

HISTORY  
OF THE  
SEVENTH CIRCUIT  
1891-1941



First regular session of the  
United States Court of Appeals  
for the Seventh Circuit,  
October 1891.

Seated, *from left to right*,  
are Judge Walter Gresham,  
Justice John M. Harlan, and  
District Judge Henry Blodgett

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A BICENTENNIAL PROJECT

HISTORY  
OF THE  
SEVENTH CIRCUIT  
1891-1941

By  
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## Introduction

**T**he first task I faced in writing the history of the United States Court of Appeals for the Seventh Circuit was to decide what constitutes a history of a court. Is it the biographies of the judges who served on the court? Is it the story of the institution's organizational development and procedures? Is it the study of the cases and case law developed by the court? The work that follows attempts to explore all three of these aspects of the court of appeals' history between its establishment in 1891 and the cutoff date, 1941.

The book follows both a thematic and a chronological order in its organization. For the reasons explained at the beginning of chapters V and VI, I have divided the fifty-year history into two segments, 1891-1912 and 1912-1941.\* Within each of these parts there is information on the judges (chapters III and V), on the court's organization (chapters II and VI), and on the court's cases and caseload (chapters IV and VII). Chapter I traces the history of the Seventh Circuit before the courts of appeals were established, and chapter

\* It was decided to cover in detail only the court of appeals' first fifty years in this volume, because of limited resources and because the next judges to be studied were still in active service.

VIII briefly describes the history of the Seventh Circuit from 1941 to the present.

This book could not have been completed without the assistance and cooperation of many people and institutions. The financial support for the project came from the Bicentennial Committee of the Judicial Conference of the United States. Judge Howard T. Markey served as coordinator of the committee and provided assistance and advice at all stages. I am also grateful to the Seventh Circuit Bar Association for the generous financial assistance that enabled the project to be completed. For access to biographical information on the judges, I would like to thank the Chicago Historical Society; the Illinois State Historical Society; Special Collections, Milner Library, Illinois State University; Peoria Historical Society; Lilly Library, Indiana University; Wisconsin State Historical Society; National Personnel Records Center; and the *Chicago Tribune*. C. Paul Beach, Gino Naughton, and George Huff all provided valuable research assistance on the project.

I benefited greatly from information supplied by the following family members of judges: Frances Baker; Jacob E. Alschuler; James S. Foster (Judge Will M. Sparks); Mrs. J. Earl Major and Mark M. Joy; Mrs. Otto Kerner, Sr.; Phyllis O'Brien (Judge Philip J. Finnegan); Robert D. Morgan (Judge Walter C. Lindley); Mrs. H. Nathan Swaim and Jean Sutter; Paul Schnackenberg; Mrs. John S. Hastings; and Mrs. W. W. Emerson (Judge W. Lynn Parkinson). A special thanks goes to George Evans, who made available to me the papers of his father, Judge Evan A. Evans. As the footnotes indicate, this collection proved to be invaluable.

Carol Avins, Jamil Zainaldin, Michael Churgin, and James Ferguson all read parts or all of the manuscript and offered valuable advice. Mary Kay Schleier and the late Jean Born assisted at early stages in the manuscript's preparation. Very special thanks go to Dorothy Davis, who spent countless hours typing and making major contributions to the preparation of this book.

One of the great joys in working on this project was being welcomed into the Seventh Circuit "family." Greatly valued are the friendship and encouragement offered by all of the following: the deputy clerks, both those at the front counter and those behind the scenes; the secretaries in the clerk's office, in the circuit executive's office, and to the individual judges; Chief Deputy Clerk John Panek; Supervisory Deputy Clerk Fay Wolff; former Senior Staff Attorney (now United States Magistrate) John Cooley; the court's bailiff; the staff attorneys; and the law clerks.

