STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT

By
STEPHEN B. PRESSER

A BICENTENNIAL PROJECT

Published under the Auspices of
The Bicentennial Committee of
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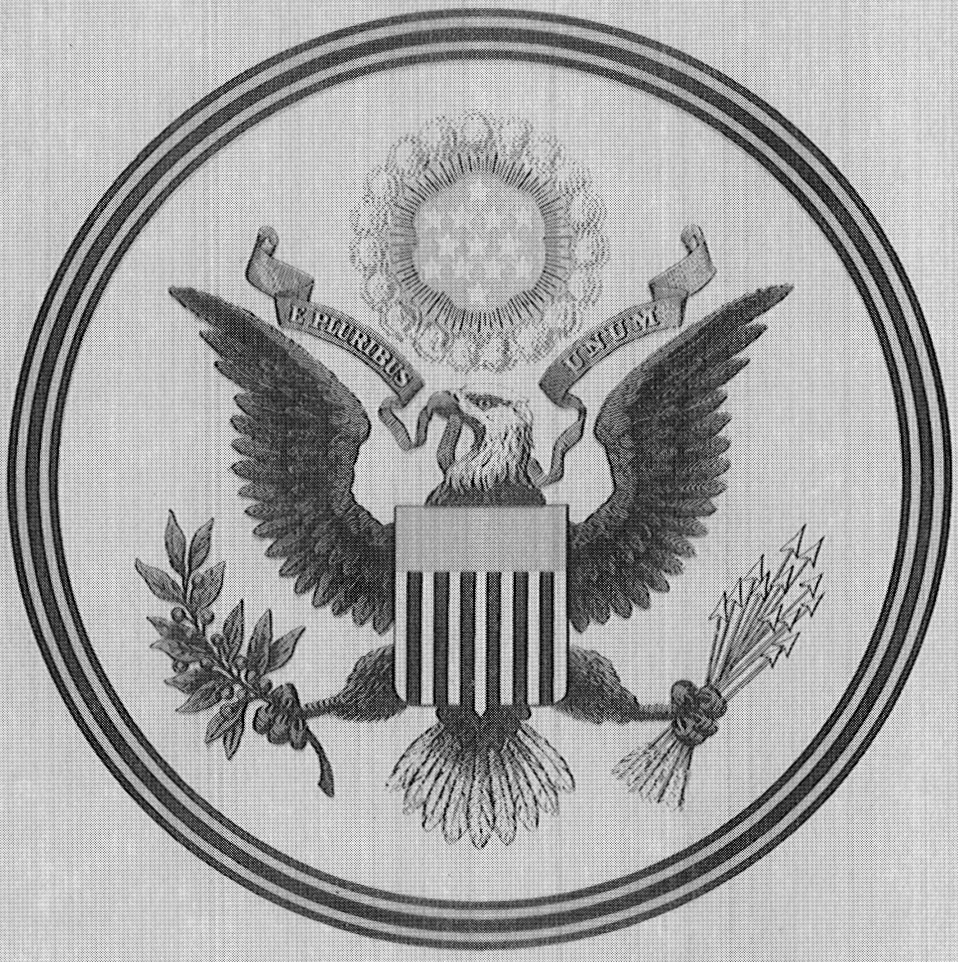

Obverse Side of the Great Seal

The Great Seal of the United States

1982 is both the 200th Anniversary of the Great Seal and Philadelphia's 300th Anniversary. The Seal was designed, engraved and first utilized in Philadelphia. Among the Seal's four creators was Francis Hopkinson, the first United States District Court Judge for the District of Pennsylvania.

STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT 1790-1980

Photo from Independence National Historical Park Collection

Independence Square, Philadelphia.
Left to right: Old City Hall, East Wing, Independence Hall, West Wing, Congress Hall.

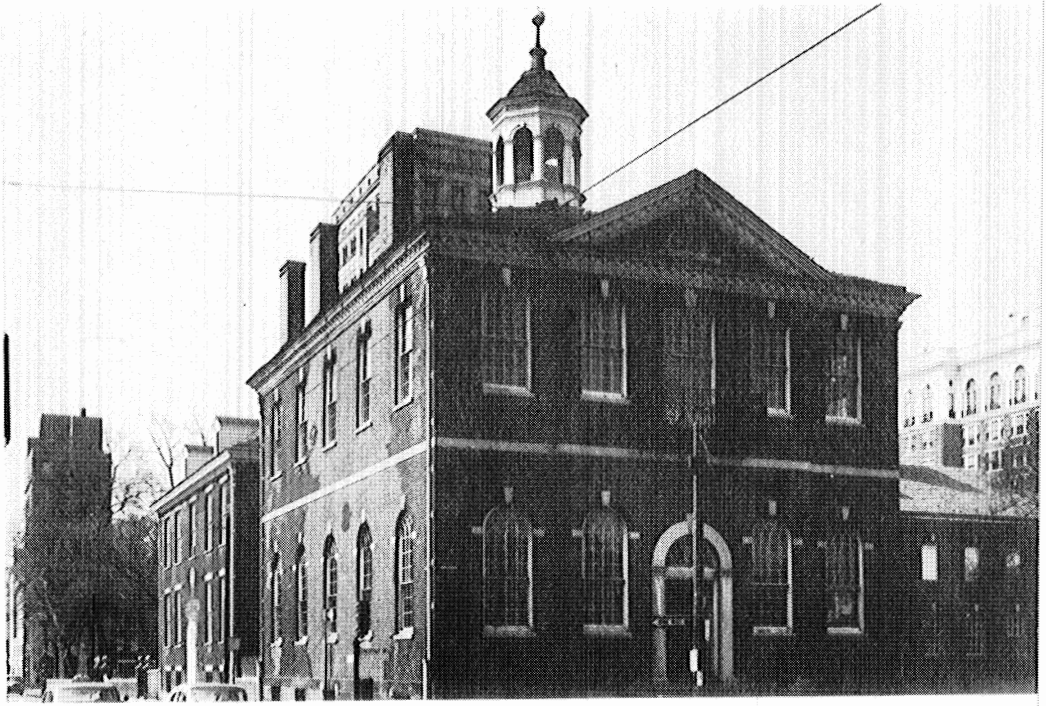

Photo from Independence National Historical Park Collection

Old City Hall, completed in 1791, was first occupied by the United States District Court for Pennsylvania and subsequently by the United States Supreme Court from 1791 to 1800.

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By
STEPHEN B. PRESSER

With the Assistance of
RICHARD SIMPSON
KENNETH GOODSMITH
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HON. COLLINS J. SEITZ
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Foreword

The federal judiciary has been actively involved in an ambitious program to commemorate the bicentennial of the Declaration of Independence in 1976. Pursuant to the authority granted by the Judicial Conference Bicentennial Committee, the Chief Justice of the United States appointed a Conference Bicentennial Committee and circuit subcommittees. The primary function of each circuit subcommittee was to prepare a history of its circuit.

The Third Circuit subcommittee was chaired by Collins J. Seitz, Chief Judge of the Third Circuit, (Wilmington, Delaware), and consisted of Albert B. Maris, Senior Circuit Judge (Philadelphia, Pennsylvania), Edward Dumbauld, Senior District Judge, (Pittsburgh, Pennsylvania), and also a member of the Conference Committee, and George H. Barlow, Chief Judge of the District of New Jersey. Upon Judge Barlow's death, John J. Gibbons, Circuit Judge (Newark, New Jersey), was appointed to replace him.

The Third Circuit subcommittee designated a legal historian, Professor Stephen Presser, then of Rutgers University School of Law and now of Northwestern School of Law to prepare the History of the Third Circuit. Professor Presser undertook a truly ambitious and scholarly approach to the project. Through original research and imagination, he tapped the rich and varied history of the circuit.

The Third Circuit subcommittee believes that Professor Presser's scholarly text captures the diversity of our circuit as well as the legal and historical impact of a committed judiciary over almost two centuries. We are deeply indebted to Professor Presser and to all who contributed to the history.

Collins J. Seitz
Chief Judge
Wilmington, June 1982

Preface

I have called this book "Studies in the History of the United States Courts of the Third Circuit" to suggest that this is not a definitive or even a comprehensive treatment of the work of the federal district and appeals courts for Pennsylvania, New Jersey, and Delaware. Since my assignment when I undertook this project was to produce such an inclusive history, however, a few words of explanation are in order. I began to research such a project by examining the opinions for the first lower federal courts in Pennsylvania from 1789 to 1800. The result of this research appears as Chapter Two, and was published in fuller form as an article in the Northwestern University Law Review. I was able to read and assimilate all of the published opinions for that period, but I realized that if I were to adhere to the same methodology for the rest of American history, this Bicentennial project would not be concluded much before the Tricentennial. Since my contract called for a much earlier completion I sought to narrow the scope of the project. In the course of my work on the Pennsylvania lower federal courts, however, I found analyzing the primary work product of the judges, their opinions, to be the most rewarding task. I concluded that for me the most satisfactory manner of presenting legal history was to study the manner in which opinions reflected the particular judicial philosophy of, and the economic and ideological influences on, federal judges. A satisfactory means out of my dilemma was thus to pick representative judges, and then proceed to study their work in some depth, with a few introductory and concluding remarks to bridge the gaps.

I then turned to the work of my research assistant, Gordon Hylton, then a third-year student at the University of Virginia School of Law, who had compiled file cards for me on all of the published decisions of the federal courts of Pennsylvania, New Jersey, and Delaware through 1890. On reviewing these cards I found that by far the largest number of decisions were rendered by a man named John Thompson Nixon, District Judge for New Jersey from 1870 to 1887. Since this was the period when the lower federal courts first began to acquire jurisdiction in accordance with the limits permitted to them by the United States Constitution, and since it seemed fair to pick a judge from a state other than Pennsylvania, I proceeded to read all of Nixon's opinions, and the result is Chapter Three, also originally published as an article in the Northwestern University Law Review.

I had then done some work with two of the Third Circuit's states, and this led me to seek an appropriate subject in the history of the federal courts of Delaware. Since Delaware's status as the home for many of the country's greatest corporations seemed to be its outstanding characteristic with regard to the implications of federal law, I decided to determine how the federal courts applied Delaware's law of corporations. The legislation which revised Delaware's law of corporations occurred at roughly the point where my Chapter on Nixon had left off, so the fit seemed serendipitous. Since the legal topic was

more narrow than that in the two previous chapters I was able to study more judges, and the result is Chapter Four, an examination of the opinions on corporation law of District Judges Bradford, Thompson, Morris, and Nields, and Court of Appeals Judges Buffington and Davis. This chapter, in the revised form of an article co-authored with Richard Simpson, will soon appear as an article in the William and Mary Law Review.

Since I had written relatively little on the Court of Appeals, it was the obvious choice for a concluding Chapter. Since there was a clear change in the personnel of the Court of Appeals following the election of Franklin Roosevelt, and since the New Deal also seemed to give rise to a new style of jurisprudence, I ended Chapter Four and began Chapter Five at approximately the same time, the beginning of the Roosevelt administration. Chapter Five brings events up to the Bicentennial year, and Chapter Six, a conclusion, reports on some cases even more recently decided. As before, my principal concern was with the cases, but as I perceived that a dramatic transformation had taken place in the personnel and the characteristics of the court of appeals since 1937, that transformation was also a subject to be treated. This too was fortuitous, since there was simply no way of assimilating all of the explosively-increasing number of opinions which the members of the court of appeals have written during the last forty years. With the aid of the members of the Third Circuit's Bicentennial Committee, I picked out a few representative cases for study, and sought to integrate these within the larger theme of the change in the character of the Third Circuit's Court of Appeals.

This is not, of course, a work of fiction, but the nature of my preoccupations led me often to speculation. I have tried to imagine what it must have been like to be faced with the necessity of making some of the crucial judicial choices here chronicled, and I have sought to produce at least tentative explanations for some judges' actions which seem to have marked new directions. I have attempted to limit these speculations, and to ground them in as much solid fact as possible. In particular I have been counseled in this endeavor by my "Dutch Uncle," the Hon. Edward Dumbauld, himself no mean legal historian. He has regularly reminded me of Douglas Freeman's famous remarks that an historian should never undertake to report the thinking of his subjects without written evidence or reliable autoptic proof. If I have occasionally gone against this advice, at least I have sought to indicate clearly where I was doing so, so that the reader will not be misled. I hope that this work might prove useful to the scholar seeking some insight into the nature of the task of judicial decision of the federal judges, but the book is not primarily intended for the legal historian, rather it is written for a more general legal reader, or perhaps for a new federal judge. It has as its simple task to clarify and compare what it has meant to be a federal judge in lower courts since the creation of the Republic.

Drafts of the chapters were read by the members of the Third Circuit's Bicentennial Committee: Chief Judge Collins J. Seitz, and Judges Albert B. Maris, George H. Barlow, John J. Gibbons, and Edward Dumbauld, and the late Third Circuit Executive, Wm. A. (Pat) Doyle. Each man supplied me with valuable and patient insight into the workings of the courts; the criticism

of Judges Maris and Dumbauld even approached the rigors of talmudic exegesis. I will miss the warmth and the friendship of the Committee's oversight more than I can express. I have often felt that these pieces simply could not do justice to the quality of commitment and judicial scholarship demonstrated by the members of the Bicentennial Committee and shared by so many other judges of their courts. In any event, while I have sought to follow the advice of the committee, I have not always been able to do so, and the responsibility for errors and outrages remains mine.

Research for the Nixon Chapter was made much easier because of the cooperation of the staff of the Princeton University Archives and the New Jersey Historical Society. Delores Altemus and Susan Brynteson at the Morris Library, University of Delaware, helped with some of the materials on Judge Morris. Betty-Bright P. Low of the Eleutherian Mills Historical Association, and Gladys M. Coghlan of the Delaware Historical Society gave graciously of their time and resources to permit me to learn more about Judges Bradford and Nields. The Wilmington News-Journal searched their morgue, and found some delightful pieces on Morris and Nields.

Many law students contributed to the project. Gordon Hylton's contribution has already been noted. I was also aided at Virginia by John H. Flood III. Since I have been at Northwestern my research assistants have included Cynthia Sopata, Denison Hatch, Karen Kole, Christopher Garrett, Barbara Zeigler, and James Churm. William Hillstrom did a third-year senior research project for me on the Delaware courts that was useful in preparing Chapter Four. Three law students contributed so much that their assistance merited recognition on the title page. Richard Simpson did early drafts of the Introduction, Chapter Four, and the Appendices and tables of Judges, which list all of the judges who have served during the period here studied. Kenneth GoodSmith did similar work for Chapters Three and Four. Cooper Ashley did his Senior Research Project on the Third Circuit's Court of Appeals, and his paper became the foundation for Chapter Five. I am not sure that any of them would be able easily to recognize their ideas in the final versions, and so once again the responsibility is mine.

The manuscript was typed by Elizabeth Quintos, who appears fortuitously when a book needs to be done. The Third Circuit's Circuit Executive, Paul Nejelski, and his staff, Jeanne LaMonaco, Leona McCabe, and Dara Quattrone, and the former acting Circuit Executive M. Elizabeth Ferguson, were indispensible in seeing the manuscript through to publication, and in helping to secure the photographs used here. My wife Carole and my colleagues Leonard Barkan, Timothy Breen, Dan Fischel, and Marty Redish have offered winged words and firm friendship, which has sustained me over the five years since I began this work.

S.B.P.
Chicago, Illinois
March, 1981

LIST OF ILLUSTRATIONS

Table of Contents

Photo from Historical Society of Philadelphia

Richard Peters, United States District Court Judge for Pennsylvania, commissioned in 1792.

Introduction: The Third Circuit and the Federal Judiciary

I. *The Judiciary Act of 1789*

After the Federal Constitution created a national political system that was to have near-exclusive jurisdiction over the regulation of interstate commerce,[1] it was thought necessary by many for Congress to create a special lower federal judiciary to enforce federal law, lest national policies flounder in provincially-minded state courts. Even if state judges were willing to give a nationalist cast to their decisions, it was likely that state judges still could not provide for uniform application of federal law throughout the country.[2]

Accordingly, the Judiciary Act of 1789[3] established a three-tiered judicial structure consisting of district courts, circuit courts, and the Supreme Court. It designated each of the original thirteen states as a judicial district, and it provided that each district would have its own district court and circuit court. Both courts were to be courts of original jurisdiction. The district court, to consist of one judge, was limited in its jurisdiction to admiralty cases, seizures in pursuance of federal law, and the enforcement of navigation and trade statutes.[4] Subsequently, the district court's criminal jurisdiction was modified to include all but capital offenses.[5] The circuit court, to consist of the district judge and two Supreme Court Justices, was to exercise original jurisdiction over diversity of citizenship cases in which more than $500 was in dispute, to have appellate jurisdiction over the district court's decisions, and to exercise original jurisdiction in important criminal cases. The Supreme Court Justices were to "ride circuit" twice a year. This arrangement, based on the English model, was designed to keep the Justices in direct contact with the people, in

order for jurisprudential development to be consistent with social customs and popular desires.[6]

The Judiciary Act of 1789 provided for three circuits—the Southern, Middle, and Eastern. The Middle Circuit, the Third Circuit's predecessor, included Pennsylvania, New Jersey, Delaware, Maryland and Virginia.[6a] This circuit arrangement continued until 1802, when the strains of circuit riding on fatigued Justices required that Congress restrict the ambit of the circuits, and create more of them.

By organizing the circuit courts and by assigning the Justices to circuit riding duties, the 1789 Judiciary Act made circuit riding the keystone of the federal judiciary, but the circuit riding system was almost immediately plagued with difficulties. Foremost was the delay in circuit court litigation caused by the requirement that two Supreme Court Justices and a district judge sit together. America's roads were then in a pitiable state, covered with tree stumps, and without bridges or ferries over many waterways. The only real means of transportation were the country's coastline and inland waterways. Yet the sailing vessels of the time could not navigate upstream; and the Northern waterways were not navigable during the winter months. Consequently, the Justices found it nearly impossible to hold circuit court twice a year in several states. Congress responded in 1793 by providing that circuit court sessions could be held with only one Justice and a district judge. Still, the problem of delay was not resolved.

As the federal courts lagged behind in their duties, commercial development in the 1790's generated increasing numbers of economic transactions, and hence heightened the possibility of legal disputes. The Atlantic coast became a "unified trading area"[7] in which sailing vessels transported goods from port to port. As war raged in Europe, reducing the level of competition from that quarter, the shipping industry in America thrived.[8] Commerce was especially vibrant in Philadelphia, the commercial center of the country at the time of the American Revolution.[9] For most of the 1790's Philadelphia continued to lead New York in both imports and exports. Pennsylvania also benefitted from the construction of a turnpike from Philadelphia to Lancaster in 1794. In addition to sparking the "turnpike fever" that soon gripped the entire country, the Philadelphia-Lancaster Turnpike enhanced internal commerce in Pennsylvania.

Since the delays accompanying the circuit court litigation might restrain the development of a national commercial system, the Federalist Congress set out to eliminate the problems connected with circuit riding by passing the Judiciary Act of 1801.

II. *The Judiciary Act of 1801*

Students of American Judicial History know the Judiciary Act of 1801[10] principally because of its creation of sixteen judicial positions which President Adams filled with loyal Federalist judges. This was the reason for the Act's

short life; it was repealed less than a year after Jefferson's Republicans assumed control of Congress in March of 1801. Still, the major thrust of the Act was not necessarily to entrench the Federalists, but to relieve the Supreme Court Justices of their circuit riding duties, and to replace the old circuit courts with new courts to be staffed by the sixteen circuit judges, to be distributed over six newly created circuits.[11]

In the Act of 1801 the "Third Circuit," consisting of Pennsylvania, New Jersey, and Delaware, made its debut in the federal judiciary.[12] The Act divided Pennsylvania and New Jersey into Eastern and Western districts, but did not create new judicial positions for these districts. Rather, the district judges for Pennsylvania and New Jersey were to hold court in both Eastern and Western districts. Congress thus supposedly made litigation in federal court more convenient for Pennsylvania and New Jersey residents, by cutting down the distance they had to travel to get to court.[13] The necessity of the reforms in the 1801 Act was most pronounced in the Third Circuit, since the federal litigation arising from the Whiskey Rebellion of 1794, the Fries Rebellion of 1799, and the enforcement of the Alien and Sedition Act of 1798 had swamped the federal courts of Pennsylvania.[14] The timing of the Act, however, was too blatantly grounded in partisan politics. Congress had been contemplating judicial reform at least since 1799,[15] but its eagerness to get a bill passed waned markedly in the first months of 1801, when President Adams was about to surrender his appointive powers to President-elect Jefferson. When Congress debated in 1800 whether to recommit a judiciary bill "it was argued, that the close of the present Executive's authority was at hand, and, from his experience, he was more capable to choose suitable persons to fill the offices than another."[16] Yet Congress did not take action until the month prior to Jefferson's inauguration, thus creating the nickname "The Midnight Judges Act."[17]

III. *The Acts of 1802*

The first Judiciary Act of 1802[18] repealled the "Midnight Judges Act," and reinstated the federal judicial system created by the Act of 1789. Some Congressmen expressed constitutional qualms about unseating the sixteen circuit judges, in light of the provision in Article III of the Constitution that "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior."[19] They argued that the elimination of these judgeships would go far in destroying the judicial independence the Framers had intended to preserve in Article III. Western Pennsylvania's Republican Senator Hugh Henry Breckenridge refuted the doubters in typical fashion by a turn of phrase more eloquent than persuasive:

> . . . because the constitution declares that a judge shall hold his office during good behavior, can it be tortured to mean that he shall hold his office after it is abolished? Can it mean that his tenure should be limited by behaving well in an office which did not exist? Can it mean that an office may exist, although its duties are extinct? Can it mean, in short, that the shadow, to wit, the judge, can remain, when the substance, to wit, the office, is removed?[20]

The Republicans justified the return to the system of the Act of 1789 on the ground that the judiciary had not been so bogged down in business as to warrant structural change. Senator Breckenridge pointed out that suits in federal courts had been decreasing prior to the 1801 Act, and that the two major sources of federal litigation—the Alien and Sedition Act and the excise taxes—had been eliminated, or would be before the end of that Congressional session.[21] Some Congressmen also voiced their support of circuit riding, arguing that frequent trips into the hinterlands kept the Justices in touch with "the laws, the morals, the habits, the state of the property of the several States."[22]

Still, perhaps sensitive to the need for some reform, in a Second Judiciary Act of 1802 the Republicans began to build on the structure created in 1789 by enacting some of the same measures that had been included in the Federalists' Act of 1801.[23] The Second Act of 1802 made circuit riding less strenuous for the justices by reducing the size of the three original circuits, and by adding three more. The "new" Third Circuit was somewhat different from that of the 1801 Act—it included only Pennsylvania and New Jersey. The second Act of 1802 also allowed the district judge single-handedly to hold circuit court sessions when a Supreme Court Justice could not be present. This feature, according to Frankfruter and Landis, enabled district judges gradually to assume control of the circuit courts:

> With the growth of the country and the corresponding increase in circuit court business, the latter provision was constantly invoked if circuit courts were to be held at all. Increasingly, it became impossible for the Justices to attend circuit in all the districts at all sessions, and the circuit court devolved more and more into the hands of single district judges.[24]

In Chapter Three, *infra,* we will see how this pattern of circuit court being held by the district judge persisted until the latter part of the nineteenth century, and could put a great burden on the district judge.

IV. *From 1802 to 1869*

The basic structure erected by Congress in 1802 endured until 1869, when the crowded Supreme Court docket finally forced Congress to authorize the appointment of circuit judges who could assume the Justices' circuit riding duties. A number of minor legislative adjustments, were, however, made between 1802 and 1869 and affected the Third Circuit.

In the first two decades of the nineteenth century, Pennsylvania's economic development generated increasing amounts of litigation. Philadelphia continued to be a commercial leader, although second to New York. At the same time, the construction of turnpikes in the Pennsylvania interior enhanced the development of a commercial network linking all parts of the state. Pittsburgh, strategically located on the Ohio River, experienced rapid growth.[25] Economic development, moreover, was not restricted to Pennsylvania's large cities. For example, the anthracite mines in the Eastern region of the state began opera-

tions in 1817.[26] At this time the population of the middle Atlantic states was growing rapidly. By 1807, both New York and Philadelphia had populations of over 100,000 people.[27] The growth in the population and the economy soon provided enough litigation in Pennsylvania to cause great delay in the federal district court. At the same time, litigants in Western Pennsylvania complained of the distance they had to travel to have their cases tried in the federal court,[28] which sat in Philadelphia. Congress provided relief to the litigants and district court of Pennsylvania in 1818 by dividing the state into two judicial districts, each district to have its own full-time judge.[29]

Dividing a large state into two judicial districts was becoming standard Congressional procedure for relieving bogged-down federal courts. New York had been divided in 1814; and Virginia would be organized into two districts in 1819. Unlike other divisions, however, there was not to be a circuit court for the Western District of Pennsylvania. Instead, the district court there would exercise all original jurisdiction, with the circuit court of the Eastern District exercising appellate jurisdiction over the Western District's court.[30] This arrangement freed Supreme Court Justices from the necessity of traveling all the way to Pittsburgh to hold circuit court sessions. Congress did not expect the business in the Western District to be so massive as to require more than one court of original jurisdiction.[31] In other tinkering, in 1824,[32] Congress transferred seven counties in the center of Pennsylvania from the Eastern District to the Western District. As usual, the impetus for this reallocation of judicial business was the growing caseload in the Eastern District generated by Philadelphia's continued commercial expansion and population growth. The transfer was also to make the federal courts more accessible to the people in those counties, since Congress specified that district court sessions were to be held at William's Port as well as Pittsburgh.

In 1837 Congress finally provided a circuit court for the Western District of Pennsylvania.[33] The Western District had advanced considerably since 1818. Its iron goods, next to New England's textiles, were the chief manufactured articles of that time.[34] The Forbes Road, connecting Philadelphia and Pittsburgh, the Main Line Canal, nearly 400 miles long, and the National Road, running through Southwestern Pennsylvania to Columbus, Ohio, all built in these years, contributed to the Western District's economic development by providing channels for commercial intercourse.[35] Growing judicial business, however, was not the only consideration that prompted Congress to supply circuit courts to the districts that had none. The proliferation of turnpikes, canals, railroads and steamboats in the twenties and thirties lessened the rigors of circuit riding in outlying districts.[36]

In 1844[37] Congress transferred the district court in New Jersey from Trenton to New Brunswick and Burlington,[38] more central locations, to make the court more accessible to New Jersey residents. Since the late 1790's, New York City had been the premier commercial and population center of the country. In the twenties and thirties, New York moved into manufacturing in addition to commerce; and immigrant laborers began to flood the city. New

Jersey's resident had begun to gravitate from the Trenton-Philadelphia area to the Newark-New York area.

In 1866 Congress transferred the District of Delaware from the Fourth to the Third Circuit. This move was part of a general plan to redistribute the states among the circuits. Since 1802 the admission of eighteen additional states into the Union had led Congress to create new judicial circuits and new Supreme Court Justices to ride those circuits.[39] By 1866 the federal judiciary consisted of ten circuits, with ten Justices riding circuit once a year. Some Justices, however, complained that the Court's size made it too unwieldy for the bargain and compromise necessary to judicial decision-making; and the even number of Justices too often resulted in a deadlocked Court.[40] Accordingly, in the Judiciary Act of 1866,[41] Congress took advantage of a vacancy on the Supreme Court to redistribute the states among nine circuits, and to reduce the Supreme Court's number to nine. Since that time the states constituting the Third Circuit have remained the same.

V. *The Judiciary Act of 1869*

By 1865, it had become clear that "the amount of business accumulating in the Supreme Court amounted almost to a denial of justice."[42] The circuit courts were also suffering under heavy caseloads. The district judges were so burdened with the business of the district courts that they did not have the time to dispose of the circuit court's cases. The Supreme Court Justices were rarely able to hold circuit court sessions. By 1869, the business accumulating in the circuit courts proved to be too much for the outmoded circuit riding system.

Congress hoped that the Judiciary Act of 1869,[43] by creating circuit judges who could take over the Justices' circuit riding duties, would reduce the backlog of business in the circuit courts, and leave the Justices free to dispose of their own Court's cases. Still, the Act stipulated that the Justices were to go out on the circuits at least once every two years. The Act authorized the appointment of a circuit judge for each of the nine circuits, and further gave these judges the power to hold circuit court sessions by themselves. By these measures, then, the advocates of the bill predicted that all three levels of the judiciary would be able to clear their dockets, as both the District and Supreme Court Judges might be relieved of at least some circuit duties.[44]

The additional judicial business prompting Congress to pass the Act of 1869 was an outgrowth of the country's continued dramatic economic expansion in the 1850's and 60's. According to Douglass C. North, "it was industrialization in the Northeast and the opening up of the West and Far West which was primarily responsible for the growth of the 1840's and 1850's."[45] After the panic of 1837 had passed, the American economy took off in a burst of productivity that catapulated the United States into a position of leadership in industrialization, second only to Great Britain. By 1860, the United States was producing one-fifth of the world's manufacturing output.[46] In 1839, man-

ufacturing in the U.S. constituted only a 20 percent share in the country's commodity output; but by 1860 its share had risen to 33 percent.[47] The rise in manufacturing was parallelled by phenomenal growth in commercial activity. The mass tonnage in coastline trade shipped in 1789 was a mere 68,000 tons. By 1840, tonnage had increased to 1.1 million tons, and by 1860 to 2.6 million tons.[48] Lastly, new industries were born every year with the invention of new consumer and capital goods. Sewing machines, wheat harvesters, reapers, vulcanized rubber, pressed glass and circular saws were common manufactured articles by 1850.[49] Telegraph lines connected the major cities of the United States.[50] Although the Civil War disrupted economic development in the sixties, the disruption was not so severe as to destroy what had already been accomplished. While the federal judiciary remained substantially unchanged since 1789, the United States had become by 1869 a highly-developed commercial state on the verge of an industrial boom which would allow it to overtake even Great Britain in industrial productivity. The overwhelming economic changes of the antebellum period were accompanied by phenomenal population growth. The population in 1790 was 3.9 million. In 1840 this had grown to 17 million, and by 1860 to 31 million.[51]

In view of the heavy federal caseloads caused by population, industrial and commercial expansion, and the patent problems which were matters of federal law, even the Act of 1869 was no more than another stopgap measure. The Act's requirement that Justices ride circuit once every two years preserved the ancient system in spite of the new pressures exerted on the federal courts. A number of Congressmen still believed that circuit riding enabled the Justices to become "acquainted with local facts, the character of our people, and the various interests in different parts of the country."[52] The practical effects on the Third Circuit and the federal judiciary of the Act of 1869 were minimal. The Third Circuit received the services of circuit Judge William McKennan, who set to work on the business that had accumulated in the Circuit's four circuit courts. In the Third Circuit as elsewhere, however, the litigation generated by the industrial boom of the post-war period proved to be too much for the new circuit judges. According to Frankfurter and Landis,

> the new business which came to the courts exceeded the capacity of the new judges. Circuit judges could pay only sporadic visits to the different districts and for brief periods. Very soon the old conditions were revived in aggravated form.[53]

Since the circuit judges were absent most of the time, district judges continued to control the circuit courts. As district judges took charge of both district and circuit courts, the two became virtually indistinguishable,[54] and thus the load on the district judges increased instead of diminishing. Exacerbating the problem dramatically was perhaps the most important development in this period, the "revolution" in the function of the lower federal courts wrought by the Act of March 3, 1875. In that legislation "Congress gave the federal courts the vast range of power which had lain dormant in the Consti-

tution since 1789." The act gave the lower federal courts original and removal jurisdiction "for vindicating every right given by the Constitution, the laws, and treaties of the United States." This new jurisdiction for the federal courts reflected a somewhat more general subordination of state to national authority following the Civil War, and had the effect of creating "a flood of totally new business for the federal courts."[55] The increasing volume of litigation, arising from the judiciary's diversity jurisdiction, from the Act of 1875 and from federal bankruptcy legislation crowded dockets at all levels of the judiciary. Not until 1891, however, were enough Congressmen persuaded that major structural renovation was necessary to eliminate the embarassing delays afflicting the judiciary.

VI. *The Circuit Court of Appeals Act of 1891*

The Circuit Court of Appeals Act of 1891[56] created intermediate appellate courts for the federal judiciary, in order to reduce the volume of diversity litigation in the Supreme Court. The Act authorized the President to appoint an additional circuit judge for each circuit, thus allowing two circuit judges per circuit. The new courts would consist of three judges, the two circuit judges and either a district court or a Supreme Court judge, and would exercise appellate jurisdiction over the district and circuit courts. They were to have final jurisdiction over diversity, admiralty, revenue and criminal cases, thus relieving the Supreme Court of all business except for the interpretation of federal statutes and the Constitution.

Senator Evarts expected the Courts of Appeals to sweep their annual dockets in four months, leaving the additional circuit judges free the rest of the year to help clear the dockets of the district and circuit courts.[57] Most Congressmen appeared at last to have recognized the Dickensian conditions and that the hard-pressed judiciary was in need of fundamental relief.[58] For example, Senator Morgan stated that relief for the judiciary was critical, for he did not know "as great a cancer upon the body-politic as this thing of accumulating cases, attorneys' fees, interest, and the other disasters that attend the delay of litigation."[59]

By this time, of course, the industrialization of the United States had become even more spectacular, and had produced an even more massive volume of litigation. Annual rates of productivity growth after the Civil War averaged 5 percent, nearly twice the rate of the ante-bellum period.[60] According to North, "in the years from the end of the Civil War until World War I, manufacturing expanded so that the United States became the leading industrial nation in the world, with about one-third of the world's manufacturing capacity."[61] By the 1880's manufacturing's share of productive output was equal to that of agriculture.[62] Commerce also advanced during this period, increasing its share of productive output from 12 percent in 1860 to 18 percent in 1890.[63] American economic growth generated a corresponding increase in litigation, and the Act of 1891 was a response to the judiciary's inability to

dispose effectively of this increased litigation.

Congress's habitual conservatism regarding the federal judiciary prevented the Circuit Court of Appeals Act from going beyond what was immediately necessary to dissipate the glut of litigation. The House version of the 1891 bill would have totally restructured the federal judiciary by abolishing the circuit courts. The Courts of Appeals would have been given the circuit courts' appellate jurisdiction. Yet Senator Willliam Evarts's Judiciary Committee, in an echo of the old justification for keeping Supreme Court Justices on the circuits, reinstated the circuit court in order to keep the circuit judges in touch with the nisi prius business of the judiciary.[64]

The Senate prevailed in conference, and the circuit courts were retained. Congress thus perpetuated a judicial institution whose intrinsic utility—its appellate jurisdiction—had been destroyed. The original jurisdiction the circuit courts shared with the district courts no longer had a functional justification. Initially the circuit courts were supposed to provide distinguished judicial personnel in the form of Supreme Court Justices for the adjudication of the more important cases brought to the federal judiciary. With the district judges controlling the circuit courts, however, even this justification for the courts' existence had disappeared.[65]

The Circuit Courts of Appeals Act of 1891 could not forever stem the tide of mounting litigation arising from population and economic growth and from increasing government regulation of economic activities. In the 1890's the United States continued the industrialization begun after the Civil War.[66] By 1920 the number of industrial workers equalled that of agricultural workers.[67] Industrialization was also accompaned by new federal legislation, which often relied on the federal courts for enforcement. The passage of the Interstate Commerce Act of 1887 was followed by the Sherman Anti-Trust Act in 1890,[68] the Safety-Appliance Act in 1893, and then by a plethora of other federal legislation in the 1900's: the Hours of Service Law, the Food and Drugs Act, the Insecticide Act, the Meat Inspection Law, the Animal Quarantine Law, the Anti-Narcotic Act, the Mann Act, the Lacey Game Act, and the Federal Employers' Liability Act.[69]

Social and economic changes were particularly pronounced in the states of the Third Circuit. Anthracite mining in Eastern Pennsylvania, oil drilling in Western Pennsylvania, and steel production in Pittsburgh catalyzed economic development, and increased poulation growth and urbanization. At the same time, Northern New Jersey became a major industrial center; and both New Jersey and Delaware, with their liberal incorporation statutes, became havens for corporations. Congress responded to the Third Circuit's increased load as it did in other judicial circuits, by dividing districts and increasing judicial personnel. In 1901 Congress carved out the Middle District of Pennsylvania from portions of the Eastern and Western Districts.[70] Yet even with three judicial districts in Pennsylvania, industrial development continued to outrun the capacity of federal court machinery. Congress accordingly authorized the appointment of additional judges in the Eastern and Western Districts in 1904

and 1909.[71] In 1905 Congress authorized the appointment of an additional judge for the District of New Jersey.

VII. *The Judicial Code of 1911*

In the early 1900's Congress began to set down all the scattered statutes relating to the federal judiciary in one judicial code. When the Senate passed a version of the Judicial Code[73] which provided for the abolition of the circuit courts, it became evident that the Code would be more than a mere declaration of existing law. The delay and inefficiency characteristic of the circuit courts finally prompted Congress to eliminate an institution whose functional justification had long since expired.

The Judicial Code included a few other significant innovations affecting the Third Circuit and the federal judiciary generally. The Code diverted a portion of the federal judiciary's diversity jurisdiction to state courts by raising the district courts' jurisdictional threshold from $2,000 to $3,000. It added a circuit judge to each circuit, thereby increasing the Circuit Court of Appeals to three circuit judges each. Most importantly, the Code rationalized the federal court structure by consolidating all original jurisdiction in the district courts.[74]

A decade before the passage of the code, Circuit Judges Taft, Lurton, and Day,[75] in a letter sent to a Congressionally-established Commission for the revision and codification of the penal laws, called the existence of circuit courts "an anomaly, if not an absurdity," which served no purpose other than "marking the universal and in most respects praiseworthy conservatism which Congress has shown in dealing with proposed changes in the organization of the Federal courts."[76] In actual operation, the district and circuit courts had become indistinguishable. According to Representative Moon's figures, out of the 18,000 days in 1908 on which circuit court sessions were held throughout the United States, circuit judges presided over the courts only 2,000 (11 percent) of those days.[77] The distinction was not only artificial and unnecessary, but also costly.[78] Furthermore, the division of jurisdiction between district and circuit courts was "perplexing and oftentimes confusing to litigants and attorneys."[79]

The Judicial Code of 1911, by abolishing the circuit courts, completed the structural renovation begun in 1869 with the creation of circuit judges. There were some Congressmen, however, who still opposed the destruction of the old structure. Senator Bacon lamented that the Judicial Code would overthrow the "elasticity" of the federal judiciary.[80] This elasticity, according to Representative Brantley, permitted a circuit judge to check "the granting of improvident orders"[81] by district judges in circuit court, without forcing the aggrieved litigants to go through a lengthy and expensive appeals process.[82] Structural renovation, these Congressmen contended, would not only destroy the judiciary's flexibility, but would also produce uncertainty. "Until the new law is judicially ascertained and known, "Representative Brantley argued,

"we will have chaos and confusion, such as has not existed since the early days."[83]

When finally completed, Congress's structural renovation had a profound effect on the Third Circuit. The Code eliminated the Circuit's five circuit courts, and vested in its district courts exclusive original jurisdiction over most federal litigation. An additional circuit judge was appointed to the Third Circuit Court of Appeals, whose members were relieved of the circuit riding duties they had performed, though sporadically, since 1869.

Some of the minor adjustments made in the 1911 Judicial Code were directed toward the Third Circuit. For example, the increasing volume of litigation generated by economic growth in the Newark area called for a provision in the Code allowing the district court in New Jersey to hold regular sessions in that city.[84] Subsequently, as New Jersey's population and economy continued to shift toward the Newark area, its judicial business shifted as well, so that the district court's Newark sessions disposed of most of New Jersey's federal litigation. Today most of the district judges in New Jersey remain stationed in Newark.

VIII. *From 1911 to the Present*

Since the Judicial Code of 1911 the Third Circuit's structure has remained the same. The district courts have sole original jurisdiction in most federal cases; and the U.S. Court of Appeals for the Third Circuit[85] hears appeals from the district courts. Since 1911 Congress has responded to the extra business of the twentieth century by increasing personnel rather than by further altering court structure.

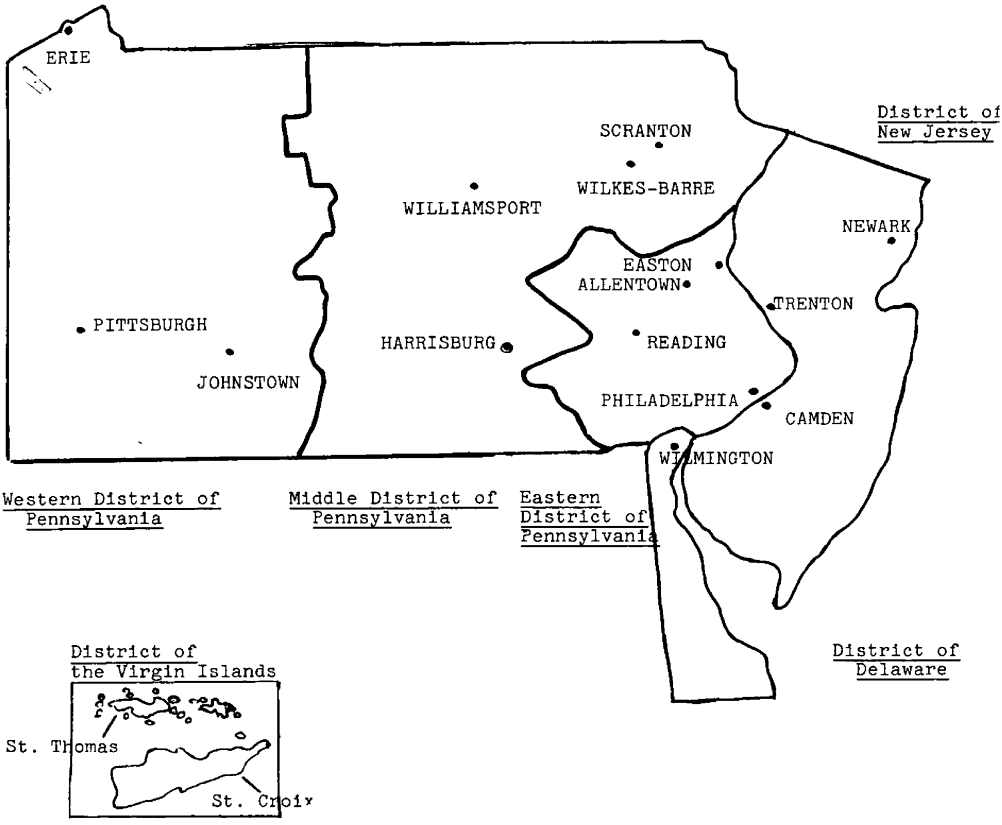
Today (1981) there are 19 judges in the Eastern District of Pennsylvania, 5 judges in the Middle District, 10 judges in the Western District, 11 judges in the District of New Jersey and 3 judges in the District of Delaware. For the most part Congress has responded to increasing business in the Third Circuit only by adding judges to the district courts, although in 1947 Congress transferred Blair County from the Middle District to the Western District of Pennsylvania,[86] in order to allocate the judicial business of one county to the district that had more judges.

Conclusion

The recent stability in the Third Circuit has been due primarily to the structural renovations Congress made from 1869 to 1911. The structure "perfected" in 1911 has proven to be flexible and efficient.[87] Whenever the lower courts have been significantly in arrears, Congress has been able to assign additional judges, although there has often been delay in the passage of such legislative relief.[88]

Congress arrived at the three-tiered structure of 1911 only after a series of stopgap measures limited to the immediate problems of crowded dockets and

MAP OF THE THIRD CIRCUIT



MAP OF THE THIRD CIRCUIT

delays in litigation. Not until the Judicial Code of 1911 did Congress consciously set out to rationalize the court structure—and this when most of the work had already been done. This seeming Congressional insouciance probably can be explained by the relatively low priority Americans accord to judicial reform as a public goal. Certainly, there were embarassing delays in federal litigation throughout American history; but the need for immediate Congressional action in this area could not compare with the need to resolve the sectional crises of the nineteenth century or the economic inequalities of the twentieth.

The history of piecemeal statutory reform of the lower federal courts raises several questions which will be addressed in the following Chapters. *First, what could have caused the relatively low priority accorded to judicial reform, and what could have created the fierce desire among members of Congress to maintain the old Circuit-Riding system which was designed to keep the federal judges in touch with the people?* In Chapter Two, which follows, we will see that these events might be explained in part as resulting from the activities of the first federal judges in Pennsylvania in the early years of our Republic. *Second, what was the experience of the judges who were forced to work under a system of over-burdened lower federal courts, and how did they attempt to adjust to the demands placed on them?* In Chapter Three we will study how one District Court judge, John Thompson Nixon of New Jersey, functioned in the late nineteenth century, between the first serious reforms of 1869 and the final structural change of 1911. *Finally, how has the character of the Federal Judiciary changed since the need for major reform was recognized and acted upon in the early twentieth century?* In Chapter Four we will review the experience of the lower federal courts of Delaware, as they ruled on litigation relating to one of the principal legal problems of the early twentieth century, the allocation of rights and responsibilities among the persons involved in forming and operating the modern business corporation. In Chapter Five, we will bring the narrative up to the present by examining the operation of the higher tier of the Third Circuit's present structure, the United States Court of Appeals, since the "Constitutional Revolution" of 1937.

Notes

1. Although Art. I, Sec. 8, of the Constitution did not expressly provide that the federal government would have near-exclusive jurisdiction over interstate commerce, Hamilton's national commercial scheme and Marshall's decision in *Gibbons v. Ogden*, 9 Wheat 1, make clear that this was an objective.
2. F. Frankfurter and J. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* 7 (1928).
3. 1 Stat. 73 (1789). For some of the relevant background of the Act, see Warren, *New Light on the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923).
4. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 140. Soon after the Judiciary Act, the district courts became almost exclusively admiralty courts, with the circuit courts receiving the bulk of their litigation from civil matters involving diversity of citizenship.
5. *Id.* at 14.
6. 41 Cong. Globe 1366 (1869) (remarks of Senator Edmunds).

6a. The appellation "Third Circuit," and the inclusion of Pennsylvania, New Jersey and Delaware under that rubric, first appeared in the short-lived Federalist Act of February 13, 1801, 2 Stat. 89, 90. Upon repeal of that Act by the Jeffersonians on March 8, 1802, 2 Stat. 132, the former system was temporarily revived until the Act of April 29, 1802, 2 Stat. 156,157, provided for a "new" Third Circuit including only Pennsylvania and New Jersey. Delaware was returned to the Third Circuit in 1866. 14 Stat. 209, and the Virgin Islands were added in 1948, 62 Stat. 930.

7. W. Smith and A. Cole, *Fluctuations in American Business: 1790–1860* 4 (1935). Ships sailing from New Orleans and Charleston would bring the South's cotton to the New England states, while ships from Boston and Salem would deliver Oriental imports to the ports of the coastal states.
8. *Id.* at 3.
9. J. Krout and D. Fox, *The Completion of Independence:1790–1830* 51 (1944).
10. 2 Stat. 89 (1801).
11. Frankfurter and Landis, *supra* note 2, at 25.
12. After a brief respite occasioned by the Republicans' repeal of the Act of 1801, the "Third Circuit" returned in 1802 and has continued to the present, the unincorporated territory of the Virgin Islands being added to the Circuit by Congress in 1948, 28 U.S.C. §41.
13. Surrency, *supra* note 4, at 147.
14. See Chapter Two, *infra*.
15. 7 Cong. 553 (1802) (remarks of Senator Tracy).
16. 6 Annals of Cong. 647 (1800).
17. *See generally*. Turner, *The Midnight Judges*, 109 U. of Pa. L. Rev. 494 (1961).
18. 2 Stat. 132 (1802).
19. U.S. Const. Art. III, §1.
20. 11 Annals of Congress 28 (1802).
21. 7 Debates of Cong. 548 (1802) (remarks of Senator Breckenridge). Subsequently the constitutional issue seems to have been resolved in favor of the judges. In 1869, one of the arguments the conservatives used in opposition to the creation of the circuit judges was that, once these judgeships were established, Congress could not do away with the judges without violation of Article III of the Constitution. The Constitutionally off the 1802 repeal was not directly addressed by the contemporary Supreme Court, however, perhaps because the new Chief Justice, John Marshall,

wished to keep the court out of controversy. See R. Ellis, *The Jefferson Crisis* 60–65 (1971).

22. 7 Debates of Cong. 552 (remarks of Senator Jackson).
23. 2 Stat. 157 (1802).
24. Frankfruter and Lindis, *supra note* 2, at 31. Even if the district judge could hold circuit court by himself, delays were still occasioned by the fact that a district judge could not hear an appeal from his district court decisions. Whenever a litigant appealed the district court decision in circuit court, he had to wait for a Justice to come to town before the appeal could be heard.
25. A. Hoogenboom and O. Hoogenboom, *An Interdisciplinary Approach to American History* 241 (1973).
26. J. Glover and R. Lagai, *The Development of American Industries* (1859).
27. Hoogenboom and Hoogenboom, *supra* note 25, at 240.
28. Surrency, *supra* note 4, at 148. The only means of transport from Western Pennsylvania to Philadelphia at this time was by road. Thus, litigants found themselves traveling for days for a court proceeding that often lasted no more than a few hours.
29. 3 Stat. 462 (1818). Thus the Act of 1818 departed from the model of the 1801 Act.
30. Surrency, *supra* note 4, at 148.
31. Some Congressmen thought that the establishment of just one court in Western Pennsylvania would be more than was necessary. Rep. Forsyth proposed that the existing district court could dispose of Western Pennsylvania's business merely by holding sessions in Pittsburgh. This proposal, however, was rejected. 15 Annals of Cong. 1778 (1818).
32. 4 Stat. 50 (1824).
33. Surrency, *supra* note 4, at 273.
34. C. Fish, *The Rise of the Common Man: 1830–1850* 91 (1944).
35. R. Kelley, *The Shaping of the American Past* 199 (1975). These channels of transportation, in addition to enhancing Pennsylvania's economic development, provided the Justices with the means of conveniently traveling to Pittsburgh from the East.
36. See Smith and Cole, supra note 7, at 38, J. Craf, *Economic Development of the United States* 175 (1952), and Kelley, supra note 35, at 201 for general descriptions of the transportation revolution of the first half of the nineteenth century.
37. Act of June 17, 1844, 5 Stat. 676.
38. Surrency, *supra* note 4, at 238.
39. Frankfurter and Landis, *supra* note 2, at 32. From 1790 to 1805, four states joined the Union, with five more joining between 1810 and 1820, two more in the 1820's, two in the 1830's and three in the 1840's. See J. Howe, *From the Revolution Through the Age of Jackson: Innocence and Empire in the Young Republic* 96 (1973).
40. 37 Cong. Globe 1259 (1866) (remarks of Rep. Wilson).
41. 14 Stat. 209 (1866).
42. 36 Cong. Globe 292 (1865) (remarks of Senator Trumbull). At this time Senator Trumbull suggested that Congress consolidate all original jurisdiction in one set of lower courts. This structural renovation, however, was constantly put off until the Judicial Code of 1911.
43. 16 Stat. 44 (1869).
44. 41 Cong. Globe 1487 (1869) (remarks of Senators Trumbull and Cole).
45. D. North, *The Economic Growth of the United States,* excerpted in R. Leopold, A. Link and S. Cohen, *Problems in American History* 316 (1972).
46. R. Gray and J. Peterson, *Economic Development of the United States* 269 (1974).
47. S. Bruchey, "The Roots of American Economic Growth: 1607–1861," in D. Diamond and J. Guilfoil, *United States Economic History* 87 (1973).
48. Craf, *supra* note 36, at 202.
49. Kelley, *supra* note 35, at 205.
50. Smith and Cole, *supra* note 7, at 88.

51. Howe, *supra* note 39, at 94, and Smith and Cole, *supra* note 7, at 87.
52. 41 Cong. Globe 1487 (1869) (remarks of Senator Buckalew).
53. Frankfruter and Landis, *supra* note 2, at 128.
54. *Id.* at 128.
55. *Id.* at 64–65.
56. 26 Stat. 826 (1891).
57. 21 Cong. Rec. 10222 (1890) (remarks of Senator Evarts).
58. See, *e.g.*, 21 Cong. Rec. 10226 (1980) (remarks of Senator Dolph).
59. 21 Cong. Rec. 10230 (1890) (remarks of Senator Morgan).
60. Diamond and Guilfoil, *supra* note 47, at 377.
61. D. North, *Growth and Welfare in the American Past* 149 (1966).
62. Gray and Peterson, *supra* note 46, at 313.
63. G. Gunderson, *A New Economic History of America* 420 (1976).
64. 21 Cong. Rec. 10222 (1890).
65. Frankfurter and Landis, *supra* note 2, at 104, stated that while the drafters of the Circuit Court of Appeals Act were concerned with the country's economic growth and consequent litigation, they "did not anticipate the great legislative energy throughout the country, both national and state, expressive of the vast increase in the regulatory functions of government."
66. T. Cochran, *200 Years of American Business* 114 (1977).
67. Diamond and Guilfoil, *supra* note 47, at 377, and Gray and Peterson, *supra* note 46, at 313.
68. Following the Supreme Court's narrow interpretation of the Sherman Act in United States v. E.C. Knight Co., 156 U.S. 1 (1895), the federal government failed vigorously to enforce the Act. Beginning in 1905, however, the government began a campaign of trust-busting that did not end until World War I. See C. Kaysen, "Government and Business in the United States: A 225 Year Perspective," in J. Backman, *Business and the American Economy: 1776–2001* 66 (1976).
69. Frankfurter and Landis, *supra* note 2, at 105.
70. 31 Stat. 880 (1901).
71. Surrency, *supra* note 4, at 274.
72. *Id.* at 239.
73. 36 Stat. 1087 (1911).
74. Frankfurter and Landis, *supra* note 2, at 144.
75. Letter of Nov. 3, 1899, from Taft, Lurton, and Day, Judges of the Circuit Court of Appeals for the Sixth Circuit, Botkin, Watson, and Culberson, Commissioners, 46 Cong. Rec. 1544 (1911). These three judges were among the most respected members of the federal judiciary. Taft, of course, was to become President of the United States, and later Chief Justice of the Supreme Court. Both Lurton and Day would also subsequently ascend to the Supreme Court.
76. *Id.*
77. 46 Cong. Rec. 85 (1910) (remarks of Rep. Moon). Moon points out further that even these figures do not accurately represent the circuit judges' attendance at the circuit courts, since many of the 2,000 days the circuit judges spent in circuit court were in their home towns. The cities that did not have a circuit judge as a resident rarely saw one.
78. 46 Cong. Rec. 88 (1910) (remarks of Rep. Moon).
79. *Id.*
80. 46 Cong. Rec. 4000 (1910) (remarks of Senator Bacon).
81. 46 Cong. Rec. 2148 (1911) (remarks of Rep. Brantley).
82. *Id.*
83. *Id.*
84. Surrency, *supra* note 4, at 238.
85. Congress changed the name of the Circuit Courts of Appeals to U.S. Courts of

Appeals in 1948. 62 Stat. 870 (1948).

86. 61 Stat. 310 (1947).
87. Mounting delays in the Supreme Court have continued to necessitate periodic statutory adjustments channeling litigation away from that tribunal.
88. For the suggestion that these delays might often have been attributable to Congress's waiting for the outcome of Presidential elections, see Bond, *The Politics of Court Structure: The Addition of New Federal Judges, 1949–1978,* 2 Law & Policy Quarterly 181 (1980).

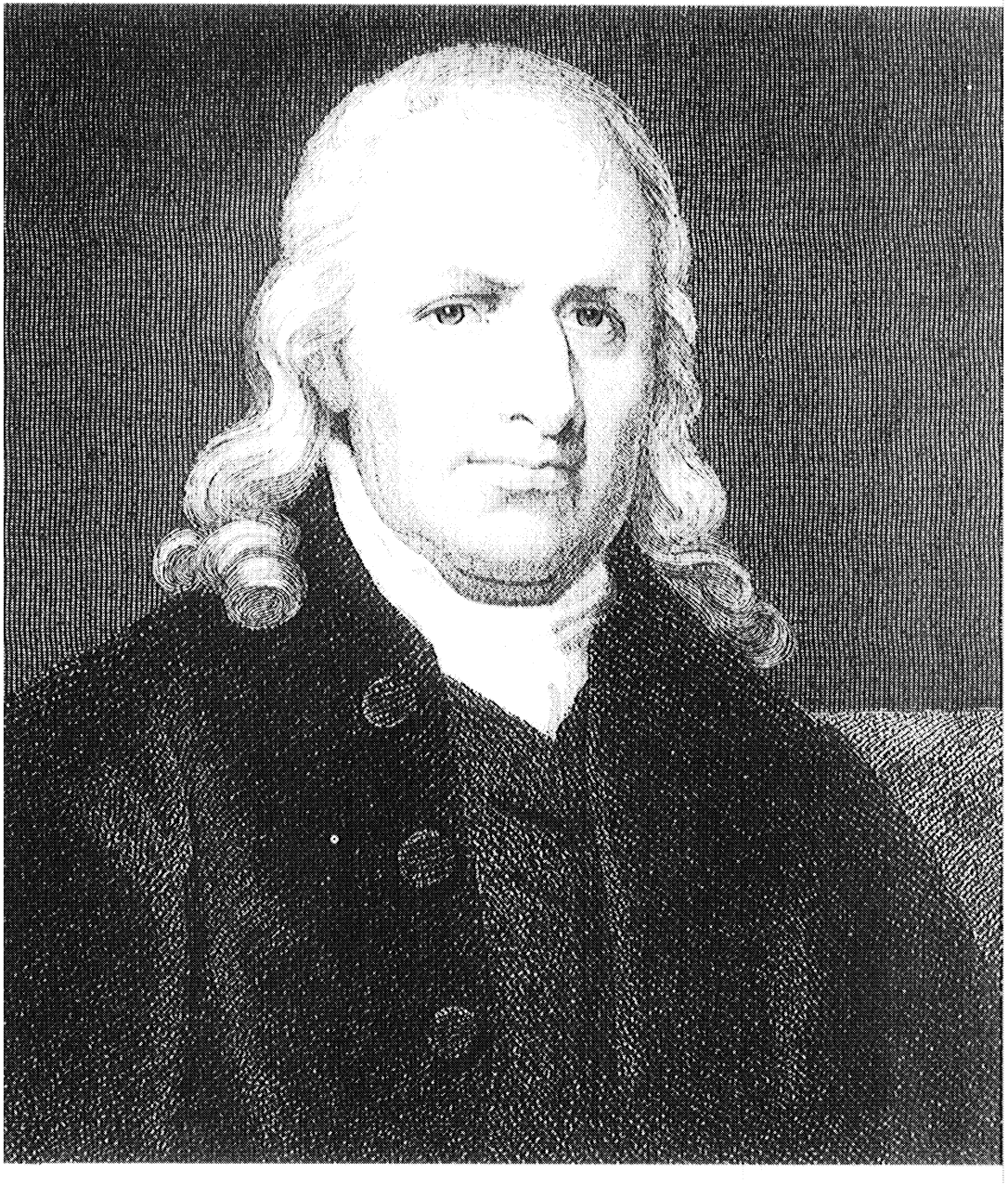


Photo from Historical Society of Philadelphia

Samuel Chase, Associate Justice of the United States Supreme Court, who sat with District Judge Peters on the United States Circuit Court for Pennsylvania during the ill fated 1800 term, and whose actions in the late 1790's were perceived as inconsistent with the Federalists' promises about the implementation of the principle of popular sovereignty.

The First Federal Courts in Pennsylvania

I. *The Political Environment of the Early Federal Courts*

A. *Introduction*

This chapter examines the federal courts in Pennsylvania during the years 1789 to 1800, the period between the inauguration of George Washington and the election of Thomas Jefferson. This story, to a large extent, is a tale of two judges—Richard Peters and Samuel Chase—but it is also the story of a broken promise, the promise of popular sovereignty under the administrations of Washington and Adams. The perception that this promise was not kept resulted in the victory of the Jeffersonian Republicans and the public's large-scale repudiation of Federalist politics, including the Republican repeal of Federalist judicial reforms. Even so, in these years, the Federalist judges had managed to set some important precedents and had succeeded in establishing the beginnings of the theory and practice of an independent judiciary. A disproportionate share of this activity took place in the Pennsylvania lower federal courts, and a disproportionate share of it involved Peters and Chase.[1]

This chapter will describe how, during the administrations of Washington and Adams, Pennsylvania federal judges sought to build a strong central judiciary and a body of federal law which would help realize the Federalist goals of making America a great commercial power and of checking American tendencies toward anarchy, "mob rule," and legislative tyranny.[2] It is argued here that there was real progress made, especially by Judge Richard Peters of the Pennsylvania District Court, in implementing the Federalist goal of commercial progress in the law. However, this accomplishment has been over-

shadowed by the difficulties federal judges, especially Justice Samuel Chase, encountered in implementing the other Federalist goal of political hegemony.

B. *Consensus and Conflict 1776-1789*

The lower federal courts in Pennsylvania adjudicated many of the most important matters to be litigated in the federal courts. At the same time, however, many Pennsylvanians had reservations about the new federal government and about the administrations of Washington and Adams.

In order to understand the tensions that developed in the 1790's between the Federalist judges and the emerging opponents of the Federalist party, it is necessary briefly to sketch the background of late eighteenth century American politics. In the years leading up to the Declaration of Independence many, if not most Americans agreed that the British were failing to allow Americans the full liberties provided in the British "Constitution" as that political arrangement was understood in the Colonies.[3]

Following the Revolution, however, those who had fought in the Revolutionary Army for "liberty" saw in this elusive value differing visions of what they had intended to achieve. For some, like John Adams, American liberty ultimately may have meant little more than the implementation of his view of the British mixed constitution.[4] For others, however, like Benjamin Franklin Bache and William Duane of Pennsylvania, the separation from Great Britain presented the opportunity to place ultimate authority not in the person of a monarch in Parliament, as England had done, but in the American people themselves.[5]

As a result, during the years following the Revolution and preceding the Federal Constitution, in Pennsylvania and in most other states, governments were set up to implement the principle of popular sovereignty through strengthening the legislatures at the expense of the executive. The Pennsylvania Constitution of 1776 provided for no governor at all; instead, there was to be a popularly elected committee which would exercise executive functions. The legislature was also given control over the tenure and salary of judges, thus ensuring the legislature's ascendance as the premier political force.

The new state legislatures proceeded to exercise not only legislative but also executive and judicial functions. State legislatures issued paper money and required its acceptance as legal tender, they ordered confiscations of the property of suspected loyalists, and they suspended or obliterated contractural debts and duties.[6] The threat to property and contract rights inherent in these activities was perceived fairly quickly by some Americans, and they began to construct an alternative political system to replace legislative supremacy.

C. *Federalist Political and Judicial Theory*

The main principle of this new American political theory, which reached its fullest expression in the Federal Constitution of 1787, was that government

should be composed of a number of powerful elements which could "check" and "balance" each other.[7] Because popular sovereignty had by this time become the essential prerequisite for success of any political theory in America, proponents of the Federal Constitution, and of corresponding governmental changes in the states, saw that the success of their proposals depended upon popular approval of the new constitutions. Thus the proponents of the new constitutions argued that once the new governments were created pursuant to the new constitutions, each branch of government was still to regard itself as an agent of the people, and to behave accordingly. The judiciary's relationship to the people was more tenuous than that of the executive or legislative branches, which were subject to popular vote.

For many years in America there had been a fear of judicial discretion, and the fact that under the Federal Constitution judges were to enjoy good behavior tenure while passing on the legitimacy of the acts of the other two branches rekindled fears about judicial arbitrariness. The proponents of an enhanced judiciary had to counter these arguments by asserting that the judicial function would be simply one of law-finding, and not law-making. Judges were to guide their decisions only by the clear dictates of reason and common law precedent and, ultimately, by the plain words of the constitution.[8] The judges would thus be guided by the wishes of the sovereign people as expressed in a popularly-approved constitution. Judges' deviations from these guidelines, so the argument ran, could be readily perceived and the constitutional remedy of impeachment applied.[9]

The federal judicial experience in Pennsylvania during the late 1790's suggests that ultimately the Federalist theory about responsible, enhanced judicial power did not work.

II. *Law in the District Court—Richard Peters and the Beginnings of an American Law of Admiralty*

The Federalists' program of building a commercial America was early implemented in Pennsylvania by Federal District Court Judge Richard Peters, who was named to the bench in 1792.[10] Peters had served as registrar of the colonial Admiralty Court and was secretary and a member of the revolutionary Board of War. After independence he served briefly as a United States Congressman. In 1787 he was elected to the Pennsylvania Assembly, and in 1790, to the Pennsylvania Senate. Having served as speaker in both houses, he was thoroughly familiar with the workings of elective politics and popular opinion in Pennsylvania. Peters was also well versed in the classics and had a reading knowledge of Dutch, Spanish, French, and Italian, thus enabling him to make full use of civil law authorities. A firm adherent to the Federalist doctrines, his education, family background, and previous experience uniquely suited him for the role of expositor of admiralty law.

The Constitution and the Judiciary Act had given admiralty jurisdiction to Peters's district court, but had not spelled out what substantive maritime law

the federal courts were to apply.[11] During the Revolutionary period, Americans had strenuously argued that they were fighting to preserve the rights guaranteed to them by the English common law[12] and in time each state was to pass a statute indicating that the English common law, insofar as it was consistent with American institutions, was to be in force.[13] It might have thus been logical to expect that when the Federal Constitution conferred admiralty jurisdiction on the federal courts, it was to be understood as granting the maritime jurisdiction of the English common law.[14] From the beginning, however, the Pennsylvania Federal District Court indicated that the sources of admiralty jurisprudence were to be much more broad.[15]

Once Peters came to the bench, the technique of admiralty jurisprudence of picking the best rule for America from a variety of sources was given full expression. In one of his first cases, Peters indicated that since America had become an independent nation, it could exercise the sovereign's prerogative of making its own law, and thus, as an American admiralty judge, he was not subject to the authority of or the limitation on admiralty jurisdiction in the English common law.[16] For Peters, American admiralty law was to come rather from the maritime laws of the "law of nations."

For example, in *Warder v. LaBelle Creole*,[17] he translated both "an authority out of Burlemaqui" and the Marine Ordinances of France to establish an American rule for admiralty salvage cases. According to "justice and policy," wrote Peters, owners of cargoes or ships had to reimburse seamen who had rescued their goods from "imminent danger, by great labor, or perhaps at the hazard of . . . life."[18] Peters subsequently developed this principle to hold that the amount of compensation for salvage should be varied according to the amount of risk assumed in the salvage operation.[19] This is an early illustration of what has been called an "actuarial consciousness" on the part of early American judges, and demonstrates that Peters was one of the earliest to mold American law according to a risk-reward calculus that took into consideration the needs of the marketplace.[20]

Although Peters drew his admiralty law from a wide variety of obscure and foreign sources, he also took pains to see that the law kept in step with the actual workings of commerce. In a 1795 case, *Hollingsworth v. The Betsey*,[21] though he had plenary authority as an admiralty judge sitting without a jury, he ruled that damages were to be determined by a panel of "intelligent and disinterested merchants of this district."[22] In *Swift v. The Happy Return*,[23] on a point involving the time when seamen's wages were due, Peters looked first to the laws of Wisby, an ancient commercial power, but decided ultimately that "Philadelphia custom" as to the time of payment should govern. Finally, in *Pollock v. Donaldson*,[24] a dispute over the extent of coverage of a marine insurance policy, Peters took the testimony of Mr. Isaac Wharton, "an experienced insurance broker," and decided that the rule to be followed was "the general sense and usage of merchants."[25]

In these and other cases, Peters laid down principles which he believed would best promote commercial prosperity and economic development.

Peters creativity in articulating new principles for admiralty law seems to foreshadow the work of later nineteenth century judges like Story, Kent, and Shaw, who would alter contract, tort, and corporation law to favor commerce by promoting a market economy.[26]

It has been suggested that in the early nineteenth century most Americans would have favored agricultural over commercial interests.[27] There is some evidence in the writings of Thomas Jefferson and others that many Americans feared and distrusted attempts to make the United States a great commercial power, and wished the country to continue as a preserve of simple yeomen.[28]

If there was such an anticommercial spirit in America, how was it that Peters was able so frankly to tailor his decisions in a manner to build commerce? One answer is that in Philadelphia at least, even the popular sentiment seemed to be procommercial.[29] Nevertheless, since the Philadelphia federal court normally operated its admiralty jurisdiction without juries, and since the expanded jurisdiction of the colonial vice admiralty courts had been opposed for the very reason that they operated without juries, one might have expected to find at least some hostility to the expansive admiralty jurisdiction in the Philadelphia federal courts.[30]

Perhaps one strong contributing factor to Judge Peters's ability singlehandedly to promulgate procommercial doctrine was his unwillingness to embroil his district court in issues that would inflame popular opinion. For example, during a period when Pro-French popular enthusiasm was at a high pitch, he refused to find that he had the jurisdiction to determine that French capture of British ships in American waters violated American neutrality[31] even though there was a precedent allowing him so to rule.[32]

Still another factor in Peters's success as a procommercial judge was his linkage of commerce with agriculture. Peters believed that the success of either commerce or agriculture in America would depend upon the constant encouragement of both endeavors,[33] and Peters practiced what he preached. While he was encouraging commerce from the bench, he was promoting agriculture from his vast country estate, Belmont, on the outskirts of Philadelphia.[34]

Finally, Peters's accomplishments as a judge and his sensitivity to popular feeling may stem in part from admirable personal qualities and a wide circle of acquaintances. Peters's good humor and generous hospitality were often exhibited at Belmont, where he and Mrs. Peters often entertained. Peters was on quite friendly terms with Washington,[35] and with the arch-Federalist Timothy Pickering.[36] In at least the early years of this period, however, Peters was also on easy social terms with Thomas Jefferson, and probably with James Madison as well.[37] Since these last two were to become the leaders of the "Republican" party, it might be inferred that Peters's personal asociations exposed him to a wide variety of political opinion, and that he was in a good position to sense the various currents of political and popular opinion and to accomodate to them where possible. As will be seen, not every Federalist judge was so sensitive to the nuances of political change.[38]

III. *Civil Cases in the Circuit Court*

At the same time Peters was at work in the district court building an admiralty law favorable to commercial progress, several important civil cases were litigated in the circuit court, where Peters sat with one or two members of the United States Supreme Court. Like the jurisprudence in the district court, the civil decisions of the circuit court helped to promote the Federalist program. Perhaps the main theme that can be found in these decisions is the preservation of the independence of the federal judiciary. The Federalists were not the first to create this notion, of course, but it was an important element of their political philosophy, as indicated earlier. These opinions anticipate the work of Chief Justice Marshall and show the beginnings of what has been characterized as an "American Judicial Tradition."[39]

The first dramatic demonstration of judicial independence came in *Hayburn's Case*.[40] In March of 1792 the United States Congress passed a statute[40a] setting up a system for determining pensions for soldiers injured in the Revolutionary War. The statute directed that the federal circuit court of the district where a particular applicant for a pension might reside was to determine the amount of the pension to be granted, and the Act further imposed a duty on the circuit court judges to remain in session for five days at each sitting for the next two years to take pension applications. Finally, the Act gave the Secretary of War the power to strike names forwarded to him by the circuit courts, where he should "have cause to suspect imposition or mistake."

On April 18, 1792, Justices Wilson and Blair of the Supreme Court, and District Judge Peters, sitting as the Circuit Court for the District of Pennsylvania, addressed a letter to President Washington, in which they set forth their determination to refuse to proceed under the Act. They indicated that since any determinations they made were subject to revision by the Secretary of War, the scheme set up by the Act was "radically inconsistent with the independence of that judicial power given which is vested in the courts; and, consequently, with that important principle which is so strictly observed by the Constitution of the United States."[41] The Pennsylvania Circuit Court's refusal to play their part under the Act resulted in an attempt to secure a mandamus from the Supreme Court to compel the judges to pass on the claim of one pension applicant, William Hayburn. The case was never decided, however, because Congress, perhaps sensing the delicate political issues involved, set up a new pension mechanism which did not involve the judges in such determinations.[42]

This declaration of judicial independence by the Pennsylvania Circuit Court is particularly striking because it was made in the face of what appears to have been strong public sentiment in favor of the pension program.[43] A decade earlier, angry Pennsylvania troops had actually caused the members of the Continental Congress to withdraw from Philadelphia because of their failure to provide payment and pensions.[44] It must have taken some courage

for the members of the circuit court to risk a similar fate.[45] By their actions in refusing to proceed under the 1792 Pension Act, the judges of the Federal Circuit Court of Pennsylvania not only indicated their belief in judicial independence, but also set precedent for the judicial exercise of the power to declare laws of Congress unconstitutional.[46] Two years later, in the unreported case of *United States v. Todd*,[47] the judges of the Pennsylvania circuit were vindicated. The United States Supreme Court apparently held illegal the actions of those judges from other circuits who circumvented the independence problems by calling themselves "Commissioners."

In *Van Horne's Lessee v. Dorrance*,[48] the Pennsylvania Circuit Court again exercised the power of judicial review by declaring that a Pennsylvania state law violated the Pennsylvania Constitution. In 1787 the Pennsylvania legislature had passed an act settling a long dispute over land in Luzerne County, Pennsylvania, between citizens of Pennsylvania and Connecticut; the former had been granted the land by the prerevolutionary Pennsylvania Proprietors, and the latter took their title from Indians and from acts of the Connecticut legislature. The Pennsylvania legislature decided that the Pennsylvanians should be compensated, but should be made to give up their land. The compensation was to take the form of title to other parcels of Pennsylvania land, vacant property subject to the disposition of the state. Pursuant to the statutory scheme, the determination of the value of the land taken and the allocation of a parcel of corresponding value was to be accomplished by a group of specially-appointed commissioners.[49] One of the Pennsylvania claimants whose title was to be given up brought suit to have the statute declared void.

In the course of the opinion for the court, Justice Paterson, sitting on circuit, made a strong statement of judicial powers and duties which anticipated the opinion of Justice Marshall in the great case of *Marbury v. Madison*.[50] Paterson declared in his charge to the *Van Horne* jury that under American constitutions, unlike the variable practices in England, "[t]he frame of the government, delineated by the mighty hand of the people [establishes] certain first principles or fundamental laws [which are to be] the permanent will of the people, and the supreme law of the land." In England, Paterson explained, Parliament was theoretically omnipotent, but in America, the legislature had a duty to conform to the constitutional mandate. Moreover, it was the duty of American courts "as a co-ordinate, and not subordinate branch, to adhere to the constitution, and to declare the act null and void" where a statute transgressed the bounds specified for legislative action.[51] Thus Paterson restated the linkage of the judiciary with popular sovereignty—the strong selling-point of Federalist political theory.[52]

In addition to reflecting the Federalist emphasis on judicial independence and judicial review, Paterson's charge emphasized the Federalist predilection for the sanctity of private property rights. "If this be the legislation of a republican government, in which the preservation of property is made sacred by the constitution," he declared, "I ask wherein it differs from the mandate of an Asiatic prince? Omnipotence in legislation is depotism."[53] "An Act of

this sort deserves no favor," he continued, "to construe it liberally would be sinning against the rights of private property."[54] In any event, while the full delineation of the sphere of protected private property rights under the Federal Constitution was not to take place until Marshall's tenure as Chief Justice,[55] Paterson was clearly drawing some of the first sketches in the Pennsylvania federal court years before.

Other cases involving private law questions which arose in the circuit court are not as dramatic as *Van Horne's Lessee* or *Hayburn's Case,* but several did seem to demonstrate the court's facility with commercial matters and its willingness to forge a body of modern commercial law.[56]

Nevertheless, the convenience of commerce was clearly not the only important value to the Pennsylvania Circuit Court. For example, in *Searight v. Calbraith*[56a] the jury instruction demonstrated the court's insistence on broad jury discretion. Justice Iredell instructed the jury:

> As to the damages . . . though it is true that in actions for a breach of contract, a jury should in general give the whole money contracted for and interest; yet in a case like the present they may modify the demand, and find such damages as they may think adequate to the injury actually sustained.[57]

Justice Iredell's failure to insist on a judiciary dictated standard for the measurement of damages is consistent with eighteen-century jurisprudence, which emphasized discretion in the jury to decide contractural cases on the basis of the community's sense of "fairness."[58] His charge reflected a strong sense of the jury's importance in this early Federalist period. Even in *Van Horne's Lessee,* Justice Paterson had told the jury: "[I]n general verdicts, it frequently becomes necessary for the jurors to decide upon the law as well as the facts." Paterson was prepared to remind the jury of this power even where it was the duty of the court to "adhere to the Constitution and declare [a statute] null and void."[59]

The old view favoring great jury discretion in determining both law and fact was seen to recede as more judges perceived that it should be the province of the jury merely to determine facts, leaving the pronouncement of the law for the court.[60] In these early years, however, the predilection for jury discretion was still strong, and it is likely that these Federalist judicial decisions in support of jury discretion are a manifestation of the same tendency to espouse the basic principle of popular sovereignty that was present in the "selling" of the Federal Constitution.

IV. *The Debate Over the Existence of a Federal Common Law of Crimes*

A. *Introduction*

While questions over the role of the jury surfaced sporadically in civil cases in the Pennsylvania Circuit Court, it was in matters of criminal juris-

prudence where the issue became most important. In the most significant case of the early years of this period, *United States v. Henfield*,[61] a jury acquittal was perceived, at least by some partisans at the time, as rejecting the law and policy of the Federal government and as demonstrating popular disenchantment with Federalist rule.[62] The *Henfield* case is one of the earliest signs of the Federalists losing touch with and being frustrated by popular opinion and is thus important to the main theme of this chapter, the "broken promise" of Federalist jurisprudence. In particular, *Henfield* merits study for what it suggests about popular and judicial attitudes toward the existence of a federal common law of crimes, or, more generally, the permissibility of the federal courts' punishing offenses which had not been proscribed by any federal statute.

By the late years of the period here under review, this issue had become of crucial significance. The emerging "Republicans" took the position that there was no federal common law of crimes and saw dark designs in the Federalists' assertion that such crimes existed and could be punished.[69] The Republican calumny against the Federalists for the latter's efforts to prosecute common law crimes probably had some importance to Jefferson's electoral victory in 1800. Furthermore, the Federalist common law prosecutions served as justification for Jeffersonian attempts to cut back the influence of the national judiciary.[70]

To this day there is disagreement among legal scholars as to whether the Federalist common law prosecutions were legal or instead represented an unwarranted usurpation of power.[71] A review of the issue in the Pennsylvania federal courts suggests that the Federalist judges may have been legally correct, but the strict legal correctness of their position was much less important in the ultimate resolution of this issue than were the contemporary ideological and political struggles.

B. *The Henfield Case and its Antecedents*

The Judiciary Act of 1789 gave the federal circuit courts jurisdiction over "crimes and offenses cognizable under the authority of the United States,"[72] but the statute did not specify what acts were "crimes and offenses," nor did it specify the extent of the "authority" of the United States. The first official public interpretation of the federal grant of jurisdiction, in 1790, signalled that it was to be broadly construed. Chief Justice John Jay charged a Grand Jury as follows: "In a word, Gentlemen! Your province and your duty extend . . . to the enquiry and presentment of all offenses of every kind, committed against the United States . . ."[73] Jay did not define the term "offenses," but did provide some clues as to the scope of "crimes and offenses" against the United States.

First, he suggested that the jurors

> would recollect that the laws of nations make part of the laws of this, and of every other civilized nation. They consist of those rules for regulating the

conduct of nations towards each other, which, resulting from right reason, receive their obligation from that principle and from general assent and practice.[74]

The jurors were thus to use their own common sense and their knowledge of world and national history to guide them in their search for criminal acts.

Jay also told the grand jurors to "direct your [attention] also to the conduct of the national officers, and let not any corruptions frauds, extortions or criminal negligence with which you may find any of them justly chargeable pass unnoticed." Jay thus seemed to be defining "offenses against the United States" to include virtually any examples of wrongdoing against the government or the public whether or not prohibited by statute.

Three years later, in a charge to the Grand Jury for the Middle Circuit in the District of Virginia, Jay had apparently refined his description of offenses. He told the juriors: "The laws of the United States admit of being classed under three heads (or) descriptions. 1st. All treaties made under the authority of the United States. 2nd. The laws of nations. 3dly. The constitution, and statutes of the United States."[75] Jay continued in a manner which suggests that conduct proscribed by any of these three "heads" of law was a matter into which the grand jury should inquire, but in this charge, at least, he seemed most concerned with violations of the "law of nations." This was a result of the outbreak of war between England and France in January 1793, which had violently split American public opinion and had just resulted in the "Neutrality Proclamation" issued by President Washington.[76] Jay quoted extensively from the Proclamation and indicated that Washington's instructions to prosecute persons who committed, aided, or abetted hostilities against any of the belligerents were "exactly consistent with and declaratory of the conduct enjoined by the law of nations."[77] Jay closed his charge with comments indicating that the United States' treaties of "firm and perpetual peace" also enjoined American citizens from aiding the belligerent powers, and that such conduct, as a violation of a treaty, was punishable as a crime.[78]

Later, in July 1793, Justice Wilson of the Supreme Court charged a Grand Jury for the Middle Circuit in Philadelphia. One of the matters which this grand jury was to investigate involved one Gideon Henfield, who was accused of engaging in acts hostile to nations at peace with the United States. Henfield had allegedly assisted in the capture of an English prize ship by a French privateer. Wilson began his grand jury charge by noting the basis of the American judicial system was what he called the "common law." American common law, explained Wilson, was like English common law in that its "accommodating principle . . . will adjust its improvement to every grade and species of improvement . . . in consequence of practice, commerce, observation, study or refinement."[79] The American common law, said Wilson, like every other, was "a social system of jurisprudence. She receives other laws and systems into a friendly correspondence; and associates to herself those who can give her information, or advice, or assistance."[80] Thus, when a

court was faced with a problem involving the law of other countries, the law of merchants, or the law of nations, those bodies of doctrine would become assimilated into the common law and would be used in the disposition of the particular case.[81]

In this manner Wilson arrived at the same point Jay started with in *his* jury charge two months earlier—the United States law incorporated the law of nations. Unlike Jay, however, Wilson carefully explained that he had arrived at this destination through the vehicle of what he called the "common law." Moreover, the "law of nations" regulated the affairs of individual citizens as well as of their countries.[82] Among these duties which devolved on individuals (and on nations) was that of keeping "peace on earth," of living in amity with one's neighbors. This meant, said Wilson, that "[A] citizen, who in our state of neutrality, and without the authority of the nation, takes an hostile part with either of the belligerent powers, violates thereby his duty, and the law of his country . . ."[83]

Five days later, on July 27, 1793, the grand jury returned an indictment against Henfield. The indictment said that his conduct was "to the evil example of all others in like cases offending, in violation of the laws of nations, against the laws of the United States in such case made and provided, and against the Constitution of the United States, and against the peace and dignity of the said United States."[84]

At Henfield's trial, the prosecutor, William Rawle, argued to the petit jury along the same lines that Wilson had charged the grand jury. He too explained that when individuals join to form a nation they give up the right to make war which "in a state of nature" adheres to the individual. Were this not so, Rawle argued, individuals might plunge the nation into unwarranted war. These propositions were not "only the speculations of the closet," explained Rawle to the jurors, "We see them carried into effect in England in affirmation of national common law, *i.e., the law of nations.*" Rawle acknowledged that in England such conduct was prohibited by statute, but he suggested that although "the English statute is not in force here, because the specific remedy for which alone it was made cannot be had, the *law* which it aided, not introduced, is in force." This was so because "the law of nations is part of the law of the land." The conduct of Henfield was "an offense against the laws of nations" and was punishable by "indictment or information as such."[85]

Unfortunately, there is no record of the argument made by counsel for Henfield, other than some notes taken by Rawle. These show that the defense stressed, *inter alia,* that Henfield's conduct "did not include an offence at common law," and that "independently" of other grounds "as there was no statute giving jurisdiction, the Court could take no cognizance of the offence."[86]

In his charge to the petit jury, Justice Wilson sought to answer the question raised by Henfield's counsel: *Against what law has he offended?* Wilson responded:

> As a citizen of the United States, he was bound to act no part which could injure the nation; he was bound to keep the peace in regard to all nations with whom we are at peace. This is the law of nations; not an *ex post facto law*, but a law that was in existence long before Gideon Henfield existed.[87]

In addition, Wilson stressed that Henfield violated the terms of specific treaties, which were "expressly declared to be part of the supreme law of the land." After almost two days of deliberation and several consultations with the court, the jury delivered a verdict of not guilty.

