 onwards, Fullerton has "bent all his efforts to *escape a trial*.… He has done precisely what a guilty man would do under the same circumstances and what none but a guilty man – who feared the results of a trial more than he feared the effect of an evasion of it and an inferential confession on his part, – would ever dream of doing."

34. N.Y. Trib., Mar. 12, 1869.

35. N.Y. Times, Mar. 14, 1869.

36. N.Y. Times, June 6 & 8, 1870.

37. The press reported that the Court was advised on March 2 that the prosecution would call twenty-two witnesses.

38. XI *Internal Revenue Record* 78 (1870)

39. References to events at the trial are drawn from the contemporaneous issues of the *New York Times* and the *New York Tribune* without further citation. There is no transcript.

40. The travails of the Du Puys deserve their own law review article. It seems that Moses must have testified instead of Jacob because the latter was still in prison, both having been convicted in the United States circuit court for the southern district of New York in January 1869 of "rescuing" thirty-two barrels of spirits from a revenue officer, but Jacob's longer, two-year sentence was not yet fully served. Remarkably, for reasons that have not been identified, on his last day in office, March 3, 1869, President Andrew Johnson granted pardons to both Du Puys which were sealed and delivered to Marshal Murray of the southern district of New York on March 6. On March 8 President Grant issued an order revoking the pardons in circumstances unidentified, and both Du Puys stayed in prison. An application for *habeas corpus* by Moses was rejected, Judge Blatchford distinguishing *Marbury v. Madison* on the basis that, while presidential signing and sealing were sufficient for the effectiveness of the judicial appointments in that case, to be effective a pardon had not only to be signed by the President and sealed but also delivered to the individual pardoned, which these had not yet been. *In re De Puy*, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3,814).

    Three days after Judge Blatchford's decision, President Grant wrote Pierrepont:

    > *I am truly glad of the result not so much because I wanted the legality of my act sustained as because I want to see evil doers punished. – I congratulate you on the result and hope you will be successful in bringing more of the same sort of public plunderers to justice.*

    19 *Papers of Ulysses S. Grant, July 1, 1868 – October 31, 1869,* at 199–200 (1995).

41. A brief summary of the decision is reported. *United States v. Fullerton*, 25 F. Cas. 1225 (C.C.S.D.N.Y 1870) (No. 15,176); the newspaper account is more informative. The same gambit failed when Porter, counsel for Babcock at his trial six years later, proposed it on the authority of the decision in Fullerton, Judge Dillon holding that: "The case against Fullerton is too briefly reported to enable us to judge exactly of its circumstances or precisely on what principle it was taken from the jury." *United States v. Babcock*, 24 F. Cas. 912 (C.C.E.D. Mo. 1876) (No. 14,486).

42. Francis L. Wellman, *The Art of Cross-Examination* 191–95 (1908); *see* A.D. Rockwell, *Rambling Recollections: An Autobiography* 265–71 (1920), *available at* https://archive.org/details/ramblingrecollec00rock. His opponents at trial included William M. Evarts and B. F. Tracy, who again gave the opening statement.

43. Leo Hershkowitz, *Tweed's New York: Another Look* 261 (1979).

44. *E.g.,* Henry Wilson Scott, *Distinguished American Lawyers, with Their Struggles and Triumphs in the Forum* 393–400 (1891), *available at* https://books.google.com/books?id=Gz8tAAAAYAAJ.

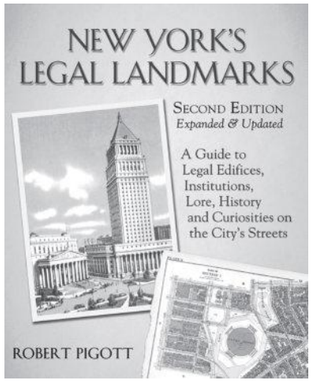
45. XI *Internal Revenue Record* 100 (1870).

46. 9 Cong. Rec. 2,327 (1879).