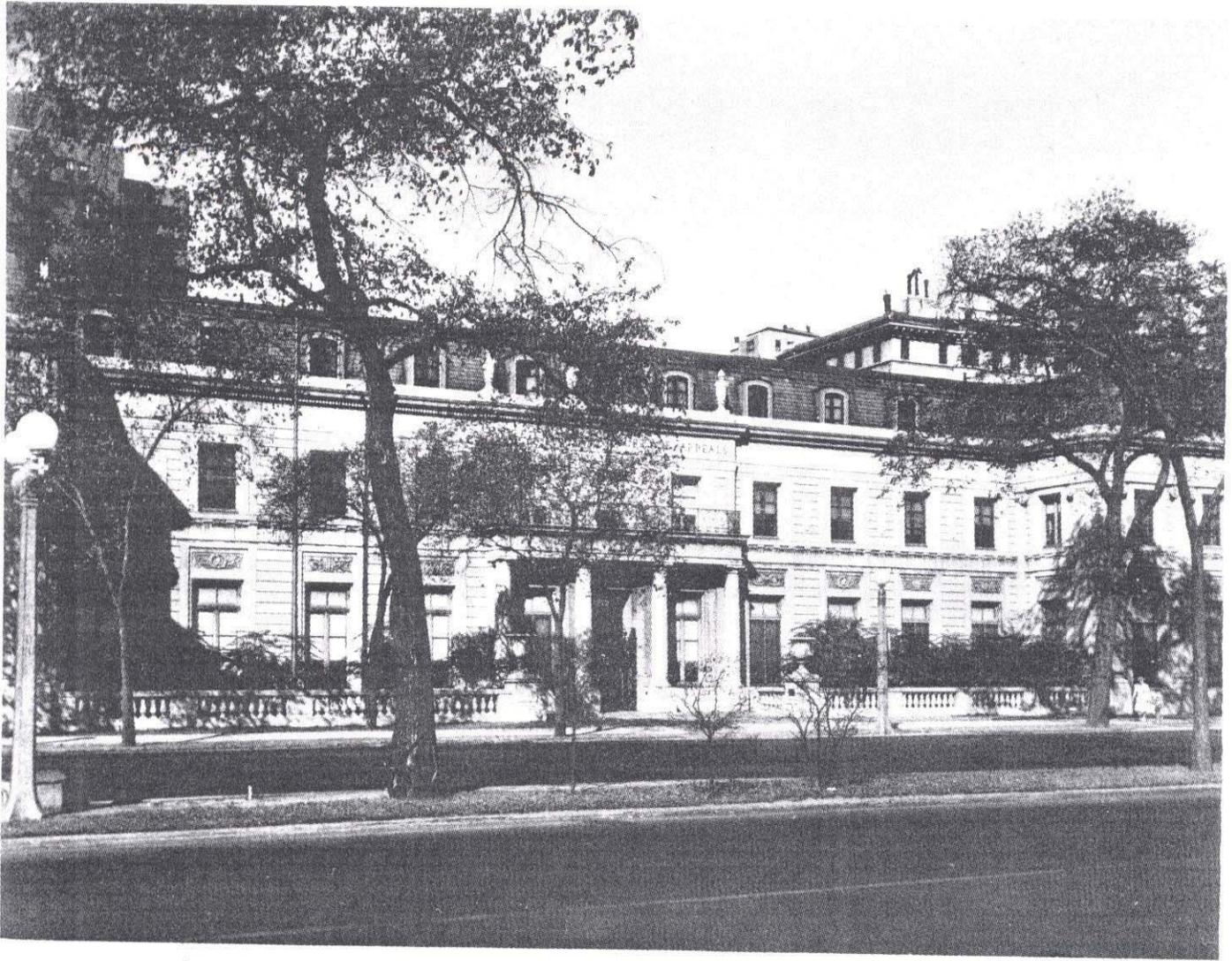
I wish to thank Kenneth Carrick, the retired clerk of the United States Court of Appeals for the Seventh Circuit, for all his assistance. This project would have been far more difficult to complete without the biographical and statutory materials carefully compiled by Mr. Carrick. In addition, his generosity in sharing with me his fifty-year knowledge of the Seventh Circuit helped me immeasurably in the beginning.

I also wish to thank Thomas Strubbe, clerk of the Seventh Circuit, who consistently offered his assistance in tending to some of the administrative details of the project.

It is difficult to express adequately my appreciation for the help and friendship of Circuit Executive Collins Fitzpatrick. His administrative skill made every stage of this project go smoothly and most enjoyably. He also spent many hours reading the manuscript and offered advice that has greatly improved it.