C. *The Meaning of the Henfield Case*

Since no one denied that Henfield committed the acts with which he was charged, it was tempting to read the acquittal as a rejection by the jury of the law as laid down by the Federalist judges and prosecutors. A piece in the *National Gazette of Philadelphia*, an organ of the emerging opposition to the Federalist party,[88] proclaimed that "[I]t would be contrary to the principles of impartial justice, that any man should, in future be convicted and punished for doing what in Gideon Henfield was no crime, and incurred no penalty." The paper blasted the Federalist doctrine that suggested that crimes could be punished without statutes:

> With respect to the charge of the court which declared explicitly, that the acts committed by Gideon Henfield were a violation of the law of the land, and punishable, we can only lament that any occasion should arise for introducing motives of policy to influence the decisions of our courts of justice.[89]

The article closed with a stirring linkage of the *Henfield* jury's actions with those of a famous English liberty-loving jury:

> When the seven bishops (good and celebrated men) were tried for petitioning James the Second, a similar difference of opinion arose between the bench and the jury; the people then as the people now exulted in the verdict of acquittal; and our posterity will, probably, venerate *this* as we venerate *that* jury, for adding to the security of the rights and liberties of mankind.[90]

It *is* possible to read the verdict in the *Henfield* case as a popular rejection of the Federalist doctrine of the existence of common law crimes. It is doubtful, however, that the popular feeling against prosecutions at the law of nations or at common law was as great as these opposition newspapers made it out to be. First, the possibility that some sort of coercion was applied to at least one of the Henfield jurors cannot be dismissed. One of their number was reported to have declared to the court that "he was induced to the verdict because he heard threats made out of doors against any one who should oppose the acquittal."[91] Second, the juriors' acquittal of Henfield may have flowed more from Henfield's personal circumstances than from any hostility to the nature of the presecution. Thomas Jefferson wrote shortly after the trial:

> It appeared on the trial, that the crime was not knowingly and wilfully committed; that Henfield was ignorant of the unlawfulness of his undertaking; that, in the moment he was apprized of it he showed real contrition; that he had rendered meritorious services during the late war, and declared that he would live and die an American.[92]

A final explanation of Henfield's acquittal is that the epidemic of Francophilia which had swept America shortly after the revolutionary events of 1789 was apparently still running fairly strongly, and Henfield's activities in aiding France may have been perceived by the majority of the jurors as "combating for liberty against the combined despots of Europe."[93] Thus, admiration for the French Republicans rather than hostility to the form of Federalist prosecution may have influenced the Henfield jury.

That there was at this time no overwhelming popular opposition to the doctrine that crimes could be prosecuted without statutes is also evident from the proceedings in the case of *United States v. Ravara,*[94] tried one year after *Henfield.* Ravara was a consul from Genoa who was accused of sending threatening letters to the British minister and to several other persons "with a view to extort money."[95]

At the trial, Ravara's defense was made on three grounds: first, that at common law what Ravara had done was no crime; second, that by virtue of his being a consul "the law of nations" (which was said to be a part of the law of the United States) made him "independent of the ordinary criminal justice of the place where he reside[d]"; and third, that the evidence was simply too circumstantial to support a verdict.[96] Thus, even the defense in this case appears to have acknowledged the authority of the common law and the law of nations. The prosecutor, again Mr. Rawle, maintained that "the offence was indictable at common law; that the consular character of the defendent gave jurisdiction to the circuit court, . . . [and] that the proof was as strong as the case allowed."[97] The same position was taken by the court (Jay and Peters) in its charge to the jury. "[A]fter a short consultation," the jury "pronounced the defendant guilty."[98] Like *Henfield, Ravara* was a case in which no statute proscribed the criminal conduct. Devoid of the peculiar circumstances which may have skewed the *Henfield* verdict, the guilty verdict in *Ravara* belies any overwhelming popular sentiment against such prosecutions.

Nevertheless, the Henfield verdict was apparently read by the wiser Federalists as a sign that prosecutions without statutes were risky. Henfield's acquittal "alarmed President Washington," who sought and obtained legislation from Congress proscribing conduct like Henfield's.[99] A case under the new law, *United States v. Guinet,*[100] was tried in the Pennsylvania Circuit Court in 1795. The jury apparently had no trouble in rendering a guilty verdict. Since Henfield was acquitted of a similar charge when the prosecution was brought at common law, it would be possible to read the guilty verdict in *Guinet* as evidence of popular approval of Federalist prosecutions for the same act where it was outlawed by statute. This would have to be a tentative reading,

however, since there were other differences in the two cases which might have influenced a jury. First, Guinet was apparently involved principally for money, whereas Henfield was at least arguably a disinterested lover of liberty. Also, the predominant pro-French mood of the country had largely dissipated by 1795 owing to the atrocities of the September Massacres of 1792, the Reign of Terror of 1793–1794, and George Washington's denunciation of the pro-French "Democratic Societies" in late 1794.

As of 1795, then, it does not seem possible to conclude that American public opinion had reached a consensus on the legitimacy of prosecution in federal courts in cases without a statutory basis. While there were several successful common-law prosecutions immediately after the *Henfield* case,[101] none of these occurred in Pennsylvania, and the issue did not surface again there until 1798, in the strange case of *United States v. Worrall.*[102]

D. *The Worrall Case*

Robert Worrall was a businessman of sorts who in 1797 had unsuccessfully attempted to bribe the United States Commissioner of Revenue into awarding him a contract for the construction of a government lighthouse. By this time, Congress had passed statutes providing punishments for bribing judges, officers of the "customs," or officers of the "excise," but there was no statute explicitly proscribing attempts to bribe the Commissioner of Revenue. Nevertheless, it was reasonably clear that at English common law such an attempt at bribery was an indictable crime.[103] Worrall was indicted by a grand jury and brought to trial in the Federal Circuit Court for the District of Pennsylvania before Judge Peters and Justice Samuel Chase. The trial jury found Mr. Worrall guilty. Defense counsel's apparent failure to argue the illegality of indictments without supporting statutes and the grand jury's previous indictment of Worrall again suggest a lack of popular appeal for that legal argument, or at least a lack of popular appeal of Robert Worrall. It might be of some significance that in early 1798 popular support for the Federalists was running fairly high in the wake of the X, Y, Z affair and the atrocities of the French Reign of Terror.[104]

Following the verdict, Alexander James Dallas, counsel for Mr. Worrall, moved in arrest of judgment on the grounds that the circuit court was without authority to take cognizance of the crime charged in the indictment. Dallas suggested that all the judicial authority of the federal courts had to be derived either from the Constitution or from acts of Congress and that "the crime of attempting to bribe, the character of a Federal officer, and the place where the present offense was committed" were not specified in any constitutional provision, nor had there been an act of Congress which expressed these elements. Moreover, Dallas argued that the provision of the eleventh section of the Judiciary Act of 1789 giving the Federal courts jurisdiction over "crimes and offenses cognizable under the authority of the United States" referred only to *express* constitutional provisions and statutes passed by Congress.[105]

Dallas took the position that a construction of the Judiciary Act more liberal than this would "destroy all the barriers between the judicial authorities of the state and the general government." If the present case were allowed, "anything which can prevent a Federal officer from the punctual, as well as from an impartial performance of his duty; an assault and battery or the recovery of a debt, as well as the offer of a bribe," said Dallas, "may be made a foundation of the jurisdiction of this court."[106]

The federal government, Dallas argued, by virtue of the tenth amendment to the Constitution[107] was one of limited, enumerated, and delegated powers. Thus, since the Constitution spelled out in article 1, section 8, that Congress could pass statutes providing for the "punishment of counterfeiting . . . piracies and felonies . . . and offenses against the law of nations,"[108] and since the Constitution also provided that laws might be passed "necessary and proper for carrying into execution the powers of the general government,"[109] the federal courts were without power to act unless a specific statute were passed making bribing the commissioner a crime. Dallas then distinguished the indictment against Henfield as involving a violation of treaties (over which the Constitution expressly gave the federal government power) and that against Ravara as a proceeding against a consul (a proceeding also explicitly permitted in the Constitution).[110]

The prosecutor, Rawle, argued that *Henfield* and *Ravara* were indistinguishable from *Worrall* in that all had been proceedings at common law, insofar as no statutes were involved in any of the cases.[111] As soon as Rawle had suggested that other federal cases had been brought by virtue of indictments sought at common law, Justice Chase broke in: "Do you mean, Mr. Attorney, to support this indictment solely at common law? If you do, I have no difficulty upon the subject. The indictment cannot be maintained in this Court." Rawle answered "in the affirmative." Chase then delivered an opinion from the bench which seems to have been written anticipating Rawle's argument.

As did Dallas, Chase emphasized that the departments of the United States Government could not assume any powers that were "not expressly granted by" the Constitution. For Chase it was "essential that Congress should define the offences to be tried, and apportion the punishments to be inflicted . . ."[112] Chase declared that it was impermissible to resort to the common law "for a definition and punishment of the offence which had been committed," because "in my opinion, the United States, as a Federal government, have no common law." Unlike the states, wrote Chase, the "United States" did not bring the common law with them from England, and neither the Constitution nor a federal statute had adopted it. Moreover, since the common law of each particular state varied according to its "local situation," there was no uniform body of common law that could be said to be applicable to the federal government.[113]

When Chase had finished, Judge Peters, who was sitting with Chase, expressed his opinion that Chase was wrong, and that the prosecutor had cor-

rectly stated the law. For Peters the power "to preserve itself" was a "necessary and inseparable" feature of any government. The United States, he said, were "constitutionally possessed" of the "common law power" to punish misdemeanors. While it was true that Congress could exercise this power in the form of a legislative act, the power could also "be enforced in a course of judicial proceeding."[114]

Chase was the only Federalist judge to utter the heresy that there was no federal common law. Soon the Republicans were to take up the claim and bandy it about the halls of Congress, in private correspondence, and in public manifestos. As Republican suspicions grew that the Federalists were going to use a "federal common law" to harass and imprison critics of the administration, the issue of the existence of a federal common law became a hot political controversy. As the late Professor Julius Goebel pointed out, the debates in late 1798 and 1799 were filled more with political rhetoric than with legal analysis and did not resolve the question of the legal correctness of Peters's or Chase's views.[115]

Professor Goebel believed that it was not the intention of the Framers of the Constitution to make the common law "the basic jurisprudence that would prevail in the new system." They intended, he believed, merely to take selected parts of the common law to fill out the definition of words like "Equity," "Jury," or "Treason."[116] Still, it was the Federalist position that by incorporation of common law terms the United States Constitution implicitly incorporated the entire common law.[117]

Even if Goebel, Chase, and Dallas were right about the Constitution's not incorporating a federal common law, however, it is still at least theoretically possible that the incorporation of this jurisprudence could have been accomplished by a federal statute. Chase himself acknowledged this possibility.[118] Peters, delivering his *Worrall* opinion immediately after Chase, stated his belief that the language of the Judiciary Act giving the federal circuit court jurisdiction over "all crimes and offences cognizable under the authority of the United States" was intended to create a federal common law of crimes.[119] In his landmark article on the history of the 1789 Judiciary Act, Charles Warren argued that such incorporation *was* the intention of Congress.[120]

In the final analysis, there may be no way of knowing just what was intended by the Framers of the Constitution and Judiciary Act. The intentions of individual framers may have been completely different, depending upon their particular philosophical or political beliefs. In the Constitutional Convention of 1787, for example, the delegates maintained different interpretations over just what had been proposed with regard to the questions of the extent of federal sovereignty and the role of the federal courts in judicial review, and a particular delegate's view was influenced by his predilection for "nationalism" or "states'-rights."[121] The Judiciary Act of 1789 was also a compromise and an ambiguous measure which did not give either those favoring "broad" jurisdiction in the lower federal courts or those favoring jurisdiction over federal questions in the state courts all they desired.[122] In

this atmosphere, it seems likely that many key measures, like the provisions for federal criminal jurisdiction, may have been ambiguously worded compromises deliberately leaving room for different interpretations.

Nevertheless, even where the legislative history was fairly certain, we should not be too surprised to find partisans disagreeing about the meaning of particular phrases. For example, even though it was apparently clear that states' rights advocates "failed in their attempts to alter the proposal that was to become the tenth amendment so as to limit the federal government to those powers 'expressly' delegated by the Constitution," those advocates or their descendants were not above "frequently but incorrectly" insisting that the tenth amendment had made implied federal powers illegal.[123]

Something like this seems to have happened right in the *Worrall* trial where both defense counsel Dallas and Justice Chase spoke as though the provisions of the tenth amendment forbid the application of a federal common law of crimes because the Constitution does not expressly grant such power. In seeking an explanation for the divergence of judicial views in the *Worrall* case, then, the widespread division in opinion over the extent of the sovereignty of the federal government looks attractive. According to this view, Richard Peters, a believer in strong federal sovereignty, would be expected to take the position he did—endorsing a strong federal government capable of exercising inherent powers of self-defense. But how, then, does one explain the views of Justice Chase, who seems to be taking a states-rights position in *Worrall* but who later was to become the most blatant symbol of aggrandizing Federalism?[124]

Some commentators on the political dispute which was soon to develop over the existence of a federal common law of crimes attribute the division of opinion to the Federalist/Republican split over the extent of power that the Constitution granted to the central government. A consideration of Chase's background and political views and his subsequent behavior in the *Worrall* case itself suggests that the Chase/Peters split was over these same issues that divided the Federalists and the Republicans. The split in *Worrall,* though, probably reflected the vestiges of divisions within the Federalist party itself. As it became clearer to Samuel Chase that the current political situation called for political hegemony, following this initial opinion, Chase may have "purified" his views to be more in accord with his new-found Federalist brethren.

Immediately after the opinions were delivered in *Worrall,* when it became clear that Chase and Peters were divided over the existence of a federal common law, the two judges suggested that Worrall's counsel bring the matter to the Supreme Court for a definitive ruling.[125] The defendant, probably realistically concluding that he stood little chance with his arguments in the Supreme Court, refused to appeal. Chase and Peters then withdrew for "a short consultation."[126] There is no hard evidence on what happened during this time, but Wharton, as a note to his report of the case, suggests that Chase and Peters consulted other members of the Supreme Court who were con-

veniently present in Philadelphia.[127] According to this hypothesis, Chase was then informed of the belief on the part of the other justices, particularly Oliver Ellsworth, that prosecutions under a federal common law of crimes were permissible and desirable.[128] Chase and Peters returned to the circuit court, reconvened, and sentenced Worrall to a term of imprisonment of three months and a fine of $200.

The fact that Chase was ultimately willing to join in the imposition of punishment certainly suggests that his views on the law were malleable. Indeed, a complete reversal in his position on a federal common law is what seems to have happened. A year after *Worrall*, in 1799, Chase "presided in the case of *United States v. Sylvester*,[129] a common-law prosecution for counterfeiting, which ended in a conviction and a sentence of one year in jail and a $100 fine." Justice Chase might well have been persuaded by his brethren that the political necessities of the time required a federal common law jurisdiction.

Federalist hysteria was beginning to run high in 1798, and the Alien and Sedition Acts were shortly to be passed. Even before these Acts, however, the need was felt to prosecute for seditious libel at common law. One such prosecution was begun in Philadelphia a scant few weeks after the *Worrall* case. On June 26, 1798, Benjamin Franklin Bache, who had long been the most strongly anti-Federalist of newspaper publishers,[130] was arrested. Since the Sedition Act had not yet been passed, the offense was one at common law for seditious libel. His counsel appeared before Judge Peters, to argue that there was no legal support for prosecution of a federal common law offense and cited the opinion of Justice Chase from the *Worrall* case. Judge Peters indicated that *he* had not changed *his* opinion from the *Worrall* case, and that as far as he was concerned, the law was as he (Peters) had stated it. Bache died before he could even be indicted. Since the Sedition Act was soon passed, and had the appearance of a more "liberal" measure, there were no further attempted Federalist prosecutions in the federal courts for common law seditious libel.[131]

Given the close proximity in time of the Bache arrest and the *Worrall* case, it is possible that Chase was made aware by his brother judges of the desirability of prosecuting Bache at common law. Chase tended to be quick on the trigger, and he may not have realized the political implications when he issued his *Worrall* opinion. Perhaps he may have been reminded that he had promised when he was appointed that the President "shall never have reason to regret the nomination."[132]

In any event, Chase's "mistake" about the existence of a federal common law was not repeated by any other federal judge in the period with which we are concerned. This issue was finally decided by the Supreme Court in 1812 in the case of *United States v. Hudson & Goodwin*.[133] In *Hudson*, Mr. Justice Johnson, speaking for the Court, stated that the question "whether the Circuit Courts of the United States can exercise a common-law jurisdiction in criminal cases" was then before the Supreme Court "for the first time." Neverthe-

less, said Johnson, "we consider it as having been long since settled in public opinion," and he proceeded to rule, in accordance with this "public opinion," that there was no federal common law jurisdiction. In essence, Johnson's opinion was bottomed on little more than the bald assertion, much like that of Chase in *Worrall*, that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence."[134] The real source of the acceptance of this principle would seem to be more in what Johnson called "public opinion" than in the United States Constitution. It remains to be explored here, however, why the position of the Federalist judges of 1799 was so decisively rejected by the "public opinion" Justice Johnson referred to in 1812. The conduct of one man, Samuel Chase, probably had as much to do with directing public opinion against the Federalist judges as all the other factors combined.[135] Before proceeding to an examination of Chase's further conduct on the bench, it is necessary to make something of a detour to consider in greater detail the biography of Samuel Chase, and what could have caused him to take inconsistent positions in *Worrall*.

V. *Samuel Chase and the Turbulence of the 1790's*

According to the conventional view of Mr. Justice Samuel Chase, he was "a 'hanging judge' if such ever sat on the bench of the Supreme Court of the United States."[136] The conventional view of Chase, however, ignores many complexities in the character of the man, in his political conceptions, and in the times in which he lived.

While some mystery still surrounds Chase's political career, it is apparent that during the revolutionary and early national years Chase was perceived as a magnificent champion of the people.[137] He was a signer of the Declaration of Independence, and served the patriot cause during the Revolutionary War. During and after the war, Chase assumed an active role in Maryland state politics. He was a principal architect of the Maryland Constitution of 1776. This document was "fraught with checks and balances, and with . . . powers so distributed between aristocracy and people, that destructive radicalism seemed impossible." Nevertheless, during Chase's service in the Continental Congress and in the Maryland legislature in the 1780's he proved that a politician demagogically playing for the multitudes could launch the most outrageous schemes for private profit at public expense. While Chase's most daring schemes for personal financial aggrandizement were apparently regularly exposed, his success with Maryland popular politics, and in particular his attacks on the Maryland "aristocracy," insulated him from serious personal or political harm.[138] Chase's sensitivity to Maryland popular opinion, or possibly his sincere feelings about concentrated and centralized aristocratic authority, led him to become a vehement opponent of the proposed Federal Constitution on the grounds that it too tightly constricted the sovereignty of the individual states.[139]

By 1796 Chase was ready to do some political trimming and to join the Federalist administration. Chase may have ultimately been motivated by personal ambition, but there is evidence that by this time, when he was well into middle age, his earlier democratic fire had cooled.[140] Nevertheless, the last vestiges of Chase as a popular states-rights advocate probably surfaced in his opinion in the *Worrall* case. Just as Jefferson and Madison would later, Chase opposed a federal common law in his *Worrall* opinion because he wished to limit the sovereignty of the federal government to express grants in the Constitution. As indicated, it is likely that when reminded of his obligations to his new political fellows and when reminded of the real difficulties of the times, Chase abandoned this last vestige of antifederalism.

As the events of the 1790's in Pennsylvania and elsewhere demonstrated significant popular dissatisfaction with the perceived policy of the ruling Federalists, Chase's political allegiance to the Federalists hardened still furthere until he was to engage in the activities that were to make him a hated symbol of partisanship. Before describing Chase's later manifestations of extremism, then, it seems worthwhile to consider their source, to pause to explore the political atmosphere of the late 1790's. One need look no further than events in Pennsylvania.

In 1794, for example, when the United States Government sought to collect long overdue revenues under an excise tax on whiskey originally passed by Congress in 1791, the residents of western Pennsylvania resisted collection with violence. The tax struck hard at the economy of the region west of the Allegheny Mountains. Many of the residents of that region engaged in armed attacks on federal excise officials in the summer of 1794, often resorting to the use of tar and feathers. For several months during 1794, federal authority was completely ended in western Pennsylvania. Federal commissioners sent to observe the situation concluded that "nothing less than the physical strength of the nation could enforce the law in western Pennsylvania."[141] Several thousand men of western Pennsylvania took up arms in opposition to the federal statute,[142] and President Washington finally dispatched a contingent of 15,000 federal troops to restore the authority of the federal government to the affected area.[143] Similar, although not as violent or extensive, citizen resistance to federal taxes broke out in eastern Pennsylvania in 1799, in the so-called "Hot Water War," or "Fries's Rebellion." This time the disturbances centered on a proposed assessment on houses, but the methods of opposition were close to those utilized in the "Whisky Rebellion" of 1794. The Federalists also quelled the 1799 uprising by the dispatch of federal troops, this time authorized by President Adams.[144]

Compounding the problems caused to the Federalist administration by the two rebellions in Pennsylvania during these years was the rise of a virulent opposition press. During the early 1790's two newspapers, Philip Freneau's *National Gazette,* and Benjamin Franklin Bache's *Philadelphia General Advertiser* (the name was changed to *Philadelphia Aurora* in 1800), grew more and more openly hostile to the Federalists. By 1798, as indicated, the Fed-

eralists sought to silence Bache by prosecution at common law for seditious libel. Almost immediately following Bache's death, the editorship of the *Aurora* was taken up by William Duane, who raged so bitterly against the Federalists that he may have had the major responsibility for the passage of the Sedition Law of 1798, an attempt to silence him. In particular, Duane took the Federalists to task for their handling of the Fries affair, and presented their conduct as a gross overreaction to the situation.[145]

It seems to be the currently accepted wisdom of American historians that the Federalists "overreacted" to the two Pennsylvania rebellions.[146] To a great extent this is the wisdom of hindsight.

To contemporaries the Whisky Rebellion and even Fries's Rebellion appeared as real threats to the continued existence of an independent and complete United States. Many responsible Americans, not all of them firm adherents to the Federalist faith, felt that the Whisky Rebellion had the potential of developing into a full-scale civil war.[147] Even the consensus accounts of the period acknowledge that the "Whisky Rebellion had the potential to spread to several other states, and to affect a great many American citizens."[148] Similar judgments about the seriousness of the situation in Fries's Rebellion were made.[149]

It would have been easy, if not inevitable, for Chase and other Federalists to see the events of the 1790's—particularly the Whisky Rebellion, Fries's Rebellion, and the activities of the opposition press—as a part of a pattern of events they had seen before. This pattern could be observed in both the recent American and European experience. During the colonial period it was a fairly common occurrence for Americans seeking redress from perceived abuses to bring their causes into the streets. Most of these demonstrations had been brought about through well-organized committees of insurgents, and often those fomenting the disturbances implemented their schemes through written articles or "constitutions" to which many citizens were persuaded to subscribe. In some instances, the power of the insurgents was so great that they were able to intimidate voters, to levy their own taxes, to dictate to colonial courts, and to deploy their own militia. In several colonies, extra-legal groups which had started as popular resistance movements to royal government eventually metamorphosed into provincial congresses. Representatives of these groups became the Continental Congress which was to declare independence.[150]

During the period of the Confederation (the decade following the Declaration of Independence), men of wealth and influence in America had watched uneasily the increasing frequency of organized demonstrations by the "people out of doors."[151] While it was one thing for Americans such as the "Sons of Liberty" to stage demonstrations against the British *before* the Revolutionary war,[152] it was quite another for these popular demonstrations to continue after the British enemy had been routed.[153] The Federalists of the late 1790's, men like John Adams and Samuel Chase, had once condoned and even participated in demonstrations of popular sentiment during

the revolutionary years.[154] But once American independence had been won and governments presumably responsive to popular sentiment had been erected, these "old Whigs" began to worry about the continued popular discord. During the late 1770's, mobs often roamed the streets intimidating merchants, dictating prices, and generally disturbing the peace. In the 1790's there were riots in Boston, New Haven, Philadelphia, and Charleston. Worst of all, in western Massachusetts in 1786, the popular uprising known as Shays's Rebellion ended the authority of the Massachusetts legislature and judiciary for several months until the state militia restored it. Even in conservative Virginia, courthouses were burned and tax collectors were stopped. In Pennsylvania during the Whisky and Fries's Rebellions, the press and popular demagogues had inflamed the people with notions that no government had the right to tax them and that the Federalists were bent on crushing the people through the establishment of an aristocracy and a monarchy.[155]

By the early 1790's these popular ideas and popular disturbances seemed to bear too close a resemblance to what was then happening in France to be taken lightly. The 1794 Whisky Rebellion occurred two years after the September Massacres in France, where more than 1,000 people had been executed, and approximately one year after the French Regicide and the atrocities of the Terror, in which more than 20,000 people lost their lives.[156] The fact that the American "Democratic Societies," groups vocally supportive of the French Jacobins, appeared to have been implicated in fomenting the Whisky Rebellion encouraged the parallels between the disorders in France and America.[157]

While the atrocities of the Terror abated in France after 1794, other French activities continued to alarm the Federalists. Even the somewhat more conservative French Directory did not appear to have abandoned the announced French goal of promising "French aid to all peoples wishing to regain their natural liberty."[158] Americans watched with increased concern the French absorption of Belgium, the Rhineland, Savoy, and Nice, and the creation with French aid of "buffer republics" in Holland, Switzerland, and Italy.[159] All of this led to the "undeclared" naval war with France of 1797–1800.

Once the news of the French fiasco at Trafalgar in August of 1798 reached America however, the political climate in America began to change. Fears of French invincibility somewhat dissipated. There was now less alarm at the possibility of yielding to French force and thus risking a war with Britain. The collapse of commerce, public credit, and fiscal planning that would accompany such a war then seemed more unlikely. Nevertheless, many Federalists continued to worry about events in France being repeated in the United States. In June 1799 a parliamentary revolution overthrew the dictatorial French Directory, and legislation was passed imposing "a forced loan on the rich . . . and a law which permitted the authorities to take hostages in the families of notorious *emigres* or suspects . . ."[160] This news came a year after the bloody Irish rebellion which ended in late June of 1798. All of this

must have added to perennial Federalist fears of an American popular uprising.

Francis Wharton, in the introduction to his *State Trials,* published in 1849, writes of the years of the late 1790's as "by far the gloomiest period in our history," and a period when there was actually a threat that part of the American West would fall under direct foreign domination.[161] As late as 1799 both the Federalist Attorney General of the United States, Charles Lee, and Alexander James Dallas, a leading Republican, carried sword canes, in fear of the general political fury.[162] Small wonder, then, that Adams might send in troops or that other Federalists might assume that the French experience might be repeated here. As we will soon see, these attitudes and assumptions influenced the workings of the federal courts of Pennsylvania and resulted in the "broken promise" of Federalist jurisprudence.

VI. *The Federalist Reaction to Popular Uprisings Reflected in the Courts*

A. *The Treason Trials*

The Trials of the Whisky Rebels—In 1795 several persons apprehended by the "federal" troops in the effort to stop the Whisky Rebellion were brought to trial at the federal Circuit Court for Pennsylvania before Judge Peters and Justice Paterson. These were the first trials for treason in the federal courts. They established the precedent that armed opposition to execution of a United States statute (in this case the excise tax on whiskey) amounted to "levying war" against the United States and thus came within the constitutional definition of treason.[163] Justice Paterson's opinion on the law in one of these cases as delivered to the jury clearly accepted the notion of the prosecutor, William Rawle: "What constitutes a levying of war . . . must be the same, in technical interpretation, whether committed under a republican, or a regal form of government; since either institution may be assailed and subverted by the same means."[164] Rawle's English common law authority that "raising a body of men to obtain, by intimidation or violence, the repeal of a law, or to oppose and prevent by force and terror, the execution of a law, is an act of levying war" was clearly reflected in Justice Paterson's summation to the jury, and thus passed into American Law.[165]

These trials reflected a willingness on the part of the judges to act in a manner that aided the national government. In some early pretrial skirmishing, for instance, Judge Peters stated that the federal judiciary should not be hamstrung by delicate niceties of state procedure. Counsel for some of the prisoners had argued that the prosecutions were not being carried on in conformity with the requirements of section 29 of the Judiciary Act, which seemed to require that matters of jury selection should be in accordance with state practice.[166] Peters diplomatically accepted some of these objections, and accordingly postponed the trials until compliance with state law could be

Photo from The Supreme Court Historical Society

William Paterson, United States Supreme Court Justice, from New Jersey, who presided over the trials of the Whiskey rebels.

accomplished, but he rejected arguments based on other technical infractions of state law:

> The legislature of a state have in their consideration a variety of local arrangements, which cannot be adapted to the more expanded policy of the nation. It never could have been in the contemplation of congress, by any reference to state regulations, to defeat the operation of the national laws.[167]

Peters cited no authority in support of these propositions.

The wish to aid the federal prosecution looms even larger in Justice Paterson's jury charges. In *United States v. Vigol,*[168] *Paterson* appears to have usurped the jury's factfinding function by declaring at the outset of this charge:

> With respect to the evidence, the current runs one way. It harmonizes in all its parts. It proves that the prisoner was a member of the party . . . who, at each place, committed acts of violence and devastation . . . With respect to the intention to suppress the office of excise, likewise, there is not, unhappily, the slightest possibility of doubt.[169]

Similarly, in *United States v. Mitchell,*[170] Paterson told the jury that the first question for them to consider was whether the object of the insurrection was the treasonous intention to prevent the execution of an Act of Congress. He then stated: "Taking the testimony in a rational and connected point of view, this was the object." Paterson concluded his charge with the assertion that

> Upon the whole, . . . the prisoner [Mitchell] must be pronounced guilty. The consequences are not to weigh with the jury:—it is their province to do justice; the attribute of mercy is placed by our Constitution in other hands.[171]

Paterson's dictating factual conclusions to the juries in these cases was probably sanctioned by English tradition,[172] but seems objectionable when we take into consideration the emerging American standards of great discretion for juries in criminal cases.[173] In a scant few years, summary conduct like Paterson's would meet with great popular resistance when it was indulged in by Justice Chase at the trials of Fries and Cooper.

The First Trial for Treason of John Fries—As indicated earlier, five years after the Whisky Rebellion, "Fries's Rebellion" took place in eastern Pennsylvania. Many yeomen of Northampton, Montgomery, and Bucks counties in eastern Pennsylvania organized protests against some new federal taxes which had been imposed in anticipation of hostilities with France. While there was no real bloodshed from the tax resisters, there was, during the months of 1799, much marching around by armed troops in uniform, and at least one overt act of rebellion—the liberation of prisoners from the custody of a federal marshal by means of armed militia.

The chief perpetrators of agitation, including John Fries, who led the freeing of the federal prisoners, were brought to trial for treason before Judge

Peters and Justice Iredell in 1799. The case aroused interest in the Pennsylvania press, and the trial immediately took on dramatic political overtones. Acting as lawyers for the defense were William Lewis, a former federal judge, and Alexander James Dallas, fast becoming the kingpin of the emerging Pennsylvania Republican organization.

Once again the beginnings of the trial reveal a tendency on the part of the judges to favor the prosecution. On April 30, 1799, Lewis moved for the Fries trial to be removed from Philadelphia to Northampton County, the place where Fries's offense was alleged to have been committed. His motion was made pursuant to section 29 of the Judiciary Act, which mandated trial in the county where the offense had occurred.[174] Peters stated that "a fair and impartial trial ought to be had, which he was certain could not be held in the county of Northampton."[175] Similarly, Iredell questioned: "If nearly one whole county has been in state of insurrection, can it be said that a fair trial can be had there?"[176] The motion was denied. If there was anything in the spirit of this section of the Judiciary Act that sought to give the defendant the benefit of a sympathetic trial among his neighbors, it was clear that it was not of paramount importance to Peters or Iredell.

At the trial, the thrust of Fries's counsel's defense was to persuade the jury that armed resistance to a federal officer's execution of a federal statute was not the crime of treason. Lewis and Dallas, in short, were exhorting the jurors in Fries's case to arrive at the opposite conclusion from that laid down by Justice Paterson, Judge Peters, and by the jurors in the trials of the Whisky Rebels. The technique of arguing the law to the jury was tacitly approved by Peters and Iredell.[177]

Fries's counsel did not argue that their client was innocent of all crimes, but simply that he was not guilty of the heinous crime of treason. They cited abuses of the treason doctrine in England. Two examples were cited with great enthusiasm. For one, defense counsel described how once, in the "dark ages of English jurisprudence" when the king killed a yeoman's stag, the yeoman, in a fit of anger "wished the horns of the stag in the king's belly." The yeoman was swiftly, and apparently successfully, prosecuted for treason. As an even more egregious travesty, for the second example, the case was given of an innkeeper who kept an inn called "the sign of the crown." He had bragged that he would make his son "heir to the crown," and so *he* was convicted of treason.[178] They then argued that in a "free republic" like America, the application of the doctrine of treason should be so limited that the phrase "levying war" would only apply to cases where armed men sought "to put an end to the government," where a part of "the Union" sought to "throw off the authority of the United States," or where rebels actually marched on the legislature or the executive. Opposing laws, they urged, might constitute "sedition" or common law "rescue," but not the capital crime of treason.[179] Lewis and Dallas urged that in the new American Republic, there was a need for a maximum freedom of expression of political sentiments and that a broad application of the treason doctrine was inconsistent with this need.[180]

After more than a week of impassioned arguments by Lewis and Dallas, Iredell and Peters charged the jury. Peters maintained that the *Vigol* and *Mitchell* cases (The Whisky Rebellion trials) governed. By opposing a law, said Peters, "the rights of all are invaded by the force and violence of a few" and "a deadly blow is aimed at the government, when its fiscal arrangements are forcibly destroyed, distracted and impeded; for on its revenues its very existence depends."[181] In short, nothing could be more dangerous than armed opposition to taxes and so it was treason. Justice Iredell opened his charge by stating his agreement with Peters on the law. In sharp contrast to the attitude of Justice Paterson in the trials of the Whisky Rebels,[182] however, Iredell indicated that he would not usurp the role of the jury and thus implied his acceptance of popular attitudes about the scope and importance of jury verdicts, at least with regard to matters of fact. "[I]t is not for the court," he stated, "to say whether there was treasonable intention to act as charged in the indictment; that is for the jury to determine; we have only to state the law, we therefore should have no right to give our opinion on it."[183] For Iredell, then, as for the judges in the years to follow, a tradeoff had begun to emerge. The jury would lose its popular right to determine law, but in return its discretion in matters of fact would not be hamstrung by the judge's own conclusions.

A verdict of "guilty" was rendered. Given the latitude that Lewis and Dallas were allowed by the judges in arguing the law to the jury, and given the force of their arguments that their client at most had committed sedition, but not treason, the verdict is somewhat surprising. It may be that public opinion in the city of Philadelphia, where the trial took place, was strongly against the rural insurgents and influenced the jury. It may be, however, that the federal marshal, who had some discretion in picking the jury, was careful to choose members sensitive to the need for peace and good order. Or, after all, it may simply be that the jurors were most impressed with the past precedent of the case of the Whisky insurgents, and were willing to extend its holding that armed opposition to federal law was treason to the case of an armed rescue of a prisoner from federal custody.

The possibility of a biased jury is strongly suggested, however, by subsequent events. Five days after the verdict was announced, Mr. Lewis moved for a new trial for Fries on the ground that a Mr. John Rhoad, one of the jurors, had "declared a prejudice against the prisoner after he was summoned as a juror on the trial".[184] Justice Iredell, probably much relieved,[185] issued an opinion that Fries was entitled to a new trial. Judge Peters initially disagreed, indicating that even if Rhoad had made the statement attributed to him, Rhoad only reflected "the facts" as they "appeared then to the public." Peters finally concluded, however, that "as a division in the court might lessen the weight of the judgment, and the great end of the law in punishments being example," he reluctantly went along with Iredell's opinion, and the new trial was granted.[186]

The Second Trial of John Fries—Fries came up for retrial during the next

term, in April of 1800, when Justice Samuel Chase was sitting on circuit with Judge Peters. Before the retrial, Chase had indicated to Peters that the judges needed to devise some way to "get through all the business which had accumulated on the civil side" as a result of the great amount of time spent in the last session with the original trial of Fries's rebels.[187] In particular, Chase wanted to keep the Fries retrial short. He had heard an account of the first Fries trial and believed that what took ten days there should have been accomplished in no more than "one third" of the time. Chase was determined that this time there should not be so much leeway in citing "irrelevant authorities & unnecessary discussions." Chase therefore drafted an opinion, which he hoped to use as the opinion of the court on the law, and thus prevent counsel from straying. He showed the draft opinion to Peters, who approved of it, later indicating that "he had expressed what I had before delivered as my opinion better than I had done it myself." Chase had apparently not yet settled on the manner of delivering this opinion, and Peters told him that it should be done with "Prudence." Peters was left with the impression that Chase would consult him about the "time & manner of delivery" of the opinion. Peters, who believed in circumspection, had begun to be uneasy, "lest a premature Declaration of the Opinion of the Court might be made."[188]

As the proceedings opened, a juror came up to Judge Peters on the bench "to make some excuses for nonattendance." Peters then noticed some commotion and discovered that while his "attention had been thus engaged" Chase had distributed copies of his opinion, one to defense counsel, one to the district attorney, and one to the jury. Chase had engaged in the very "premature" conduct that Peters had feared. Chase proceeded to announce to defense counsel that the opinion contained the court's view of the law of treason, which view was that articulated by Judge Peters and Justice Paterson in the Whisky Rebels case and Judge Peters and Justice Iredell in the first Fries trial: armed opposition to United States statutes was treason. Since this was the law, Chase went on, the court would not permit arguments that such conduct was not treason to be made to the jury. In particular, Chase was determined that the jury not be distracted with odious English treason cases.[189] There seems ot be no example in early American judicial history of counsel being thus circumscribed in advance of the trial, and Chase's tactics were clearly inconsistent with the still prevalent attitude that the jury's role extended to finding both fact and law.[190]

When Mr. Lewis, one of Fries's two lawyers, realized that the tactics he and Dallas had used in the first Fries trial would be foreclosed, he threw down Chase's opinion in anger. Peters whispered to Chase that he believed the two Fries counsel would "take the stud & abandon the Cause, or take advantage of [the delivery of this statement of Chase's view] to operate on public opinion, or on that of the jury at least." Peters reprimanded Chase, and reminded him of "my having 'told him so' or 'predicted it!' " Sure enough, Lewis and Dallas then announced their intention of withdrawing from the case, since the court had "prejudged" what they wished to argue.[191]

Chase and Peters then repaired to the office of Mr. Rawle, the prosecutor. (Some measure of their detachment from the prosecution might be taken from their choice of meeting place.) Rawle and Peters persuaded Chase that his opinion "should be recalled." Chase "readily consented."

The next morning Peters told Lewis and Dallas that "they might proceed in the Cause." He assured them that "you may, & I *hope* will, proceed in your own way, as if nothing had happened." Chase was not quite as conciliatory as Peters, and though he did not contradict Peters, Chase "administered no Emollients." Chase declared: "The counsel could not embarass him. He knew what it was about!"[192] Chase cautioned Lewis and Dallas that "he would not permit improper or irrelevant authorities," and probably told them that if they stepped out of bounds in their citation of authority they would be proceeding "at the hazard of [their] reputation." Dallas later said: "This had the contrary effect rather than to induce me to proceed," and he and Lewis remained firm in their determination to leave the case.[193]

Chase and Peters then offered to appoint other counsel for Fries. Fries declined other counsel, however, having been persuaded by Lewis and Dallas that to proceed without counsel would generate sympathy for him that might result in a Presidential pardon. Chase then informed the prisoner that since he refused to accept other counsel, he, Chase, would take it upon himself to serve as attorney for the defense, as well as judge.[195] As the trial proceeded, however, Chase refused to excuse a juror who was uneasy about his possible prejudice,[196] he reminded the jury that the jury in the first trial had seen fit to convict Fries;[197] he supplied arguments against the prisoner that the prosecutor, Rawle, neglected to mention;[198] and he emphasized his own view of the law *and* the facts of the case.[199] In the articles of impeachment later brought against Chase, the first charge was that by his conduct he deprived Fries of counsel. As we have seen, however, it was Chase's conception of the proper roles of judge and jury with regard to legal determinations that prompted Fries's counsel, of their own volition, to resign from the case. Still, Chase's hair-trigger temper, his stubbornness, and his sense of his own judicial prerogative led him to rush precipitously into a confrontation on a sensitive jurisprudential point for which he had little popular support.

The Republican press, at the time of the Fries trial, was quick to pounce on Chase. With the election of 1800 fast approaching, the campaign of the Democratic-Republican press to discredit the Federalist judges who sat on the federal courts, and particularly Justice Chase, had by now begun in earnest.

Why did Chase proceed in such a steamrolling manner when he must have known that he would be subjected to intense popular criticism? In his defense at his impeachment trial, he gave several reasons for limiting the arguments to the jury in the Fries case. First, he felt a strong duty to adhere to the legal precedent clearly established in the earlier cases. Second, he believed that the large backlog of civil cases in the circuit court made it incumbent on him to keep the criminal trials as short as possible. Third, he stated that *he* knew what the constitutional definition of treason was, and he did not think

it worth spending much time on. Fourth, because of his certainty as to the law of treason, he felt it his duty to prevent the jury from getting the wrong impression as to the law.[200]

Probably as important for Chase, however, was his feeling that the conduct of the Fries insurgents represented a real threat to the continued peace and political stability of the country. As he condemned Fries to death, Chase explained that if obedience to laws could not be compelled, "there must soon be an end to all government in this county." Fries was told that "the time you chose to rise up in arms to oppose the laws of your country, was when it stood in a very critical situation with regard to France, and on the eve of a rupture with that country." Because of the crippling expenses involved in quelling the two Pennsylvania insurrections that had already occurred, future rebellions had to be prevented. So Chase concluded that "the end of all punishment is example; and that the enormity of your crime requires that a severe example should be made to deter others from the commission of like crimes in the future."[201] That this was Chase's real motivation in the Fries trial is suggested by his behavior two weeks earlier, in the trial for seditious libel of Thomas Cooper. Before coming to some of the details of Cooper's trial, however, a brief consideration of the Sedition Act and its political background is necessary.

B. *The Sedition Act and the Trial of Thomas Cooper*

Section 2 of the Sedition Act of 1798[202] imposed a penalty for publishing material creating distrust of the federal government—the crime of seditious libel. Scholars studying the period during which this Act was passed have divided over whether it reflected a "reign of terror" on the part of the ruling Federalist party of John Adams, or whether this Act and other Federalist activities at this time were merely a reasonable response of a government seriously concerned about the country's chances for survival.[203] It is important, in putting this in perspective, to realize that in the late 1790's in England, a law was passed making it a criminal offense to *speak* or *write* as well as to act treasonably. At the same time, the same fears caused the Hungarians to put to death a man who translated the Marseillaise into Magyar. Similarly, the governments of Austria, Rumania, and Russia were regularly meting out sentences of death, sixty years in chains, exposure in the stocks, and confiscation of property. In light of this contemporary European experience, it is difficult to regard the efforts of the Federalists as a "reign of terror."[204]

In 1800, to the Europeans and to the Federalists, it looked as though France, following the Revolution of 1789, had embarked on a wide-scale program of subversion of liberty, property, and good order, and that the governments of European nations were tumbling like so many dominoes. From where the Federalist judges sat, they thought they could discern a pattern of French incursions which began with friendly overtures, included the

formation of native pro-French "Democratic" societies, and ended with submission to French-style military dictatorship. This was the theory propounded even by the relatively liberal Justice Iredell in his charge to the grand jury that indicted the Fries Rebels.[205]

Observers could see the beginning of this pattern of subversion in America with the activities of the French ambassador, Citizen Genet, who encouraged the American "Democratic Societies" to become pro-French. Some of the participants in Fries's Rebellion were reported to have worn the French Tricolor and to have declared that "it should soon be in his country as it was in France."[206] The residual Federalist fears of mob violence were exacerbated by the added threat of Francophilic and other subversion, and produced widespread political reaction, culminating in the Alien and Sedition Acts, the Fries treason trial, and the Alien and Sedition Act trials.

At the legislative level the Federalist reaction was not without some restraint. At the time of the passage of the Alien and Sedition Acts, the prevailing judicial opinion was that there was a federal common law of crimes, which was used at least once to begin a prosecution for seditious libel in a federal court in Pennsylvania,[207] and which could theoretically have continued to be used to prosecute other persons for that crime in the federal courts. The Federalist legislators seemed to feel, however, that they needed to demonstrate that they were not out to silence all political criticism, but merely dangerous falsehoods.[208] Thus, while truth of a libel was no defense to the crime at common law, it became one in the Alien and Sedition Acts.[209] While at common law in England the jury had frequently been barred from making the determination of the "seditious" or provocative nature of a particular libel, in America under the Sedition Act it was clear that the jury was to determine both "the law and the fact, under the direction of the court, as in other cases."[210]

Because of the Federalist desire to accommodate prevailing opinions regarding the liberalization of the common law even in the face of what was perceived as a grave threat to American stability, one might have expected that the Federalist cause would have had great popular support. For some months after the passage of the Sedition Act this was the case, owing in part to the French perfidy revealed in the X.Y.Z. affair.[211] Unfortunately, the promise of accommodating this popular opinion, which seems to have been made in the Sedition Act, was broken in the trials that followed.

Thomas Cooper found himself on trial for seditions libel before Chase and Peters in 1800 because he had published some derogatory comments about President John Adams. In particular, Cooper had accused Adams of borrowing money at too high a rate during peace-time, of keeping a standing army and navy, and of interfering with the judiciary.[212] While there was an argument that each of these charges was false, there was probably an almost equally strong case for their being true.[213] At the height of the Federalist Francophobia of November 1799 when the charges were published, however, they may well have seemed seditious to strong supporters of President Adams.

Prosecutor Rawle noted in his arguments to the jury that it was "false" charges like those of Cooper that had excited the Whisky Rebellion of 1794 and Fries's Rebellion of 1799. It was now time to put a stop to this conduct, he urged, before it again plunged the state and the nation into disorder.[214]

Justice Chase proceeded to make a series of rulings that were probably legally wrong and were certainly highly prejudicial to Cooper. Chase declared that the truth of the accusations Cooper had made was an affirmative defense which he, Cooper, had the burden of proving "beyond a marrow."[215] From the text of the Sedition Act, however, it clearly appears that the falsity of the libel was an element of the crime and thus should have been a matter for the prosecutor to prove. Furthermore, even if the burden of proving truth was correctly placed on Cooper, Chase's holding him to proof of truth "beyond a marrow" was wrong. It is, and was, an axiom of the Anglo-American criminal law that to render a conviction a jury must be convinced of *guilt* "beyond a reasonable doubt."[216] One would think, then, that the burden of proof placed on Cooper should only have been to raise a "reasonable doubt" about the falsity of the statements he had made. Significantly, in two Sedition Act trials in the Circuit Court of Vermont, Justice Paterson, no great friend to jury discretion in Pennsylvania, had made rulings that the "beyond reasonable doubt" standard applied.[217] Given the ambiguity of what Cooper had actually published, with this usual standard in operation, he might have had to be acquitted.

As Chase's instructions to the jury came to a close, however, it became clear that there was little hope of acquittal for Cooper while Chase sat. He told the jury precisely what he expected them to conclude on *both* the law and facts.[218] In addition, as he later did in the *Fries* case, Chase filled in arguments for the prosecution that the prosecutor had omitted.[219] The jury convicted Cooper, he refused a pardon, and went off to prison.

VII. *Denouement*

Soon after the *Cooper* trial, Chase journeyed to Virginia where he sat on the Richmond Circuit. There he tried another case of seditious libel, *United States v. Callender*.[220] His conduct in the *Callender* trial was as clearly pro-prosecution as it had been in the *Fries* and *Cooper* trials. Following the trial of Callender, Chase returned to Maryland, there to go out on the hustings on behalf of President Adams's campaign for reelection.

Soon the *Philadelphia Aurora* was to refer to the federal prison as "Chase's repository of Republicans." The *Aurora*'s opinion was probably best summed up in a "vicious little couplet" published shortly after the *Fries* and *Cooper* trials in August, 1800:

> Cursed of thy father, scum of all that's base.
> Thy sight is odious and thy name is- - - - -.[221]

For the *Philadelphia Aurora* and for the Republican press generally, Chase became a convenient symbol for all the failings of the Federalists: Chase's shortcomings were sought to be portrayed as common to those of the entire federal judiciary.[222] The popular success of the Jeffersonian electors in 1800 probably owed much to the press campaign to discredit the federal judiciary,[223] a campaign that could not have been waged without the conduct of Samuel Chase.[224] As indicated in the previous chapter, hostility toward the Federalist judiciary, brought on in large part by criticism of Chase, resulted in the Jeffersonians repealing the reformist Judiciary Act of 1801. Perhaps because of the popular opposition to the federal judiciary stirred up by the presidential campaign of 1800, Congress proceeded to regard the strengthening of the lower federal courts as a very low priority matter. As we have seen, Congress continued for many years to perpetuate the outmoded Circuit riding system, ostensibly to keep the Federal judges at all levels in touch with popular opinion. Since the charge brought against Samuel Chase was basically that he (and by implication the other Federal judges) had ignored the principle of popular sovereignty, it does not seem too far-fetched to assign Chase a major share of responsibility for the perpetuation of the Circuit-riding system. As indicated, meaningful reform of the lower federal courts was not accomplished until almost a century later.[225] What was it about Samuel Chase in particular, and the Federalist judiciary in general, that could have helped lead to such a situation?

A. *Personalities*

Perhaps much of this difficulty was caused by the peculiar personality of Justice Chase. Richard Peters stated "Of all others, I like the least to be coupled with him [Chase]. I never sat with him without pain, as he was forever getting into some intemperate and unnecessary squabble."[226] Peters tried, unsuccessfully, in the *Fries* and *Cooper* trials to restrain Chase, but he was dealing with a man who "had the singular instinct for tumult which scents [it] at a distance from whence it is imperceptible to other eyes, and irresistibly impels a participation in it."[227] Chase was far too quick on the judicial trigger, as demonstrated by his hasty opinion-giving in *Worrall* and *Fries*. His political zeal carried him so far as to demean his office by publicly jumping on the Adams bandwagon. A further contrast between Chase and Peters is shown by their attitudes toward a seat on the Supreme Court. Chase clearly and actively sought the appointment; Peters, when he was offered such elevation, declined.[228]

If it had been Peters, rather than Chase, who rode the Pennsylvania Circuit for the Supreme Court in 1800, the *Fries* and *Cooper* debacles might never have happened. Peters, who was intimately familiar with the nuances of Pennsylvania politics and Pennsylvania public opinion, could tailor his judicial opinions to fit his surroundings. He was able correctly to predict to Chase the political and tactical consequences of Chase's behavior.[229] Samuel

Chase made no effort at such accommodation. Instead, he sought imperiously to impose his own jurisprudential precepts. Perhaps this was due to Chase's "greater familiarity with the Maryland practice, where the judge used to respond . . . more exclusively for the law, and the jury for the facts, . . . than was, . . . the usage in Pennsylvania."[230] Similarly, Chase seems to have believed that he, as a Justice of the United States Supreme Court, should have been allowed to proceed as did the judges in England, where the judges were not required to be as responsive to popular opinion.[231] To clear-eyed contemporaries, Chase's rulings may have been regarded not as "intended oppression" but rather as "great mistakes" resulting from his character and background.[232] Still, the Pennsylvania public opinion that Chase was unable to understand was forcefully turned against him and his party.

Even Richard Peters was caught in the political crossfire, when, in early 1803, the House of Representatives authorized a committee to inquire into the conduct of *both* Chase and Peters. The real goal of the Republicans who introduced this resolution may have been to remove Chase from the Supreme Court and substitute a Republican Marylander. The House committee soon reported that "no cause of accusation existed" against Peters.[233] Yet, since Peters had acquiesced in most, if not all, of Chase's controversial rulings in the *Fries* and *Cooper* cases which were at the core of the impeachment case against Chase, if the congressional opponents of Chase intended to be completely principled in their arguments of judicial misconduct, they should have put Peters on trial before the Senate with Chase.

Thus, the implied congressional approval for Peters's judicial conduct needs further explanation. Possibly it again illustrates the personal contrast between Peters and Chase. Peters did not appear to have been terribly concerned that the Congressional proceedings would result in harm to him. He wrote to his friend Timothy Pickering:

> I know I am brought into the Field, without premeditation. One not invited to the Hunt turned me out like a *Bag-Fox*, to amuse & wary the Hounds & divert them from the real *Chase*. One of them opened on a wrong scent, not being well broke in. I suspect the Huntsmen know better & will not be thrown out.[234]

Peters's casualness is certainly different from the grim and combative resolve with which Chase fought the proceedings.[235] It would appear that Peters was able to rely on the wide circle of influential friends he had acquired over the years, a circle which reached into the new White House, to save him from any congressional hostility, Chase seems to have been better at acquiring a circle of enemies. Peters was able to be rescued at an early stage, but Chase had to suffer the humiliation and agony of a Senate trial.

Though there may have been these surface dissimilarities between Chase and Peters, and though Chase's personal characteristics may have been largely responsible for the political storm he created, it is important to realize that Chase still was not the unrestrained ogre or "hanging judge" that some make him out to be. The disparagement of Chase does not appear to have

always been so prevalent. In the nineteenth and early twentieth centuries Chase was described as one of the "greatest" of Maryland lawyers,[236] "one of the most conspicuous and able members of the Continental Congress," "an ardent lover of liberty and justice," "persuasive and where possible conciliatory,"[237] and "[d]isinterested and consistent in all things."[238] Chase's judicial philosophy did, after all, have something of a popular base to it. His rhetoric indicated that his extreme views on the lack of rights of criminal defendants in libel trials sprang from a conviction that in a government based on popular sovereignty, to libel the government was to libel the people themselves, and therefore intolerable.

Even Chase's conduct in the *Fries* trial may not have been as bad as it now seems. After his pardon, Fries himself was reported to have visited Chase at his home in Maryland "for the avowed purpose of thanking him for his impartial, fair and equitable conduct."[238a] It seems possible that Fries might have realized that at some level both he and Chase shared a commitment to the idea that the people were the ultimate sovereigns, though they differed over the means of implementing this principle in the law. Even before the impeachment trial, Chase had chosen to adopt a rather restricted sense of what a judge could do, even if this involved rejecting the English judicial role. While sitting on the Delaware circuit in June of 1804, Chase wrote:

> I know that in England construction of the words of Statutes has gone a great way. This doctrine I explode. If the words of Statutes are clear, I am bound, tho' the provision be unjust. This I hold to be the duty of an American judge [A] judge has in this Country only to say *Sic lex est scripta.*[238b]

It would seem then, that Chase's stepping out of appropriate judicial bounds was of relatively short duration, probably reaching its worst excesses only during the 1800 term, when he sat at the *Fries, Cooper,* and *Callender* trials.

B. *Popular Politics and Federalist Paranoia*

As has been seen, though, this was a period of overreaction among many people and nations. Even Richard Peters seems to have swung decidedly to favor the government in several of the criminal trials reported here—by eschewing the technical niceties of state procedure in the Whisky Rebels' trial, virtually ignoring the purpose of a provision in the Judiciary Act in the first trial of Fries, and by deprecating the necessity of a retrial in that case. Like Chase, Peters perceived dark designs forming in the United States and felt he should act accordingly. By 1798, the same year that Chase turned around on the issue of common law crimes, Peters had become quite worried about the "secret projects" of the "discontented characters which infest our country."[239]

When Peters was on official business concerning the Fries Rebellion, he concluded that "unless the army had gone through the whole county, there would have been the most atrocious instances of violence."[240] Finally, con-

vinced that the country was in dire peril, Peters assured Pickering that he would make all necessary efforts to get rid of a Set of Villians who are ready to Strike when they think the Crisis arrives."[241] Thus he and Chase appear to have been acting on many of the same impulses.

Similarly, Justice Paterson, who in *Van Horne's Lessee* lauded the independence of the jury as the finder of *both* law and fact,[242] went out of his way to tell the jurors in the trial of the Whisky Rebels exactly what they should conclude on legal and factual questions.[243] Even Justice Iredell, who seemed to be quite sympathetic to the defendant in the first trial of John Fries, telling the petit jury that he had no right to comment on the question of treasonable intention or overt acts,[244] had expressed grave concern to the grand jury that indicted Fries. "If you suffer this government to be destroyed," Iredell cautioned the grand jurors, "anarchy will ride triumphant, and all lovers of order, decency, truth and justice will be trampled under foot."[245] The same views that were reflected on the bench, of course, prompted Washington and Adams to send federal troops to quell the two Pennsylvania insurrections.

At this time also, a majority of Congressmen could be persuaded to vote for the passage of the Alien and Sedition Acts. By 1800 there were those in Congress who seemed to be actively seeking by any means to deny Jefferson the Presidency.[246] In that crisis year even Alexander Hamilton appears to have lost control, hatching his ill-conceived plan to thwart the will of the legislature in New York by imposing a scheme that would take away their power to select presidential electors.[247] Similarly, Hamilton was careless in expressing his feelings that President Adams had lost his judgment by such actions as making peace overtures to France and by pardoning John Fries. The publication of these sentiments probably did as much as anything else to weaken the Federalist party from within and thus cause the loss of the election of 1800.[248]

It took more than this to sink the Federalist ship of state. The chief problem had to do with the basic difference in political philosophy between the Federalists and the Jeffersonian Republicans. While the Federalists argued, and may have even believed, that their government was one that was set up by the actions of the people in approving the Federal Constitution and was thus bottomed on the concept of popular sovereignty, their political philosophy left little room for on-going popular participation in government. The people could vote in elections and on constitutions, but once the people had cast their votes, they were to refrain from harmful criticism of their properly constituted officials and were to obey them unquestioningly. Any other course, the Federalists believed, would lead to exciting "the passions and jealousies of the mob," and eventually to the collapse of government.[249] Such a philosophy, of course, was not likely to enlist great popular support. It revealed a basic distrust of the wisdom of the people and resulted in a government that saw its role as "preaching wisdom to untutored masses."[250] The Republicans, who professed a greater faith in the wisdom of the public and

a greater willingness to tolerate on-going public participation in government, were thus able to discredit the Federalists when it came time to vote for presidential electors.

This philosophical struggle about the proper role of the people, as we have seen, carried over to the activities of the Federalist courts. It was obviously at work in the *Cooper* trial where Chase's legally questionable rulings, in effect, made it impossible for the defendant to engage in fair political comment without being able to demonstrate "beyond a marrow" the truth of his opinions. Just as important, but perhaps somewhat subtler, was the struggle in the courts during this period over the proper roles of judge and jury. There was, at that time, a strong popular feeling that the expansive participation by the jury in legal decisions was an essential safeguard to the liberty of the people.[251] This required that the jury be given the latitude to pass on questions both of law and of fact, and received at least lip service from both the Federalist judges and the Sedition Act. Nevertheless, the conduct of the judges in closely instructing the jury in many of these cases as to the appropriate legal and factural conclusions and the tendency of Justice Chase to remove legal issues from jury discretion opened the judges to charges of oppressing the people.

C. *Unplanned Obsolescence*

At a somewhat deeper level, the explanation for some of the self-destructive activity of the Federalists on and off the bench may life in their inability to cast off the preconceptions of the eighteenth century. Ultimately it would seem that both Hamilton and Chase, whatever their differences, believed in a structured society, the inevitability of different social classes, and perhaps the continued subordination of the lower classes to the upper. Their view was that the yeomen and the mechanics ought to be content with a system where their "betters," the large landowners, the members of the learned professions, and the titans of commerce ruled for the common good.[252] Accompanying this view was an eighteenth century pessimism about the chances for success of their conception of government. The likelihood of things deteriorating loomed much larger. Hamilton was frightened about the force of the love of power and of the possibility of demagoguery leading to dictatorship.[253] Jefferson's victory in 1800 confirmed his fears, and shortly afterward, Cassandra- like, he predicted to his friends the inevitability of "bloody anarchy." At best, there was a slim chance that out of the coming debacle "a strong, stable, and 'energetic' government would emerge."[254] Samuel Chase mirrored these views. In March of 1803 he wrote John F. Mercer: "I believe nothing can save the *present* [government] from dissolution . . . The Seeds are sown, they ripen daily. Men without *sense* and without *property* are to be our *Rulers* . . . Confidence is destroyed . . . Things must take their natural course from *bad* to *worse*."[255] The times had clearly passed Chase and Hamilton by, however, and their conception of popular sovereignty was no longer accepta-

ble to most of the people, or at least to those who influenced Presidential elections.

VIII. *Conclusion*

The actions of Chase, Peters, Paterson, and others in the late 1790's then, were perceived as inconsistent with the Federalists' promises about the implementation of the principle of popular sovereignty, hence the Republicans argued that the Federalists were bent on making people "subjects" instead of "citizens."[256] Because of this, there has been a tendency to ignore the sensible and creative work that the early federal judges, especially in Pennsylvania, did in building a strong body of commercial law and in laying the theoretical foundations for an independent judiciary.

The impeachment of Samuel Chase, which appears as a coda to the period here discussed, had a profound impact on the course of the federal judiciary. While everyone recognizes this, the tendency has been simply to focus on the outcome of the episode—Chase's eventual acquittal by the Senate. Since that time, of course, no Justice of the Supreme Court has been impeached; neither has the impeachment remedy been used as "a means of keeping the Courts in reasonable harmony with the will of the nation."[257] Nevertheless, the very institution of impeachment proceedings caused some major changes in judicial practice. John Marshall seems to have realized that had the Chase impeachment been successful, he would have been the next target.[258] This must have redoubled his tendency to appear above political controversy, and to avoid, where possible, the resolution of issues bound to plunge the court into the political thicket. Marshall's circumspection, learned from Chase's mistakes, enabled him to establish what has been called "the American judicial tradition", the prestige of the national judiciary is said to run only from his tenure as Chief Justice.[259] The Supreme Court was thus able to remain highly visible and to make its contribution to American development. Still, probably as a result of what happened during the 1790's, the lower federal courts may have been permitted somewhat to atrophy and decline in importance over the next ninety years as Congress refused to implement the remedies required for truly effective federal justice. The federal courts, and particularly the United States Supreme Court, continued to fulfill an important function in providing an impartial forum for the settlement of interstate disputes, particularly those involving commercial law.[260] It is also true that many distinguished Americans continued to serve on the federal courts following the election of Thomas Jefferson.[261] Still, not until after the civil war did Congress allow the lower federal courts to exercise the full scope of jurisdiction permitted under the Constitution, and in the years between the administration of Thomas Jefferson and the Civil War, apart from Constitutional issues, the most important and innovative judicial decision-making appears to have been in the state courts. There were some exceptions. For example, Justice Story's work on Circuit courts appears to have developed the law of

property and commercial law. Still, legal developments in these years were more often the work of state court judges, like Kent or Shaw.[262]

The state court judges, curiously enough, appear to have implemented many of the views of the federal judges expressed in the cases from 1790 to 1800. For example, a most important principle of the development of judicial doctrines may have been the facilitation of commerce and economic development, along the lines suggested by Judge Peters and by some of the Circuit Justices. Further, at least in civil cases, by the middle of the nineteenth century it appears that juries had pretty much lost the power to make law, and had been reduced to following the directions of the court, a development presaged by some of the opinions and actions of Samuel Chase.[263] Still, as far as the lower federal courts were concerned, the days of great importance were not to come again until after the Civil War, and it is to that time that we next turn.

Notes

1. A longer version of this chapter, to which those seeking more scholarly references and fuller documentation of the points made here are referred, appears as Presser, *A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence*, 73 Nw. L. Rev. 26 (1978).
2. See generally G. Wood, *The Creation of the American Republic, 1776–1787*, at 471–518 (1969).
3. *Id.*, at 77, and see also B. Bailyn, *The Origins of American Politics* 11–12, 131–36 (1967) and B. Bailyn, *The Ideological Origins of the American Revolution* 34–54, 162–75 (1967) [hereinafter cited as *Ideological Origins*].
4. John Adams wanted to see America recreate what he believed to be the British distribution of national power. He apparently toyed with the idea of an hereditary chief executive and Senate, and wanted thus to preserve a balance between monarch, aristocracy, and people in America. See J. Adams, *Defense of the Constitutions of Government of the United States*, in *4 Works of John Adams* 379, 392, 397 (for the theory of a balanced constitution); Letters from John Adams to Benjamin Rush (Feb. 8, June 19, July 5, & July 24, 1789).
5. Some of the thought of these Pennsylvanians is discussed in Henderson, *Some Aspects of Sectionalism in Pennsylvania, 1790–1812*, 61 Pa. Mag. Hist. & Biog. 113 (1937), and Phillips, *William Duane, Philadelphia's Democratic Republicans, and the Origins of Modern Politics*, 101 Pa. Mag. Hist. & Biog. 365 (1977).
6. G. Wood, *supra* note 2, at 403–09.
7. The classic exposition is A. Hamilton, J. Madison, & J. Jay, *The Federalist* (first published 1787–88; all page cites are to the New American Library Paperback ed. 1961) [hereinafter cited as *The Federalist*].
8. THE FEDERALIST No. 78, at 467–69 (A. Hamilton).
9. THE FEDERALIST No. 79, at 474 (A. Hamilton).
10. Biographical data on Peters can be found in RICHARD PETERS, HIS ANCESTORS AND DESCENDANTS 1810–1899, at 68 (N. Black ed. 1904) [hereinafter cited as N. Black]. For a brief treatment, see the entry in 14 DICTIONARY OF AMERICAN BIOGRAPHY 509 (1934).
11. U.S. CONST. art. III §2, gave the federal courts admiralty jurisdiction and the Judiciary Act of 1789 gave this jurisdiction to the district courts. Peters wrote 19 of the 24 published opinions for the district court in the period covered by this chapter. All of the published opinions dealt with matters of admiralty law.
12. *See, e.g.*, IDEOLOGICAL ORIGINS, *supra* note 3 at 30–31.
13. *See, e.g.*, L. FRIEDMAN, A HISTORY OF AMERICAN LAW 96–97 (1973).
14. The jurisdiction of the admiralty courts in England was substantially less than in most maritime nations. The law courts had gradually expanded their power at the expense of the admiralty courts. *See generally* G. GILMORE & C. BLACK, ADMIRALTY (1975).
15. The first Pennsylvania District Court judge, Francis Hopkinson, indicated in 1789 that he was prepared to decide admiralty cases, not simply on the basis of parties' contracts or any country's positive enactments but with reference to "law and reason" and the "rights of humanity" which were said to be "superior" to the specific laws and customs of any one nation. See Rice v. The Polly & Kitty, 20 F. Cas. 666 (1789) (D. Pa. No. 11,754), and Dixon v. The Cyrus, 7 F. Cas. 755 (1789) (D. Pa. No. 3,390).

16. Jennings v. Carson, 13 F. Cas. 540, 542 (D. Pa. 1792) (No. 7,281), Hart v. The Littlejohn, 11 F. Cas. 687, 688 (D. Pa. 1789) (No. 6,153).
17. 29 F. Cas. 215 (D. Pa. 1792) (No. 17,165).
18. *Id.* at 217.
19. Brevoor v. The Fair American, 4 F. Cas. 71 (D. Pa. 1800) (No. 1,847).
20. See M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 226–37 (1977).
21. 12 F. Cas. 348 (D. Pa. 1795) (No. 6,612).
22. *Id.* at 351.
23. 23 F. Cas. 560 (D. Pa. 1799) (No. 13,697).
24. 19 F. Cas. 945 (D. Pa. 1799) (No. 11,254).
25. *Id.* at 946.
26. *See, e.g.*, M. HORWITZ, *supra* note 20, *passim*.
27. M. HORWITZ, *supra* note 20, at 211–12. *But see Presser*, Book Review, 52 N.Y.U.L. Rev. 700 (1977).
28. The most eloquent statement of these views is probably in Jefferson's *Notes on Virginia*. *See*, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 279–80 (A. Koch & W. Peden eds. 1944).
29. *See, e.g.*, Philadelphia General Advertiser, Nov. 27, 1790, at 3, col. 3 (stressing importance of agriculture *but also* commerce and manufacturing); Nov. 28, 1790, at 3, col. 2 (importance of carrying trade).
30. The New Jersey federal admiralty court, by contrast, operated with a jury, presumably because of popular approval of juries, D. HENDERSON, COURTS FOR A NEW NATION 56 (1971).
31. Instead, he circumspectly ruled that this was a question that should be left to the executive branch of American government and that the judiciary should abstain from acting.
32. Findley v. The William, 9 F. Cas. 57 (D. Pa. 1793) (No. 4,790); Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9,875).
33. Willings v. Blight, 30 F. Cas. 50,52 (D. Pa. 1800) (No. 17,765).
34. Peters was probably well-known to farmers as the president of the first agricultural society in America. Based on his own experimentation at Belmont, Peters published in 1797 "A Statement of Facts and Opinions in Relation to the Use of Plaister of Paris (Gypsum)," a treatise which taught farmers how to increase their yields of clover, and thus enabled them more easily to produce good meadowland to feed their livestock. These details regarding Peters and agriculture are given in Address by Samuel Breck to the Blockley and Merion Agricultural Society (Sept. 20, 1828), in 5 FARMERS LIBRARY (1845), *reprinted* in N. Black, *supra* note 10, at 68.

    The treatise, a pamphlet which was dedicated to George Washington, proved so popular that the father of his country wrote Peters for additional copies. Letter from George Washington to Richard Peters (Jan. 21, 1797), 10 HISTORICAL SOCIETY OF PENNSYLVANIA, PETERS PAPERS 46 [hereinafter cited as PETERS PAPERS]; Letters from George Washington to Richard Peters (Mar. 4, 1796), 10 PETER PAPERS, *supra* at 40. Even before this publication, Peters was recognized as an agriculture expert. A few months prior to his acceptance of the district judgeship, Alexander Hamilton wrote Peters to solicit his advice on the productivity of agricultural lands. Hamilton stated: "I am persuaded no person can better assist in this object than yourself. . . ." Letter from Alexander Hamilton to Richard Peters (Aug. 13, 1791), 9 PETERS PAPERS, *supra*, at 121.
35. Washington is reported to have sat for a portrait at Peters's request, an honor which he reserved for a few of his intimate friends. N. Black, *supra* note 10, at 67,78,79.
36. *See, e.g.*, Letter from Timothy Pickering to Richard Peters (Apr. 9, 1790), 9 PETER PAPERS, *supra* note 34, at 108; Letter from Timothy Pickering to Richard

Peters (Sept. 28, 1797), 10 PETERS PAPERS, *supra* note 34, at 51; Letter from Timothy Pickering to Richard Peters (Aug. 28, 1798), 10 PETERS PAPERS, *supra* note 34, at 53.

37. Letter from Thomas Jefferson to Richard Peters (June 13, 1790), 9 PETERS PAPERS, *supra* note 34, at 109; Letter from Thomas Jefferson to Richard Peters (June 30, 1791), 9 PETERS PAPERS, *supra* note 34, at 119.
38. In passing, it bears noting that in some ways Richard Peters may have been as important a federal judge as the great Joseph Story. If Joseph Story is the father of American admiralty law, as is commonly acknowledged, then since much of what Story was to do was anticipated by Peters, and since Story himself acknowledged his debt to Peters's "rich contributions to the maritime jurisprudence of our country," 1 W. W. STORY, LIFE AND LETTERS OF JOSEPH STORY 540 (1851), perhaps it is time to accord Richard Peters the recognition he deserves as at least the "grandfather" of American admiralty law.
39. *See* G. WHITE, THE AMERICAN JUDICIAL TRADITION (1975).
40. 2 U.S. (2 Dall.) 409 (1792).

40a. Act of March 23, 1792, ch. 1, 1 Stat. 324 §§2–4.

41. The letter is reprinted in 2 U.S. (2 Dall.) 411 (1792).
42. Act of February 28, 1793, ch. 1, 1 Stat. 324.
43. *See, e.g.,* National Gazette, Apr. 12, 1792, *quoted in* 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 70 n.1 (rev. ed. 1947), *also quoted in* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 87 (2d ed. 1973).
44. This activity of the Pennsylvania troops was part of general army dissatisfaction with the Continental Congress which led in March of 1783 to the "Newburgh Addresses" recommending the establishment of a military dictatorship. *See generally* J. ALDEN, THE AMERICAN REVOLUTION 265–67.
45. So important was the principle of judicial independence to the judges of the Pennsylvania Circuit that they chose not to proceed in the face-saving manner of their brethren sitting at the New York and North Carolina Circuits, who declared that they were merely acting as "Commissioners," and not judges, in performing their duties under the act. *See generally,* Wheeler, *Extra-Judicial Activities of the Early Supreme Court,* 1973 Sup. Ct. Rev. 123, 135–39.
46. *See* Ritz, *United States v. Yale Todd,* 15 WASH. & LEE L. REV. 220 (1958).
47. *See* Justice Taney's summary of the case, at 54 U.S. (13 HOW.) 40, 52 note (1851).
48. 28 F. Cas. 102 (C.C.D. Pa. 1795) (No. 16,857).
49. Act of March 28, 1787, 1787 Pa. Laws 770.
50. 5 U.S. (1 Cranch) 137 (1803).
51. 28 F. Cas. at 1014.
52. *See* text accompanying notes 7–9 *supra.*
53. 28 F. Cas. at 1018.
54. *Id.* at 1019.
55. *See, e.g.,* Fletcher v. Peck ,10 U.S. (6 Cranch) 87,139 (1810).
56. *See, e.g.,* Searight v. Calbraith, 21 F. Cas. 927 (C.C.D. Pa. 1796) (No. 12,585), (expectation principle in contract law), Wilkinson v. Nicklin, 29 F. Cas. 1263 (C.C.D. Pa. 1798) (No. 17,673) (holder in due course doctrine), and Livingston v. Swanwick, 15 Cas. 696 (C.C.D. Pa. 1793) (No. 8,419); Parassell v. Gautier, 18 F. Cas. 1088 (C.C.D. Pa. 1795) (No. 10,709); and Wharton v. Lowrey, 29 F. Cas. 855 (C.C.D. Pa. 1796) (No. 17,481) (refusals to let business transactions be defeated by legal technicalities).

56a. Searight v. Calbraith, 21 F. Cas. 927 (C.C.D. Pa. 1796) (No. 12,585).

57. *Id.* at 928–29. The *Searight* case was settled before the verdict was announced, but it was later revealed that the jury would have exercised its discretion and awarded only six pence damages, in a case where the "expectation" damages would have been much higher.

58. W. NELSON, AMERICANIZATION OF THE COMMON LAW at 54–63 (1975), M. HORWITZ, *supra* note 20, at 166–67.
59. Van Horne's Lessee v. Dorrance, 28 F. Cas. at 1013, 1015.
60. See the views of the Massachusetts jurisprude Theodore Sedgwick, described in R. ELLIS, THE JEFFERSONIAN CRISIS 190 (1971)
61. 11 F. Cas. 1099 (C.C.D. Pa. 1793) (No. 6,360).
62. *See National Gazette,* Aug. 3, 1793; Philadelphia General Advertiser, Aug. 3, 1793.
69. 9 WORKS OF THOMAS JEFFERSON 73 (P. Ford ed. 1904), *quoted* in 2 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 29 (1916).
70. 3 A. BEVERIDGE, supra note 69, at 23.
71. *Compare* Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 73 (1923) *with* 1 J. Goebel, Jr., A HISTORY OF THE SUPREME COURT, at 229–30, 626–27 (1971).
72. An Act to establish the Judicial Courts of the United States, ch. 20, § 11, 1 Stat. 73 (1789).
73. Jay's charge was delivered May 4, 1790. The quotations in the following paragraphs are taken from the Independent Chronicle, May 27, 1790, at 2.
74. *Id.*
75. Henfield's Case, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793) (No. 6,360); STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 50, 52 (F. Wharton ed. 1849) [hereinafter cited as STATE TRIALS].
76. For a concise discussion of the split of public opinion and the political background of the "neutrality Proclamation," see J. MILLER, ALEXANDER HAMILTON & THE GROWTH OF THE NEW NATION 363–69 (1959).
77. 11 F. Cas. at 1102; STATE TRIALS, *supra* note 75 at 53.
78. 11 F. Cas. at 1103; STATE TRIALS, *supra* note 75, at 54.
79. 11 F. Cas. at 1106; STATE TRIALS, *supra* note 75, at 61.
80. 11 F. Cas. at 1107; STATE TRIALS, *supra* note 75, at 61.
81. *Id.* at 1107; STATE TRIALS, *supra* note 75, at 61–62.
82. *Id.* at 1107; STATE TRIALS, *supra* note 75, at 62.
83. *Id.* at 1108; STATE TRIALS, *supra* note 75, at 63.
84. The indictment is reproduced *id.*, at 1109, 1115; STATE TRIALS, *supra* note 75, at 66, 76–77.
85. The points made by Rawle are reported *id.*, at 1116–17; STATE TRIALS, *supra* note 75, at 78–79. As authority for this last proposition, Rawle cited 4 W. BLACKSTONE, COMMENTARIES* 69.
86. *Id.* at 1119; STATE TRIALS, *supra* note 75, at 83.
87. *Id.* at 1120; STATE TRIALS, *supra* note 75, at 84.
88. National Gazette of Philadelphia, Aug. 3, 1793.
89. *Id.*
90. The seven bishops were prosecuted under the notorious seditious libel doctrine of the Stuarts: the greater the truth of the libel, the greater the crime. The jury apparently rejected this doctrine, and the Bishops were acquitted. *See, e.g.,* 2 T. MACAULAY, HISTORY OF ENGLAND 990–1039 (1858).
91. Massachusetts Mercury, Aug. 9, 1793, at 2, col. 3.
92. Letter from Thomas Jefferson to Robert Morris, (1793), *reprinted in* STATE TRIALS, *supra* note 75, at 89 note.
93. J. MARSHALL, LIFE OF GEORGE WASHINGTON 273–274 (1807).
94. United States v. Ravara, 27 F. Cas. 714; STATE TRIALS, *supra* note 75 at 90 (C.C.D. Pa. 1794) (No. 16,122).
95. 27 F. Cas. at 714; STATE TRIALS, *supra* note 75, at 90.
96. 27 F. Cas. at 714; STATE TRIALS, *supra* note 75, at 91.
97. 27 F. Cas. at 714; STATE TRIALS, *supra* note 75 at 92.
98. *Id.*

99. 1 C. WARREN, *supra* note 43, at 114–15. Act of June 5, 1794, 1 Stat. 381.
100. United States v. Guinet, 26 F. Cas. 53; STATE TRIALS, *supra* note 75, at 114, and 1 J. Goebel, Jr., *supra* note 71 at 629–630, at 93, 101 (C.C.D. Pa. 1795) (No. 15,270).
101. 1 C. WARREN, *supra* note 43, at 114–15.
102. 28 F. Cas. 774; STATE TRIALS, *supra* note 75, at 189 (C.C.D. Pa. 1798) (No. 16,766).
103. *Id.* at 776, 777; STATE TRIALS, *supra* note 75, at 192; 194.
104. R. BUEL, JR., SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS 1789–1815, 166–83 (1972).
105. 28 F. Cas. at 776–77; STATE TRIALS, *supra* note 75, at 194.
106. *Id.* at 777; STATE TRIALS, *supra* note 75, at 194.
107. *Id.* at 777; STATE TRIALS, *supra* note 75, at 195.
108. U.S. CONST. art. 1, § 8, cl. 6.
109. *Id.* cl. 18.
110. 28 F. Cas. at 778; STATE TRIALS, *supra* note 75, at 195.
111. 28 F. Cas. at 778; STATE TRIALS, *supra* note 75, at 196. In the report in STATE TRIALS there is an obvious error in the substitution of the word "distinguishable" for "indistinguishable" in the fifteenth line of page 196.
112. *Id.* at 779; STATE TRIALS, *supra* note 75, at 197.
113. *Id.* at 779; STATE TRIALS, *supra* note 75, at 197–98.
114. *Id.* at 779–80; STATE TRIALS, *supra* note 75, at 198.
115. 1 J. GOEBEL, JR., *supra* note 71, at 658–59.
116. *See id.* at 229–30.
117. *Id.* at 654, quoting a Congressional speech made in July 1798 by Harrison Gray Otis. The speech is reported at 8 ANNALS OF CONG. 2145 (1804).
118. United States v. Worrall, 28 F. Cas. 774, 799; STATE TRIALS, *supra* note 75, at 189, 198 (C.C.D. Pa. 1798) (No. 16,766).
119. *Id.* at 800; STATE TRIALS, *supra* note 75, at 198.
120. Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49, 73 (1923). There are some fundamental difficulties with Warren's analysis, however, *see* Presser, *supra* note 1, at 64 n. 170.
121. *See, e.g.,* A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION 134–37 (5th ed. 1976) for a short summary of the delegates' actions and views on the locus of sovereignty under the proposed Constitution.
122. 1 C. WARREN, *supra* note 43, at 67–69.
123. A. KELLEY & W. HARBISON, *supra* note 122 at 165.
124. For an examination of Morton Horwitz's provocative views on this question *see* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, 11–12 (1977), and Presser, *supra* note 1, at 66–68.
125. United States v. Worrall, 28 F. Cas. 774, 780; STATE TRIALS, *supra* note 75, at 189, 198 (C.C.D. Pa. 1798) (No. 16,766).
126. *Id.* at 780; STATE TRIALS, *supra* note 75, at 198–99.
127. STATE TRIALS, *supra* note 75, at 199 note.
128. *Id.*
129. *See* L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY; LEGACY OF SUPPRESSION xv-xvi (Torchbook ed. 1963).
130. J. SMITH, FREEDOM': FETTERS: The Alien and Sedition Laws and American Civil Liberties 188–192 (1956).
131. There is a report of Bache's arrest and appearance before Judge Peters in his paper, the *Philadelphia Aurora,* June 27, 1798, and June 30, 1798.
132. Letters from James McHenry to George Washington (Jan. 24 & 31, 1796), *cited in* 1 C. WARREN, *supra* note 43, at 142.
133. 11 U.S. (7 Cranch) 32 (1812).

