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UNSUNG SERVICES OF THE SUPREME COURT OF THE UNITED STATES

HAROLD H. BURTON*

NEARLY EVERYONE knows that there is a Supreme Court of the United States, but hardly anyone knows much about it. Some have surprising preconceptions. After a visit to a Court session, a young man from Latin America was asked if he had seen anything unusual in the Court procedure. "Yes, indeed," he said, "Some of the Justices smiled!" So this article seeks to answer such questions as "Where does the Court meet? What does it do? Who does it?" and "How do they do it?"

I. WHERE THE COURT MEETS

The Court meets in Washington and never in sections or divisions. From 1801 until 1935 it met in the Capitol when that building was usable. Throughout Chief Justice Marshall's service and thereafter until 1860, it met in a semicircular room on the ground floor immediately under the Senate chamber. When the Senate moved to its present quarters in the new Senate wing, the Court moved upstairs into the beautiful old Senate chamber.

However, when William Howard Taft became Chief Justice in 1921, he found the Court handicapped by lack of space for its staff, and with no offices for its Justices. To remedy this and to dramatize the separation of the legislative, executive and judicial branches of the government, he induced Congress to authorize construction of the Supreme Court Building. Across the Capitol Plaza and facing the Capitol at Number One First Street, North East, the site was acquired before Chief Justice Taft's death in 1930, and the building was completed under the leadership of Chief Justice Hughes in 1935.

Designed by Cass Gilbert and completed by his son, Cass Gilbert, Jr., under the supervision of David Lynn, the then architect of the Capitol, it is an architectural gem. To the credit of Chief Justice Hughes, it was completed for enough less than its appropriation to leave funds for its furnishing and the return of a one per cent surplus to the government.

It is not labeled with its name, but, if a visitor to Washington enters a marble temple marked on one side "Equal Justice Under Law," and

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on the other "Justice, the Guardian of Liberty," he finds there the Supreme Court of the United States. The visitor reaches the entrance by climbing broad stairs between two heroic, seated figures. They are sculptures by James Earle Frazier representing Justice and Authority or, more familiarly, "Law and Order." The impressive front pediment is by Robert Aitken and that in the rear by Herman MacNeil.

Inside, the building is finished in snow-white Alabama marble. The entrance hall is reminiscent of the interior of the Parthenon. It leads directly to the courtroom. That chamber includes an impressive stone frieze by Adolph Weinman. It teaches that the law is an age-old product of human experience. On the south wall it presents nine lawgivers who lived before Christ—Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius and Octavian; on the north wall nine comparable leaders who lived after Christ—Justinian, Mohammed, Charlemagne, King John of England, St. Louis of France, Hugo Grotius, Blackstone, John Marshall and Napoleon. Marshall is there to represent America's contribution—a written Constitution, superior in authority to all officials of the government and finally interpreted by the judiciary.

II. WHAT THE COURT DOES

Years ago when I was asked by a boy in Cleveland why we had so many courts and judges in our city, I replied by asking him if he played baseball. When he said, "Of course," I asked him if he used an umpire. His answer was full of wisdom, for he said, "Well, when we want to last a whole nine inning game, then we have an umpire." In elemental terms, that illustrates the service of the judge. He is not an abstraction. He meets a human need. He is not perfect but he is independent of the parties, knows the rules and, to the best of his ability, applies them promptly, impartially and courteously.

The Supreme Court is the umpire in the federal system. The Constitution and statutes set forth its rules. The judicial power of the United States is stated in one sentence of the Constitution.¹ The principal part of the Court's jurisdiction is thus restricted to cases arising under the Federal Constitution or the many federal statutes.

The independence of the judiciary is vital to its success. Its independ-

1. "Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." U.S. Const., art. III.

ence was a major concern of the founding fathers. Like Montesquieu, they believed "that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'"² They complained in the Declaration of Independence because the Colonial Judges held their offices at the pleasure of the King. To safeguard the independence of the judiciary, the Constitution provides that Judges of the Supreme Court shall be nominated by the President and appointed to office by him with the advice and consent of the Senate;³ that they "... shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office;"⁴ and that they may be removed from office only upon impeachment by the House of Representatives and conviction by the Senate upon the "Concurrence of two thirds of the Members present."⁵ Although one Justice of the Supreme Court has been thus impeached, none ever has been convicted or removed from office.⁶

The independent judiciary of the United States is the keystone that holds in place the members of the governmental arch which our Constitution has designed to sustain a representative government, dedicated to the preservation for the individual of the greatest freedom consistent with the enjoyment of a like freedom by all.