During the preparation of this history, the judges of the Seventh Circuit all gave generously of their time to me. Judges Luther M. Swygert and Wilbur F. Pell, Jr., shared with me their vast knowledge of Indiana and the history of the federal judiciary there. Judges Latham Castle, Winfred G. Knoch, Walter J. Cummings, Philip W. Tone, William J. Bauer, Harlington Wood, Jr., and William J. Campbell all provided information about their careers and the federal judiciary in Illinois. Both the late Judges John S. Hastings and F. Ryan Duffy spent time with me discussing their careers and the Seventh Circuit's history during the 1940s and 1950s. Judge Robert A. Sprecher offered encouragement at the beginning stages of the project, and his insightful comments were of great value.

From the initial stages of my work at the Seventh Circuit until its completion, Chief Judge Thomas E. Fairchild has encouraged and supported this project. His careful reading of the manuscript greatly improved it. His kindness, generosity, and knowledgeable advice were invaluable to me in achieving whatever success this project has attained.



U.S. Court of Appeals Building,  
1212 Lake Shore Drive, 1938 to 1965

## History of the Seventh Circuit Prior to the Creation of the Court of Appeals

Congress created the United States Court of Appeals for the Seventh Circuit by the Act of March 3, 1891.<sup>1</sup> This law, known as the Evarts Act, ended a protracted twenty-five-year effort by the bench, bar, and Congress to reform the federal judiciary. As a compromise act, it both preserved key elements of the old system and established important innovations. Congress retained the venerable circuit courts as trial courts and refused to alter the geographical boundaries of the circuits. However, the Evarts Act increased the number of judgeships; it provided that appeals would be heard and decided by panels of three judges, and it significantly revised appellate jurisdiction.

To understand the Seventh Circuit's mixture of the traditional and innovative, it is necessary to look first at the early history of the federal courts and to examine those aspects of the system that were retained and those that motivated reformers to seek change. Among the subjects to be investigated are: the geographical units designated as the Seventh Circuit before its present combination of Illinois, Indiana, and Wisconsin; the organization and

<sup>1</sup> Act of March 3, 1891, ch. 517, §§1-15, 26 Stat. 826.

jurisdiction of the district and circuit courts before 1891; the pattern of practice in those courts; and the lives and careers both of the judges who served on the Seventh Circuit bench before the creation of the court of appeals and those who were to take their seats on the new court.

Following the adoption of the United States Constitution in 1789, Congress exercised its power under Article III to establish inferior federal courts. The Judiciary Act of 1789 created both district and circuit courts.<sup>2</sup> Congress followed a general plan that set up one district court in each state and assigned states to circuits. The 1789 law organized three circuits. The district courts served as trial courts and possessed concurrent jurisdiction with the circuit courts over lesser crimes and tort claims. District courts had exclusive jurisdiction over cases under admiralty law, trade statutes, and seizures of land. Besides the concurrent original jurisdiction shared with the district courts, the circuit courts maintained exclusive jurisdiction in diversity cases. Congress also gave circuit courts appellate jurisdiction over all cases tried in the district courts. Originally each circuit court consisted of the district judges plus two Supreme Court justices, who were required to hold court twice a year in the various districts within the circuit. Except for the judicial system established by the famous, but short-lived, Federalist Act of 1801,<sup>3</sup> the basic judicial system outlined here remained in effect until 1891.

During this period of nearly 100 years, the United States experienced a tremendous expansion, both in its geographical boundaries and its economic activity. As the nation expanded westward, more federal courts were needed. With the addition of new states, Congress created more district courts, and in 1802 it redivided the country into six circuits.<sup>4</sup> A second reorganization occurred in 1807,<sup>5</sup> and an additional circuit was added. Thus began the history of the Seventh Circuit of the United States. The original Seventh Circuit included the district courts of Tennessee, Kentucky, and Ohio. Congress authorized a seventh seat on the United States Supreme Court, and the new justice, Thomas Todd, became the Seventh Circuit's first circuit justice.

When the increased demand for federal courts from the newly admitted states in the West forced expansion to nine circuits, Congress placed Illinois, Ohio, Michigan, and Indiana in the Seventh Circuit. Thus we can see the

2 Act of September 24, 1789, 1 Stat. 73. For a detailed account of the history of the Judiciary Act see the classic work in the field, F. FRANKFURTER and J. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM*, ch. 1 (1928). See also, Surrency, *A History of the Federal Courts*, 28 *MO.L.REV.* 214 (1963); H. HART and H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 1-40 (2d ed. 1973).