134. *Id.* at 33–34, *Cf.* United States v. Worrall, 28 F. Cas. 774, 779; STATE TRIALS, *supra* note 75, at 189, 197 (C.C.D. Pa. 1798) (No. 16,766).
135. STATE TRIALS, *supra* note 75, at 41–42.
136. J. MILLER, THE FEDERALIST ERA 248 (1960).
137. A good summary of Chase's career is to be found in the short biography by Edward S. Corwin, 4 DICTIONARY OF AMERICAN BIOGRAPHY, 34 (1934).
138. F. MACDONALD, E PLURIBUS UNUM 89–99 (1965).
139. *See, e.g.*, 1 J. GOEBEL, JR., *supra* note 71, at 369.
140. 9 J. SANDERSON, BIOGRAPHY OF THE SIGNERS TO THE DECLARATION OF INDEPENDENCE 234 (1827).
141. Report of the United States Commissioners to E. Randolph, *reprinted in* 4 PENNSYLVANIA ARCHIVES 164 (2d ser.).
142. *See, e.g.*, United States v. Insurgents, 26 F. Cas. 499, 506–07 (C.C.D. Pa. 1795) (No. 15,443), for the suggestion that this number was as high as 7000.
143. *Id.* at 507–11.
144. Elsmere, *The Trials of John Fries*, 103 Pa. Mag. Hist. & Biog. 432–435 (1979).
145. *See, e.g.*, Philadelphia Aurora, Apr. 11, May 15, May 16, & May 24, 1799.
146. *See, e.g.*, J. Miller, *supra* note 136, at 158–59 (Whisky Rebellion), 247–50 (Fries's Rebellion).
147. H. TINKCOM, THE REPUBLICANS AND FEDERALISTS IN PENNSYLVANIA 1790–1801 96 (1950).
148. J. MILLER, *supra* note 136, at 158, refers to the fear that the reistance might spread to Maryland, Georgia, and the Carolinas.
149. *See* Presser, *supra* note 1, at 76 n. 150, and *see also* Elsmere, *supra* note 144, at 434 and sources there cited.
150. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, 319–23 (1969).
151. *Id.* at 323–28.
152. Reid, *In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution*, 49 N.Y.U.L. Rev. 1043 (1974).
153. G. WOOD, *supra* note 150, at 326–27.
154. 9 J. SANDERSON, *supra* note 140, at 190–91.
155. *See, e.g.*, J. MILLER, *supra* note 136, at 247, and *see* Presser, *supra* note 1, at 78 n. 156.
156. C. BRINTON, A DECADE OF REVOLUTION, 117 (Torchbook ed. 1963).
157. R. BUEL, JR., *supra* note 104, at 128–29.
158. C. BRINTON, *supra* note 156, at 55, referring to the November 19, 1792, declaration of the French Convention.
159. *Id.* at 230.
160. *Id.* at 218.
161. STATE TRIALS, *supra* note 75, at 9.
162. *Id.* at 5 note.
163. U.S. CONST. art III. § 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort."
164. United States v. Mitchell, 26 F. Cas. 1277, 1278 (C.C.D. Pa. 1795) (No. 15,778) (argument of Mr. Rawle).
165. 26 F. Cas. at 1281.
166. United States v. Insurgents, 26 F. Cas. 499, 511–12 (C.C.D. Pa. 1795) (No. 15,443).
167. *Id.* at 513–14.
168. 28 F. Cas. 376 (C.C.D. Pa. 1795) (No. 16,621).
169. *Id.* at 377.
170. 26 F. Cas. 1277 (C.C.D. Pa. 1795) (No. 15,788).
171. *Id.* at 1281–82.

172. *See, e.g.*, Green, *The Jury and the English Law of Homicide 1200–1600*, 74 Mich. L. Rev. 413, 489–92, 499 (1976), and sources cited therein.
173. *See, e.g.*, the discussion of the *Henfield* case at text accompanying notes 88–93, *supra*.
174. An Act to establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789).
175. 9 F. Cas., at 846.
176. *Id.*
177. Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), 10 PETERS PAPERS, *supra* note 34, at 91.
178. *See* 9 F. Cas., at 941 note.
179. 9 F. Cas. at 899.
180. *Id.* at 897.
181. *Id.* at 895.
182. *See* text accompanying notes 168–173, *supra*.
183. 9 F. Cas. at 916.
184. Though Rhoad denied it under oath, five sworn witnesses stated that after Rhoad was summoned for jury duty but before the trial, he had said that Fries "ought to be hung" and that "it would not be safe at home unless they hung them all." *Id.* at 918.
185. Justice Iredell had earlier written his wife that when the jury's verdict was announced, "I could not bear to look upon the poor man, but, I am told he fainted away . . . I dread the task I have before me in pronouncing sentence on him" Letter from James Iredell to Mrs. James Iredell (May 16, 1799), *quoted in* D. HENDERSON, *supra* note 30, at 129.
186. 9 F. Cas. at 923.
187. Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804) note 177, *supra*
188. *Id.*
189. *Id. See also* Presser, *supra* note 1, at 89 n. 277.
190. Presser, *supra* note 1, at 89–90, n. 278.
191. Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), note 177, *supra*.
192. *Id.*
193. 9 F. Cas. at 941.
195. 9 F. Cas. at 942. Peters wrote that Chase was true to his word, and "[a] more impartial, fair and humane proceeding I never witnessed. Mr. Chase conducted himself with Ability, Kindness & impartiality." Letter from Richard Peters to Timothy Pickering (Jan. 24, 1804), note 177 *supra*.
196. 9 F. Cas. at 926.
197. *Id.* at 930–31.
198. *Id.* at 931 (discussion of "public intent").
199. *Id.* at 930–31.
200. *See generally* 9 F. Cas. at 934–40.
201. 9 F. Cas. at 933–34.
202. An act in addition to the act, entitled "Act for the punishment of certain crimes against the United States", ch. 74, 1 Stat. 596 (1798).
203. See Presser, *supra* note 1, at 93, n. 294.
204. For the details of the European events, see C. BRINTON, *supra* note 156, at 173, 179.
205. 9 F. Cas. at 833.
206. 9 F. Cas. at 844–859.
207. *See* text accompanying notes 131–132 *supra* (prosecution of Benjamin Franklin Bache).
208. *See* 2 W.W. CROSSKEY, POLITICS AND THE CONSTITUTION 767 (1953).

209. An act in addition to the act entitled "Act for the punishment of certain crimes against the United States," ch. 74, §§ 2,3, 1 Stat. 596 (1798). In pertinent part Section 3 provided that the defendant might "give in evidence in his defense, the truth of the matter. . . ."
210. *Id.* § 3.
211. R. BUEL, JR., SECURING THE REVOLUTION: IDEOLOGY IN AMRICAN POLITICS 1789–1815, 137–38 (1972).
212. United States v. Cooper, 25 F. Cas. 631 (C.C.D. Pa. 1800) (No. 14,865).
213. Cooper argued, for instance, that we were at "peace" with France, which we technically were, though there was an "undeclared" war on. Similarly, federal troops were stationed in Pennsylvania for some time to keep things quiet after Fries's Rebellion, although there were no "standing armies" elsewhere. Finally, though President Adams did take matters out of the hands of the courts in his handling of the case Cooper referred to, the matter of Jonathan Robbins, it was likely that Adams acted within his constitutional capacity to execute treaties and conduct matters of diplomacy.
214. 25 F. Cas. at 634.
215. *Id.* at 642.
216. *See, e.g.*, United States v. Fries, 9 F. Cas. at 883–86, 908, 839–40.
217. Lyon's Case, 15 F. Cas. 1183, 1185 (C.C.D. Vt. 1798) (No. 8,646), United States v. Haswell, 26 F. Cas. 218, 219 (C.C.D. Vt. 1800) (No. 15,324).
218. 25 F. Cas. at 640–42.
219. *Id.* at 640.
220. 25 F. Cas. 239: STATE TRIALS, *supra* note 75, at 688 (C.C.D. Va. 1800) (No. 14,709).
221. D. STEWART, THE OPPOSITION PRESS OF THE FEDERALIST PERIOD 543 (1969), *quoting* Philadelphia Aurora, Aug. 8, 1800. *See also* Philadelphia Aurora, May 22 and July 7, 1800.
222. *See* D. STEWART, *supra* note 221 at 533–35 nn. 138 & 141–43.
223. *See* 1 C. WARREN, *supra* note 43, at 168.
224. *Id.* at 273, STATE TRIALS, *supra* note 75, at 42.
225. See Chapter One *supra*, text accompanying notes 56–70.
226. Letter from Richard Peters to Timothy Pickering *quoted* in 1 C. WARREN, *supra* note 43.
227. STATE TRIALS, *supra* note 75, at 41.
228. 1 C. WARREN, *supra* note 43, at 153.
229. *See* text accompanying note 191, *supra*.
230. Binney, *The Leaders of the Old Bar of Philadelphia*, 14 Pa. Mag. Hist. & Biog. 1, 19, 20 (1859).
231. *See* Leter From Richard Peters to Timothy Pickering (Jan. 24, 1804) note 177 *supra*, where he observed that Chase stated that the practice of issuing opinions without argument on the general principles of law was done "every day" in England.
232. Binney, *supra* note 230, at 20.
233. See Presser, *supra* note 1, at 102, n. 339, n. 340.
234. *Id.* This is one of the better examples of Peters's celebrated wit. As a punster, he was said to be "unrivalled in this country." For an example, this gem appears in *A Collection of Puns and Witticism of Judge Richard Peters*, 25 Pa. Mag. Hist. & Biog. 366, 367 (1901): "The judge had an uncommon sharp nose and chin, and as he grew old they became more prominent and approached each other. A friend observed to him one day that his nose and chin were getting so near they would quarrel. 'Very likely,' he replied, 'for hard words often pass between them.' "
235. Samuel Chase to Richard Peters (Jan. 22, 1804), 10 PETERS PAPERS, at 90.
236. LaTrobe, *Biographical Sketch of Daniel Dulany*, 3 Pa. Mag. Hist. & Biog. 1 (1879).

237. Riddel, *Benjamin Franklin's Mission to Canada and the Causes of its Failure*, 48 Pa. Mag. Hist. Biog. 111, 149 n.59 (1924).
238. 9 J. SANDERSON, *supra* note 140 at 233.
238a. *Id.* at 230.
238b. Penn's Lessees v. Pennington (New Castle Circuit Court for Delaware June 5, 1804) *quoted in* Rodney, *The End of the Penns' Claims to Delaware 1789–1814*, 61 Pa. Mag. Hist. & Biog. 182, 196 (1937).
239. Leter from Timothy Pickering to Richard Peters (Aug. 28, 1798), 10 PETERS PAPERS, *supra* note 34, at 53.
240. Case of Fries, 9 F. Cas. 826, 874 (C.C.D. Pa. 1799) (No. 5,126).
241. Letters from Richard Peters to Timothy Pickering (Aug. 24, Aug. 30, 1798). *quoted in* J. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 137 (1951).
242. *See* text accompanying note 59 *supra*.
243. *See* text accompanying notes 168–171 *supra*.
244. *See* text accompanying note 183 *supra*.
245. Case of Fries, 9 F. Cas. at 841.
246. *See* J. MILLER, *supra* note 241, at 199–200, where he discusses a Senate plan to pass a bill for settling disputed elections by using a closed-door tribunal composed of seven Senators and six Representatives.
247. J. MILLER, ALEXANDER HAMILTON AND THE GROWTH OF THE NEW NATION 513–14 (1959).
248. *See id.* at 520–25.
249. *See generally* R. BUEL, JR., *supra* note 104, at 235–39; J. MILLER, *supra* note 136 at 276; J. SMITH, *supra* note 130, at 332.
250. R. BUEL, JR., *supra* note 104, at 231; J. MILLER, *supra* note 136, at 276.
251. *See, e.g.*, Philadelphia General Advertiser, Nov. 2, 1790.
252. *See* G. STOURZH, ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT 87–90 (1970), for Hamilton's views on this matter.
253. *Id.* at 97.
254. J. MILLER, *supra* note 247, at 541–42.
255. Letter from Samuel Chase to John F. Mercer (Mar. 6, 1803), *reprinted in* 29 Pa. Mag. Hist. & Biog. 205–06 (1905).
256. *See, e.g.*, J. CALLENDER, THE PROSPECT BEFORE US (1800).
257. 1 C. WARREN *supra* note 43, at 292–95.
258. *Id.* at 292–93.
259. G. WHITE, THE AMERICAN JUDICIAL TRADITION 1–2 (1975). *Cf.* STATE TRIALS, *supra* note 75, at 48 (court's use of "judicial veto" under leadership of Marshall established federal judiciary as coequal branch).
260. T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979). *See also* M. TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC (1978).
261. *See, e.g.*, Hall. 201 Men: *The Antebellum Lower Federal Judiciary 1829–1861*, 29 Vand. L. Rev. 1089 (1976).
262. *See generally* M. HORWITZ, *supra* note 124; L. LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW (1957); G. White, *supra* note 259, at 35–63.
263. *See, e.g.*, text accompanying notes 59–60, *supra*, and *see also* NELSON, AMERICANIZATION OF THE COMMON LAW 165–171 (1975).

John Thompson Nixon, United States District Judge for New Jersey from 1870-1889, who accelerated his own blindness and death in near heroic efforts.

Judicial Ajax: John Thompson Nixon and the Federal Courts of New Jersey in the Late Nineteenth Century

I. *Introduction*

As indicated in Chapter One, following the Civil War, after many years of relative neglect, the United States Congress passed a series of measures which altered the jurisdiction and the structure of the lower federal courts. It is likely that these measures were designed to increase the ability of the lower federal courts to serve as instruments of national policy. It appears that the changes were a result of a new Republican legislative philosophy which recognized that the federal courts might be made more useful in healing the "emotional and physical trauma" of the Civil War, and might help in the Republicans' goals of "subordination or elimination of regional and local diversity in favor of a central or national authority."[1] The expanded jurisdiction of the federal courts pursuant to this new judicial philosophy may have been the most significant development in the history of the lower federal courts since the Federalists' ill-fated efforts to use the lower federal courts to implement national policy. In this chapter, in order to understand how this second attempt at implementing national policy through the lower federal courts worked, we will examine the work of one Federal Judge, John Thompson Nixon of New Jersey, who served as Federal District Judge for New Jersey from 1870 to 1889. An examination of Judge Nixon's judicial activities and his personal philosophy may also help correct some general misconceptions about American law in the late nineteenth century.

Historians are still in the process of beginning research into the American legal history of the late nineteenth century,[2] when Nixon presided, and very little work has been done on the lower federal courts. One reason for the previous inattention to this period may be the conventional wisdom regarding this time. Legal historians have nearly universally accepted Karl Llewellyn's characterization of the period as one of formal, rigid, and arid jurisprudence.[3] According to this view, late nineteenth century judges did not use law as an instrument in service of a changing society, but rather viewed legal principles as static entities, which their job was simply to discover, and never to change.[4] Supposedly, the judges believed that it was their task to discover the law simply by looking to precedent—to the vast body of previously decided cases—and authoritatively to apply "the law" as "found" there.[5]

This approach, so the theory goes, caused case reports to be filled with strings of redundant citations,[6] and, in particular, led to a literalism in the interpretation of legislative acts which often gave effect to the language of a statute at the expense of the legislative purpose for its passage.[7] Rules of law, it is said, were thought of like rules of mathematics, judicial opinions were to apply refined precedent and principle with little attention to their impact on the real world.[8] This conception of law purportedly limited flexibility, and prevented particularized equitable inquiries into the circumstances of individual cases.[9] This judicial approach, usually referred to as "formalism," or the "formal style" is said to have been pervasive throughout the state and federal judicial systems.[10] "The few people," says Grant Gilmore, "who have ever spent much time studying the judicial product of the period have been appalled by what they found."[11] This predominately pejorative view of the period following the civil war in American jurisprudence seems ripe for revision,[12] and even Gilmore has acknowledged that the "tradition of judicial creativity" may have survived "to some degree" in the federal courts.[13]

In this chapter, then, some revision of the conventional wisdom will be attempted by building upon Gilmore's suggestion, and elaborating one concrete example of what might be called "creative jurisprudence" in the late nineteenth century. If the work of Nixon's court was typical, or even occasional, for lower federal or state courts during this period, the richness of the available judicial data may turn out to have been badly underestimated.[14] Whatever other judges were doing at this time, however, Nixon's opinions seem to reflect a struggle to render "just" decisions, even if this meant ignoring precedent. Particularly as Nixon spent more time on the bench, his decisions seem to have been deeply and openly influenced by political, moral, philosophical and religious notions, and they are far from arid. String citations are rare in Nixon's opinions, the analysis is not normally camouflaged to disguise a struggle between competing considerations, and the opinions often show a frank attempt on Nixon's part to reconcile diverse policy goals. In particular, and again against the conventional wisdom, when Nixon dealt with statutes, as we shall see, it was nearly always with an attempt to follow what he perceived to be the legislative policy, and when, as he occasionally

did, he ignored statutory directives, it was because of what he believed to be a more important legally-approved goal.

Before proceeding to an analysis of Judge Nixon and his opinions, it seems appropriate to reach for a literary analogy for help in illuminating the work of this nineteenth-century judge who has hardly been a household word even around the Third Circuit or among American legal historians. The analogy comes from that greatest of all works, the *Iliad*, and is the Greek chieftain, Ajax. Ajax's fellow fighters against Troy appear to have described him as the second greatest of the Greeks, after Achilles.[15]

One of the characteristics of Ajax, however, is that he fails to receive the recognition which his conduct merits. For example, he is passed over for the honor of receiving Achilles's armor after that hero dies, and the armor is instead given to Odysseus. Since the *Iliad*, when westerners think of heroic stereotypes, the tendency has been to neglect Ajax for the flashier Achilles and Odysseus. Achilles, the bravest and strongest of the Greeks, was also a singer and a poet, an extremely intelligent and sensitive man of honor. Odysseus, in contrast to Achilles (and Ajax) could not rely on brute force or magnificence to prevail, and lived by his wits. It was he who concocted the strategem of the Wooden horse to defeat Troy, and he who was wily enough, usually by the use of trickery or deceit, to defeat the Cyclops, the Sirens, and everyone else. Ajax is not a figure of such great individual glory. His greatness comes from the way he is able to extricate his fellow heroes from tight situations, for his unceasing martial efforts.[16] It is Ajax who bears the brunt of the battle while Achilles sulks in his tent. Ajax agonizingly and excruciatingly almost single-handedly holds the Trojans off, before he is overwhelmed by the force of Zeus on behalf of Troy.[17] Ajax is Homer's spokesman for the simple virtue of loyalty to one's comrades and the cause; Ajax is not eloquent like Achilles (Shakespeare calls Ajax "beef-witted") or clever and polished like Odysseus, but he can sometimes inspire with his plain speech and devotion. Without Ajax's long-suffering endurance, it is clear, the Greeks would never have been able eventually to prevail.

In American legal history we have concentrated, not unexpectedly, on the Achilleses of the law, like Story, Field, or Langdell—proud men with grand purposes—or on the legal Odysseuses, like Marshall, Kent, and Cardozo—who could skillfully and subtly twist precedent to achieve their ends. The man to be considered here, John Thompson Nixon, was a judicial Ajax. Like the Greek, his achievements were not as grand, but they may have been crucial. Also like the character in the *Iliad*, Nixon's jurisprudence reflected boundless endurance, single-mindedness, and a devotion to simple virtues. Finally, like Ajax, Nixon (and probably many like him) have yet to receive recognition for indispensable duties performed.

II. *The Legal Philosophy and Times of Judge Nixon*

A. *His Era*

The most important period of American legal history, the "formative era"

or "golden age" has traditionally been thought to have extended from the American Revolution to the Civil War. This opinion results from the fact that the major developments of the basic disciplines of American private law such as contracts, torts, property, and corporations,[18] and the formation of sophisticated national and state theories of constitutional law took place in this "golden" period.[19] The issues in the late nineteenth century have not seemed as grand, as it was more a time concerned with systematization and a "search for order".[20] Nevertheless, Nixon's jurisprudence suggests that particularly in the federal courts, there may have been an equally creative burst in the late nineteenth century, although the creativity took place in more specialized legal doctrines such as patents, bankruptcy, or insurance, fields which have often escaped the attention of the legal historian.[21] Further, it appears that we have often misunderstood the late nineteenth century judicial bombastic style; instead of reflecting mindless adherence to *stare decisis,* we may discover that its exponents reflected a view of the world, and of America's place in it, that was not far different from that of the great jurists of the early nineteenth century. If the opinions now strike us as defensive or unimaginative, the explanation may be that their writers felt that the traditional values were extremely threatened by the economic and moral chaos following the civil war, and that strong and simple statements of fundamental values were badly needed.[22] If ever there was a judge who was weaned on these fundamental and simple values, it was Nixon. These values, as Robert Wiebe has suggested[23] were more appropriate to "small-town" American communities than to the urban bureaucratized nation that was rapidly forming during the period. Nixon's outlook stressed principles of individualism that may have predominated in the early part of the century, when opportunities for individual achievement, or what Willard Hurst has called the "release of energy"[24] were more evident. Nixon stood for a simpler time, when the heroic individual, not unlike the prototypes in the *Iliad*, was the model for good citizenship. Nixon's reaction to the Civil War and his passionate pro-Unionism may also have simplified the issues for him. Even in the *Iliad*, however, there is great conflict between the need for assertions of individual integrity (like the disasterous wrath of Achilles) and the need for social responsibility (the duty of all the heroes to unite against Troy).[25] This conflict eventually destroyed Ajax, and, as we shall see, the difficulty of reconciling similar competing considerations eventually took its toll on Nixon.

In order to understand the competing considerations with which judges like Nixon had to grapple at the end of the nineteenth century, and in order to be able to appreciate his value system, we must consider first some basic biographical data, and then some of Nixon's philosophical speculations. We may then proceed to an analysis of his jurisprudence itself.

John Thompson Nixon was from one of the leading families of Cumberland county.[26] Born in 1820, he received a preparatory "classical education" at the Lawrenceville Academy near Princeton, and attended the College of New Jersey, now Princeton University. Nixon continued his classical studies

after graduation by serving for two years as an instructor in languages at the College.[27] In 1845 he entered the practice of law in New Jersey, in 1848 he was elected as a Whig member of the General Assembly of New Jersey, and he served as speaker of the New Jersey General Assembly in 1849.[28] From 1858 to 1862, during the crucial period when the Civil War began, Nixon served two terms in the United States Congress, first as an "American", and second as a Republican.

Nixon then returned to law practice in New Jersey. During the years between his service in the New Jersey Assembly and his appointment to the District Judgeship in May 1870, Nixon produced a digest of New Jersey statutes, bringing out a first edition in 1855, a second edition in 1861, and a third in 1868.[29] From 1864 until his death he served as a trustee of the College of New Jersey and he remained very active in Princeton University affairs.[30]

By the time Nixon finally became a federal judge he was nearly 50 years old.[31] He brought to the bench what contemporaries perceived as an "harmonious blending" of "mental and moral" qualities.[32] Before 1861 the district court of the United States in New Jersey "had been of little importance . . . . for it was seldom that matters of any consequence were brought before it."[33] In the 1860's and 1870's, however, the New Jersey federal court "became much more important, especially because of the grave questions arising out of the Civil War, and from the necessary extension of the powers of the federal judiciary in the states." In 1867 a new federal bankruptcy statute was passed, to be administered by the federal district courts. This created a marked increase in the scope "of the powers of the court and the extent and importance of its business."[34] Further, since the Third Circuit Judge, William McKennan, was principally occupied with his duties in Philadelphia, "year by year more of the [New Jersey] circuit court business devolved upon the district judge."[35] During this period also, cases involving the collection of the internal revenue increased, particularly in the district of New Jersey. Finally, an 1875 act further enlarged the jurisdiction of the federal courts, particularly in patent cases. It "was soon discovered by suitors in patent cases in the two great states on either side [of New Jersey] that [in New Jersey] was a [federal] tribunal in which such controversies could receive prompt and intelligent consideration." As a result Nixon's patent cases "increased more and more in consequence of the patience, ability and urbanity which he brought to their consideration."[36]

B. *His Philosophy: Race, Country, and Religion.*

From several speeches and addresses which Nixon gave in the late nineteenth century, we can understand what his contemporaries meant when they commented on his morality and his urbanity. As he told the students at Princeton in 1863, John Thompson Nixon viewed the world as a place where liberally educated men were duty-bound to strive for achievement. There

were, according to Nixon, three goals to be achieved by this striving. It was a man's duty to honor, by his efforts, his race, his country, and his God.[37]

When Nixon suggested that one of man's tasks was to honor his race, he meant that each man ought to be concerned with the progress of mankind, and with human society in general. Nixon believed that the condition of mankind could and should be bettered by economic progress through individual entrepreneurship,[38] and by accomplishments in the arts and sciences, and his Princeton address shows a familiarity with the writings and discoveries of the great historians, philosophers, and scientists.[39] Nixon was concerned, however, that throughout the world of the late nineteenth century, human societies seemed "disturbed in all the elements of social organization."[40]

As did the men who made the American Revolution, Nixon believed that he lived in a crucial time in the history of mankind, when America had a special burden to shoulder, and that Americans by honoring their country would actually be bettering the entire race. This was because the "spirit" of "popular liberty", born in Greece and Rome, and nurtured in England, was dependent for its survival upon events in America.[41] Though America had recently been "an imperiled republic struggling for life," Americans were now expected to demonstrate that man's capacity for self government could survive against oppression and the aggressions of power.[42] Nixon deeply believed in "the fundamental doctrine of popular power."[43] And to this end Nixon was also devoted to "the great work of popular education."[44]

Nixon's love for "liberty" and "popular power" had some limitations, and his beliefs were not free from tension. Thus, for Nixon, "liberty" was not "the abstract deity of the ancients . . . begetting anarchy, disorder, and licentiousness;" but was instead the "practical earth-child of modern civilization, born of written constitutions, temperate progress, and social order."[45] Similarly, Nixon believed that one of the greatest problems of his age was what he described as "an agrarian spirit, which levels distinctions . . . necessary for the existence of the social order."[46] At the other end of the social spectrum, however, Nixon was worried about "a corrupting spirit which substitutes the power of wealth for the legitimate influence of virtue and intelligence."[47] Similarly, Nixon was concerned about the possibility of a general lowering of standards. This was illustrated particularly by what he perceived as a decline in the quality of the American Bar. Nixon decried "the growing tendencies to lower the standard of what was once properly termed a learned profession, by filling up the roll with men of little elementary training and whose knowledge of the law was obtained from the mere definitions and catch-words of a noble science."[48] In short, Nixon's concept of "popular sovereignty" was like that of the early Thomas Jefferson. He believed in a democratic base for politics, but he also saw a need for a structured society, and leadership by an intellectual elite.[49] Still, the popularly-based power of the legislature was of fundamental importance to Nixon, and, as we shall see, he felt himself bound to try to effectuate the popular will in his decisions.

Perhaps the deepest level of Nixon's concern was reached when he considered the problems which he believed were facing American religion. While Nixon believed fervently in the "spirit of civil liberty, and the genius of religious freedom",[50] he also believed that Christianity should not be "degraded into a child of earth, by having her doctrines, principles, and claims subjected to the limited and defective processes of human reason." Nixon excoriated the "infidel spirit, which, wandering away from the simpler forms of ancestral faith, fails to recognize a constantly superintending Providence in the direction of our individual lives, and in the determination of our national destinies."[51] For Nixon, history was the study of God's mysterious workings on earth, and it was not always easily intelligible to man.[52]

Faced with the difficulty of understanding the work of God in history, man's job, then, was not to question the works of God, but rather to seek to serve Him by glorifying His work, and by being faithful to His commandments.[53] The religious aspects of man's task thus shaded virtually imperceptibly into man's duties to his race and country through what Nixon called "worth and moral power."[54] Here the Greeks (and perhaps Ajax himself) were the best models for Nixon, who admired their "prodigies of personal valor" and their "heroic constancy of purpose."[55] Nixon's writings do not reveal a fully detailed description of man's moral duties, but as was true of the ancient Greeks, for Nixon the highest possible achievement for man was to maintain unblemished his personal character.[56]

In the material which follows, we will see how Nixon used a flexible and creative style of jurisprudence to further the simple values he saw as transcendent—service to America, to mankind, and to God—through the promotion of popular sovereignty and economic progress. This can be traced through his district and circuit court opinions dealing with the areas of patents, bankruptcy, admiralty, criminal law, negligence, and insurance. In all of these opinions there exists at least some concern with Nixon's threefold prescription for American citizenship, and a consciousness that individuals who followed his canons ought to be rewarded.

III. *The Early Years: Effectuating Legislative Purpose*

Nixon's earliest opinions reveal his desire to implement the policies of Congress, particularly in the sensitive area of legislation designed to assist the underprivileged. Perhaps the finest example is a case Nixon decided in 1871, *United States* v. *Souders*.[57] Nixon was asked to rule on a motion for a new trial for defendants convicted of violating the Voting Rights Act of 1870,[58] by "unlawfully preventing certain legal voters from freely exercising the right of suffrage." The election in question was for a representative in Congress, and occurred in Newton, Camden County. The defendants, "a company of white men," made "a violent attack" on some black voters, "driving them forcibly" from the polling place.[59] The blacks "almost immediately rallied, and . . . . drove out the [defendants.]" The blacks then pro-

ceeded to vote.[60] The question for Nixon to decide was whether, if the blacks were eventually able to vote, the defendants could still be found guilty of "preventing a voter from freely exercising the right to suffrage." The defendants' counsel argued that since the blacks eventually voted, their freedoms were merely "hindered" or "temporarily obstructed," but not permanently prevented.

Nixon began by observing that "The object of all inquiry is to get at the intention of the legislature in passing the law; and the sole duty of the court is to grant to that intention, when ascertained, its full force and effect." Nixon proceeded to explain that the review of statutory language might be a process of several stages. His first task, he said, was to give "to words and sentences their obvious import and signification; having regard more to their general and popular use than to etymological or grammatical refinements." If there was still doubt as to the meaning of the statute, however, then "we must look at the context; at the subject matter; look to the effects and consequences of this or that interpretation; to the reason and spirit of the law itself; expounding it in the light of the mischief of the old law or want of law; and the remedy which the legislature has attempted to provide."[61] This analysis of the method of interpretation of statutes, of course, bears no resemblance to the "wooden" interpretation which some historians have suggested prevailed during this period.[62]

Nixon noted the general rule that "Where the statute is penal it must have a strict construction," but he immediately asserted that "we must not err in a too liberal application of the rule," and that penal statutes "are not to be construed so strictly as to defeat the obvious intention of the legislature."[63] Nixon then concluded, taking the tests for statutory interpretation he mentioned into consideration, that the "free exercise of suffrage" provision ought to include freedom from all restraints, even temporary ones, on voting. In short, the act intended to shield voters from "all sorts of duress, mental or bodily, while in the performance of the act."[64]

Although this decision might be indicative of Nixon's stern morality in so far as he referred to what happened as "this outrage of expelling the colored voter,"[65] Nixon's views on the importance of wide popular participation and thus the integrity of the political process itself, were perhaps more crucial. In this case, as much as any other he decided, he was probably able to feel that he was performing the highest task a Nationalist Republican judge could, that is to effectuate his party's program of universal congressional suffrage.

In any event, the case of *United States* v. *Souders* was probably not a problematic one for Nixon, because his own expressed preference for political freedom and his moral judgements coalesced so nicely with the obvious legislative purpose of the 1870 Voting Rights Act. A better indication of how Nixon felt himself bound by legislative purpose is provided by several bankruptcy opinions, where it is clear that Nixon's moral preferences were against the party for whom he believed he had to decide. The Act under which Nixon rendered most of these decisions was the Bankruptcy Act of 1867.[66] While

the earliest national bankruptcy legislation had tended to favor creditor interests—perhaps because of a predominant moral feeling among national legislators that it was the responsibility of the debtor class to make good on their promises—the Bankruptcy Acts of 1841 and 1867 were designed to provide benefits for debtors as well.[67] By this time, the sentiment had become more prevalent that personal bankruptcy did *not* reflect moral turpitude, but might simply be the result of unpredictable and impersonal cycles of the economy.[68] There is some indication that Nixon's own preferences were still to favor creditors over debtors, but most of his bankruptcy cases reflect an effort to effectuate the "popular will" expressed in the 1867 Act, and Nixon's unwillingness to let the legislative intention be defeated by mere technical irregularities.[69]

The case which illustrates this phenomenon most clearly is *Andrew* v. *Dole* (1875).[70] Plaintiff was the assignee in bankruptcy of defendant Dole. Plaintiff alleged that defendant, in fraud of the bankruptcy act, had transferred to his brother-in-law property worth hundreds of thousands of dollars. Following this transfer, it was alleged, Dole continued to reside on, and to enjoy the profits of the property—before, during, and after bankruptcy proceedings. Unfortunately, the plaintiff had not discovered this fraud until nearly seven years after his appointment as assignee in bankruptcy, and a provision of the act of 1867[71] stated that "no suit shall in any case be maintainable, *at law or in equity* . . . by any assignee in bankruptcy . . . unless such suit shall be brought within two years from the time the cause of action accrued . . ."[72] The question for Nixon to decide in the case, then, was whether to accept the assignee's argument that his cause of action was still alive because it did not "accrue" until *discovery* of the fraud. Nixon was the first federal judge faced with the necessity of thus construing this provision of the 1867 act, although several other judges had expressed opinions.[73]

The plaintiff argued that since the action for relief on the grounds of fraud was an equitable action, he was entitled to apply to the case "the long established equity rule, that statutes of limitation do not begin to run until the fraud has been, or by reasonable diligence may have been, discovered."[74] In a rather frank acknowledgement that there was no easy formalistic solution to the problem and after a long review of English and American cases, Nixon indicated that the "best judicial minds of England and the United States [had] differed. . . ." Nixon noted that while there were some precedents suggesting that even in courts of law this "equitable rule" regarding the accrual of a case of fraud could be applied,[75] the usual rationale for the rule in equity courts was that courts of equity are normally "only bound by the spirit of the statute." Law courts, Nixon stated, were not permitted to engage in the "judicial legislation" of constructing an exception to the statute of limitations in cases of fraud.[76]

While courts of equity were permitted to act outside the statutes of limitation under most circumstances because "normally they act outside law", Nixon felt that the situation was different where the legislature expressly in-

cluded equity cases in the relevant statute of limitations. Nixon concluded that "if any hardship should result, in a particular case, because of such omission, is not the remedy to be found in the legislature rather than in the courts?"[77] Nixon added that if Congress had meant to preserve the equity doctrine allowing the statute to be tolled in cases of fraud, they should have expressly so specified in the relevant section. Nixon dismissed the claim with the observation that "it is neither the province or prerogative of courts to repeal legislation by any such methods of construction."[78] Nixon's strong desire to effectuate the legislative intent of settling bankrupt estates may have thus been enough to overcome any moral aversion he might have had to the conduct of the bankrupt.[79]

Nixon's opinions in the bankruptcy area could also be lenient with regard to "fraud" on the bankruptcy act committed by creditors. For example, in the case of *in re Kaufman* (1879)[80] a creditor who had been forced through legal processes to return property "conveyed in fraud of the provisions of the Bankrupt Act of 1867"[81] sought to be listed among the creditors of the bankrupt to receive his pro-rated share at the distribution, and was refused listing among the creditors by the bankrupt's assignee. The assignee believed that he was entitled to refuse listing because of the creditor's earlier illegal attempt to collect. The difficulty in the case was an apparent conflict between Section 12 of the Act of June 22, 1874[82] which provided that where a creditor had originally received payment "in cases of actual fraud" on the bankruptcy act half of the debt only was permitted to be proved in the final listing, and the still not repealed Section 5084 of the 1867 Act[83] "which deprived the creditor who shall have accepted a fraudulent preference from either proving his debt or receiving a dividend until he shall have *surrendered* to the assignee all such property."[84]

The assignee relied on Section 5084, and argued that no "surrender" had occurred, since a "surrender" had to be voluntary, and recovery through legal process was involuntary. Since there had been no "surrender" he argued, Section 5084 deprived the creditor of the right to any listing. The assignee relied on two previous cases which so construed Sections 12 and Section 5084. Refusing to construe the word "surrender" in the rigid and formalistic manner of these previous opinions,[85] Nixon decided that it was the intention of Congress, when the 1874 Act was passed, to allow half recovery *even in the case of "fraudulent" creditors.* Nixon stated that the 1874 Act allowing half of the debt to be recovered after "surrender" of the property was designed "to alleviate harshness" present in the 1867 Act. Said Nixon, "the section, before the change, expressly prohibited any proof by a creditor who knowingly received a preference. There was a widely expressed desire to relax the vigor of such a provision. It was deemed a hardship to punish men with the loss of their whole claim because they made an effort to secure the payment of their honest dues."[86]

Taking into account the purposes of the change in 1874, Nixon held that giving up the property after being sued could be construed as a "surrender",

therefore § 5084 would not bar the claim, and thus even in the case of actual fraud on the bankruptcy act by the creditor one half of his debt could be recovered.[87] We see in this case, then, a conflict between the political principle of popular sovereignty which would suggest that creditors who had proceeded contrary to the federal bankruptcy statute of 1867 should be punished by wiping off their listings, and the strong moral principle that persons should not be punished for a technical indiscretion made in seeking payment of their originally just claims. Nixon attempted, in a manner that he apparently believed was consistent with the spirit of the *latest* legislative expression, to reconcile the two principles with the Solomon-like solution presented in Section 12 of the 1874 statute. The interpretation, though somewhat tortured, certainly is not rigid, and shows a sincere concern for legislative purpose. Again, as we saw in the *Souders* case,[88] Nixon exhibited a willingness to go beyond the mere words of a statute and to seek to render a decision in line with underlying policies.

Still, if some of the cases in bankruptcy suggest a tendency on Nixon's part to bow to legislative purpose and slight his own feelings about the importance of moral responsibility,[89] the explanation may be that Nixon perceived legislative efforts in the area of bankruptcy to be effectuating policies that he believed were also exceptionally important, for example, commercial progress. It will be remembered that Nixon saw that the future of America was dependent on industrial progress to be achieved by rewarding individual striving.[90] Clearly the aim of bankruptcy legislation, as far as debtors were concerned, was to wipe the slate clean, and to allow bankrupts to return to the productive sector of American society.[91] By examining some of Nixon's other decisions we can see further how he attempted to implement legislative attempts to ensure the success of commercial endeavors, and to reward individual achievement.

One such example comes from an admiralty case decided in 1882, The *Maria and the Elizabeth*.[92] In that case a vessel had collided with another, and was sold to pay the damages caused by the collision. The sale was insufficient completely to compensate for the damages, which were approximately five times the amount realized. The parties injured by the collision accordingly sought to recover the balance from the ship's owners. By this time, however, Congress had passed the "limited liability act," Revised Statutes § 4283, which provided, in pertinent part, that "the liability of the owner of any vessel for . . . . any loss, damage, or injury by collision, ... incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of the owner in such vessel. . . ."[93] The case turned upon the question whether, since the master was a part owner, and since he was on board the ship at the time of the collision, although he was then asleep, knowledge of the collision ought to be imputed to the owners, thus removing the limitation in the statute. Nixon conceded that in this situation one might say that the master "had privity of knowledge of the collision."[94] In light of the Congressional policy, however, which Nixon

found to be "to encourage commerce, and ownership in its instrumentalities," such a "narrow construction" would be unwarranted. To hold that the statute would be unavailable in the case at bar, concluded Nixon, would be "to deprive all vessel-owners of the privileges of the act in cases where the master happens to have any interest, however small, in the vessel."[95] Apparently understanding that this would hardly comport with the congressional purpose of encouraging ownership of ships and shipping, and perhaps realizing that an adverse holding would discourage ownership by masters and thus the concomitant possibilities of social and economic mobility through individual striving so dear to Nixon, he held that there was no "knowledge" of the collision on the part of the owners, and the statute's limitation applied.

IV. *A Second Goal: Facilitating Economic Development Through Rewarding Individual Striving*

A. *Admiralty Decisions*

As Nixon spent more time on the bench, and as the time of his own service in legislatures grew more distant, he seems to have shown a tendency to relax his inclination to be guided by legislative intent, when he perceived that he could thereby further his own goals of facilitating individual enterprise and economic progress. As indicated earlier, Nixon held to these goals because he believed that enterprise and progress eventually served all mankind.[96] The tendency to move beyond legislative intent can be seen in a series of admiralty cases in which Nixon ruled on claims for damages from negligence.

In *Brooks* v. *The D.W. Lenox* (1878),[97] a barge belonging to the plaintiff had been sunk while being towed by the defendant tugboat. The sinking had occurred after the barge had been struck by a schooner, the *May Morn*. The "steering and sailing rules Nos. 20 and 22," part of a Congressional statute, required all steamships (like the tug *Lenox*) to keep out of the way of sailing vessels, and the evidence seemed to demonstrate that the master of the *Lenox* had caused the collision by failing to follow this rule.[98] Accordingly, the owner of the *May Morn* sought to cast the entire blame of the collision on the tugboat, and thus avoid any liability for negligence. Nixon found, however, that it would have been possible for the schooner *May Morn* to have "promptly ported her helm and let her jibs run" thus coming "up into the wind" and minimizing or avoiding the accident. While the steering and sailing rules would seem to have required the schooner simply to follow her course, as she did, Nixon declared that "All rules of navigation have their exceptions," even though none were expressed here.[99] Citing no authority, and indeed declaring that "It would serve no useful purpose . . . to state at large the reasons for my opinion in the case," Nixon held that since the steering and sailing rules were "adopted to prevent collision, when a collision is inevitable by adhering to them, each vessel is not only bound to depart from the rules, but to adopt such different methods as will tend to avoid the disaster.[100] Nixon then held the schooner jointly liable with the tug for the collision,[101] Nixon thus saw his task as minimizing collisions, in a manner consistent with

the purpose, if not the express language, of Congressional directives. Still, it is perhaps appropriate to speculate that Nixon may have been attempting to go beyond the Congressional intent, and to limit the liability of steam-powered vessels. It may be that Nixon, as an admirer of technological improvements, believed that the rules were too harsh on steam-driven vehicles.[102] In any event, Nixon must have believed that he could increase the material benefits from maritime commerce by thus reducing the costs incurred through collisions.

Perhaps Nixon's wish to reduce collisions was also motivated by a concern for the seamen who risked injury whenever a captain of a vessel chose stubbornly to cling to his right of way under rules of navigation. Such a concern would be consistent with Nixon's attitude as evinced in admiralty cases dealing with the rights of sailors. Nixon was extremely solicitous to the rights of seamen, and in particular their opportunities for material advancement,[103] even if this meant that he would have to ignore the words of a statute. In *Somers* v. *The Jersey Blue* (1879)[104] a pilot sought to recover a year's wages. The owners defended on the grounds that the pilot had agreed to purchase a share in the vessel, and that they were simply applying his wages towards reducing the balance he owed for his share. Nixon had to determine whether the sailor could rely on the provisions of Sections 4535 and 4536 of the Revised Statutes, which forbid assignment of seamen's wages. Nixon observed that the assignment of wages here might "come within the letter of the statute," but he stated his belief that "it does not fall within its spirit and intent." Recognizing that the legislation was passed "for the benefit of seamen, who are the wards of the admiralty courts," Nixon suggested that "no interpretation should be given to it which would work to their injury."[105] Because such assignment of wages would increase the chances of seamen to buy shares in vessels, and this would be "a benefit to seamen," Nixon refused to hold that an assignment of this type would fall within the bar of the statute. This might have meant that Nixon would deny relief to this particular sailor, in the interests of protecting the potential for economic advancement of his class, but Nixon managed to hold that in the case at bar, since there had actually been no agreement to assign wages for the year in question, the pilot was entitled to his wages.[106]

An even more paternalistic attitude is revealed towards the end of Nixon's tenure on the bench. For example, in *The Frank C. Barber* (1884),[107] the sailors believed that they were to be paid wages monthly, and that they would be paid "fish money" (bonuses of three cents for every 1,000 fish caught during the season) as it was earned. The owners, however, maintained that they had told the sailors that they were not to be paid until the end of the season, and further that the sailors were to have deducted from their wages certain charges for food. When the sailors were not paid as they expected, they protested to the master of the ship who seemed "to have taken sides with the men, when with them, and with the owners when away from the crew." The master never told the crew the owners' terms for payment, which terms

were different from the periodic payments in use in prior years. Indeed, the master appeared to have represented to the men that the usual periodic and bonus payments would be made.[108] The master, when asked for payment by the sailors replied that the men could "go to work or . . . . go ashore," and that if they chose to leave they would be paid for work done to date. The men took this option, and did receive some "checks" for wages then due from the owners, but these checks did not include the "fish money."[109] At the trial, the owners claimed that the seamen had deserted and therefore no money was due them, since deserters forfeited accrued pay. Nixon decided that there had been an "unfortunate misunderstanding between the owners and the crew," which came about because of the "double-faced dealing of the master." Since, as Nixon observed, "It must be borne in mind that seamen of this class are generally ignorant; and are often imposed on, and that such imposition makes them suspicious," Nixon held that their leaving the ship's employ was a reasonable act, a discharge and not a desertion, and they were entitled to the wages earned to date including the fish money.

In this and other cases,[110] Nixon made it clear that in admiralty he would depart from the strict rule of the common law in contracts of this nature, which would require construction in favor of the employer. Because of the presumption created in the admiralty courts owing to the susceptible nature of seamen, "When . . . . the master leaves . . . uncertainty . . . . about the terms of the bargain with the seamen, he must not complain if all doubts are resolved in favor of the more ignorant party to the contract."[111] Just as Nixon was prepared to go beyond the words of a statute where he felt it necessary in order to effectuate his personal goal of encouraging individual advancement through individual striving, so he was prepared to set aside particular rules of the common law where he believed they were antithetical to the values he prized. Insofar as this led him to modify the doctrines of admiralty law, or at least to ensure that they continued to carry a strong equitable dimension, it seems fair to suggest that Nixon's was a "creative" jurisprudence, and not the arid variety thought to prevail in the late nineteenth century.

B. *Patent Decisions*

A tendency to engage in creative jurisprudence in order to prevent unfair advantage from being taken of stalwart individuals is also evident in Nixon's patent decisions. These cases also suggest that though Nixon was convinced of the need to encourage industrial expansion, his personal philosophy led him to be concerned about some of the distributive effects of the late nineteenth century economy. This moral tone is best captured in *Celluloid Manufacturing Company* v. *Crofut* (1885).[112] The decision in the case turned on the question of whether an inventor of a plastic compound, one William Hugh Pierson, was entitled to the protection of a patent. Mr. Pierson was a witness in the case, and Nixon observed that "his modest story of his perplexities and struggles with poverty is quite pathetic."[113] The defendant infringers had

argued that Pierson was not entitled to patent rights because he was "not the original and first inventor; [his] patent having been anticipated" by an English patent in 1856, and that Pierson had also forfeited his patent rights by "abandonment of the invention to the public."

Pierson began his experiments in 1850, and continued for five years until his plastic compound was perfected. Since he was still poor, having recently began his practice as a physician, it took a long time for him to make his plastic compound commercially valuable.[114] According to Pierson, he braved poverty and possible starvation for another five years, in order to perfect "what I at that time and ever since have believed would prove to be an invention of the greatest value to mankind and possibly to myself."[115] Thus, it was not until 1860 that application for Letters patent was made.[116] Pierson's application was initially refused by the patent office. Then,

> ". . . after having devoted so many years of my life to this one idea, the disappointment was too great for me to bear . . . my mind became unbalanced [and] I was sent to an asylum early in February, 1861, and remained there until sometime in September, 1861."[117]

Finally, after a few years at sea to regain his health, and after dismissing an apparently inept patent attorney, Mr. Pierson was able to secure a patent for the plastic. In view of these facts, which were not contradicted by the defendants, Nixon held that his invention had been perfected before the time of the English competitor. Similarly, even though there was a period of approximately 10 years between the original invention and the securing of the patent, Nixon held that this 10 year period did not constitute "abandonment". Said Nixon, "continued poverty, sickness, and mental alienation are always regarded as sufficient excuses for delay, and not a fact or circumstance has been brought into the case showing any intention of abandonment."[118]

The theme of the noble patentee against the cruel world was one that Nixon had been articulating for many years. For example, in an 1874 case[119] involving a machine for cutting mitres, Nixon refused to allow defendants to succeed in their claim that they had either anticipated, or improved the plaintiff's invention, and he held the defendants infringers because, as he stated:

> It is the old story of taking up the thread of another's invention or combination, improving upon it by the substitution of well known equivalents, and then claiming the merit of the whole invention. In the present state of the mechanical arts, it is the most usual and obvious mode of infringing the rights of others, but none the less an injury, against which it is the duty of the court to give protection."[120]

Perhaps the clearest suggestion that Nixon believed that it might be his job to redress late nineteenth century economic imbalances came in another 1874 case, *Webster* v. *New Brunswick Carpet Company,* involving an inventor who had taken some time before securing a patent "for a new and useful improvement in looms for weaving pile fabrics."[121] Nixon stated that "too often" the

"only recompense" inventors received was the "honor of the invention." The situation in *Webster*, said Nixon, was "the old story of poor inventors patiently waiting at the door of rich capitalists."[122] It was a case, said Nixon, where the inventor "was obliged to wait, either for the death of [another patent] or until the heart of capital should relent, in order to give his invention to the world under circumstances that might afford him [the inventor] some compensation for his years of thought and unrequited efforts."[123] Nixon proceeded to rule in favor of the "poor inventor," and against an infringing "rich capitalist".[124]

C. *The Law of Contract*

In an era which is supposed to be characterized by judges impersonally applying formal rules, Nixon's predilection in the patent cases for highly individualized examination of the situation of each patentee is striking. Nixon's attitude of individualized treatment is also evident in his refusal to be bound by what we have come to call the "classical" rules of contract, rules that were supposedly established and dominant by the nate nineteenth century.[125] We have already observed a tendency to ignore the common law rules of contract in admiralty cases.[126] This might not be surprising, since Admiralty Courts have traditionally been regarded as courts of equity, but Nixon was prepared to temper the common law rules with equitable notions even when there was no maritime element.

Batchelor v. *Kirkbride* (1886),[127] for example, was a case involving an architect's failure to give a certificate so that a builder could be paid for ongoing construction. The contract for construction expressly provided that before any progress payments could be made, the architect was to certify that enough work had been done to warrant the payment and the architect's decision was to be "final on both parties."[128] The architect had fraudulently withheld his certification, apparently hoping by that tactic to be bribed by the builder. At this time the building was approximately three-quarters completed, and the builder had received payment for one-half of the construction. When the architect refused the certificate, the builder demanded payment from the owner. The owner refused, sticking by the contract, and demanding certification first. There was no evidence of collusion between the owner and architect. The builder stopped work, since he could not continue to pay his workers without progress payments. The owner requested the builder to proceed, and when the builder could not, the owner exercised his contractual rights to replace him. The builder then brought an action in *quantum meruit* for the value of the uncompensated work. He prevailed in a jury trial, and Nixon was asked to rule on a motion for a new trial. Since the builder had failed to obtain the architect's certificate, it would appear that by the then-prevailing rules regarding express contracts, an essential condition precedent to payment had not occurred, and the action in *quantum meruit* should not have been allowed.[129] For Nixon, however, this was not a matter of express

conditions precedent, but simply a question of whether or not "the work had so far progressed as to entitle the contractor to have the certificates, and whether they were withheld for a fraudulent purpose." These, said Nixon, were questions of fact, for the jury to determine, and as they had ruled in favor of the plaintiff, that ended the matter.

Nixon's holding in *Batchelor* does not seem sensitive to the supposedly central idea of nineteenth century classical contract law that the role of the jury should be narrowly circumscribed when the express language of a contract covered the situation.[130] There would appear to have been no need for Nixon to stretch the rules of contract here, since even if the owner were allowed to rely on his contract, the builder could have recovered his damages from the architect, in a separate action for fraud. This would seem best calculated to ensure honesty on the part of architects and to preserve the sanctity of written contracts, supposedly a paramount late nineteenth century goal. Nixon's allowance of *quantum meruit* recovery, however, may suggest that he believed that the architect was judgement-proof. His strong moral feeling that the owner should pay for what he received, and that the builder should be rewarded for his efforts, may have then caused him to slight the rule regarding express conditions. As is true of so many other decisions late in Nixon's judicial career, it is nearly impossible to find Nixon engaging in the supposedly typical practice of mindlessly following clear precedent.

In Nixon's earlier years as a judge, however, he may not have so strongly supported the role of the jury as a repository of moral judgement on parties involved in contract cases. It will be remembered that in other early Nixon decisions, he tended to suppress some of his personal views, to promote other purposes, perhaps most prominently the hegemony of the federal legislature.[131] In at least one contracts case, we can also discern an early tendency to reign in what appear to be Nixon's prejudices against large aggregations of capital,[132] at least where it might appear that a corporation was rendering an important public service, or one essential to material progress. In such a case, however, Nixon, as he did in *Batchelor*, did seem to feel free to ignore the usual rules of construction of contract law. While Nixon had refused to allow a condition precedent in *Batchelor* when the rules of contract would seem to have required it, in *Yeomans* v. *Girard Fire & Marine Insurance Company* (1876),[133] when the precedents would seem to have required ignoring such a condition, Nixon enforced it.

Yeomans involved the interpretation of an insurance policy which contained a clause whereby the parties agreed that in the case of disputes over the amount of money due on a claim, no suit at law or equity could be brought "until arbitration shall have determined what amount is due."[134] The words of this clause in the contract were not strictly those of condition; the clause was preceded by the phrase that "it is furthermore hereby provided and mutually agreed," and this language could have been read as the language of promise as well as terms of a condition. According to the majority view,

such ambiguous language ought normally to be construed as a promise, especially when dealing with promises to arbitrate, since they oust jurisdiction from the courts.[135] Nevertheless, Nixon, while he noted the traditional policy against private parties ousting jurisdiction from the courts, decided that the clause ought to be construed as a condition precedent "to the right of bringing an action."[136] This was because the arbitration contemplated by *this* contract was only a means of fixing the amount due, of liquidating damages, and after such fixing there was no bar to recourse to the courts for recovery.[137] Nixon's holding was not without some support.[138] Nevertheless, his construction of the clause as a condition precedent meant that the policyholder in this case had to rely on the impartiality of arbitrators for the actual amount of his recovery, and could not obtain a review of the amount due under the policy from a judge or jury. To the extent, then, that a judge or jury might be swayed by individualistic considerations to award a different amount, the policy did "oust the courts of their ordinary jurisdiction." This did not appear to have troubled Nixon, however, who then seemed satisfied by the rather formalistic distinction between ousting jurisdiction to determine the liability of the company on the policy (which even Nixon would not permit)[139] and ousting jurisdiction to set damages. While Nixon did not explain the policies that supported his analysis, it seems fair to infer that the wish of the insurance company to avoid the massive costs and possible prejudice of fixing damages in a jury trial was instrumental.

D. *The Corporation and the Individual*

We have already observed how Nixon's desires for the facilitation of economic expansion may have led him to manipulate the rules of contract in a manner that favored productive enterprise. We have also noted how Nixon could employ what might be characterized as this "creative" jurisprudence (at least insofar as he viewed himself as free to choose between alternative lines of precedent, and to make a choice based on his policy preferences), in the service of either individuals or corporations. Finally, we have remarked on what may have been Nixon's preference, based on his own moral notions of the importance of individual character, efforts, and worth, for seeing that individuals were not wrongfully treated by "rich capitalists." During most of his tenure on the bench it appears that Nixon tried to be objective in his opinions when he was faced with a case involving individuals opposing corporations. By his last years, however, as we will see, Nixon's personal morality may have overwhelmed his desires for objectivity, in a manner that resulted in several reversals of his decisions by the United States Supreme Court. In what follows we will first review some of the decisions regarding corporations in which Nixon tried to maintain objectivity, and then conclude with some of the decisions in which this objectivity would seem to have been lost. In the next section, we will examine the cases which the Supreme Court reversed, and compare Nixon's jurisprudence with that of the members of the Supreme Court.

In *Globe* v. *Delaware, L. & W. R. Co.* (1880),[140] a dentist, whose annual income was $5000 per year, was paralyzed as the result of an injury he received while sitting in the smoking car of a railroad. His train had been struck from the rear by two loose railroad cars. Nixon noted the Supreme Court's rule that railroads "must be held to the greatest possible care and diligence," and that absent any contributory negligence on the part of the passengers, there is a "strict rule of accountability." The railroad sought to argue that since the plaintiff voluntarily chose to place himself in the smoking car, which was next to the locomotive, and "not the safest place in the train" he assumed the risk of any consequences of his being there.[141] Nixon dismissed this argument by observing that while the other passengers might be "more fastidious (shall I say 'more cleanly'?)" than the riders in the smoking car, the railroad was still "responsible for the safety of its passengers in any place which [was] provided for their transportation."[142]

Nevertheless, though Nixon dealt brusquely with the railroad's defense, he did caution the jury that "this is no case for vindictive or exemplary damages," since there was "no pretense that there was any wilful neglect."[143] Nixon explained that the plaintiff was only entitled to "compensatory damages," and he added that "I do not mean by this that you must try to make the plaintiff whole, or put him in as good condition as he was before the accident."[144] This seems to be curiously favorable to the railroad, as the black-letter rule of torts of the late nineteenth century was that the aim of damages *was* restitution, as far as money would do it, to put the plaintiff "in as good condition as he was before" the harm done him. For example, in an 1868 case, Judge Blatchford of the Southern District of New York had announced that the rule was that the plaintiff in such a personal injury case was entitled to recover as if he "were a portion of the cargo . . . which its owner is entitled to have restored, repaired, and replaced in the condition in which it was at the time of the collision."[145]

Nixon seems to have thus circumscribed the jury as he told them that it was "impossible" to "make the plaintiff whole" because "No amount of money . . . . can compensate for loss of health or physical suffering." Nixon then admonished the jury that they could still do "something," and though he said he knew of "no rule which I can lay down which is applicable to every case,"[146] Nixon told the jury that in estimating damages they could consider bodily injury, pain, the effect on future health, medical expenses, and loss of future business revenues caused by the accident.[147] The jury proceeded to find the railroad negligent, and implicitly absolved the plaintiff from any charges of contributory negligence, but they returned a verdict for the plaintiff of only $12,000, slightly more than two years income for the plaintiff.[148] It would appear, since the defendant was said to be completely disabled, that this was a modest verdict,[149] and it would seem logical that the modest verdict resulted from Nixon's circumscription of the jury. Nixon thus seems to have been sensitive to the possibility of jury bias against railroads or other corporate defendants, and sensitive, perhaps, to the role such corporations could play in the material advancement of America.

Nixon's sensitivity to the possible prejudice against corporate defendants was most clearly expressed in 1883, in *Carlwitz* v. *Geremia Fire Insurance Company*.[150] Plaintiff's husband had taken out fire insurance on a grocery store and fixtures in her name. The store had been damaged by fire approximately seven months after the purchase of the insurance policy. There were "grave suspicions" on the part of the police that the fire was the result of "fraud . . . . which can be traced to the plaintiff."[151] Nixon indicated that the burden of proving such arson was on the defendant company, but that the jury need not be "satisfied of this beyond a reasonable doubt" to find for the company.[152]

After these instructions, Nixon went on to the company's second defense, that half of the premium had never been paid, and that therefore it was within its rights to have cancelled the policy (as it did). On this point Nixon remarked—after restating the plaintiff's husband's story that the defendant's agents had agreed to accept payment in kind—that the defendant's denial of such an agreement "to some extent at least, seems to be corroberated by circumstances." Nixon also told the jury that "I have never known a case of this kind tried where the proof as to the extent of the fire and the real damage done has been left in such an unsatisfactory state."[153] Finally, Nixon made a valiant attempt to see that impartial justice was rendered:

> "In this controversy, gentlemen, the plaintiff is a woman, and the defendant a corporation. It is difficult for a jury not be misled by their prejudice in such a case. Jurors are men, and have a chivalric feeling for the gentler sex. They are also apt to have more or less prejudice against corporations. The court room is no place for any such feelings. Corporations are entitled to the same justice, and to the same application of the principles of the law, as individual citizens. Indeed, a corporation is only a modern contrivance, wherein a number of persons unite their capital together for business purposes, and in all controversies respecting their rights the same law must be administered as if the stockholders, as men, were endeavoring to secure their personal rights. You will therefore look at the case impartially, and render the verdict which you would render if the issue was between man and man. This is no place for sympathy. Courts are organized and juries are summoned to mete out equal and exact justice to all, and where they fail to do this they come short of fulfilling the chief object of their organization."[154]

Still, the jury may have been activated by some "chivalric feeling," (indeed, by his calling their possible prejudice to their attention, Nixon had reminded them that they should experience this feeling) and they found against the company on the issues of arson and cancellation, and awarded the plaintiff the verdict.

While Nixon may have tried to make it clear in the *Carlwitz* case that it was his task as a judge to see that every legal entity was treated fairly in his court, it did often appear that even when Nixon delivered jury instructions favorable to corporations, he would shade them in a manner that ultimately favored individual interests. *Trefz v. Knickerbocker Life Insurance Company* (1877)[155] concerned an allegedly false statement made in an application for

insurance by the policyholder, Cristolph Trefz. Trefz had died, and his wife sought to collect on the policy. By the terms of a clause of his policy, it was null and void if any misstatements were made in the application. The task for the jury, said Nixon, was simply to determine the facts regarding the alleged falsity, and the jury was *not* to be concerned with the possible harshness of a voiding of the policy after years of premiums paid by the insured. Nixon acknowledged that the clause "seems to be a hard condition for the policy holder," but cautioned the jury that this was not to influence them: "courts and juries, in cases of this sort," he said, "are obliged to ascertain what the contract is, and enforce it, without reference to the parties concerned in the litigation; in other words, there is no place for sympathy."[156] Sounding very much like an exponent of the "classical" or non-equitable theory of contracts,[157] Nixon declared that "We are not to inquire whether one party or the other made a good or bad bargain, nor are we to set up our individual judgements upon the question whether it was wise or unwise for one or the other to conclude such a contract."[158] Though Nixon again acknowledged that "This may seem harsh," he stated that "The company, in propounding the inquiry, made themselves the judges of its materiality, and the individual, in answering falsely agreed that he should have no benefit under the policy or the contract."[159]

Nevertheless, Nixon did urge upon the jury a construction which was quite beneficial to the insured. It appeared that the insured had directed that the words "never sick" be written on an application for a policy, after being asked whether he had had any of "a long enumeration of diseases, commencing with A (apoplexy) . . . and ending with Y (yellow fever)." The company sought to prove that six months before the application, Trefz "was exposed to the rays of the sun whilst at work in the field, and was overcome by the heat in such a manner, and to such an extent, that he left his work, and went to his house," and that "such a fact was sufficient to make void the policies, because it shows that a man could not truly say he was never sick who had suffered from such a sunstroke."[160] Nixon cautioned the jury that Trefz, a German, "was not a native born citizen, and that he was not very familiar with the language in which the question [on the form] was put." It seems to me," said Nixon, "that, in endeavoring to ascertain the truth or falsity of the answer, we ought to look at it in the light of the knowledge and understanding which the individual had in regard to the terms he used."[161] With this advice, it would seem that Nixon undid any attempt to make the jury consider objectively the relations between the insured and the company.

Having started down this road, Nixon proceeded to elaborate on how the jury could interpret the facts favorably to the plaintiff. Nixon acknowledged that Trefz had felt it important enough (at a subsequent physical examination by an insurance physician) to mention the attack of sunstroke (which was apparently dismissed as inconsequential by the physician), and that Trefz had put "cabbage leaves in his hat . . . . [which] indicated his apprehension of a return of the trouble[!]" Warming to his subject, Nixon told the jury that

"it is not every affliction of the head from the heat of the sun that constitutes sickness. When a man says that he was never sick, he does not mean that he never had a headache, or that he was never affected by the heat of the sun, or that he never had any of the ills that flesh is heir to." "It may have meant," said Nixon, "that the insured had 'never been sick' with any of the long list of diseases which had just been enumerated to him."[162] Nixon then placed the burden of proof of falsehood, in light of Mr. Trefz's understanding of the terms, on the company, perhaps thereby deciding the case.

Defense counsel accordingly excepted to several rulings. Nixon protested that, "I did not mean to influence the judgement of anyone," and immediately cautioned the jury that "Anything I have said with regard to any fact in the case should not be allowed to influence your judgement." "The facts," he told them, "are for you to determine. Although it may be proper, at times for the court to impart to the jury the impression made upon its mind by the testimony, they are not bound by it." The jury took the hint, however, and after "an absence of about one hour," a relatively short time, returned a verdict for the plaintiff for $11,998.82, the full amount of the policies, with interest. The case was appealed to the Supreme Court, and Nixon's views were affirmed.[163]

Perhaps the best example of Nixon's ambivalent approach to corporations is *Tooten* v. *Pennsylvania Railroad Company* (1881).[164] The plaintiff, a railroad machinist, had been injured by a railroad engine which "broke through the closed doors of the shop." Nixon cautioned the jury that:

> "We must not allow our judgement or sense of justice to be perverted by our sympathies and feelings because the plaintiff happens to be a poor man and the defendant is a large corporation. The law recognizes no difference in regard to parties. All stand upon the same level in a court of law, and the court and jury must be careful to mete out exact justice to all, without regard to mere external condition and circumstances."[165]

Nixon proceeded to tell the jury that they "must accept" the law as he stated it, and he immediately gave an orthodox statement of the fellow servant rule:[166] "[T]he master," said Nixon, "is not liable to his servant for injuries produced by the negligence of his fellow-servant, engaged in the same business and common employment, provided there be no negligence in the appointment of such negligent servant . . . An employer does not guarantee his servants against accidents." Explaining the assumption of risk model inherent in the fellow-servant doctrine, Nixon suggested that "As a rule, the greater the risk . . . . the larger the compensation demanded and received," and instructed the jury that they were to interpret the law as reflecting this assumption. These notions might have resulted in a ruling favorable to the defendant railroad. Immediately afterwards, however, Nixon announced two legal possibilities allowing a finding for the plaintiff. Nixon first told the jury that they might find that the plaintiff and the engineer responsible for the driving of the injuring engine were not in "common business" if the jury be-

lieved that "their employment and work [did not] conduce to a common result," and second, Nixon told the jury that they might find for the plaintiff if they determined that the offending engine "was [not] reasonably fit for the duty that it was sent there to perform." It has been suggested that judges like Nixon, who stressed these exceptions to the fellow-servant rule, significantly weakened its pro-employer effects, if they did not obliterate the rule altogether.[167] In *Tooten* the jury did find either a lack of common employment, or an unreasonably unfit engine, because they brought in a verdict in favor of the plaintiff for $2500.00.

Still another instance of Nixon's failure, perhaps intentionally, to deflect juries from tendencies to favor the insured against insurance companies is *Waters* v. *Connecticut Mutual Life Insurance Company* (1880).[168] The policy holder had committed suicide, and left this curious note to his brother, who was also his employer:

> "Abe, I cannot live any longer with such a woman as my wife, and her family. She and they are perfect. I and my family are rascals, drunkards, gamblers, etc. . Whatever you can do for my two daughters, do it; but as for my wife and son George, let him and his mother and the unborn look out for themselves. .
>
> This step I hate and despise, but whether I am to go to a hell or a heaven, I am satisfied, and may God, who rules over all, guide, direct and govern you and yours and mine in the right and perfect way, and give you each a fortune here and hereafter . . . ."[169]

Several sentences were "At the end of the letter . . . . written in an almost illegible hand—as if penned in the last agonies of life," as Nixon explained.[170] Among these were "wages are good, but self-respect is better," and "Abe, see that my wife has no benefit."

A clause in the insurance contract, upon which the insured's wife was suing, provided that "nothing should be due and payable by the company if the assured . . . . should 'die by his own hand.' "[171] This would certainly seem to rule out compensation for suicides, but Nixon did not so construe this clause. After indicating that the clause had to be construed "so . . . . as to give effect to the intention of the parties," Nixon observed that "This expression is not to be taken literally," because "In law, a man does not die by his own hand, although he puts an end to his life, unless he commits the act which results in death with a knowledge at the time of its moral character, and its consequence and effects." Further, Nixon added that "Nor does he die by his own hand if he is impelled to the act by an insane impulse which he has not the power to resist."[172] Building on this construction,[173] which was obviously favorable to the insured, Nixon then drew the attention of the jury to the insured's suicide note to his brother Abe. He advised the jury that the plaintiff and the defendant drew diametrically opposite inferences from the letter as to the deceased's sanity, and invited the jury to draw its own conclu-

sions. The jury thereupon found a verdict for the plaintiff wife "for the full amount of her claim."[174]

V. *Nixon's Opinions Reversed on Review*

A. *Insurance*

In his last years as a judge, it appears that the tendency in Nixon's court to rule favorably to plaintiffs suing insurance companies had become so pronounced that it was necessary for the Supreme Court to restrain it. In *Davey* v. *Aetna Life Insurance Company* (1884)[175] a widow sought to recover on her husband's life insurance policy. There was a condition subsequent to the policy that the insured's beneficiary could not recover if the insured "shall become so far intemperate as to impair his health . . ."[176] and there was substantial evidence that on the night of "the sickness which terminated in death" the insured indulged in "free use of brandy and gin."[177] The insurance company sought an instruction from Circuit Judge McKennan, who was sitting with Nixon, that a single act of "intemperance" which produced "impairment of health" would be enough to void the policy. McKennan refused.[178] "The words," said McKennan "are to be expounded according to the common and popular acceptance of their meaning." This meant, then, that "a single excessive indulgence in alcoholic liquors is not intemperate, but there must be such frequency in their use, continued for a longer or shorter period, as indicates an injurious addiction to such indulgence."[179] McKennan's insistence that the words "impairment of health" be given their "common and popular" connotation by the jury is in sharp contrast to Nixon's instructions in the *Waters* case that same year.[180] In *Waters*, it will be remembered, Nixon had instructed the jury that the words "die by his own hand" be given a restricted, legalistic meaning which would exclude self-induced death brought on by insanity or irresistible impulse.[181] What the two judges' instructions have in common, of course, is that they were both favorable to the insured.

But whatever the implications in *Davey* of the evidence regarding the insured's last night and his free use then of brandy and gin, there was also evidence from his attending physician (from the death certificate given the insurance company) that the insured "was in the habit of using stimulants and a great deal of tobacco; probably they impaired his health."[182] Given this evidence, McKennan and Nixon expected a verdict for the defendant insurance company.[183] The jury retired for the extended period of twenty-five hours,[184] and returned a verdict for the *plaintiff*. The insurance company then moved for a new trial on the grounds that "the verdict was against the weight of the evidence."[185] Nixon, before whom this motion was brought, refused the request for a new trial. "A trial by jury is the constitutional right of the American citizen," he declared, "and courts may not infringe upon this right by undertaking to nullify the acts of the jurors by setting aside their deliberate judgement in cases where the judges, under the evidence, would have reached a different conclusion."[186]

Nixon proceeded to indicate that there was "one view of the facts" upon which the verdict could be sustained. Nixon stated, somewhat misleadingly, that "the court instructed the jury that they had the right to hold that proof of a single instance of the excessive use of alcoholic liquors, although *it resulted in death*, should not be regarded as the intemperance referred to in the policy."[187] While Nixon's reporting of the charge was accurate insofar as McKennan *had* instructed the jury that a single instance of drinking might not be the intemperance which would void the policy, McKennan did not *expressly* state that *every* single instance of alcoholic use that resulted in death was not such intemperance.[188] Nixon then indicated that, in response to what he perceived to be the instruction, the jury might have regarded the insured's indulgence on the night of his death "as an exceptional case, ... and may not have given as much importance to the testimony of drinking at other times as the defendants were disposed to do."[189]

It would appear, then, that McKennan's charge, with its emphasis on "popular acceptance" of the meaning of intemperance, and Nixon's restatement of McKennan's charge, which subtly shifted it to favor the insured, reveal a sympathy on Nixon's and McKennan's part with the insured, or at least a willingness to support the jury's sympathy with the insured against the insurance company. Again, at least insofar as Nixon indicates his implicit acceptance of McKennan't "popular acceptance" construction of language, he took a position at variance with his own opinion in *Waters*.[190] From this case, at least, it appears that Nixon felt free even to depart from precedents *he* had set in upholding "popular construction," and the power of juries.

On a writ of error to the Supreme Court, Mr. Justice Harlan delivered an opinion which flatly rejected McKennan's charge, and reversed the judgement with directions for a new trial.[191] Citing no authority directly on point, and apparently unaware of much supporting authority for the trial judges,[192] Harlan declared that "If the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes . . . . his health was impaired by intemperance, within the meaning of the words, 'so far intemperate as to impair his health.' "[193] Harlan made no attempt to respond to McKennan's suggestion that the "common and popular acceptance" of the words "intemperance," and "impairment of health" should govern, and McKennan't implicit conclusion that the popular meaning of these words had *habitual* connotations. In searching for an explanation of Harlan's failure thus fully to respond to McKennan's (and implicitly Nixon's) reasoning, a greater sensitivity to the needs of the insurance company, rather than the insured, does suggest itself. Harlan noted (as Nixon and McKennan had not) that the reason for the clause in the policy was that "the company sought to protect itself against an improper use by the insured of alcoholic stimulants . . .", and Harlan's construction of the phrase, which construction ignores McKennan's conception of "common and popular acceptance", would seem to reflect a policy of effectuating the intention of the insurance company.[194]

B. *The Elizabeth Paving Litigation*

In the insurance case just discussed, we were able to observe how Nixon's belief in the popularly-based jury prerogatives, and perhaps his sympathy for policy-holders and antipathy towards insurance companies led to reversal by the Supreme Court. An examination of some of the other opinions in which Nixon was reversed by the Supreme Court helps further to underscore what might be called the morally-based nature of his jurisprudence. Perhaps the most important of these are Nixon's opinions in the *Elizabeth* paving litigation, which took several hearings and more than seven years to conclude.[195] This was a patent infringement proceeding, and the invention involved was an improvement in the foundation for paved roads, patented by one Samuel Nicholson, in the late 1840's.[196] By the time Nixon's court was asked to pass on the patent, 1873, the original inventor had died, and the plaintiffs were a company that had been licensed to use the invention by the inventor's administrator. There were three defendants, (1) the *New Jersey Wood Paving Company*, a company which used a patent which was found to infringe Nicholson's, (2) *George W. Tubbs*, the President of the *New Jersey Wood Paving Company*, and (3) the city of Elizabeth, New Jersey which had hired the *New Jersey Wood Paving Company*. The form of the proceeding was a bill in equity for an injunction and accounting.

The circumstances surrounding the infringement in this case were suspicious. Defendant Tubbs, and others who were eventually to join with him in forming the defendant *New Jersey Wood Paving Company*, successfully lobbied the New Jersey legislature to amend the *Elizabeth City Charter* to "practically repeal" a provision which gave city contracts to the lowest bidder, and to substitute therefore a unique system of choosing contractors. As Nixon interpreted the new statutory provision, "whenever a City Council should determine to cause any improvement to be made, which contemplates the use of any patented process or materials, and the owners of one-half of the property . . . . along the line of the intended improvement [request a particular patent by name], the City Council should award the contract for the said work, only in accordance with the request of such proportion of owners."[197]

Shortly after the passage of this new New Jersey law, the defendant *New Jersey Wood Paving Company* was formed. The company was remarkably thinly capitalized, as its only asset was a license to use the patent that was later found to infringe Nicholson's, referred to in the case as the *Brocklebank & Trainer* patent. This thin capitalization should have violated its state charter, which expressly required the company not to begin business until it had $10,000 "subscribed and paid in."[198] In a construction rather favorable to the company, however, Nixon held that this "little inconvenience" was obviated by another section of the charter which permitted the directors of the company to receive patents or patent rights "at a valuation to be agreed upon, and in lieu of cash subscriptions for stock."[199] This section was apparently taken advantage of by an original exchange of shares of *New Jersey*

Wood Paving Company stock for a license to use the *Brocklebank & Trainer* patent. This license was granted to, and the shares in the *New Jersey Wood Paving Company* were taken by another company, *Crane, Tubbs, & Co.*, controlled by defendant Tubbs and two of his business colleagues. These men, then, as directors of *Crane, Tubbs, & Co.*, originally controlled the shares of the *New Jersey Wood Paving Company*. Other shares and directorships in *New Jersey Wood Paving Company* were passed out to persons owning property along routes for which paving was contemplated in Elizabeth. Originally there were to be nine directors in addition to Tubbs and two of his associates from Crane & Co., as the original charter provided for twelve named directors. Apparently some individuals "declined or failed to accept shares" in the scheme, however, and during the next legislative session the New Jersey legislature reduced the number of directors to seven, probably at the instance of Tubbs and his associates.[200] This reduction insured tight control of the *New Jersey Wood Paving Company* by those in on the scheme. Finally, testimony at the hearing before Nixon showed that the property owner-directors were to receive a rebate from the company if it did any paving on roads adjacent to their property.[201] Not surprisingly, then, the *New Jersey Wood Paving Company* was able to secure requests by a majority of the concerned property owners that the *Brocklebank & Trainer* patent be used, the statute for which Tubbs and his colleagues had lobbied came into operation, and thus the *New Jersey Wood Paving Company*, the licensee of that patent, was awarded the contracts.[202] What happened in the case, in short, was very adept manipulation of the New Jersey legislature and property owners in *Elizabeth* by Tubbs and his colleagues in order to make sure that they carried off their scheme to secure paving contracts.

The extraordinary nature of the scheme was matched by boldness of the defense to the equity action for profits because of patent infringement. Even if the infringement were conceded, argued the defendants, no "profits" could be awarded to the plaintiffs because the plaintiffs could never have received the paving job, since by the law of New Jersey, the request of the majority of affected property-holders for the *Brocklebank & Trainer* patent would have had to be granted and a majority had never requested the plaintiff's Nicholson patent.[203] While this defense seemed to have a certain amount of logic to it, Nixon could not abide the spectacular *chutzpah* that it revealed. He invoked the equitable powers of his court and the purposes behind the patent laws, and declared that (1) his court would not "allow the bulk of these profits to be retained by the infringers, because the complainant could not be a competitor for the work, when it so clearly appears that whatever disabilities existed in regard to competition were produced by the infringers themselves," and (2) that the inquiry should not be the "new and false" standard of "what the complainant could or could not made," but rather "what the defendants actually made."[204] Whatever Nixon's sympathies for the principle of popular sovereignty then, he would not permit manipulation of the New Jersey legislature to be used as an excuse to avoid payment of

profits by patent infringers in his equity court.

In addition to Nixon's concern about legislative manipulation, his handling of the *American Nicholson* case also demonstrates a desire of ensuring that the public benefit from invention. This can be seen in his handling of another defense raised in the case. It appeared that Samuel Nicholson, although he filed a "caveat"[205] for his patent in 1847, did not file specifications and seek the patent itself until 1854, six years later.[206] In the meantime, Nicholson, who was the treasurer of the Boston and Roxbury Mill Corporation, a private company which maintained a tollway between Boston and Brookline, tried out his new paving system on a stretch of his company's tollway. Nicholson allowed this stretch of his paving to be used by the public for six years, and Nicholson watched the results, checking periodically for wear and tear. Since the patent statute provided that the application for patents must be made within a "reasonable time" after filing the *caveat*, the defendants argued that six years was *more* than such a reasonable time, and that, in any event, since the public had used the pavement during this long period, there was such "public use" as would render the invention unpatentable. Citing no authority but the *caveat* statute itself and a description of the statutory scheme in a treatise[207] Nixon determined that since the "obvious design" of the statute was to afford an opportunity of perfecting inventions, since Nicholson's conduct was "an honest experiment," and since the public could not discern from the surface the exact nature of the pavement, there was no loss of patentability by public use.[208] While the statute required "reasonable diligence" in filing the patent, the question of diligence, said Nixon, was "not an absolute, but a relative one, and must be considered in reference to the subject-matter of the experiments." When one is dealing with roads, Nixon appeared to suggest, in order to calculate cost and durability "long use and lapse of time were essential ingredients," and six years was not too long.[209] Here, then, we have a prime example of a situation where the statute gave Nixon only broad guidelines, and he had to determine the meaning of "reasonable time" using his own judgement of practicalities in the particular situation, supporting his conclusion with general references to the policies of the statute and the realities of the situation. This is not the "formalistic" style thought to predominate in the late nineteenth century, indeed, a clearer example of Llewellyn's *Grand Style* could not be found even in the early part of the nineteenth century.[210]

Nixon decided that the three defendants, the city of *Elizabeth, Tubbs,* and the *New Jersey Wood Paving Company* were all liable for the infringement of the Nicholson patent, and that the plaintiffs should be awarded the "profits" made by the three defendants. All three defendants appealed to the Supreme Court.

On appeal, three years later, the Supreme Court upheld Nixon on the question of whether or not there was an infringement,[211] and the Supreme Court appeared not to have been completely uninfluenced by the remarkable circumstances of the case. The court observed that the defendant *New Jersey*

Wood Paving Company had claimed, as an expense, "$31,111.92 as a profit of twenty percent which the . . . Company claimed they had a right to add to the actual cost of lumber and other materials and labor." Mr. Justice Bradley stated for the court that "It is only necessary to state the claim to show its preposterousness."[212]

Still, the Supreme Court reversed Judge Nixon on the issue of the liability of the city of *Elizabeth* and *Tubbs*. The city, said the court, actually made no profits on the use of the *New Jersey Wood Paving Company*, since it would have paid the same price to the plaintiffs.[213] Similarly, since Tubbs received only a salary for his superintendence of the *New Jersey Wood Paving Company*, he could not be charged with "profits." This last aspect of the Supreme Court's opinion seems erroneous, Nixon, when he declared that the profits made by the *New Jersey Wood Paving Company* were to be the standard of damages, rejected that company's request that he subtract from the damage award the profits that the company would have made "but for" the infringing use of the patent, because the company had not met its standard of proof on that point. Neither had Tubbs.[214] It seems clear that Tubbs's salary would not have been earned at all, if the infringing patent had not been used, and it also seems clear that he was one of the moving forces behind the scheme, even if he operated through two corporate vehicles. Since the case was in equity, and since it should have been appropriate to pierce the "corporate veil" here, it is hard to understand why the Supreme Court felt it necessary to let Tubbs escape liability. The appropriateness in such a case of looking beyond the corporate form to the individuals involved appears to have been a basic tenet of Nixon's jurisprudential beliefs,[215] but perhaps not of the Supreme Court's.

With regard to the city of Elizabeth, the Supreme Court conceded that "It made itself liable for damages, undoubtedly, for using the patented pavement of Nicholson; but damages are not sought, or, at least, are not recoverable in this suit. Profits only, as such, can be recovered therein." Whatever Nixon's style of jurisprudence might have been, this would seem to be judicial formalism at its worst. Nixon had accepted the notion that only "profits" were recoverable, but Nixon made it clear that the use of "profits" as the equity standard was simply a convenient means of measuring the *damages* to the plaintiff.[216] Since, then, at law Elizabeth would have been liable for "damages", and since Nixon was using profits in an equitable case as a way of compensating for damages, it does not seem inequitable to hold Elizabeth liable for damages, measured by the profits of the paving company. Elizabeth did, after all, have the use and benefit of the infringement, and it could have presumably recovered from the paving company in an action for indemnification, or perhaps breach of contract. That the Supreme Court saw fit to apply this "wooden" application of the profits/damages distinction for equity and law seems even more incredible in light of the fact that the court itself acknowledged that "the general question of profits recoverable in equity by a patentee . . . . is surrounded with many difficulties, which the courts have

not yet succeeded in overcoming."[217] On the other hand, since the *New Jersey Wood Paving Company* was insolvent, if Tubbs was not held liable then the city of Elizabeth, if liable, would have had to be responsible for the entire damage figure, almost $75,000. This realization might have been too much for the Supreme Court, which might have decided to sacrifice the interests of the *American Nicholson Company*, which now could recover *no* profits,[218] in favor of those of the citizens of Elizabeth.