Portrait of Elihu Root, c. 1902.
Library of Congress, Prints & Photographs Division, LC-USZ62-92819

Elihu Root: Nobel Peace Prize Recipient And Manhattan Real Estate Pioneer

by Robert Pigott



Robert Pigott is the general counsel of a nonprofit developer of affordable housing in New York City and the author of *New York's Legal Landmarks*, a historical guidebook to New York City devoted to old courthouses and locations related to the law and the legal profession. He is a former Bureau Chief of the New York Attorney General's Charities Bureau.

Towards the end of his life, Elihu Root, the founder of the firm that would become Pillsbury Winthrop, said that "the office of being a leading lawyer in New York was the only one I ever cared about." Such a confession is remarkable coming from a Nobel Peace Prize winner who also served as U. S. Secretary of War, U. S. Secretary of State and U. S. Senator from New York. But Root's spectacular *curriculum vitae* overlooks his significance to the Manhattanite who lives by the mantra "location, location, location."

On two occasions, Root blazed trails realty-wise, making certain neighborhoods or modes of living respectable for upper-class New Yorkers. In 1905, he built an elegant mansion at 71st Street on Park Avenue at a time when uncovered railroad tracks still ran down the Avenue's center. Only six years later, he was among the first prominent New Yorkers to move from a freestanding private home to one of the luxury apartment buildings that had begun to supplant the Gilded Age mansions lining Fifth Avenue opposite Central Park.

Root was not a child of the New York City streets. The son of a Hamilton College professor of mathematics, he first came to New York City directly after graduating as valedictorian of the Hamilton College Class of 1865. He made the trip with his brother Oren on a New York Central train from Utica to Albany, then ferrying across the Hudson River to take a Harlem Railroad train to 26th Street and Fourth Avenue—the location of the railroad's Manhattan terminal before the 1871 construction of the Grand Central Depot. On their first night in New York City, in what seems to be youthful extravagance, the Root brothers dined at the Astor House.[1]

Elihu Root's New York City life then took a more modest direction. He rented a room in a boardinghouse on Seventh Avenue between 41st and 42nd Streets, supporting himself by giving Latin lessons.[2] Root later taught at a girls' school at 1 Fifth Avenue.[3]

But he quickly began his pursuit of a legal career, enrolling in New York University School of Law, from which he received a law degree in 1867. Root's first law firm job was with Man & Parsons.[4] (Name partner John E. Parsons, one of the founders of the New York City Bar Association, played a leading role in prosecuting the Tweed Ring, but was

998 Fifth Avenue, where Root was one of the first tenants.
Published in *The Architect*, Vol. 6, No. 61, 1912

New York University (then known as University of the City of New York), Washington Square, 1850, where Root studied law.
The Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library

himself, towards the end of his career, indicted on antitrust charges as a director of the Sugar Trust.)

In 1868, after only a year with the firm, Root formed his own law firm with John H. Strahan, Strahan & Root. "With several other young lawyers, they took office space on the top floor of a ramshackle four-story wooden building at 43 Pine Street, one of the old residences which still stood between Broadway and Nassau Street."[5] The office had no elevator, stenographer, telephone or typewriter.[6]

Root's practice flourished, although an early bit of legal work, while prestigious, would dog him to the end of his days. In 1871, he was part of the team of lawyers defending William M. Tweed in one of the several trials that brought down the corrupt Tammany Hall boss (facing off against prosecutor John Parsons, who had been his boss only a few years earlier). However, despite any taint from the association with Tweed, Root became one of the leading members of the bar in Gilded Age New York. In the current era of lawyer specialization, it is remarkable how the leading lawyers of the late 19th century, such as Root, excelled at once as litigators, transactional lawyers, and corporate counsel.