3 Act of February 13, 1801, 2 Stat. 89, repealed Act of March 8, 1802, 2 Stat. 132. For an account of the Federalist-Jeffersonian conflict surrounding these laws, see FRANKFURTER and LANDIS, *supra* at 24-32; Surrency, *The Judiciary Act of 1801*, 2 *AM. J. LEG. HIST.* 53 (1958).

4 Act of April 29, 1802, 2 Stat. 156, 157. For a discussion of the reorganization of the circuits, see Surrency, *A History of the Federal Courts*, *supra* at 224-26; FRANKFURTER and LANDIS, *supra* at 32-39.

5 Act of February 24, 1807, 2 Stat. 420.

beginning of the present United States Court of Appeals for the Seventh Circuit. However, the circuit did not assume its current form until reorganization of the federal judiciary, caused by the Civil War, had taken place. When Wisconsin entered the Union in 1848, it was not assigned to a circuit, as Congress gave the district court there the powers of a circuit court. During the Civil War Congress placed Wisconsin in the Eighth Circuit, together with Michigan and Illinois; Indiana and Ohio remained in the Seventh Circuit.<sup>6</sup> The following year, though, Congress rearranged the circuits by putting Indiana in the Eighth Circuit with Wisconsin and Illinois and shifting Michigan to the Seventh Circuit with Ohio.<sup>7</sup> Following the Civil War, the readmission of the southern states required yet another reordering of the circuits. This time, however, the new arrangement was permanent. Congress retained in a single circuit the three-state area of Indiana, Illinois, and Wisconsin, but renumbered it as the Seventh Circuit.<sup>8</sup>

Another pre-1891 development crucial to an understanding of the Evarts Act was the passage of the 1869 statute, known as the Circuit Court Act, which provided for the appointment of one circuit judge in each circuit.<sup>9</sup> The Circuit Court Act's framers were attempting to eliminate some of the burden on the United States Supreme Court; the creation of this judgeship would lessen the time required for Supreme Court justices to attend circuit duties. Although by the 1840s justices no longer regularly rode circuit and were not required to attend annually a fixed number of sessions, they still spent a portion of the year out of Washington holding circuit court with the district judges. The 1869 Act required the justices to hold only one circuit term every two years. The presence of a permanent circuit judge would allow for this reduction in attendance by justices, while increasing the number of circuit terms that could be held. Congress also believed that the appointment of circuit judges would upgrade the quality of appellate judging in the federal courts. Due to the scarcity of federal judges, there were numerous instances when a district judge would conduct a trial, and then, acting alone, would convene the circuit court to hear the appeal. This resulted in harsh criticism from members of the bar and from litigants, who complained about the manifest unfairness of this procedure.<sup>10</sup> It was believed that the new circuit judges would conduct the appeals from the district court, to prevent the former abuses.

6 Act of July 15, 1862, 12 Stat. 576.

7 Act of January 28, 1863, 12 Stat. 637.

8 Act of July 23, 1866, 14 Stat. 209.

9 Act of April 10, 1869, 16 Stat. 44. FRANKFURTER and LANDIS, *supra* at 69-77, provides the legislative history of this Act in great detail. See also Surrency, *A History of the Federal Courts*, *supra* at 232.

10 One contemporary commentator characterized the system as follows: "Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision." W. Hill, *The Federal Judicial System*, 12 A.B.A. REP. 302 (1887), *quoted in* FRANKFURTER and LANDIS, *supra* at 87.

Following passage of the Circuit Court Act President Ulysses S. Grant, on December 22, 1869, nominated Judge Thomas Drummond as circuit judge of the Seventh Circuit. Judge Drummond was quickly confirmed by the Senate and took the bench the second week of January, 1870.<sup>11</sup>