Nixon appears to have been disturbed by the Supreme Court's reversal of his opinion holding Elizabeth liable. This is suggested by an opinion he decided two years later, in which he managed to sidestep both the basic principles of contract law, and a New Jersey decision, in order to hold Elizabeth liable by *estoppel* for lawyers fees on the appeal.[219] The claim, exclusively for the appeal to the Supreme Court, was for $5,611.40 and was demanded by the lawyer who had originally been hired by the *New Jersey Wood Paving Company*, one Blake. At the time of Nixon's original decision on the question of damages, the *New Jersey Wood Paving Company* was "insolvent and was unable to pay" Mr. Blake.[220] Blake advised the city to appeal, and the city council so voted. Blake then drew up the appeal papers, sent the bond for the city to execute, and perfected the appeal.[221] There was never any express contract to employ Mr. Blake, and the city claimed that "at the time of the appeal they were assured by Mr. Tubbs that the fees had been paid, or secured, and that the city would be put to no expense, and that Mr. Tubbs communicated this to Mr. Blake.'"[222] Blake disputed this, and maintained that he had sent the city solicitor a bill for a retainer, although he had received no reply to this bill.[223] Nevertheless, Nixon pointed out, after these events "the city counsel was in frequent communication with Mr. Blake and Mr. Keasbey (whom Blake had hired to work with him) concerning the appeal, and was advised of their proceedings, and [the city employed] no other counsel . . . . to take charge of the appeal.[224] Taking these events into consideration, Nixon charged the jury in the case that statements made to the city by Tubbs could not bind Blake unless communicated to him, and that Blake's letter demanding a retainer was notice to the city that Blake understood he was acting in its behalf, and the city had a duty to reply. This would seem to run counter to the black-letter contracts rule that absent a previous understanding silence does not constitute acceptance.[225] Still, Nixon held that the city's acquiescence in Blake's continuing as its counsel created a legal duty to speak out to reject Blake's offer of services, and thus estopped the city from denying the attorney of record relationship, and the city should be found liable "to pay a reasonable sum for disbursements and services in the cause."[226]

Finally, while Keasbey was hired by Blake as *his* counsel, and *not* as attorney for the city, and while the rule of the state of New Jersey was that "the law makes a distinction between attorney's and counsel fees" requiring in the case of counsel an express agreement, Nixon held that Blake could still recover for the fees already paid to Keasbey.[227] Although this was not spelled

out in the opinion, this was because they were presumably items of expense chargeable to Blake, and *not* by virtue of a contract between the city and Keasbey. In this way Nixon managed to sidestep the policy of the New Jersey decision requiring express contracts for counsel fees.[228] In short, Elizabeth escaped liability for the infringement, but Nixon would not allow the city to escape from the lawyers.

C. *The Question of Invention*

Nixon also differed with the Supreme Court on the patent law question of what could be held to constitute "invention." In this area too, Nixon may have felt that the Supreme Court failed adequately to consider the relevant policies, and, indeed, Nixon's opinions are far more thoughtful and less formalistic than those of the Supreme Court.

Adams v. *Loft* (1879)[229] sets forth Nixon's basic views on when activity is creative enough to be "invention." In that case, the plaintiff had obtained Letters patent for "improvement in chewing gum." The plaintiffs' alleged improvement, however, was merely the washing of the "natural product known as Chickly"[230] with hot water. The plaintiff sought to prevent the defendant from infringing his patent. The defendant, instead of using *hot* water for washing crude chewing gum, used steam and cold water. "Such a palpable attempt at evasion," said Nixon, "not having even the merit of originality, would not for a moment be tolerated by the court . . ."[231] In this case, however, the plantiff's complaint had to be dismissed because his own Letters Patent lacked sufficient originality.

Nixon indicated that he was initially inclined quickly to dismiss the case, since chewing gum could be regarded as "frivolous or insignificant," and the Patent Act only applied to those who had "invented or discovered any new and useful, art, machine, manufacture or composition of matter or any new and useful improvement thereof."[232] Considering its moral consequences more fully, however, Nixon concluded that "chewing gum may have its use, in the social economy, as a substitute for greater evil or folly." Since the law merely required, then, that patentable articles "be capable of some use, and that the use is not prohibited by sound morals or public policy,"[233] an improvement in chewing gum might, after all, be patentable. However, this particular improvement, namely washing the chewing gum's raw derivatives in hot water, lacked sufficient "novelty" in order for it to be patentable. For example, for at least 30 years, the washing of "india rubber and gutta percha," crude vegetable products similar to "gum chickly," in hot water had been "generally known" and so the plaintiff's "invention" came "within the forbidden application of old contrivances to new objects."[234]

Nixon did strive to protect what he found to be real invention. For instance, where the alleged inventor's efforts had resulted in a new *combination* of old processes to produce new or better results, Nixon was quite willing to find a patentable endeavor. In doing so, Nixon attempted to protect those whom he

believed to be righteously struggling inventors because he believed that he would thereby encourage the largest possible degree of invention—thereby benefitting all of mankind. For example, in *Alright* v. *Celluloid Harness—Trimming Company* (1877)[235] Nixon had before him the case of an "inventor" who had been anticipated by others in each of three crucial steps in the combination he sought to patent. Still, because the plaintiff was the first to do all these things together, by machine in one single action, the plaintiff was able to bring upon the market "a better article of rubber-coated harness-trimming with less labor and expense," and this new process was patentable.[236]

As was true in the case of the Elizabeth road litigation, however, there was disagreement between Nixon's views on the nature of patentable combinations and those of the United States Supreme Court. In *Welling* v. *Rubber-Coated Harness Trimming Co.* (1874),[237] a case similar to *Alright*, the patent at issue was for a "martingale ring",[238] which the patentee claimed as new because of his manufacturing according to a "new" process. The article was formed by 1) taking a metallic ring, 2) enveloping the metallic ring with a plastic substance such as a synthetic ivory, and 3) pressing and solidifying the enveloped ring by means of dies. The process accomplished both the strengthening of the plastic martingale ring (by the use of the metallic inner ring) and the appearance of ornamentality desirable for such articles (by use of the dies). As in *Alright*, none of the individual steps were new, as there had been martingale rings with metallic inserts, and there had been ornamental martingale rings shaped by dies, but these had never before occurred in combination. Nixon noted that there was an "established American rule, that patents are to be construed liberally, and are not to be subjected to a rigid interpretation," held that the martingale patent was valid, and, further, that it extended to all manufacture by means of metallic rings for martingales coated with a plastic substance and shaped by dies.[239]

On appeal Nixon was reversed. The Supreme Court, cryptically, announced that "There is, in truth, no combined action," but that rather all three steps were done "separately, by no combined action."[240] The holding would thus seem to be that no multi-step process could be a patentable "combination". It is difficult to believe that the Court seriously considered the implications of such a holding. By announcing that the patent was for a *product* rather than a combination *process*, however, the Supreme Court was able to point to earlier patents for plastic products shaped by molds and dies and suggest lack of novelty for this patent. This view of the court was probably disapproved of (although grudgingly followed) by Nixon, as indicated by a remark he made in a case nine years later. "There seems to be a growing sentiment among inventors" he wrote, "that the Supreme Court, in its more recent decisions, has become, I will not say more exacting, but less liberal, in its construction of patents for a combination."[241]

It seems likely that the difference of views between Nixon and the Supreme Court over the nature of patentable combinations flowed from a deeper difference, over how liberal one ought to be in construing the rights of American

patentees. This difference was illustrated by *Williamantic Linen Co.* v. *Clark Thread Co.*,[242] which Nixon decided in 1879, and which the Supreme Court reversed in 1890.[243] The invention in question was a device for winding thread upon spools, and the American patent was originally issued to one Hezekiah Conant in late 1859,[244] although it was applied for in January of 1859. The defense on which the Supreme Court's denial of the infringement claim turned was the defendant's operation under a competing American patent, issued in January of 1866. This later patent was issued to one William Weild, an Englishman, who first patented his device in Great Britain in 1858, recording and publishing a description of his patented device on July 22, 1858. In the Supreme Court, the defendant argued that since the publishing of Weild's English patent antedated Conant's American patent, Conant's patent was therefore invalid under American patent law.[245] The most important issue for the Supreme Court then became whether or not Conant had produced his invention before July 22, 1858. This issue was decided in Conant's favor by Nixon.[246]

The only evidence on the time of Conant's discovery of his invention was Conant's testimony that his original conception for an automatic thread-winding machine occurred in 1857, but that "in the spring of 1858, I decided upon another style of machine, which I thought would be more certain in its action, and which I completed during the summer of—and, to the best of my recollection, in July—1858." The Supreme Court, taking this evidence into consideration, announced that since Conant was an interested party, his evidence had to be received "with great caution". Therefore, said the court, the evidence should be construed "most strongly against" Conant. The court then announced that "this would necessarily lead to the inference that the invention was completed in the last part of July, subsequent to the publication of the English patent." Since there was no evidence at all on the point offered by defendants, the Supreme Court seemed to be placing quite a heavy burden on the inventor Conant, requiring him to come up with more than a mere statement that it was in "July—1858." The evidence did not suggest any lack of credibility of Mr. Conant, however, unless it was the Supreme Court's suggestion that "such testimony, given for the purpose that this was, is necessarily subject to the gravest suspicion, however honest and well-intentioned the witness may be."[247] Since there was no attack on Conant's credibility, however, and since even the Supreme Court seemed willing to accept the notion that he did produce his invention in July of 1858, the Supreme Court's opinion appears to be a most wooden insistence on arriving at a judgement unfavorable to the patentee. The purpose of the provision of the patent laws invalidating patents which were antedated by foreign inventions was presumably only to ensure that American patents rewarded originality on the part of American inventors, and since transatlantic communications were relatively slow in the late nineteenth century, it would seem that in this case there could have been no opportunity for Conant to copy Weild's patent, as it is almost inconceivable that he could have seen it at any time

Judge William McKennan, United States Circuit Judge commissioned 1869, sat occasionally with Judge Nixon to constitute a circuit court for New Jersey, but more often Nixon acted alone as both District and Circuit Courts.

during July, since it would have taken more than ten days for detailed news of the patent to reach America. Perhaps it was for this reason that Nixon was able to dispose of the issue so easily. In any event, as has been suggested regarding the preponderance of "formalism" in this era,[248] the Supreme Court's opinions in both the *Welling* and the *Williamantic* cases seem to be based on reasoning that fails to take account of the actual purposes that motivated the patent laws, purposes which assumed central importance in the construction of laws for Nixon. Worse, the Supreme Court, in construing Conant's evidence in the worst possible manner for him, seems to have created a presumption against the validity of his patent. It would appear that Nixon believed that the appropriate presumption was *in favor* of the validity of the American patent.[249]

Nixon does not appear to have abandoned rationality in favor of American patentees, and, indeed, he seems to have balanced his tendency to find patents valid by narrowly construing damages in cases of infringement. Thus, while some federal courts were later to disagree,[250] Nixon declared that where complainant's patents were merely improvements over existing means of production, profits recoverable as damages would not be the infringers' *total* profits, but only the additional profits made possible by the use of the "improvement" in complainant's patents.[251] Nixon may have thus chosen to balance his liberality in construing the validity of patents with a conservative approach to damages. Perhaps he sought in this way to maximize invention *and* production, as the individual patentee was protected by the law, but an overzealous producer would not suffer too heavily for infringement, and production would therefore not be chilled by a fear of litigation. This kind of balancing seems absent from the opinions of the Supreme Court in which Nixon was reversed.

D. *Admiralty*

Nixon's opinions in admiralty, like those in patent matters, seem to illustrate a willingness to examine policies and to construe jurisdiction broadly, providing for maximum creativity in the judicial role. In this area too, Nixon seems to have differed from colleagues on the bench. Nixon, in this regard, was like his early third circuit predecessor, Richard Peters, who wrote emphatically that American admiralty courts should possess all the maritime jurisdiction of the courts of the great commercial nations, and should not be circumscribed by the English common law, or the practice of the English admiralty courts.[252] In *Haslett* v. *the Enterprise* (1874)[253] Judge Nixon early made the same point, although he purports to be following a recent case of the Supreme Court.[254] Nixon pointed out that the advocates of narrow jurisdiction including Chancellor Kent[255] and Justice Baldwin[256] had held sway in some of the subordinate courts of the country, and only in a line of cases beginning in 1847 and culminating in 1870 was the point clearly settled in

favor of broader jurisdiction not limited by "the statutes or judicial prohibitions of England."[257]

Nixon's opinion about the wide scope for the exercise of flexible, equitable powers in admiralty matters, in at least one instance, led to a reversal by the Circuit Court. In *The Schooner Eliza B. Emory* (1880)[258] Nixon forbade majority owners of a vessel from exercising their ownership right of replacing their master, because one of their number had led the master to believe that he had been sold a "sailing right", when he bought part ownership in the vessel. Nixon conceded that "a sailing right is not transferable" and that "the owners of the shares of a vessel are tenants in common . . . and . . . the majority in interest may displace the master at their will."[259] Nevertheless, though the contract for sale of "sailing rights" was void, Nixon held the equitable doctrine of estoppel applicable, because the part-owner in question had profited from the illegal sale of "sailing rights", charging more for the ownership share than he would have otherwise. Nixon stated that a court of admiralty "has the capacity of a court of equity in the mater of granting relief and of restraining a wrong, when the rules of natural justice require a departure from strict legal [rules]."[260] In short, Nixon appears to have held that because of the "unclean hands"[261] of one of the part owners, his ownership share could not be counted toward a majority necessary to replace the master. Given Nixon's strong equitable principles which can be observed in other contexts[262] the result here is not surprising, but his views seem to have been somewhat unique, and the Circuit Court reversed him.

On appeal Judge McKennan of the Circuit Court held, without citation of authority, that there could be no application of the estoppel doctrine in the case, because the representation as to "sailing rights" was "not the statement of a fact within the knowledge of one party upon whose representation of its existence the other party relied and was misled, but . . . . was the statement of a legal result as to which both parties might form their own judgement. . . ."[263] Given the wide discretion of admiralty courts in applying equitable principles, it would seem that Nixon's opinion, which was really not even analyzed by McKennan, deserved more than a summary dismissal. Judge McKennan seems to have been far more impressed with Section 4250 of the Revised Statutes, which he said gave "the majority ownership of a vessel . . . . the same power to remove a master, who is also part owner, as such majority, if owners, have to remove a master not an owner," and that the only exception to this power of removal was "a valid written agreement subsisting, by virtue of which such master would be entitled to possession."[264] McKennan did concede that there might be an action for damages for breach of contract for failure to sell "sailing rights" as allegedly happened in the case, but that the contract "was not susceptible of specific enforcement, either by way of estoppel or by a direct proceeding for that purpose. . . ."[265] Thus, McKennan indicated his acquiescence in the "public policy," that was reflected in other cases[266] which had affirmed "The absolute right of the owners of a vessel to displace the master," a right which McKennan called "so well settled now as

to be incontestable."[267] Here again, we find pure formalism, in this instance the unqualified acceptance of previous precedent, in the court that reviewed Nixon, but not on the part of Nixon himself.[268]

VI. *Nixon's Reaction: Moralistic Jurisprudence*

A. *Admiralty*

In the closing years of Nixon's tenure as a Federal Judge, if we find any effect to these formalistic reversals of Nixon's creative policy-oriented jurisprudence, it is that Nixon turned, with ever more determination, to a jurisprudence that emphasized the moral dimension.

In his earliest decisions, as we have seen, Nixon had emphasized the importance of legislative policy-making, and thus had stressed his own preferred value of popular sovereignty according to the political principles of America. In many of his subsequent decisions Nixon had also tried to promote private ordering and economic progress, in a manner consistent with his ideas about Americans' duties to serve their fellow man, and to foster material well-being. As Nixon's years as a judge drew to a close, however, more and more frequently, the dominant value in his jurisprudence seems to have been the promotion of man's duties to God, through what Nixon perceived as proper moral conduct. Some signs of Nixon's move away from the centrality of private ordering can be seen in his opinion in the *M. Vandercook* (1885) one of Nixon's later admiralty decisions,[269] where the question was whether a claim for damages from negligence in towing arose *ex contractu* or *ex delicto*. If the claim were a matter of contract law it would have a lower priority as a lien against the vessel, and, since the vessel had been sold to pay the claims against it, the claim for damages would stand little chance of being paid. If the claim were *ex delicto*, however, according to the rules of maritime liens, the claim would have priority over contractual claims. It seems to have been the tendency in the late nineteenth century to view matters of private ordering as contractual, and to allow parties the maximum freedom to order their own affairs pursuant to contracts.[270] Accordingly, the courts in the Eastern and Southern Districts of New York had held that damage from towing should be viewed simply as breach of a towage contract, and ot as a tort.[271] Still, several opinions by Judge Blatchford[272] and an early one by the United States Supreme Court[273] seemed to suggest that any damage caused by negligent navigation was really damage caused by breaches of duty coming from "the law", and not from "the contract".[274] Nixon's holding then, that this was a matter of tort, would seem to repudiate the idea that parties ought to be allowed maximum ordering by contract, and to reveal a concept of law somewhat more favorable to ordering by the general rules of tort. Even those who entered into towage *contracts*, then, were guaranteed protection by the rules of *tort*, rules which emphasized reciprocal social duties, and not maximum freedom for individual private ordering.

The ascendence for Nixon of the moral dimension over the individual enterprise orientation, or the triumph of tort concepts over contractual ones can also be traced in two salvage cases, *The C&C Brooks* (1883)[275] and *The Young America* (1884).[276] In the situation that gave rise to the first of these, a schooner worth about $2000 with a cargo worth approximately $500 had been damaged in a collision, and was in danger of sinking, when a tug agreed to tow her to safety. After four hours of effort, the tug brought her into harbor. The master of the tug had persuaded the master of the schooner to agree to pay $1000 for the towing, and though the evidence was conflicting, Nixon found that a salvage contract for $1000 had been entered into. Nevertheless Nixon refused to enforce payment for anything more than a "reasonable charge" for services rendered, which he found to be approximately $250.00. Nixon quoted with approval a Supreme Court decision which indicated that "The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services."[277] "Courts of admiralty," said Nixon, look upon salvage contracts with great care, and will not be controlled by them when any advantage has been taken of the necessities of the party in need of help."[278] Nixon did recognize that it was necessary to allow remuneration for salvage "liberal enough to induce masters of other tugs, who are not moved to help their fellow-men, when in distress, by motives of sympathy, to do so from motives of compensation and gain."[279] Still, Nixon could conceive of nothing "more heartless" than the behavior of the master of the tug.

In the *Brooks* case there had been no elements of real danger to the tug, and this seemed to be a factor counting against the award of a large figure for salvage services. In the circumstances explained in *The Young America* it appeared more likely that such danger was present. There a disabled schooner was rescued from a harbor ablaze from an oil tank explosion. Again a tug came to the rescue, although "She came, not merely as an angel of mercy, to relieve distress and avert threatened disaster, but with an eye to business and profit as well."[280] Again the alleged contract was for $1,000. Again the contract was denied by the master of the salvaged ship, and it appeared that the master had "an imperfect knowledge of the English language," and may not have understood that the master of the tug believed that he had entered into a contract for $1,000. Nevertheless, even if the evidence showed a contract, said Nixon, "I am not sure that a contract made under such circumstances ought to be enforced by the court."[281] In this case, it may be that Nixon was prepared to go beyond mere admiralty precedent, as he made no reference to admiralty cases, but simply stated that "contracts of this nature, entered into in the midst of excitement, are justly regarded by the courts with suspicion, especially when they are of such an unconscionable character."[282] Nixon determined that in the circumstances $300 was a "liberal allowance" for the services rendered. However, Nixon specifically indicated that of that amount only $25.00 should be allocated to the master of the tug. Significantly, Nixon

explained that "I should have made a larger allowance to the master of the tug if I was not strongly impressed with the thought that, in his demand of $1,000 for such a service, he was attempting to profit by the fright and necessities of the claimants."[283] Here, then, Nixon demonstrated that not only was he prepared to set aside private contractual arrangements in admiralty, but he was even prepared to reduce what might have been a fair market allowance when he found instances of immoral conduct.

B. *Bankruptcy*

Even in matters of bankruptcy law, Nixon betrayed a tendency, from time to time, to abandon the legislative goal of wiping the slate of the debtor clean, in favor of other, more morally-based policies. In the *Eking* (1881)[284] case, the petitioner sought discharge in bankruptcy, but the discharge was contested on the grounds that Eking had violated the eighth clause of Section 5110 of the revised statutes, which prohibited a discharge "if the bankrupt, or any person in his behalf, has procured the assent of any creditor, or influenced the action of any creditor, at any state of the proceedings, by any pecuniary consideration or obligation." In this case, while the bankrupt had not paid any money to friendly creditors to secure his discharge, he had promised some of them that he would "pay all my just debts",[285] and to one that he would make amends "by paying me all he ever owed me when he got able."[286] The precise question was whether a promise, after proceedings had begun to discharge a particular debt, to pay the debt "when money became available" would be such a "pecuniary" consideration as to defeat the discharge. Even though a discharge would remove the legal obligation to pay the original debt, said Nixon, "the moral obligation to pay still existed (after the filing for bankruptcy), and was a sufficient consideration to support the promise."[287] Since the promise to pay the debt when the bankrupt became able was a legally enforceable promise, reasoned Nixon, it could count as the "pecuniary consideration" required in order to defeat the discharge.

While it is true that Nixon was following precedent in this case, and thus it might be difficult to draw inferences regarding Nixon's moral feelings that debts should not be shirked, especially by means not authorized by the statute, there are considerations here which suggest that Nixon had some freedom in this particular case to decide the other way. New Jersey had recently enacted a statute "requiring [that to create enforceable obligations] every promise of the bankrupt to pay any debt or demand, from which he had been released by bankruptcy, [had] to be put in writing, and signed by the party to be charged there with."[288] Nixon seems to have understood himself under an obligation to follow the statute[289] but held that the statute was inapplicable to the case at hand, since this particular promise had been made before the discharge in bankruptcy, but after the filing for bankruptcy. Nevertheless, Nixon's holding runs directly counter to the "spirit" of the New Jersey statute, a guide that was formerly of paramount importance to Nixon.[290]

C. *Criminal Law*

Given the application of moral principles in the patent, bankruptcy, and admiralty cases and given Nixon's belief in the high standards of conduct that ought to govern human affairs,[291] one might expect his cases in the criminal area to reflect a bias in favor of society's rules and against transgressors. While there are some cases that certainly tend in this direction, there are a surprising number of opinions which suggest that Nixon could be very sympathetic to the interests of criminal defendants, and that he was prepared quite strictly to construe the criminal statutes against the government. Ultimately, however, as we shall see, even in the cases when Nixon seemed to be tilting toward the accused transgressors, such favoritism stemmed from a well-developed sense of the moral proprieties.

In *United States* v. *Sacia* (1880),[292] a man named Joseph L. Lewis "had died at Hoboken, devising the greater part of his estate to his executors, in trust, to be applied by them to the reduction of the national debt incurred in the war of the rebellion" [the American civil war].[293] Lewis's estate was worth more than one million dollars. A woman calling herself Jane H. Lewis had sought to contest this will, and had procured "a large mass of testimony to prove that she was the widow of the testator."[294] This testimony was fabricated, and she eventually filed a formal renunciation of her claim. She pleaded guilty to conspiracy to defraud the government, and then was enlisted as a government witness in *Sacia*, a case against five of her co-conspirators. Nixon first instructed the jury to remember that "all the text books agree that the evidence in proof of [a] conspiracy may be, and from the nature of the case generally must be, circumstantial."[295] Nixon acknowledged that there had been some comment on the weight which ought to be given to the testimony of co-conspirators, like the phony Mrs. Lewis, but Nixon cautioned the jury that "The fact that a witness is a co-conspirator doubtless operates, and ought to operate, largely against the credibility of his testimony, but the jury is not bound to reject it on that account"[296] Nixon indicated to the jury that where "Mrs. Lewis's" testimony was supported "in material respects" by other witnesses the jury was "bound to credit it."[297] Even where corroboration came from "the mouths of co-conspirators," Nixon advised the jury that it was important because such evidence usually was "the only source" of direct testimony "in cases of this sort."[298]

Lest the jury have any doubt as to which conclusion Nixon would draw from this evidence, immediately after informing the jury that if the government had failed to convince the jurors that any defendant was a party to the conspiracy they should acquit, he reminded them of the crime that had been committed. "If you come to the conclusion, *as probably you will*, that a conspiracy existed," said Nixon, "your next inquiry will be, were any of the alleged acts done by one or more of the parties to give effect to the fraud."[299] Since only the evidence of the co-conspirators and the government could support the charge of conspiracy, this was tantamount to Nixon suggesting

that he believed at least to some extent in the credibility of the government witnesses. Since only five of the nine alleged co-conspirators were on trial, however, Nixon then turned more precisely to the question of whether the evidence supported the charge of the participation of those five in the conspiracy. Nixon first indicated that he had "no intention to review the evidence," and then stated that "Nor is it my province or disposition to express any opinion as to the facts."[300] Nixon could not resist, however, sharpening the questions before the jury in a manner that suggested which way they ought to find.

For example, Nixon told the jury that the real question for them was "which will you believe, Mrs. Lewis [the government witness] or Dr. Park [one of the defendants]?" Nixon then added that, "The course of conduct in every one is influenced by motive." He then asked the jury "Has anything appeared in the cause which, in your judgment, would prompt a bad[301] woman like Mrs. Lewis to falsely charge Dr. Park with complicity in the fraud?" "How", Nixon asked, "does she benefit herself by attempting unjustly to drag him in?" Turning then to Dr. Park, Nixon observed, "With regard to his testimony, he has every motive to deny it. You must ask yourselves, how, and how far, the advantage which must result to him affects the credibility of his testimony."[302] He further instructed the jurors that "you must not be deterred by any consideration of sympathy or mercy from finding him [Dr. Park] guilty. Your duty is to decide according to the evidence, without regard to the consequences."[303] In his final words to the jury Nixon cautioned them that "you are trying these defendants, not for the general misconduct and bad habits of their lives, not for perjury in the state courts, but for a conspiracy formed to defraud the government of the United States.[304] While these remarks were made in the context of Nixon's advice to the jurors that they might "give to each [of the defendants] the benefit of every reasonable doubt respecting their guilt,"[305] it is certainly possible that such suggestion of other evils perpetrated by the defendants could equally well prejudice the jury against them. Not surprisingly, the jury found all of the defendants guilty.

Yet, despite this and similar examples of jury instructions tendered by Nixon which seem blatantly pro-prosecution, a surprising number of other cases, throughout Nixon's term on the bench, show what seems to be a strong tendency to construe criminal laws in favor of the accused. One such case of apparent leniency is *United States* v. *Thoma* (1879).[306] Mr. Thoma had been the landlord of one Jacob Schoch, who committed suicide owing Thoma $41.00. Before his death Schoch had told Thoma that he was expecting money from abroad, and would satisfy his debt to Thoma out of that money. Following Schoch's suicide, a letter from Switzerland, "containing a bill of exchange in favor of Schoch, drawn upon [a New York bank], for $155.66" was delivered to Thoma by registered mail. The letter was addressed to Schoch, in care of Thoma. Believing that "the postmaster had a right" to open letters in the presence of witnesses, Thoma convinced an

assistant postmaster that he (Thoma) was going to administer Schoch's estate, and persuaded the assistant postmaster to open the letter and give the contents to him. Thoma told the assistant postmaster that he intended to satisfy his debt from Schoch, and the debts of others, from the proceeds of the draft. Thoma took out no letters of administration, and refused to surrender the draft to Schoch's widow, who had taken out letters of administration in New York. Thoma was prosecuted for "taking and embezzling a letter which had been in a post office before the same had been delivered to the person to whom it was addressed."[307] Nixon conceded that Thoma's actions placed him "within the letter of the law, but not within its spirit." "Penal statutes," Nixon explained, "should be construed strictly; and the retention of a letter by a person who came lawfully into its possession, is not the misdemeanor that the Congress had in view."[308] While the ownership of the draft was a question to be decided by local law, once the letter was delivered to Thoma by the post office, the interests of the federal government in the matter came to an end. While there may have been some authority suggesting that a criminal act had been held under similar circumstances,[309] there appears to have been substantial authority to support Nixon's holding.[310] Accordingly, upon the special findings of the jury, Nixon entered a verdict of not guilty.

Another case of leniency in statutory construction, which shows jury instructions in marked contrast to those examined earlier,[311] is *United States* v. *Hewitt* (1882).[312] Hewitt was an "attorney" for one Benjamin Barnes, and was employed in prosecuting Barnes's claim for a Civil War pension. As Nixon explained to the jury, Congress had passed pension legislation for the relief of pensioners and their families, but "As these beneficiaries of the nation were generally from the humbler walks of life, and ignorant, it soon became necessary to enact laws for their protection against a class of men called 'pension agents,' who too often used their position in prosecuting the claims of pensioners to enrich themselves at the expense of the unfortunate persons who were the objects of the bounty of the government."[313] Such legislation limited the fees which pension agents could receive, and imposed heavy fines and imprisonment on any agents "who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed or due such pensioner or claimant."[314] The indictment charged Mr. Hewitt with wrongfully withholding pension funds. Barnes had testified that Hewitt wrongfully withheld $500. Referring to this testimony of Barnes, Nixon cautioned the jury, "You see how ignorant [Barnes] is; you hear what unfortunate habits he has contracted, and you know what allowance should be made for his conduct and his conversation."[315] Nixon continued by reminding the jury that "You also should not forget the terrible strain which a charge of this kind subjects the defendant to, and also what allowance should be made for his apparently contradictory stories about the precise character of the relations of the parties and the nature of the transactions between them."[316] Nixon then reviewed the uncontradicted evidence in the

case which showed that Hewitt had procured Barnes's indorsement on the check for the pension funds by explaining to Barnes that he was merely signing a voucher for the money which would then be sent on to Washington.

Hewitt's defense, as described by Nixon, was that Barnes had agreed that the money from the eventual proceeds of the $1,610 check was to be distributed by Hewitt to several of Barnes's creditors, as well as to Barnes himself. One half was to go to a creditor named Starn, $200 to a grocer, and $200 to be retained by Hewitt "for other professional services." The balance, said Hewitt, was to be paid to Barnes "from time to time until all the money was exhausted."[317] Reflecting that the statute did not permit any such amounts to be withheld, Nixon explained that these facts, if true, revealed acts that were "not, in my judgment, in compliance with the spirit, and certainly not with the letter, of the pension laws. . . ."[318] Nevertheless, Nixon added, the truth of these facts "has much to do with the defendant's actual criminality." By this language Nixon appears to have been willing to concede that there could be occasions when *both* the letter and spirit of a criminal statute could be violated, and there would still be no *crime.*

Nixon did caution the jury that if they were to find "any collusion in this case . . . with regard to this poor man's money, then all this defense is a pretence." At the close of his charge, however, Nixon told the jury that "If the evidence and law justify it, we all desire that the defendant should be acquitted." In line with what appears to be the drift of Nixon's views on the matter the jury brought in a verdict of "not guilty."[319]

What accounts for this leniency in criminal matters, and in particular, Nixon's position in the *Hewitt* case that even if the letter and the spirit of the penal statute were violated by a defendant there might still be no *crime*? Nixon's allowance of Hewitt's defense, that he thought he was entitled to disburse the funds for Barnes, suggests that it was the attitude of the defendant that was of paramount importance in determining criminality. This seems to be something more than merely a question of the requisite *mens rea,* since in *Hewitt* there was no suggestion in the statute itself that absent an intent to commit the offense there was no crime. What the Hewitt case seems to be all about, in short, is whether or not Hewitt was the kind of "bad" man who commits crimes. In *Sacia,* it will be remembered,[320] Nixon had no trouble in characterizing the fraudulent Mrs. Lewis as a "bad" woman, and it appears that Hewitt would only have been criminal if he too were "bad". Given the imperfections in human nature, and given Nixon's disposition toward allowing maximum freedom, we can infer that it was his own personal morality that led him so strongly to seize upon the common law's usual presumption in favor of innocence, even when clear statutory violations were present. What then explains Nixon's increasingly morally-influenced jurisprudence, and how is it that in this period of supposed formalism, Nixon so fails to fit the mold?

Summary and Conclusions

The conventional wisdom among American legal historians with regard to judging in the late nineteenth century is that the judges believed that it was not their job to change legal principles or to engage in great creativity, and that judicial decisions of the period are characterized by a formal, rigid and arid adherence to precedents. As we have seen this description does not fit the jurisprudence of John Thompson Nixon. The guiding tenets of Nixon's jurisprudence were his own personal trilogy of paramount values, duty to mankind, to country, and to God.

In his earliest years as a judge, Nixon appears to have emphasized the second of these values, insofar as he attempted to implement American principles of popular sovereignty by giving effect to the particular provisions and purposes of American legislation. In these years Nixon did indeed seem to be carrying out the nationalist program of the Republicans, whom he had served in Congress, and whose President had placed him on the bench.

Once Nixon had become fairly well established on the bench, however, it appears that his jurisprudence may have subtly shifted to favor what may have been his primary value, the furtherance of individual efforts in order thereby to ensure economic progress, social mobility, and the betterment of the race. In case after case during these years, Nixon can be observed to go beyond the words of a statute, sometimes even to reject its terms; and also to ignore the rules of the common law, where he felt that such procedures were necessary to accomplish his goals. In these years too we observe Nixon's stated aversion to the power of large concentrations of wealth showing up in his opinions, in what seems to be a tendency to favor individuals over aggregations of capital, even where Nixon appears to be bending over backwards not to draw distinctions between the treatment of persons and corporations.

In several instances Nixon's particularistic and moralistic jurisprudence appears to have led to reversals of his opinions by reviewing courts. The reviewing courts seem to have demonstrated less of a tendency creatively to apply policies to solve the problems being litigated, and their opinions do seem to reflect something of the "formalistic" style said to prevail during this period. Nixon appears to have been frustrated by these reversals, and towards the end of his tenure on the bench we may be able to observe another shift in the values of his jurisprudence. Where he began by favoring popular sovereignty, and adherence to the nationalistic program of his party, and where he continued by furthering the individualism also dominant during the late nineteenth century, he concluded by emphasizing the individual's duty to his God, at least insofar as Nixon strived to reward the "good," and punish only the "bad." In this way did the three fundamental values of Nixon's philosophy reveal themselves in his opinions.

By the last few years of his term, Nixon's judicial efforts had begun to assume proportions that might fairly be termed heroic. In the complicated

patent area alone, he was turning out literally scores of written opinions each year. For the period from 1870 to 1888, the Federal Cases contain opinions decided by him in over 300 cases of all kinds.[321] Over 100 of these are patent opinions, an area of enormous difficulty. Nixon apparently had acquired a national reputation of expertise in patent law, and it was common for litigants' from neighboring states to seek out his court for resolution of their patent problems.[322] The statistics do suggest that Nixon was one of the busiest of federal judges deciding patent cases.[323] This effort was not without great cost to Nixon. "Excessive labor in the discharge of his judicial duties" resulted in impaired health and blindness during his last years, and probably hastened his death in 1889.[324] It is not likely that Nixon derived excessive joy from his physical labors in the technical vineyards of the law, but, he prized no human attribute above endurance,[325] which he certainly possessed.

The extent to which Nixon's patent jurisprudence required great physical and intellectual sacrifice can be roughly gauged by attempting to puzzle one's way through some of the drawings and descriptions which appeared with regularity in Nixon's patent opinions. Equally taxing for Nixon was the fact that even after his monumental efforts at understanding, he was often forced to base decisions largely on exasperating expert testimony. In *Turrell* v. *Spaeth* (1878),[326] a case involving a patent for roller skates, Nixon stated the problem:

> "Are the devices in the defendant's skate, producing this result, the equivalents of the devices set forth in the Lovatt patent? The experts of the parties, *as usual*, are as wide as the poles asunder. Mr. Serrell says that they are precisely alike in principle, and Mr. Faber du Faur thinks they are diametrically different."[327]

Yet Nixon *did* endure these cases, and maintained a judicial style that does not seem to fit the rigid mold that many legal historians claim predominated during this period. We have seen, however, that the formalistic jurisprudence described by commentators did often exist in the Supreme Court, and seems to account, in part, for at least some of the times creative efforts on Nixon's part were checked by reversals in reviewing courts.[328] Still, only a small percentage of Nixon's opinions were reversed, and only a small percentage of all lower federal court opinions were reversed by the Supreme Court. As we learn more about the lower courts, we may discover that Nixon's efforts at moralistic, principled accommodation of policy needs were not unusual, and that the lower federal courts made a significant contribution to the economic progress of American society, in areas of crucial concern such as the orderly development of new industrial and transportation processes.[329]

It remains to suggest something about how Nixon was able to demonstrate the great endurance and dedication which his opinions reflect. We have already considered the three major goals of Nixon's life—performance of duties to mankind, country, and to God—and seen them implemented in the various stages of his jurisprudence. It would be easy to dismiss these as sim-

plistic rhetorical bombast, but to do so we would have to ignore the evidence of substantial commitment that Nixon's life provides.

The chief factor that illuminates and explains Nixon's jurisprudential outlook is his commitment to his Presbyterian faith. This commitment, always strong, seems to have increased with age, parallelling an increase in the moralistic cast of his jurisprudence. In 1864, he represented his Presbytery in the National General Assembly of the Presbyterian Church.[330] In 1869, Nixon was instrumental in securing a union of the once acrimoniously-separated "old school" and "new school" members of the Presbyterian Church.[331] During this period "he was frequently elected a member of the Higher Church courts, and of their most important committees, and of the special committee on the National Council of Evangelical Churches, to which body he was appointed as a delegate of the assembly."[332] In 1877, by appointment of the General Assembly, he attended the meeting of the Presbyterian Alliance in Edinburgh, Scotland, and in 1878 he was a member of the committee that revised the Presbyterian Book of Discipline, the very articles of that faith. Finally, from 1883 until his death, he served as director of the Princeton Theological Seminary, the leading school for members of the Presbyterian ministry. For a man who was as busy a judge as Nixon, this involvement would seem to indicate a heavy commitment to religion. In light of this, it seems appropriate to examine those tenets of Presbyterians which he would have embraced, and to speculate how they might have affected his jurisprudence.

Perhaps the most idiosyncratic part of the Presbyterian creed is "predesination"—the belief that God has already worked out the future of mankind, which plan is unalterable.[333] Integrally related to this concept is that of "salvation by grace", meaning that "salvation is an unmerited gift" bestowed at the will of God.[334] Still, Presbyterians and their Calvinist predecessors have recognized the possibility of making an educated guess about whether a particular individual has been "elected" for salvation, by observing the outward manifestations of "good" in his or her life.[335]

This belief that "saved" individuals demonstrated "goodness" must have influenced Nixon's decisions. This belief would account for Nixon's tendency in his later years to characterize individuals as "good" or "bad", and to favor those with whose moral choices he sympathized. Further, perhaps the ultimate unfathomability of God's choice in matters of salvation also accounted for Nixon's tendency to be solicitous for the rights of criminal defendants.

A final example of Nixon's morality influencing his decisions in his closing years on the bench is *In re Stewart* (1884).[336] There Nixon used English doctrines and United States Rev. Statutes § 5110 to refuse a discharge in bankruptcy because some of the losses sustained by the bankrupt had occurred at the gaming table. Nixon's moral condemnation of such behavior can probably be observed in his rejection of two of the bankrupt's arguments. First, Nixon refused to accept the proposition that the amount lost was "de minimis", and held that *any* gambling loss brought the bankrupt within the

prohibitory terms of the statute.[337] This is in marked contrast to Nixon's willingness to consider the "spirit" rather than the "letter" of other legislative acts.[338] Second, Nixon rejected the argument that the bankrupt's *winnings* from gambling should be taken into account in determining whether he had "lost" money gambling. Nixon cited only English common-law precedent in determining that this *statute* did not permit such an accounting.[339] Instead, Nixon noted that the statute was founded "on the idea that the order of discharge is not a matter of right, but of favor."[340] Nixon was quite sure that this "favor" was to be revoked when the bankrupt had lost any portion of his funds through "gaming". It must be no coincidence that the Presbyterian Digest of 1886, which includes the revisions of the Book of Discipline which Nixon helped formulate, describes gambling activities as "immoral in their nature and ruinous in their effects upon individual character and the public welfare."[341]

Nixon apparently believed advocates would do best to adhere to his rigorous moral code. For instance, in describing a departed member of the New Jersey bar, Nixon's own father-in-law, Nixon praised him for his personal characteristics which revealed these qualities:

> He "never deceived his client by giving him a too favorable view of his case: *he never forfeited his own self-respect, by knowingly taking the wrong side of a controversy*, he never attempted to mislead the court by making the worse appear the better reason, and was remarkably free from the too prevalent vice of perverting the evidence for the benefit of his client, or of befogging the minds of ignorant jurors, by giving a false coloring to the fair import of testimony, he never wished, even in the heat of controversy, to succeed in a case if the law and the evidence did not entitle him to a verdict."[342]

For Nixon, then, a courtroom was ideally not an arena for the display of intellectual pyrotechnics, but was, simply, a forum for rendering moral judgement uninfluenced by perversion or pettifoggery. This notion must have added an extra burden of responsibility to one like Nixon, for while in God's plan all outcomes might be predetermined, Nixon's ability to decide correctly would serve to demonstrate that he was "elected". Knowledge or hope of a guaranteed place in heaven may then have proven a powerful incentive for Nixon's prodigious judicial efforts.

No matter what the reason for his dedication, Nixon did decide a great number of complicated, tedious cases in areas which appear to have demanded a creative and flexible jurisprudence. From these cases emerges a pattern which is different in form and in substance from the perceived stereotype of the period. Instead of favoring an entrenched plutocracy, Nixon came more and more to decide largely on the basis of personal morality. He favored the advance of commerce through individual effort, but he exhibited no slavish adherence to formalistic decisions, as he sought to shape the law in a manner which served the values he cherished.

After Ajax failed to receive Achilles's armor, Sophocles tells us, he had to decide how best to respond to an affront that seemed to bertay all the principles of virtue and reward to which Greek heroes were supposed to be dedicated.[343] He concluded that his only appropriate course of action was to fall on his sword, to make the most powerful statement he could in support of the principle of recognition of heroic valor. A life without honor, in other words, was not fit for a Greek to live. After Ajax's suicide, the Greek chieftains, Agamemnon and Menelaus, at first refused him decent burial rights, adding a last insult to the career of this champion of endurance and heroism. Finally, however, Odysseus, in a magnificent act of heroic munificence, convinced the Greek Kings that his old rival deserved acclaim for his constancy and fidelity to the tradition, and Ajax was given the proper ceremonies.

John Thompson Nixon must have felt, as a result of his reversals by the Supreme Court, and as a result of the general deterioration in American economic and moral life in the late nineteenth century, that the proper respect to the classic virtues of piety, patriotism, and endurance was not forthcoming. As the end of his life neared, his moral fervor seems to have grown, and, in the manner of Ajax, Nixon accelerated his own blindness and death in service of the old values.

Notes

* This chapter appears in a somewhat revised, more-scholarly version, under the same title at 76 Nw. U. Law Rev. 423 (1981).

1. Hall, *The Civil War Era as a Crucible for Nationalizing the Lower Federal Courts* 7 Prologue: The Journal of the National archives 177 (1975).
2. Hurst, *New Dimensions of Research in United States Legal History*, 23 Am. J. Leg. Hist. 1, 8 (1979).
3. K. Llewellyn, The Common Law Tradition: Deciding Appeals, 38ff (1960).
4. See, *e.g.* Grant Gilmore, The Ages of American Law 62–63 (1977).
5. Llewellyn, *Remarks on the Theory of Appellate Decision*, 3 Vand, L. Rev. 395, 396 (1950).
6. *See, e.g.* L. Friedman, A History of American Law 334 (1973).
7. Llewellyn, *supra* note 5, at 400.
8. Gilmore, *supra* note 4, at 62, Nelson, *Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in the Nineteenth Century*, 87 Harv. L. Rev. 513, 566 (1974).
9. M. Horwitz, The Transformation of American Law 1780–1860 263 (1977).
10. See, *e.g.* Gilmore, *supra* note 4, at 62–63. Gilmore concedes, at page 60, that the federal courts, during part of this period, may have been more creative than the state courts, although he maintained that "even in the federal courts . . . the pace slackens as we come down to the turn of the century." *Id.*, at 61.
11. *Id.*, at 60.
12. Cf. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the Nineteenth Century* 1975 Wis. Law Rev. 1.
13. Gilmore. *supra* note 4, at 60, *but see* note 10, *supra.*
14. We have, of course, recognized exceptions to the supposed norm of bland judges and judging at this time. A principal exception is Charles Doe of New Hampshire. See generally John Reid, Chief Justice: The Judicial World of Charles Doe (1967).
15. The Ajax referred to is Ajax of Salmis, son of Telamon, not to be confused with the "lesser" Ajax, son of Oileus. On Ajax generally see Sophocles, *Ajax* in F. Storr, trans., *Ajax, Electra Trachinae, Philoctetes* (Loeb Classical Library, 1913); Cedric Whitman, Homer and the Heroic Tradition 67–71 (1958), and "Aias," in Hammond and Scullard, eds., *The Oxford Classical Dictionary* 32 (2nd ed. 1970).
16. Whitman, *supra* note 15, at 170, referring to Homer, Iliad XVII:98-105.
17. Iliad XVI: 97ff.
18. *See generally* Horwitz, *supra* note 9.
19. *See generally* Gordon Wood, The Creation of the American Republic 1776–1787 (1969).
20. Robert Wiebe, The Search for Order (1967).
21. For some of the few exceptions see C. Warren, Bankruptcy in United States History (1935), and F. C. Vaughan, The United States Patent System (1956).
22. Cf. Wiebe, *supra* note 20, and see also M. Keller, Affairs of State 122–161 (1977).
23. Wiebe, *supra* note 20.
24. J. W. Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States 3–32 (1967).
25. Whitman, *supra* note 15, *passim.*
26. 13 D.A.B. 531 (1946).

27. PRINCETON SEMINARY NECROLOGICAL REPORT, 1890, at 11, Keasbey, *J. T. Nixon, a memoir prepared and read by A. Q. Keasbey, before the N. J. Historical Society at its annual meeting in Trenton, January 28, 1890* 11 Proceedings of the New Jersey Historical Society 41, 42 (2nd. ser. 1890).
28. PRINCETON SEMINARY NECROLOGICAL REPORT, at 12.
29. Keasbey *supra* note 27, at 44. Nixon also published a book of forms.
30. Keasbey, *supra* note 27, at 45.
31. He was born August 31, 1820 and appointed United States District Judge for the District of New Jersey on April 28, 1870.
32. Keasbey, *supra* note 27, at 46.
33. *Id.*, at 47, See also Hall, *supra* note 1, and sources there cited.
34. Keasbey, *supra* note 27, at 47–49.
35. *Id.*, at 49. The governing statute, the Act of April 10, 1869, 16 Stat. 44, authorized the District Judge, if necessary, to hold the Circuit Court alone.
36. Keasbey, *supra* note 27, at 48–49.
37. John T. Nixon, *An Address Delivered Before the Cliosophic and American Whig Societies of the College of New Jersey*, June 23, 1863, 6 (1863).
38. One of the models for emulation by the young Princetonians which Nixon furnished was George Stephenson, "father of the locomotive railway system of the world." A man of humble birth, but who rose to be "the companion of nobles and crowned heads." *Id.*, at 23–24.
39. *Id.*, at 9–10.
40. *Id.*, at 34–35.
41. *Id.*, at 32. Cf. B. BAILYN, THE ORIGINS OF AMERICAN POLITICS (1965) and THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).
42. Nixon, *supra* note 37, at 23–24, 32.
43. *Id.*, at 13. See also Nixon, "Response to a Toast to 'The American Whig Society'" June 29, 1869 reprinted in Henry Clay Cameron, Addresses and Proceedings at the celebration of the One Hundredth Anniversary of the Founding of the American Whig Society, of the College of New Jersey 195 (1871) where Nixon praises the society: "Born before the Revolutionary War, and the child of revolutionary principles, her sons have ever been the advocates of popular rights, and have largely contributed to the formation and upholding of a system of government, best adapted to the highest development of man."
44. Nixon, *A Sketch of Lucius Quintius Elmer,* LL.D., 8 Proceedings of the New Jersey Historical Society 40, 43 (2nd Ser. 1885). See also John T. Nixon, *A Digest of the Laws of New Jersey by Lucius Q. C. Elmer* iii (2nd ed. 1855), where Nixon indicates that one of his purposes as a compiler of laws was to make them "plain and easy of reference", for "citizens in general," whose "rights and duties" were so "deeply affected" by New Jersey's law.
45. Nixon, *supra* note 37, at 30.
46. *Id.*, at 35–36.
47. *Id.*
48. Nixon, *Sketch of Elmer, supra* note 44. at 41.
49. See *e.g.* the excerpt from Jefferson's *Notes on Virginia* found in S. PRESSER AND J. ZAINALDIN, LAW AND AMERICAN HISTORY 125–137 (1980).
50. Nixon, *supra* note 37, at 28–29.
51. *Id.*, at 35–36.
52. Said Nixon, there is "a God in history, whose wise designs often contradict the probabilities of man's experience." *Id.*, at 32. See also Nixon, *The Circumstances Attending the Election of William Pennington, as speaker of the Thirty-Sixth Congress*, 2 Proceedings of the New Jersey Historical Society 205 (1872): ". . . nothing more clearly illustrates the presence of God in History, than to observe the great consequences, which often follow the use of seemingly trivial means."

53. Nixon, *supra* note 37, at 34–36.
54. Nixon, Response to Toast, *supra* note 43, at 194.
55. Nixon, *supra* note 37, at 27–28.
56. *Id.* See also Nixon, *supra* note 52, at 214–219, where he reflects admiringly on Congressman Sherman's "personal honor," which led Sherman to withdraw from the contest for house speaker, and clear the way for Nixon's candidate, William Pennington. Nixon saw as the aim of the New Jersey Historical Society "to gather up everything that is valuable in incident or noble and stimulating in personal character, and to preserve the record for those who come after us. Nixon, *Sketch of . . . Elmer, supra* note 44, at 41–42.
57. 27 Fed. Cas. 1267 (D.C.D.N.J. 1871, Case No. 16,358).
58. Act of May 31, 1870, 16 Stat. 144. This act was an important piece of Republican "Reconstruction" legislation.
59. 27 Fed. Cas. at 1267.
60. *Id.*
61. *Id.* at 1268.
62. See LLEWELLYN, *supra* note 5, at 400.
63. 27 Fed. Cas. at 1269, quoting the opinion of Chief Justice John Marshall in *U.S. v.Wiltberger,* 5 Wheat. (18 U.S.) 95.
64. *Id.,* at 1269–1270.
65. *Id.* at 1248.
66. Bankrupt Act of March 2, 1867, c. 176 (15 Stat. 227).
67. See generally C. WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935).
68. See, *e.g.* the remarks of President Buchanan in 1857, Senator Lafeyette S. Foster in 1862, or Representative William M. Steward quoted by Warren, *Id.,* at 95, 98, and 105–106. See also the remarks of Joseph Story, made in 1837, quoted in W. NELSON, THE AMERICANIZATION OF THE COMMON LAW 153 (1975).
69. See, *e.g. In re Donnelly and Hughes* 5 Fed. 783 (D.C.D.N.J. 1881) holding that failure to have a notary verify a creditors petition as required by statute would not void bankruptcy proceedings *ab initio.*
70. 1 Fed. Cas. 779 (case no. 373).
71. Note 66, *supra,* § 2.
72. Emphasis supplied, 1 Fed. Cas. at 880.
73. *Id.,* at 881.
74. *Ibid.*
75. See, *e.g.,* Massachusetts Turnpike Corp. v. Field, 3 Mass. 201 (Judge Parsons), and Sherwood v. Sutton 21 F.C. (C.C.D.N.H. 1828, case no. 12,782, Justice Story).
76. 1 Fed. Cas., at 883.
77. *Id.,* at 883.
78. *Id.,* at 884.
79. For a similar holding by Nixon, strictly construing a statute, in which Nixon did not let any moral scruples stand in the way of limiting relief for persons defrauded see *In re Shaefer* 21 Fed. Cas. 1141 (no. 12,695, 1878).
80. 14 Fed. Cas. 154 (no. 7627).
81. 14 Stat. 517, 14 Fed. Cas., at 155.
82. 18 Stat. 178, amending section 5021 of the 1867 law.
83. 14 Stat. 517.
84. *Id.,* emphasis supplied.
85. *In Re Stein* 22 Fed. Cas. 1232 (D.C.S.D.N.Y., 1877, case no. 13,352) and *In Re Cramer* 6 Fed. Cas. 742 (D.C.D.Minn. 1875, case no. 3,345). Both of these cases held that where a creditor was guilty of actual fraud against the bankruptcy act, no recovery of any portion of the debt would be allowed in the bankruptcy proceeding.
86. 14 Fed. Cas. at 154, 155.

87. Nixon cited two other federal cases which had so construed the bankruptcy legislation, *In re Black* 3 Fed. Cas. 500 (D.C.D.Mass., 1878, case no 1,459) and *In re Newcomer* 18 Fed. Cas. 49 (D.C.N.D.Ill., 1878, case no 10,148).
88. Text accompanying notes 57–65, *supra*.
89. See, e.g. text accompanying notes 70–79, and note 79, *supra*.
90. Text accompanying notes 38 to 39, *supra*.
91. See, *e.g.* the remarks of Justice Joseph Story, *supra* note 68.
92. 12 Fed. Rep. 627 (D.C.N.J. 1882).
93. *Id.*, at 630.
94. *Id.*, at 630.
95. *Id.*, at 630.
96. See text accompanying Notes 38 to 39, *supra*.
97. 4 Fed. Cas. 273 (D.C.D.N.J. 1878, Case No. 4233).
98. The rules were adopted by the Act of April 29, 1864 and can be found at Rev. St. 8181, c. 5 §4233.
99. 2 Fed. Cas. at 274.
100. *Id.*
101. A similar division of damages under nearly identical circumstances, between a colliding steamboat and a schooner was directed by Nixon in *Logan* v. *The C. H. Northram*, 15 Fed. Cas. 798 (D.C.D.N.J. 1878, Case No. 8,473).
102. I am indebted for this suggestion to Mr. Christopher Garrett.
103. In this connection see also the text accompanying notes 92–95, *supra*.
104. 22 Fed. Cas. 789 (D.C.D.N.J. 1879, Case No. 13,169).
105. *Id.*, at 790.
106. *Id.*, at 790.
107. 13 Fed. Rep. 332 (D.C.D.N.J. 1884).
108. *Id.*, at 334.
109. *Id.*, at 333.
110. See, *e.g. The Two Fanneys* 25 Fed. Rep. 285 (D.C.D.N.J. 1885), and the *Mary C. Conery*, 9 Fed. Rep. Rep. 222 (D.C.D.N.J. 1881).
111. *The Two Fanneys*, 25 Fed. Rep. 285 (D.C.D.N.J. 1885).
112. 24 Fed. Rep. 796 (C.C.D.N.J., 1886).
113. *Id.*, at 797.
114. *Id.*, at 797–798. Pierson stated that "my practice as a physician . . . was very small in amount, and was among the poor, and I think I could not have collected as much as 50¢ a day." Pierson went on to describe how "I was reduced to very great straits at times, and lived the best way I could, from hand to mouth, in my own room, a large part of the time on bread and water."
115. *Id.*, at 797.
116. *Id.*, at 798.
117. *Id.*, at 798.
118. *Id.*, at 799.
119. Labraw v. Hawkins, 14 Fed. Cas. 895 (C.C.D.N.J. 1874).
120. *Id.*, at 898–899.
121. Webster v. New Brunswick Carpet Company, Fed. Cas. 554 (1874).
122. *Id.*, at 556–557.
123. *Id.*, at 557.
124. For another case where Nixon commented on the endemic economic weaknesses of patentees, see *Green* v. *French*, 10 Fed. Cas. 1107 (C.C.D.N.J., 1879).
125. For the suggestion of the establishment of these rules, see, e.g. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 160–210 (1977).
126. See Note 110, *supra*, and accompanying text.
127. 26 Fed. Rep. 899 (C.C.D.N.J. 1886).
128. *Id.*, at 900.

129. Nixon noted for example, that *Addison on Contracts,* at page 396 (Section 862), suggests that the owner is not responsible for payment when the architect refuses to certify, if such refusal is not brought about by the owner himself. *Id.,* at 901–902. It appears that the modern tendency is to remove the condition, if the architect acts fraudulently, even if the owner is not implicated. *Corbin on Contracts* 618–619 (Student ed., 1952).
130. See, *e.g.* HORWITZ, *supra* note 125, at 141–143, 181–188.
131. See Section II, *supra.*
132. See Text accompanying notes 47, 119–124, *supra.*
133. 30 Fed. Cas. 808 (C.D.D.N.J. Case No. 18,136).
134. *Id.,* at 810.
135. See, *e.g. Anderson* v. *Odd Fellows' Hall,* 86 N.J.L. 271, 90 A. 1007 (1914), *Southern Surety Co.* v.*MacMillan Co.* 58 F. 2d 541 (10th Cir., 1932) and cases there cited.
136. 30 Fed. Cas., at 810.
137. *Id.,* at 809.
138. *Id.,* at 809–810.
139. *Id.,* at 809.
140. 10 Fed. Cas. 502 (D.C.D.N.J. 1880, Case No. 5488a).
141. *Id.,* at 504.
142. *Id.*
143. *Id.*
144. *Id.*
145. The *D. S. Gregory and the George Washington,* 7 Fed. Cas. 1123, 1126 (D.C.S.D.N.Y. 1868, Case No. 4,100), affd., 9 Wall. (76 U.S.) 513 (1869).
146. He could have found such a rule in the *D. S. Gregory, supra,* note 145.
147. 10 Fed. Cas., at 504.
148. The plaintiff testified that "his income was $5,000 a year," and there does not appear to have been any contradictory testimony on this point.
149. One cannot know this for certain, since the age of the plaintiff is not given. In the case decided by Judge Blatchford, however, involving a 40 year old nurse who earned less than $1,000 per year, an award of $10,000 was permitted. See the *D. S. Gregory, supra,* note 145.
150. 5 Fed. Cas. 87 (C.C.D.N.J., Case No. 2,415a (1883)).
151. *Id.,* at 88.
152. *Id.,* at 88.
153. *Id.,* at 88–89.
154. *Id.,* at 89.
155. 24 Fed. Cas. 177 (C.C.D.N.J., Case No. 14166).
156. *Id.,* at 178.
157. See, *e.g.* HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 160–210 (1977).
158. 24 Fed. Cas., at 178.
159. *Id.,* at 179.
160. *Ibid.*
161. *Ibid.*
162. *Id.,* at 180.
163. 104 U.S. 197. For another example of a third circuit judge "seemingly swayed by his dislike for the power of insurance companies," see the evaluation of Judge Acheson's roughly contemporary opinion in U.S. v. Mitchell, 36 F. 492 (W.D. Pa., 1888), in Rakoff, *The Federal Mail Fraud Statute (Part I),* 18 Duquesne Law Review 771, 800 (1980). I am indebted to Judge Dumbauld for calling this to my attention.
164. 11 Fed. Rep. 564 (C.C.D.N.J. 1881).
165. *Id.,* at 566.

166. See, *e.g. Farwell* v. *Boston & Worcester R.R. Corp.* 45 Mass. 49 (1842).
167. Friedman and Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Col. L. Rev. 50, 59–62 (1967).
168. 2 Fed. Rep. 892 (C.C.D.N.J. 1880).
169. *Id.*, at 896.
170. *Ibid.*
171. *Id.*, at 892.
172. *Id.*, at 892–893.
173. *Id.*, at 894–895.
174. *Id.*, at 896.
175. 20 Fed. Rep. 482 (C.C.D.N.J. 1884).
176. *Id.*, at 484.
177. Davey v. Aetna Life Insurance Company, 20 Fed. Rep. 494 (C.C.D.N.J. On application for a rule to show cause, 1884).
178. 20 Fed. Cas., at 487.
179. *Id.*, at 487.
180. Text accompanying notes 168–174, *supra*.
181. *Ibid.*
182. *Id.*, at 485.
183. This is indicated by Nixon's statement in his opinion refusing to set the verdict aside that, "It is conceded that the verdict rendered in this case was not expected . . ." 20 Fed. Cas., at 494.
184. The longest time a jury deliberated in the cases here reviewed.
185. 20 Fed. Cas., at 494.
186. *Id.*
187. *Id.*, emphasis added.
188. See 20 Fed. Cas. at 487-488, where, in response to a request to charge regarding the cause of death McKennan states, "If the jury find that the illness of William A. Davey at Alexandria Bay in the summer of 1881, which resulted in his death, was caused, either wholly or partially, by the intemperate use of alcoholic liquors, as explained in answer to the ninth prayer of the defendant [McKennan's charge that a single use might not constitute intemperance], they might find for the company."
189. 20 Fed. Cas., at 494.
190. See text accompanying notes 180–181, *supra*.
191. *Aetna Life Insurance Company of Hartford* v. *Davey*, 123 U.S. (1887).
192. Mr. Justice Field, in *Bennecke* v. *Insurance Company*, 105 U.S. 350, had written that an insured's occasional use of intoxicating liquors did not render him a man of intemperate habits, nor would an exceptional case of excess justify the application of this character to him . . ." When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act." See also the other cases collected in a note to the trial court's charge in *Davey*, 20 Fed. Cas., at 490–494.
193. 123 U.S., at 743–744.
194. *Id.*, at 742. At the new trial, presided over by Delaware Federal District Judge Wales, in spite of instructions which tracked Harlan's opinion, the jury still found for the plaintiff, *Davey* v. *Aetna Life Insurance Company*, 38 Fed. Rep. 650 (C.C.D.N.J. 1889).
195. See *American Nicholson Pavement Company* v. *Elizabeth*, 1 Fed. Cas. 691 (C.C.D.N.J. 1874, Case No. 309).
196. The patent was for a combination of steps, including (1) the laying of a continuous foundation directly upon the roadway, (2) forming the wooden surface of the pavement by a series of blocks standing endwise in rows, (3) a smaller set of

blocks or strips which were placed between the blocks that were to form the surface, and (4) the filling of the grooves formed between the principal blocks by the auxillary blocks with broken stone, gravel, and tar, or other like material. *American Nicholson Pavement Company* v. *Elizabeth*, 1 Fed. Cas. 703, 705 (C.C.D.N.J., 1873, Case No. 311).

197. 1 Fed. Cas., at 696.
198. *Id.*, at 696.
199. *Id.*, at 696.
200. *Id.*, at 309, Laws N.J. 1871, page 312.
201. *Id.*, at 696–697.
202. *Id.*, at 686–697.
203. *Id.*, at 697–698. The defendants appeared willing to concede that even under this defense they would have been liable to pay license fees to the plaintiffs, but it appeared that the profits made by the New Jersey Wood Paving Company were much larger than the license fees.
204. *Id.*, at 697.
205. A formal notice which may be filed with the Patent Office indicating that a patent will soon be applied for, which has the effect of preventing others from patenting the same device.
206. I Fed. Cas., at 706–707.
207. Section 12 of the Act of July 4, 1836, Curt. Pat. 270. *Id.*, at 706–707.
208. I Fed. Cas., at 706–707.
209. *Id.*, at 707.
210. For these characterizations of early and late nineteenth century styles of judicial reasoning see K. LLEWLLYN, *supra* note 3.
211. *Elizabeth* v. *Pavement Company*, 97 U.S. 126, 141 (1877).
212. *Id.*, at 142.
213. *Id.*, at 140.
214. *American Nicholson Pavement Co.* v. *Elizabeth*, 1. Fed. Cas. 691 (C.C.D.N.J. 1874, Case No. 309).
215. See generally *Consolidated Fruit Jar Co.* v. *Whitney*, 6 Fed. Cas. 349 (C.C.D.N.J. 1876) and sources there cited.
216. *American Nicholson Pavement Co.* v. *Elizabeth*, I Fed. Cas. 691 (C.C.D.N.J. Case No. 309).
217. 97 U.S., at 138.
218. Because the New Jersey Paving Company was insolvent, and because the Supreme Court had said that Elizabeth and Tubbs had made no "profits".
219. *Blake* v. *Elizabeth*, 3 Fed. Cas. 591 (1879), Case No. 1495).
220. *Id.*
221. 3 Fed. Cas., at 592.
222. *Id.*, at 592.
223. *Ibid.*
224. *Ibid.*
225. See, *e.g.*, CORBIN ON CONTRACTS §72, and cases there cited.
226. 3 Fed. Cas. *Id.*, at 593.
227. *Id.*, at 592. These fees amounted to $2,500.
228. *Schlomp* v. *Schenck*, 11 Vroom (40 N.J. Law) 195.
229. 1 Fed. Cas. 135 (C.C.D.N.J.).
230. *Ibid.*
231. *Id.*, at 136.
232. *Id.*, at 135.
233. *Id.*, at 135 citing Curt. Pat. Section 106.
234. *Id.*, at 136.
235. 1 Fed. Cas. 320 (C.C.D.N.J.).

236. *Id.*, at 321–322.
237. 29 Fed. Cas. 622 (C.C.N.J. Case No. 17382).
238. A device used in harnesses for horses.
239. *Id.*, at 623.
240. *Rubber-Coated Harness-Trimming Company* v. *Welling*, 97 U.S. 7, 11–12 (1877). *Compare Albright* v. *Celluloid Harness-Trimming Co.*, notes 235–236, *supra.*
241. *Scott Manufacturing Company* v. *Sayre*, 26 Fed. Rep. 153, 154 (C.C.D.N.J. 1885). Nixon did qualify his remark by adding, "Whether true or not, it is my duty to examine the present claims in the light of these decisions, and to give them such interpretation and effect as the deliberate judgement of that court declares they are entitled to. Nixon went on to hold that in the case at hand, the proposed combination to manufacture an "ice creeper" (a device to be fastened under shoes to facilitate walking on ice) included no new processes used to produce ice creepers. Since under the stringent standard applied by the Supreme Court patentable combinations must either form a new machine, or produce a new result by the interaction of old processes, the combination failed the test, and Nixon rejected it.
242. 30 Fed. Cas. 43 (C.C.D.N.J. 1879).
243. 140 U.S. 481 (1890). The long delay in reversing Nixon seems to be even more astonishing when it is realized that the original bill of complaint alleging infringement was filed in 1877. 30 Fed. Cas., at 43.
244. 140 U.S., at 488.
245. As the Supreme Court explained it, "the law is that any person sued for infringement of an American patent may show in defense that the invention claimed was patented or described in some printed publication . . . before the patentee's supposed invention or discovery thereof."
246. 30 Fed. Cas., at 43–44. Most of Nixon's opinion is a technical discussion of the nature of the infringement, a point not of much importance to the Supreme Court.
247. 140 U.S. at 488–489.
248. See text accompanying notes 3–11, *supra.*
249. For a case in which Nixon did construe the "foreign patent" section of the statute (Act of July 8, 1870; 16 Stat. 198), Section 24, see *Roemer* v. *Simon*, 20 Fed. Cas. 1097 (C.C.D.N.J., 1874, Case No. 11,997). In that case Nixon also noted the policies behind the "prior use" defense for infringements (section 16), and noted that that section requires defendants seeking to invoke that defense to give notice to the complainant of names and addresse of persons having knowledge of prior use, and to particularize places of such prior use. This procedural requirement would seem to underscore the presumption in favor of the patentee which the Supreme Court appears to have ignored in *Williamantic.*
250. See, *e.g.*, *Webster Loom Company* v. *Higgins*, 43 Fed. 674.
251. *Webster* v. *New Brunswick Carpet Company*, 29 Fed. Cas. 557 (C.C.D.N.J. 1875). See also, *American Nicholson Pavement Company* v. *City of Elizabeth, supra.*
252. See Chapter Two, *supra.*
253. 11 Fed. Cas. 783 (C.C.D.N.J. 1874, Case No. 6169).
254. *Insurance Company* v. *Gunham* 11 Wall. 78 U.S. 1 (1870).
255. Nixon cites 1 Comm. 377.
256. Citing "Bains v. The James and Catherine (Case No. 766)".
257. 11 Fed. Cas., at 783–784.
258. 3 Fed. Rep. 241 (C.C.D.N.J., 1880).
259. *Id.*, at 244.
260. *Id.*, at 243. For a case in which Nixon restated his belief that "a court of admiralty is the 'chancery of the seas,' " see *Six Hundred Tons of Iron Ore*, 9 Fed. Rep. 595, 598 (D.C.D.N.J. 1881).
261. He called the doctrine he was applying "estoppel".

262. See *infra*, next section.
263. *Clayton* v. *The Schooner Eliza B. Emory*, 4 Fed. Rep. 342, 343–344 (C.C.D.N.J. 1880).
264. 4 Fed. Rep., at 345.
265. *Id.*, at 345–346.
266. *e.g.*, *Montgomery* v. *The Owners of the General Greene* Bee's R. 388.
267. 4 Fed. Rep., at 344.
268. For another case where Nixon declared that "The admiralty court, although not technically a court of law or of equity, is a court of justice," and used this principle equitably to distribute the proceeds from a sale of a vessel among creditors, see *Adams* v. *The Wyoming*, 1 Fed. Cas. 161 (D.C.D.N.J. 1879, Case No. 71).
269. 24 Fed. Rep. 472 (D.C.D.N.J. 1885). Further support for Nixon's policy in this case, of imposing strict standards of conduct on tugboat operators, is provided by *Ulrich* v. *The Sunbeam*, 24 Fed. Cas. 515 (D.C.D.N.J. 1878, Case No. 14,329) where Nixon held (pursuant to a recent decision of the Supreme Court, *New Jersey Stream Navigation Company v. Merchant's Bank*, 6 How (47 U.S.) 384) that a tug could not contractually relieve itself from liability for negligence, although such an agreement would shift the burden of proof of "want or due care or . . . gross negligence" onto the libellants.
270. This tendency was established as early as 1842, see *Farwell* v. *Boston and Worcester Railroad Corp.* 45 Mass. (4 Metc.) 49, and was still in full swing as late as 1905, *Lochner* v. *New York*, 198 U.S. 45 (1905).
271. *Id.*, at 476, citing *The Samuel J. Christian*, 16 Fed. Rep. 796 (E.D.N.Y.), and *The Grapeshot* 22 Fed. Rep. 123 (S.D.N.Y.).
272. *The Brooklyn*, 2 Ben 547, *The Deer*, 4 Ben, 355, and *The Frank G. Fowler*, 17 Fed. Rep. 655.
273. *The Quickstep*, 9 Wall. 655.
274. *Id.*, at 476–477, quoting Blatchford in *The Deer*.
275. 17 Fed. Rep. 548 (D.C.D.N.J. 1883).
276. 20 Fed. Rep. 926 (D.C.D.N.J. 1884).
277. *Post* v. *Jones*, 19 How. 160. Nixon also quoted language from Justice Story, in the *Emulous*, 1 Sumn. 210, to the effect that salvage contracts would not be enforced unless the court can clearly see that no advantage is taken of the parties' situation . . ." *Id.*, at 550.
278. *Id.*, at 550.
279. *Id.*, at 550.
280. 20 Fed. Rep., at 927.
281. *Id.*, at 928.
282. *Ibid.*
283. *Ibid.*
284. 6 Fed. Rep. 170.
285. *Id.*, at 173.
286. *Id.*, at 174.
287. *Ibid.*
288. *Id.*, at 175.
289. Indeed, the Rules of Decision Act and the principles of conflict of laws would seem to require application of the *lex loci contractu* principle here when deciding the relevant question of contract law.
290. See text accompanying notes 57–95, *supra*.
291. See text accompanying notes 53–56, *supra*.
292. 2 Fed. Rep. 754 (D.C.N.J. 1880).
293. *Id.*, at 755.
294. *Ibid.*

295. *Id.*, at 757.
296. *Id.*, at 758.
297. *Id.*, at 759.
298. *Ibid.*
299. *Id.*, at 760, emphasis added.
300. *Id.*, at 761.
301. Only a stern moralist like Judge Nixon would feel confident enough to be able to characterize a witness as a "good" or "bad" person. That he thought it appropriate to do so is further evidence of the primary importance to Nixon of honorable conduct in human affairs.
302. 2 Fed. Rep., at 761.
303. *Id.*, at 762.
304. *Id.*, at 763.
305. *Ibid.*
306. 28 Fed. Cas. 74 (D.C.D.N.J. 1879, Case No. 16471). For another case of leniency see *U.S.* v. *Ninety-Five Boxes,* 27 Fed. Cas. 171 (D.C.D.N.J. 1874, Case No. 15,891).
307. 28 Fed. Cas. at 74, Section 3792, Rev. St.
308. *Id.*, at 75.
309. "It was suggested by the district attorney on the argument that the late distinguished judge of the Eastern district of Pennsylvania (Cadwalader) gave a different view of the section, holding in a recent case that a defendant was liable . . . who opened a letter addressed to his care to a female servant of his family—the letter having been delivered to him by the officials of the post office." Id., at 75. The case was unreported.
310. *U.S.* v. *Parsons* (S.D.N.Y., Case No. 16000), *U.S.* v. *Sander* (C.C.N.D.O., Case No. 16,219) and *U.S.* v. *Driscoll* (D.Mass., Case No. 14,994). *See also U.S.* v. *McCready,* 11 Fed. 231, and *U.S.* v. *Safford,* 66 Fed. 945, which cite Nixon's opinion.
311. In *United States* v. *Sacia,* text accompanying notes 292–305, *supra.*
312. 11 Fed. Rep. 243 (D.C.D.N.J.).
313. *Id.*, at 243.
314. Rev. Stat. Section 5485, as quoted by the court, *Id.*, at 244.
315. *Id.*, at 245. This conduct was not specified.
316. *Id.*, at 245–246.
317. *Id.*, at 246.
318. *Ibid.*
319. *Id.*, at 248.
320. Text accompanying note 301, *supra.*
321. My research indicates a total of 338 published opinions. This number appears to be far more than any judge who sat on the federal courts of Pennsylvania, New Jersey, or Delaware before 1890. While the Federal Cases do not contain all the opinions written by the federal judges, it is still clear that Nixon's output was prodigious.
322. Keasbey, *supra* note 27, at 48–49.
323. For the years 1876 to 1886, Nixon's prime years, he shows up more frequently among the top five federal judges, in terms of number of cases listed in the *Decisions of the Commissioner of Patents and United States Courts in Patent Cases,* published by the United States Government Printing Office, than does any other federal judge. In those years his standing among the approximately sixty federal judges, in terms of number of cases noted, rose as high as second (1876), and usually hovered around fourth (1877, 1878, 1879, 1885). He was in a ten-way tie for thirteenth place in 1880, but he was in fifth place in 1881, third in 1882, sixth in 1883, and seventh in 1884 and 1886. His patent cases were frequently

cited in contemporary patent treatises; in particular his *American Nicholson Pavement Company* case is cited fifteen times in O. Bump, *The Law of Patents, Trademarks and Copyrights* (1877), making it one of the most frequently cited cases in that treatise.

324. Princeton Seminary Necrological Report, 1890, at 13; Keasbey, *supra* note 27, 49–51, Parker, *John Thompson Nixon*, 13 Dictionary of American Biography, 531–532 (1934).
325. "Endurance" was the title and the main theme of his address at Princeton, note 37, *supra*.
326. 24 Fed. Cas. 382 (No. 14,269).
327. *Id.*, at 383. Emphasis added.
328. Text accompanying notes 173–251, *supra*.
329. This might be a late-century analogue to what Professor Freyer has described as the work of the early nineteenth century federal courts in homogenizing commercial jurisprudence. T. Freyer, *Forums of Order* (1979).
330. Keasbey, *supra* note 27, at 45.
331. UNIVERSITIES AND THEIR SONS, 1899.
332. PRINCETON SEMINARY NECROLOGICAL REPORT, 1890, at 12.
333. Lingle, Walter L., PRESBYTERIANS—THEIR HISTORY AND BELIEFS, 187 (1928).
334. *Id.*, at 191.
335. Shedd, William G.T., CALVINISM: PURE AND MIXED, 19 (1893).
336. 21 Fed. Rep. 398.
337. *Id.*, at 399.
338. See, *e.g.* text accompanying notes 61–64, 85–88, *supra*.
339. 21 Fed. Rep. at 399.
340. *Id.*, at 398.
341. THE PRESBYTERIAN DIGEST OF 1886, at 592. This condemnation of gambling went so far as to prohibit lotteries for "benevolent and religious objects". Id.
342. Nixon, "Sketch", *supra* note 44, at 41–42, emphasis added.
343. Sophocles, *Ajax*.

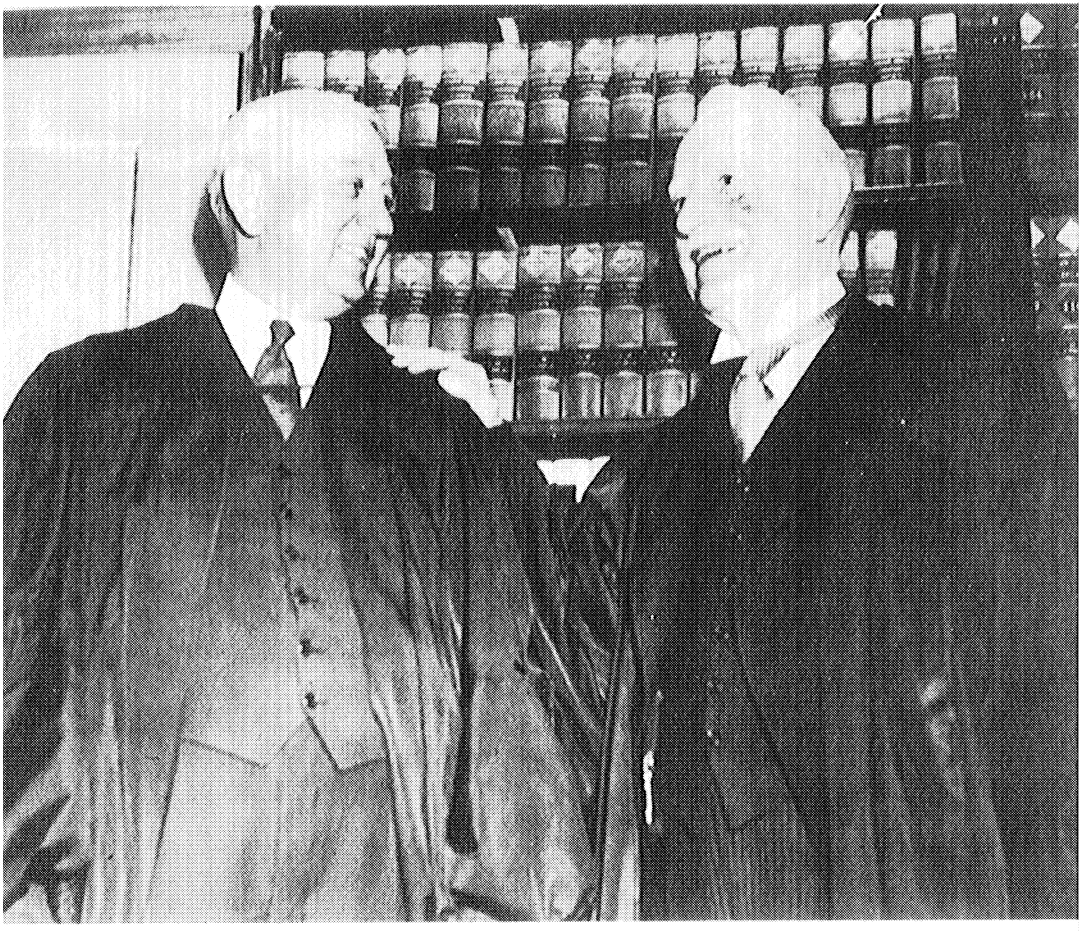


Photo from Historical Society of Pennsylvania

United States Circuit Judges for the Third Circuit J. Warren Davis and Joseph Buffington, whose decisions on matters of corporation law often reversed the delicate balance attempted by the Delaware District Court judges.

Adjusting to the Managerial Revolution: The Law of Corporations in the Federal Courts of Delaware 1900-1941

In Chapter Two we saw how the earliest federal judges, principally Richard Peters and Samuel Chase, went about responding to the changes in American society brought about by the American Revolution.[1] In particular, that chapter analyzed how the first federal judges of Pennsylvania confronted the perceived necessity for altering legal institutions in accordance with the dominant American political philosophy of popular sovereignty, and how the character of early American jurisprudence allowed them freedom to implement their own conceptions of the appropriate legal rules. In Chapter Three the principal concern was with one judge. John Thompson Nixon, District Court Judge of New Jersey from 1870–1889, who sought to respond to the increased litigation brought about by another "revolution", what has usually been referred to as our "Industrial Revolution", following the American Civil War.[2]

The subject of this chapter is related to that of the third, and is the manner in which the federal judges of Delaware and the Third Circuit's Court of Appeals dealt in the early twentieth century with the problem of American industrialization. The focus of this chapter is somewhat narrower than the others, however, since it is concerned simply with the doctrines of the law of corporations. Still, as we shall see, it appears that the several judges whose work is examined here were responding to yet a third "revolution", the "managerial revolution" in the American economy. As was true in the previous studies, the choices which the judges appear to have made between conflicting doctrines will be the primary interest. In what follows, the im-

portance of the corporation to the late nineteenth and early twentieth century American economy, and the attitudes of some of its critics will first be sketched, in order that the legal doctrines may be placed in context. This will be followed by some general comments on the regulatory and facilitating activities of the legislatures of two of the states of the Third Circuit, New Jersey and Delaware, which activities are also necessary to an understanding of the importance of the development of law in the federal courts. A final matter to be explored, before examining the decisions of the judges, is the character of the "managerial revolution" itself, which may have ultimately determined the climate in which the federal judges decided cases on corporate law. The remainder of this chapter will proceed to examine the backgrounds and the judicial opinions of the judges who sat on the bench of the Federal District Court for the District of Delaware during this period, Judges Bradford, Morris, and Nields, and the disposition of some of these cases on appeal to the Third Circuit Court of Appeals. We shall be particularly concerned with the appeals decided by, and the characteristics of, Circuit Judges Buffington and Davis. The thesis of the chapter is that while Bradford, Morris, and Nields sought to respond to the managerial revolution by striking a delicate balance between the needs for managerial autonomy and corporate democracy and legitimacy attempting to take account of both, the balance was often upset on appeal, and tipped toward the needs of the corporate managers. In the next chapter it will be suggested how the somewhat skewed nature of the decision-making by the Third Circuit Courts of Appeals in the early years of the twentieth century helped to determine the radically different nature of the operation of a dramatically changed United States Court of Appeals following still another revolution, the "Constitutional Revolution" of 1937.

I. *Towards the Modern Business Corporation*

In the early nineteenth century, most economic activity was carried on by single proprietors or by partnerships, while the use of the corporate form was usually reserved for specially chartered monopolies formed to conduct charitable or transportation activities, enterprises with a clear public interest. By 1930, however, 90 percent of all products manufactured in the United States were made by corporations, and by 1950 most of the key industries were dominated by large firms.[3] With the rise of the giant corporations, it has frequently been argued that the doctrines of corporate law ought to be used as a means of holding corporate decision-makers accountable to the public, or at least to all shareholders. These concerns were not absent during the formative period of our law of corporations, the late nineteenth and early twentieth centuries, but it appears that other purposes, for example the maximization of the autonomy of corporate managers, may have taken priority.