III. WHO DOES IT

Of the three constitutional branches of the Federal Government, the Supreme Court is the only one that is completely continuous. We have today the 84th Congress because the life of each Congress is two years. We have the forty-second presidential term because the presidential term is four years. The Supreme Court today is, however, technically the same Court that first met in 1790. It does not adjourn sine die, but merely to the time and place prescribed by law for its next meeting. Its membership does not change with the elections. It changes only upon the retirement, resignation or death of its Justices. As a result only 89 men have served on the Court since the birth of the nation. In a sense, they all are part of the Court. Nine Justices hear the arguments on the bench—but they take counsel not only among themselves, but with their 80 predecessors who are "in the books." Together, the 89 decide the case through the "living voice" of the nine.

2. LXXVIII *The Federalist* (Macy Co., 1945) 521, quoting from 3 Montesquieu, *Spirit of Laws* 181.

3. U.S. Const., art. II, § 2.

4. U.S. Const., art. III, § 1.

5. U.S. Const., art. I, § 3.

6. See Burton, *An Independent Judiciary—The Keystone of Our Freedom*, 39 A.B.A.J. 1067 (1953).

This continuity of service is not limited to the Justices. The officers and employees of the Court share in it. Those who serve the Court tend to dedicate their lives to it. Loyalty and devotion to the Court as an institution is a primary characteristic of service to it.

The Reporters of Decisions

There have been but 12 reporters of its decisions. They report the opinions and draft the headnotes which summarize the decisions of the Court. Lawyers know the names of the first seven because the volumes they published are cited by their names—Dallas, Cranch, Wheaton, Peters, Howard, Black and Wallace. They account for 90 volumes. The next 258 volumes are the work of five equally devoted, but less known, members of the staff. They are Otto, Davis, Butler, Knaebel and Wyatt. Each has rendered distinguished, responsible service.

The spirit and continuity of this service is illustrated by the late Clarence E. Bright. He devoted his life to making the initial prints of the opinions. For 75 years, Pearson's Printing Office held the contract and for more than 50 years, Clarence Bright supervised the printing. His devotion is reflected in his touching letter of retirement:

"Mr. Charles E. Cropley,
Clerk, U. S. Supreme Court,
Washington, D. C.

"July 1, 1946.

"Dear Mr. Cropley:

"Advancing years with an unsatisfactory physical condition compels the decision to relinquish the contract for the Court's printing, as of this date.

"The Court's best interest would not be served if I should attempt to carry on, only to find myself lacking in the punch and alertness which I have been able to apply during the past 55½ years.

"To have served under 5 Chief Justices and 35 Associate Justices covers a lot of territory. It has been a wonderful experience and the fine treatment accorded me by the Justices leaves nothing to be desired. The splendid and helpful cooperation of your office speaks well for your administration.

"This is the hardest decision I have ever been called upon to make, but it is the inevitable result of the passing of time.

"With best wishes and high personal regards, I remain

"Yours very truly,
C. E. BRIGHT."

Today, his work is entrusted to a small devoted staff of men from the Government Printing Office who operate a shop exclusively for this service in the basement of the Court Building.

The Clerks of the Court

There have been but 11 clerks of the Court. In the last 128 years there have been but seven—Carroll, Middleton, McKenney, Maher, Stansbury, Cropley and Willey. The present Clerk, Harold B. Willey, began his service as an Assistant Clerk 25 years before he succeeded Cropley in 1952. Cropley, in turn, had begun his services as a Court page 40 years before that. Among the treasures in the Clerk's office is a silver urn which was presented to Mr. Maher when he had completed 50 years with the Court. The helpful courtesy of the Clerk's staff is traditional.

The Marshal

For many years, the Court used the services of the Marshal for the District of Columbia but, since 1867, it has had its own. In 88 years but six men have held the office. The first was Colonel Richard C. Parsons of Cleveland, who resigned when elected to Congress. The second was John G. Nicolay, who resigned after 15 years to devote himself to preparing the Nicolay and Hay biography of Lincoln. He was followed by Major John M. Wright, Frank Key Green, Thomas E. Waggaman and T. Perry Lippitt. The present Marshal started his service as a clerk-stenographer in 1935 and became Marshal in 1952. His predecessor started as a page boy and served the Court 40 years.