This first Seventh Circuit judge established a pattern, followed almost without exception for fifty years, of advancement to a circuit court from the United States District Court. Drummond had been appointed the United States District Court judge of Illinois in 1850 by President Zachary Taylor. He had migrated west to Illinois from Philadelphia in 1835.<sup>12</sup> Born in Maine on October 9, 1809, he was the son of a sailor and farmer who also served several terms in the Maine legislature. Drummond attended school at several private academies in Maine before entering Bowdoin College, where he received a Bachelor of Arts degree in 1830. He then moved to Philadelphia to read law with William T. Dwight, the son of Timothy Dwight, president of Yale University. After Dwight decided to become a Congregational minister, Drummond shifted his studies to the office of Thomas Bradford, Jr. He gained admittance to the Pennsylvania bar in March 1833, and he practiced there for several years before moving to the rapidly developing town of Galena, Illinois. He established his own law office in Galena and quickly became well known and prosperous. He loyally supported the Whig party and was elected to the Illinois House of Representatives in 1840, where he served with his fellow Whig, Abraham Lincoln. Leaving the legislature in 1842, he returned to his thriving law office. His practice was that of a typical small-town general practitioner of the period. He handled land transactions, occasionally served as defense counsel in criminal trials, administered estates, and represented both plaintiffs and defendants in tort and contract suits. One contemporary described him as the leading member of the Galena bar: "[H]e very soon secured an excellent practice. His clients were the bankers, merchants and best businessmen of the busy little town."<sup>13</sup>

In 1850 Judge Nathaniel Pope, the first United States District Court judge in Illinois, died, and President Zachary Taylor, a Whig, appointed Thomas Drummond to replace him. Drummond maintained his office and held court in Galena until 1854, when he moved to Chicago. When Congress divided Illinois into two districts in 1855, Judge Drummond received assignment to the Northern District of Illinois.<sup>14</sup> Judge Drummond continued to serve in the Northern District until his elevation to the circuit court. On several occasions the Bar of the Seventh Circuit pressed for his elevation to the Supreme

11 3 Chicago Legal News, 124 (Jan. 15, 1870).

12 The biographical details of Judge Drummond's life are, unless otherwise cited, from S. Gregory, *Thomas Drummond*, in 5 W. DRAPER, GREAT AMERICAN LAWYERS, 503 (1908), and 22 Chicago Legal News, 310 (May 17, 1890).

13 Gregory, *supra* at 506.

14 President Franklin Pierce appointed Samuel H. Treat, Jr., chief justice of the Illinois Supreme Court, to the newly created judgeship in the Southern District of Illinois which had its courthouse in Springfield. Judge Treat served from 1855 until his death on March 27, 1887.

Court. In 1861 Lincoln seriously considered making his old legislative colleague, Drummond, a Supreme Court justice, but turned instead to his friend and campaign manager, David Davis.<sup>15</sup> In 1873 and again in 1876 the Bar petitioned the White House for Drummond's appointment, but his age now eliminated him as a realistic nominee.<sup>16</sup> Judge Drummond decided to step down from the circuit bench in 1884 and lived in retirement in Wheaton, Illinois until his death on May 15, 1890.

Since Judge Drummond's service on the federal bench covers four decades of the nineteenth century, an examination of his court organization and caseload will help explain the operation of the pre-Evarts Act judiciary.

The statute of 1869 creating circuit judgeships authorized circuit court to be held by the circuit justice, circuit judge, or district judge, either alone or together in any combination. The practice in the Seventh Circuit followed all possible patterns. Judge Drummond held court with regularity in Chicago (Northern District of Illinois), Springfield (Southern District of Illinois), Milwaukee (Eastern District of Wisconsin), Madison (Western District of Wisconsin), and Indianapolis (District of Indiana). The reported cases reveal that while in those cities he sat alone or with the district judge of the particular district. It appears that David Davis, circuit justice from 1867 to 1878, and John M. Harlan, circuit justice from 1878 to 1892, sat with Judge Drummond at least once a year, usually in June. Just as a district court judge would hold over important or complex cases until the circuit judge held court in his district, the circuit judges would often wait until the circuit justice arrived to hear difficult cases. An example is *United States v. Cook Co. National Bank*,<sup>17</sup> which required the Circuit Court of the Northern District of Illinois to determine a novel question of bankruptcy and banking law. The issue was whether the United States had a priority claim on assets of an insolvent bank in which the United States Treasury had deposited funds and where the United States bonds purchased by the bank and held by the Treasury were sufficient to cover the claim by the government. The Circuit Court of the Northern District at this time consisted of Justice John M. Harlan, Judge Drummond, and Henry Blodgett, who was Drummond's successor as judge of the District Court of the Northern District of Illinois. Justice Harlan delivered the opinion, concurred in by the two judges, granting the United States the priority. The United States Supreme Court, however, construed the statute differently and unanimously reversed the Circuit Court's decision. This case also serves to underline the point that during this period a circuit court still remained essentially a trial court and the only effective review came on appeal to the Supreme Court.