The modern corporation probably first flourished under the New Jersey Incorporations Act of 1896,[3a] but its greatest friend was to be the legislature of the state of Delaware.[3b] Both Delaware and New Jersey adopted a policy of minimum regulation of corporations, and firms were soon flocking to those states to incorporate. As a result, federal judges in the District of Delaware were to play an important role in the development of the modern corporation. With so many interstate disputes arising from the far-flung activities and policies of Delaware corporations, the federal judges' attitudes toward the corporate scheme created by the Delaware legislature in large part determined whether the legislative intent respecting corporations would be implemented.

One might have expected to find that the federal judges in Delaware shielded corporations from those who sought to restrain them. At the beginning of this century, according to Willard Hurst, "we treated the corporate instrument as so useful for desired economic growth as to warrant using law to make it available on terms most responsive to businessmen's needs or wishes."[4] Indeed, most Americans appeared to believe that growth and increased productivity were desirable social goals, and many believed that the large corporation was the best means of facilitating the mass production necessary for the attainment of those goals. The professional and familial ties of the federal judges in Delaware might also suggest that they would be amenable to "corporate" interests. Three federal district judges served Delaware in this period: Edward G. Bradford, Jr. (1897 to 1918), Hugh M. Morris (1919 to 1930), and John P. Nields (1930–1941). Judge Bradford was connected by marriage with the Du Ponts, the richest and most powerful family in Delaware, and the owners of E.I. Du Pont de Nemours Co., one of the leading manufacturing firms in the country. Judges Morris and Nields, before their appointments, pursued lucrative corporate law practices in Wilmington. Nields had once served as personal attorney for Pierre S. Du Pont, president of E.I. Du Pont de Nemours, and later of General Motors.

Nevertheless, federal district judges in Delaware frequently decided *against* corporate managers and majority stockholders, and in favor of aggrieved minority stockholders. These Delaware federal judges seem to have believed that part of their role was to make sure that traditional democratic ideals were not slighted, and they thus appear to have sought means to bring the operation of corporations into line with received American ideals: to "legitimize" the private exercise of power within the corporate framework.

To a certain extent, then, the Delaware judges appear to have believed their task to be to ensure that stockholders not be exploited by corrupt managers or by crafty "robber barons".[5] While a great many Americans in the early twentieth century might have seen economic salvation in the corporation, there were still many public figures continually expressing their fear that economic concentration, resulting in a few large firms controlling

entire industries, would crush individual initiative—nay, democracy itself.[6] In this atmosphere, the federal judges in Delaware appear to have sought to control the increased corporate autonomy created by the state's incorporation statutes by reviewing decision-making processes in the corporations and by guarding against the abuse of power by directors and majority shareholders. At the same time, however, the judges seem to have believed in the economic importance of corporations and thus were cautious in their reviewing function. It appears likely, however, that ultimately the jurisprudential activity of the judges, particularly the decisions on the appellate level, did more to facilitate the concentration of economic power in corporate managers, who soon came to determine the allocation of goods and services in the national economy.[7] Before studying this activity, however, it is important to understand the nature of the legislative scheme the judges were called upon to interpret.

II. *The Legislatures and the Corporations*

In the late nineteenth century, especially in transportation and manufacturing, corporations and "trusts" rapidly became the predominant form of economic organization, and were often able to drive smaller enterprises out of the market. Combinations, acquisitions, and mergers often allowed large firms to take advantage of economies of scale and lower prices to a point that made operation by smaller firms unprofitable. Some industrial magnates of this era were able to accumulate fabulous wealth, occasionally enough to extend loans to the federal government.[8] In the early years of this period, however, most corporations were subject to state regulation which limited capital stock, and allowed for continual judicial interference in corporate affairs. In Delaware, for example, an 1871 statute had fixed maximum and minimum levels of capital stock at $100,000 and $10,000.[9] Such limitations on levels of capital stock meant that there were no legal means by which corporations could merge into giant firms capable of dominating entire industries. Further, every state then required corporations to adhere closely to the business purposes set forth in their charters, thereby preventing corporate diversification and vertical integration.[10] Finally, the states did not allow corporations to amend the scheme of shareholder democracy mandated by law and by their charters, so that the corporate decision making processes were not necessarily adaptable to changing economic circumstances.[11]

Seeking the economic benefits of large-scale operations,[12] enterpreneurs such as John D. Rockefeller first attempted to circumvent state regulation over corporations by concentrating capital in unincorporated "trusts". This scheme, developed by the ingenious attorney Samuel C. T. Dodd in 1871 for Rockefeller's Standard Oil Company,[13] was an arrangement by which

several corporations put their properties under the control of a group of trustees, who then operated the enterprise in concert.[14] The trust avoided the pitfalls of corporate law, but the arrangement had weaknesses. If a number of corporations in the trust disagreed with the majority, they could leave the trust, causing a renewal of the costly competition that had brought about the formation of the trust in the first place. Further, the trust was endangered in 1890 when Congress passed the Sherman Antitrust Act.

Perceiving an opportunity for state gain, the legislature of New Jersey soon came to the rescue by enacting a series of new corporate statutes. These laws permitted unlimited capitalization and encouraged holding companies. They eliminated or greatly liberalized earlier laws which had imposed limits on corporate purpose and corporate life-times. Finally, by 1896, the revised New Jersey incorporation act's "self-determination clause" permitted corporations to amend their charters to modify, regulate or create corporate powers, so long as these amendments were not contrary to other provisions of state law.[15] In short, these revisions "turned corporate law inside out" by changing the long-standing rule that corporations could exercise only those powers expressly granted by the legislature.[16]

Many enterprises soon relocated in New Jersey, and incorporation fees began to supply a large part of government revenue. By 1902 New Jersey was able to abolish its property taxes; and by 1905 it had a $3 million surplus in its treasury.[17] Across the state line, Delaware was growing "gangrened with envy at the spectacle of the truck-patchers, sand-duners, and mosquito wafters of New Jersey getting all the money in the country into her coffers."[18] Thus, in 1899 Delaware enacted its own liberal incorporation statute, modelled on that of New Jersey.[19]

Even though Delaware sought to take advantage of the laws of competition and the market by charging a lower incorporation fee, Delaware's statutes initially attracted few corporations to the state, probably because potential incorporators were suspicious of what appeared to be Delaware's sudden "camp-meeting" conversion, and thus decided not to leave states where corporate policy had become stable.[20] This changed in 1913, when New Jersey's Governor Woodrow Wilson destroyed that state's popularity among incorporators by bringing about the enactment of laws decidedly unfavorable to corporate autonomy. Corporate regulation was a part of Wilson's general reform program, which covered everything from public utilities to high food prices.[21] Governor Wilson's attempts to circumscribe corporations reflected a still widespread hostility toward corporations in particular and the concentration of economic power in general. In his inaugural address, for example, Wilson promised to enact legislation that would "prevent the abuse of the privilege of incorporation which has in recent years brought so much discredit upon our State."[22] It was necessary, he believed "to prescribe methods by which the public shall be safeguarded against fraud, deception, extortion, and every abuse of its confidence." Corporate regulation, Wilson believed, was necessary to protect small stockholders and the public generally

from exploitation by corporate managers and others who had been "preying upon them."[23]

As New Jersey seemed to perform a complete reversal to demand greater corporate responsibility, Delaware became "the happy hunting ground of the corporate promoter."[24] The advantages accruing to Delaware from this situation were considerable. The revenue generated by the state's incorporating fees significantly eased the tax burden on its citizens, and from 1913 to 1934 franchise taxes and related fees contributed an average of 25% of Delaware's total state revenues.[25] Accordingly, the Delaware legislature, from time to time, amended its incorporation statutes further to facilitate corporate formation and to enlarge the range of corporate autonomy.[26] It has been generally concluded that under the new Delaware Corporation laws, ideas of corporate democracy were of secondary importance, as "the various amendments of the Delaware Act . . . tended to concentrate in the board of directors the exercise of powers which had heretofore required ratification by the stockholders."[27]

III. *The Context of Federal Judicial Interpretation of Delaware Corporation Law*

If the theories of an independent judiciary articulated by the framers of the federal court system have any validity, we should expect the judges of the federal courts in Delaware, who were called upon to interpret the corporation laws, to manifest a somewhat different perspective from that of the legislators who passed the statutes. As indicated, the legislators appear to have acted on the basis of a desire for the maximization of state revenue. We might expect to find that the judges would be interested in the goal of economic expansion for the state, but we would also expect the judges to be interested in maintaining other goals of the legal system, such as adherence to the principles of popular sovereignty or democracy. We might also expect the judges to be sensitive to the climate of public opinion which as Woodrow Wilson's victory in New Jersey indicated, could be hostile toward corporate autonomy. Finally, as men who had been involved in their legal practices with corporations, it seems likely that the judges would also be aware of, and sensitive to, the "managerial revolution" which was then occurring in the national economy.

As business historians have recently shown, this "managerial revolution" came about because of the fact that mass production had rendered many market mechanisms obsolete. A haphazard network of wholesalers found it difficult to distribute the increased number of manufactured goods. Supply often outran demand, and manufacturers came to recognize that market mechanisms too often brought cut-throat competition and rapidly falling prices.[28] The manufacturers eventually realized that, if mass production was to provide an adequate return on investment, they would have to remove both competitors and middlemen, and capture entire markets. By the

end of the nineteenth century, then, some manufacturers had taken advantage of the new legal climate to initiate programs of vertical integration, setting up their own distribution units and also buying out the producers of raw materials. They were then in a position to begin to buy out their competitors, and this resulted in the most pervasive merger movement this country has ever witnessed.[29] By the turn of the century entire industries were controlled by a handful of giant firms; firms so large that the original magnates and entrepreneurs could not operate them alone. The manufacturers thus hired thousands of managers to staff their vast and far-flung enterprises, and to create central committees, made up of department heads, to formulate the broad policies of the enterprise. According to Alfred D. Chandler,

> "By then the visible hand of management replaced the invisible hand of market forces in coordinating the flow from the suppliers of raw materials to the ultimate consumer."[30]

As managers acquired control over the day-to-day allocation of goods in the economy, it was they who acquired the knowledge and expertise necessary to plan the efficient functioning of business, and accordingly, they became more influential in corporate governance. By the late nineteenth century, in the larger corporations, there had begun to be noticeable an increased separation between control and ownership.[31] Eventually, with increasing levels of capitalization in the large corporations and the resultant diffusion of stock ownership, often no stockholder or group of stockholders could round up enough votes to defeat management in a proxy fight.[32] Stockholders at the corporations' annual meetings often simply ratified the decisions of the board of directors, and re-elected management's slate of directors. Following World War II, even where the legal "owners" were elected to the board of directors, "they [took] less and less part in the running of the business. Management consider[ed] them 'outsiders' and resent[ed] any 'interference' from them."[33]

By the beginning of the twentieth century several state and national institutions appear to have chosen to facilitate the concentration of power in management, thus establishing an enclave of corporate autonomy free from governmetal influence. The Supreme Court's interpretation of the Fourteenth Amendment to hold that a corporation is a "person" within the meaning of that Amendment, and its development of substantive Due Process, "substantially curbed the legitimacy of government regulation of corporate behavior."[34] Moreover, as we have seen, some of the states' liberalization of incorporation acts seems to have been designed to enhance the power of management, and to restrict the authority of stockholders.[35] Still, the facilitation of corporate management seems to have been undertaken in an atmosphere in which altruism was not absent. Government officials seem to have recognized the advantages of corporate autonomy to the productive capacity of the country. By the turn of the century, corporations were turning out 66 percent of the United States' manufactured output, and this figure rose to 87

percent by 1920.[36] According to Hurst, "no social goal was dearer to the late-nineteenth-century United States than increase of economic productivity [and] . . . the corporation . . . emerged as the principal instrument for organizing large business enterprise."[37]

Nevertheless, the federal district court judges in Delaware seem to have been cautious about enhancing corporate managerial autonomy. As we shall see, for the most part, they often tenaciously held management and directors to the standards of fiduciary duty that had been enforced prior to the incorporating statutes of the 1890's. They still sought to prevent majority shareholders from formulating corporate policy in ways that imposed disproportionate burdens on minority stockholders. They required corporations to adhere closely to charter provisions, and they refused to recognize corporate transactions that were not clearly authorized by state law.[38]

A number of reasons have been posited which might account for this continued judicial regulation. First of all, until relatively recently, courts changed directions in policy only through modest incremental steps over a long period of time; and, in spite of the abrupt changes in corporate law wrought by the Delaware legislature, federal judges in that state could thus have been expected to retain and apply the same principles of corporate responsibility set down in cases prior to the liberalization of the 1890's.[39] Second, it is possible that the judges may have felt that the state legislature, recognizing the prospect of state profit in corporate autonomy, "had abdicated its responsibilties as a lawmaker."[40] J. Willard Hurst has suggested that this legislative "abdication" left the courts, both state and federal, as the only effective means of monitoring corporate activities and preventing management from abusing its newly acquired power.[41]

In addition to pressures from institutional conservatism and legislative "abdication" of responsibility, the courts, as indicated earlier, may have sensed that a cautious attitude was appropriate because of the need to "legitimize" managerial autonomy in the eyes of both the public and corporate stockholders. This would have been an almost inescapable conclusion to any judges who followed the comments of popular and professional commentators. While many admitted the functional significance of the modern corporation (and thus of modern management) to mass production,[42] a number of public spokesmen from the 1890's to the 1930's decried the increasing economic and political power of corporations. Grover Cleveland, for example, in his 1896 inaugural address, charged that the trust relegated the common man "to the level of a mere appurtenance to a great machine, with little free will, with no duty but that of passive obediance."[43] Attorney Edward Keasbey, speaking in 1899 to the American Bar Association on the subject of New Jersey corporations, recognized "the undefined but very real fear on the part of the people of the growing power of wealth and of the concentration of the control of great industries in a few hands."[44] J. Bryce, writing *The American Commonwealth* in 1895, called the control of corporations "a political problem of the first magnitude."[45]

The most articulate attack against corporations came from William Cook's *The Corporation Problem,* written in 1893. Cook called the corporation "as perfect and heartless a money-making machine as the wit of man has ever devised."[46] He stated that:

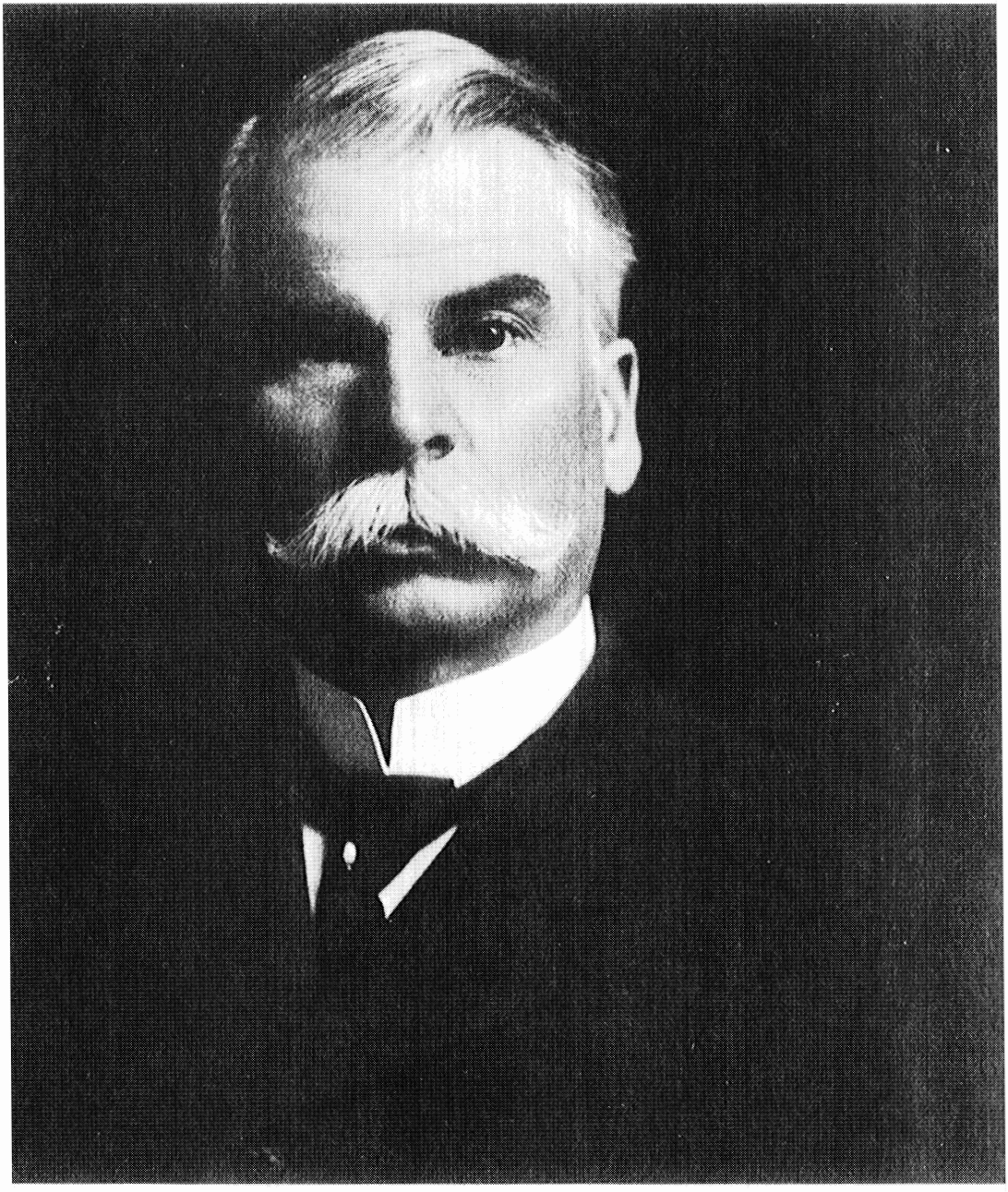
> . . . the control, the management, and the ownership of the great corporations of the land are to-day in the hands of the wealthy few. Plutocracy has appeared in a new guise, a new coat of mail—the corporation. The struggle of democracy against plutocracy—a struggle that is coming to the American people—will be between democracy and the corporation.[47]

Cook's solution to the problem was increased government regulation.[48]

On the federal level, at the close of the nineteenth century, at least, it appeared that efforts to regulate the corporation were underway. In 1887, public hostility against the railroads led to the Interstate Commerce Act; and in 1890, public fear of the power of trusts resulted in the Sherman Act. In 1903, President Roosevelt organized the Bureau of Corporations, which proceeded to investigate the Standard Oil and American Tobacco Trusts.[49] To a certain extent this attitude was shared by the United States Supreme Court. While the Court's first decision under the Antitrust Act severely undercut that measure by refusing to find that "manufacturing" was interstate commerce, and thus liable to federal regulation,[50] subsequent decisions opened the way for relatively rigorous enforcement of the Sherman Act's provisions.[51] In 1914 Congress created the Federal Trade Commission to guard against some illegal corporate activities.[52] Ultimately, of course, in 1934 Congress created the Securities and Exchange Commission to regulate the issuance of corporate stock and to prevent the erosion of stockholders' rights.[53]

Though there were these attempts at regulation, and though there were "devil" theories of the corporation and popular fears of its Leviathan-like power, it still appears that the public and the government's attitude toward corporations from the 1890's to the 1930's is best characterized as one of Janus-faced ambivalence. Government officials and public spokesmen knew, and sometimes maintained, that corporations facilitated the increased productivity which brought mass-produced consumer goods to the public, and some advocated corporate managerial autonomy so that productivity might continue. In spite of this, or perhaps as an inescapable corollary, many of these some persons characterized the corporation as a bloodless money-making monster, a menace to the common man, that would not only take away his livelihood, but would also corrupt his republic. In short, "the use Americans have made of the corporate device [was] strangely at odds with [their] historic mistrust of corporations and 'Big Business'.[54]

The federal judges in Delaware and elsewhere, then, can be seen to have had contradictory and somewhat irreconcilable responsibilities. First, they were required to make certain that the rights of all stockholders were protected against the abuse of power. The courts appear to have concluded that



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Edward G. Bradford Jr., United States District Court Judge for the district of Delaware, commissioned in 1897, whose moral indignation often reached the intensity of the "fire of Savanarola".

the protection of a stockholder's rights, especially his right to govern corporate policy by voting his stock, would best confer legitimacy on the corporate autonomy newly created by permissive legislative frameworks.[55] Only by maintaining some semblance of "democratic" shareholder control could the courts allay the "vague and indescribable dread and suspicion"[56] of corporate plutocracy that seemed to be gnawing at the public psyche.

It seems likely that the Delaware federal judges may also have realized that their reviewing of corporate decision-making, in an attempt to protect stockholder rights not only would encourage general public acceptance of corporations, but might also make stockholders less fearful of corporate relocation in Delaware, thereby generating more state revenues. When stockholders perceived that there was a judicial, if not a legislative, check against the infringement of their rights in Delaware, they may have reasoned, they would be more willing to vote in favor of relocation, so as to enjoy the advanages of corporate autonomy while avoiding the dangers. This would have been of particular importance during the years of competition with New Jersey. Moreover, the federal judges' regulation of corporate activities might sensibly have been believed to have enhanced the growth of corporate autonomy, because such growth ultimately depended on public and stockholder support which could be better obtained if the exercise of managerial power could be "legitimated."

Still, the federal judges had a second responsibility—to guard against being so zealous to protect shareholder democracy that they might fatally endanger managerial autonomy, and thus discourage incorporation. Perhaps sensing this responsibility, the judges generally refused to intervene in corporate activities when such intervention would have interfered substantially with the corporations' abilities to make business decisions. The conclusion from the judicial record of review of decisions on matters of corporate law appears thus to be that the judges refused to intervene unless the corporate activity complained of fell within narrow categories of fraud or wrongdoing.[57] This conclusion appears to hold true for the District Judges of Delaware, but, as will be seen below, even when the federal district judges in Delaware held management liable for violations of fiduciary duties, the court of Appeals for the Third Circuit often appeared to be so concerned with maximizing managerial autonomy that the District court's attempts to regulate corporations may have been futile.

IV. *Working Toward the Balance*

A brief review of the backgrounds of the District Judges suggests a personal dimension to the pressures of conflicting policies they were asked to resolve. Judges Morris and Nields had pursued successful corporate law practices, and both belonged to the Wilmington Club, the city's most prestigious business club, where they would have come in contact with corporate promoters or magnates. Furthermore, Judges Bradford and Nields were per-

sonally or professionally asociated with the Du Ponts, the state's leading commercial family. In short, it it likely that their personal and professional contacts made the judges well aware of the feelings of businessmen, and thus probably aware of the need for corporate autonomy. At the same time, however, each of the judges came from well established, respected Delaware families. Judge Bradford was the son of an accomplished Delaware judge and politician, Edward G. Bradford, was a direct descendant of the second governor of Plymouth Planatation, William Bradford, and was committed to historical research.[58] Judge Morris's family had been prominent in Delaware for six generations, and Judge Morris's law partner was a Democratic United States Senator from Delaware. Judge Nields was the son of a respected Wilmington attorney and Civil War hero, Colonel Benjamin Nields. It seems likely, then, that if these judges were closely tied to the new world of the great corporation, they were also sufficiently imbued with a sense of national history, political realities and family honor to make them aware of aspects of democratic ideals which might conceivably lead to their questioning the accumulation of power in corporations.

A. *Bradford and Thompson: Moral Indignation*

While Judge Bradford was connected to Delaware business through his marriage to Eleuthera Du Pont, he gave the impression of possessing such attentiveness and moral fibre that he would permit no one within his control to be remiss in their fiduciary duties. A state historian wrote that Bradford was "of a studious disposition,"[59] and John P. Nields, eulogizing Bradford in 1928, said that the judge's moral indignation often reached the intensity of the "fire of Savanarola."[60] Bradford had acted on his beliefs at the state constitutional convention in 1897, where he advocated measures to prevent corruption and bribery at elections.[61] Bradford was a vestryman in the Episcopal Church, and brought his notions of stern and uncomprising moral duty with him to the federal bench.[62]

1. *Jones v. Mutual Fidelity*

Perhaps the best example of Bradford's attitude toward corporate abuses comes in *Jones v. Mutual Fidelity Co.* (1903).[63] The defendant was a Delaware corporation which had sold "certificates of investment" to the plaintiffs, Tennessee residents. The certificates were vaguely worded, so that in the certificates, at least, the investors may actually have been promised nothing by the Delaware corporation. Still, Bradford was convinced that the certificates were "ambiguous, misleading and obscure, and so artfully worded as to prove a snare to the ignorant and unwary," that the defendant had engaged in "fraudulent representation," and that the defendant hatched a "disreputable and overreaching scheme," accomplished by "deception and illegitimate means" which held out the promise of "well-nigh impossible profits."[64] There

were two technical arguments, however, which in the hands of a judge disposed to deny relief could have enabled Bradford to dismiss the claims of the plaintiffs. First, none of the individual plaintiffs had claims which were large enough to meet the test of the $2000 requirement for federal diversity jurisdiction,[65] although the aggregate of their claims was greater than $2000.00. Second, the equitable remedy which plaintiffs sought—placing the insolvent defendant in receivership and ordering a pro-rata distribution of defendant's assets to its creditors, including the plaintiffs—though provided for in a Delaware statute by application to the Delaware Chancellor, was not expressly authorized as a proceeding in the Federal courts by any state or Federal statute.

Bradford disposed of the first problem, the jurisdictional amount issue, by stating that the test for the jurisdictional amount was not to be the plaintiffs' individual claims, but the amount of assets of the corporation that would be placed in receivership if plaintiffs succeeded. There appears to have been some lower federal court authority which supported Judge Bradford here, but there also appears to have been several holdings by the United States Supreme Court which suggested that his view of jurisdictional amount calculation was too liberal.[66]

The second problem, whether the Federal court could apply the state equitable receivership statute, was a more difficult hurdle for Judge Bradford, because the Supreme Court had explicitly stated, in *Hollins v. Brierfield Coal & Iron Co.* that where plaintiffs were unsecured creditors, whose claims had not yet been reduced to judgment (as was the case in *Jones*):

> It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the Federal courts cannot be obliterated by state legislation.[67]

Bradford dismissed this language, and perhaps the policy of strict construction of federal jurisdiction, with the observation that it was "mere obiter dictum."[68] Still, Judge Bradford seemed reluctant to disagree with the clear language of the Supreme Court, but he concluded that it would be an "absurdity"[69] to apply the Supreme Court's rule in a case where refusing the parties equitable relief in the federal court "would defeat and practically nullify the equitable right provided by [the state] statute."[70] It appears that Bradford chose to reject the Supreme Court's reasoning on this point, and instead to rely on broad principles such as "a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts,"[71] or "justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrified to mere questions of mode and form."[72]

Perhaps the most impressive judicial legerdemain in Bradford's opinion, however, was in the final few paragraphs, where he turned a case of fraud

which the plaintiffs might have had some difficulty proving into a case "on the common count in assumpsit for money had and received," where the standard of proof could probably be met simply by the plaintiffs' entering their certificates of investment into evidence. Specifically, Bradford observed that under Tennessee law a foreign corporation seeking to do business in the state was required to file a copy of its charter with the Tennessee secretary of state, and that failure so to file made it "unlawful for any foreign corporations to do . . . business in the state."[73] The Defendant had never made the requisite filing. This meant, Bradford held, that the transaction by which the 'certificates of investment" were sold to the plaintiffs was "unlawful," and this meant, in turn, that the plaintiffs, who Bradford said (without explanation) "were not chargeable with knowledge of the fact that the defendant had failed to comply with the requirements of the Tennessee statute," were "innocent parties to unlawful and void contracts."[74] In spite of the fact that the plaintiffs could hardly be called "innocent" in that they sought "impossible profits" through what amounted to illegal activity, Bradford declared that they were entitled to be treated as creditors, and to recover from the defendant "all moneys paid by them to it on account of the prohibited contracts," Bradford was able to cite a Supreme Court opinion and a treatise that mandated such treatment for "innocent" parties who had lost money under illegal contracts, but other than the plaintiffs' gullibility, avarice, and ignorance of the Tennessee statute, he offered no explanation of their innocence.[75]

It appears, then, that in *Jones* Bradford refused to follow relevant federal precedent, judically expanded the boundaries of federal jurisdiction, and used Tennessee state law as a pretext for granting relief where he believed a Delaware corporation had defrauded investors. Decisions such as *Jones,* Bradford might have reasonably believed, would tend to assure the public that the federal judiciary would take all means at its disposal to make certain that corporation conducted their activities in a manner consistent with not only the law, but with basic principles of fairness. It seems likely that Bradford's strong moral sensitivity[76] must have reacted to Mutual Fidelity's methods of extracting money from gullible and weak investors.

Similar indications of Judge Bradford's being willing vigilantly to act in cases of "fraudulent representation," "direputable schemes", or "deception" occur in several other corporations cases he decided. It appears, however, that Bradford generally required much evidence of wrongdoing before he would conclude that the conduct of the officers of a corporation ought to result in liability. In *Wright* v. *Barnard*,[76a] a case decided near the end of his term, for example, in justifying his decision to bind the company to liability for the misconduct of its Vice President and secretary-treasurer who held only a minority of its stock Bradford seemed careful to note that "It is difficult to conceive of a case more permeated with fraud than that now before this court," and further that "The evidence . . . has established to a moral certainty fraud and wrongdoing . . ."[76b] It is probably also of significance that in the *Wright* case the complainant was the company's "general manager"

who had been promised a share of ownership of the corporation if he would agree to continue in his successful managerial role for the enterprise. The other officers of the company, while taking advantage of the complainant's services, had fraudulently failed to carry out their promises to him to see that the company was reorganized in a manner which would have permitted him to own shares. In the *Wright,* case, then, by finding the company liable, Judge Bradford was actually rewarding one who had demonstrated an ability to exercise managerial skill, which, as has been suggested, was among the dominant values involved in striking the delicate balance between corporate autonomy and corporate accountability, which seems to have been the task of the District court in corporations cases. Normally limiting the liability of a corporation and its officers in the case of exercises of managerial discretion resulted in encouraging that discretion, but where, as here, the primary manager of the company was the one who sought compensation for fraud, and where the evidence seemed clear it must have been easy to strike the balance in a manner to afford him relief.

One other case in the last year of Judge Bradford's service underscores the commitment of his court to facilitating the development of corporate enterprise, through the protection of productive individuals, even if it meant subjecting others in their corporations to liability. In *Beltz v. Great Western Lead Mfg. Co. et. al.,*[76c] Judge Bradford was presented with another case involving a manager, this time a mining superintendent, who sought relief against the corporation for which he had served. This time there was apparently no fraud involved, but there was a failure on the part of several individuals involved in the corporation to carry through a contractural promise to deliver one fifth of the capital stock of the corporation in return for the complainant's delivery of all the capital stock in a predecessor corporation. The complainant had invested considerable time and money in the old corporation, bringing a deposit of ore nearly to the stage where it would yield profitable results. The complainant, the court observed, was a man "of but little education," suggesting that this might account for the "inconsistencies and discrepancies on minor points," in his testimony. Taking account of how the individual defendants had actually allowed many others to profit from the initial success of the company, and how poorly the complainant seemed to have fared at the hands of the new corporation, however, Bradford declared that "it is against the dictates of self-interest and the known rules of human conduct that after acquiring the mining lease and turning it over to the [new] company in consideration of which its total capital stock was issued, he should . . . have intended or contemplated that [the stock] would be so manipulated as to produce the grotesque result the defendants seek to justify."[76d] The new corporation had, in the meantime, gone into bankruptcy, but Bradford proceeded to hold four individual defendants, who had been the founders of the new corporation along with the complainant, personally liable for the failure to deliver stock to defendant as per their agreement resulting in the incorporation of the new

company. Bradford appears to have given the complainant the benefit of the doubt in resolving some inconsistencies in the testimony, and it seems likely, given his expressed views in the two cases considered earlier, that the initiative and expense undertaken by the complainant as a manager for the company and the likelihood of the lapse of moral duties manifested in the defendants breach of contract played a role in his decision.

There is evidence in other opinions of Bradford's, however, that he was less inclined to grant relief in the case of non-managerial shareholders or of creditors who sought relief against corporate officials when there was no clearly-proved fraud or strong evidence of deception involved. In *Sellman* v. *German Union Fire Insurance Co.* of Baltimore,[76e] for example, Judge Bradford was asked, in his role as an equity judge, to appoint a receiver for a corporation, and to direct the receiver to wind up the corporations' affairs, distribute assets, and restrain the defendant's officers from interfering with the grant of such relief. The plaintiffs were several stockholders and creditors of the company who asked for such relief on the grounds that the company's board of directors had so disregarded the rights of the stockholders and creditors as to bring "such peril to the corporation" that the drastic relief they called for was necessary. Bradford observed that there were "many authorities" which stated that "where the facts clearly disclose such fraudulent or wrongful management of its business and affairs as to produce a conviction that further control of the corporation by its board would result in the destruction of its business or create a great and unnecessary loss to its creditors and stockholders" relief of the sort sought by the plaintiffs might be granted. In the case at bar, however, Bradford was indisposed to grant such relief. This was because "the stockholders are by no means unanimous on the question of the wisdom or propriety of the relief sought by the bill," and "in the case of a corporation which is a solvent and going concern the proofs must be clear and convincing to justify the winding up of its business and affairs."[76f] Stating what seems to have been the assumption of Delaware law that a strong presumption of legitimacy was to be accorded by Delaware law to the acts of managers, or at least to the acts of the Board of Directors of corporations, Bradford observed that "The board of directors of a corporation is charged by law with the control of its business and affairs; and when the law making power had declared that the business and affairs of a corporation, created and organized under that power, shall be directed by its board, it ill-becomes courts created for the administration of law, unless under special and peculiar circumstances, to declare that its business and affairs shall not be directed by such a board."[76g] Thus, though Bradford would be moved to intervene in corporate affairs where his stern morality became aroused, he appears to have tried to balance any inclination to intervene by attentiveness to the policies which he could discern behind the Delaware incorporation act, policies which dictated a maximum of autonomy for the managers of corporations. Still, when Bradford felt compelled to act, as the *Jones* and *Beltz* cases demonstrate, he was somehow able to brush aside conflicting legal doc-

trines or to dispel doubts about the evidence in a manner which appears to have satisfied his conscience.

2. *Du Pont* v. *Du Pont*

The moral indignation which Bradford may have shown in some cases was also evident in the resolution of *Du Pont* v. *Du Pont* (1916),[77] decided by the Eastern District of Pennsylvania's Judge J. Whitaker Thompson, rather than by Bradford, because Bradford had connections by marriage to both sides in the dispute. The *Du Pont* case arose from the efforts of Pierre S. Du Pont to assume control of E.I. Du Pont de Nemours & Company and to diminish the influence of his cousins Alfred and William. This controversy was one of the most important events in the career of Pierre S. Du Pont, as he began to develop his plans to transform the Du Pont company from a relatively small gunpowder company into one of the world's great industrial giants. Pierre was a pioneer in the emerging business arts of vertical integration and financial management, and his efforts on behalf of Du Pont have been characterized as of fundamental importance in bringing about the "managerial revolution" which ensured the hegemony of American business in the mid-twentieth century. The *Du Pont* case, then, was crucial in the development of the modern corporation, and may thus have been the most important corporations case decided by the Delaware Federaal courts during this period. It thus deserves treatment in some detail,[78] even though the Judge involved at the district court level, Thompson, was not one of the three who are most important to this analysis. Still, the views articulated by Thompson, in their preoccupation with moral and fiduciary duties bear a strong resemblance to those of Judge Bradford. Furthermore the reaction of the Court of Appeals to Thompson's opinion, which will be considered shortly, appears to be of a piece with the treatment of several other opinions by the "permanent" district court judges of Delaware. It seems fair, then, to include this case of Thompson's in the data to be examined in reaching general conclusions about the development of the doctrines of corporation law in general and the interaction of the district and appeals courts in particular.

(a) *Background*

The *Du Pont* litigation arose because of the manner in which Pierre S. Du Pont acquired control of the company. The key act by Pierre was the formation of a holding company and the purchase of 63,000 shares of Du Pont stock from Pierre's cousin, T. Coleman Du Pont. This stock was the largest single block of stock in the Company. At that time the next two largest holdings had been those of Pierre himself, and of another cousin, Alfred Du Pont. Before the holding company's purchase of Coleman's shares, Pierre, Alfred and Coleman had held the Company's highest executive positions. In late 1914, however, Coleman was in need of liquid assets to enable him to

J. Whitaker Thompson, United States Judge of the Eastern District of Pennsylvania, who presided over the trial of *Du Pont v. Du Pont*, 1916.

purchase New York real estate, and to pursue political ambitions. Accordingly, he offered to sell 20,000 shares of his common stock to the Company at a price of $160 per share. When communicating his offer to Pierre, who was then acting for the Company, Coleman stated that he believed the stock to be worth at least $200 per share, because of the profits the Company could expect to reap from gunpowder sales to the Allied nations then fighting the World War. The apparent generosity of Coleman's offer, in light of the value he placed on the stock, was a result of his expectation that the stock would be resold by the company, under favorable terms, to some of the junior executives of the company. The activities of these young executives had already resulted in great profit to Coleman and the other Du Ponts, and he felt them deserving of this consideration.

Pierre relayed Coleman's offer to the Company's finance committee—which then included Pierre, Alfred, and still another cousin, William Du Pont. Alfred appears to have been more pessimistic about the company's immediate prospects then was Coleman, and while he believed that the purchase for resale to the executives was a sound plan, he believed that a counter-offer should be made to Coleman of $125 per share. When the finance committee voted whether to accept Coleman's offer, William sided with Alfred. Pierre voted to accept Coleman's $160 offer. According to Alfred's and William's testimony at trial, the finance committee understood that Pierre would continue negotiations on price with Coleman. The minutes of the finance committee, however, signed by all the parties, simply stated that Pierre was directed to inform Coleman that "we do not feel justified in paying more than $125 per share for this stock."[79] Six days later, however, the report of the finance committee presented to the company's board of directors stated that "The committee expressed the feeling that we are not justified in paying more than $125 per share for the stock *and asked Mr. P.S. Du Pont to take the matter up with Mr. T.C. Du Pont further.*"[80] The evidence on whether or not Pierre was expected to continue to act on behalf of the finance committee once he had communicated the finance committee's rejection of Coleman's offer was thus contradictory. The minutes of the Finance committee suggest a clear rejection, and a limited duty simply to communicate this rejection to Coleman, but the report to the Board of Directors suggests a duty imposed on Pierre to continue negotiations.

Pierre did communicate the finance committee's rejection of the $160 offer to Coleman's attorney, but he apparently did not suggest that the committee's $125 counter-offer meant that the committee contemplated continued negotiations. Pierre proceeded to combine with a number of his associates to form a holding company (Du Pont Securities) which eventually reached agreement with Coleman for the purchase of *all* of his stock—63,000 shares of common and 14,000 shares of preferred—at a price of $200 per share for the common stock. The holding company then borrowed more than $8.5 million in a loan from several banks brokered by J.P. Morgan & Co., and the holding company put a substantial portion of Coleman's stock up as collateral for the

loan. Soon after the purchase was made public, Philip Du Pont, a Pennsylvania cousin, filed suit in federal court, asking that an injunction be issued requiring that the holding company offer Coleman's stock to the Du Pont Company on the grounds that (a) Pierre had deceived both Coleman and the finance committee in a plot to obtain possession of Coleman's stock and control of the Du Pont company for himself, and (b) Pierre and the others had wrongfully used his position as vice president of the Du Pont Company to secure the multi-million dollar loan needed to purchase Coleman's stock. Philip may have been acting at Alfred's direction. In any event, he was soon joined by Alfred as a plaintiff.

(b) *Du Pont v. Du Pont*—I

The first issue that resulted in an opinion in the *Du Pont* case[81] was a matter of discovery. In an attempt to show that Pierre and his associates had used their executive positions at Du Pont to secure the $8.5 million dollar loan, plaintiffs Philip and Alfred Du Pont petitioned Judge Thompson to order Pierre to answer interrogatories concerning all the bank deposits the Du Pont Company had made following the loan. Phillip and Alfred maintained that they could show that Pierre and associates had directed the Company's funds to the banks that had participated in the loan. Judge Thompson dismissed the petition because the "mass of details" sought by the plaintiffs was "undoubtedly calculated to burden, oppress, and harass the corporation defendant."[82] The interrogatories appear to have been broadly drafted, and were not restricted to matters involving the banks that had participated in the loan, but rather sought information concerning all banks holding Du Pont funds. Here, of course, Judge Thompson had to make the usual decision which faces a judge in discovery proceedings, that is, how to determine the appropriate balance to be struck between relevancy and materiality on the one hand and of burdensomeness on the other. Perhaps one cannot make too much of this relatively routine discovery decision, but perhaps it does not go too far to infer from Thompson's insistence on narrowly drawn interrogatories that, as may also be implied from Bradford's opinions, he recognized the need to protect corporate management from undue harassment from dissatisfied stockholders.

In any event, it may be that Thompson's decree was prompted by concern more for Du Pont's banks than for Du Pont itself. Thompson stated that the decree was necessary to protect "banking institutions in no way connected with the cause, from being unduly oppressed and harassed by unnecessarily disclosing their intimate business affairs."[83] Moreover, Thompson seemed prepared to allow Philip and Alfred something of a fishing expedition, as he held that since the plaintiffs were suing on behalf of the Company in a derivative action, they were entitled to inspect the Company's books and records to establish "any fact material to the cause."[84] In this discovery context, then, it does appear that Thompson was attempting to strike a balance beween the

needs for managerial autonomy and corporate legitimacy: he seemed to want to protect Du Pont's and the banks' corporate privacy as much as possible, but not at the expense of imposing so many procedural barriers in the way of the plaintiffs as to make it impossible for them to prove a manager's abuse of power. Thompson believed that by allowing examination of the books he would be permitting the plaintiffs enough leeway to find evidence (if it existed) to support their allegations that (1) Pierre and his associates had used their corporate positions to "reward" banks which loaned them the money to purchase Coleman's stock, and (2) that contrary to the claims of Pierre, the company had in its treasury money sufficient to have purchased Coleman's stock itself.

(c) *Du Pont v. Du Pont*—II

Thompson sought to strike a similar balance when he finally ruled upon the merits of the case.[85] He first appeared to move in the direction of implementing "corporate legitimacy" by holding Pierre to the strict duty of fiduciary. A corporate officer's fiduciary duty. Thompson stated, "requires him to exercise the utmost good faith in managing the business affairs of the company with a view to promote not his own interests, but the common interests, and he cannot directly or indirectly derive any personal benefit or advantage by reason of his position distinct from the coshareholders."[86] If the officer obtained any personal advantage in a transaction where his personal interest was in conflict with the corporation's interest, said Thompson, "the law holds the transaction constructively fraudulent and voidable at the election of the corporation."[87] Thompson's comments on the fiduciary duties of corporate officers were to make this a leading opinion of corporation law.

Applying his fiduciary standard to Pierre's conduct, Thompson held that Pierre had breached his duties, first by failing to inform the finance committee of Coleman's belief that the stock he was offering for $160 was worth $200, and second, by failing to keep negotiations going with Coleman by informing him that the finance committee did not wish to shut off negotiations with its $125 counter-offer. With regard to Coleman's opinion of the worth of the stock, Thompson apparently believed that an officer such as Pierre was under a duty of full disclosure of all facts which might inure to the benefit of the corporation, and Thompson must have believed that if all of the members of the corporation's finance committee knew of Coleman's optimistic evaluation of company prospects, they might have voted to buy the shares at $160. It appears, however, that to hold Pierre to such a duty of disclosure was seriously to put form over substance, since the other members of the finance committee were fully aware of the prospect of profits arising from the Company's war contracts on which Coleman had based his optimistic evaluation. Evaluating the same information, it was clear that Alfred, and by implication, William, still believed the stock only to be worth $125.[88] Judge Thompson did have more of a basis for his holding that Pierre was under a duty to con-

tinue negotiations, namely the language of the finance committee's report to the Directors which stated that Pierre was directed "to take the matter up with Mr. T.C. Du Pont further," after communicating the $125 counter-offer.[89] Still, Thompson had to dismiss as incomplete the minutes of the finance committee's December 24 meeting, which minutes were signed by all of the members, and which minutes suggest that Pierre was not under a duty to continue negotiations.[90] On the existence of Pierre's duty to continue negotiating, then, there was an adequate factual basis to reach a conclusion either way. It seems fair to speculate that Thompson's interest in imposing high standards on corporate directors tipped the balance,[90a] especially in light of the holding on the "disclosure of Coleman's reasoning" issue.

Thompson also proceeded to hold that Pierre had fraudulently used his position at the Company to secure the $8.5 million loan—in spite of the testimony of several bank presidents that they had participated in the loan simply because of the *personal* worth of the participants in the holding company and the value of the collateral offered. In the course of his opinion, in effect, Thompson found Pierre a man without principle, who was prepared to sacrifice his relatives to acquire control of the Du Pont Company.[91] Thompson then held that the Company, if it so desired, should be permitted to purchase Coleman's stock from Du Pont Securities at the price of $200 per share.

Thompson's formulation of a demanding standard of fiduciary care, his strict application of that standard against Pierre, and his denunciation of Pierre's conduct might have been calculated, like Bradford's opinion in *Jones* v. *Mutual Fidelity Co.*, to demonstrate to the public that the federal district court would unflinchingly intervene in corporate decision-making when confronted with clear evidence of wrongdoing committed by corporate officers. In addition, Thompson suggested that he would not water down the standard of fiduciary care through exceptions or narrow interpretations, but rather would hold constructively fraudulent any benefit accruing to an officer in a conflict-of-interest situation. Thompson's fervency against the abuse of power in *Du Pont* thus can be taken to have promoted the legitimacy of corporate autonomy by demonstrating to the public that, notwithstanding liberalized incorporation statutes, the federal courts stood ready to prevent officers from reaping personal profits at the expense of stockholders.[91a]

Though Thompson thus sought to enhance corporate legitimacy by formulating a demanding standard of fiduciary care, he still managed somewhat to enhance corporate autonomy by broadly construing the power given to Du Pont in its charter.[91b] Such a broad construction of corporate powers was necessary if Thompson was to hold Pierre accountable for his conduct. This was because Pierre had defended his holding company's purchase of Coleman's stock, *inter alia*, on the ground that Du Pont did not have sufficient capital surplus on hand lawfully to purchase Coleman's stock. When Pierre had been confronted by his cousin Alfred regarding Pierre's holding company's purchase of Coleman's stock, Alfred had demanded that Pierre offer

the stock to the company. Pierre at first refused, but then thought better of it, and offered the stock, at the $200 cost to his syndicate, to the corporation, at a meeting of the board of directors, held March 6, 1915. Counsel to the corporation, John P. Laffey, then advised the board that the stock purchase would be illegal, because there was not enough capital surplus to cover it. There is nothing to suggest that Laffey did not believe in the legal advice he offered, although it was clear that Laffey was acting on Pierre's instructions. Four days later the Board rejected Pierre's offer, and before adjournment, elected Laffey a director.[92]

Perhaps Judge Thompson believed that Laffey's advice was not free from self-interest, then, and Thompson clearly disagreed with Laffey's and Pierre's construction of the company's charter provision. He held that the provision cited did not "exclude the use of other funds of the company in making such purchases."[93] So long as the Company did not diminish its liquid assets to the point where its creditors were endangered, Thompson said, it could have used any liquid assets on hand to purchase Coleman's stock. Since the Company's current liquid assets exceeded $33 million, Thompson found that it had "ample assets on hand out of which it could lawfully have paid for the stock without depleting its paid-in-capital."[94] Thompson cited no authority to support his conclusion, reached implicitly, that Pierre and the corporation's Board could not rely on the construction of the difficult legal question reached by the corporation's counsel, Mr. Laffey. Perhaps sensitive to this difficulty, and to the possible charge that he acted on the basis of a perception that Laffey was not rendering impartial objective advice, Thompson finally decided to limit his intervention in Du Pont's decision-making to the measures least intrusive of corporate autonomy. Plaintiffs Philip and Alfred had requested Thompson to order the immediate sale of Coleman's stock to the Company without the formality of a stockholders' vote authorizing the Company to purchase the stock. Since Pierre's holding company would have had to account for the spectacular dividends it had earned on Coleman's stock, Du Pont would then have been in a position to use those dividends to purchase Coleman's stock without expending any of its own assets. Furthermore, the sale would have been an extremely profitable bargain for Du Pont: the Company could have acquired the stock at a court-ordered rate of $200 per share, at a time when the company's wartime activities had raised the market price to $900 per share. No stockholder in his right mind, Philip and Alfred argued, would reject such a bargain. Consequently, they urged Thompson there was no need to take the matter up with the stockholders; rather, they prayed that Thompson simply order that the transfer of stock take place.[95]

Judge Thompson, however, refused to order the transfer of stock without a stockholder's vote on the ground that "that question of business policy is not one for the determination of the court."[96] Even though it was "a foregone conclusion that its acquisition would be of enormous profit to the company,"[97] the stock had to remain the possession of Pierre's holding company for the time being because Thompson refused to substitute his judgment for that of

the corporation in a matter of business policy. Thompson realized that such a decision normally should have been made by the Board of Directors of Du Pont, but since the Board was then controlled by Pierre, and since a majority of the Board had an interest in Coleman's stock through its participation in Du Pont Securities Co., Thompson ordered that the shareholders vote. To guarantee further the fairness of the procedure, Thompson ordered that a special master supervise the vote whether to purchase Coleman's stock. In addition, Thompson barred Pierre from voting the shares purchased from Coleman, though Pierre was allowed to vote his own substantial block of stock.[98]

(d) *The aftermath*

Pierre appears to have been deeply hurt by Thompson's assertions that he had committed fraud and breached his fiduciary duties. To demonstrate that he sought little profit for himself from his participation in Coleman's sale of stock, Pierre promised that if the shareholders' vote went against him, he would compensate his colleagues in the Du Pont Securities company for the loss of their shares by transferring to them stock from his personal original holdings in Du Pont. Since these associates were the managers who had so dramatically increased the company's earnings, Pierre believed that they deserved to be so compensated. Whatever the eventual outcome turned out to be, for a while Pierre appears to have believed that he might have lost the crucial shareholder vote, because of the allegations of fraud against him, and because of some other possible legal battles.[99]

Still, Pierre won the shareholder's vote 312,587 to 157,959. Judge Thompson then refused to reverse the stockholders' decision, in spite of allegations that Pierre or his associates had unduly influenced a number of stockholders. "The question of influence exerted upon other stockholders," Thompson stated, "would involve an inquiry by the court into the motives which actuated each stockholder in depositing his vote, which is beyond the power or policy of the courts to pursue."[100]

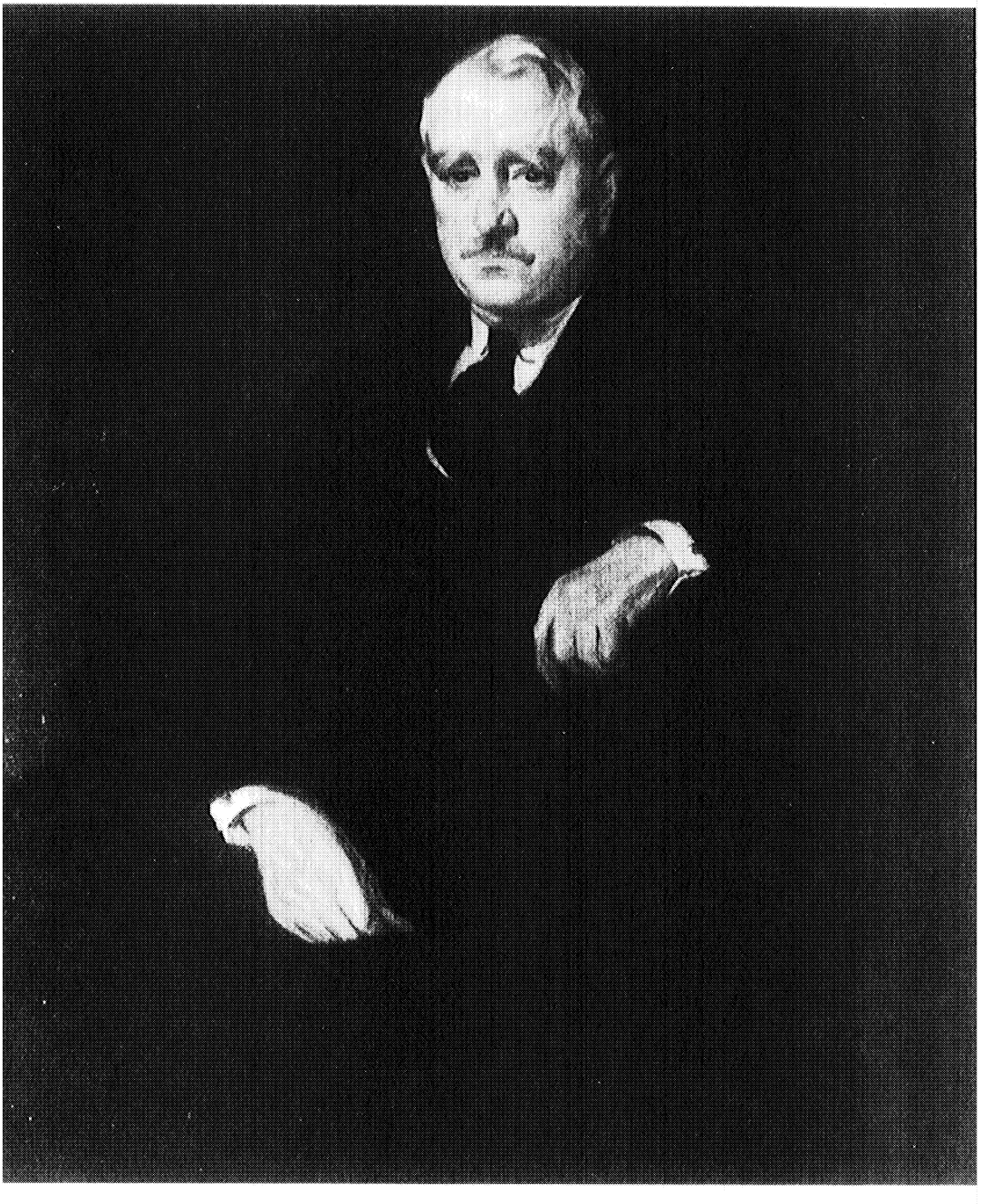
Thompson's refusal to overrule the stockholders where they had implicitly approved what he had decreed to be an abuse of power by one of Du Pont's executives indicates the high premium that even he placed on maximum freedom for the exercise of corporate business judgements. In particular, Thompson stated that a reasonable shareholder might have wished to vote in accordance with Pierre's desires in order to keep him, and the same management team that had recently done so well, in control.

Taken together, then, Thompson's three *Du Pont* decisions do seem to have been an attempt to strike an appropriate balance between legitimacy and autonomy: Thompson served the legitimizing function by formulating a strict fiduciary duty and finding Pierre guilty of fraud, but he preserved corporate autonomy even while ostensibly implementing shareholder democracy by leaving it up to the shareholders of Du Pont, if they desired, to rectify the results of Pierre's wrongdoing.

(e) *In the Court of Appeals*

After losing the shareholder vote, Alfred and Philip took their case to the Third Circuit's Court of Appeals,[101] contending that Judge Thompson had erred in failing to order the immediate transfer of Coleman's stock to the Du Pont Company, without a stockholder vote. Judge Joseph Buffington, delivering the Court of Appeals's opinion, not only held that the shareholders' decision not to purchase Coleman's stock was a matter of business policy beyond the judiciary's purview, but extensively reevaluated the facts, and declared that Pierre had not violated any of his fiduciary duties in participating in the acquisition of Coleman's stock. Buffington held that Pierre was not under a continuing duty to negotiate with Coleman on behalf of the company for the purchase of Coleman's stock, as the finance committee had decisively rejected Coleman's offer. In order to reach this conclusion, of course, Buffington relied on Pierre's interpretation of finance committee events, and relied on the text of the finance committee's minutes. It seems worth noting that Judge Thompson had drawn an opposite inference as to the facts, and that Buffington gave no explanation of his assumption of authority to rule on the factual question that was Thompson's province as the trial court judge. Further, Buffington minimized the importance of the Finance Committee's report to the board of directors,[102] suggesting opaquely that the language that directed Pierre to "take the matter up with Mr. Du Pont further," was simply a "courteous way" of directing Pierre to reject "what Coleman regarded as a generous offer."[103]

Buffington's relatively narrow interpretation of Pierre's duties as a DuPont executive, and his repeated assertions that Pierre was guilty of no fraud suggest that Buffington favored the enlargement of management's discretion beyond that range established by Judge Thompson. Thompson had held that any personal benefit reaped by managers was constructively fraudulent, but Buffington, in effect, held that managers could actively pursue their own interests. Buffington appears to have acknowledged that the instructions given to Pierre by the finance committee were vague and that they might have been able to be construed, in the way Phillip and Alfred suggested, to have placed Pierre under a continuing duty to act for the Committee, and not for his own account. Still, Buffington urged that since the instructions *were* vague, and since the other members of the finance committee (who differed in interpretation of the instructions from Pierre) had several opportunities to reaffirm his agency on behalf of the finance committee, and chose not to do so, Pierre was justified in believing that his agency to negotiate on behalf of the company was at an end, and he could proceed to act on his own initiative and in his own interest.[104] Buffington's understanding of the role of directors seems consistent with human nature, as he understood the difficulty of proceeding under vague instructions, but Buffington's construction of the duty of corporate fiduciaries seems to have departed from what is now said to be the usual standard in corporate opportunity cases. In Judge Cardozo's words, which in



United States Circuit Judge Joseph Buffington, official portrait.

content, if not in phrasing are close to the sentiments of Judge Thompson, such fiduciaries are to held "to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is [for them] the standard of behavior."[105] What might explain this departure of Judge Buffington's from what has come to be the usual, albeit unrealistic, standard?

Judge Joseph Buffington was a fascinating figure. Well known before and during the first World War for his speeches to the European immigrants to Pennsylvania, Buffington seems to have relished his duty to lecture the foreign-born on the duties of American citizenship. Most often in Buffington's statements these duties included sobriety, obedience to the law, and acceptance of existing American socio-economic conditions. In 1919, Buffington told a group of new American citizens that "the man who is always kicking about the Government is a domestic enemy, and you should avoid him."[106]

At this time he made aliens going through the naturalization process recite a special oath which he had composed that they were neither anarchists nor polygamists.[107] He appears also to have been particularly wary of "Bolshevism."[108] For Buffington there was no need for social reform. "Law and order and love of country sum up our needs,"[109] he stated in 1919. As a proponent of "law and order," Buffington was nearly unmatched. He called for "stern, unflinching and vigorous suppression of mob rule,"[110] and he recommended the whipping post for repeat offenders because "a professional criminal who is punished by such an institution as the whipping post is not only punished in his eyes but loses caste with his fellow-criminals."[111] In 1933, with the close of Prohibition and the advent of the bank "holiday," Buffington told his immigrants, "Don't be like some of the younger generation who think it smart to drink a cocktail;" and "Don't be frightened by what has happened in recent days about banks. There are many, many honest banks and bankers who will take care of your money."[112]

Judge Buffington, as a good Republican, as a good Episcopalian, and as a man prominent in Philadelphia social circles, may have believed that it would be best for the country to have a relatively submissive working class, and orderly development of the American economic system.[113] A few years earlier, in an opinion in which he declined to hold that the activities of United States Steel violated the Sherman Antitrust Act, Buffington had made clear his concurrence in the views that "Success and magnitude of buisness, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress." He appeared to agree with the characterization of a government witness who commented on the "magnificent" and "wonderful" organization which resulted in specialization of the managers of the international operations of United States Steel, he noted approvingly the domestic benefits to be gained by the foreign operations of the company, and he concluded that the company's success was not due to a conspiracy in restraint of trade but rather to the company's inspired integration of operations and "economy of management."[113a] Perhaps Buffing-

ton's decision in the *Du Pont* case also illustrates a sympathy for managerial interests, and his faith that economic affairs could safely be entrusted to corporate managers. The different interpretations of the facts and law of the district court and the Court of Appeals in respect to an officer's fiduciary duty to the corporation might thus have arisen from the judges' divergent attitudes toward the concentration of corporate power in managers.

It seems that Judge Thompson may have been trying to establish some basic mechanisms of stockholder democracy without interfering too seriously with corporate autonomy, and it seems likely that he was writing with the general public audience in mind. On the other hand, it appears likely that Judge Buffiington's opinion, his long summary of all the facts, and his interpretation consistently favorable to Pierre was designed for a somewhat different audience, the corporate managers. Perhaps Buffington wished to reassure them that where they believed themselves to be acting in good faith in the best interests of their companies, the federal courts would not hamstring them. It seems that Buffington was most impressed by the fact that though Pierre executed his scheme to seize personal control of the company, and removed some of his relatives from influential positions, he did so because he believed that the situation of the company demanded it. There was some testimony in the case that was clearly supportive of this view, although that testimony does not appear to have weighed heavily with Judge Thompson.[114] Buffington suggested that his holding (and his facual interpretation) was influenced by other factors passed over by Thompson as well, for example that Pierre believed it necessary to relieve Coleman of his stockholdings because there was a possibility that Coleman's debt would lead to possession of his stock by pro-German interests, and that rumors circulating to that effect were already threatening to result in the loss of orders and profits for the company.[115] Buffington appears also to have been impressed that Pierre, through participation in the holding company, used Coleman's stock in a manner that rewarded some of the junior officers at Du Pont, men whom the company felt it needed to encourage because of their great productivity. The importance of such a system of rewarding achievement, and the great success of the Du Pont company in supplying essential war material to the allies in World War I were matters of grave significance for the highly patriotic Buffington. Finally, it is probable that Buffington may have been influenced by T. Coleman Du Pont's letter to the Du Pont directors and stockholders, written on May 11, 1917, shortly after Judge Thompson's opinion ordering a stockholder meeting, in which Coleman claimed that Pierre fully apprised him of the attitude of the finance committee, that the statements of the plaintiffs' attornies to the contrary were "entirely unwarranted and are untrue in every particular," that he never intended to offer more stock to the company than he did in his original [rejected offer], and that "the stockholders should know directly from [him] that [he believed] that they have no right or interest whatever in the stock which [he] formerly owned. . . ."[116] If Buffington enlarged the ambit of corporate managerial autonomy to legitimize Pierre's actions, it

seems understandable, and, given the circumstances of the company, perhaps not undesirable.

B. *Judge Morris: Maintaining the Balance*

Notwithstanding what appears to be the Court of Appeals's sympathy for managerial interest in its *Du Pont* opinion, the district court in Delaware continued to seek to emphasize the availability of democratic restraints on management after Hugh Martin Morris was appointed in 1918. Prior to ascending the federal bench, Morris carried on "an excellent and lucrative"[117] corporate practice with Willard Saulsbury, Delaware's United States Senator. Morris was a vice president of the Equitable Trust Company of Wilmington, and a trustee of the Wilmington Trust Company. In addition, he was a director of the Delaware Power Company, and the Delaware Light & Power Company.[118] Judge Morris thus seemed sufficiently steeped in corporate and managerial associations adequately to represent a corporate or managerial viewpoint on the federal bench.

Still, Morris appears to have been able to maintain a relatively objective perspective, and, like Bradford and Thompson, he was aware of the need to balance the desire for managerial autonomy with the maintenance of mechanisms to prevent the abuse of power by managers. Morris's family had been a part of Delaware history for over six generations.[119] Morris was a Son of the American Revolution, and a leader in Delaware's Americanization movement.[120] This heritage made him sensitive to democratic ideals, as did his service in the Democratic party. Indeed, even while he was on the bench, he may have been advising the Chairman of the Democratic party on how to deal with the influence of the Republican Du Ponts in Delaware. In a letter dated October 2, 1920, that appears to have been written by Judge Morris, he indicates that "The worship of the Golden Calf in this community has gone to such an extent that the atmosphere reeks of the yellow rich." In the letter it is acknowledged that Pierre S. Du Pont "is reputed to be a very good man," but that "He is a sample of the very rich men who think that in some way the Almighty has made him [sic] a trustee of wealth and that his [sic] ideas regarding its management and disposition are infallible." Judge Morris laments in the letter that Pierre "is, of course, surrounded completely by a lot of boot licks praising his greatness, his generosity and infallibility."[121] It is thus consistent with his background and political views for Morris to have sought some managerial restraints while on the bench.

1. *Eagleson, Port Lobos, and Myers: Restraining Interference but Preventing Abuses*

Morris's wilingness to check the abuse of power, suggested by his comments on Pierre S. Du Pont, is illustrated by his decision in *Eagleson v. Pacific Timber Co.* (1920).[122] Revolution in Mexico had rendered Pacific Timber's

Photo by Karsh, Ottawa

Hugh Martin Morris, United States District Court Judge for Delaware, commissioned 1919.

property in that country virtually worthless, driving the corporation into insolvency. A reorganization plan was devised by Pacific whereby all the assets of the old corporation would be transferred to a new one. Those holding common stock in Pacific Timber could exchange their stock for an equal number of shares in the new corporation. Holders of preferred stock were also allowed to exchange their stock for preferred stock in the new corporation, but only if they paid $10 per share of preferred stock they sought to acquire. Preferred stock in the new corporation was also available to the public at $10 per share. Those who held both common and preferred stock could not participate in the exchange plan for common stockholders unless they purchased an amount of preferred stock in the new corporation equal to the amount they held in the original corporation. Eagleson, a holder of common and preferred stock in Pacific, challenged the reorganization plan on the ground that he was not being treated equally with other common stockholders.

Judge Morris held that by effectively denying preferred stockholders the privilege of participating in the exchange plan, Pacific Timber ignored the pre-emptive rights they were supposed to enjoy over the common stockholders, as "the effect of the reorganization plan was the complete forfeiture of the preferred stock."[123] Morris thus insisted that Pacific Timber adhere to the spirit of its original charter provisions, even though the reorganization plan had been passed by majority vote and there had been no evidence of deception on the part of management.

The right to participate in the new corporation, Morris stated, "must be equally favorable to all stockholders of the same class, and . . . a denial of such equality of opportunity is a legal fraud upon the stockholders thus discriminated against."[124] Since the plan imposed a disproportionate burden on those who held both common and preferred stock, and since very few common stockholders fell into this category, it was obvious that "the plan of reorganization was for the benefit of the majority, to the detriment of the minority, and consequently unfair and fraudulent."[125] Morris followed a long line of authority that demanded equal rights for similarly-situated shareholders, and was thus prepared to undermine corporate autonomy to the extent necessary to protect minority rights.[126]

Judge Morris appears to have believed in the importance of maintaining the viability of litigation as a means of correcting corporate wrongs, and thus he may have tried to lower some procedural barriers that might have otherwise impeded stockholder litigation. On the other hand, Morris realized that totally lax procedural standards might lead to harassment of corporations by dissatisfied stockholders filing frivolous suits. Morris's solution was to subject stockholder-litigants to strict pleading standards when they alleged corporate wrongdoing, but also to provide procedural alternatives to stockholder-litigants when the strict pleading requirements threatened to prevent litigation, and thus deprive his court of an opportunity to prevent the abuse of power.

Morris's procedural balance is best illustrated by his decision in *Atlantic Refining Co.* v. *Port Lobos Petroleum Corporation* (1922).[127] In that case

Port Lobos had contracted with Atlantic to sell to Atlantic all the oil it produced in consideration for Atlantic's loan for the construcion of pipelines. A suit for breach of contract arose from a dispute as to the amount of oil the contract obligated Port Lobos to supply to Atlantic. A stockholder of Port Lobos petitioned for leave to intervene in the case on Port Lobos's behalf on the ground that Port Lobos was so closely connected with Atlantic that it could not present an adequate defense, and that the inadequacy of the defense would damage Port Lobos's minority shareholders. Denis, the stockholder, alleged that Atlantic owned a majority of Port Lobos's stock and designated a majority of Port Lobos's board of directors from a pool comprised of its own employees and officers.

Judge Morris dismissed Denis's petition on the ground that there were no specific facts alleged to support the charge that Port Lobos was acting against the interests of its minority stockholders. "A petition founded upon fraud or misconduct," Morris stated, "which does not allege definite, tangible facts to sustain the general charge of fraud, is insufficient and cannot be sustained."[128] Denis had to do more than allege that Atlantic and Port Lobos were engaged in a collusive suit designed to defraud Port Lobos's stockholders. The question before Judge Morris, the permissibility of intervention by a stockholder acting on behalf of the corporation, was one of the court's equitable discretion, and one of first impression in the Delaware District Court. In essence Morris imposed two procedural hurdles to a successful intervenor alleging collusion. Denis had to show Port Lobos's unwillingness to defend itself, *and* his own ability to present a viable defense.

Morris's strict requirements served to enhance corporate autonomy by allowing corporations with closely connected directorates to do business with minimal fear of frivolous suits by disenchanted stockholders. Morris stressed that it was *not* impermissible for such corporations to do business with each other.[129]

Although he formulated strict procedural requirements for intervention by a stockholder, because there was no objection to the right of Denis to amend his petition,[130] Morris did give Denis leave to amend his petition to meet the procedural requirements. In addition, Morris enhanced Denis's right to intervene by holding that in making the decision on the appropriateness of the intervention, the court would assume that the petitioner's allegations were true without requiring supporting affidavits.

Morris's refusal to close the doors to Denis's petition ultimately redounded to Denis's favor, for in a later opinion in the *Atlantic Refining* case[131] Morris held that the petitioner had finally alleged sufficient facts for Morris to allow his intervention in the case. This time Denis included in his amended petition a long list of specific allegations. Not only did Atlantic have a controlling interest in Port Lobos, Denis maintained, but Port Lobos had in fact been reorganized to merge with one of Atlantic's subsidiaries. Denis alleged further that the reorganized Port Lobos had assumed the obligation under the old contract to sell Atlantic its oil, even though it was under no legal com-

pulsion to do so, that the sale of all its oil under the contract at the rate of 25 cents a barrel was ruinous to Port Lobos, and that Port Lobos had assumed these obligations over the objections of its minority stockholders. Once the alleged facts met Morris's standards, then, he appeared willing to allow intervention.

Yet Morris was not eager to push the equitable powers of his court to the limits to guard against managerial or majority stockholder wrongdoing. In *Myers v. Occidental Oil Corp.* (1923),[132] Plaintiff Myers alleged that defendant Occidental Corporation was insolvent, that it had unlawfully issued stock to its officers, and that the officers had converted the assets of the corporation to their own use. He petitioned the court to appoint a receiver to sell Occidental's assets, so that the proceeds of such a sale could be distributed to the shareholders, and Myers also asked that the court cancel the allegedly unlawfully-issued stock.

Myers was seeking relief under the same Delaware receivership statute Judge Bradford had boldly held applicable in proceedings in federal courts in *Jones v. Mutual Fidelity Co., supra.*[133] Morris declared he could not appoint a receiver without proof of insolvency because "the appointment of a receiver is merely a remedy incidental and ancillary to the primary object of litigation, and cannot itself constitute such primary object."[134] Myers had alleged insolvency, because of fraud, but had not offered proof. In this manner, Morris limited the interventionary powers of his own court so as to protect corporate autonomy against novel remedies sought by dissatisfied stockholders. In the authority Myers advanced in support of his request there was no case of such relief being granted without a statute clearly setting forth its availability, although one statute, that of Louisiana, was said simply to be "declaratory of pre-existing equitable rights."[135] Morris rejected the notion that such equitable powers existed for his court.[136]

At the same time, as was true in the *Port Lobos* case, Morris did not want to make a judicial remedy totally inaccessible to stockholders like Myers. Myers had chosen not to sue the officers, perhaps because they were not residents of Delaware, and service upon them would have been difficult. Judge Morris proceeded to offer alternative means of bringing such officers to account for their abuse of power. Since shares in a corporation's capital stock were personal property having their situs in the incorporating state, said Morris, a suit seeking the cancellation of stock unlawfully issued by a Delaware corporation "may be brought in this district and service had . . . on defendants residing elsewhere."[137] Morris's court could also assert *in rem* jurisdiction over corporate assets unlawfully converted by officers if those assets were located in Delaware. As was true with the opinions of Bradford and Thompson, then, Morris's procedural decisions in *Myers* and *Atlantic Refining* seem to represent an attempt to strike a balance, to generate a level of stockholder litigation sufficient to allow the court to serve its legitimizing function, but without encouraging so much litigation that desirable corporate activities would be undermined.

2. *Morris vs. The Court of Appeals: The Hodgman Case*

In *Hodgman v. Atlantic Refining Co.* (1924),[138] Morris was once again called upon to act to protect stockholders from the alleged abuse of power by corporate managers. The case arose as a result of an agreement between defendant Atlantic Refining Company and the Superior Oil Company that Atlantic would cancel a $2.5 million debt owed by Superior to it if Superior would transfer to Atlantic 325,000 shares of its common stock, enabling Atlantic thus to acquire Superior's stock at approximately $8 per share. A roughly contemporaneous arrangement that may have been part of the deal obligated Atlantic to buy all of Superior's oil output for ten years. At the time of this agreement Superior was enagaged in some complicated financing arrangements. A syndicate of underwriters was negotiating to purchase other shares of Superior for $16.00 per share, and was eventually to sell those shares to the public for about $19.00 per share. Also at about the time of the agreement between Atlantic and Superior the Old Dominion Oil Company had conveyed land to Superior in exchange for still other shares of Superior's stock at a rate of about $16.00 per share.

The President of Superior, one Robert M. Catts, had received 45,000 shares of Superior, apparently as compensation for his closing the deal with the Atlantic Refining Company. The evidence established that Catts had intentionally misrepresented the price being paid by Atlantic for Superior's shares both to Superior's Board of Directors, and to the underwriters who were buying shares at $16.00, leading both to believe that Atlantic was paying $16.00 per share. At the time the misrepresentations were being made to Superior's Board, one Mr. E.J. Henry, an officer of Atlantic who sat on Superior's Board, remained silent, though he knew that Atlantic was in effect paying $8.00, not $16.00 per share. It appears that the underwriters eventually found out about the misrepresentation, but raised no objection.

Judge Morris declared that the sale of Superior shares to Atlantic was "consistent with no hypothesis other than that of deliberate fraud."[139] He reached this conclusion not only on the basis of the discrepancy in the prices between the sales to Atlantic and to the underwriters but because that discrepancy was accompanied by false statements made by Catts to Superior's Board of Directors and to the underwriters. Morris declared that the position of the President of a corporation was "fiduciary to a high degree," and that "Occupying such a position of trust, honesty and fair dealing, as well as the law, require that in transactions with the corporation in which transactions the president or director has a personal interest, there must be the fullest disclosure, the utmost good faith, and no secret profits inuring to the officer or director from the transactions."[140] Since Catts, by his receipt of 45,000 shares, had profitted personally, and since Catts had made misrepresentations, this meant that the sale of the stock to Atlantic was fraudulent, and could be set aside, as requested by the Plaintiff, a minority shareholder in Superior. Further, Morris reasoned, Atlantic was equally guilty of the fraud, since its officer, Henry, had knowledge of misrepresentations made to Superior's Board

and to its stockholders, and since Atlantic also knew about misrepresentations to the syndicate of underwriters.

Morris proceeded to grant relief against Atlantic, and it appears that his desire to discourage managerial or corporate fraud led him to formulate a creative remedy. By the time the decision to impose liability had been reached, the market value of Superior's stock had dropped to $4 per share. The usual remedy in such a case would simply have been recission of the contract, with a refund to Atlantic of the money it paid. This, however, would have entailed a transfer of wealth from Superior's stockholders to one of the guilty parties, Atlantic. To prevent Atlantic's unjust enrichment, then, Morris ordered Atlantic to pay Superior $2.5 million, the difference between the amount actually paid to Superior and the amount Atlantic would have paid if the price had been $16 per share. Borrowing from the law of contracts, Judge Morris thus sought to do equity where the tort remedy would reward a wrongdoer.[141] Atlantic and the miscreant managers had to be punished for their abuse of power; and apparently the loss Atlantic had suffered from the decreasing market value of Superior's stock was not sufficient retribution . . .

Judge Morris's opinion in *Hodgman* was reversed by the Third Circuit's Court of Appeals, in an opinion written by Judge Buffington.[142] Buffington's reversal of the District court in *Hodgman* is similar to his reversal of the District court in the *Du Pont* case, in that both opinions demonstrate a willingness to create great discretion for management, and both reveal less of an inclination to find fraudulent conduct on the part of managers.

To begin with, Buffington declared in *Hodgman* that his court had the benefit of a Delaware chancery court decision which had come down between the time the District court's opinion was written and the delivery of his opinion. In that case, *Bodell v. Gen. Gas. & Electric Corp.*,[143] said Buffington, the Delaware court decided that where "fairness in light of all the circumstances" dictated different prices of stock sold to different persons, and where such a differential sale was done in the "genuine and beneficial interest of the corporation" none of the transactions need be set aside. Buffington proceeded to declare that the deal struck between Superior and Atlantic was such a transaction which should not be set aside for fraud.

In general, and even if Buffington relied on authority not available to Morris, it is also clear that Buffington concentrated his analysis on aspects of the transaction which were of minimal importance to Judge Morris, and Buffington minimized the aspects which had most disturbed Morris. For example, Morris appears to have believed that the roughtly contemporaneous ten-year purchase contract Atlantic had made with Superior should not have been treated as an element of the stock deal. Morris observed that though Atlantic was obligated to buy all of Superior's oil, it was to buy at market prices, and "The Superior product was of a desirable quality, and usually sold readily at a premium above posted prices." Further, testimony taken at the trial showed that "The overbearing element" of Atlantic's decision in mak-

ing the ten-year arrangement was "our desire to assure for our refineries for a long period of time the appreciable and staple quality of crude oil" which Superior could supply.[144] In contrast, Buffington declared that the ten-year deal had become effective at a time when "oil was at low figures and a drag on the market," so that Atlanic was *not* simply benefitting itself by the ten-year obligation.[145] Buffington stressed that whatever misleading with regard to the price paid by Atlantic for Superior stock had been done to the underwriters, they would not have entered into their stock purchase without the ten-year guaranteed acquisition of Superior's output by Atlantic, and this meant to Buffington that Superior would not have received the $16.00 a share it did from the underwriting deal without the sale to Atlantic at the lower price.[146] Since Superior was badly in need of the operating capital it received from the underwriting, Buffiington reasoned, it clearly benefitted from the Atlantic sale, even at the lower price. Further, Buffington observed, the underwriting venture itself would not have been possible unless Atlantic released Superior from its obligations under the original $2.5 million loan from Atlantic to Superior, since that loan had as a condition that no further issuance of stock was permitted until the loan was paid. This too appears to have been of little importance to Morris.

Similarly of little importance to Morris, but of great moment to Buffington, was the fact that Atlantic obligated itself not to sell any of the shares it received for two years. Buffington commented that this meant that Atlantic benefitted Superior 'by changing its position of creditor with assured periodic interest payments for that of stockholder with uncertain dividends; by tying up its stock for 2 years as that stock which others, during the tie-up period, sold for $16, and indeed as high as $20.75, had only a value of some $6 when the tieup expired." Atlantic, then, had hardly profited from this arrangement, Buffington suggested, and what had turned out to be the benefits to Superior meant that the whole transaction was within the corporation's "zone of discretion," and could not be challenged by a dissident stockholder. Indeed, stated Buffington, "there was equal, if not stronger, ground for stockholders of Atlantic criticizing their company's management for entering into these contracts than for Superior's blaming their management."[147]

Buffington then proceeded, in effect, to overrule Morris's findings of fact, and held that even though Superior's President Catts might have committed fraud, Catts's fraudulent acts "were in no way connected with, participated in, or even known to, Atlantic."[148] Buffington acknowledged that Atlantic's officers had followed Catts's instructions not to reveal to the underwriters the price at which Atlantic was buying Superior's stock, even though they knew Catts was telling the underwriters that Atlantic was paying $16 per share, but Buffington observed that the underwriters eventually learned what price Atlantic was paying. More troublesome to him, perhaps, was the fact that Henry, Atlantic's officer, had sat quietly at Superior's Board of Directors meeting as Catts made incorrect statements regarding the price Atlantic was to pay for Superior's stock.

This part of Buffington's opinion appears to come very close, if it does not actually pass the point, of condoning actual fraud on the part of Henry. First Buffington declared that Henry denied the fact that he was present when misrepresentations as to the price Atlantic was paying were made, and that others' testimony supported Henry. Perhaps ultimately refusing to reverse Judge Morris's finding of fact to the contrary, however, Buffington attempted to excuse Henry's conduct by holding that

> assuming for present purposes such statements were made, and that Henry, who knew that Atlantic was only paying $8, remained silent, such silence is not necessarily fraudulent in purpose, for Henry might well have assumed that, as Superior had intrusted the financing plan to Catts, its president, as Catts was its sole representative in dealing with the bankers and Atlantic, and as Catts had requested Atlantic not to disclose its price, we may as well attribute Henry's silence to his feeling he was complying with Superior's wishes, expressed by its president, about a sale at different prices, which was lawful, as to evidence a purpose to mislead and defraud.[149]

What this means, then, is that for Buffington intentional misleading of other Directors or stockholders might not necessarily be fraud, but might be consistent with the overall business purposes of the corporation. Clearly Morris reached an opposite conclusion, believing that where there was intentional misleading in circumstances such as those of *Hodgman,* where the party engaged in the misrepresentations derived financial benefits, the strict standards of fiduciary conduct which he believed ought to apply to a corporate offeror required that such misrepresentations could be nothing but fraud. As he had done in his *Du Pont* opinion, then, but perhaps with less justification, in his *Hodgman* opinion Buffington loosened fiduciary standards, and facilitated the concentration of corporate power in management. Still, Buffington was not alone in his views, and he took special pains in his opinion to reveal that after he and his brethren Judges Davis and Wooley had heard the arguments, but before they met in conference to discuss the disposition of the case, each had independently concluded that Judge Morris should be reversed.[150] This certainly seems like an unusual revelation for Buffington to make, and suggests that he was aware his opinion might be misconstrued.

C. *Judge John P. Nields: Restraining Abuses, but Rewarding Heroism*

If personal associations and career experiences dictated judicial decisions, Judge John P. Nields, appointed by President Hoover in 1930 to replace Judge Morris, would probably have been a strong supporter of managerial autonomy and corporate discretion. In contrast to the private beliefs of Judge Morris, for example, Judge Nields, who appears to have been Pierre S. Du Pont's personal lawyer in connection with certain of his charitable endeavors,[151] was conceived that Pierre was a "remarkable" man, who was engaged in a "holy experiment" designed to better the education and the

Photo from Historical Society of Delaware

John P. Nields, United States District Court Judge for Delaware, commissioned 1930, when Judge Hugh M. Morris returned to private practice.

material well-being of the citizens of Delaware in a manner "so near the ideal that few can believe it today."[152] Nields thought that the contribution of the Du Pont Company to the Allied Armies in World War I, made possible by the company's "manufacturing experience and . . . well-trained organization", was the most "outstanding achievement" in Delaware history during the period from 1876 to 1926, and he appears to have shared in the sentiment of Lord Moulton, who gave the Du Pont Company, J. P. Morgan & Company, and the Bethlehem Steel Company the credit for enabling the British and French armies to "hold their own" during the War.[153] Nields appears to have been on close personal terms with the son of the leader of the corporate bar Josiah Marvel,[154] and Nields appears to have traveled in rather aristocratic Delaware Republican and Episcopalian circles.[155] Still, Nields appears to have been greatly influenced by the career of Theodore Roosevelt, and to have embraced what he perceived to be Roosevelt's commitment to "ideas of social and industrial justice."[156] He seems to have agreed that when Roosevelt took over from the assasinated McKinley, Roosevelt was nothing less than a hero [responding to] an Olympian summons," and to have subscribed to Roosevelt's opinion that "The surest way to invite disaster is to be rich, aggressive, and unprepared."[157] Nields seems to have recognized that after 1900 it was clear that Americans had decided against the notion "that the laissez faire doctrine should control legislators in dealing with vast corporate wealth and influence."[158] Something of a similar dichotomy in beliefs held by Judge Nields is revealed in his attitude toward the South. He appears to have believed that the Civil War was badly misnamed because that conflict was in reality "an attempt by the North, the strongest of two separate nations," to "attack, conquer and re-annex the weaker."[159] Even if the North was the agressor against the weaker South, however, Nields believed that at least one of the South's responses after the war to rebuild its social system, the Ku Klux Klan, was an "abomination of abominations."[160] One can discern a similar attempt to achieve moderation in Nields's judicial treatment of the law of corporations.