The Librarian

Since 1887, the Court has developed an excellent law library. In those 68 years, there have been but four librarians. Henry DeForest Clarke served 13 years, Frank Key Green about 14 years, and Oscar DeForest Clarke, son of the first librarian, 32 years. The present librarian is Miss Helen Newman, who formerly served as Associate Librarian with Oscar Clarke.

Law Clerks, Secretaries, Guards and Pages

Each Associate Justice is allowed two law clerks, and the Chief Justice three. They are able young lawyers who serve with anonymity, usually for one or two years. Among them have been Dean Acheson, later Secretary of State, and Calvert Magruder, now Chief Judge of the United States Court of Appeals for the First Circuit.

Invaluable auxiliaries of the Justices are their equally unsung secretaries. Their devoted service often extends throughout their respective Justices' connection with the Court.

The guards of the Court serve under the Marshal. They have police jurisdiction within the area of the Court grounds.

There are four Court pages of high school age who serve the Justices both in and out of the Court room.

The Messengers

Each Justice traditionally is allowed the assistance of a personal messenger of his own selection. In them continuity of service has reached its peak. The longest service that has been rendered to the Court is that of Archibald Lewis, a messenger who served it 63 years. Today, the senior employee of the Court is a messenger, Clinton C. Burke, now serving his 48th year. There is also in the service of the Court Harold Joice, now in his 35th year, following in the footsteps of his father, who served the Court 48 years, and of his grandfather, who served it 30 years.

The Bar

The continuity of the Court is matched by that of its bar. From the earliest days, leaders of the American bar have assisted the Court in solving its greatest problems. Examples of such recent service of more than 50 years before it are George Wharton Pepper of Pennsylvania, and John W. Davis of New York.

The Court

Described by James Bryce as the "living voice of the Constitution,"⁷ the Justices contribute many facets to the Court's continuity.

The Constitution refers to "one supreme Court" but does not prescribe its size. Congress at first fixed its membership at six, then seven, then nine, then ten. Soon thereafter, it determined that no new members be appointed until the number had fallen to seven. However, when the number was reduced to eight, Congress restored the limit to nine. Six of the nine constitute a quorum. The Chief Justice bears the title of "Chief Justice of the United States" and is appointed to that office as such.

There have been but 14 Chief Justices—Jay, John Rutledge, Ellsworth, Marshall, Taney, Salmon P. Chase, Waite, Fuller, White, Taft, Hughes, Stone, Vinson and Warren. The Chief Justice presides not only over the Supreme Court, but also over the Judicial Conference of the United States. That conference consists of the Chief Judges of the 11 Federal Circuits.

A tradition of the Court that was instituted by Chief Justice Fuller has been scrupulously followed ever since. It is that whenever the mem-

7. I Bryce, *The American Commonwealth* (3d ed. 1895) 272.

bers of the Court gather either to go on the Bench or into conference, each Justice shakes hands with each of the other eight—making a grand total of 36 handshakes on each occasion.

The continuity of judicial service also appears from the fact that the service of seven members of the Court spans its life. A visitor to the Court at any time since 1790 would have found there at least one of the following—Cushing, Marshall, Wayne, Field, White, McReynolds or Black.

The record length of judicial service is that of Justice Field—34 years, 8 months and 22 days. Others who have served over 30 years are Marshall, Harlan, Story, Wayne, McLean, Washington and William Johnson. Justice Holmes served a little less than 30 years.

At all times, the Senior Justice in point of service lends a special continuity to its work. During two-thirds of the life of the Court, some member of it has had over 20 years of personal experience on it. And since the first nine years of its life, the Court always has had someone on it with nine or more years of membership. The Associate Justices sit on the right and left of the Chief Justice, strictly in the order of their seniority, and change seats only as their seniority changes. As a result of this, one man, and only one, has sat in all nine places. This was Chief Justice Stone, who moved by seniority from the junior to the Senior Associate Justiceship and then was appointed Chief Justice.⁸

Even more significant than the individual continuity of the Court is its group continuity. The longest period during which the Court has remained unchanged is one of 12 years between the early part of President Jefferson's term and the latter part of Monroe's. There have been ten periods of five or more years without a change, but evidence of the flexibility of the Court's membership appears in the fact that each president who has served four years or more in office has appointed one or more members of the Court.