During his career on the bench, Judge Drummond heard and decided cases covering the full range of federal law. The reported cases reveal that as a district court judge, sitting first in Galena and then in Chicago, the greatest

15 W. KING, *LINCOLN'S MANAGER, DAVID DAVIS*, 191 (1960).

16 Gregory, *supra* at 528.

17 25 F.Cas. 608 (N.D. Ill. 1879) (No. 14,853), *rev'd* 107 U.S. 445 (1882).

number of cases coming before him were admiralty, patent, and bankruptcy disputes.<sup>18</sup> Judge Drummond conducted some criminal trials and presided over the large number of cases generated by the railroads—defaults of railroad bonds, tort claims against the railroads brought in federal court under diversity jurisdiction, and land title disputes. This pattern changed only slightly on Judge Drummond's elevation to the circuit court in 1869. Due to the district court's exclusive jurisdiction over admiralty matters and the fact that most criminal trials came before the district court, the number of these two types of decisions by Judge Drummond declined. Similarly, since most patent and bankruptcy cases were filed in the circuit court, these two areas account for almost 40% of all his reported decisions.<sup>19</sup> Railroads continued to supply much litigation in the federal courts. Following the rapid expansion of lines in the Midwest during the mid-nineteenth century, many railroads found themselves overextended and forced into bankruptcy during a depression. The panic of 1877 precipitated several of these bankruptcies and led to important cases dealing with such issues as the priority of liens for wage and labor disputes.<sup>20</sup>

Upon the retirement of Judge Drummond in 1884, President Chester A. Arthur named Walter Q. Gresham as Seventh Circuit judge. Judge Drummond's life (migration west) and career (successful lawyer, politician, district court judge) were typical of an antebellum federal judge.<sup>21</sup> Gresham, on the other hand, typified the federal judge of the second half of the nineteenth century, distinguished from his predecessor mainly by service in the Civil War. Gresham and Drummond differed also in that Gresham's political activity far exceeded Drummond's. In fact, Gresham was probably the most nationally prominent figure ever appointed to the Seventh Circuit, as evidenced by his being a serious contender for the Republican presidential nomination in 1888.

Walter Quintin Gresham was born in 1832 on the Indiana frontier.<sup>22</sup> His family had arrived in the Indiana Territory in 1809. Their settlement there

18 A survey of Vol. I of *BISSELL'S REPORTS*, which contains the reported opinions of the district and circuit courts of the Seventh Circuit, reveals that of the eighty-seven cases decided by Judge Drummond prior to his becoming circuit judge, 16% were admiralty cases, 13% were various railroad suits, 11% were patent, and 10% bankruptcy.

19 See Vols. 2-11 of *BISSELL'S REPORTS* which contain cases from the courts of the Seventh Circuit between 1870 and 1883. By 1883 admiralty cases comprised only about 4% of the work of the circuit courts.

20 G. EGGERT, *RAILROAD LABOR DISPUTES: THE BEGINNINGS OF FEDERAL STRIKE POLICY*, ch. 1 (1967).

21 Two interesting and important studies of the early nineteenth-century federal bench are K. Hall, *101 Men: The Social Composition and Recruitment of the Lower Federal Judiciary, 1829-1861*, 7 *RUT.-CAM.L.REV.* 199 (1976); and K. Hall, *240 Men: The Antebellum Lower Federal Judiciary, 1829-1861*, 29 *VAND.L.REV.* 1089 (1976).

22 Unless otherwise cited, the biographical details of Judge Gresham's life are found in the two-volume uncritical biography of him written by his wife and son: M. GRESHAM, *LIFE OF WALTER QUINTIN GRESHAM, 1832-1895* (2 vols. 1919).

ended a long odyssey from England to Virginia, where Gresham's grandfather, an indentured servant, fought in the Revolutionary army. From Virginia the family moved to Kentucky and then to Harrison County, Indiana. Judge Gresham's father, William, in 1825 married Sarah Davis, whose family history was similar to his. William, the local sheriff, was murdered in 1833 while trying to make an arrest, leaving his widow with the responsibility for raising their five young children.