A case decided by Judge Nields, which resulted in a difference of approach between his court and the Court of Appeals similar to the divergence taken in the *Hodgman* and *du Pont* cases, *was Mallery v. Managers' Securities Co.* (1932).[161] The case arose as a result of an attempt by the majority stockholders in *The Managers' Securities Co.* (Managers') to shift part of a $25 million debt onto the minority. Managers' had been set up by General Motors in 1923 as a profit-sharing program for its managers. By the time the case was decided, the company had two stockholder classes. Pursuant to Managers' Charter, Class A stockholders, all of whom were currently employed by GM, received special dividends from the proceeds of a "5 after 7" contract with GM, which provided that Managers' would receive 5 percent of GM's net income over a 7 percent return on the company's investment. Managers' Class B stockholders received dividends from 2.25 million shares of GM stock owned by Managers'. According to Managers' charter, only current GM executives were entitled to hold Class A stock. At the company's inception,

the executives whom GM sought to involve were sold an equal number of Class A and Class B shares. When any of the executives terminated their employment at GM, they were required to allow Managers' to repurchase their Class A stock.

In 1928, the current class A stockholders approved a program whereby they would forego the dividends from their Class A stock in order to enhance Managers' future earnings capacity. Pursuant to this plan, Managers', after procuring a $25 million loan from J.P. Morgan & Co., purchased additional GM stock and set about retiring the loan gradually with income from the "5 after 7" contract. Had the loan and the extra investment in GM stock not been made, of course, the income from the "5 after 7" contract would have been paid to the Class A shareholders. With the Stock Market Crash of 1929, however, Managers' 1928 investment in GM stock resulted in a great loss. The market value of Managers' GM stock plummeted, and the income from the "5 after 7" contract vanished, leaving Managers' with a great debt to Morgan which it could not pay. Managers' was forced to dissolve. During dissolution, the question arose as to allocating the J.P. Morgan debt among the stockholders. When the decision was made by Managers' to treat the debt as one allocable to all the stockholders, Mallery, a former GM executive who held only Class B stock, filed suit. He challenged the dissolution plan on the ground that the Class A stockholders, who held a majority interest in the company, were attempting to shift part of the Morgan debt onto the minority who held only Class B stock. He contended that the charter provisions which mandated separate accounts for Class A and Class B stockholders, and the fact that the loan was originally to be repaid only from the "5 after 7" contract proceeds, showed that the Class A account should absorb the debt. District Judge John P. Nields's professional ties might have led one to expect that he would support management's side in the *Mallery* case, the side that argued in favor of spreading the debt to the minority shareholders. As we have seen before, however, the views of this District judge were not so constrained.

Nields struck down Managers' dissolution plan, and held for plaintiff Mallery on the ground that the stockholders from the company's beginning had intended to keep the Class A and Class B accounts completely separate. Because the Class A account was always separate from the Class B account, "it followed as a necessary legal consequence that the investment of that fund is for the sole account of Class A stockholders."[162] If the benefits from the 1928 stock purchase would have been enjoyed by Class A stockholders alone, the burdens of loss could not be shifted onto the company as a whole. Further, the judge also was impressed with the argument that Managers' charter itself provided for separate Class A and general surplus accounts. "Class A stockholders having agreed with the class B stockholders in and by defendant's charter that the proceeds of the '5 after 7 contract' should constitute a separate fund for the sole benefit of Class A stockholders,"[163] they could not disregard the charter and avoid in part the burden of the J.P. Morgan debt.

The Managers' Company, consequently, could not in effect violate its charter and make the Class B stockholders bear part of the loss arising from the stock purchase. With this reasoning, Nields attempted to protect Managers' minority against an abuse of power by the majority in its allocation of the burdens of corporate membership.

When the case reached the Third Circuit Court of Appeals, however, Judge J. Warren Davis reversed Nields's decision, and held that the J.P. Morgan debt had to be borne by the company as a whole because "money earned by a corporation does not become the property of its stockholders until it is distributed to them as dividends or in dissolution."[164] Even though the "5 after 7" income was credited to a separate Class A account, "until it was distributed in dividends or in retiring stock, it remained an asset of the corporation."[165] Consequently, any debt procured through the "5 after 7" income had to be borne by the corporation, not by a single class of stockholders.

Judge Davis arrived at this conclusion after first declaring that Managers' 1928 purchase of GM stock was in violation of its charter, and that consequently the loss arising from the violation had to be borne by the corporation rather than the Class A stockholders, since all had to take responsibility for the corporation's illegal act. Since the charter had provided that the "5 after 7" income was to be used only for retiring Class A shares and for paying dividends to Class A stockholders, he reasoned, Managers' had "improperly used the earnings to purchase that stock, and the Class A stockholders, as such, may not be held liable for the defendant's illegal acts which directly injured them more than it did anyone else."[166] Davis thus used Managers' charter to enforce the imposition of the J.P. Morgan debt onto the company as a whole, even though only the Class A stockholders had stood to gain from the 1928 investment. Davis's opinion was not without some logic or without some authority to support it, insofar as he rested it on the proposition that all stockholders should have borne the responsibility for an *ultra vires* action.[167] Nevertheless, the proceeding was one in equity; and it would seem that Judge Nields might well have possessed equitable discretion to decide as he did, that the Class A shareholders should have been made to bear the loss, since they would have stood to gain the most.

It seems possible, then, that the *Mallery* case further illustrates divergent approaches to corporate law pursued by the district court and the Court of Appeals. Whereas Nields in *Mallery* (and Thompson in *Du Pont* and Morris in *Hodman*) sought to "legitimize" corporate autonomy by checking a majority's or a manager's abuse of power, Davis lent support to a corporation's discretionary use of power by a somewhat strained interpretation of Managers' charter. This is suggested by the fact that the company's charter did not explicitly proscribe the use of "5 after 7" income for purchasing additional stock, but merely stipulated two uses to which the income would be put—the retirement of debts and the payment of dividends. The reinvestment plan, after all, was a deferred scheme for the payment of dividends, and if one

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United States Circuit Judge J. Warren Davis, who was found, by a panel sitting in his own court, to have exerted a "malign influence" on some of the decisions of the Court of Appeals.

wished liberally to construe the charter it might have been permissible. How then do we explain the Appeals Court's tendency in these cases to favor managerial discretion?

One extraordinarily intriguing explanation is suggested by the fact that in less than a year after the Court of Appeals decided the *Mallery* decision, it was clear that a "malign influence"[168] on the court was at work through Judge Davis. For example, in 1937 and 1938, even though Judge Buffington was in his eighties, nearly blind and deaf, and fiercely adamant in his refusal to hire a clerk, opinions bearing his name routinely issued from the Courts of Appeals.[169] It was subsequently revealed that Judge Davis was writing some of these opinions, Davis apparently decided in favor of former movie mogul William Fox as a result of "loans" from Fox totalling $27,500.[170] Davis's apparent corruption was not restricted to the Fox case. The Third Circuit Court of Appeals, in 1944, had to re-open two patent cases decided by Davis because they were "tainted with fraud."[171] The party winning those cases, the Universal Oil Products Corporation, had apparently earned Davis's favor because its counsel made a $10,000 "loan" to Davis's cousin which was to be "repaid" to Davis. There is no indication, however, with regard to the *Managers'* case just discussed that the Managers' Company exercised any influence on the Court of Appeals. Still, in the *Mallery* case it appears that Judge Davis may have rendered a decision enabling one party, the Class A shareholders, to take undue advantage of another party, the Class B minority stockholders. Whether or not any corruption was involved in any of the cases here discussed, it does appear that for Davis *and* Buffington, it seemed appropriate to go further in assuring the autonomy of corporate officers than it did for the District Judges. Given a choice between the values of individualism and economic advancement through the course of managerial discretion on the one hand, and the communitarian strict standards of fiduciary responsibility on the other, at least from the cases reviewed here, it appears that the Disrict Court Judges favored fiduciary responsibility and the Court of Appeals judges managerial discretion. Curiously, at least on the part of the District judges, this preference appears to have transcended party loyalties and to have been as strong in the Republicans Bradford and Nields as in the Democratic Morris.

In any event, Judge Nields, notwithstanding the Court of Appeals' licit or illicit sympathy for managerial interests, continued to reflect his personal political and philosophical beliefs by attempting to guard against corporate abuses of power. *In Re Mississippi Valley Utilities Corp.* (1933)[172] Nields overturned an adjudication of bankruptcy because Mississippi Valley had failed to adhere to its charter provisions in calling the meeting where the vote was made to seek the adjudication. The Company's failure to give notice to all its stockholders of the meeting at which it decided to seek bankruptcy, said Nields, required setting aside the adjudication. Yet Nields went even further in insisting on procedural regularity, for he set aside the adjudication in spite of a second stockholders' meeting which had satisfied the notice require-

ment mandated by his court's earlier decree, and which second meeting had sought to "ratify" the court's bankruptcy adjudication. "The [bankruptcy] adjudication," Nields stated, "is the act of the court. The stockholders and directors can ratify their own acts but cannot rectify and make valid an adjudication of the courts upon an invalid petition."[173] Nields insisted that the stockholders meet again, in accordance with the charter's notice requirement, and vote to seek another bankruptcy adjudication.[174]

What amounted to Nields's glorification of form over substance in *Mississippi Valley* might have been designed to signal to corporate officers that the federal court in Delaware would not tolerate even procedural irregularities. Many of these procedural requirements included in corporate charters, of course, were intended to protect stockholders from the abuse of power by managers—in short, to ensure that the appearance and reality of corporate democracy would be preserved, and Nields's decision thus gave some assurance that the judiciary would stand alert against potential inroads to corporate democracy.

Whatever Nields's *Mallery* and *Mississippi Valley* decisions may suggest, the final decision of Nields that we consider, *Koplar* v. *Warner Bros. Pictures, Inc.* (1937)[175] indicates that like Bradford and Morris he could also exercise self-restraint in interfering with managerial autonomy, even when he may have personally disagreed with the results reached by corporate decision-makers. The *Koplar* case arose from a stockholder's objections to the financial remuneration Warner Bros. Pictures had conferred on a number of its officers, the three brothers Warner. Pursuant to a contract of employment entered into in late 1928, Warner Bros. issued 90,000 shares of common stock then worth $10,000,000 to the brothers, and agreed to pay them $10,000 *a week* for their services for the next six years. In addition to agreeing to work for the company in return for their salaries, the brothers agreed not to compete with the company. In a derivative suit, Koplar challenged this salary agreement on the grounds that (a) it operated as a fraud on the stockholders, and (b) the stock issued to the brothers was without consideration and therefore illegal under the laws of Delaware.

Judge Nields held that the salary agreement was neither fraudulent nor illegal. Nields found that it was "perfectly apparent" that "the major consideration for the delivery of the 90,000 shares of common stock was the past and future financial aid of the Warner brothers to the Warner Company."[176] In leaner times, it appeared, the brothers had generously given their stock in the company to the company to be used to secure financing. Nields also found no fraud practiced on the stockholders, because they had ratified the agreement at their 1928 meeting, and "during the years 1929, 1930 and 1931 not a single stockholder voted against the re-election of the Warner slate of directors. Not a single stockholder ever complained of the employment contract so long as the company was making money."[177] Since the salary agreement had been executed in the open, with the knowledge and acquiescence of Warner's stockholders, Nields did not think it appropriate for him to inter-

vene on Koplar's behalf. Such a reversal of the stockholders' decision to support the salary agreement, Nields must have reasoned, would have seriously undermined Warner's managerial autonomy.

Nields also found that, even if the agreement had been fraudulent, the stockholders themselves had already resolved the dispute through their ratification of a "settlement" of other lawsuits challenging the employment contract drafted by Warner's board of directors. Pursuant to this settlement, the brothers transferred 100,000 shares of common stock back to the company and surrendered all claims to the money already earned by the brothers under the agreement. Since the settlement appeared to be a fair compromise, Nields held that the company had satisfactorily dealt with the issues raised by Koplar in his derivative suit and dismissed Koplar's bill of complaint.

Nields's support of the compromise agreement, however, may not have meant that he approved of the brothers' conduct. Referring to the $10,000 weekly salaries voted to them by a Board of Directors on which they sat, he stated that

> as a matter of morals such payments may be questioned. Directors have the power to award just compensation. That power should be used, not abused. Fair human requirements should set some limits to salaries. Extraordinary talent is not acquired. If it were, it would not be extraordinary. Doubtless, it is an endowment which the holder should not place on the auction block.[178]

Yet Nields did not allow his conception of a fair salary to interfere with his determination of the case, but rather let the stockholders decide for themselves the salary question.

Indeed, it appears that Nields's moral scruples against the compensation awarded the Warner brothers was counter-balanced by his obvious admiration for their business success prior to the depression. In particular he was impressed by their courage in concocting million-dollar schemes to finance their enterprises, and to enable them to become "pioneers in the 'talkies.' "[179] Nields credited the brothers with transforming the theatrical business from silent movies to "talkies," and of this transformation he stated, seemingly in awe:

> Their plan of financing their business through bank credits instead of advances from franchise holders was a move involving millions. Their acquisition of a great chain of theaters to use their films was a step involving more millions. To keep abreast of the march of time demanded extraordinary and heroic efforts.[180]

There were several reasons why Nields could be so impressed with Warner Brothers' activities that he would speak of them in terms like those he applied to Theodore Roosevelt or Pierre S. Du Pont,[181] as "extraordinary" and "heroic." First was the fact that the brothers had succeeded, at least until the depression was well underway, through their daring management of the company, to earn staggering sums. Nields also may have been struck by the

fact that the brothers continued, even in dark times, to tie their fortunes to those of the company:

> In the fiscal year ending August 31, 1929, the net profits were $17,271,805. For the six months ending March 1, 1930, the net profits were $10,092,109. For the fiscal year ending August 30, 1930, the net profits were $7,074,621, despite the fact that the last half of that fiscal year showed a net operating loss of $3,000,000. Thereafter as the depression deepened, the Company's losses increased. Throughout the depression the Brothers continued to loan the Company substantial amounts.[182]

Finally, it could not have escaped Nield's notice that by the brothers' pioneering efforts in developing "talkies," the public enjoyed perhaps its most absorbing, if frivolous, diversions from the economic agonies of the depression. Indeed it seems more than coincidental that Judge Nields appears to have been a devoted fan of "class B cowboy pictures," who had the habit of sneaking off to the movies at lunch time.[183]

Nields's *Koplar* decision, then, could have been calculated to preserve what he too believed to be the invaluable benefits of management autonomy by allowing the stockholders and managers settlement decision on the Warner Brothers' salaries to stand, although Judge Nields's beliefs about his "legitimizing" function may have led him to admonish the Warner brothers for reaping such lavish financial rewards. Nields's *Koplar* decision thus may have suggested to corporate officers that under his guidance the District court would hesitate to intrude upon management autonomy unless the corporate decision-making process was so defective that no possibility existed of the process's correcting itself. Nields's self-restraint, in short, may have rested on the corporation's capacity for self-correction.

Conclusion

In the first half of this century, as indicated earlier, the American public was both attracted and repelled by corporations. While many in government and business perceived large corporations and economic concentration as necessary concomitants to a mass production economy, public spokesmen decried what they believed to be an alarming accumulation of social and economic power. Americans wanted the goods produced by the highly industrialized economy of the twentieth century, but as Mr. Justice Brandeis observed in *Liggett v. Lee*,[184] there was still a pervading suspicion "that by the control which the few have exerted through giant corporations, individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened."[185]

The public ambivalence toward corporations was reflected, as we have seen, in the federal district court in Delaware as an attempt to strike a balance between corporate "legitimacy" and managerial autonomy. In their decisions, Judges Bradford, Thompson, Morris and Nields sought to "legiti-

mize" the managerial autonomy, created in large part by the activities of the Delaware legislature, by maintaining mechanisms of democratic control over corporate decision-making and by preventing managers from egregiously abusing corporate power. At the same time, the judges acted to preserve managerial autonomy by exercising self-restraint—by limiting their interventionary activities to those instances of clear abuse of power through such means as deception, discrimination against minority stockholders, or violation of charter provisions. This judicial self-restraint, in combination with the broad opportunities the Delaware legislature had given corporations, facilitated the concentration of economic power in corporate management. With the sharp reduction in demands legal and governmental institutions imposed on corporations, the corporations were left relatively free to respond to economic necessities. These economic necessities then gave rise to what Alfred O. Chandler has called the "managerial revolution:"

> Technological innovation, the rapid growth and spread of population, and expanding per capita income made the processes of production and distribution more complex and increased the speed and volume of the flow of materials through them. Existing market mechanisms were often no longer able to coordinate these flows effectively. The new technologies and expanding markets thus created for the first time a need for administrative coordination. To carry out this function enterpreneurs built multiunit business enterprises and hired the managers needed to administer them. . . . As technology became both more complex and more productive, and as markets continued to expand, these managers assumed command in the central sectors of the American economy.[186]

By expanding and legitimizing managerial autonomy, federal judges in Delaware appear to have helped to ensure that the level of legal restraints on corporations remained low enough to allow managers to gain the ascendance in the corporate power structure, as they were able to do, for example, in the case of Delaware's premier industry, the *Du Pont* corporation.[187] With the concentration of corporate power in management, the managers could make their production and distribution decisions without significant fear of stockholder interference through judicial machinery. Until about 1937, so long as the managers remained within the limits the lower federal court judges established to "legitimize" corporate and managerial autonomy, they were free to operate their enterprises as they saw fit, individual stockholders' objections, or even groups of stockholders' objections generally notwithstanding. The stock market crash of 1929 and the ensuing Great Depression shook Americans' faith in the benefits to be gained by autonomy of industrial concerns, however, and, in particular, the economic chaos that ensued led many Americans to question whether the market in corporate securities could be allowed to continue with so little federal regulation. The result was the passage of the Securities Act of 1933, the Securities Exchange Act of 1934, and the creation of the Securities and Exchange Commission. While the earlier climate of favoring the autonomy of corporate managers prevailed, the behavior of the Court of Appeals, in going even farther than did the District

Courts in facilitating the concentration of power in management, and, in some cases, even appearing to disregard some of the "legitimizing" legal restraints on managerial and corporate power, may not have seemed particularly alarming to observers of the legal system. Still, what seems to have been done by Judges Buffington and Davis and others like them eventually resulted in a reaction which tipped the balance between managerial autonomy and corporate democracy, which they had skewed toward autonomy, back in the other direction.

In particular, events such as those that had been approved by Judge Buffington in the *Hodgman* case, the selling of shares under less than full disclosure, came to be seen as an evil in need of immediate efforts at eradication, as millions lost their savings when the speculative fever of the twenties ended disastrously. This economic disaster appears to have resulted in both personal tragedy and doctrinal change on the bench of the Third Circuit, and they are the subjects of the next chapter.

Notes

1. A revised version of this chapter has appeared as Presser, *A Tale of Two Judges: Richard Peters, and the Broken Promise of Federalist Jurisprudence,* 73 Nw. U.L. Rev. 26 (1978).
2. A revised version of this chapter has appeared as Presser, *Judicial Ajax: John Thompson Nixon and the Federal Courts of New Jersey in the Late Nineteenth Century,* 76 Nw. U.L. Rev. 423 (1981).
3. A CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS 49 (1977), and D. BOORSTIN, THE AMERICANS: THE DEMOCRATIC EXPERIENCE 420 (1973).

3a. N. J. Laws 1896, ch. 185.

3b. See, e.g. *Cary, Federalism and Corporate Law; Reflections upon Delaware,* 83 Yale C. J. 663 (1974) and sources there cited.

4. J. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780–1970 62 (1970).
5. A CONRAD, CORPORATIONS IN PERSPECTIVE 30 (1976).
6. See, e.g. Grover Cleveland's message to Congress, 1896, quoted in A. THIMM, BUSINESS IDEOLOGIES IN THE REFORM-PROGRESSIVE ERA: 1880–1914 56 (1976).
7. See Chandler's VISIBLE HAND, *supra* note 3 for the authoritative description of how corporate managers, through vertical and horizontal integration of entire industries, came to determine the allocation of manufactured goods in the national economy. Chandler's article, "The Role of Business in the United States: A Historical Survey," printed in E. GOLDSTON and G. RYLAND, THE AMERICAN BUSINESS CORPORATION: NEW PERSPECTIVES ON PROFIT AND PURPOSE (1969), is a capsulized version of the VISIBLE HAND hyposthesis.
8. Indeed, some observers believed that one such enterprise, J. P. Morgan & Co., was not lending so much as profiteering. In any event, Morgan's banking group controlled enough capital to obtain half the gold in Europe in 1895. H. FAULKNER, POLITICS, REFORM AND EXPANSION 155, 156 (1959).
9. 14 Del. Laws, 1871, chapter 152.
10. A. BERLE AND G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 122 (1968 ed.).
11. *Id.*, at 123.
12. BOORSTIN, *supra* note 3, at 416.
13. *Id.*, at 417.
14. T. Manning, THE STANDARD OIL COMPANY: THE RISE OF A NATIONAL MONOPOLY 16 (1960).
15. Seligman, *A Brief History of Delaware's General Corporation Law of 1899,* Del. J. Corp. L. 249, 261 (1976). The New Jersey incorporation statutes did not expressly legalize holding companies. Rather, their provision allowing corporations to hold the stock of other corporations was held to be broad enough to include the creation of holding companies. It was Samuel C.T. Dodd who devised the holding company as a form of economic organization when it became apparent that the trust had become obsolete. See BOORSTIN, *supra* note 3, at 419.
16. Seligman, *supra* note 15 at 264.
17. Seligman, *supra* note 15, at 268
18. *Little Delaware Makes a Bid for the Organization of Trusts,* 33 Am. L. Rev. 418, 419 (1899).

19. For example, Delaware's "self-determination clause" provided that
    > The Certificate of Incorporation may . . . contain any provision which the incorporators may choose to insert for the management of the business and for the conduct of the affairs of the corporation, and any provisions creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders, or any class of the stockholders. . . . ; provided, such provisions are not contrary to the laws of this State.

    Del. Corporation Law, art. 1, sec 4 (1928).
20. H. Stoke, *Economic Influence upon the Corporation Laws of New Jersey*, 38 Journal of Political Economy 551, 576 (1930).
21. D. LOCKARD, THE NEW JERSEY GOVERNOR: A STUDY IN POLITICAL POWER 108 (1964).
22. See Wilson's inaugral speech, quoted at length in D. HIRST, WOODROW WILSON: REFORM GOVERNOR, 168, 169 (1965).
23. *Id.* at 163.
24. Dodd, *Statutory Developments in Business Corporation Law: 1886–1936*, 50 Harv. L. Rev. 27, 27 (1936).
25. Seligman, *supra* note 15, at 276.
26. See, e.g. Berle, *Investors and the Revised Delaware Corporation Act*, 29 Col. L. Rev. 563 (1929).
27. See, e.g. LARCOM, THE DELAWARE CORPORATION 154 (1937).
28. Chandler, in Goldston, Morton and Ryland, *supra* note 7, at 44.
29. *Id.* at 47.
30. CHANDLER, *supra* note 3, at 315.
31. P. DRUCKER, THE NEW SOCIETY: THE ANATOMY OF THE INDUSTRIAL ORDER 34 (1949).
32. In 1932, the largest stockholder in the country's most powerful railroad (the Pennsylvania Railroad) controlled .34 percent of the outstanding shares; the largest stockholder in the number one utility (A.T.&T.) controlled .7 percent; and the largest in the number one industrial (US Steel) controlled .9 percent. BERLE AND MEANS, *supra* note 10, at 47.
33. DRUCKER, *supra* note 35, at 34.
34. J. HURST, *supra* note 4, at 66.
35. See, e.g. Rutledge, *Significant Trends in Modern Incorporation Statutes*, 22 Wash. U. L. Q. 305, 312 (1937). Rutledge laments that "the individual stockholder has been placed almost in the position of holding a 'pig-in-a-poke'."
36. Berle and Means, *supra* note 10, at 40.
37. Hurst, *supra* note 4, at 68.
38. *Cf. Id.*, at 98.
39. Berle and Means suggest that the courts' reliance on common law standards of corporate responsibility "may perhaps account for their development along lines which seem, to the detached observer, more healthy than those of the statutes." BERLE AND MEANS, *supra* note 10, at 197.
40. Seligman, *supra* note 15, at 276.
41. Hurst, *supra* note 4, at 98. Hurst states that the statutory liberalization of corporate policy "put so high a social valuation on vigorous central management that the new legislation gave little guidance toward standards restrictive upon the controllers. It was the courts which developed a body of doctrine demanding fidelity and care of directors and officers."
42. W. COOK, THE CORPORATION PROBLEM 4 (1893).
43. Grover Cleveland, quoted in THIMM, *supra* note 6, at 56.
44. Keasbey, *New Jersey and the Great Corporations*, Address at American Bar Association at Buffalo, N.Y., August 28, 1899.
45. J. BRYCE, THE AMERICAN COMMONWEALTH 655 (1895).

46. Cook, *supra* note 42, at 251.
47. *Id.* at 249.
48. *Id.* at 252.
49. M. SEAGER AND C. GULICK, TRUST AND CORPORATION PROBLEMS 67 (1929).
50. United States v. E.C. Knight Co. 156 U.S. 1 (1895).
51. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), Addyston Pipe and Steel Co. v. U.S., 175 U.S. 211 (1899).
52. SEAGER AND GULICK, *supra* note 49, at 68.
53. See, e.g. BOORSTIN, *supra* note 3, at 419.
54. H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY", AND AMERICAN CONSTITUTIONALISM 372 (1968).
55. Hurst, *supra* note 4, at 93.
56. Cook, *supra* note 42, at 253.
57. Even though the judges imposed liability for fraud on corporate officers, that liability "was generally restricted by requirements of an affirmative misrepresentation, a consciousness of falsity, an intent to deceive, a justifiable reliance, and a causally related loss." CONARD, *supra* note 5, at 382.
58. See, e.g. Letter from Alice Eugenie Ortiz to Judge Bradford, April 30, 1909, Accession 504, Box 21, Family Correspondence of Francis G. Du Pont, Eleutherias Mills Historical Society, Wilmington, where the judges's research on John Peter Zenger is discussed.
59. W. BEVAN AND E. WILLIAMS, HISTORY OF DELAWARE: PAST AND PRESENT 367 (1929).
60. Ibid.
61. Ibid.
62. For one example of the Savonarola-like fire that blazed within Judge Bradford see the letter from him to Francis G. Du Pont, November 14, 1893, Accession 504, Box 21, Family Correspondence of Francis G. Du Pont, Eleutherian Mills Historical Society, Wilmington, where the judge describes his reaction to a "thoroughly bad man" as being "disgusted beyond measure." The man in question appears to have been a church official who allegedly committed "gross unusualities" and had "improper relations with a young woman." The Judge recommended to Du Pont that he "drop him *instantly*."
63. 123 F. 506 (C.C. Del.).
64. *Id.*, at 531.
65. *Id.*, at 510.
66. *Compare e.g.* Wheless v. St. Louis, 180 U.S. 79, (against Bradford) with Taylor v. Decator Mineral and Land Co. 112 Fed. 4, 9.
67. Hollins v. Brierfield Coal &Iron Co., 150 U.S. 371. Quoted by Bradford, 123 Fed., at 525.
68. *Id.*
69. *Id.*, at 527.
70. *Id.*
71. *Id.*, at 517.
72. *Id.*, at 523, Quoting Brine v. Insurance Co. 96 U.S. 627, 634.
73. Tennessee Acts 1891, p. 264, c. 122.
74. 123 Fed. Rep., at 533.
75. *Ibid.*
76. See note 62, *supra*, and accompanying text.
76a. 248 F. Rep. 756 (D. Del. 1917).
76b. *Id.*, at 772.
76c. 251 F. 696 (D. Del. 1918).
76d. *Id.*, at 706.

76e. 184 F. 977 (D. Del. 1909).

76f. *Id.*, at 978.

76g. *Ibid.* To the same effect see Carson v. Alleghany Window Glass Co. et. al., 189 F. 791 (D. Del. 1911) where Bradford denied relief similar to that sought in *Sellman.* In Carson, Bradford noted that he might allow the equitable relief of granting a receivership to stockholder complainants who alleged that the mismanagement and misrepresentations of corporate officers were injurious to the financial soundness, good will, and credit of a corporation where "strong and clear proof" was made that "fraudulent, wilful, or reckless mismanagement" threatened to destroy the business. Where there were differences of opinion among the stockholders, however, there was not "strong and clear proof," and, in particular, since no other stockholders beside the complainant had come forward to join in his prayer for relief, the required standard could not be said to have been met.

77. 234 F. 459 (D. Del.).

78. For evaluations of the importance of the activities of Pierre S. Du Pont to the development of the modern corporation, see A. CHANDLER, JR. AND S. SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION (1971), and A. CHANDLER, JR. THE VISIBLE HAND 438–450 (1977).

79. Du Pont v. Du Pont, 242 Fed. Rep. 98, 103 (D. Del., 1917).

80. CHANDLER AND SALSBURY, *supra* note 78, at 342–343 (emphasis supplied).

81. Thompson's interlocutory decree is reported at 234 F. 459 (D. Del.).

82. *Id.* at 462.

83. *Id.* at 464.

84. *Id.* at 463.

85. 242 F. 98 (D. Del.).

86. *Id.* at 136.

87. *Ibid.*

88. Fed. Rep. 139, 150–151 (C.C.A. 3rd. 1919), see also A. CHANDLER AND S. SALSBURY, PIERRE S. DU PONT AND THE MAKING OF THE MODERN CORPORATION 329–330 (1971).

89. See text accompanying note 80, *supra.* This fact is omitted from the account of the case in Chandler and Salsbury, *supra* note 78, which concludes that Judge Thompson incorrectly accepted Alfred's version of events.

90. See text accompanying note 79, *supra.*

90a. For other Thompson opinions, which seem to suggest a sensitivity to a need to circumscribe the activities of corporations or corporate managers particularly in the interest of creditors, see, e.g. Gibbon v. Hill, 79 F. 2d 289 (3rd. Cir. 1935), and *Wheeler* v. *Badenhausen,* 260 F. 991 (E.D. Pa. 1919). Nevertheless, as suggested, *supra.*, there is evidence that Thompson recognized that corporate managers needed substantial autonomy with which to operate, and he would *not* grant relief to shareholders who alleged misconduct on the part of directors without clearly specifying the nature of any alleged fraud, collusion, or want of good faith. Hutchinson v. Philadelphia & G.S.S. Co., 216 F. 795 (E.D. Pa. 1914).

91. Cf. M. DUKE, THE DU PONTS: PORTRAYAL OF A DYNASTY 290 (1976). For contemporary newspaper reports that support this interpretation of Thompson's opinion see, e.g. The New York Times, September 16, 1917, Section 11, at 2, *Id.*, April 13, 1917, at 4.

91a. Thompson also appears to have sought to ensure that stockholders would not be deprived of any limited liability which might have had the effect of encouraging investment. *See* Grier v. Union National Life Insurance Co., 217 F. 287 (E.D. Pa. 1914). Thus while Thompson sought to maintain standards of fiduciary case, his willingness to limit the liability of shareholders in an ambiguous case, *Grier,* suggests that Thompson's primary goal may have been the maintenance of a healthy market for subscription to the shares of corporations, because of the

general benefits which would accrue in such a smoothly functioning investment environment.

91b. Cf. Hutchinson v. Philadelphia & G.S.S. Co., 216 F. 795 (E.D. Pa. 1914), *supra* note 90a.

92. CHANDLER AND SALSBURY, *supra* note 78, at 340–341.

93. 242 F. at 132.

94. *Id.*, at 134.

95. *Du Pont* v. *Du Pont,* 251 Fed. Rep. 937, 941–942 (D. Del., 1918).

96. 242 F. at 137.

97. *Id.*

98. In his decree affirming the results of the shareholder vote, 251 F. 937, Thompson rationalized his refusal to bar Pierre's stock from the voting on the ground that the "court cannot deprive one who is interested adversely to the alleged interests of the corporation and other stockholders from exercising his right to vote his stock."

99. Chandler and Salsbury, *supra* note 78, at 352.

100. 251 F. at 945.

101. 256 F. 139 (3rd C.C.A. 1919) *cert. den.* 249 U.S.

102. See text accompanying note 80, *supra.*

103. 256 Fed. Rep., at 154–155.

104. *Id.*, at 157.

105. Meinhard v. Salmon, 249 N.Y. 458, 463–464 (1928).

106. *New York Times,* October 1, 1919, Section 2, page 5. *New York Times,* October 28, 1919, page 1.

107. Buffington's oath:

> I am not a disbeliever in or opposed to organized Government or affiliated with any organization or body of persons teaching disbelief in or opposition to organized Government. I am not a polygamist, nor a believer in the practice of polygamy.

New York Times, October 1 ,1919, page 2.

108. *New York Times,* January 11, 1919.

109. *New York Times.* November 2, 1919, page 22.

110. *New York Times,* June 13, 1920, Section VIII, page 8.

111. *New York Times,* April 6, 1928 page 10. When not advocating use of the whipping post, Buffington used moral suasion as a crime prevention measure. In 1926, when sentencing a young criminal, Buffington told the offender: "Don't think you are smart in trying to outwit the law. Crime doesn't pay; in fact, it is the most stupid thing imaginable." *New York Times,* March 13, 1926, page 4.

112. *New York Times,* March 23, 1933 page 2.

113. When advocating the use of the whipping post, Judge Buffington stated "that he was not so much interested in causes back of crime waves as in methods that will check them." *New York Times,* April 6, 1928, page 10.

113a. United States v. United States Steel Corporation, 223 F. 55, 67, 96, 110–111, 133 (D.C.D.N.J., 1915).

114. This testimony was printed in the *New York Times,* October 3, 1917, at 10.

115. *Du Pont v. Du Pont,* 256 Fed. Rep., at 162, 167–169.

116. *New York Times, supra* note 114.

117. BEVAN AND WILLIAMS, *supra* note 59, at 88.

118. CHASE, KRISLOV, BOYUM, AND CLARK, BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY (1976), sketch of Hugh Martin Morris.

119. *New York Times,* August 19, 1923, Section VII, page 10.

120. *Id.* Morris's concern for Americanization, however, was prompted in part by a fear of class warfare. In 1923 Morris told a group of naturalized citizens:

> Every American citizen should have in his home a copy of the Declaration

of Independence and the Constitution. . . . Unless you and all other American citizens understand the principles of the Government you now have, it will be easy for visionaries, demagogues, and those tirelessly scheming to destroy all government to induce you to exchange those principles for principles which deny to man the rights of life, liberty, property and the pursuit of happiness.

121. A copy of the letter to the Hon. George White, Chairman of the Democratic Committee, is to be found among Judge Morris's papers in the Morris Library's Special Collection, University of Delaware, Newark. The copy is not signed by Morris, but it appears to be typed by the same machine that was used for his other correspondence.
122. 270 F. 1008 (D. Del. 1920).
123. *Id.*, at 1010.
124. *Ibid.*
125. *Id.*, at 1011.
126. *Id.*, at 1010.
127. 280 F. 934 (D. Del.).
128. *Id.*, at 939.
129. In his opinion Judge Morris recognized that "corporations controlled and managed by the same officers and stockholders have a right to deal with each other." *Id.*
130. Atlantic Refining Co. v. Port Lobos Petroleum Corporation, 283 Fed. Rep. 681, 682 (D. Del., 1922).
131. *Id.*, at 681 (D. Del.).
132. 288 F. 997 (D. Del.).
133. 123 Fed. 506, discussed at text accompanying notes 63 to 75, *supra.*
134. 288 F., at 1001.
135. *Id.*, at 1002.
136. *Ibid.*
137. *Id.*, at 1003.
138. 300 F. 590 (D. Del.).
139. *Id.*, at 598.
140. *Id.*, at 594.
141. *Id.*, at 591.
142. 13 F. 2d 781 (3rd C.C.A.).
143. 132 A. 442 (Del. Ct. Chan.).
144. 300 F., at 595.
145. 13 F. 2d, at 794.
146. *Ibid.*
147. *Ibid.*
148. *Id.*, at 789.
149. *Id.*, at 793–794.
150. *Id.*, at 794.
151. *New York Times,* July 1, 1930, page 4.
152. John P. Nields, *September Twentieth: Delaware's Birthday* 14–15 (September 20, 1926).
153. *Id.*, at 8–9.
154. Josiah Marvel, Jr., was a member of the committee in charge of organizing Judge Nields' retirement ceremony in 1941. *Proceedings in the District Court of the United States for the District of Delaware on September 30, 1941, in Connection with the Retirement of the Honorable John P. Nields* 3 (1941).
155. Chase, *et. al. supra* note 122, sketch of John P. Nields.
156. John P. Nields, *Theodore Roosevelt* (Address given on October 27, 1923, Old Town Hall Leaflets, No. 1).
157. *Id.*, at 6.

158. *Id.*, at 3.
159. John P. Nields, *James Harrison Wilson: Delaware's Greatest Soldier* 3–5 (Address Before the Wilmington Rotary Club and Veterans of the Civil War who were guests of the Club, May 23, 1929).
160. John P. Nields, *Intolerance: Remarks at the Luncheon of the Bar Association of the State of Delaware at its Monthly Meeting* (October 2. 1925).
161. 1 F. Supp. 942 (D. Del.).
162. 1 F. Supp. at 946.
163. *Ibid.*
164. 77 F. 2d 186, 190 (3rd C.C.A.).
165. *Ibid.*
166. *Id.*, at 191.
167. *Id.*, at 192.
168. The phrase is that used by the Court of Appeals itself, in *Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 514, 533 (3rd Cir. 1948), where it concluded that Davis had taken money to obstruct justice.
169. *Id.*, and *New York Times*, May 24, 1941 at 18. Buffington later admitted that his sight was so bad that he could read attorneys briefs only with a powerful magnifying glass.
170. Judge Davis was never convicted for his corruption, partly because the jury "couldn't see sending an old man to jail." *New York Times*, August 23, 1941 at 15. William Fox, however, pleaded guilty to charges of bribery and obstruction of justice, and was sent to jail. The Court of Appeals appears to have believed that Davis had indeed accepted the money from Fox. See generally *Root Refining*, *supra* note 168.
171. *Root Refining*, *supra* note 168. See also *New York Times*, June 20, 1944 at 23.
172. 2 F. Supp. 995 (D. Del.).
173. *Id.*, at 998.
174. *Id.*, at 997.
175. 19 F. Supp. 173 (D. Del.).
176. *Id.*, at 181.
177. *Id.*, at 183.
178. *Id.*, at 188.
179. *Id.*, at 182.
180. *Ibid.*
181. See text accompanying notes 152 and 156, *supra*.
182. 19 F. Supp. at 183.
183. Frank, *Memories of Judge Nields*, Wilmington News Journal, December 19, 1975, at 12.
184. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517 (1933) (Brandeis, dissenting).
185. *Id.*, at 565.
186. CHANDLER, *supra* note 3, at 484.
187. CHANDLER AND SALSBURY, *supra* note 78.

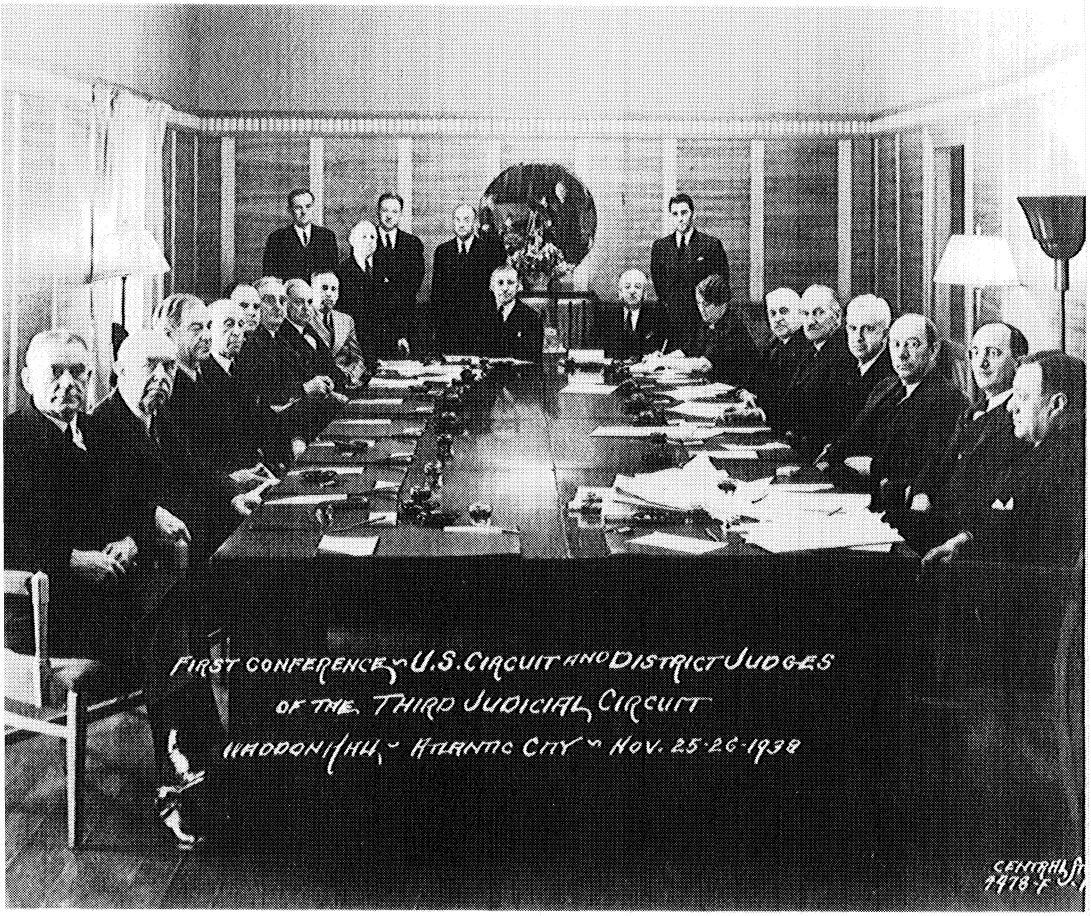
The old and the new: Circuit Judge Joseph Buffington administers the oath of office to new Circuit Judge John Biggs Jr., March 2, 1937.

The Impact of the "Constitutional Revolution" on the United States Court of Appeals for the Third Circuit

I. *Introduction*

In 1937, as every student of American Constitutional Law knows, the United States Supreme Court became noticeably more willing to accept the constitutionality of federal legislation which sought broadly to regulate interstate commerce and to redress perceived imbalances in the national economy.[1] This change in attitude has come to be known as a "Constitutional Revolution," and has led to increased public recognition of judicially-protectable fundamental rights. It is probably no overstatement to suggest that most Americans now believe that the federal government has as one of its responsibilities the insurance of an acceptable level of welfare for all, and this belief has led to a situation where many individuals and groups who have suffered discrimination or deprivation have sought redress in the federal courts. The implementation of federally-protected rights and the supervision of the operation of a burgeoning federal government since the Constitutional Revolution of 1937 has been primarily the task of the lower federal courts.[2]

In Chapter Two we saw how the earliest federal judges believed that they were charged with the responsibility of helping the federal government to provide for the basic needs of national security and for restraints on the anarchic and overly-democratic tendencies of part of the population. By the late nineteenth century however, if the work of Judge Nixon examined in Chapter Three can serve as a representative example, the task of the federal judges had primarily become that of ensuring that federal law protected the exercise of individual initiative, creativity, and moral development. Still later,



First Conference — United States Circuit and District Judges of the Third Circuit, at Haddon Hall, Atlantic City on November 25 & 26, 1938.

Seated left to right: Judges George A. Welsh, Victor B. Wooley, Albert W. Johnson, John P. Nields, John Biggs Jr., John Boyd Avis, Guy Fake, Justice Dept. Official, Justice Owen J. Roberts, Judges J. Warren Davis, Frederic P. Schoonmaker, Robert M. Gibson, William H. Kirkpatrick, Albert B. Maris, Harry E. Kalodner, Philip Forman.

Standing: Justice Department Officials (2), Arthur Vanderbilt, Esq., Justice Department Officials (2)

in the early twentieth century, as the work of the Delaware federal judges examined in Chapter Four suggests, the federal courts may have been most concerned with increasing the overall productivity of the national economy through the encouragement of the efficient functioning of American corporations. The subject of this chapter, however, is what may be the latest in the series of shifts in the concerns facing the federal judges, a return to preoccupation with individuals. This time, however, pursuant to the "Constitutional Revolution" of 1937, the task for the courts has not been to help in the securing of the maximum exercise of individual or corporate initiative, nor to secure the maximum protection for national security conceived broadly. Rather it has been to redress historic imbalances and to provide remedies for perceived damages to individuals and groups brought about by previous policies of local, state, and federal governments. This shift in jurisprudential concerns occurred in the Third Circuit following a virtual "reconstitution" of the court of appeals.

II. *The Reconstitution of the Third Circuit's Court of Appeals*

Transformation of the Third Circuit's Court of Appeals began on March 2, 1937 when John Biggs was sworn in as a Judge. Born in Wilmington, Delaware in 1895, Biggs was educated at Princeton University and at Harvard Law School.[3] Bigg's 1937 appointment by Roosevelt was apparently the result of an effort to improve the jurisprudential quality of the Third Circuit. Associate Supreme Court Justice William J. Brennan, who had been a young lawyer practicing in 1937, recalled ". . . that in 1937, practitioners before the Third Circuit often felt that oral and written arguments, however well done, seemed wasted . . ."[4] Part of the problems which Justice Brennan perceived were the result simply of the advanced age of the Third Circuit's judges. Before Biggs's appointment, the two youngest members of the court were J. Warren Davis and Victor B. Wooley, both of whom were 70 years of age. J. Whittaker Thompson was 76 and Joseph Buffington was 82.[5] Thompson, Woolley and Buffington all retired in 1938, and Judge Davis followed in 1939.[6] Thus, in 1939, only two years after his appointment as Judge, John Biggs became Chief Judge of the Third Circuit.[7] Meanwhile, Roosevelt had appointed Albert B. Maris and William Clark to the Third Circuit in 1938, and Francis Biddle and Charles Alvin Jones in 1939.[8] The President was also placing five justices on the Supreme Court during roughly the same time period. Roosevelt's new appointees had judicial philosophies which Justice Brennan has characterized as "humanitarian liberalism."[9] Chief Judge Biggs and Roosevelt's "new" Supreme Court were to stay in close philosophical step. Between 1937 and 1947, the Supreme Court reversed all 19 Third Circuit decisions argued before it in which Biggs had dissented, while it affirmed 20 of 29 Biggs majority opinions.[10]

Some insight into Judge Biggs's jurisprudential perspective and the nature of the Third Circuit's transformation may be gained by considering the varied

Albert B. Maris, commissioned as Federal District Court Judge for the Eastern District of Pennsylvania in 1936, and as United States Circuit Judge in 1938, who assumed senior status in 1958, and continues to provide exemplary service to the Court of Appeals and to the Federal Courts generally in the early 1980's.

nature of the works Judge Biggs published. Biggs had roomed with the class-conscious and perceptive "jazz-age" novelist F. Scott Fitzgerald at Princeton, Biggs himself had received "high critical acclaim" for his novels *Demi-gods* (1926) and *Seven Days Whipping* (1929),[11] and Biggs also contributed short stories to "Scribner's Magazine." Biggs's writing could also be highly practical, however, as shown by his co-authoring a text book entitled *Dela-ware Laws Affecting Business Corporations.*[12] Most important, probably, was Biggs's 1955 Isaac Ray Award winning work, *The Guilty Mind,* which remains a widely-acclaimed study of the historical interaction between law and psychiatry. In that book Biggs described the practices of several ancient civilizations and their struggles with criminal behavior and insanity, and compared the efforts of modern psychiatrists and modern society generally to bring forensic psychiatry beyond primitive conceptions and into a form that might contribute to a more just resolution of criminal cases.

In the foreword to *The Guilty Mind,* Biggs explains that his interest in forensic psychiatry resulted, in part, from a concern about injustices occurring in courtrooms because of the obvious "hiatus" between the theoretical ap-proaches of the psychiatrist and the judge. Upon his appointment to the federal bench, Biggs encountered equally serious problems in the area of judicial administration, and brought to their resolution the same analytical zeal he demonstrated in his writing. Biggs sensed the increasing importance of the federal courts and quickly became an effective lobbyist for the federal judiciary. He first became active as a member of the Judicial Conference of the United States in September 1939. By 1955 Biggs had been named Chair-man of the Conference's newly created Court Administration Committee.[13] Judge Biggs has been credited with effective advocacy for such "landmark" developments as the "Biggs Bill" with its 70-year maximum age for Chief Judges, the setting of the $10,000 jurisdictional amount in diversity cases, and the creation of many new federal judgeships.[14] Biggs also proposed pro-visions for judicial widows' pensions,[15] and pressed for other ways to meet the need for adequate pension and retirement provisions, in order effectively to bring in new judges and to establish the lower federal judiciary as a career with just rewards for long service.

John Biggs's apopintment thus established an extremely high standard of excellence, and Roosevelt's next choice for the Third Circuit met that stan-dard. Albert B. Maris, who had served for two years on the federal district court for Eastern Pennsylvania by appointment by President Roosevelt, was commissioned as circuit judge on June 24, 1938.[16] Maris was born in Phila-delphia in 1893, and received his LL.B from Temple University in 1918. He later earned an engineering degree from Drexel Institute of Technology, graduating in 1926. Maris had been an active Democrat, serving as county chairman and state committeeman. He had also served in local public offices as borough auditor and councilman.[17] Like Biggs, Maris was instrumental in improving judicial administration. Maris served on several Judicial Confer-ence Committees almost from the Conference's inception in 1938. Maris

served on the Conference's Committee on Supporting Personnel beginning in 1943. During the 16 years from 1951 until 1967, Maris was Chairman of the Conference Committee on Revision of the Laws. This committee worked with the House Judiciary Committee to revise U.S.C. titles 18 and 28.[18] In 1959, Maris was appointed Chairman of the Conference's standing Committee on Rules of Practice and Procedures.[19] For many years, at each session of the Third Circuit Judicial Conference Judge Maris reported on the varied activities of his committee. Maris may not have been a novelist like Biggs, but he possessed an uncommon ability infectiously to communicate in a lucid and gripping manner his interest and fascination with developments and contemplated reforms of the Federal Rules of Court Procedure.[20]

Maris's work as a codifier was not limited to activities on behalf of the Judicial Conference. Maris also codified and rewrote large portions of the Virgin Islands Revised Organic Act of 1954, and served on the subsequent commission to codify and revise the local laws of the Islands. He did similar work for the newly formed civil government of Guam in 1941 and for Samoa in 1952.[21]

As was true for Judge Biggs, it seems likely that Judge Maris's jurisprudential philosophy was close to that of Roosevelt's refurbished Supreme Court. Maris was designated a judge for the United States Emergency Court of Appeals under the Price Control Act in March of 1942, and became Chief Judge of that court in June of 1943. As Chief Judge, Maris never had a decision reversed by the Supreme Court.[22] The depth of the development of Maris's legal expertise and endurance was equally evident in 1959, when Maris was appointed by the United States Supreme Court as Special Master in the highly complicated Lake Michigan water diversion case. His opinion and report, which were produced after 158 days of hearings in seven cities, the introduction of 1300 exhibits, and the accumulation of a transcript of 30,681 pages were accepted by the parties and affirmed by the Supreme Court without a single revision.[23] A somewhat similar service was performed by Judge Maris, when he was appointed by the Supreme Court in 1970 and served as special master in an action brought by several states to challenge the federal government's claim to ownership of off-shore drilling rights. Maris's report and recommendations were again accepted by the Supreme Court.[24]

Finally, in an example of using benefits he helped create to further improve the system, Maris was to retire as an active judge long before his physical or mental faculties might have dictated. In Judge Maris's letter of election to retire from active service written to President Eisenhower on December 19, 1958 he stated:

> The opportunity to serve our country which judicial office afforded me has been one of the most treasured privileges of my life. It has been a most congenial service and I have devoted to it the utmost of the powers which God has given me. But I should be less than candid if I did not recognize that there are many others in the Third Circuit who are well qualified to render satisfactory judicial service and who would welcome the opportunity to do so. I do not want to

> stand in the way of anyone else having the same opportunity for judicial service which I have so much enjoyed. By assuming the status of senior judge I shall open the way for another to be called now, rather than after my death, to serve in judicial office. At the same time I shall continue to render judicial service myself so long as I am able and called upon to do so.[25]

In apparent contrast to several of his Third Circuit predecessors, and with characteristic modesty, Maris indicated in his letter that "It is the lot of judges, along with all others, to experience with advancing years a diminution of their mental and physical powers." He went on to state that "Because of this possibility I believe it to be in the public interest that my future judicial service should be performed only under specific assignment by the chief judge or Judicial Council of the Third Circuit or the Chief Justice of the United States."[26] At this writing, more than twenty years after his assumption of Senior Status, and forty-two years after his original appointment to the Court of Appeals, Judge Maris continues to render exemplary service. The example of Maris's retirement may be even more striking, however, when it is noted that at the time of his retirement 70 federal judges had reached an age making them eligible for Senior status, but had failed to assume it.[27]

On May 7, 1940, Roosevelt appointed Herbert F. Goodrich to the Third Circuit to replace Francis Biddle, who was leaving to become United States Solicitor General, and who ultimately served as Attorney General. Goodrich was born in Minnesota in 1889, and was educated at Careton College and Harvard Law School. Goodrich's appointment further developed the diversity and professional expertise on the Third Circuit. Goodrich was Dean of the University of Pennsylvania School of Law when he was appointed, and was thus one of a group of legal academics placed by Roosevelt on the federal bench. Goodrich had served as a law professor at the State University of Iowa (1914-22), the University of Michigan (1922-29), and the University of Pennsylvania (1929-40). He continued as a lecturer at Pennsylvania for eight years after his appointment.[28]

As was Judge Maris, Goodrich was an active member of the American Law Institute, serving as Director of Public Relations, Assistant Director, and Director[29] and participating in the drafting of the Restatement Second of Conflict of Laws.[30] Rejecting the thought of some of the then-current radical exponents of legal realism, who appeared to maintain that judicial discretion was unbounded,[31] Goodrich's work with the Restatement Second revealed his belief that judges could be rational, impartial, and impersonal settlers of controversies. Goodrich was the author of *Cases of Conflict of Laws,* (1936, 2nd Edition, 1940) and *Goodrich on Conflict of Laws* (1927), the third edition of which he published in 1949, nine years after his appointment to the Third Circuit.[32]

In 1943, Roosevelt appointed Gerald McLaughlin, a well-known trial lawyer, to a seat vacated by Judge William Clark, who had joined the army.[33] McLaughlin was a Roman Catholic Democrat from Newark, New Jersey. He attended Fordham University as an undergraduate and law student, and had

been practicing law in Newark since 1919. Gerald McLaughlin was Roosevelt's last appointment to the Third Circuit's Court of Appeals.

President Truman's appointments to the Third Circuit showed even greater diversity than did Roosevelt's.[34] Truman added to the Third Circuit bench an outspoken Jewish Zionist, two Roman Catholics, and America's first black federal judge.

Truman's first appointee was John J. O'Connell, appointed in 1945 to replace Judge Charles Alvin Jones, who had taken a seat on the Pennsylvania Supreme Court. O'Connell was a Roman Catholic from Pittsburgh who practiced for 19 years counselling in matters involving mining and related industries of western Pennsylvania.[35] Judge O'Connell died after serving only four years.

In 1946, Truman appointed Philadelphian Harry E. Kalodner. Kalodner had entered the University of Pennsylvania Law School at age 18. His career had included private practice in Philadelphia and extensive experience with the *Philadelphia North American* (1919-25) and the *Philadelphia Record,* where he was Financial and Political Editor from 1928 until 1934.[36] Kalodner had received two Pulitzer Prize Honorable Mentions in 1931 and 1932 for stories exposing corruption in Philadelphia city government, and for reporting on a fraudulent securities scheme.[37] Kalodner had been active in state Democratic politics, and had served as then Pennsylvania Governor Earle's campaign manager in 1935, and as Secretary of Revenue after Earle's election. After two years on the Philadelphia County Court of Common Pleas in 1936-37, Kalodner was appointed by Roosevelt to the United States District Court for the Eastern District of Pennsylvania, where he remained until his 1947 appointment to the Third Circuit.[38] Kalodner was a member of many local and national committees which promoted the cause of a Holy Land homeland for Jews, and which provided other services to the Jewish community.[39]

In 1949, after the untimely death of Judge O'Connell, President Truman apointed William H. Hastie to the Third Circuit. Hastie was born in Knoxville, Tennessee in 1904. He graduated from Amherst College and the Harvard Law School. After three years of private practice, Hastie served as an assistant solicitor in the United States Department of the Interior, until 1937, when he was appointed by Roosevelt to sit as the Judge for the District Court of the Virgin Islands.[40]

Interior Secretary Harold L. Ickes was a fervent supporter of his assistant solicitor for a federal judgeship, and took his proposal that Hastie be nominated as a judge over the head of the rather unresponsive Attorney General Homer Cummings, to speak directly to President Roosevelt. After a few months delay, which caused inquiries to be made by other backers of Hastie, such as Justice Frankfurter, Roosevelt announced Hastie's nomination on February 5, 1937, the same day that Roosevelt unveiled his "court-packing" plan. As suggested by Jonathan J. Rusch, perhaps the fortuitous timing was designed to ". . . soften the impact of presenting the Senate with its first

black judicial appointee. . . ."[41] Ickes also found it necessary to prod an unusually slow Senate Judiciary Committee, particularly Sen. Millard Tydings of Maryland. Ickes quietly but effectively spread word among Tydings' black constituents that Mr. Tydings was blocking Hastie's appointment. Tydings apparently then retreated, and William Hastie became America's first black federally-appointed judge.[42]

Hastie resigned from the Virgin Islands' court in 1939, to become the Dean at Howard University Law School, where he remained until 1946. In 1946, Hastie was appointed Governor of the Virgin Islands, ". . . the first of his race to attain so high a position in the Executive Branch."[43] His next federal appointment was his last, and he served on the Third Circuit until his death in 1976.

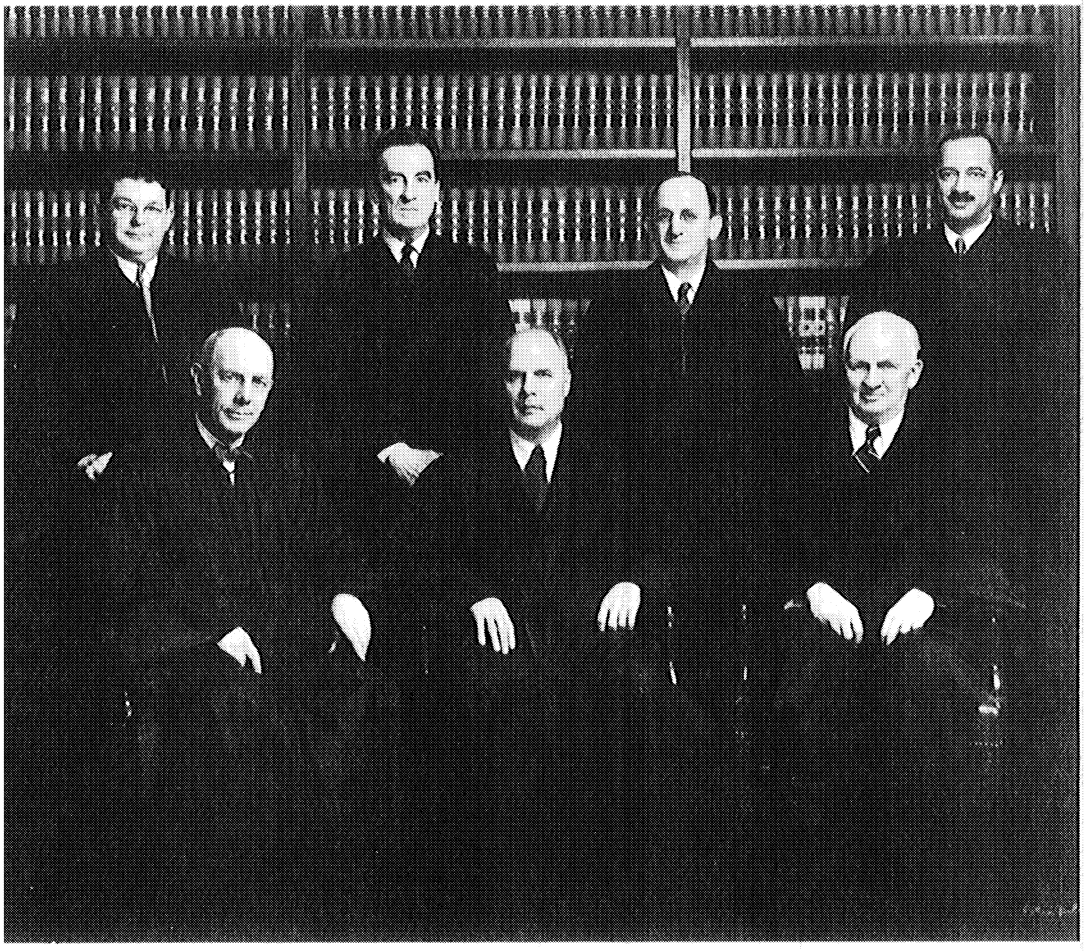
Hastie's 1949 nomination to the Third Circuit by President Truman encountered opposition from some members of the Senate Judiciary Committee. In spite of his previous professional achievements, not only did Hastie have to fight his usual battle against racial prejudice,[44] he encountered considerable questioning and delay because of his youthful affiliation with the left-leaning National Lawyers Guild.[45] Three days after the members of the Third Circuit's Court of Appeals offered to travel to Washington to testify on Hastie's behalf, the Committee approved the nomination. The entire confirmation process had taken ten months.[46]

The final act of transition for the Third Circuit from its pre-1937 days occurred in 1950 when Truman appointed Austin L. Staley to the Court. Born in Pittsburgh in 1902, Staley, like Judge Kalodner, and like Judge Maris, had obtained no undergraduate education, but went directly into law study. He received an LL.B. from Duquesne University in 1928. Like Judges McLaughlin and O'Connell, Staley was a Roman Catholic. Staley had extensive experience in Pennsylvania politics. He had served as an assistant city solicitor for Pittsburgh in 1934, as the Deputy Attorney General for Pennsylvania in 1935, as the Director of the Pennsylvania Workman's Compensation Bureau in 1936, and as the Deputy Secretary of the Department of Labor and Industry for Pennsylvania in 1937. Like Judges Goodrich and Maris, Staley was a member of the American Law Institute.[47]

III. *The Third Circuit during the "Biggs Years:" Judicial Development and then Judicial Restraint*

A. *Expiation and New Directions*

Perhaps one of the most important tasks before the rejuvenated Third Circuit Court of Appeals, begun soon after Goodrich's appointment, was to correct the damage to litigants and to the court itself done by the allegations that former Court of Appeals Judge Davis had engaged in obstruction of justice.[48] The completion of this task was to take seven years. A few days after Judge Davis's first trial on charges of corruptly influencing decisions had



The "Biggs" Court, which served intact throughout the 1950s, United States Circuit Judges:
Standing left to right: Austin L. Staley, Gerald McLaughlin, Harry E. Kalodner, William H. Hastie
Sitting left to right: Albert B. Maris, John Biggs, Jr., Herbert F. Goodrich

ended with the jury unable to agree on a verdict,[49] an informal hearing of the Court of Appeals was held on the matter on June 5, 1941, and a special master was appointed to look into Judge Davis's conduct, and to report on whether any of his decisions were "tainted and invalidated by fraud."[50] The special master, following examination of the grand jury testimony which led to the indictments against Judge Davis, reported on October 19, 1943 his conclusion that Davis's and some of "Buffington's" decisions were so tainted.[51] After hearing objections from some of the parties whose judgments the master had found tainted by fraud, the Court of Appeals, on June 15, 1944, adopted the findings and conclusions of the master, vacated many of the judgments, and restored the cases to its reargument list. The court also taxed the expenses of the proceeding against the parties whose judgments had been invalidated. This order of the Court of Appeals was then reversed by the Supreme Court, on the grounds that the proceeding involving the master had failed to follow "the usual safeguards of adversary proceedings."[52] This meant that the Court of Appeals had to start its self-vindication over again.

Accordingly, on June 20, 1947 the court vacated its order of June 14, 1944, but ordered some of the parties to "show cause why their judgments should not be vacated by reason of fraud or corruption practiced upon this court. . . ."[53] Then, on January 16, 1948, an order of the Chief Justice of the United States designated Circuit Judges Soper and Mahoney and Associate Justice Prettyman to act as Circuit Judges in the Third Circuit, and reexamine the judgments in three allegedly "tainted" cases.[54] On July 6, 1948, following trial of the cases in which they took testimony from all concerned for ten days, these three judges announced their conclusions, echoing the findings of taint found by the master.[55] Their opinion stressed that they realized that they were acting to correct "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society."[56] In all of the cases in question, the court found that attorney Morgan Kaufman had been hired by the parties who eventually won "in order that he might influence Judge Davis improperly and secure judicial action favorable to them," and in all cases the court concluded that "Judge Davis was in fact so influenced."[57] The court's findings are reported in painstaking detail, and their efforts to bare the record even extended to some implicit criticism of former Federal District Judge Hugh Martin Morris, for accepting a retainer from one of the parties, *Universal Oil Products Co.*, the day following his resignation from the Federal Bench, and only a short time after he had ruled on a motion for a bill of particulars and two motions for leave to file interrogatories in cases involving Universal.[58]

The court concluded that $10,000 paid to Kaufman by his clients was indirectly paid to Davis by the "false front" of a loan to Davis's cousin.[59] The court also implicitly excoriated Davis for clandestinely meeting under an assumed name with another party to a proceeding in his court, William Fox, and for accepting "loans" from Fox, in return for favorable rulings on his

Maris photo from Fabian Bachrach

John Biggs Jr. and Albert B. Maris

case.[60] Finding this evidence of Kaufman's and Davis's misconduct, the court ordered that the judgements obtained by the parties who had allegedly hired Kaufman for his ability to influence Davis be vacated, and the suits dismissed, reasoning that no matter what the merits of the individual cases, the parties were not entitled to relief because of their "unclean hands." So it was that Judge Davis, who had never been convicted of a crime, was found guilty of official misconduct by a panel sitting in his own court.

Davis died shortly after his criminal trials had ended with no convictions, and he was thus not able to defend his conduct in the proceeding in his Court of Appeals. Much of the testimony against Davis had come from William Fox, whose testimony also resulted in the disbarment of Morgan Kaufman from the United States District Court for the Eastern District of Pennsylvania in 1943 and from the United States Court of Appeals in 1944.[61] Twenty-five years later, however, Morgan Kaufman was to be reinstated as a member of the bar, when evidence was discovered that William Fox may have been fabricating his testimony against Kaufman and Davis in order to ward off federal prosecution on other charges. Fox's testimony against the two men had earlier been believed because Davis's and Kaufman's advocates had been unable to provide a reason for Fox to lie.[62] The discovery of Fox's motive for duplicity came too late for Judge Davis. Still, some matters, for example, some of the circumstances surrounding Davis's meeting with Fox under assumed names, originally came from the testimony of Davis himself. Other suspicious matters, however, for example, the loan to Davis's cousin, might have had benign explanations.[63] It may be, then, that J. Warren Davis was not the thoroughly corrupt judge he seemed in the early forties. In any event, as will be seen, *infra,* in addition to the Third Circuit's "expiation" for the supposed sins of Davis by undoing the results in the cases he allegedly "tainted," a new course for the Third Circuit was charted with the issuance of several bold decisions in the "Biggs" years.

One such pathbreaking decision, that must be accounted for principally by the strength of the beliefs of Judges Biggs and Maris, was issued in January of 1939, before any widespread disclosures of the conduct of Judge Davis, who sat on the panel with Biggs and Maris. This was *Hague v. Committee for Industrial Organization,* which might fairly be characterized as one of the first great Civil Rights Cases to be decided after Reconstruction.[64] The disposition of the case was suggested by the very first sentence of Judge Biggs's opinion, "The question presented by the appeal at bar is whether or not certain fundamental civil liberties safeguarded by the Constitution of the United States shall be observed and protected in Jersey City or shall there stand abridged."[65] The major of Jersey City (Frank Hague), the Director of Public Safety, the Chief of Police, and the Board of Commissioners of Jersey City were the original defendants. The original plaintiffs, the Committee for Industrial Organization (CIO), affiliated labor organizations, and the American Civil Liberties Union, had sought an injunction to prevent interference with their "rights to be and move about freely in Jersey City, to distribute leaflets

and circulars, to hold and address public meetings and to display placards." Defendant Hague was one of the most powerful politicians in the Democratic party, and presided over Jersey City and Hudson County as if it were his personal satrapy. The case had come about because Union officials and organizers sought to exercise their rights under federal labor law legislation and to prevent Hague from keeping his "tacit promise that the new industrial unions would not be permitted to organize in Jersey City."[66]

Reviewing the evidence, Judge Biggs observed that law enforcement officials of Jersey City, supported apparently by the majority of the inhabitants of Jersey City, engaged in conduct which was "in gross violation of the civil rights" of the plaintiffs, and that "CIO members and sympathizers were deported from Jersey City and searches of individuals continued to be made without warrant or probable cause."[67] Judge Biggs declared that such conduct on the part of the officials of Jersey City was clearly in violation of the rights guaranteed to the plaintiffs by the Fourth and Fourteenth Amendments to the Constitution, and that the statutory provisions under which the Jersey City officials purported to be acting, for example a Jersey City ordinance prohibiting the distribution in a public place of handbills, were also in violation of the freedoms of speech and press protected by the Fourteenth Amendment.[68] Finally, Judge Biggs held that the Jersey City officials' actions, taken pursuant to another city ordinance prohibiting public meetings without a permit, were also unconstitutional in that they constituted previous restraints on the rights guaranteed by the Fourteenth Amendment to individuals to speak before assemblies of their fellows in public places.[69] Clearly Judge Biggs believed that incidents such as those which passed in Jersey City were of the greatest danger to the republic:

> We think that an American community, devoted to American principles, cannot exist upon the terms offered by the appellants. Minorities, however unpopular, must be allowed to make their voices heard and the whipping up of public indignation and public clamor to the end that free expression of opinion and free assembly may not be had sits with little grace upon the officials of an American city. Fundamental civil liberties must not be tampered with if our system of democratic government is to survive.[70]

Judge Davis dissented from Judge Biggs's opinion, on the ground that the city ordinances in question were valid exercises of the state's right "to promote the health, safety, morals, and general welfare of its people." Davis's position on this legal issue was one that had the explicit support of several decisions of the United States Supreme Court,[71] and Judge Davis indicated "with regret" that he could not agree with Judge Biggs that the rule of these cases had been "modified" by subsequent Supreme Court decisions.[72] Further, considering all the evidence, Judge Davis declared that the officials who administered the ordinances might well have honestly believed that they were required to refuse permits for the CIO to assemble because of the risks of violence and damage to property.[73] Even Judge Davis, however, appeared

to agree with the majority that the conduct of the police of Jersey City might have gone too far in the acts of "deportation" and searches and seizures of the plaintiffs.[74] Still, while Judge Davis's conservative views about the extent of the right to public assembly may have been in accordance with the law as it had been laid down in the past by the Supreme Court, Judges Biggs and Maris had "resuscitate[d] the long dead Civil Rights Act" and rendered a decision on broad democratic principles which anticipated the great civil rights cases of the future. Indeed, because of recent rulings of the Supreme Court which effectively limit the ability of the federal courts to intervene to prevent state officials from infringing individual civil rights, it is probable that a decision like that rendered by Biggs and Maris against Frank Hague could not be repeated today.[75]

Further evidence that the Third Circuit's Court of Appeals, and, indeed, Judges Maris and Biggs, were prepared to adopt a new Constitutional philosophy which anticipated the work of the Supreme Court is provided by another landmark case, involving the right of children of Jehovah's Witnesses to refuse to salute the flag in school ceremonies. In *Gobitis v. Minersville School District* (1937), Jehovah's Witnesses argued before the then District Judge for the Eastern District of Pennsylvania, Albert B. Maris, that the flag salute imposed on their children by their school district was an idolatrous religious practice which violated their liberties guaranteed by the Fourteenth Amendment to practice their religion without the interference of the state government. In that case of first impression, Judge Maris held for the plaintiff Jehovah's Witnesses, and his decision was affirmed by the Court of Appeals in an opinion by Judge Clark, Judge Biggs and District Judge Kalodner concurring.[76] When the case reached the Supreme Court, however, the decision of the Court of Appeals was reversed, in an opinion by Justice Frankfurter, from which Justice Stone dissented.[77] Still, a scant three years later, in *West Virginia State Board of Education v. Barnette*,[78] in an opinion by Justice Jackson, the Supreme Court, over the dissent of Justice Frankfurter, overruled their *Gobitis* decision, and held in accordance with the opinions of Judge Maris and the Third Circuit's Court of Appeals. Significantly, Justices Black and Douglas, who had concurred in the Supreme Court's reversal of the Third Circuit in *Gobitis*, and who were to go on shortly to become leading exponents of broad construction of the guarantees of the Bill of Rights, filed a joint concurring opinion, indicating that they had become convinced that they were wrong to concur in the Supreme Court's decision in *Gobitis*.

In 1946 the Federal District Court for the Eastern District of Pennsylvania decided *Kardon v. National Gypsum Co.*,[79] probably one of the most important opinions to be rendered by any of the courts of the Third Circuit. The question in that case was whether there was a private right of action for investors injured by acts in violation of the anti-fraud provisions of Section 10(b) of the Securities Exchange Act of 1934.[80] The defendants argued that since other provisions of the Act, notably Sections 9, 16, and 18, expressly provided that acts in violation of their provisions would give rise to private

civil actions, the inescapable inference was that Congress, in writing Section 10, which contained no such express provision, did not intend to create a private cause of action.[81] It seems to have become the currently accepted opinion of most of the members of the United States Supreme Court that "when Congress wished to provide a private damage remedy, it knew how to do so and did so explicitly."[82] District Judge Kirkpatrick rejected such a line of reasoning, however, and followed instead the logic of Restatement Torts, Vol. 2, Section 286.[83] The restatement suggests that civil actions are appropriate when a statute making certain conduct illegal is intended to protect particular interests of individuals and when the individual seeking to bring a civil action is a member of a class sought by the legislature to be protected.[84] Judge Kirkpatrick proceeded to declare, in effect, that the decision of Congress not to provide expressly for a private right of action in Section 10 was irrelevant. He stated that the question was not merely one of statutory interpretation, but rather:

> It is whether an intention can be implied to deny a remedy and to wipe out a liability which normally, by virtue of basic principles of tort law accompanies the doing of the prohibited act. Where, as here, the whole statute discloses a broad purpose to regulate securities transactions of all kinds and, as a part of such regulation, the specific section in question provides for the elimination of all manipulative or deceptive methods in such transactions, the construction contended for by the defendants may not be adopted. In other words, in view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.[85]

The Supreme Court did not rule on the availability of the private right of action under Section 10(b) until 1971, twenty-five years later, but in the meantime the *Kardon* case became a judicial landmark, and was embraced by many other lower federal courts.[86] In light of the Supreme Court's current attitude in the securities area that "The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law,"[87] Judge Kirkpatrick's opinion can be seen not to be free of bootstrap reasoning. Judge Kirkpatrick was relying on what he called the implication of "general law," by which he presumably meant the Restatement of Torts section to which he referred. The Restatements, of course, are not, strictly speaking, law unless previously so declared by a competent law-maker for the jurisdiction, and, in any event, the Restatement provision seems to have been of doubtful applicability where the legislative provisions of other sections might have suggested a deliberate Congressional omission of a private right of action for Section 10. What then, might have led Judge Kirkpatrick in the direction of his holding? Perhaps the most likely explanation is simply the increasing prominence of the jurisprudential perspective already noted for the Court of Appeals, a perspective that sought to give greater scope to the protection of individual rights. Indeed, if one can take further license to speculate, perhaps Judge Kirkpatrick might have been influenced by the fact that another Pennsylvania federal

district judge, Judge Albert W. Johnson had just resigned after charges of corruption, and perhaps he remembered the ruination and corruption as a result of losses in the market of Judge J. Warren Davis and of Judge Martin T. Manton of the Second Circuit.[88] Perhaps this memory led to a desire that the chance for such ruination and corruption be diminished, and perhaps Judge Kirkpatrick's provision of a private right of action under the anti-fraud section of the Exchange Act, Section 10(b), was a means for the effectuation of such a desire.

In any event, one can see a similar spirit of broad equitable construction of the Securities Exchange Act of 1934 on the bench of the Third Circuit's Court of Appeals, perhaps best exemplified by Judge Biggs's opinion in *SEC v. Transamerica Corporation,*[89] decided in the year following *Kardon;* and which became a leading case on the interpretation of the Securities Exchange Act's provisions regarding the solicitation of proxies by corporate management. The principal issue in the Transamerica case was whether the provision of Delaware law that dictated management of the business of a corporation by its board of directors[90] meant that the Board had discretion over whether or not to select independent auditors and whether or not to send an account or a report of the proceedings at the annual meeting to stockholders. *Transamerica's* management argued that Delaware's statute gave it such discretion, and that therefore it could legally refuse to send out proxies regarding a shareholder's proposals concerning these matters.

Judge Biggs, construing the proxy provisions of the Securities and Exchange Act of 1934, declared that "A corporation is run for the benefit of its stockholders and not for that of its managers."[91] This meant, he held, that stockholders were "entitled to employ watchmen to eye the guardians of their enterprise, the directors," and therefore the Delaware statutory provision regarding board management could not be invoked to prevent voting on a shareholder proposal for the hiring of independent auditors.[92]

With regard to the stockholder proposal concerning the mailing out of reports of the annual meeting, Judge Biggs wrote that "accurate information as to what transpires respecting the corporation is an absolute necessity if stockholders are to act for their joint interest."[93] Judge Biggs went on to hold, in effect, that such joint action by stockholders was precisely what the framers of the Securities and Exchange Act of 1934 had in mind. In language that was to be quoted innumerable times in the next few decades, Judge Biggs declared that

> It was the intent of Congress to require fair opportunity for the operation of corporate suffrage. The control of great corporations by a very few persons was the abuse at which Congress struck in enacting Section 14(a).[94]

In this manner Judge Biggs set a precedent that the Securities Laws should be construed in a fashion that encouraged the expansion of "corporate democracy." There was some support in the legislative history for Judge Biggs's opinion as to the linkage between ideas about corporate democracy and the

passage of the proxy provisions of the Act of 1934,[95] but the overwhelming purpose of the provisions in the 1934 Act would seem to have been the furtherance of "disclosure" with regard to the value of securities, and not the furtherance of the participation of stockholders in corporate governance.[96] Further, at least in the case of a large publicly traded corporation such as *Transamerica,* it would seem arguable that extended action on shareholder proposals is not necessary adequately to protect the monetary interests of shareholders, since a shareholder who was disenchanted with management has the easy option of sale of his or her shares. This possibility, then, would serve to keep management in line, since management's performance and subsequent rewards depend in part on the maintenance of an environment in which investors are encouraged to buy and hold rather than to sell shares, and would serve also to afford an inexpensive remedy for the individual dissatisfied shareholder.[97] As may have been true in the *Kardon* and the *Hague v. CIO* cases, perhaps Judge Biggs believed that the primary goal of his court was fundamentally to reaffirm the principles of fairness and democracy by means of greater protection of the rights of individuals, particularly in light of the allegations of misconduct recently levelled at Third Circuit judges. Perhaps the furtherance of this goal led him to the paradoxical declaration in *Transamerica* that the fact that the facilitation of the participation of shareholders in the governance of the corporation might result in considerable expense to the corporation (and thus indirectly to its shareholders) was irrelevant in light of the "absolute necessity" of permitting shareholders to "act for their joint interest."[98]

B. *Caution*

Whatever the reasons for the boldness of these opinions, by the 1950's, the members of the Third Circuit Court of Appeals appear to have become concerned with certain inherent limitations on a court's law making activities. The "Constitutional Revolution" of 1937 eventually generated pressure on the Supreme Court to sort out its various roles and to harmonize conflicting notions of judging,[99] and similar pressure seems to have been felt by the members of the Third Circuit's Court of Appeals.

Competing judicial philosophies resulted in conflicting pressures on twentieth century appellate judges.[100] On the one hand, influenced primarily by the legal realists, and working as a 'social engineer' a judge like Judge Biggs, Judge Maris, or Judge Kirkpatrick could promote causes and issues he thought important. On the other hand, impartiality, impersonality, and rationality remained as important judicial qualities,[101] and these suggested caution in implementing judges' personal values. By the mid-fifties or so, it may have appeared that the judges of the Third Circuit were more concerned with judging as a specialized profession bound by a certain level of restraint rather than with judging as a vehicle for achieving a personal vision of social reorganizaiton. The Third Circuit judges appear to have concluded that social

changes were still necessary, but that changes could be made to occur naturally, rationally, and with increased public acceptance, if the judges stressed what might be characterized as "judicial integrity."

The judicial career of Judge Hastie may provide the best example of these developments. Before being appointed to the Third Circuit's bench, Hastie had worked with civil rights lawyers such as Charles Houston and Thurgood Marshall, and had achieved a remarkable record of courtroom victories over racial discrimination.[102] Hastie had worked as counsel in such cases of *Fisher v. Hirst,* 333 U.S. 147 (1948), in which the Supreme Court enforced the right of access for blacks to state professional schools of quality equal to those available for whites; *Smith v. Allright,* 321 U.S. 649 (1944) in which the Court invalidated Texas's "white primary;" and *Alston v. School Bd.,* 112 F. 2d. 992 (4th Cir. 1940) in which the court of appeals declared unconstitutional different salary schedules for black and white public school teachers.