As a bachelor lawyer, Root lived from 1871 to 1878 on Irving Place between 15th and 16th Streets, a short walk from the cynosure of affluent, Gilded Age New York City, the Fifth Avenue Hotel at 23rd Street. The plaque on the building that currently stands where Root's rowhouse once stood, commemorating his time on Irving Place, is the only tangible trace in New York City of his many years as one of its leading citizens.[7] Upon his marriage in 1878, he lived briefly with his new in-laws and then in a house they bought for the newlyweds at 30 East 55th Street.[8]

Beginning in 1884, Root successively formed law partnerships with Willard Bartlett, Theron G. Strong, and Samuel B. Clarke.[9] Increasingly active in Republican politics, Root discussed with Speaker of the House Thomas B. Reed the possibility of Reed's joining his law firm (then Root & Clarke) if Reed lost the leadership fight in the House of Representatives

Photograph of Root's residence at 71st Street on Park Avenue, c. 1915.
Wurts Bros. (New York, N.Y.) / Museum of the City of New York. X2010.7.1.4446

Elihu Root

Root's summer home in Clinton, NY.
From the collection of the author

in 1889; however, that never materialized. In 1897, Root formed the firm Root, Howard, Winthrop & Stimson with offices in the Mutual Life Building at the corner of Nassau and Liberty Streets. This firm grew into Winthrop, Stimson, Putnam & Roberts, one of New York City's venerable "white shoe firms," which merged in 2001 with a large San Francisco firm to become Pillsbury Winthrop. Root remained with the firm until 1899, when he was appointed Secretary of War by President McKinley.

Befitting his stature as a successful New York City lawyer, in 1886 Root purchased a brownstone at 25 East 69th Street, between Fifth and Madison Avenues.[10] It was one of four connected rowhouses built in 1885 in the Queen Anne style. He and his family remained there until 1899 when, upon his cabinet appointment, they relocated to Washington, D.C. Root's former East 69th Street rowhouse, while still standing, was renovated in 1929 in the Georgian style.

When Root stepped down as Secretary of War in 1904 (Theodore Roosevelt, who had become president in 1901 when President McKinley was assassinated, had retained Root in his cabinet position), he returned to New York City. "Root did not reenter his old firm but took offices on the same floor of the Mutual Life Building at 32 Liberty Street. He did not wish to become engaged in the general practice of law as an attorney, but confined himself to acting as counsel."[11]

When Root relocated a second time to Washington in 1905 upon his appointment as Secretary of State, he and his family "were just moving into the handsome new New York house which they had built at 733 Park Avenue, but rented that house for four years to the Paul Mortons."[12] To understand how remarkable it was that Root built his home on Park Avenue, it must be remembered that, after the construction of Grand Central Depot (later Station), the portion of Park Avenue above 44th Street was still open railroad tracks. To live on Park Avenue back then

Open train tracks on Park Avenue, heading to and from Grand Central Depot, c. 1900, before it was the site of fashionable residences such as Root's 1903 mansion at 71st Street. Photo courtesy of Frank English/MTA Metro-North Railroad

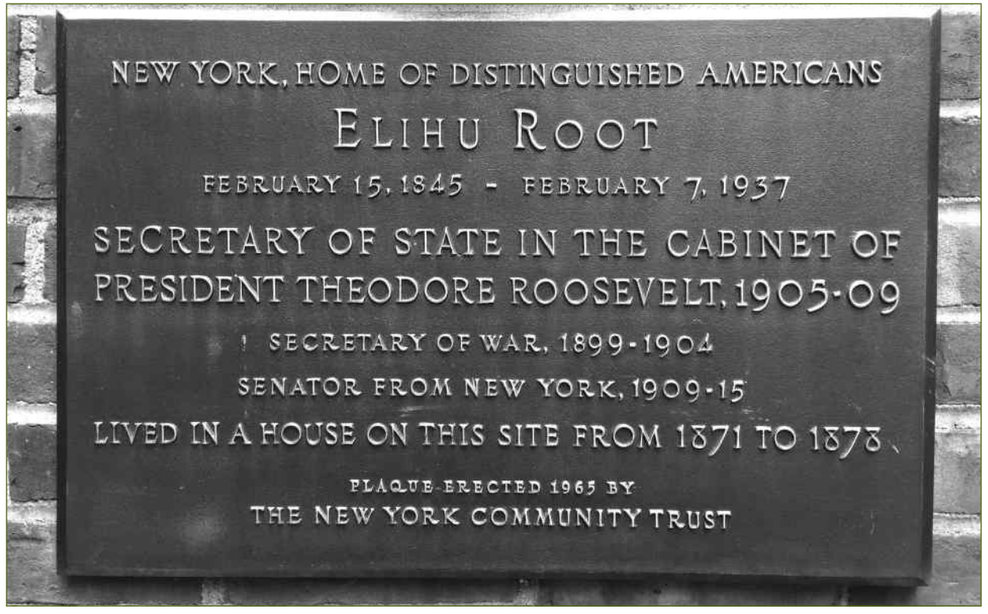
placed one among New York City's working class, not the affluent who inhabit Park Avenue today. It was only with the electrification of the trains, which permitted the railroad tracks to be covered over, that Park Avenue would become a fashionable address. But Root was ahead of the curve, building his home when the railroad tracks were still uncovered in anticipation of the transformation that the avenue would undergo. This move was thus the first of the two that would earn him his status as a Manhattan real estate pioneer.