Young Gresham attended school in Harrison County. Although the family was poor, at age seventeen he began study at Corydon Seminary. He received his degree in two years, returned home, and taught school to help support the family. At that time he also began his study of law under the direction of his uncle, Dennis Paddington, a leader in the Indiana Whig party. Gresham attended Indiana University at Bloomington for a year but was forced to drop out because of lack of money. At home again, he read law with Judge William A. Porter. Gresham gained admission to the Indiana bar in 1854 on Porter's motion, and entered into partnership with Thomas C. Slaughter. The firm prospered with Gresham handling both federal and state litigation. He argued the full range of criminal and civil cases in federal court in Indianapolis, while he also heard numerous appeals before the Indiana Supreme Court.

Walter Gresham's early career in politics centered around the most pressing issue of antebellum life—slavery. His personal views reflected those of the moderate Whig, and later Republican, party. He morally opposed slavery, a belief his wife attributed to the passionate teachings of both his mother and his uncle, Dennis Paddington. However, he believed with equal force in the sanctity of property and in the rights of those who owned slaves to be secure in their property. He favored neither social nor political equality for blacks. Therefore, he totally deplored the tactics and goals of the abolitionists. He argued that if slavery were geographically contained, it would gradually die out, as it would become economically inefficient.<sup>23</sup> Thus he supported the principles of the Missouri Compromise of 1820 and the Compromise of 1850, both of which prevented slavery from expanding in the North. He also fought against the Kansas-Nebraska Bill, which implemented Stephen A. Douglas's plan of popular sovereignty and opened the door for the admission of a slave state north of the Missouri Compromise line.<sup>24</sup> The Kansas issue led to Gresham's first attempt at winning an elective office. He was drafted by the Whig/Republicans to run for prosecuting attorney on the anti-Nebraska ticket in Harrison and three surrounding counties. Although southern Indiana was solidly Democratic, Gresham lost by only 100 votes. The following year he ran on the same platform in a race for Harrison County clerk and was again defeated. Gresham helped organize the Republican party in

<sup>23</sup> *Id.* at 43-55.

<sup>24</sup> *Id.* at chap. III. For a discussion of the politics of slavery during the antebellum period, see E. FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

Indiana and campaigned vigorously for the Republican presidential candidate, John C. Fremont, in 1856. In 1860 he ran as the pro union Republican candidate for the Indiana Assembly and was elected, although Harrison County gave Stephen A. Douglas a large majority of votes over Lincoln.<sup>25</sup>

When Gresham took his seat in the legislature in Indianapolis, the crucial question facing the state—and the nation—was secession and the possibility of a civil war. As we have seen, Gresham believed Southerners had a legal right to their slaves, and he disapproved of laws interfering with the return of fugitive slaves, but he never wavered in his belief in preservation of the Union. He considered any armed resistance to the Union by the South as treason, which must be countered by any means necessary.<sup>26</sup> He served as chairman of the legislature's military committee and helped author and pass the law that allowed Governor Oliver Morton to organize and arm regiments of Hoosiers. When the governor initially passed him over for a commission, Gresham returned to Harrison County, raised 1,000 men, and finally received a commission as lieutenant colonel of the 38th Regiment of Indiana Volunteers. A promotion to colonel and command of the 53rd Regiment came soon after, and Gresham and his men first fought Confederate troops at Shiloh, Tennessee. After the battle they marched south and joined General Grant in Memphis. During Grant's siege of Vicksburg, Gresham and his troops fought valiantly. He was rewarded with a promotion to brigadier general and command of the troops and civilian population of Natchez. General Sherman requested Gresham to accompany him on his famous march through Georgia to the sea; General Gresham, however, failed to advance past Atlanta, as he was critically wounded in the leg. He spent the remaining years of the war recuperating in bed at his home.

Following his recovery Gresham accepted the Republican nomination for Congress in 1866. The campaign centered around whether the Fourteenth Amendment should be adopted. Gresham, like other moderate Republicans, believed that the amendment was necessary to give the freed blacks economic and civil equality, but opposed any measures that would grant blacks social or political equality.<sup>27</sup> He again lost a close race in the Democratic stronghold of southern Indiana. The Republican legislature then elected him state agent. This job required Gresham to oversee the state's finances and handle all bond issues—experience that proved valuable in his later cabinet service.