Moreover, Hastie's government service had included two years as a civilian aide to the Secretary of War (1940–42) at the end of which he again demonstrated his personal commitment to racial equality. This position as aide was supposed to have lasted the duration of the war, but Hastie resigned as ". . . a public challenge to the discriminatory policies and practices of the Army Air Force."[103] This last incident might be taken to emphasize the difference between private citizen Hastie, who felt free to express his outrage at a racially prejudiced system, and Judge Hastie, who wrote opinions which appear to reflect a notion of the court as ". . . a truly limited . . ." branch of government.[104]

Hastie's entire judicial career, from appointment hearings to retirement was one of "faithful observance of judicial self-restraint."[105] His protracted confirmation proceedings for both the Virgin Islands District Court judgeship and for the Third Circuit Judgeship must have been exceptionally painful examples of prejudice.[106] Still, "Judge Hastie's reaction was remarkably mild."[107] He does appear to have believed that as a judge he could use the Constitution as an ". . . eventual instrument of justice."[108] Hastie felt, however, that the dispensation of justice could be effectuated "only by demonstrating the integrity and orderliness of the judicial process. . . ."[109]

For example, in *Gentile v. Finch,* 423 F. 2d 244 (3rd Cir. 1970), writing for the court, Judge Hastie reversed the district court in an OASDI disability case. He stated that he was required to read the statute narrowly, and he found no "disability," though his finding meant denying a coal miner with obvious black lung disease any statutory benefits.[110] Hastie admitted that this result was "harsh," but he concluded, perhaps somewhat contrarily to the spirit of the *Kardon* and *Hague* cases, that the court was ". . . bound by the explicit Congressional command."[111] As early as 1952 Judge Hastie had indicated his tendencies toward judicial restraint, when he participated in a decision that held that the National Labor Relations Act did not impose a broad duty of non-racially discriminatory representation.[112] In order so to hold Hastie had to reject the rather compelling analogy which might have

Photo from Fabian Bachrach

William H. Hastie, an exemplar of the philosophy of judicial restraint, the first black federal judge (on the Virgin Islands District Court) and the first black Circuit judge on the Third Circuit.

been drawn to the Supreme Court's recent holding of such a non-discriminatory duty implied by the Railway Labor Act.[113]

IV. *1960-1981: Ideological Diversity*

It appears, then, that the 1950's were a decade of relatively stability and orderly development for the Third Circuit, as they were for the country. The 1960's were more uneven. In the beginning of this period there were many changes in the personnel of the Court of Appeals. In 1959, as indicated earlier, Judge Maris retired to Senior Judge status and Phillip Forman, Eisenhower's only appointment to the Third Circuit Court of Appeals, took his place on the bench.[114] Judge Forman, who had been sitting on the District Court, was a living link to the national past, having been appointed United States Attorney by President Coolidge and appointed a District Judge in 1932 by President Hoover. Beginning after his appointment to the Court of Appeals, he served as the Chairman of the Judicial Conference's Advisory Rules Committee on Bankruptcy Rules. His length of federal judicial service was one of the longest, although after only two years as a Court of Appeals judge, Forman retired and joined Judge Maris as a senior judge.

In 1961, J. Cullen Ganey[115] and William F. Smith[116] were appointed to the Third Circuit by John Kennedy. Herbert F. Goodrich died in 1962, and was replaced in 1964 by Abraham L. Freedman, a Johnson appointee.[117] Judge Biggs retained his position as Chief until 1965, at which time he assumed Senior Judge status. He was followed as Chief Judge by Judge Kalodner on October 6, 1965. Judge Kalodner stepped down as Chief Judge on March 28, 1966 at the age of 70, but did not assume Senior status until October 3, 1969. Kalodner was replaced as Chief Judge by Staley on March 29, 1966, who in turn assumed senior status on December 31, 1967. Judge Hastie became Chief Judge on January 1, 1968. Collins J. Seitz,[118] on July 18, 1966, filled the vacancy created after Judge Biggs assumed senior status. Judge J. Cullen Ganey assumed senior status in August 1966. Francis L. VanDusen replaced Staley.[119] Judge Smith died in 1968, and was replaced by Ruggero J. Aldisert.[120] David Stahl[121] was appointed to the Court of Appeals in October of 1968. Judges Arlin M. Adams and John J. Gibbons joined the Third Circuit in 1969.[122]

These rapid personnel changes, of course, altered the character of the Third Circuit, which had remained a virtually unchanged bench for more than a decade. Still, the Court's identity continued to be molded by the traditions of the "Biggs" years. Furthermore, Biggs's successors, Kalodner in 1965, Staley in 1966, and Hastie in 1968, had all been appointed to the court by 1950, and had all served with Chief Judge Biggs since their appointments. Still another source of continuity for the Third Circuit was the provision of federal law which ensures that a retired or Senior Judge might still work to the extent that he is willing and able. Pursuant to 28 U.S.C. §294(b) and 371(b), any United States District or Circuit Judge may elect to become Senior Judge at

age 65 if he or she has served 15 years, or at age 70 if he or she has served 10 years.

As indicated earlier, the assumption of Senior Status also allows for the appointment of a replacement judge, thereby easing a court's workload. Most observers have agreed with Judge Lumbard, who stated that

> The federal judicial system would be strengthened in several ways if every circuit and district judge became a senior judge at age 70 or as soon after 70 as he or she has served 10 years.[123]

The experience of the Third Circuit supports this view, as it was aided considerably by the election of senior status by Maris in '59, Forman in '61, Biggs in '65, Ganey in '66, and Staley in '67. These Senior judges continued to assume a large share of responsibility in case disposition. During the years 1965 until 1969, the Third Circuit ranked a very close second to the Seventh Circuit in the percentages of three judge panels which included a senior judge. 27.2% of the panels, better than one in four, included a senior judge. In contrast, the Third Circuit ranked 9th among the eleven circuits in frequency of utilizing the two other tools available to Circuit Chiefs for additional judicial manpower. Only 13.3% of the Third Circuit panels included District Court judges while only 1.7% of the panels employed a visiting judge.[124] The figure for District Court judges employed might have been lower still were it not for the Third Circuit's practice of inviting each new District Judge, some time during his or her first year of service to sit on a panel of the Court of Appeals, in order better to understand the problems confronted by the appellate court.

Still, the constant influx of new judges to the Third Circuit bench during the 1960's might have been expected to lead to some jurisprudential differences. The statistics compiled by one scholar indicate, however, that the Third Circuit maintained a reasonably high level of unanimity during the early 1960's. In his study of the Federal Circuit Courts of Appeals sociologist Sheldon Goldman suggested that dissents were "relatively infrequent." Between July 1, 1961 and June 30, 1964, however, the Third Circuit had dissenting opinions filed in 9.4% of its cases decided, a figure which was the fourth highest of the eleven circuits.[125]

The figures on dissents in almost one out of ten cases might still thus be seen to reflect new pressures being exerted upon the federal appellate courts. In the sixties, in an increasing number of cases, Federal judges were asked to redress continuing societal wrongs. Many litigants perceived the executive and legislative branches of government as lumbering and ineffectual, as unable to respond effectively to a series of events which included domestic turbulence in the cities, the assassinations of national leaders, and the death and destruction caused by an undeclared war in Southeast Asia. These events apparently led several judges to feel that it was appropriate and necessary for them to decide cases according to their own substantive values[126] and deci-

sions prompted by and statements of substantive values by judges inevitably led to disagreement.

The increasing difficulties faced by the federal judges is suggested by the striking increase in the number of cases initiated in the federal district courts in the sixties and early seventies and a subsequent increase in the number of appeals filed. In 1960, 3,889 cases were filed in the eleven circuit courts of appeal. By 1962, the number had risen by almost 25% to 4,823, but by 1972, the number of filings had increased again by more than 300%, to 14,535. Meanwhile, the number of federal Appellate Court judgeships during the ten year period from 1962 to 1972 rose only 20% from 78 to 97.[127]

If we examine some representative opinions of this period we can find evidence of conflict over "substantive values," and difficulty in maintaining the posture of "judicial restraint" that may have characterized the jurisprudence of the preceeding decade. One landmark of the early sixties was Judge Biggs's decision in *United States v. Currents* (1961).[128] In that case Judge Biggs was presented with an opportunity to apply judicially the insights he had developed in his book, *The Guilty Mind* (1955).[129] The question presented in the *Currens* case was the psychological nature of criminal guilt. The defendant had pleaded "not guilty" by reason of insanity, and, in determining the question of whether the defendant possessed the requisite "sanity" to possess criminal guilt, the trial court had instructed the jury according to the traditional "M'Naghten Rules."[130] According to that standard, the defendant was to be declared "sane" and thus potentially guilty, if it could be demonstrated that at the time of doing the acts for which he was being prosecuted, he was capable of distinguishing "right" from "wrong."

According to Judge Biggs, a test for sanity that depended on the ability to distinguish "right" from "wrong", was a "sham." "Our institutions, he pointed out, "contain many patients who are insane or mentally ill or mentally diseased and who know the difference between right and wrong." Biggs explained that the truth of this assertion would be obvious to any layman who toured a mental hospital.[131] Based on the research he undertook in *The Guilty Mind,* Judge Biggs exposed the origins of the M'Naghten Rules in a sixteenth century English text, published in a time "in which belief in witchcraft and demonology, even among well educated men, was widespread."[132] Referring to a number of modern scholarly and textbook works in psychology and psychiatry,[133] Biggs maintained that the view of "guilt" inherent in the M'Naghten Rules was as fallacious and simplistic as the belief in witchcraft or demonology.

Accordingly, Biggs declared that the Third Circuit would become the first Circuit to follow the D.C. Circuit's seven-year-old decision in the *Durham* case,[134] and adopt the rule that a defendant could be found not guilty by reason of insanity if "at the time of committing a prohibited act, defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of law he allegedly violated."[135] By rejecting the rigid M'Naghten Rule, Biggs maintained he was allowing the courts of

the Third Circuit to take advantage of the insights of modern psychology. Biggs sought thus to free juries from the "frozen" dictates of an outmoded demonology, and sought to ensure that instead of being forced into an artificial inquiry having little to do with the actual mental capabilities of defendants, juries would be allowed to engage in a more sophisticated analysis of mental disabilities, advised by the insights and the testimony of experts.

Whatever the ultimate wisdom of the psychological test of *Currens* and *Durham,*[136] it is clear that Biggs was making a bold effort to adapt the substantive law to the complexities and realities of modern society. It would appear that in so doing Judge Biggs had, at least in part, departed from some of the tenets of the jurisprudence which had recently characterized many of the Court of Appeals's decisions.

This departure is suggested by the separate opinion in *Currens* filed by perhaps the leading proponent of "judicial restraint" on the Court of Appeals, Judge Hastie. He suggested that while Judge Biggs's views on the appropriate test of insanity were correct, they would have been better stated in an opinion where the facts more clearly indicated that the old and new standards would result in different decisions.[137] Perhaps it is fair to say that Judge Hastie was implicitly criticizing Judge Biggs for overreaching in order to establish the substantive legal rule Biggs thought best for the Third Circuit.

One can find a similar debate over the appropriate psychological determinations for legal purposes, and perhaps more clear conflicts over substantive values in a different context at the end of this period, in the beginning of the next decade, when the Court of Appeals considered a number of cases involving young men indicted for refusing induction during the Vietnam War. The psychological question associated with these determinations was the nature of the choice made by those who sought to be exempted from induction on the grounds that they were "conscientious objectors." In *Scott v. Commanding Officer,* one of the most important draft cases, which was decided in 1970,[138] an inductee claimed that he was entitled to a review of his draft status on the grounds that he had become a "conscientious objector" to war. The success of his case depended on the court's determining that his personal "conversion" to conscientious objector status was "beyond his control," since it occurred after he received his notice of induction. The applicable federal regulations only permitted a change of classification by the local board in such cases where events "beyond the control" of the individual had led to a change in his status. In accepting the argument of the inductee, Judge Seitz, writing for the court, explained that the making of a "conscientious objector" was an "evolutionary" process, involving a "crystallization of beliefs," and that such a crystallization might take place involuntarily only when a notice of induction was actually received and when one was "finally forced to confront the reality of a world dominated by military force."[139]

This aspect of Judge Seitz's opinion was dissented from by Judge Aldisert, who believed that the conversion to conscientious objector status was a matter of personal choice, a matter within the control of the individual. Judge

Aldisert pointed out that Judge Seitz's holding on this matter was a "minority" position held by only one other circuit and rejected by five.[140] Judge Aldisert cited the works of several philosophers, including William James, John Dewey, and Bertrand Russell in support of his views on the voluntary nature of human beliefs,[141] but Judge Aldisert appeared to recognize that his own views on the matter might have been dictated by his personal feelings:

> "At the risk of being accused of undue cynicism, I must confess my own subjective inclination to examine carefully all tardy expressions of conscientious objector belief. When the public expression of this formulation first takes place after receipt of the notice of induction. I am not willing to affix to such an occurrence, as would the majority, the irrebuttable presumption that it has happened on the road to Damacus."[142]

Judge Aldisert may have been somewhat more "cynical" than the majority, and his position in these draft cases seems to have made him somewhat less willing to relax the standards for cases of conscientious objection than were some of his brethren.[143] Still, Judge Aldisert took pains to point out in the *Scott* Case that he believed that there might be some cases where "the crystallization of conscientious objector beliefs" was "beyond the control of the registrant," and that he was willing to have "each case be evaluated on its own facts."[144]

Furthermore, Judge Aldisert appears to have been wholly in agreement with the main point decided by the Third Circuit's Court of Appeals in *Scott*, that when a *prima facie* case for conscientious objector status was made out by a registrant, and a local board rejected such a claim and ordered induction, that the board was required to state its basis of decision and reasoning.[145] Perhaps it is fair to suggest that given the volatility of public criticism of the Vietnam War, and the dislocations erupting in America as a result, fundamental fairness was thought by most of the judges of the Third Circuit to dictate at least this minimal procedural step on the part of the local boards. By thus requiring a precise statement of rationale by the local boards, of course, the Court made the task of an inductee seeking to overturn the Board's rejection of conscientious objector status much easier, as the statement would tend to narrow the matters in dispute. The agreement on this point by the Court of Appeals and by the United States Supreme Court is even more striking when one considers that the applicable statute originally seems to have been drafted in a manner that would forbid judicial review of these decisions.[146]

This interpretation of the *Scott* case, that is, that it may have resulted from a desire to liberalize the requirements for conscientious objector status in light of expressed public dissatisfaction with the war in Vietnam, is given further credence by the difficulties that at least one other Third Circuit Judge, Judge McLaughlin, had with the *Scott* standards. For example, in *United States v. Merkle*,[147] Circuit Judge Van Dusen, joined by District Judge Hannum, held that the defendant made out a *prima facie* case for conscientious

objector status by maintaining in his application that (1) "Love and understanding among men are delicate [and] . . . are destroyed by violence and war," (2) that "to kill another is an act of despair and blindness," and (3) that he was "not willing to do this;" where the defendant's sincerity was attested to by supporting letters.[148] The majority further held that since the local board had not submitted its reasons for denying the defendant's C.O. application, the defendant's conviction for refusing induction had to be reversed.[149]

Judge McLaughlin, dissenting, pointed out that the registrant, in his first filing with his draft board had not asked for conscientious objector status, but had instead requested a student deferment, and, upon that being granted, had "put in what seems to have been a comfortable four years at college."[150] Judge McLaughlin expressed his skepticism regarding the defendant's claim that reading Dostoyevsky had influenced him to assume a conscientious objector's beliefs. First the judge questioned whether the defendant really had read Dostoyevsky's works, since he referred specifically to none of them. Then, indicating his own feelings on the legitimacy of the Vietnam War, Judge McLaughlin stated, ". . . Dostoyevsky had pity for suffering humanity. There is not even an attempted suggestion by [the defendant] that Dostoyevsky would not have pitied the South Vietnamese whose every existence as a nation and as individual human beings was and is destroyed by North Vietnam with the open help and cooperation of Soviet Russia and Communist China."[151] Judge McLaughlin also declared that the defendant had not adequately supported his claim that the ancient Chinese philosophy of Taoism had influenced his beliefs, and again Judge McLaughlin did so in terms that revealed the nature of *his* political beliefs:

> "Nothing was presented to his Local Board . . . that could be twisted to charge that honest, old fashioned Chinese Taoism practitioners, if Mao-Tse-Tung has left any of them alive, would not feel badly at the plight of the South Vietnamese and if free to do so, gladly help them."[152]

In light of this analysis, Judge McLaughlin believed that there was a factual basis for denying the sincerity of the defendant's beliefs regarding conscientious objection, and he maintained that this was enough "reasoning" to support the decision of the draft board. It is thus difficult to believe that Judge McLaughlin's sympathies with the expressed American aims in the Vietnamese War effort did not influence his attitude toward the disallowance of conscientious objector claims.[153]

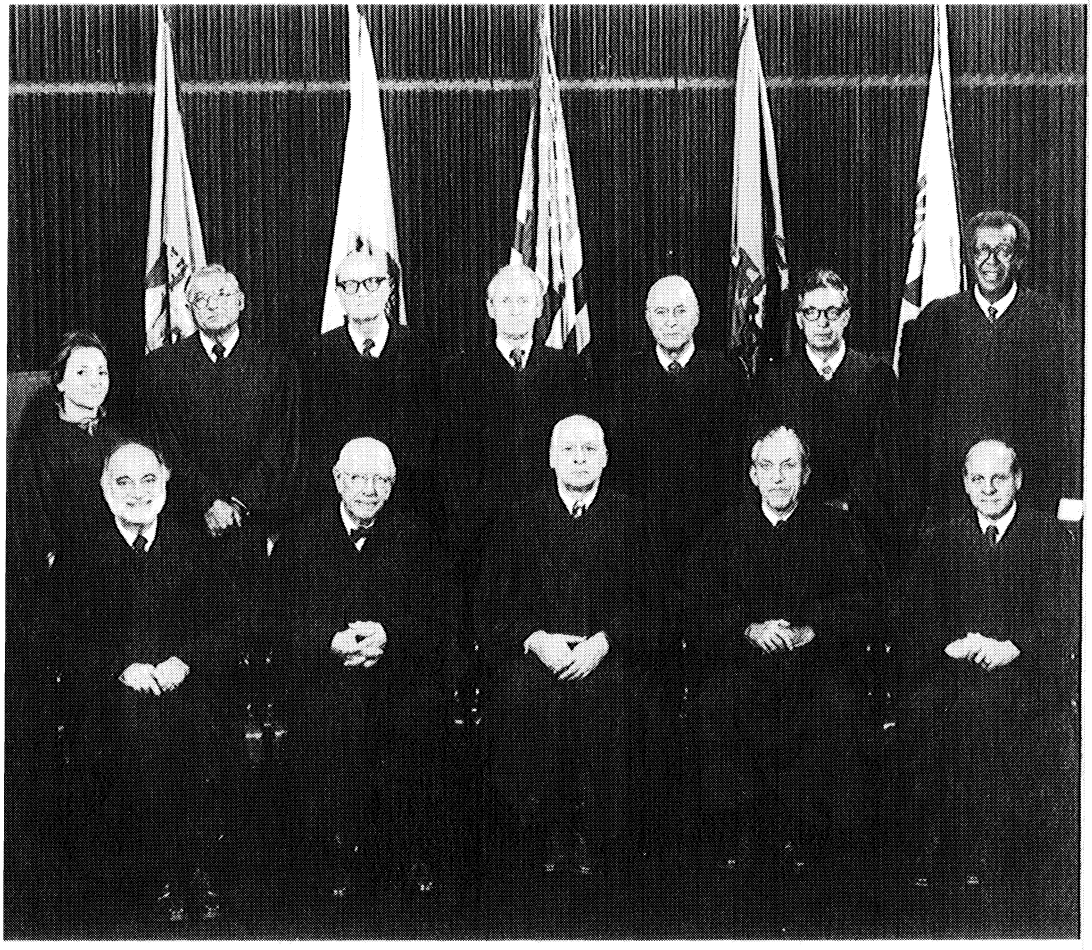
It seems most important to observe, however, that even if there were occasional expressions of dissent over matters of political ideology, in the early seventies the rate of dissents was still low, and thus the Judges of the Third Circuit, even in the acrimonious late sixties and early seventies, seem to have been successful in using en banc panels and other means available to them in maintaining a relative uniformity of law within the Circuit.[154]

V. *The Third Circuit Today: Technical Wizardry and A Young Bench*

As indicated, the relatively stable bench of judges on the Third Circuit through the 1940's and 1950's is in stark contrast to the changes in personnel which occurred during the late 1960's and 1970's. The retirement of Judges McLaughlin, Hastie and Kalodner and the deaths of Judges Smith, Freedman and Ganey moved Judge Seitz from junior judge in 1966 to the Chief Judgeship only five years later in 1971.[155] Richard Nixon appointed eight new judges in less than four years from October 1969 until August 1973. This large number of appointments was made necessary in part by the untimely deaths of David Stahl in 1970 and James Rosen in 1971. Stahl sat on the court for 16 months, while Rosen sat for only a year.[156] The other Nixon appointees, all of whom are still active circuit judges, were Max Rosenn in October of 1970,[157] James Hunter III in September of 1971,[158] Joseph F. Weis, Jr. in March of 1973,[159] and Leonard J. Garth in August of 1973.[160] The Circuit's only Republican appointment since World War II had been Judge Forman, who had retired in 1961. With the Nixon appointments the Third Circuit became a predominantly "Republican" court after over 30 years as a "Democratic" institution.

It still seems fair to suggest that much of the character of the Third Circuit remains unchanged. The Chief Judge of the Third Circuit since Judge Hastie's retirement in 1971 has been Collins J. Seitz, a Democrat appointed to the court by President Johnson in 1966.[161] Seitz's appointment to the Third Circuit and his tenure as Chief Judge have led to a continuation of the judicial philosophy for the Third Circuit espoused by Judge Biggs, even if the court's composition has changed. An indication of Judge Seitz's judicial philosophy might be gained from an examination of *Parker v. University of Delaware,* 75 A. 2d 225 (Del. 1950), and some successor cases which Seitz decided in his position as Vice Chancellor of Delaware. The *Parker* case was brought on behalf of 30 black students who sought admission to the then all-white University of Delaware. The Plaintiffs complained that the conditions at Delaware State College for negroes was inferior to those at the University of Delaware, and that this was unconstitutional, even in view of the 'separate but equal' doctrine of *Plessy v. Ferguson.*[162] Vice Chancellor Seitz visited both campuses, determined that the College for blacks was significantly inferior, and accordingly ordered the plaintiffs admitted to the University. This was the first time a state run undergraduate institution had been desegregated under the *Plessy* doctrine by court order.[163]

Two years later, the NAACP brought two suits before Seitz attacking *Plessy* itself on the basis that segregation was 'per se' unequal.[164] Despite Seitz's obviously strong feelings against segregation, Seitz declined to overrule *Plessy*. Seitz was willing to apply the 'separate but equal' rule to grant the plaintiffs relief, but in language that indicated subscription to the views of judicial restraint espoused by Judges such as Hastie, he stated:



The United States Court of Appeals for the Third Circuit in November, 1980:
Standing, left to right: Dolores K. Sloviter, Leonard I. Garth, James Hunter, III, John J. Gibbons, Max Rosenn, Joseph F. Weis, Jr., A. Leon Higginbotham, Jr.
Seated, left to right: Ruggero J. Aldersert, Albert B. Maris, Collins J. Seitz, Francis L. Van Dusen, Arlin M. Adams.

> . . . I do not believe a lower court can reject a principle of United States Constitutional law which has been adopted by fair implication by the highest court of the land. I believe the "separate but equal" doctrine in education should be rejected, but I also believe its rejection must come from that Court.[165]

Not only is Chief Judge Seitz's judicial philosophy thus similar to that articulated by previous judges of the Third Circuit, but the administration of the Third Circuit during the tenure of Chief Judge Seitz has continued to be exceptional. As indicated, in these years the courts have had to face an increasingly litigious American population. Indeed, as Judge Seitz remarked at the Third Circuit Judicial Conference in September of 1979:

> In looking back (to 1971) . . . I find many recurring themes—judicial vacancies, the shortage of supporting personnel and facilities, and the ever increasing case load.[166]

Additional administrative pressures have resulted from the 1974 enactment by Congress of the "Speedy Trial Act," which sets time limits for the final disposition of criminal cases.[167] The result, Seitz has observed, ". . . is an ominous delay in trying and deciding civil cases."[168] This is particularly significant in the Third Circuit, where in 1978, 83% of all filings in the Third Circuit District Courts were *civil* cases.[169]

Nevertheless, the Third Circuit Court of Appeals's record of disposition of cases during the late 1970's has been impressive. In his 1978 "State of the Circuit" address, Chief Judge Seitz stated:

> In the last eight quarters, our court of appeals consistently has the fewest number of cases in the country falling into a delayed disposition category. Indeed, in five of the last eight quarters not one of our cases fell into a delayed disposition category.[170]

More recently, in his 1979 address, Seitz remarked:

> I am delighted to report that about 90% of all cases being heard this fall in our court of appeals were docketed this year. Thus, the appeal process in the Third Circuit could be more current than in any Circuit in the country.[171]

Seitz's court has been able effectively to handle its caseload under difficult conditions, in large part because the Third Circuit has retained the innovative spirit which characterized the court under Chief Judge Biggs and Judge Maris. The court has shown a willingness to find new men, machines and procedures to streamline the administration of justice. It has increasingly utilized staff attorneys to pre-screen briefs for jurisdictional defects. In pro se appeals, these men and women develop the issues, establish complete records for the judges' inspection, and write bench memos.[172]

The Third Circuit now uses computers for docketing cases and for circulating draft opinions.[173] Correspondence between judges is transmitted by

electronic mail which relies upon a computer in Washington, D.C., and word processors in each judge's chambers.[174] Other uses of electronics are being explored, yet there may be some wariness about the nature of progress in this area. Judge Seitz states, with characteristic restraint;

> We are moving carefully on this phase so that we do not adopt gadgetry for its own sake but only where it will help the court perform its assigned tasks more efficiently.[175]

In conjunction with the Judicial Conference, the Third Circuit has initiated a 'satellite library system' to promote efficient use of legal resources while cutting costs.[176] Rather than having each of the Third Circuit's courthouses support a complete legal library, each judge has been encouraged to maintain only essential sources. Other research materials are then kept at three "satellite" libraries in Pittsburgh, Newark and Wilmington, where librarians and staff respond to individual requests by judges throughout the circuit for specialized materials. "Mini-satellites" are maintained in Wilkes-Barre and Camden.[177] The result of these developments is a smaller overall library staff, reduced number of legal volumes, and reduced expenses. The Third Circuit's library pilot program has been so successful that it has been recommended for adoption by the entire judiciary.[178] It seems characteristic of the Third Circuit not only to have been chosen as the experimental circuit, but to have transformed the experiment into a practical success. In an earlier experiment conducted in cooperation with the Federal Judicial Center, from August 15, 1971, to August 15, 1972, seven judges and fourteen law clerks kept precise time records on their disposition of appellate cases, in order to facilitate the study of suggestions for improving the administration of the Circuit Courts of Appeals.[179] The experiment resulted in the only Time Study ever conducted by a federal Court of Appeals, and perhaps by any court.

Also in accordance with the Third Circuit's tradition of recognition of the need for some diversity in analysis and of the value of suggestions for improvement, the Third Circuit was the first circuit in the country to establish a Lawyer's Advisory Committee, which it did in December of 1975.[180] Formulated pursuant to 28 U.S.C. §332, the Advisory Committee

> ". . . is authorized to entertain communications from the Bar about the judicial system and personnel. If requested, the identity of the complaining party is not disclosed to the court. In this way, the court or the council may initiate an inquiry in an appropriate case without threat of recrimination. Beyond this, it is a valuable conduit by which the court can be made aware of the concerns of the Bar.[181]

In addition to taking advantage of administrative innovations, the Third Circuit in recent years has also been able to achieve current status because of increased "productivity" of its judges. In 1975, the normal three judge panels of the court met for 26 weeks a year.[182] This was increased to 29 weeks in 1976, a year in which an average judge reviewed 240 cases.[183] In 1977, the

figures were increased to 30 weeks and 260 cases. In 1978, the traditional ten-month sitting schedule was increased to a 12 month schedule, which has resulted in a more uniform and continual disposition of cases.[184] By 1979, Third Circuit judges were sitting on an average of 280 cases a year.[185]

Since Collins J. Seitz assumed the position of Chief Judge, the size of the court has grown to its present number of ten judges, and the Third Circuit has maintained its diverse character. For example, since the New Deal the court has continued to have on the bench men and women from varied religious and ethnic backgrounds. Judges Adams, Rosenn and Garth are Jewish, Judges Aldisert, Weis and Gibbons are Catholic, as is Chief Judge Seitz. The court has recently been joined by Democratic Carter appointments A. Leon Higginbotham, who is black,[186] and Dolores K. Sloviter, the Court of Appeals's first woman judge.[187] Most of the New Deal judges have died; Biggs in 1979, Staley in 1978. Only Albert B. Maris, a marvelously vital individual, survives.

Because of the lack of any perspective furnished by hindsight, it is difficult if not impossible to characterize the Third Circuit Court of Appeal's present judicial philosophy. The Third Circuit is again a "young" court, and there are signs that the court may be experimenting with a variety of approaches to contemporary legal issues, particularly the scope of individual rights, which, as we have seen, is perhaps the dominant concern in post New-Deal jurisprudence. For example, in *U.S. v. Dalia,* (1978) the Third Circuit's Court of Appeals held that a law enforcement agency was implicitly authorized under Title III of the Safe Streets Act surreptitiously to enter a dwelling to install a listening device, although a court order only authorized specifically the surveillance itself.[188] This result might be thought of as favoring the faciliation of law-enforcement activities, but the holding differs from results reached in the 4th, 6th, 8th, 9th, and D.C. Circuits.[189]

Dalia might instructively be compared with *U.S. v. Molt,* a case decided the same year, in which the Third Circuit held that a "good faith" misrepresentation made by a government agent to a defendant regarding a warrantless search rendered it involuntary, despite the fact that the defendant was college educated, had consulted with counsel, had some business experience, and had initially consented.[190] In that decision, of course, the facilitation of law enforcement was subordinated to the desire for the protection of the rights of individuals to be free from unreasonable searches and seizures.

In *Rosen v. Public Service Electric & Gas Company* (1975), the court held that sex discrimination in a pension plan violates Title VII.[191] Similarly, in *E.E.O.C. v. DuPont de Nemours & Company* (1975), the court rejected the defendant's claim that racial discrimination suits under Title VII must be brought within 180 days of the alleged discrimination. The important role of the E.E.O.C. as Title VII enforcer was lauded, and its enforcement efforts were thus aided.[192] Still, in *Kober v. Westinghouse Electric Company* (1973), two years earlier, the court of appeals had denied a claim under Title VII for back pay due to sex discrimination. Relief was denied in *Kober* despite a

court finding that the defendant had intentionally discriminated. The Third Circuit held that no back pay was due where Westinghouse had acted in "good faith."[193]

Another area in which the Third Circuit's Court of Appeals has recently demonstrated differing attitudes is that of the law regarding corporate securities. It will be remembered that the "Biggs" court was strongly committed to the ideal of "corporate democracy," and to the protection of individual investors.[194] One 1978 case, *Monson v Consolidated Dressed Beef Co., Inc.,* [195] gives strong evidence that this commitment continues. In that case Circuit Judge Rosenn held that there was "aiding and abetting" liability under the Securities Laws[196] where a bank's officers "effectively assisted" securities violators by telling them that future bank loans to them would be contingent on the continuation of a program where the prospective borrowers were exchanging promissory notes for their employees' payroll deductions in apparent violation of the securities laws. This was perhaps one of the least restrictive interpretations of "aiding and abetting" liability by a federal court of appeals, an area of law that could potentially impose massive liability on financial institutions and, in effect, make lenders "insurers" that their borrowers were involved in no securities violations. For this reason, the leading scholarship on "aiding and abetting" liability cautions against liberally imposing such liability.[197]

Still, a year after *Monson,* in *Collins v. Signetics Corporation,*[198] Circuit Judge Aldisert refused to depart from the rule of the Third Circuit's district courts that privity between issuer and purchaser was required before liability could be imposed under 12(2) of the Securities Act of 1933 for misstatements in connection with the sale of securities. Judge Aldisert explained that Congress had provided a remedy under §11 of the Securities Act of 1933[199] for a purchaser to utilize against an isuer for misstatements made in registration statements. He stated that it would "torture the plain meaning of the statutory language," and would also "frustrate the statutory schema" to permit issuers also to be held liable, absent privity, under §12(2).[200]

Judge Aldisert stressed that "In interpreting liability provisions of the acts, we must respect recent Supreme Court teachings that militate against excessively expansive readings."[201] He noted several of these recent "Supreme Court teachings," including, *inter alia,* a decision that "A defeated tender offeror has no implied cause of action for damages under §14(e) of the Securities Exchange Act of 1934 or under rule 106-5."[202] There is no doubt that Judge Aldisert's statement of the current "teachings" of the United States Supreme Court was correct,[203] and that the Supreme Court has suggested that it feels it appropriate to reject an expansive construction of the federal securities law so as not to permit private actions when they are not expressly provided.[204] Still, in adopting the perspective of the Supreme Court, Judge Aldisert did depart from the line of reasoning in the *Kardon case,*[205] which appears to have been that such an expansive construction was the best means to protect investors and to secure "corporate democracy."

The Third Circuit has just finished a decade-long period of reconstruction in personnel, much like the period beteen 1937 and 1950. The years 1966 to 1979 have seen a nearly total change in the members of the Third Circuit Court of Appeals and perhaps the differences in perspective just discussed reveal accommodations to new judicial concerns. Indeed, a somewhat cursory study of 59 representative cases reveals thirteen with dissenting opinions.[206] That 22 percent figure is substantially higher than the "dissent" figure reported in two previous studies of the court's work, both of which were below ten percent.[207]

Conclusion

The Third Circuit Court of Appeals of the 1970's recalls the Third Circuit of the 1940's and 1950's in more ways than the initial experience of a rapid turnover in personnel. For example, both courts benefitted from the leadership of a young, highly experienced, and innovative Chief Judge. While the court may be once again engaged in the search for an appropriate judicial philosophy, given time, cooperation, and leadership, as happened in the nineteen-forties, consistency and consensus could increase. A perceived decline in the quality of jurisprudence on the Second Circuit after the retirement of Learned Hand might provide a lesson for the Third Circuit. Under the leadership of Judge Hand during the 1940's, the Second Circuit was believed to be the country's most efficient court in terms of total number of cases pending and average time for disposition of a case.[208] According to Marvin Schick, author of *Learned Hand's Court,* after Hand's retirement in 1951, the 2nd Circuit achieved one of the poorest records in those same areas. Upon close examination, Schick found ". . . a distinct difference between the performance of the 2nd Circuit in the 1940's and the court's record after Learned Hand's retirement. . . ."[209] In contrast, there were no distinct differences between the performances of the 3rd Circuit after Chief Judge John Biggs, nor after Chief Judge Harry E. Kalodner, nor after Chief Judge Austin L. Staley, nor after Chief Judge William H. Hastie. If the administrative system now being constructed by Chief Judge Seitz and his colleagues is treated with the same kind of innovative attention it has received since 1939, and if the current debates over substantive law are resolved as they have been in the past, an outstanding post-'Revolution' tradition of both the vindication of individual rights and judicial self-restraint can be maintained.

Notes

1. *See generally* S. PRESSER AND J. ZAINALDIN, LAW AND AMERICAN HISTORY: CASES AND MATERIALS 674–705 1980).
2. Lumbard. *Current Problems of the Federal Courts of Appeal,* 54 Cornell Law Review 29, at 29–30 (1968).
3. CHASE, KRISILON, BOYUM AND CLARK, BIOGRAPHICAL DICTIONARY OF THE FEDERAL JUDICIARY 21 (1976).
4. *Remarks by Mr. Justice Brennan in honor of Judge Biggs,* 507 F. 2d, at 15.
5. *See* CHASE, note 3 *supra,* at 35, 67, 309, 274.
6. *Ibid.*
7. *Id.,* at 21.
8. *Id.,* at 20–21, 50–51, 142–143, 175–176.
9. Brennan, note 4 *supra,* at 15.
10. *Ibid.*
11. *Remarks of Mr. Vincent A. Theisen in honor of Judge Bigg's Retirement as Chief Judge,* 355 F. 2d 8 (1965).
12. CHASE, note 3 supra, at 21.
13. *Remarks by Professor Peter G. Fish at Proceedings in Honor of Judge Biggs,* 507 F. 2d 8 (1970).
14. *Id.,* at 10–11.
15. *Id.,* at 8–9.
16. CHASE, note 3, *supra,* at 175–176.
17. *Id.,* at 175.
18. *Remarks by Judge John Biggs at a Proceeding in his Honor,* 494 F. 2d at 6.
19. CHASE, note 3 *supra,* at 175.
20. Letter from Hon. Edward Dumbauld to the author, December 2, 1980.
21. *Remarks by Walter Alessandroni at the Retirement Proceedings for Albert Maris,* 260 F. 2d at 7. *Remarks by Chief Justice Christian,* 494 F. 2d at 13.
22. *Remarks by Judge Biggs at a Proceeding Honoring Albert Maris,* 494 F. 2d at 6.
23. *Id.,* at 7.
24. United States v. Maine et al., 420 U.S. 515 (1975).
25. Albert B. Maris to Dwight D. Eisenhower, December 19, 1958, reproduced in *Proceedings of a Special Session of the Court of Appeals Honoring Albert B. Maris,* at 260 F. 2d 17.
26. *Id.*
27. J. GOULDEN, THE BENCHWARMERS, 302–310 (1974).
28. CHASE, note 3, *supra,* at 104–104.
29. *Remarks by ALI President Norris Darrell at Memorial Proceedings for Herbert Goodrich,* 317 F. 2d at 14 (1963).
30. *Id.,* at 15.
31. See, *e.g.* J. FRANK, LAW AND THE MODERN MIND (1938).
32. CHASE, note 3 *supra,* at 105.
33. *Id.,* at 50–51.
34. Goldman, *Judicial Appointments to the U.S. Courts of Appeals,* 1967 Wisconsin Law Review 186, at 204.
35. CHASE, note 3, *supra,* at 210.
36. *Id.,* at 146.
37. *Remarks by Judge Arlin Adams in Memory of Judge Kalodner,* 567 F. 2d at 6.
38. CHASE, note 3, *supra,* at 146.

39. *Remarks by I. Jerome Stern in Memory of Judge Kalodner*, 567 F. 2d at 16.
40. CHASE, note 3, *supra*, at 118.
41. Rusch, *William H. Hastie and the Vindication of Civil Rights*, 21 Howard Law Journal 771 (1978).
42. *Id.*, at 773.
43. *Remarks by Mr. Chief Justice Burger in Memorium for William H. Hastie*, 535 F. 2d at 9.
44. *Remarks by Bernard Segal in Memory of Judge Hastie*, 535 F. 2d at 9.
45. *See* Rusch, note 41 *supra*, at 749, 798, 805.
46. *Id.*, at 805.
47. CHASE, note 3 *supra*, at 260.
48. *See, e.g.* the series of articles in the New York World Telegram in December, 1939, and Chapter Four, *supra*.
49. Davis's first trial, on charges of obstruction of justice, ended on May 19, 1941. His second trial lasted from July 28 to August 21, 1941, and also ended with the jury unable to agree.
50. *See generally Root Refining Co. v. Universal Oil Products Co.*, 169 F. 2d 314 (1948).
51. *Id.*, at 518.
52. *Id.*, at 518–519.
53. *Id.*, at 519.
54. *Id.*, at 519. The three cases were Nos. 5546 and 5648, *Root Refining Company v. Universal Oil Products Company*, and No. 5649, *American Safety Table Company v. Singer Sewing Machine Company*.
55. *Id.*, at 521.
56. *Id.*, at 552, quoting *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, at 246.
57. *Id.*, at 525.
58. *Id.*, at 526.
59. *Id.*, at 531.
60. *Id.*, at 532–534.
61. *In the matter of Morgan S. Kaufman*, United States District Court for the Eastern District of Pennsylvania, No. M978, May 12, 1943, *Root Refining, supra*, 160 Fed. Rep., at 541.
62. *In the Matter of Morgan S. Kaufman, Proceedings in re Readmission to the bar*, United States District Court for The Eastern District of Pennsylvania, April 8, 1959.
63. The loan to his cousin was made, after all, with perfectly adequate collateral. In the proceeding for readmission of Kaufman, this matter was again raised, since the "loan" had originally come from Kaufman. This time the judges appear to have found that there was nothing particularly corrupt about the transaction, that it was a bona fide loan to the cousin, and that it was not a bribe. *Id.*, These matters are discussed in J. Borkin, *The Corrupt Judge* 128–137 (1962).
64. 101 F. 2d 774, aff'd 307 U.S. 496. For a passionate perspective on the *Hague* case, explaining the importance of the case in civil rights jurisprudence, both then and now, and also providing rich details about the litigants and the controversy, see Gibbons, *Hague v. CIO: A Retrospective*, 52 N.Y. U.L. Rev. 731 (1977).
65. 101 F. 2d, at 777.
66. *Id.*, Gibbons, *supra* note 64, at 732–33, 744.
67. *Id.*, at 778–779.
68. *Id.*, at 782, citing Lovell v. City of Griffin, 303 U.S. 444.
69. *Id.*, at 782–786.
70. *Id.*, at 786. For the suggestion that the decision of Biggs and Maris may have come as a shock to Hague, since he was then the Vice Chairman of the Demo-

cratic National Committee, and Biggs had been Democratic State Chairman of Delaware while Maris, for his part, had been Democratic Chairman of Chester County, Pennsylvania, see Gibbons, *supra* note 64, at 740.

71. *e.g. Davis v. Massachusetts,* 167 U.S. 43, *Near v. Minnesota,* 283 U.S. 697.
72. 101 F. 2d, at 797, 801.
73. *Id.,* at 807.
74. *Id.,* at 797–798.
75. Gibbons, *supra* note 64, at 742–744.
76. 21 F. Supp. 581 (1937), aff'd, 108 F. 2d 683 (1939).
77. 310 U.S. 586 (1940).
78. 319 U.S. 624 (1943).
79. 69 F. Supp. 512.
80. 15 U.S.C. Section 78a *et. seq.*
81. 69 F. Supp. at 514.
82. *Touche Ross & Co. v. Redlington,* 442 U.S. 560 (1979).
83. 69 F. Supp., at 513.
84. *Id.*
85. *Id.,* at 514.
86. *Superintendent of Ins. v. Bankers Life & Cas. Co.,* 404 U.S. 6 (1971). *Bankers Life* has been said to have "ratified 25 years of lower court precedent." *Cannon v. University of Chicago,* 441 U.S. 677 (Mr. Justice Powell, dissenting).
87. *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979).
88. For an account of these matters see generally J. Borkin, *The Corrupt Judge* (1962).
89. 163 F. 2d 511 (1947).
90. Rev. Code Del. 1935, Section 2041.
91. 163 F. 2d, at 517.
92. *Id.*
93. *Id.,* at 517–518.
94. *Id.*
95. *See* sources cited in Footnote 12 of Judge Biggs opinion, 163 F. 2d, at 518.
96. *See, e.g.* W. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 59–60 (1963).
97. *See generally,* R. WINTER, GOVERNMENT AND THE CORPORATION (1978).
98. 163 F. 2d, at 517.
99. Cf. Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 Harv. L. Rev. 1 (1959).
100. See e.g. G.E. WHITE, THE AMERICAN JUDICIAL TRADITION 292–293 (1976), G.E. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136–163 (1978).
101. *Id.*
102. Robinson, *William Henry Hastie—The Lawyer,* 125 University of Pennsylvania Law Review, (1976), n. 1. See also Pollak, *Tribute to Judge Hastie,* 30 Harv. L.S. Bull, 40 (1979).
103. *Remarks by Bernard Segal in Memory of Judge Hastie,* 535 F. 2d at 9.
104. *Id.,* at 7. See also Pollak, *supra* note 102.
105. *See Rusch,* note 41 supra, at 808.
106. *Cf. Id.,* at 771–773, 803–806.
107. *See* 535 F. 2d note 103, *supra,* at 11.
108. *See* Rusch. note 41, *supra,* at 806.
109. *Id.*
110. 423 F. 2d at 246.
111. *Id.,* at 248.

112. *Williams v. Yellow Cab. Co.* 200 F. 2d 304 (3rd Cir. 1952).
113. *Syres v. Oil Workers International Union Local No. 23*, 223 F. 2d 739 15th Cir. (1955).
114. *See* CHASE, note 3 *supra*, at 93. Born in 1895 in New York City, Forman graduated from Temple University with an LL.B. After 13 years of private practice, Forman spent the years from 1923 until 1928 as an assistant U.S. Attorney for New Jersey. He was promoted to U.S. Attorney in 1929 where he remained until his appointment as Judge of the U.S. District Court of New Jersey.
115. *Id.*, at 98. Ganey was born in 1899 in Bethlehem, Pennsylvania, and received his A.B. from Lehigh University in 1920 and his LL.B. from Harvard in 1923. After 14 years of private practice, Ganey was appointed U.S. Attorney for the Eastern District of Pennsylvania in 1940.
116. *Id.*, at 258. Born in Perth Amboy, New Jersey, in 1904, Smith received his Ph.D. from Columbia University in 1922 and his LL.B. from New Jersey Law School in 1929. During 11 years in private practice (1930–1941), Smith taught law school at his alma mater and acted as Assistant U.S. Attorney (1934–1940) and U.S. Attorney (1940–1941). He was appointed to the U.S. District Court for New Jersey in 1941.
117. *Id.*, at 95–96. Freedman was born in Trenton, New Jersey in 1904, and received his LL.B. from Temple University in 1926. He was city solicitor for Philadelphia (1952–1956), and counsel to the Philadelphia Housing Association (1940–1961). He was appointed U.S. Federal Judge for the Eastern District of Pennsylvania in 1961.
118. *Id.*, at 248.
119. *Id.*, at 283. Born in Philadelphia in 1912, Van Dusen received his A.B. from Princeton in 1934 and his LL.B. from Harvard in 1937. After 17 years in private practice (1937–1955), Van Dusen was appointed Federal Judge for the Eastern District of Pennsylvania.
120. *Id.*, at 4. Aldisert was born in Carnegie, Pennsylvania, in 1919, and received his B.A. in 1941 and his LL.B. in 1947, both from the University of Pittsburgh. After 14 years in private practice (1947–1961), Aldisert was appointed judge of the Court of Common Pleas, Allegheny County until his appointment to the Third Circuit.
121. *Id.*, at 260. *See* also 451 F. 2d. Stahl died suddenly after 16 months on the circuit. Born in 1921, Stahl attended the University of Pittsburgh law school and served as Attorney General of Pennsylvania and Pittsburgh City Solicitor.
122. *Id.*, at 319, 331–332. Adams was born in Philadelphia in 1921. He received his B.S. from Temple in 1941 and his M.A. and LL.B. from the University of Pennsylvania in 1947 and 1950. Except for 3 years as Secretary of Public Welfare in Pennsylvania (1963–1966), Adams was in private practice from 1947 until his appointment in 1969. Gibbons was born in Newark, in 1924. He received his B.S. from Holy Cross College in 1947 and his LL.B. from Harvard in 1950. He was in private practice from 1950 until his appointment.
123. *See* Lumbard, note 2 *supra*, at 34.
124. Green and Atkins, *Designated Judges: How Well Do They Perform?* 61 Judicature 359, 1977–1978, at 364.
125. Goldman, *Conflict and Consensus in the United States Courts of Appeal*, 1968 Wisconsin Law Review 461, at 463.
126. *See*, e.g. Wright, *Professor Bickel, The Scholarly Tradition and the Supreme Court*, 84 Harv. L. Rev. 769 (1971).
127. *Hruska, The Commission on Revision of the Federal Court Appellate System: A Legislative History*, 1974 Arizona State Law Journal 579, at 582.
128. 290 F. 2d 751 (3rd., Cir., 1961).

129. See text following Note 12, *supra*.
130. Those rules grew out of the case of *Regina v. M'Naghten*, 4 State Trials, N.S. 923 (1843).
131. 290 F. 2d, at 765.
132. *Id.*, at 763–764.
133. *Id.*, at 761–763.
134. *Durham v. U.S.*, 214 F. 2d 862 (D.C. Cir., 1954).
135. 290 F. 2d, at 751.
136. The *Durham* test was recently repudiated in the D.C. Circuit, on the grounds that it was difficult to administer, See *United States v. Brawner* 471 F. 2d 969 (D.C. Cir., 1972).
137. 290 F. 2d at 776–777 (concurring opinion of Judge Hastie).
138. 431 F. 2d 1132.
139. *Id.*, at 1138.
140. *Id.*, at 1136. Judge Aldisert's position was later adopted by the Supreme Court, in *Ehlert v. United States* 402 U.S. 99 (1971).
141. 431 F. 2d, at 1139.
142. *Id.*, at 1142.
143. See, *e.g.* his concurring opinion in *United States v. Stephens*, 445 F. 2d 192 (1971).
144. 431 F. 2d, at 1142.
145. *Id.*, at 1138–39.
146. Cf. *Estep v. United States*, 327 U.S. 114 (1946), *La Franchi v. Seamans*, 536 F. 2d 1259, 1261 (9th Cir., 1976).
147. 444 F. 2d 411 (1971).
148. *Id.*, at 412.
149. *Id.*, at 414.
150. *Id.*, at 415.
151. *Id.*, at 415.
152. *Id.*, at 415–416.
153. For another case in which Judge McLaughlin's doubts as to the sincerity of a registrant may have been the "true basis" for upholding a denial of c.o. status, see *United States v. Jones*, 456 F. 2d 627, 633 (1972, Adams, J., dissenting).
154. Goldman, *Conflict on the U.S. Courts of Appeals 1965–1971: A Quantitative Analysis*, 42 University of Cincinnati Law Review 635 (1973).
155. *Remarks by Judge Clinton Palmer in Memory of Judge Ganey*, 470 F. 2d at 6.
156. CHASE, Note 3, *supra*, at 349. James Rosen was born in Brooklyn in 1909. He received his LL.B. from New Jersey Law School in 1930. He was in private practice from 1931 until 1959, with part-time positions as Dep. Atty. Gen. in New Jersey and Ass't. Counsel, New Jersey Enforcement Council. Rosen sat on the Hudson County Court of New Jersey (1959–1964) and the Superior Court of New Jersey (1964–1971).
157. *Id.*, at 349. Born in Belle Plain, Pa. in 1910, Rosen received his A.B. from Cornell in 1929 and his LL.B. from the University of Pennsylvania in 1932. He was in private practice from 1932 until his appointment to the 3rd Circuit in 1970. He was also Ass't. District Atty., Lucerne County, Pa., and Secretary of Public Welfare for Pennsylvania.
158. *Id.*, at 334–5. Born in Westville, N. J. in 1916, Hunter received his A.B. from Temple University in 1936 and his LL.B. from the University of Pennsylvania in 1939. He remained in private practice until his appointment to the 3rd Circuit in 1971.
159. Born in 1923, Judge Weis was educated at Duquesne (B.A.) and the University of Pittsburgh Law School (J.D. 1950). He practiced in Allegheny County from 1950 to 1968, until he became a Judge on the Pennsylvania Court of Common

Pleas Fifth Judicial District (1968–70). He served on the United States District Court for the Western District of Pennsylvania from 1970 to 1973. Reineke and Lichterman, THE AMERICAN BENCH 49 (1979).

160. Judge Garth was born in 1921, and received his B.A. from Columbia (1942), and an LL.B. from Harvard (1952). He practiced in Paterson, New Jersey from 1957 to 1970, and was a Judge of the United States District Court for New Jersey from January 29, 1970 to August 29, 1973. See, e.g. Reineke, *supra* note 159, at 22.
161. Judge Seitz was born in 1914, and attended the University of Delaware (A.B. 1937), and the University of Virginia (LL.B. 1940). He has received L.L.D. degrees from the University of Delaware (1962) and Widener College (1975). He was admitted to the Delaware Bar in 1940, was made Vice Chancellor in 1946 and Chancellor in 1951. 2 Who's Who in America 2915 (40th ed., 1978–79).
162. 163 U.S. 537 (1896).
163. R. KLUGER, SIMPLE JUSTICE 430–32 (1976). Kluger calls the relief Chancellor Seitz granted a "thunderbolt," and stated that his decision was "the first time [that] a segregated white public school in America had been ordered by a court of law to admit black children. *Id.*, at 449.
164. Belton v. Gebhart, Bulah v. Gebhart, 87 A.2d 860 (Del. Ch. 1952).
165. *Id.*, at 865. See also KLUGER, *supra* note 163, at 432–450.
166. Seitz, *State of Circuit Address* (September 11, 1979), at 1.
167. *Ibid.*
168. Seitz, *Remarks by Chief Judge Collins J. Seitz*, 39th Third Circuit Judicial Conference (September 22, 1976), at 3.
169. Seitz, *State of the Circuit Address* (October 24, 1978), at 1–2.
170. *Id.*, at 10.
171. Seitz, *supra* note 166, at 6–7.
172. Seitz, *State of the Circuit Address* (September 19, 1977), at 10.
173. Seitz, *supra* note 166, at 9.
174. *Id.*, at 8–9.
175. *Id.*, at 9.
176. *Id.*, at 3–4.
177. Seitz, *supra* note 172, at 11.
178. *Id.*
179. See generally Moshman Associates, Inc., *An Analysis of the Appellate Process* (May 14, 1973).
180. Seitz, Note 169 *supra*, at 11.
181. *Id.*, at 11–12.
182. Seitz, Note 172 *supra*, at 8.
183. Seitz, Note 168 *supra* at 6–7.
184. Seitz, Note 169 *supra*, at 9.
185. Seitz, Note 166 *supra*, at 7.
186. CHASE, Note 3 *supra*, at 123–4. Higginbotham was born in Trenton, N. J. in 1927. He received his B.A. from Antioch College and his LL.B. from Yale University in 1952. Before his 1963 appointment to U.S. Federal Court for the Eastern District of Pennsylvania in 1963, Higginbotham was in private practice, was an Assistant District Attorney in Philadelphia, a member of the F.T.C., and active in the N.A.A.C.P.
187. Judge Sloviter is a Phi Beta Kappa graduate of Temple University, A.B. 1953, and a graduate of the University of Pennsylvania School of Law, LL.B. 1956, magna cum laude. She practiced law in Philadelphia as an associate and later as a partner of the firm of Dilworth, Paxson, Kalish, Kohn & Levy from 1956 to 1969, and was a member of the firm of Harold E. Kohn, P.A. from 1969 until 1972. She joined the faculty of law at Temple University where she served from

1972 until 1979, teaching Antitrust Law, Civil Procedure, and Law and the Elderly.

188. 575 F. 2d 1344 (3rd Cir. 1978).
189. 575 F. 2d at 1345–1346.
190. 589 F. 2d at 1247 (3rd Cir. 1978).
191. 477 F. 2d 90 (3rd Cir. 1975).
192. 516 F. 2d 1297 (3rd Cir. 1975).
193. 480 F. 2d 240 (3rd Cir. 1973).
194. See text accompanying notes 89 to 98, *supra*.
195. 579 F. 2d 793.
196. Securities Act of 1933 §§ 1 et. seq., 2(1), 12(1,2), 15, 15 U.S. §§ 77a et. seq. 77b(1), 771(1,2) 770; Securities Exchange Act of 1934, §§ 1 et. seq., 10(b), 20; 15 U.S.C. §§ 78a et seq. 78j. (b), 78.
197. D. Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Conspiracy*, 120 U. Pa. L. Rev. 597, 630–31 (1972).
198. 605 F. 2d 110 (1979).
199. 15 U.S.C. §§ 77K.
200. 605 F. 2d, at 110.
201. *Id.*
202. *Id.*, citing *Piper v. Chris-Craft Industries, Inc.* 430 U.S. 1 (1977).
203. See, e.g. W. CARY & M. EISENBERG, CORPORATIONS 297–298 (5th ed., unabridged, 1980).
204. See sources cited in CARY & EISENBERG, *supra* note 203.
205. See text accompanying notes 79 to 87, *supra*.
206. This sample was taken from Third Circuit Reviews in Volumes 19 through 24 of the Villanova Law Review and a similar Third Circuit criminal decision review in Volume 10 of Rutgers Camden Law Journal 1978–79. Both reviews were predicated on a "representative cases" sample. Villanova Law Review chose

> cases which not only reflect the breadth of the work done by the 3rd Circuit, but which also indicate the court's approach to issues of first impression or which are of practical importance because of their refinement or elaboration of already established doctrines.
>
> 19 Villanova Law Review, at 277.

207. See Goldman *supra* notes 125 and 154.
208. SCHICK, LEARNED HAND'S COURT, (1970), at 69.
209. *Id.*

Photo by Bob Baldesari

United States Courthouse, Sixth and Market Streets, Philadelphia. Dedicated in 1976 as the seat of the Third Circuit Court of Appeals, the courthouse is two blocks north of Independence Square which was the site of the first United States District Court of Pennsylvania.

Summary and Conclusions

These studies in the history of the federal courts of the Third Circuit have presented developments as responses to four "Revolutions" in American History: the American Revolution (Chapter II), the Industrial Revolution (Chapter III), the Managerial Revolution (Chapter IV), and the Constitutional Revolution (Chapter V). Perhaps a less grandiose way of characterizing the matters surveyed would be to say simply that we have treated the impact of several major political or economic dislocations on the federal courts. In Chapter I, then, we examined how, once the United States had separated from England, the new American federal courts sought to fashion and implement rules of American law which could function in a more satisfactory manner than had the common law rules of the British Empire. In Chapter III, we saw how one judge, John Thompson Nixon, attempted to apply the moral and legal principles of antebellum America to the new and troubled society which emerged after the American Civil War. In Chapter III we compared the work of the district and appellate courts as they sought to determine rules appropriate for the organization of American business as the economy of America changed in the period between two world wars. Finally, in Chapter V, concentrating primarily on the work and the personnel of the Third Circuit's Court of Appeals, we sought to review how judges responded to the inequities exposed by the Great Depression and to the demands for economic and social relief increasingly being made on all branches of the federal government.

While the conditions which gave rise to the cases we have studied have had certain dramatic and perhaps even "revolutionary" differences, the nature of federal judicial decision-making has also exhibited some striking consistencies. Certain key legal assumptions, or core values, which were present in the post-revolutionary era continued to be implemented throughout American

history. Further, the task of reconciling competing assumptions and values has not significantly altered, although the types of legal matters which have had to be resolved may have changed.

I. *The Past*

Richard Peters and Samuel Chase, the subjects of Chapter II, both had distinguished careers during the revolutionary war, and both fought for the principles of sovereignty of the people and for the idea of republican instead of monarchical government. Both may have also accepted the notion that American greatness depended on the development of legal rules that would lead to commercial prosperity. Chase appears to have differed with Peters, however on the extent to which popular participation was necessary in federal law-making. He sought to circumscribe the popular jury in the *Fries* trial, and sought to limit the freedom for criticism of the government in the trials for seditious libel. Peters appears to have been more willing to allow diverse legal arguments to be made to juries, and there is evidence that Peters's admiralty opinions were quite sensitive to the needs of common sailors. Yet, in the dispute over the federal common law of crimes, Chase appears, initially at least, to have been more reluctant than Peters to sanction criminal punishment when there had been no express pronouncement by the people's representatives. In any event, as Chase's speech to Fries at the close of his trial demonstrated[1] Chase believed that rigorous enforcement of federal tax and treason laws was necessary simply because no individuals had the right to revoke the work of the sovereign people's representatives. Similarly, Chase appears to have been harsh in the trials for seditious libel because he believed that the structure of American popular government was in severe danger of collapse. Unfortunately, the conception of limited onging popular participation in government which was probably shared by Peters and Chase resulted in popular perceptions of Federalist judicial tyranny, and led to efforts to restrain the power and prerogatives of federal judges.

John Thompson Nixon, the subject of Chapter III, assumed a position on the federal bench at a time when the jurisdiction of the lower federal courts had finally been allowed to expand almost to its constitutional limits, and at a time when congress had repeatedly failed to provide the courts with the resources required to function consistently with the purposes of the multi-tiered court structure. As a result, Nixon found himself acting as both a District and Circuit Court judge for New Jersey, and he was confronted with increasingly complex and perplexing litigation. Nixon, too, sought valiantly to apply the principles of popular sovereignty, and in his early decisions, as least, he tried to make the expressions of purposes of the legislature his strongest guides. As Nixon began to be confronted with a bewildering variety of matters resulting from increased industrialization and American economic development, however, particularly in patent cases, he seems to have emphasized a personal value preference for rewarding individual effort. He hoped thereby to encourage economic development which would benefit all. Eventually Nixon

demonstrated a capability of departing even from precedents that he had set in upholding "popular construction" of language and the power of juries.

Particularly toward the end of his tenure on the bench, Nixon's jurisprudence demonstrated a creative and flexible standard of judging, which Nixon used to reach results he considered equitable in particular cases. The flexible and equitable nature of Nixon's judging resulted in significant reversals by the Circuit and Supreme Courts, which appear to have been less willing seriously to consider the purpose behind American laws, and to have been more disposed to rigid application of simple rules.

While Chase and Peters may have found themselves losing touch with popular opinion, it appears that the basic equitable notions Nixon employed (and which the courts which reversed him might have ignored) were based on the early nineteenth century popular conceptions which Chase and Peters appeared to reject. In particular, Nixon seems to have been more concerned with the possibility of aggregations of economic power crushing valiant individuals, and to have sympathized, for example, with inventors in their struggles with "capitalists." While Nixon himself appears to have struggled to repress a popularly-based prejudice against corporations, a reading of jury instructions which he gave in several cases suggests that he was never able to divorce himself totally from such views.

The conflict between the interests of individuals and the prerogatives of business organizations and the essential American ambivalence toward corporations was the explicit subject of Chapter IV. Like Nixon, other Americans in the late nineteenth and early twentieth centuries appear to have realized that concentrations of great economic power were inevitable if goals of American material prosperity were to be met. Still, again like Nixon, Americans struggled with the problem that such concentrations of economic power threatened other cherished conceptions, such as the supremacy of democratic ideals. In Chapter IV, then, we saw how the federal district court judges of Delaware, a state which had greatly encouraged incorporation, sought to balance increasing economic needs for managerial autonomy with older concepts of economic democracy.

Judges Thompson and Morris, for example, seem to have showed great concern over the possibilities for self-dealing on the part of corporate managers, and to have tried to construct fiduciary principles which would limit the possibility of such abuses. Circuit Judge Buffington, however, appears to have been more willing than were the district judges to create discretion in corporate managers, and to have gone so far in this direction that he may have exceeded his authority as an appellate judge in reversing determinations of facts. Similarly, District Judge Nields was concerned about the possibility of corporate fraud, although he admired the efforts, which he termed "heroic", of corporate entrepreneurs. Circuit Judge Davis, like his colleague Judge Buffington, appears to have been willing to tolerate greater autonomy for corporate managers. Indeed, it appears that Judge Davis's faith in the unbounded possibilities of American economic growth led him to invest

heavily in the stock market, and, following the Great Crash, Davis's losses led him to compromise the independence of his office. He was never convicted of a crime in connection with such indiscretions, but a special panel sitting in his court found that he had been bribed, and reversed several of his judgements.

The subject of Chapter V was the reconstitution of the Third Circuit's Court of Appeals, which proceeded as a result of the change in the character of political leadership and constitutional interpretation in the 'thirties and 'forties. As men like Judges Biggs and Maris replaced Davis and Buffington, there was less of an articulated concern with the needs of economic organizations, and more concentration on the rights of individuals. The lower federal courts do not, of course, choose the cases which come before them, and this is not to suggest that Biggs and Maris or their colleagues sought consciously to mold the law in order to redress past abuses. Still, the expressed concern with civil rights in the *Hague* v. *CIO* and Jehovah's witnesses cases, and the concern with the protection of shareholders and "corporate democracy" in *Kardon* v. *National Gypsum, Inc.* and *S.E.C.* v. *Transamerica Corp.* do appear to mark a difference in attitude and approach to the resolution of legal problems. Insofar as these judges appear to have emphasized the rights and concerns of individuals, however, their jurisprudence contains elements similar to that of Judge Nixon.

Since World War II there has not been any major world or national cataclysm approaching those which gave rise to the legal events studied here, but the work of the courts of the Third Circuit has continued to be characterized by the task of reconciling competing legal values. In several draft cases which resulted from the undeclared war in Vietnam, the bench of the Third Circuit divided in a manner which revealed tensions similar to those which divided the country in the time of Peters and Chase. Perhaps Judge McLaughlin's belief that American participation in Indochina was in accordance with primary principles of democracy, and was a struggle against tyranny, led him to support discretion for local draft boards, in the same manner that Justice Chase had felt that strong support for the early American federal government was necessary to preserve the principles for which the Revolutionary War had been fought. Similarly, it may be that those judges who sought to circumscribe the actions of local boards, and to allow for increased conscientious objection on the part of draftees, reflected an emphasis on individual rights that was shared by those who opposed the early Federalist Judges. In any event, in the last several decades, in the Third Circuit and elsewhere, as we have seen, the recognition of the possibility of judicial lawmaking which might be contrary to the manifestations of popular will expressed in the acts of legislatures or the Constitution itself has led some judges to espouse a philosophy of "judicial restraint," and to eschew the sort of creative jurisprudence which we have seen exercised by several of the judges here studied. Still, it appears that the pressures to make law exerted on the judges of the Third Circuit cannot be escaped. Two of the most recent

cases make the inevitability of the judicial choices with which these studies have been concerned explicit.

II. *The Present*

In 1980, in the *Japanese Electronic Products Antitrust Litigation*[2] the Court of Appeals was asked to resolve a matter on interlocutory Appeal from the District Court for the Eastern District of Pennsylvania which raised issues of the appropriate participation of juries reminiscent of those Chase confronted. As Chief Judge Seitz posed the problem, it was "In an action for treble damages under the antitrust and antidumping laws, do the parties have a right to trial by jury without regard to the practical ability of a jury to decide the case properly?" The plaintiffs, American corporations, had asked for a jury, and the defendants, Japanese competitors, had resisted. The issues involved determinations whether the Japanese corporations had engaged in conspiracies to destroy their American competitors, and whether they had engaged in price-discriminations among purchasers, in violation of various American antitrust laws.

By the time the case reached the trial stage, the activities of over one hundred corporations had become a subject of dispute, and, following nine years of discovery "millions of documents and over 100,000 pages of depositions," had been produced. The defendants argued that the case was too large and complex to go to a jury. The District court had ruled that the seventh amendment to the United States Constitution, which guarantees a jury trial in matters of common law involving disputes over twenty dollars, did not recognize the complexity of a lawsuit as a valid reason for denying a jury trial. The court of appeals, in an opinion by Judge Seitz, reversed the interlocutory order of the District court. While Judge Seitz did not determine the merits of the dispute, he did declare that the law in the Third Circuit was that the fifth amendment to the constitution, insofar as it mandated "due process," required that "the decisionmaker's conclusion . . . rest solely on the legal rules and evidence adduced at the hearing."[3]

To Judge Seitz this meant that unless the jury could understand the legal rules and the evidence that might be brought before them they would not be deciding in a "rational manner", and that a decision that was not rendered in such a "rational manner" would violate fifth amendment "due process" requirements.[4] Recognizing the conflict between the seventh and fifth amendments, and declaring that his task was to "balance the constitutionally-protected interests", Judge Seitz concluded that the fifth amendment interests were more fundamental. He observed that where jury verdicts might be based on improperly understood legal rules or evidence, "legal remedies will not be applied consistently with the purposes of the laws," and further that "There is a danger that jury verdicts will be erratic and completely unpredictable, which would be inconsistent with evenhanded justice." Finally, said Judge Seitz, "unless the jury can understand the evidence and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost entirely."[5]

Noting that the existence of equitable and maritime actions without juries "indicates that federal courts can provide fair trials and can grant relief in accordance with . . . basic justice," Seitz concluded that the seventh amendment guarantee of a jury trial was not as fundamental as the fifth amendment guarantee of rationality.[6] Seitz indicated that it was not always true that judges would have an easier time rationally resolving complex problems of civil litigation than would juries, but he stated his belief that there were certain instances when a judge would be able to do a rational job when a jury would not, because judges might be more familiar with both the technical subject matter of complex cases and the process of civil litigation, and judges might also be less disabled by having to spend a long period in the resolution of a single dispute.[7]

In the course of his discussion of the fifth amendment problems Judge Seitz indicated that while the function of "jury equity" might be legitimate when the jury modified law to conform to community values, "when the jury is unable to determine the normal application of the law to the facts of a case and reaches a verdict on the basis of nothing more than its own determination of community wisdom and values, its operation is indistinguishable from arbitrary and unprincipled decisionmaking."[8] Like Justice Chase, then, Judge Seitz seems to have been prepared to circumscribe the operation of juries where other fundamental legal values might be at stake. Still, according to Judge Seitz's tests, perhaps some of the jury trials we explored in Chapters II and III often resulted in judgements which might have to be characterized as "irrational," insofar as they ignored the clear directions of the judges, and the undisputed character of the evidence. Indeed, the very principle of popular sovereignty, on which the sixth and seventh amendment right to jury trials rest, is one that does not seem to be based principally on notions of rationality, but rather on "community wisdom and values." Perhaps Judge Gibbons's reluctant dissent to Judge Seitz's opinion recognized this problem when Judge Gibbons appeared to reject the majority's assertion that a trial judge could conceivably meet fifth amendment requirements in complex civil litigation when a jury could not. Judge Gibbons thought that the precise issue was not presented in the case at bar, but he said that "I cannot conceive of a case in which what would be a separate claim for relief at common law, sufficiently comprehensible to a trial judge to satisfy due process, would be too complex for trial to a jury."[9] Still, part of Judge Gibbons's disagreement with the majority ran deeper, and resulted from his "perception of the nature of the judicial process and the role of juries in that process."[10] In words that might have been uttered by some of the republican opponents to Justice Chase who sought his impeachment, Judge Gibbons wrote:

> It is often said that the judicial process involves the search for objective truth. We have no real assurance, however, of objective truth whether the trial is to the court or to a jury. The judicial process can do no more than legitimize the imposition of sanctions by requiring that some minimum standards of fair play, which we call due process, are adhered to. In this legitimizing process, the

> seventh amendment is not a useless appendage to the Bill of Rights, but an important resource in maintaining the authority of the rule of law. In the process of gaining public acceptance for the imposition of sanctions, the role of the jury is highly significant. The jury is a sort of ad hoc parliament convened from the citizenry at large to lend respectability and authority to the process. Judges are often prone to believe that they, alone, can bear the full weight of this legitimizing function. I doubt that they can. Any erosion of citizen participation in the sanctioning system is in the long run likely, in my view, to result in a reduction in the moral authority that supports the process.[11]

Insofar as Judge Seitz's ultimate concerns may have rested with the need for certainty of verdicts and the rational application of antitrust law in complex litigation in order to facilitate rational economic planning and development, then, he was making a choice between competing values in a manner similar to that of the Federalists Chase and Peters. This was a choice rejected by his colleague Judge Gibbons, who, like the republican opponents of Chase, chose to adhere to the values of popular sovereignty which he saw as dictating fuller "citizen participation in the sanctioning system."

Another fundamental judicial choice appears to have been made recently by the specially-convened three-judge District Court for the Eastern District of Pennsylvania, in *Goldberg* v. *Rostker* (Civil Action No. 71–1480, Memorandum Opinion issued July 18, 1980), where the court was required to determine the constitutionality of the selective service registration of males only.[12] Judge Seitz's opinion in the *Japanese Electronic Products* litigation was the first pronouncement by a federal court of appeals of the superiority of the fifth amendment over the seventh amendment rights in complex civil litigation, and in that sense might be said clearly to have made "new law." The opinion of District Judge Cahn in *Goldberg* purported simply to be following the Supreme Court's rule that statutory classifications based on gender were unconstitutional unless they are substantially related to an important governmental interest.[13] Still, since the "important government objective" for gender classifications test is itself a rather blatant example of judicial lawmaking by the Supreme Court,[14] and since Judge Cahn's opinion is, at this writing, the only one to hold the males-only selective service registration unconstitutional,[15] it seems worthy of note in a discussion of the inevitability of judicial value choices.

Judge Cahn noted, again in accordance with the expressions of the Supreme Court, that "Outdated stereotypical notions are not a valid basis for gender discrimination,"[16] and he also remarked in a footnote that "when the MSSA was adopted in 1948 an aura of male chauvinism permeated Congressional attitudes toward women in the military."[17] Congress, in its *Report of the Subcommittee on Manpower and Personnel on the Rejection of Legislation Requiring the Registration of Young Women under the Military Service Act,* advanced several reasons in support of a males-only registration, and among the most important were that there was no "military need to include women in a selective service system," that the usefulness of women to the

military was limited because by law and policy they could not be placed in combat positions, and that "strains on family life . . . would result from the registration and possible induction of women." In his opinion, Judge Cahn examined testimony on the usefulness of women to the military, and then concluded that all the evidence (and, indeed, the testimony of military officials) supported the suggestion that women could be extremely useful to the military in non-combat positions during wartime, freeing more men for essential combat tasks, and thus the government had not met its burden of justifying the gender-based discrimination against women.

Curiously, Judge Cahn never weighed the Congressional assertion that "strains on family life . . . would result from the registration and possible induction of women." Judge Cahn reviewed no evidence suggesting that the Congressional assertion was groundless, unless that was the purpose of his suggestion that "outdated stereotypical notions are not a valid basis for gender classification." Insofar as this Congressional argument (admittedly unsupported by expert testimony or empirical study) was rejected without analysis, it would appear that while Judge Cahn and his bretheren purported to be following the mandates of the Supreme Court, they were actually determining that a Congressional desire to minimize disturbances in family life, by not subjecting women to the risk of possible induction or the inconvenience of registration, was not an important governmental purpose. In short, if one may engage in a little construction, Judge Cahn's opinion may reflect a legal value choice which placed equality of opportunity for women above the maintenance of traditional child-nurturing roles for women. Given the historical primacy of the legislature as an organ of expression of popular values, given the failure of the passage of the Equal Rights Amendment to the Constitution, and given the artificiality of the "important governmental interest" test, this does seem like a relatively bold step for the courts to take, even in these days given to discarding "outmoded" stereotypes. Perhaps this too is an application of particular judges' notions of democratic ideals which might or might not be shared by the population at large, and this choice poses the same kind of difficulties as some of those we have observed made by Chase, Nixon, Buffington, Davis, Biggs, Maris and others.

III. *The Future*

In a recent speech Chief Judge Seitz asserted that a predominant feature of the judiciary was "significant reshaping of the law" in response to "great movements in society" or "great ground swells of popular opinion."[18] Most of the materials in the previous Chapters, and these recent examples of judicial choice, appear to have been the result of such disturbances, and Judge Seitz, at least, saw every indication that they will continue. He noted an increasing tendency for legislatures to pass bills for their "presumed political value, without providing the means for an administrative agency or the judicial branch to implement [them] effectively,"[19] a tendency which puts a great burden on the courts. Seitz also saw a risk of increased litigation brought

as a result of legislation which encourages "individuals who rationalize their inadequacies by embracing a conspiratorial concept of life. Any failure to obtain a job or a promotion or tenure, in their view is explained by [illegal] discrimination by others."[20] In general Seitz found a failure of will on the part of legislatures. He suggested that state legislatures have failed to fulfill their constitutional duty to reapportion themselves to conform to changed population patterns, that this default has resulted in resolution by the courts, and that this is a sign of the difficulty of maintaining "rigid judicial restraint when presented with a citizen's grievance crying out for redress after prolonged inaction for inappropriate reasons by the other branches."[21] Seitz concluded that "legislators will find it increasingly difficult to legislate in large areas of controversial subject matter because of the continuing fractionalization of our society." He proceeded to predict that "the courts will continue to be presented with subject matter that a political purist would say is exclusively for the legislative branch."[22] It would appear, then, that the philosophy of judicial restraint, which Judges Hastie and Seitz were seen to espouse in Chapter V, is not likely to be greatly in favor in the future. Judge Gibbons has recently asserted that "both the role of the federal courts in interpreting the United States Constitution and access to those courts by aggrieved parties appears . . . to be diminishing."[23] Still, the *Goldberg* case, and even the debate between Judges Gibbons and Seitz in the *Japanese Electronic Products* case suggest that Judge Seitz is correct that the role of the court as a frequent Constitutional expounder will continue.

Commenting on efforts by "pressure groups" which "unintentionally foist important policy decisions on the judiciary by rendering the other branches of government politically powerless," and then "make the judiciary their whipping boy when, on occasion, it fills the void," Seitz revealed his present position toward a restrictive philosophy of judicial decision. "Certainly judicial restraint is admirable," he noted, "but I suggest that the judicial branch, by Constitutional interpretation, has helped many times to provide this country with some of its most important social accomodations and thereby assuaged some of the great social pressures on our representative form of government."[24] Perhaps the work of Judge Nixon and the District Court Judges of Delaware, which we observed in Chapters III and IV, suggests that the "social accomodations" have been made, and will continue to be made, not only in the areas of Constitutional interpretation, but also in the interpretation of the basic rules of contracts, torts, property, and corporations.

Still, Judge Seitz appears to share many of the concerns of Judge Gibbons when he declares that "I am far from sanguine because I am not certain that enough voting Americans believe that in practice individual liberties are as valuable as the majority view, at least so long as they are in the majority."[25] Seitz made that remark in the context of expressing his fears that Americans might not continue to prize the constitutional value, or as Judge Seitz put it, the "article of faith," that "judicial independence is a prized adjunct of our system." He proceeded to catalogue the difficult decisions which the federal

judiciary might find itself facing in the next few years, all of which might result in resolutions which could incur the wrath of powerful forces against the judiciary. Among these were choices between the imposition of economic or environmental burdens, the conflict between seniority rights and minority opportunities, the acknowledgement of nontraditional family units, or the reconciliation of the rights of father, mother, and unborn fetus. Judge Seitz noted some of the trends evident in Chapter V, the increased tendency to demand solution for major economic problems from the federal government and consequently the federal courts, and, most recently, the demand that correction of abuses in the political process be made by remedial federal criminal statutes.[26] Finally, Seitz noted the difficulty faced by the courts in continuing to maintain the importance of the jury as a valued institution, in attempting to reconcile the conflict between the public's right to be informed and the right of the individual to privacy or a fair trial, and in imposing prison sentences when prison conditions are so intolerable that incarceration might itself pose constitutional problems.

Seitz closed his remarks by indicating that only the American public of the future could determine whether the judiciary could continue to withstand threats to its independence and continue to discharge its constitutional responsibility.[27] He stated that it was the task of the public to be "militant in defense of challenges to the independence of the judiciary," and that "Here too will eternal vigilence be the price of true liberty."[28] All of this seems hard to dispute. To an outsider, however, reviewing nearly two hundred years of experience in the federal courts of Pennsylvania, New Jersey, and Delaware, a striking feature is the resiliency of the judicial institution and the fortitude of the individuals who have been judges. Despite a century or more of congressional neglect, a trend that has by no means ceased, the federal judiciary continued to play an important role in American society, and individual judges continued to exert massive principled effort, even if, on occasion, as happened to John Thompson Nixon, this resulted in blindness and death. Not all of the third Circuit's judges have been totally above reproach, of course, as the foibles of Judges Davis and Buffington, and the leaving of the bench by Judge Morris for the greener pastures of private practice, would seem to illustrate. Still, these men too were not without principle, and their decisions are not without the assertion of accepted legal values. Indeed, since Judges are always forced to buttress their actions by the citation of previous cases, there is always at least some minimal assent to recognized and valued principles, even if it is only to the principle of the rule of law itself.[29] An examination of the activity of the judges presented in these studies, however, shows something more. It shows that even if some judges have been exhausted from or compelled to cease their efforts, they have usually been replaced by others with similar or greater commitments to the nearly impossible task of implementing and reconciling the highest values of American law, democracy and the protection of individual rights.

Notes

1. Reprinted in S. Presser and J. Zainaldin, *Law and American History* 184–187 (1980).
2. No. 79-2540, slip opinion filed July 7, 1980.
3. Slip op., at 33, citing *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).
4. Slip op., at 22–23, 32–33.
5. *Id.*, at 33–34.
6. *Id.*
7. *Id.*, at 36–37.
8. *Id.*, at 35.
9. *Id.*, at 50.
10. *Id.*, at 51.
11. *Id.*, at 51–52.
12. Military Selective Service Act, 50 U.S.C. App. Section 451 *et. seq.*
13. Memorandum opinion, at 12.
14. See, e.g., *Craig v. Boren*, 429 U.S. 190, 217–219 (Rehnquist, J., dissenting).
15. *See generally* Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 Harv. L. Rev. 406 (1980). Some time after the accompanying text was written, Judge Cahn's decision was reversed by the Supreme Court. *Rostkar v. Goldberg*, 101 S. Ct. 2646 (June 25, 1981).
16. Memorandum Opinion, at 14, cf. *Craig v. Boren*, 429 U.S. 190, 198–199.
17. Note 14, Memorandum opinion, page 23.
18. The Future of The American Judiciary—Part I, University of Delaware Honors Program, Remarks by the Honorable Collins J. Seitz, Chief Judge, U.S. Court of Appeals for the Third Circuit, November 24, 1980, at 3.
19. *Id.*, at 11.
20. *Id.*, at 12.
21. *Id.*, at 14.
22. *Id.*, at 14.
23. Gibbons, *Hague v. CIO: A Retrospective*, 52 N.Y.U. L. Rev. 731 (1977).
24. Seitz, *supra* note 18, at 17.
25. *Id.*, at 19.
26. *Id.*, at 24–25.
27. *Id.*, at 28.
28. *Id.*
29. As even the Marxist E. P. Thompson tells us, this is no small accomplishment, E. Thompson, *Whigs and Hunters: The Origin of the Black Act* 266 (1975). *But see* Horwitz, *The Rule of Law: An Unqualified Human Good?* 86 Yale L. J. 561 (1977).

Note on the Appendices

The following appendices briefly discuss each of the federal judges of the Third Circuit who served between the years 1798 and 1980. Each appendix is followed by a table which gives the date of birth, the year appointed, the date of termination of judicial service, and the name of the President making the appointment. Since the subject of judicial retirement is a rather complex one, the remainder of this note describes the relevant legislation, and the terminology here employed. I am indebted to Judge Maris for this information.

The first provision for retirement of federal judges with pay was made by the Act of April 10, 1869, c. 22, §5, 18 Stat. 45, which provided that judges who resigned after attaining age 70 and after having served 10 years or more should continue to receive for life the salary they were receiving when they resigned. This provision for salary after resignation is now provided for by section 371(a) of Title 28 United States Code.

Fifty years later, section 260 of the Judicial Code of 1911 was amended by the Act of February 25, 1919, c. 29, §6, 40 Stat. 1157, to authorize federal judges after attaining the age of 70 and after having served 10 years or more to retire from regular active service while retaining their commissions and the right to continue to perform judicial service if willing and able. Such retired judges were to continue to receive for life the salary they were receiving when they retired. This retirement provision was incorporated in section 371(b) of Title 28 United States Code as enacted in 1948 with the change that such retired judges should continue to receive for life "the salary of the office." A provision for similar retirement at any age of permanently disabled judges is contained in section 372(a) of Title 28, and incorporates provisions first enacted by the Act of August 5, 1939, c. 433, §§1–4, 53 Stat. 1204.

Section 371(b) was amended by the Act of February 10, 1954, c. 6, §4(a) 68 Stat. 12, to extend the retirement privilege to judges who had attained age 65 and had served 15 years or more. And, finally, section 294 (b) of Title 28 United States Code was amended by the Act of August 25, 1958, Pub.L. 85–755, §5, 72 Stat. 849, to designate a judge retiring under sections 371(b) or 372(a) as a "senior judge", the designation now widely used for such judges. In these appendices and annexed tables that designation is used for all judges who have retired under the Acts of 1919, 1939 or sections 371(b) or 372(a) of Title 28. The "Year Retired or Resigned" for those judges is marked with an "*" in the following tables. The term "resigned" is used to signify the complete giving up of judicial office. For Judges who resigned or who retired prior to 1911, the "Year Retired or Resigned" appears without "*." When there is no entry for a particular judge under "year retired or resigned," the judge either remained in active service until his or her death, or is still serving.