As chronicled by architect Robert A. M. Stern and his collaborators in *New York 1900:*

> *When Elihu Root began construction in 1903 of his house on the southeast corner of Park Avenue and 71st Street, on the same block where Gerrish Milliken later assembled his brownstone palace, it marked an important step in the transformation of the avenue from an unimportant street of ordinary tenements and modest rowhouses to one of the city's most fashionable boulevards, second only to Fifth Avenue.*
>
> *[Carrere & Hastings'] red brick house on Park Avenue for Senator Elihu Root was built in 1903–05 in an English Regency style that struck one critic as the 'embodiment of well-proportioned dignity.' 'It is a significant fact that the house of one so prominent in national life as Mr. Root should be strikingly free from the profusion of ornament and meretricious finery which blazes forth from the façades erected of many notable citizens,' according to the editors of the magazine* Indoors and Out.[13]

Although Root returned to 733 Park Avenue when his time in the Roosevelt administration ended, he did not remain there long. By this point, Root was dividing his time between New York City

Photograph of the Mutual Life Building on Nassau Street, c. 1890, where Root had the offices of his law firm, which evolved into Winthrop, Stimson, Putnam & Roberts. Photographer unknown / Museum of the City of New York. X2010.11.14484



A plaque highlighting Root's residency at 22 Irving Place. Photo courtesy of the author

and Washington, having been elected United States Senator from New York in 1909. (Despite his lengthy career in government, Root never campaigned for public office; U.S. Senators were still elected by state legislature at the time, and his other positions were all appointive.)

In 1911, a shrewd realtor (the Douglass Elliman whose company exists to this day) induced Root to play his second great role as a Manhattan real estate pioneer. The late 19th century saw commerce steadily advance up Fifth Avenue, crowding out the Vanderbilts and other Gotham plutocrats from Fifth Avenue below 59th Street. However, the portion of Fifth Avenue above 59th Street facing Central Park was a phalanx of Gilded Age mansions that seemed destined to define the east side of the Park for centuries. Most did not last more than a generation.

Wealthy New Yorkers were slow to embrace apartment living. In their eyes, apartments were either for the very poor, such as the tenement-dwelling immigrants of the Lower East Side, or for Europeans of looser morals. But the great cost of maintaining a private mansion in New York City, exacerbated by the introduction of the federal income tax, made the replacement of single family homes on the avenues by luxury apartment buildings inevitable.

The story of Root's final New York City dwelling, 998 Fifth Avenue at 81st Street, is chronicled in *New York 1900:*

> *McKim, Mead & White's design for Fifth Avenue was more chaste, presumably because its very exclusive clientele was thought to be more refined than the upper-middle-class tenants in the Alwyn at 180 West Fifty-eighth Street. Above the granite base, the façades were sheathed in limestone carved with Italian Renaissance details. The twelve-story building with an almost square plan only filled half the block-long front along Fifth Avenue, but the floors were cleverly arranged so that all the various duplex and simplex units except one had only servants' and service rooms on the court.… The success of the building was ensured when the rental agent, Douglas L. Elliman, persuaded Senator Elihu Root to move into the building by offering him a cut-rate rental: $15,000 per year instead of $25,000 per year. Once Root, who had earlier established the respectability of a Park Avenue address when he built his house there in 1903 moved to 998, others immediately followed.*[14]

A little more than a year later, Root might have been less susceptible to Douglas Elliman's monetary inducement. In December 1913, for his work promoting international arbitration, he was awarded the Nobel Peace Prize, which then carried with it a cash award of about $40,000.