The most striking example of this group continuity is that which marked the Court over which Chief Justice Marshall presided. During his nearly 34½ years of service, he served with but 15 Associate Justices, and seven of these served with him for extended periods. They were—Thompson for about 12 years, Livingston 16 years, Todd 19 years, Story 23 years, Duvall 23 years, Washington 29 years, and William Johnson 30 years. These are the men who, with him, made up the Court which handed down the decisions that have become the foundation of our constitutional law. These Justices not only made those vital decisions, they nurtured and protected them.

8. The Senior Justices have been Jay, Cushing, Samuel Chase, Washington, Marshall, Story, McLean, Wayne, Nelson, Clifford, Miller, Field, Harlan, White, McKenna, Holmes, Van Devanter, McReynolds, Stone and Black.

Finally, there has been an informal but traditional recognition of the value of a geographical distribution in the training and perspective of the Court's members. This has appeared in several lines of succession to the Bench. One example is what might be called the New England Chair on the Court. This was first filled by Cushing of Massachusetts. He was succeeded by Story of Massachusetts, Woodbury of New Hampshire, Curtis of Massachusetts, Clifford of Maine, Gray of Massachusetts, Holmes of Massachusetts, Cardozo of New York, and Frankfurter of Massachusetts. The apparent break in continuity through the succession of Cardozo to Holmes was not actually such because, throughout Cardozo's service, Brandeis of Massachusetts was a member of the Court.

IV. HOW THE COURT DOES IT

How this Court keeps up with the demands of the nation is a story in itself. Much credit for the solution goes to Chief Justice Taft.⁹ When he took office in 1921, the Court was nearly two years behind its docket. At the end of the term in which he retired in 1930, the Court was current with its docket and it has been so ever since.

The jurisdiction of the Court is limited largely to those substantial federal questions that come to it for review from other federal or state courts. This limitation alone does not, however, keep the case load down to manageable size. The solution sought by Chief Justice Taft, and approved by Congress in 1925, was, first, to enlarge the personnel of the Courts of Appeals so as to enable them to keep current in their several circuits. Sitting in panels of three judges, or occasionally *en banc*, those courts, in large measure, were thus enabled to serve as locally accessible federal courts of review.

The next step was to limit the kind of questions as to which litigants could carry their cases to the Supreme Court in Washington. This limitation was provided by granting to that Court itself a large option to decline to hear cases unless they involved issues of special significance. This "optional jurisdiction" means that, for a Supreme Court review, litigants, in most cases, must seek a writ of certiorari. In other words, they must show good reason why the Supreme Court should order the lower court to certify its record for further review.¹⁰ This proposal was adopted and has proved effective. Petitions which seek review for purposes of delay or for re-examination of a conclusion not involving an important principle of federal law are generally promptly denied. Such a denial often comes on the Monday following the filing of the

9. See Burton, *Judging is Also Administration*, 33 A.B.A.J. 1099 (1947).

10. For an indication of the basis of selection, see Supreme Court Rule 19 (1954).

statement in opposition to the petition for certiorari. If the petition is granted, the case is soon set for argument on the merits. Printed briefs are filed and each party usually is allowed an hour for oral argument.

Ever since this procedure has been authorized, the Court has accepted for argument about 15 to 25 per cent of the cases submitted. This means that out of 750 cases presented each year, about 600 are left as the lower courts decided them, and 150, representing the vitally important cases, are heard further on their merits. In those, decisions are handed down with supporting opinions to serve as precedents for the nation.¹¹

In this procedure, there inheres a danger that the Court might refuse to hear some case that it should hear. To protect itself against that error, Chief Justice Taft explained to Congress that such petitions are granted whenever a substantial minority of the Court requests it. In other words, if four of the nine Justices vote to hear a case, the writ of certiorari is granted. Through this flexible mechanism, the needs of justice and of speed are served, and the Court keeps up with the demands of the nation in all cases of major significance.

A successful "Government of Laws and not of Men" calls for just and wise laws, intelligently interpreted and administered with promptness, justice, wisdom, impartiality, mercy and understanding. The Supreme Court thus dedicates itself to the best interests of the people of America to the end that Justice may be the "Guardian of Liberty" and that there may be "Equal Justice Under Law."

11. In addition to the average of 750 cases thus handled, the Court maintains a miscellaneous docket in which it files about another 750 cases a year. These come to the Court in a somewhat informal manner, generally claiming violation of some constitutional right. Many are from penitentiary inmates. They are examined and, if found meritorious, they are placed on the regular docket, sometimes with counsel specially assigned to represent the indigent complainant. Each year, one or two per cent of these are thus argued on their merits.