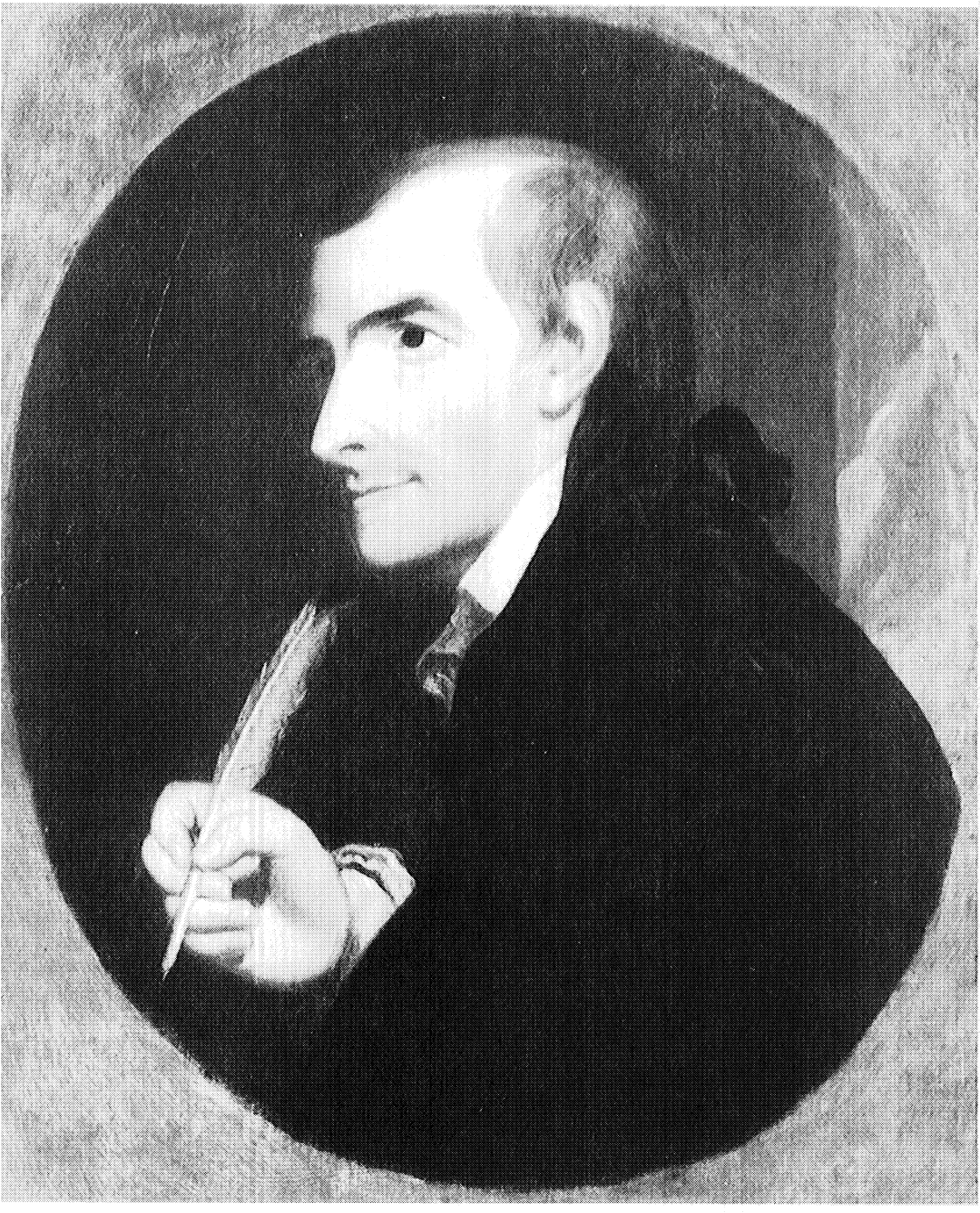


Photo from Independence National Historical Park Collection

Francis Hopkinson, the First United States District Court Judge for the District of Pennsylvania, 1789-1791.

Appendix I
The Federal Judges of Pennsylvania

The earliest federal Judges of Pennsylvania appear to have been products of the eighteenth-century Enlightenment as well as successful politicians. Many of them were also businessmen who sought means of conciliation with the South as the American sectional crisis worsened in the 1840's and 50's. Whatever the similarities of the early judges, however, the characteristics of the later federal judges in Pennsylvania seem to have changed, and their diversity has increased as the American social structure has evolved. The judges of the post-Revolutionary period seem to have come from a propertied upper class, but the backgrounds of the federal judges sitting in Pennsylvania today reflect the relative pluralism and mobility which have characterized modern American society.

1. *The Post-Revolutionary Period: 1789–1828*
   Francis Hopkinson (D. of Pa., 1789).*
   William Lewis (D. of Pa., 1791).
   Richard Peters (D. of Pa., 1792).
   Jonathan H. Walker (W.D. Pa., 1818).
   William Wilkins (W.D. Pa., 1824).

The judges appointed to the federal courts in the post-Revolutionary period appear to have had wide-ranging interests. Many of the judges were

* The date given is the date of the Judge's commission signed by the President. Other dates of service are to be found in the table following this appendix.

prominent in their churches, and some were noted scholars. Three of them participated in the Revolutionary War: Francis Hopkinson as head of the Navy Department, Richard Peters as Secretary of the Board of War, and Jonathan H. Walker as an officer in the campaign against Quebec. William Wilkins was President of the Bank of Pittsburgh, and also sat on the Board of Directors for the Monongahela Bridge Company and the Greensburg and Pittsburgh Turnpike Company. At the time of his death Wilkins owned more than $200,000 in real property.[1]

Some Pennsylvania federal judges appear to have ended political careers with their arrival on the bench, but others found their judgeships led to still higher office. Before American independence, Frances Hopkinson served on New Jersey's provincial council. He represented New Jersey in the Continental Congress of 1776, signed the Declaration of Independence, and sat on the committee that drafted the Articles of Confederation. Richard Peters also served in the Continental congress in the 1780's. At the time of his appointment to the bench, as indicated earlier, Peters was speaker of the Pennsylvania Senate. William Wilkins, however, became a U.S. Senator after serving as judge in the Western District of Pennsylvania. In 1834 Wilkins was appointed minister to Russia, in 1842 he served as a member of Congress, and, in 1844, he was appointed U.S. Secretary of War. Though William Lewis does not appear to have held any governmental post after resigning from the federal bench, he appears to have had a practice which deeply involved him in local politics. In 1794, he acted as counsel for the petitioners against the election of the Jeffersonian Albert Gallatin to the U.S. Senate, but in 1800 he defended John Fries before Justice Samuel Chase in the famous treason trial that followed the "Hot-water" War. Lewis was also active in the Society of Friends' crusade against slavery, and he participated in drafting the 1780 act that abolished slavery in Pennsylvania.

Judges Hopkinson and Peters were lay leaders in the American Episcopal Church. Peters was instrumental in getting the British Parliament to pass the act of secession which made possible the establishment of an independent Episcopal Church in America. Hopkinson served as Secretary of the convention that proceeded to organize the American Episcopal Church. Hopkinson and Peters were also notable for a number of intellectual and cultural achievements. Hopkinson became one of the first American composers of secular music when he set some of his poems to music he had written for his harpischord. He also wrote essays and poems, among them "The Battle of the Kegs", "The New Roof", and "The Political Catechism". Peters, as noted earlier, was fluent in a number of languages, and well-versed in the ancient texts of maritime law.[2] He published several books and more than one hundred papers on agriculture, and was the first President of the Philadelphia Society for the Promotion of Agriculture.

2. *Ante-Bellum Period: 1828–1860*
Joseph Hopkinson (E.D. Pa., 1828).

Thomas Irwin (W.D. Pa., 1831).
Archibald Randall (E.D. Pa., 1842).
John K. Kane (E.D. Pa., 1846).
John Cadwalader (E.D. Pa., 1858).
Wilson McCandless (W.D. Pa., 1859).

The federal judges of the ante-bellum period in Pennsylvania were much like their post-Revolutionary predecessors. Most were conspicuous participants in the politics of their time, some pursued scholarly interests, and others were prominent in their churches, or led philanthropic or cultural societies. More of the ante-bellum judges had what we might now characterize as business backgrounds, and one, Judge Thomas Irwin, was forced out of office in 1859 by charges that he and his son (who was clerk for the Western District of Pennsylvania) had corruptly held unnecessary court sessions and demanded that the federal marshal turn over a quarter of his annual income to them.

Most of Pennsylvania's judges in the ante-bellum period were distinguished participants in the work of the Democratic Party. Thomas Irwin had been a member of the U.S. House of Representatives, John K. Kane a member of the Pennsylvania legislature and also state attorney general, and John Cadwalader a member of Congress and a personal friend of Pennsylvania resident and Democratic President James Buchanan. Joseph Hopkinson had defended the insurgents of Western Pennsylvania in 1794, and later represented Chase in the impeachment trial in 1804. Hopkinson was an articulate Federalist ideologue, even composing a song, "Hail Columbia", which helped turn public opinion against French republicanism in the 1790's. Hopkinson represented Pennsylvania in the U.S. Congress from 1814 to 1819, and attended the Pennsylvania constitutional convention of 1839.

As did their predecessors, the judges of the ante-bellum period pursued interests beyond the field of politics. Judge Hopkinson was a trustee of the University of Pennsylvania, President of the Academy of Fine Arts in Philadelphia, and Vice-President of the American Philosophical Society. John K. Kane was President of the Board of the Second Presbyterian Church of Philadelphia, a trustee of the General Assembly of the Presbyterian Church, and the Vice-President of the Institution for the Instruction of the Blind. Archibald Randall was also active in philanthropy, serving as a member of the Philadelphia Society for Alleviating the Miseries of Public Prisons and as Director of the Philadelphia Schools.

John K. Kane was on the board of directors of the Delaware & Chesapeake Canal Company and of the Girard Bank. John Cadwalader worked as solicitor for the United States Bank, a position offered him by a relative, Nicholas Biddle.

In one of the areas that must have been the most difficult, given the climate of popular opinion in Pennsylvania, the judges demonstrated their understanding of the importance of protecting property rights to the future of the union. The judges were careful to defend Southern interests in slave property

from the abolitionists seeking to obstruct the implementation of the Federal Fugitive Slave Act. John K. Kane, for example, survived a Republican impeachment attempt, after he had imprisoned Passmore Williamson, secretary of Pennsylvania's Antislavery Society, because Williamson had refused to aid in the recovery of a slave "kidnapped" by abolitionists. John Cadwalader defended the Fugitive Slave Act while a member of Congress, and called for conciliation with Southern slaveholders on the territorial question. Wilson McCandless supported President Buchanan's acquiescence in the solution to the territorial issue (no restrictions on slave-holding in the territories) articulated by the Supreme Court in *Dred Scott v. Sanford*.[3]

The Pennsylvania judges' conciliatory attitude on the slavery issue, their connection with business interests, and their philanthropic interests together suggest that the judges viewed antebellum society from a relatively conservative perspective. They probably understood that as members of a privileged class they had an obligation to work for the support of those less fortunate, but, at the same time, they sought to preserve the national economic and social structure that had brought much of the country great prosperity, and had enabled them to rise to positions of distinction.

3. *From the Civil War to World War I*
   Winthrop W. Ketchum (W.D. Pa., 1876).
   William Butler (E.D. Pa., 1879).
   Marcus W. Acheson (W.D. Pa., 1880).
   James H. Reed (W.D. Pa., 1891).
   Joseph Buffington (W.D. Pa., 1892).
   John B. McPherson (E.D. Pa., 1899).
   Robert W. Archbald (M.D. Pa., 1901).
   James B. Holland (E.D. Pa., 1904).
   Nathaniel Ewing (W.D. Pa., 1906).
   James S. Young (W.D. Pa., 1908).
   Charles P. Orr (W.D. Pa., 1909).
   Charles B. Witmer (M.D. Pa., 1911).
   J. Whitaker Thompson (E.D. Pa., 1912).
   Oliver B. Dickinson (E.D. Pa., 1914).
   W. H. Seward Thomson (W.D. Pa., 1914).

The judges of the Gilded Age and the Progressive Era were less frequently politicians or entreprenurial businessmen than they were "professional" lawyers. Still, they were attorneys with sophisticated expertise in the effective representation of business interests, cut from the same mold as David Dudley Field. Most of the judges were not men of substantial property, but appear to have been successful professionals. In contrast to the judges of earlier periods, the judges appointed in the decades after the Civil War appeared to have had relatively few interests outside of their legal careers. The composition of the

federal bench in this period, then, may have reflected the emergence of professionals and managers in society at large.[4]

Only a few of the federal judges in Pennsylvania in this period had been prominently involved in public affairs. Winthrop W. Ketchum was the only judge who served in the U.S. Congress. Nathaniel Ewing had served on the Court of Common Pleas of Fayette County, as had his father and grandfather. He resigned from the bench in 1908 to become chairman of the Pennsylvania State Railroad Commission and then its successor, the Public Service Commission of Pennsylvania. In large part, however, the judges had represented, rather than participated in, business interests. Judge Ewing had been counsel for the H.C. Frick Coke Company, the Pennsylvania Railroad Company, and other corporations. Still, he was also President of the National Bank of Fayette County, and a board member for the Finance Company of Pennsylvania and the Pittsburgh Life & Trust Company. James H. Reed was a partner in the law firm Reed, Smith, Shaw & Beal, and President of the Bessemer & L.E. Railroad.

Prior to this time, as we have seen, the Pennsylvania federal judges seem to have come from relatively similar social strata. The judicial personnel in this period, however, show a diversity of interests and backgrounds. Winthrop W. Ketchum had been an instructor at Wyoming Seminary in Kingston, Pa.; William Butler had been a small-town newspaper publisher before being admitted to the bar. Oliver B. Dickinson, in addition to being a trustee of Crozer Theological Seminary and J. Louis Crozer Home and Hospital, was a member of the Delaware County Historical Society, the Delaware County Institute of Science, and the Philadelphia Academy of Fine Arts. J. Whitaker Thompson served as a trustee for the State Hospital for the Insane and for the State Institution for the Feeble Minded and Epileptic.

Although a number of the federal judges in Pennsylvania during this period were thus interested in philanthropic, intellectual or cultural activities, the percentage of them who were involved in these activities does not appear to be as high as it was for their predecessors. Such a narrowing of interests could reflect the growing somewhat-narrower expertise and specialization of the entire legal profession.

4. *The Inter-War Years: 1922–1945*
Robert M. Gibson (W.D.Pa., 1922).
Charles L. McKeehan (E.D. Pa., 1923).
Frederic P. Schoonmaker (W.D. Pa., 1923).
Albert W. Johnson (M.D. Pa., 1925).
William H. Kirkpatrick (E.D. Pa., 1927).
Nelson McVicar (W.D. Pa., 1928).
Albert L. Watson (M.D. Pa., 1929).
George A. Welsh (E.D. Pa., 1932).
Albert B. Maris (E.D. Pa., 1936).

Harry E. Kalodner (E.D. Pa., 1938).
Guy K. Bard (E.D. Pa., 1939).
J. Cullen Ganey (E.D. Pa., 1940).
Wallace S. Gourley (W.D. Pa., 1945).

The judges appointed to Pennsylvania's federal courts in the 1920's and 30's were also characterized by diversity of background and interest, although some similarities do emerge when we consider the party affiliation of the Presidents who appointed particular judges. The Republican appointees were predominantly members of the Episcopalian or Presbyterian Church, while the appointees of the Democrat, Roosevelt, represented a greater variety of religious groups. Three of the five Democratic appointees went on to become judges on the Third Circuit's Court of Appeals. Almost all of the Roosevelt appointees were connected in some way with education, two of them were distinguished journalists, and one was prominently involved in national politics.

To a greater extent than their immediate predecessors, the federal judges of the inter-war years had been involved in political pursuits. William H. Kirkpatrick and George A. Welsh were both members of Congress before their judicial appointments. Guy K. Bard had perhaps the most illustrious political career of the judges of this period. Besides serving on Pennsylvania's Public Utility Commission, Bard was an active delegate to the Democratic Convention that first nominated Franklin D. Roosevelt to the Presidency. Serving on the 1932 Democratic Rules Committee, Bard drafted the plank calling for the repeal of Prohibition. In 1953 Bard was an unsuccessful candidate for U.S. Senator from Pennsylvania.

Guy K. Bard had been the supervising principal of the Ephrata, Pa. schools before pursuing his legal career. Albert W. Johnson had been an instructor at the Bucknell University Law School, and Albert B. Maris was an adjunct professor at the Temple University Law School during his judicial tenure. Harry E. Kalodner was a trustee at Yeshiva University, and George A. Welsh was a trustee at Temple University and a member of the local Board of Education. Judge Maris had been editor of the *Legal Intelligencer* before entering the federal judiciary, and Judge Kalodner had been the financial and political editor of the *Philadelphia Record*. Kalodner was also on the Board of Directors of the Independence Hall Association, the Philadelphia Psychiatric Hospital, and the Federation of Jewish Agencies of Greater Philadelphia. Albert B. Maris, Harry E. Kalodner and J. Cullen Ganey, following distinguished careers as District Judges, all became judges of the Third Circuit's Court of Appeals.

The changing character of the bench during this period—from a largely homogeneous group of professional lawyers to a group whose members had diverse interests and backgrounds—illustrates the increasing diversity and social mobility of twentieth century America, and this diversity was to continue in the years that followed.

Truman appointees:
Frederick V. Follmer (M.D. Pa., 1946).
James P. McGranery (E.D. Pa., 1946).
John W. Murphy (M.D. Pa., 1946).
Thomas J. Clary (E.D. Pa., 1949).
Allan K. Grim (E.D. Pa., 1949).
Owen M. Burns (W.D. Pa., 1949).
Rabe F. Marsh, Jr. (W.D. Pa., 1949).
William A. Stewart (W.D. Pa., 1951).

Eisenhower appointees:
Joseph P. Willson (W.D. Pa., 1953).
John W. Lord, Jr. (E.D. Pa., 1954).
John L. Miller (W.D. Pa., 1954).
C. William Kraft, Jr. (E.D. Pa., 1955).
John W. McIlvaine (W.D. Pa., 1955).
Herbert P. Sorg (W.D. Pa., 1955).
Francis L. Van Dusen (E.D. Pa., 1955).
Thomas C. Egan (E.D. Pa., 1957).
Harold K. Wood (E.D. Pa., 1959).

Kennedy-Johnson appointees:
Edward Dumbauld (W.D. Pa., 1961).
Michael H. Sheridan (M.D. Pa., 1961).
Abraham L. Freedman (E.D. Pa., 1961).
Joseph S. Lord III (E.D. Pa., 1961).
Alfred L. Luongo (E.D. Pa., 1961).
Louis Rosenberg (W.D. Pa., 1961).
Ralph C. Body (E.D. Pa., 1962).
William J. Nealon (M.D. Pa., 1962).
A. Leon Higginbotham, Jr. (E.D. Pa., 1963).
John Morgan Davis (E.D. Pa., 1964).
Gerald J. Weber (W.D. Pa., 1964).
John P. Fullam (E.D. Pa., 1966).
Thomas A. Masterson (E.D. Pa., 1967).
Charles R. Weiner (E.D. Pa., 1967).
E. Mac Troutman (E.D. Pa., 1967).

Nixon-Ford appointees:
John B. Hannum (E.D. Pa., 1969).
R. Dixon Herman (M.D. Pa., 1969).
Joseph F. Weis, Jr. (W.D. Pa., 1970).
William W. Knox (W.D. Pa., 1970).
Malcolm Muir (M.D. Pa., 1970).
Edward R. Becker (E.D. Pa., 1970).

Donald W. Van Artsdalen (E.D. Pa., 1970).
J. William Ditter, Jr. (E.D. Pa., 1970).
Daniel H. Huyett (E.D. Pa., 1970).
James H. Gorbey (E.D. Pa., 1970).
Hubert I. Teitelbaum (W.D. Pa., 1970).
Barron P. McCune (W.D. Pa., 1970).
Raymond J. Broderick (E.D. Pa., 1971).
Clifford S. Green (E.D. Pa., 1971).
Clarence C. Newcomer (E.D. Pa., 1971).
Ralph F. Scalera (W.D. Pa., 1971).
Louis C. Bechtle (E.D. Pa., 1972).
Herbert A. Fogel (E.D. Pa., 1973).
Daniel J. Snyder, Jr. (W.D. Pa., 1973).
Joseph L. McGlynn, Jr. (E.D. Pa., 1974).
Edward N. Cahn (E.D. Pa., 1974).
Maurice B. Cohill, Jr. (W.D. Pa., 1976).

Carter appointees:
Paul A. Simmons (W.D. Pa., 1978).
Gustave Diamond (W.D. Pa., 1978).
Donald E. Ziegler (W.D. Pa., 1978).
Louis H. Pollak (E.D. Pa., 1978).
Norma L. Shapiro (E.D. Pa., 1978).
Richard P. Conaboy (M.D. Pa., 1979).
Sylvia H. Rambo (M.D. Pa., 1979).
Alan N. Bloch (W.D. Pa., 1979).
James T. Giles (E.D. Pa., 1979).

Reagan appointees:
Glenn E. Mencer (W.D. Pa., 1982).
William W. Caldwell (M.D. Pa., 1982).
Carol Los Mansmann (W.D. Pa., 1982).

Once again, while there is great diversity, there are also some contrasts between the Republican and Democratic nominees. Most of the judges appointed by Eisenhower, Nixon or Ford were heavily involved in philanthropic activities, while most of the Democratic judges were likely to have served full-time in political offices. The Republican Presidents seem to have been much more likely than the Democrats to appoint Episcopalians or Presbyterians to Pennsylvania's federal courts. Kennedy's appointees often had academic positions. One-third of Eisenhower's appointees had careers in the business community. Broadly speaking, the Republican appointees seem to have been primarily businessmen and professionals who, having achieved prominence in the private sector, were also active in private philanthropic activities. The Democrats, on the other hand, were more likely to have served in public office, and gained the federal bench as a culmination of political

careers. Still, the judges were more active politically and philanthropically than were their predecessors.

Ralph F. Scalera, a Nixon appointee, well illustrates a Republican involvement in philanthropic activities. He has been chairman of both the Beaver County Arthritis and Rheumatism Foundation and of a fund drive for the Medical Center of Beaver County, and he has been on the Board for the McGuire Memorial Home for Retarded Children, the Gateway Rehabilitation Center, and the Golden triangle YMCA. Among the other Nixon-Ford appointees, R. Dixon Herman has been a member of the Board for the Harrisburg Hospital; William W. Knox a board member for the Family and Child Service of Trie; Hubert I. Teitelbaum a trustee for the Woodsville State Mental Hospital; Joseph F. Weis, Jr., a member of the Allegheny County Mental Health and Mental Retardation Board; Clifford S. Green a board member for the Children's Aid Society; and Herbert A. Fogel a board member for the Eagleville Hospital and Rehabilitation Center. Nearly half of Eisenhower's appointees were prominent in philanthropic activities. John L. Miller was a director at St. John's General Hospital; C. William Kraft, Jr., was a Board member for Crozer Hospital; and Harold K. Wood was Board President for the Memorial Hospital of Chester County. The Kennedy-Johnson appointees have also included a number of philanthropists. William J. Nealon had been a Board member of the American Cancer Society; E. Mac Troutman a board member for the Schuylkill County Society for Crippled Children; and Charles R. Weiner a director of the Mental Health Association of Pennsylvania. A. Leon Higginbotham has served as President of the American Foundation for Negro Affairs, and President of the Philadelphia NAACP.

As indicated, while the Republicans have somewhat surpassed the Democrats in private philanthropy, more Democrats have occupied political offices. James P. McGranery was probably the most active of Truman's appointees in this regard, serving as a member of Congress, and as U.S. Attorney General in 1952 and '53. John W. Murphy, another Truman appointee, had also been a member of Congress before taking his judicial post. A. Leon Higginbotham had been a member of the Federal Trade Commission. Some of the Democratic appointees had also occupied state political office. John M. Davis had been Lieutenant-Governor of Pennsylvania, and Charles R. Weiner had been majority floor leader in the Pennsylvania Senate. Some of the Republican judges had also been active in state politics. Herbert P. Sorg, an Eisenhower appointee, had been speaker of the Pennsylvania House of Representatives before his judicial appointment. Raymond J. Broderick, appointed by President Nixon in 1971, had been President of Pennsylvania's 1967 constitutional convention, and Lieutenant-Governor of the state from 1966 to 1971.

Finally, many of the post-war judges have had academic and cultural interests that seem reminiscent of those of the first federal judges in Pennsylvania. Eisenhower appointees John W. Lord, Jr., and John W. McIlvaine had been instructors at Temple University Law School and Washington and Jefferson

College, respectively. Nixon appointee Clifford S. Green has been a lecturer at the Temple University Law School in addition to his judicial duties. Kennedy appointee Abraham L. Freedman taught family law at the University of Pennsylvania Law School, while A. Leon Higginbotham was an adjunct professor at Yale Law School and at the University of Michigan Law School. Edward Dumbauld has served on the Board of the American Society for Legal History, has published a number of books concerning international law and the documents of the American Revolution, and has recently written a landmark study, *Thomas Jefferson and the Law* (1979).[5] Alfred L. Luongo has been a member of the Allens Lane Art Center Association and the Philadelphia Grand Opera Company; William S. Nealon a trustee of the Everhart Museum. A. Leon Higginbotham has been a frequent contributor to law journals and has recently published an impressive analysis of race and the law, *In the Matter of Color* (1979). Charles R. Weiner has been a member of the Pennsylvania Board of Arts and Sciences. Truman appointee James P. McGranery wrote *Private Chamberlain of the Cape and Sword,* and Abraham L. Freedman wrote the *Law of Marriage and Divorce in Pennsylvania.* The Nixon-Ford appointees have also distinguished themselves in academic and cultural pursuits. Joseph F. Weis has contributed a number of articles to professional journals, and Ralph F. Scalera has served as board member for the Merrick Art Gallery Association. Finally, Carter appointee Louis H. Pollak had perhaps the most distinguished academic career of any of the Third Circuit's judges, having served as both faculty member and Dean at both Yale and the University of Pennsylvania Law Schools.

The diversity of interests and backgrounds of the post-war judges reflects the diversity of twentieth century America. The earliest federal judges in Pennsylvania had been products of the eighteenth-century Enlightenment, and may have been principally inspired by philosophy and literature. It appears that the judges of the modern period have pursued divergent lines of experience and inquiry, realizing perhaps that familiarity with a wide variety of human endeavors is necessary for the decisions judges must make in an increasingly pluralistic society.

Notes

1. Hall, "101 Men: The Social Composition and Recruitment of the Antebellum Lower Federal Judiciary, 1829–1861," 7 Rut.-Cam. L. Rev. 199, 214 (1975). Much of the background information here presented has been taken from H. Chase, S. Krislove, K. Boyum, J. Clark, *Biographical Dictionary of the Federal Judiciary* (1976), and from *Biographical Notes of the Federal Judges,* 30 Fed. Cas. 1361.
2. See Chapter II, *supra.*
3. See K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–61* 142–44 (1979) for a description of the political views of Kane, Cadwalader and McCandless.
4. On the increased professionalism of American society generally after the war see Robert Wiebe, *The Search for Order 1877–1920* (1967), and on David Dudley Field see Schudson, *Public Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles,* 21 Am. J. Leg. Hist. 191 (1977) and S. Presser and J. Zanaildin, *Law and American History: Cases and Materials* 407–416, 419–428 (1980), and sources there cited.
5. Dumbauld's works include *The Constitution of the United States* (1964), *The Life and Legal Writings of Hugo Grotius* (1969), *Interim Measures of Protection in International Controversies, Thomas Jefferson: American Tourist, The Declaration of Independence and What It Means Today, The Political Writings of Thomas Jefferson, The Bill of Rights and What It Means Today, and Thomas Jefferson and the Law* (1979).

TABLE I
THE FEDERAL DISTRICT COURT JUDGES OF PENNSYLVANIA

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	District
Francis Hopkinson	1737	1789	—	1791	Washington	Pennsylvania
William Lewis	1751	1791	1792	1819	Washington	Pennsylvania
Richard Peters	1744	1792	—	1828	Washington	Eastern
Jonathan H. Walker	1756	1818	—	1824	Monroe	Western
William Wilkins	1779	1824	1831	1865	Monroe	Western
Joseph Hopkinson	1770	1828	—	1842	J. Q. Adams	Eastern
Thomas Irwin	1785	1831	1859	1870	Jackson	Western
Archibald Randall	1800	1842	—	1846	Tyler	Eastern
John K. Kane	1795	1846	—	1858	Polk	Eastern
John Cadwalader	1805	1858	—	1879	Buchanan	Eastern
Wilson McCandless	1810	1859	1876	1882	Buchanan	Western
Winthrop W. Ketchum	1820	1876	—	1879	Grant	Western
William Butler	1822	1879	1899	1909	Hayes	Eastern
Marcus W. Acheson	1828	1880	1891 (to Ct. of Appeals)	1906	Hayes	Western
James H. Reed	1853	1891	1892	1927	B. Harrison	Western
Joseph Buffington	1855	1892	1906 (to Ct. of Appeals)	1947	B. Harrison	Western
John B. McPherson	1846	1899	1912 (to Ct. of Appeals)	1919	McKinley	Eastern
Robert W. Archbald	1848	1901	1911 (to Circuit Court)	1926	McKinley	Middle
James B. Holland	1857	1904	—	1914	T. Roosevelt	Eastern
Nathaniel Ewing	1848	1906	1908	1914	T. Roosevelt	Western
James S. Young	1848	1908	—	1914	T. Roosevelt	Western
Charles P. Orr	1858	1909	—	1922	Taft	Western
Charles B. Witmer	1862	1911	—	1925	Taft	Middle

TABLE I (continued)
THE FEDERAL DISTRICT COURT JUDGES OF PENNSYLVANIA

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	District
J. Whitaker Thompson	1861	1912	1931 (to Ct. of Appeals)	1946	Taft	Eastern
Oliver B. Dickinson	1857	1914	—	1939	Wilson	Eastern
W. H. Seward Thomson	1856	1914	1928*	1932	Wilson	Western
Robert M. Gibson	1869	1922	1949*	1949	Harding	Western
Charles L. McKeehan	1876	1923	—	1925	Harding	Eastern
Frederic P. Schoonmaker	1870	1923	—	1945	Harding	Western
Albert W. Johnson	1872	1925	1945	1957	Coolidge	Middle
William H. Kirkpatrick	1885	1927	1958*	1970	Coolidge	Eastern
Nelson McVicar	1871	1928	1951*	1960	Coolidge	Western
Albert L. Watson	1876	1929	1955*	1960	Hoover	Middle
George A. Welsh	1878	1932	1957*	1970	Hoover	Eastern
Albert B. Maris	1893	1936	1938 (to Ct. of Appeals)		F. D. Roosevelt	Eastern
Harry E. Kalodner	1896	1938	1946 (to Ct. of Appeals)	1977	F. D. Roosevelt	Eastern
Guy K. Bard	1895	1939	1952	1953	F. D. Roosevelt	Eastern
J. Cullen Ganey	1899	1940	1961 (to Ct. of Appeals)	1972	F. D. Roosevelt	Eastern
Wallace S. Gourley	1904	1945	1969*	1976	F. D. Roosevelt	Western
Frederick V. Follmer	1885	1946	1967*	1971	Truman	Middle
James P. McGranery	1895	1946	1952	1967	Truman	Eastern
John W. Murphy	1902	1946	—	1962	Truman	Middle
Thomas J. Clary	1899	1949	1969*	1977	Truman	Eastern
Allan K. Grim	1904	1949	1961*	1965	Truman	Eastern
Owen M. Burns	1892	1949		1952	Truman	Western

* Indicates that Senior Status was assumed.

TABLE I (continued)
THE FEDERAL DISTRICT COURT JUDGES OF PENNSYLVANIA

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	District
Rabe F. Marsh, Jr.	1905	1950	1977*		Truman	Western
William A. Stewart	1903	1951	—	1953	Truman	Western
Joseph P. Willson	1902	1953	1968*		Eisenhower	Western
John W. Lord, Jr.	1901	1954	1971*	1972	Eisenhower	Eastern
John L. Miller	1901	1954	1971*	1978	Eisenhower	Western
C. William Kraft, Jr.	1903	1955	970*		Eisenhower	Eastern
John W. McIlvaine	1907	1955		1963	Eisenhower	Western
Herbert P. Sorg	1911	1955	1976*	1979	Eisenhower	Western
Francis L. Van Dusen	1912	1955	1967 (to Ct. of Appeals)		Eisenhower	Eastern
Thomas C. Egan	1894	1957		1961	Eisenhower	Eastern
Harold K. Wood	1906	1959	1971*	1972	Eisenhower	Eastern
Edward Dumbauld	1905	1961	1976*		Kennedy	Western
Michael H. Sheridan	1912	1961		1976	Kennedy	Middle
Abraham L. Freedman	1904	1961	1964 (to Ct. of Appeals)	1971	Kennedy	Eastern
Joseph S. Lord III	1912	1961			Kennedy	Eastern
Alfred L. Luongo	1920	1961			Kennedy	Eastern
Louis Rosenberg	1898	1961	1976*		Kennedy	Western
Ralph C. Body	1903	1962	1972*	1973	Kennedy	Eastern
William J. Nealon, Jr.	1923	1962			Kennedy	Middle
A. Leon Higginbotham, Jr.	1928	1963	1977 (to Ct. of Appeals)		Kennedy	Eastern
John Morgan Davis	1906	1964	1974*		L. B. Johnson	Eastern
Gerald J. Weber	1914	1964			L. B. Johnson	Western
John P. Fullam	1921	1966			L. B. Johnson	Eastern

* Indicates that Senior Status was assumed.

TABLE I (continued)

THE FEDERAL DISTRICT COURT JUDGES OF PENNSYLVANIA

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	District
Thomas A. Masterson	1927	1967	1973		L. B. Johnson	Eastern
Charles R. Weiner	1922	1967			L. B. Johnson	Eastern
E. Mac Troutman	1915	1967			L. B. Johnson	Eastern
John B. Hannum	1915	1969			Nixon	Eastern
R. Dixon Herman	1911	1969			Nixon	Middle
Joseph F. Weis, Jr.	1923	1970	1973 (to Ct. of Appeals)		Nixon	Western
William W. Knox	1911	1970			Nixon	Western
Malcolm Muir	1914	1970			Nixon	Middle
Edward R. Becker	1933	1970			Nixon	Eastern
Donald W. Van Artsdalen	1919	1970			Nixon	Eastern
J. William Ditter, Jr.	1921	1970			Nixon	Eastern
Daniel H. Huyett, 3d	1921	1970			Nixon	Eastern
James H. Gorbey	1920	1970		1977	Nixon	Eastern
Hubert I. Teitelbaum	1915	1970			Nixon	Western
Barron P. McCune	1915	1970			Nixon	Western
Raymond J. Broderick	1914	1971			Nixon	Eastern
Clifford S. Green	1923	1971			Nixon	Eastern
Clarence C. Newcomer	1923	1971			Nixon	Eastern
Ralph F. Scalera	1930	1971	1976		Nixon	Western
Louis C. Bechtle	1927	1972			Nixon	Eastern
Herbert A. Fogel	1929	1973	1978		Nixon	Eastern
Daniel J. Snyder, Jr.	1916	1973		1980	Nixon	Western
Joseph L. McGlynn, Jr.	1925	1974			Nixon	Eastern
Edward N. Cahn	1933	1974			Ford	Eastern
Maurice B. Cohill, Jr.	1929	1976			Ford	Western

* Indicates that Senior Status was assumed.

TABLE I (continued)

THE FEDERAL DISTRICT COURT JUDGES OF PENNSYLVANIA

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	District
Paul A. Simmons	1921	1978			Carter	Western
Gustave Diamond	1928	1978			Carter	Western
Donald E. Ziegler	1936	1978			Carter	Western
Louis H. Pollak	1922	1978			Carter	Eastern
Norma L. Shapiro	1928	1978			Carter	Eastern
Richard P. Conaboy	1925	1979			Carter	Middle
Sylvia H. Rambo	1936	1979			Carter	Middle
Alan N. Bloch	1932	1979			Carter	Western
James T. Giles	1943	1979			Carter	Eastern
Glenn E. Mencer	1925	1982			Reagan	Western
William W. Caldwell	1925	1982			Reagan	Middle
Carol Los Mansmann	1942	1982			Reagan	Western

* Indicates that Senior Status was assumed.

Appendix II
The Judges of the Federal District Court of New Jersey

Most of the Judges of the District of New Jersey were community leaders, but, as a group, they appear to have been less active in politics than were the federal judges of Pennsylvania. The New Jersey judges have moved more frequently from positions in the state judiciary to the federal bench. Further, while it appears that the federal judges in Pennsylvania came from increasingly diversified backgrounds, it generally appears that the New Jersey judges have specialized in their profession, and have concentrated more exclusively on their judicial careers.

Before the Civil War: 1789–1863
David Brearly (1789)
Robert Morris (1790)
William S. Pennington (1815)
William Rossell (1826)
Mahlon Dickerson (1840)
Philemon Dickerson (1841)
Richard S. Field (1863)

Most of the judges appointed to New Jersey's federal court prior to the close of the Civil War had experience in politics, and most served as state judges before their appointments. Two of the judges served in the colonial army during the Revolutionary War. Judge Richard S. Field had been a professor of constitutional law and jurisprudence at the College of New Jersey (now Princeton) before pursuing a judicial career. Most of the judges served more than ten years each on the federal bench. An exception to this

pattern of long judicial tenure was Mahlon Dickerson, who held his judicial post only until political conditions were favorable for the appointment of Philemon Dickerson, Mahlon's brother, to the New Jersey district court.[1] Apparently all of the judges were either Episcopalian or Presbyterian.

William S. Pennington and the two Dickersons all served as New Jersey governors before assuming their Federal judicial duties. David Brearly represented New Jersey at the U.S. Constitutional Convention in 1789; and Richard S. Field served in the U.S. Senate in 1862 and 1863. Mahlon Dickerson, however, has the most impressive political career of these men.[2] Not only did he preside over New Jersey, first as governor, and then as unofficial political leader, but he also represented the state in the U.S. Senate from 1817 to 1833, and served as Secretary of the United States Navy. Mahlon's brother, Philemon, was a U.S. Congressman for six years.

Five of the seven had judicial experience before becoming federal judges. Robert Morris and David Brearly had served as Chief Justices of the Supreme Court of New Jersey, and Pennington, Rossell and Mahlon Dickerson had been Associate Justices of that court.[3]

The New Jersey judges may not have been as nationally prominent in intellectual circles as were Pennsylvania judges Frances Hopkinson and Richard Peters. Still, some of the New Jersey judges made notable literary or cultural contributions. Philemon Dickerson wrote *The City of Paterson: Its Past, Present and Future,* and Richard S. Field was the author of a classic in New Jersey Legal History, *The Provincial Courts of New Jersey.* Field was also a co-founder of the New Jersey Historical Society. David Brearly was a delegate to the Episcopal General Convention of 1786, and helped form the American Episcopal Church.

From the Civil War to World War One: 1865–1916

John T. Nixon (1870)
Edward T. Green (1889)
Andrew Kirkpatrick (1896)
William M. Lanning (1904)
Joseph Cross (1905)
John Rellstab (1909)
Thomas G. Haight (1914)
J. Warren Davis (1916)

The homogeneity which characterized New Jersey's federal judiciary in the decades prior to the Civil War carried over into the Gilded Age and the Progressive Era. Most of the judges in the period between the Civil War and World War I had judicial experience prior to their appointments, and half of them were prominent in politics. All but one of the judges were either Episcopalians or Presbyterians. Three of them were educators. Still, as in the ante-bellum period, the judges in the Gilded Age were usually former politicians or state judges with relatively few outside interests.

Although they were not as visible in politics as their ante-bellum predecessors, New Jersey's federal judges were at least more politically active during this period than were their Pennsylvania colleagues. John T. Nixon was elected to the New Jersey Assembly in 1849, and to the U.S. House of Representatives in 1858 and 1860. William M. Lanning served a two-year term in the U.S. Congress. Joseph Cross was speaker of the New Jersey Assembly in 1895, and President of the New Jersey Senate ten years later. J. Warren Davis served in the State Senate before being appointed U.S. Attorney for New Jersey.

It again appears, however, that more of New Jersey's federal judges were involved in judicial than political careers prior to their appointment to the federal bench. Andrew Kirkpatrick, William M. Lanning, Joseph Cross and John Rellstab had all served at least three years on New Jersey's state courts before becoming federal judges. In contrast to the judges of the ante-bellum period, however, none of the federal judges in this period were alumni of the Supreme Court of New Jersey. William M. Lanning, Thomas G. Haight and J. Warren Davis were appointed to the Third Circuit Court of Appeals from their positions on the District Court.

John Thompson Nixon taught languages at the College of New Jersey, and tutored for the family of Judge Isaac S. Pennypacker of Virginia. J. Warren Davis, an ordained Baptist minister, taught at Crozer Seminary from 1899 to 1902. William M. Lanning was on the Board of Directors for the Princeton Theological Seminary, as was Nixon. William M. Lanning published *Help for Township Officers* in 1885, and John T. Nixon wrote several volumes on New Jersey practice.

The Inter-War Years: 1919–1945

Charles F. Lynch (1919)
Joseph L. Bodine (1920)
William N. Runyon (1922)
William Clark (1925)
James W. McCarthy (1928)
Guy Laverne Fake (1929)
John B. Avis (1929)
Phillip Forman (1932)
Thomas Glynn Walker (1939)
William F. Smith (1941)
Thomas F. Meaney (1942)
Thomas M. Madden (1945)

The judges appointed to the federal district court in New Jersey in the inter-war years had political and judicial backgrounds similar to those of their predecessors. Still, there are significant differences. Nine of the twelve judges appointed in the inter-war years had been involved in the administration of justice—either as state judges or as U.S. Attorneys—prior to their

appointment to the federal judiciary. As was true with the Pennsylvania judges, although the phenomenon may be observable somewhat earlier in Pennsylvania, the New Jersey federal judges of the inter-war years illustrate the increasing professionalism of the federal judiciary, which resulted in a bench which included fewer politicians or businessmen and more career attorneys or former state judges.

A number of New Jersey's inter-war appointees were active in state politics, but none were prominent in national politics. William N. Runyon was President of the New Jersey Senate, and served as Acting Governor in 1919 and 1920. Thomas Glynn Walker was Speaker of New Jersey's General Assembly, as was John B. Avis. Guy L. Fake was in the New Jersey General Assembly and then served as a state judge for fifteen years.

As Judge Fake's move from the General Assembly to the state bench suggests, most of the inter-war appointees had given up political office for work in the judiciary. Five of the twelve judges served as state judges before being appointed to the federal court. Two of these, William Clark and Thomas G. Walker, were on the highest state court, New Jersey's Court of Errors and Appeals, when they were appointed federal judges. Joseph L. Bodine left the federal judiciary to sit as a Justice on the New Jersey Supreme Court. Other judges left the district court when they were appointed to higher positions in the federal judiciary. William Clark served on the Third Circuit Court of Appeals after sitting for thirteen years on the district court. Phillip Forman served on the New Jersey district court for 27 years, and was appointed to the U.S. Court of Appeals for the Third Circuit in 1959.

After the First World War it became increasingly common for the United States Attorneys for New Jersey to be appointed federal judges, a tendency that does not seem as pronounced for Pennsylvania. In the inter-war years Charles F. Lynch, Joseph L. Bodine, Phillip Forman and William F. Smith all served as U.S. Attorney before becoming federal judges.

One other change in the characteristics of the New Jersey federal judges in this period is religious affiliation. The Republican appointees in the twenties were predominantly Presbyterian, but all of the Roosevelt appointees in New Jersey were Catholic, perhaps indicating a different source of support for the Democratic administration.[4]

The Post-War Period: 1946–1979

Truman appointees:
Alfred E. Modarelli (1951)
Richard Hartshorne (1951)

Eisenhower appointees:
Reynier J. Wortendyke, Jr. (1955)
Mendon Morrill (1958)
Arthur S. Lane (1960)

Kennedy-Johnson appointees:
Anthony T. Augelli (1961)

James A. Coolahan (1962)
Robert Shaw (1962)
Mitchell H. Cohen (1962)
Lawrence A. Whipple (1967)

Nixon-Ford appointees:
George H. Barlow (1969)
Leonard I. Garth (1969)
Clarkson S. Fisher (1970)
John J. Kitchen (1970)
Frederick B. Lacey (1971)
Vincent P. Biunno (1973)
Herbert J. Stern (1973)
H. Curtis Meanor (1974)
John F. Gerry (1974)
Stanley S. Brotman (1975)

Carter appointees:
Dickinson R. Debevoise (1979)
Anne E. Thompson (1979)
H. Lee Sarokin (1979)
Harold A. Ackerman (1979)

The post-war appointees to New Jersey's federal court had the same professional orientation as those of the inter-war years. Most of the federal judges in the post-war period pursued judicial careers before or after their tenure on the federal bench. Very few of the post-war judges held political office prior to their appointment. Three of the post-war judges served as U.S. Attorney before their judicial appointments.

None of the New Jersey federal judges in the post-war period had held national public office. Only two of them, Robert Shaw and Clarkson S. Fisher, served in the New Jersey legislature, and each served for only one two-year term. The Pennsylvania judges of this period, in contrast, had been more active in both national and state politics, one of them becoming U.S. Attorney General, and one Lieutenant-Governor of Pennsylvania.

Twelve of the judges in this period served on either county or state courts before entering the federal judiciary. Lawrence A. Whipple, George H. Barlow, Clarkson S. Fisher, John J. Kitchen, John F. Gerry and H. Curtis Meanor all sat on the Superior Court of New Jersey. In contrast to previous periods, none of the post-war appointees came from New Jersey's appellate courts.

Richard Hartshorne was a professor of constitutional law and insurance law at the New Jersey Law School, while Leonard I. Garth was a lecturer at Rutgers Law School. Frederick B. Lacey has been a trustee of Rutgers University, and Vincent P. Biunno a member of the advisory board of Western Reserve University School of Library Science. Judges Hartshorne, Biunno

and Stanley S. Brotman have all been frequent contributors to professional journals.

As the personnel on New Jersey's federal court have become more specialized in their interests, positions on the court seem to have gone to people from a wider segment of the legal profession. All of the Truman and Eisenhower appointees in New Jersey had graduated from either Columbia or Harvard Law Schools, but after Kennedy's election New Jersey federal judicial positions were occupied by graduates from other legal institutions as well, including Dickinson, John Marshall and Notre Dame. For the most part, however, the post-1960 appointees have graduated from the New Jersey Law School, Rutgers or Harvard.[5]

A review of the federal judicial personnel in Pennsylvania suggested that there has been increasing diversity in interests and backgrounds. The New Jersey judges, in contrast, appear to have become more specialized in their judicial careers. Relatively few of them, especially in the post-war period, wre involved in teaching or education; and relatively few were prominent in state or national politics. Perhaps like Judge John T. Nixon, the subject of Chapter III, the New Jersey Judges have managed to find sufficient sources of personal challenge and reward simply from judicial service in their home state.

Notes

1. See K. Hall, *The Politics of Justice: Lower Federal Judicial Selection and the Second Party System, 1829–61* 34, 35 (1979) for a description of the political conditions surrounding Mahlon's appointment to the federal court in New Jersey.
2. *Id.*, at 33.
3. Until 1947, the Court of Errors and Appeals was the highest court of New Jersey. The Supreme Court was a court of Original Jurisdiction with some appellate jurisdiction. The Court of Errors and Appeals consisted of the Chancellor of New Jersey, the Chief Justice and justices of the Supreme Court, and six additional specially appointed judges. When the 1844 constitution was replaced by the Constitution of 1947, a "Supreme Court" became the highest state court.
4. Four out of the six Republican judges whose religious affiliations are a matter of record were Presbyterian. Joseph L. Bodine was Baptist, and Phillip Forman was Jewish.
5. President Roosevelt, for example, appointed Fordham and Rutgers graduates to the federal court in New Jersey. The Republican judges of the 20's, on the other hand, were predominantly from Harvard or New York University.

TABLE II
THE FEDERAL DISTRICT COURT JUDGES OF NEW JERSEY

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed
David Brearly	1745	1789		1790	Washington
Robert Morris	1745	1790	1814	1815	Washington
William S. Pennington	1757	1815		1826	Madison
William Rossell	1761	1826		1840	J. Q. Adams
Mahlon Dickerson	1770	1840	1841	1853	Van Buren
Philemon Dickerson	1788	1841		1862	Tyler
Richard S. Field	1803	1863		1870	Lincoln
John T. Nixon	1820	1870		1889	Grant
Edward T. Green	1837	1889		1896	B. Harrison
Andrew Kirkpatrick	1844	1896		1904	Cleveland
William M. Lanning	1849	1904	1909 (to Ct. of Appeals)	1912	T. Roosevelt
Joseph Cross	1843	1905		1913	T. Roosevelt
John Rellstab	1858	1909	1929*	1930	Taft
Thomas G. Haight	1879	1914	1919 (to Ct. of Appeals)	1942	Wilson
J. Warren Davis	1867	1916	1920 (to Ct. of Appeals)	1945	Wilson
Charles F. Lynch	1884	1919	1925	1942	Wilson
Joseph L. Bodine	1883	1920	1929		Wilson
William N. Runyon	1871	1922		1931	Harding
William Clark	1891	1925	1938 (to Ct. of Appeals)	1957	Coolidge
James W. McCarthy	1872	1928	1929	1939	Coolidge
Guy L. Fake	1879	1929	1951*	1957	Hoover
John B. Davis	1875	1929		1944	Hoover

* Indicates assumed Senior status.

TABLE II (continued)
THE FEDERAL DISTRICT COURT JUDGES OF NEW JERSEY

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed
Phillip Forman	1895	1932	1959 (to Ct. of Appeals)	1978	Hoover
Thomas Glynn Walker	1899	1939	1941		F. D. Roosevelt
Wiliam F. Smith	1903	1941	1961 (to Ct. of Appeals)	1968	F. D. Roosevelt
Thomas F. Meaney	1888	1942	1966*	1968	F. D. Roosevelt
Thomas M. Madden	1907	1945	1968*	1976	F. D. Roosevelt
Alfred E. Modarelli	1898	1951		1957	Truman
Richard Hartshorne	1888	1951	1961*	1975	Truman
Reynier J. Wortendyke, Jr.	1895	1955	1970*	1975	Eisenhower
Mendon Morrill	1902	1958		1961	Eisenhower
Arthur S. Lane	1910	1960	1967		Eisenhower
Anthony T. Augelli	1902	1961	1972*		Kennedy
James A. Coolahan	1903	1962	1974*		Kennedy
Robert Shaw	1907	1962		1972	Kennedy
Mitchell H. Cohen	1904	1962	1974*		Kennedy
Lawrence A. Whipple	1910	1967	1978*		L. B. Johnson
George H. Barlow	1921	1969		1979	Nixon
Leonard I. Garth	1921	1969	1973 (to Ct.		Nixon
Clarkson S. Fisher	1921	1970	of Appeals)		Nixon
John J. Kitchen	1911	1970		1972	Nixon
Frederick B. Lacey	1920	1971			Nixon
Vincent P. Biunno	1916	1973	1982*		Nixon
Herbert J. Stern	1936	1973			Nixon
H. Curtis Meanor	1929	1974			Nixon
John F. Gerry	1925	1974			Ford

* Indicates assumed Senior status.

TABLE II (continued)
THE FEDERAL DISTRICT COURT JUDGES OF NEW JERSEY

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed
Stanley S. Brotman	1924	1975			Ford
Dickinson R. Debevoise	1924	1979			Carter
Anne E. Thompson	1934	1979			Carter
H. Lee Sarokin	1928	1979			Carter
Harold A. Ackerman	1928	1979			Carter

* Indicates that Senior Status was assumed.

Appendix III
The Judges of the Federal District Court of Delaware

Delaware federal judges Bradford, Morris, and Nields, as we have seen, came to the bench with experience which enabled them to become familiar with the character and needs of the modern business corporation. Delaware's present federal judges, however, appear to have been less directly involved with business. A few have had corporate practices, but more have come to the federal judiciary from positions in state courts or administrative bodies. The Delaware judges of the nineteenth century, in contrast, were predominantly former politicians.

It seems likely that as was true for Pennsylvania and New Jersey, the characteristics of the individuals appointed have changed as the necessity for particularized judicial expertise, rather than business or political experience, has become a more important qualification for the federal judiciary.

Before the Civil War: 1789–1865
Gunning Bedford, Jr. (1789)
John Fisher (1812)
Willard Hall (1823)

The three judges who sat on Delaware's federal court in the ante-bellum decades all came to the court after careers in state or national politics, and might have been described as members of Delaware's upper class. As was true of the early New Jersey federal judges, they were either Episcopalian or Presbyterian. They appear to have received the finest education available in America at that time. Gunning Bedford, Jr. graduated from what was to become Princeton University and Willard Hall from Harvard.

The three judges were prominent in state and national politics. John Fisher was Delaware's Secretary of State in 1811; and Willard Hall held the same position from 1811 to 1814. Hall sat in the U.S. House of Representatives from 1817 to 1821, and was a member of the Delaware Senate when appointed to the federal court. Gunning Bedford, Jr., probably had the most noteworthy political career. He served during the late 1780's as General George Washington's aide-de-camp, sat in the Delaware legislature, and was a member of the Delaware Council. In the 1780's, Bedford was Attorney General of Delaware, and was a delegate to the Continental Congress, the Annapolis Convention of 1786, and to the U.S. Constitutional Convention of 1787. As a Constitutional delegate, Bedford argued for the equal representation of states, for short Presidential terms, and for a strong legislative branch. His acceptance of the compromises worked out in that convention, of course, was instrumental in Delaware's being the first state to ratify the new federal Constitution.

The federal judges in Pennsylvania and New Jersey, as indicated, often left the judiciary to pursue political careers or private practice; but the Delaware judges in this period stayed on the bench for comparatively long periods. Bedford was a federal judge for 23 years, Fisher for eleven years, and Hall for nearly half a century. Bedford was president of the trustees for Wilmington Academy, and Hall was president of the Wilmington School Board, but once on the bench the Delaware judges appear to have concentrated on judging rather than on philanthropic or cultural activities.

Between the Civil War and World War One: 1871–1919
Edward G. Bradford (1871)
Leonard E. Wales (1884)
Edward G. Bradford, Jr. (1897)
Hugh M. Morris (1919)

Although the Delaware federal judges of the Gilded Age and the Progressive Era came from social backgrounds similar to those of their predecessors, there are significant differences. Judge Wales and the elder Judge Bradford were both prominent in politics prior to their judicial appointments, and in this sense were like the judges of the decades prior to the Civil War. Yet the judges appointed after 1884 were not particularly active in politics, or at least did not hold high political office, and this pattern has continued to the present. The judges appointed between the Civil War and the close of World War I predominantly came from business backgrounds, either carrying on corporate practices or holding executive positions in local companies.

The elder Judge Bradford was a member of the Delaware legislature, and a leader in the state's Republican Party. Leonard E. Wales, before being admitted to the Delaware bar, was an editor of the *Delaware State Journal,* an organ of Delaware's Whig Party. After becoming dissatisfied with Whig policies in the 1850's, Wales helped to form Delaware's Republican Party in 1856.

After Wales's tenure on Delaware's federal court, however, political service appears not to have been the most significant qualification for federal judicial position in Delaware. Hugh M. Morris, for example, was one of the most successful corporate lawyers in Delaware, both before and after his tenure on the federal court. The two Bradfords were also closely connected with the state's business community. The elder Bradford was a director of the Wilmington Farmers' Bank, and the younger Bradford married a Du Pont. Judge Morris was a member of many corporate directorates, including those of the Wilmington Trust Company, the Delaware Power Company, the Delaware Light & Power Company, and the Philadelphia, Baltimore & Washington Railroad Company.

Since World War One: 1930–1974

John P. Nields (1930)
Paul C. Leahy (1942)
Richard S. Rodney (1946)
Caleb M. Wright (1955)
Caleb R. Layton III (1957)
Edwin D. Steel, Jr. (1958)
James L. Latchum (1968)
Walter K. Stapleton (1970)
Murray M. Schwartz (1974)

As indicated, none of Delaware's federal judges have held high national or state elective office since Leonard E. Wales. It also appears that the most recent judges are less closely connected with the business community than were their predecessors. While some have represented members of Delaware's business community, most appear not to have served as directors of local corporations. In short, as we saw for New Jersey and Pennsylvania, the latest Delaware federal judges seem to be a group of legal professionals—in the sense that they have more exclusively pursued their professional rather than political or business careers. In Delaware, however, as in Pennsylvania, the judges have kept up many philanthropic and cultural interests.

Some of these men had close contact with Delaware's business community, usually through their work as corporate attorneys. Both Edwin D. Steel and Walter K. Stapleton were partners in the firm of Morris, Steel, Nichols & Arsht or its predecessors, perhaps the foremost law firm in the state. John P. Nields also carried on a highly successful practice. Richard S. Rodney began practice as a partner with Hugh M. Morris.

Some of the judges have held board or salaried positions in corporations. Edwin D. Steel, for example, has been on the board of directors of the Kaumaugraph Company, and, during the Second World War, was general counsel for War Material, Inc.

Some of the judges since the First World War have come on the federal bench following judicial experience in the state courts or on state administra-

tive commissions. Richard S. Rodney had perhaps the most distinguished such judicial career, as an Associate Justice on Delaware's Supreme Court for 24 years. Caleb R. Layton served eleven years on Delaware's Superior Court, and Paul C. Leahy was a member of the Delaware Unemployment Compensation Commission for five years. Like their predecessors, the judges of this period served for long terms, for an average of eleven years.

John Nields served as President of the Wilmington Public Library and the Wilmington Boys' Club. Nields, Caleb R. Layton and Edwin D. Steel were members of the Delaware Historical Society, and Steel served as the Society's President in 1961 and 1962. Judge Steel has also served as a director of the Wilmington General Hospital. James L. Latchum served on the board of directors for the Delaware Steeplechase and Race Association.

TABLE III
THE FEDERAL DISTRICT COURT JUDGES OF DELAWARE

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed
Gunning Bedford, Jr.	1747	1789		1812	Washington
John Fisher	1771	1812		1823	Madison
Willard Hall	1780	1823	1871	1875	Monroe
Edward G. Bradford	1819	1871		1884	Grant
Leonard E. Wales	1823	1884		1897	Arthur
Edward G. Bradford, Jr.	1848	1897	1918	1928	McKinley
Hugh M. Morris	1878	1919	1930	1966	Wilson
John P. Nields	1868	1930	1941*	1943	Hoover
Paul C. Leahy	1904	1942	1957*	1966	F. D. Roosevelt
Richard S. Rodney	1882	1946	1957*	1963	Truman
Caleb M. Wright	1908	1955	1973*		Eisenhower
Caleb R. Layton III	1907	1957	1968*		Eisenhower
Edwin D. Steel, Jr.	1904	1958	1969*		Eisenhower
James L. Latchum	1918	1968			L. Johnson
Walter K. Stapleton	1934	1970			Nixon
Murray M. Schwartz	1931	1974			Nixon

* Indicates that Senior Status was assumed.

Appendix IV
The Judges of the District Court of the Virgin Islands

George P. Jones (1936)
William H. Hastie (1937)
Herman E. Moore (1939)
Walter A. Gordon (1958)
Almeric L. Christian (1969)
Warren H. Young (1971)
David V. O'Brien (1981)

The Virgin Islands of the United States were acquired from Denmark in 1917. Congress then provided that appeals from the Islands' local court which had been taken to the Supreme Court of Denmark should thereafter be made to the Circuit Court of Appeals for the Third Circuit. In 1922, the local colonial councils, by identical ordinances, created an insular district court, its judge to be appointed by the Governor of the Islands. It was not until 1936, however, that the present District Court of the Virgin Islands was created by Congress, which designated that the court's judge was to be appointed by the President. Finally, with the enactment of title 28 of the United States Code in 1948, the United States Territory of the Virgin Islands became a part of the Third Circuit. The District Court of the Virgin Islands is not, however, a United States District Court, but is rather a territorial court exercising both local and federal jurisdiction.*

Of the judges of the District Court, only Almeric L. Christian was born and raised in the Islands. Christian attended college at the University of Puerto Rico and Columbia, and, after receiving his LL.B. from Columbia Law

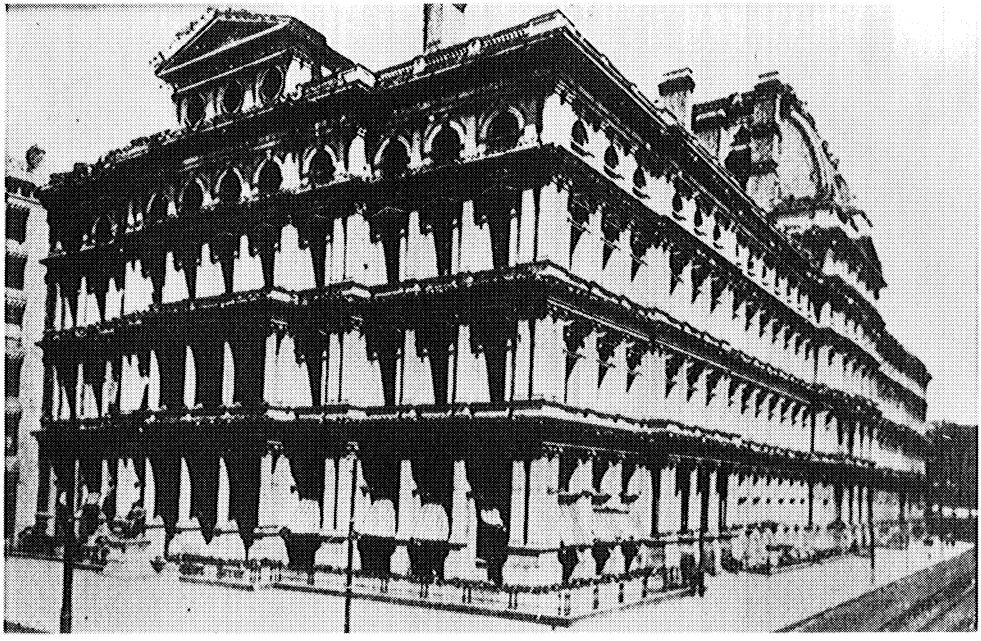
School, he returned to St. Croix and established a private practice. Warren H. Young left a legal position in Chicago and practiced law for twenty-one years in St. Croix prior to his appointment. Walter A. Gordon was born in Atlanta and was educated and first practiced in Berkeley, California. Gordon also served as a Berkeley, California police officer for eleven years, and as an assistant football coach at the University of California for twenty-four years. William H. Hastie was born in Tennessee, educated at Amherst and Harvard, and previously worked in Washington, D.C.

For most of the judges, their appointments served as capstones of their legal careers. Gordon, Christian, and Young, as indicated, left firmly established private practices for the bench. Judge Hastie, as we have seen in Chapter V, supra, was an exception. He was appointed when he was only thirty-three, and his only previous legal experience had been a four year term as assistant solicitor for the Department of the Interior. After leaving the Virgin Islands District judgeship, Hastie went on to serve as Dean of the Howard University School of Law, as Governor of the Territory of the Virgin Islands, and as a judge on the Third Circuit's Court of Appeals.

* See, *e.g. United States v. George*, 625 F. 2d 1081, 1087–1089.

TABLE IV
THE JUDGES OF THE DISTRICT COURT OF THE VIRGIN ISLANDS

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed
George P. Jones		1936	1937		F. Roosevelt
William H. Hastie	1904	1937	1939	1976	F. Roosevelt
Herman E. Moore	1892	1939	1957	1980	F. Roosevelt
Walter A. Gordon	1894	1958	1968	1976	Eisenhower
Almeric L. Christian	1919	1969			Nixon
Warren H. Young	1916	1971		1980	Nixon
David V. O'Brien	1932	1981			Reagan



Old Post Office Building, 9th and Market St., Philadelphia. The Third Circuit Court of Appeals and The Eastern District of Pennsylvania presided here on the second floor from the early 1880's until the building's destruction in 1937.

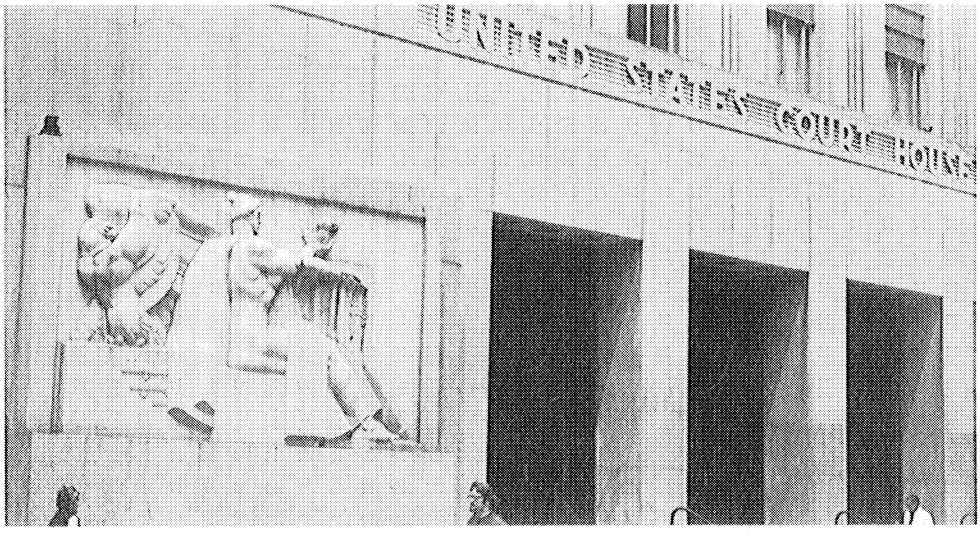


Photo by Seymour I. Toll

United States Courthouse, 9th and Market, Philadelphia.
Site of the Third Circuit from 1937 to 1975.

Appendix V
The Judges of the Third Circuit's Courts of Appeal

Since the creation of a federal Court of Appeals for the Third Circuit,[1] most of its judges have been "professionals" with years of judicial experience. Some of the judges were active in state politics, but rarely have they held national elective office. The federal appellate judges have usually been drawn from state or federal trial courts, and, once appointed, they have usually served on the federal Court of Appeals for many years. For more information on the most recent activity of the Third Circuit's Court of Appeals, see Chapters V and VI, *supra*.

From the Civil War to World War One: 1869–1918
William McKennan (1869)[2]
Marcus W. Acheson (1891)
George M. Dallas (1892)
George Gray (1899)
Joseph Buffington (1906)
William M. Lanning (1909)
John B. McPherson (1912)
Victor B. Woolley (1914)

Five of the eight judges appointed to the Third Circuit's Court of Appeals in the period between the Civil War and World War One came from other courts, four from federal district courts, and one from the Supreme Court of Delaware. The judges also had similar religious affiliations. The majority

were either Presbyterian or Episcopalian, as were most of the judges in the Third Circuit's district courts.

Marcus W. Acheson, Joseph Buffington, William M. Lanning and John B. McPherson served in the federal district courts before their appointments to the Court of Appeals, having had an average of ten years' experience on the lower court. Victor B. Woolley had been an Associate Judge of the state Superior Court for fourteen years. Once on the Court of Appeals, the judges remained for an average of 16 years. Joseph Buffington served 32 years. Most of the judges on the Court of Appeals thus had decades of judicial experience and had apparently concentrated on their judicial careers rather than on politics or private practice.

Of those who were more active politically, George Gray seems most noteworthy. He was Delaware's attorney-general for six years, and U.S. Senator from Delaware from 1885 to 1899. William M. Lanning sat in Congress, and William McKennan had served as Pennsylvania's deputy attorney-general, and was a delegate at a number of state and national conventions.

As was true for some of the District Court judges, some of the judges on the Court of Appeals were professional educators. George M. Dallas had been a professor in torts and evidence at the University of Pennsylvania Law School. William M. Lanning had taught in the district schools of Mercer County, New Jersey, and at Trenton Academy. While a judge on the Court of Appeals, Lanning was also a director at the Princeton Theological Seminary. Victor B. Woolley was a lecturer on Delaware practice at the University of Pennsylvania Law School, and wrote *Woolley on Delaware Practice* while an Associate Judge on the state Superior Court. With the exception of education, however, it appears that the judges had relatively few interests outside of their judicial careers.

The Inter-War Years: 1919–1945
Thomas G. Haight (1919)
J. Warren Davis (1920)
J. Whitaker Thompson (1931)
John Biggs, Jr. (1937)
Albert B. Maris (1938)
William Clark (1938)
Francis Biddle (1939)
Charles A. Jones (1939)
Herbert F. Goodrich (1940)
Gerald McLaughlin (1943)
John J. O'Connell (1945)

The judges appointed to the Court of Appeals in the inter-war period had experiences similar to those of their predecessors. Most had served on either lower federal courts or on state courts. Once appointed to the Court of Appeals, the judges remained on the Court an average of fifteen years—an

average quite close to the sixteen years average achieved by their predecessors. While the judges of the two periods are hardly distinguishable in terms of their professional backgrounds, there were still some notable divergences between the two groups of judges. For example, with the election of Franklin D. Roosevelt, judges with more diverse religious affiliations began to be appointed to the Court of Appeals.

Half of the judges appointed to the Court of Appeals in this period had prior judicial experience. Thomas G. Haight, J. Warren Davis, J. Whitaker Thompson, William Clark and Albert B. Maris had all served on federal district courts. William Clark had also been a judge on New Jersey's Court of Errors and Appeals before he became a federal judge. Charles Alvin Jones, however, left the federal Court of Appeals to take a position in a state court —the Supreme Court of Pennsylvania.

The growing importance of judicial expertise compared with political office-holding as a criterion for selection is again suggested by the fact that relatively few of the Court of Appeals judges held high political office. Charles Alvin Jones had once been the Democratic nominee for Governor of Pennsylvania. Albert B. Maris had been a member of Pennsylvania's Democratic State Committee, and J. Warren Davis a member of the New Jersey Senate. None of the inter-war appointees appears to have held national elective office, and a majority of them appear to have been minimally involved in politics.

Still, the inter-war appointees do show a greater amount of involvement in fields other than adjudication. Herbert F. Goodrich's career is particularly illustrative. After graduating from Harvard Law School in 1914, Goodrich was a professor of law at the State University of Iowa, as well as Acting Dean of the law school in 1921 and 1922. Goodrich taught conflict of laws at the University of Michigan in the twenties, and was Dean and professor of law at the University of Pennsylvania in the thirties. He also published treatises and casebooks, writing *Goodrich on Conflict of Laws in* 1927 and co-editing *Cases on Conflict of Laws* (Cheatham, Dowling and Goodrich) in 1936.

The Post-War Period: 1946–1981

Harry E. Kalodner (1946)
William H. Hastie (1949)
Austin L. Staley (1950)
Phillip Forman (1959)
J. Cullen Ganey (1961)
William F. Smith (1961)
Abraham L. Freedman (1964)
Collins J. Seitz (1966)
Francis L. Van Dusen (1967)
Ruggero J. Aldisert (1968)
David Stahl (1968)
Arlin M. Adams (1969)
John J. Gibbons (1969)

Max Rosenn (1970)
James Rosen (1971)
James Hunter III (1971)
Joseph F. Weis, Jr. (1973)
Leonard I. Garth (1973)
A. Leon Higginbotham, Jr. (1977)
Dolores K. Sloviter (1979)
Edward R. Becker (1981)

Most judges appointed to the Court of Appeals in the post-war period were judges prior to their appointments to the Court of Appeals. None of them had held national political office and none had held elective positions in state governments. As in the past, judicial qualifications rather than political experience seems to have been the major prerequisite to a position on the Court of Appeals. At the same time, while the pre-war appointees were almost exclusively protestants, and usually Episcopalian or Presbyterian, the post-war appointees have included many judges who are Catholic or Jewish. The post-war appointees also seem to differ from their predecessors in their experience in governmental administration. Many of them held appointive positions in state governments before their entrance into the federal judiciary. Finally, the post-war appointees have been involved in philanthropic and cultural activities to a greater extent than their pre-war predecessors. Repeating the pattern that we observed for the Pennsylvania and Delaware district courts, the continued professional homogeneity of the Court of Appeals has been accompanied by a growing diversity in the interests and backgrounds of the judges.

Eight of the post-war appointees were on the Third Circuit's district courts, and four of them were judges on the state courts. Collins J. Seitz served as Chancellor of Delaware for fifteen years, where he delivered many significant opinions on the Delaware law of corporations, and, as we have seen, on the law of equal protection. As in the past, then, judicial expertise has been important for appointees. Particularly during the Nixon Administration, however, a career in private practice has served as preparation for appointment to the Court of Appeals. Arlin M. Adams, John J. Gibbons, Max Rosenn, and James Hunter III—all Nixon appointees—were so engaged when appointed to the Court of Appeals.

Service in state or local government appears to have been an increasingly common means of preparation for the Court of Appeals. Harry E. Kalodner was Pennsylvania's Secretary of Revenue before entering the state judiciary; William H. Hastie was Governor of the Virgin Islands from 1946 to 1949; and Austin L. Staley was director of the Workmen's Compensation Bureau of Pennsylvania. Arlin M. Adams was Pennsylvania's Secretary of Public Welfare for three years, and Max Rosenn succeeded Adams at that post when Adams returned to private practice.

A relatively great number of the post-war judges have held important posi-

tions in legal and university education. William H. Hastie served as Dean of the Howard University School of Law from 1939 to 1946, and William F. Kalodner was on the board of trustees for Yeshiva University, Austin L. Staley on the advisory board at Duquesne University, and Ruggero J. Aldisert on the board of trustees at the University of Pittsburgh. Judge Aldisert has taught at the University of Texas, has continued to be an Adjunct Professor of Law at the School of Law of the University of Pittsburgh, and is the author of a unique casebook based in part on his experience on the bench, The Judicial Process (1976). Judge Aldisert has also been a member of the faculty of the Appellate Judges Seminar at New York University Law School and a member of the Board of the Federal Judicial Center. John J. Gibbons has written often for professional journals, has taught at all three New Jersey law schools and at Suffolk University Law School in Massachusetts. He has been a Trustee of Holy Cross College, and was also President of The New Jersey State Bar Association. Dolores K. Sloviter, the first woman to be appointed to the Third Circuit's Court of Appeals, was Professor of Law at Temple University at the time of her appointment.

The post-war appointees have also been active in a number of philanthropic and cultural organizations. Harry E. Kalodner was on the board of directors of the Philadelphia Psychiatric Hospital and on the board of directors for the Independence Hall Association. Phillip Forman was a director at the McKinley Memorial Hospital and the New Jersey State Hospital. Francis L. Van Dusen has been a director of the Philadelphia division of the American Cancer Society, Ruggero J. Aldisert a district chairman of the Multiple Sclerosis Society, and Max Rosenn chairman of the Pennsylvania Governor's Council for Human Services. William H. Hastie was a Fellow of the American Academy of Arts and Sciences, Ruggero J. Aldisert has served on the board of directors of the Civic Light Opera Association, and Francis L. Van Dusen is a member of the Pennsylvania Historical Society. Dolores K. Sloviter was a member of the Philadelphia citizens' "watchdog" group, the Committee of 70. A. Leon Higgenbotham, Jr. is the author of the highly-acclaimed study of race relations, *In the Matter of Color* (1979).

As we have seen for the district courts, the modern Court of Appeals is characterized by increasing professionalization, increasing diversity, and increasing involvement with a variety of educational and cultural institutions.

Notes

1. Pursuant to the Evarts Act (The Circuit Court of Appeals Act of 1891), Act of March 3, 1891, 26 Stat. 826.
2. Date of Commission, as in previous appendices. Judge McKennan was appointed a United States Circuit Judge for the Third Circuit, pursuant to the Act of April 10, 1869, but retired from office before the circuit Court of Appeals was established in 1891.

TABLE V
THE JUDGES OF THE COURT OF APPEALS

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	State From
William McKennan	1816	1869	1891	1891	Grant	Pennsylvania
Marcus W. Acheson	1828	1891	—	1906	B. Harrison	Pennsylvania
George M. Dallas	1839	1892	1909	1917	B. Harrison	Pennsylvania
George Gray	1840	1899	1914	1925	McKinley	Delaware
Joseph Buffington	1855	1906	1938*	1947	T. Roosevelt	Pennsylvania
William M. Lanning	1949	1909	—	1912	T. Roosevelt	New Jersey
John B. McPherson	1846	1912	—	1919	Taft	Pennsylvania
Victor B. Woolley	1867	1914	1938*	1945	Wilson	Delaware
Thomas G. Haight	1879	1919	1920	1942	Wilson	New Jersey
	1867	1920	1939*			
			1941 (Resigned)	1945	Wilson	New Jersey
J. Whitaker Thompson	1861	1931	1938*	1946	Hoover	Pennsylvania
John Biggs, Jr.	1895	1937	1965*	1979	F. D. Roosevelt	Delaware
Albert B. Maris	1893	1938	1958*		F. D. Roosevelt	Pennsylvania
William Clark	1891	1938	1942	1957	F. D. Roosevelt	New Jersey
Francis Biddle	1886	1939	1940	1968	F. D. Roosevelt	Pennsylvania
Charles Alvin Jones	1887	1939	1944	1966	F. D. Roosevelt	Pennsylvania
Herbert F. Goodrich	1889	1940		1962	F. D. Roosevelt	Pennsylvania
Gerald McLaughlin	1893	1943	1968*	1977	F. D. Roosevelt	New Jersey
John J. O'Connell	1894	1945		1949	Truman	Pennsylvania
Harry E. Kalodner	1896	1946	1969*	1977	Truman	Pennsylvania
William H. Hastie	1904	1949	1971*	1976	Truman	Virgin Islands
Austin L. Staley	1902	1950	1967*	1978	Truman	Pennsylvania
Phillip Forman	1895	1959	1961*	1978	Eisenhower	New Jersey
J. Cullen Ganey	1899	1961	1966*	1972	Kennedy	Pennsylvania
William F. Smith	1903	1961		1968	Kennedy	New Jersey

* Indicates that Senior Status was assumed.

TABLE V (continued)
THE JUDGES OF THE COURT OF APPEALS

Judge	Year Born	Year Appointed	Year Retired or Resigned	Year Died	President Who Appointed	State From
Abraham L. Freedman	1904	1964		1971	L. B. Johnson	Pennsylvania
Collins J. Seitz	1914	1966			L. B. Johnson	Delaware
Francis L. Van Dusen	1912	1967	1977*		L. B. Johnson	Pennsylvania
Ruggero J. Aldisert	1919	1968			L. B. Johnson	Pennsylvania
David Stahl	1920	1968		1970	L. B. Johnson	Pennsylvania
Arlin M. Adams	1921	1969			Nixon	Pennsylvania
John J. Gibbons	1924	1969			Nixon	New Jersey
Max Rosenn	1910	1970	1981*		Nixon	Pennsylvania
James Rosen	1909	1971		1972	Nixon	New Jersey
James Hunter III	1916	1971			Nixon	New Jersey
Joseph F. Weis, Jr.	1923	1973			Nixon	Pennsylvania
Leonard I. Garth	1921	1973			Nixon	New Jersey
A. Leon Higginbotham, Jr.	1928	1977			Carter	Pennsylvania
Dolores K. Sloviter	1932	1979			Carter	
Edward R. Becker	1933	1981			Reagan	

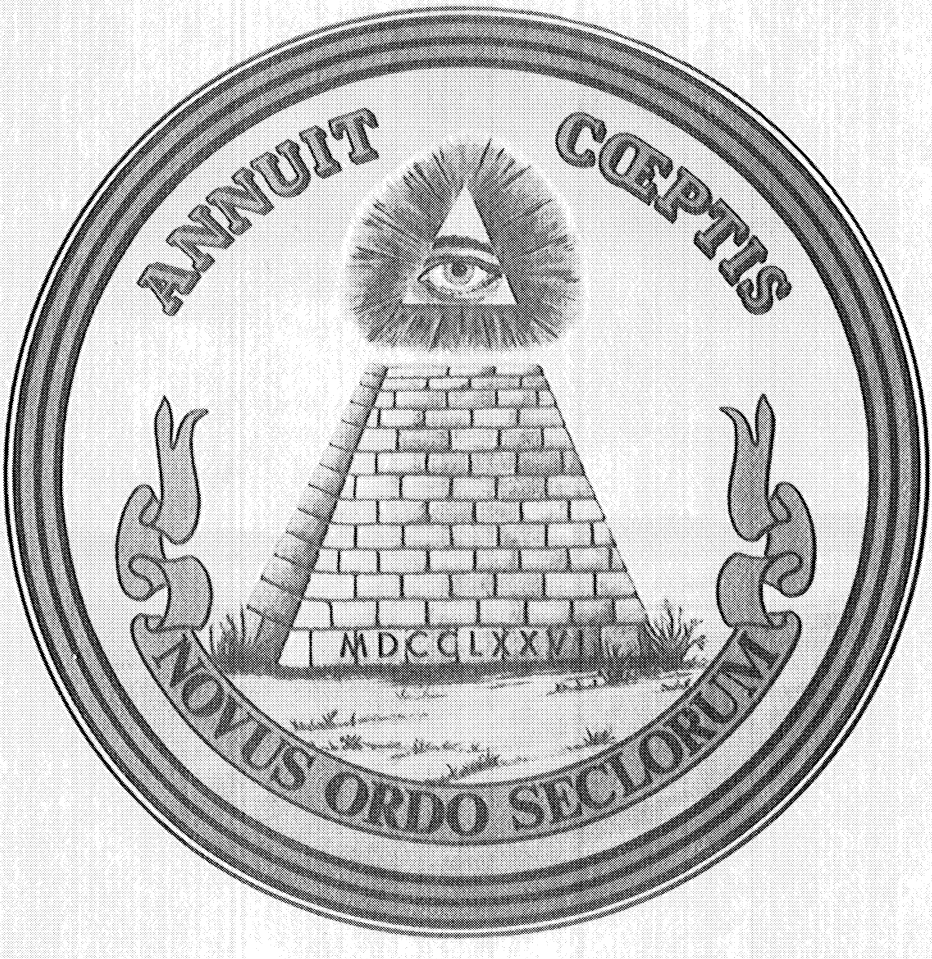
* Indicates that Senior Status was assumed.

Appendix VI
United States Supreme Court Justices Assigned to the Third Circuit

Justice	*Date of Assignment*
Bushrod Washington	July 1, 1802
Henry Baldwin	February 11, 1830
Robert C. Grier	April 8, 1846
William Strong	April 4, 1870
Joseph P. Bradler	January 10, 1881
John M. Harlan	February 1, 1892
George Shiras, Jr.	October 17, 1892
Henry Brown	March 9, 1903
Edward D. White	May 29, 1906
William H. Moody	December 24, 1906
Horce H. Lurton	January 9, 1911
Mahlon Pitney	March 18, 1911
Pierce Butler	January 22, 1923
Louis D. Brandeis	March 16, 1925
Owen J. Roberts	June 2, 1930
Harold H. Burton	October 15, 1945
William J. Brennan	October 16, 1956

Source: Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served During the Period 1801 Through May 1972. Committee on the Judiciary, United States Senate, U.S. Government Printing Office, Washington 1972.

Index



Reverse Side of the Great Seal