After his one term as U.S. Senator from New York ended in 1915, Root, then 70 years old, did not resume fully the practice of law. Rather than return to the firm he had founded, Winthrop Stimson, he became Of Counsel to Root, Clark, Buckner & Howard, the firm headed by his son, Elihu Root, Jr.[15] Located at 31 Nassau Street, across the street from Root's old firm, his son's firm evolved into what was, until a few years ago, one of the nation's leading law firms: Dewey, Ballantine, Bushby, Palmer & Wood.[16] Indeed, name partner Emory Buckner, who also served as United States Attorney for the Southern District of New York from 1925 to 1927, is credited with introducing many of the practices and methods of the modern, large law firm.[17]

Like many prosperous Manhattanites, Root maintained a country home; unlike most, he chose Clinton, New York, as the site for his. After leaving Clinton upon his graduation from Hamilton College in 1865, Root had returned there regularly to visit his parents (and to attend meetings of the College's Board of Trustees). In 1893, Root purchased the house on College Hill at 101 College Hill Road, which was adjacent to the house where he had been raised.[18] He and his wife and children would return both to Clinton and to Southampton, where her side of the family had a home. But, by 1907, after his father-in-law had died, Clinton had become Root's principal and permanent summer home. The Elihu Root House, listed on the National Register of Historic Places, remained in the Root family until the 1970's and was sold in 1978 to Hamilton College, which has used it for administrative offices.

Root's attachment to Clinton was enduring. When he died in 1937, he was buried in the Hamilton College Cemetery. His connection to New York City real estate, however, far surpasses the mere physical one he has with a small plot in Upstate New York. Awareness of Root's accomplishments as a lawyer and statesman and his recognition as a Noble Peace Prize recipient may be fading, but his place in Manhattan real estate lore is secure.

ENDNOTES

1. Phillip C. Jessup, *Elihu Root* 53 (1938).
2. *Id.* at 54.
3. *Id.* at 55.
4. *Id.* at 63. Jessup incorrectly refers to the firm as "Mann and Parsons."
5. *Id.* at 66.
6. *Id.*
7. The rowhouse in which Root resided appears to have had the address 20 Irving Place, but the building subsequently erected on the site that it (and adjacent rowhouses) occupied, and to which the historic plaque is affixed, has the address 22 Irving Place.
8. Jessup, *supra* note 1, at 107.
9. *Id.* at 161–62.
10. *Id.* at 159.
11. *Id.* at 413.
12. *Id.* at 459.
13. Robert A. M. Stern, Gregory Gilmartin, & John Montague Massengale, *New York 1900: Metropolitan Architecture & Urbanism* 353 (1983).
14. *Id.* at 290, 295.
15. Jessup, *supra* note 1, at 341.
16. In 2007, the firm merged with LeBoeuf, Lamb, Greene & MaCrae to form Dewey & LeBoeuf LLP, which dissolved only five years later amidst charges of financial improprieties.
17. *See generally* Martin Mayer, *Emory Buckner: A Biography* (1968).
18. National Register of Historic Places Inventory – Nomination Form for Grant House a.k.a. Elihu Root House, dated July, 1972.

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Red Hook Community Justice Center's Youth & Community Programs Associate **Joshua Pacheco** spoke to Judith S. Kaye Teaching Fellow **Aaron Welt's** class in fall of 2019 about the history of the criminal courts in the State and the unique problem-solving role RHCJC takes to solve community problems. Through the fellowship, juniors and seniors at Bard High School Early College Manhattan and Queens can take legal history classes while earning their high school diplomas and Associate's degrees.

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