At the same time General Gresham resumed law practice. At first he opened an office with John Butler (Butler & Gresham) in New Albany, Indiana, but when Butler wanted to take in his son, Gresham opened an office of

<sup>25</sup> GRESHAM, *supra* at ch. VII.

<sup>26</sup> *Id.* at 130-31.

<sup>27</sup> *Id.* at 341-43. Gresham strongly opposed adoption of the Fifteenth Amendment—a view he adhered to even though it meant forgoing an opportunity to be elected to the U.S. Senate in January, 1869. *See id.* at 345-46. For a discussion of reconstruction politics, *see* K. STAMPP, *THE ERA OF RECONSTRUCTION* (1967). *See also* FONER, *supra*.

his own. He quickly became one of the leading and most successful trial lawyers in the state. His wife testified to their prosperity when she wrote: "A housekeeper knows whether business is good or not. We were in easier circumstances at this time than at any time afterwards."<sup>28</sup>

General Gresham's friendship with and support of General Grant for president in 1868 were not forgotten by Grant after his election. Grant desired to appoint Gresham to the lucrative post of collector of the Port of New Orleans, but Gresham refused, as he enjoyed his law practice. On September 9, 1869 Grant ignored the wishes of Gresham's long-time political opponent, Senator Oliver Morton, and nominated Gresham to fill the vacancy of United States District Court judge for the District of Indiana.<sup>29</sup> Judge Gresham sat initially in Indianapolis, but later also held court in New Albany.

Judge Gresham's caseload in the district court of Indiana differed only slightly from Judge Drummond's in the Northern District of Illinois. The largest volume of cases was generated by bankruptcy statutes, patents, and the railroads. Fewer admiralty cases were tried in his court than in Drummond's, but he handled a greater number of criminal cases. Judge Gresham held court throughout the year, taking only a few weeks off in August. His daily routine saw him on the bench from 9:00 A.M. to 6:00 P.M. Often he heard important or difficult cases, such as patents, with Circuit Judge Drummond or the circuit justice (David Davis until 1877 and Justice John M. Harlan thereafter).<sup>30</sup>

Of the numerous cases tried by Judge Gresham during his tenure as district court judge, several aroused great public interest. Historically the most important case in which Gresham was involved arose out of the railroad labor strikes of 1877. As mentioned before, receivers appointed by the federal courts operated many railroads that had been forced into bankruptcy by the depression of 1877. A large number of these railroads were located in the Seventh Circuit area, where, one historian has remarked, "[t]he most significant legal developments occurred."<sup>31</sup> Eastern workers began to strike after management announced wage cuts, and workers in Indiana and Illinois talked of strikes. After violence exploded along the eastern lines, it began to move westward, and in July 1877, workers prevented trains from running in Indiana. The receivers turned to Judges Gresham and Drummond for guidance. Gresham first asked the governor and mayor for troops to keep the lines operating, but they refused to act. Taking matters into his own hands, the judge called a meeting of ex-Union army officers. He swore them in as deputy United States marshals and had the receivers tell the strikers, who had occupied the Indianapolis railroad station, that the deputies would arrest them for contempt of court if they did not disperse and cease interfering with

<sup>28</sup> *Id.* at 341.

<sup>29</sup> *Id.* at 349.

<sup>30</sup> *Id.* at 349-65.

<sup>31</sup> EGGERT, *supra* at 35.

the operation of the trains. Some of the workers refused, the strike leaders were arrested, and the strike was effectively ended.<sup>32</sup> Judge Gresham recused himself from the contempt trials, since he had been so intimately involved in the raising of “the troops.”

Judge Drummond came to Indianapolis, conducted the trial, and sentenced the convicted laborers for terms of one to six months. Many were ordered released before the end of their sentences. Drummond’s sentences were the first instance of contempt proceedings being used to break a strike.<sup>33</sup> The rationale, first conceived by Gresham and Drummond, that federal railroads in receivership should receive protection against strikers through the use of contempt orders, quickly spread throughout the nation. In the opinion of one labor historian, “The work of Drummond, Gresham, and Treat [Southern District of Illinois] laid the basis for the future use of federal courts in coping with strikes, particularly on the railroads.”<sup>34</sup>

In addition to the railroad cases Judge Gresham was involved in another well-publicized trial; this one arose out of the “Whiskey Ring” scandals that plagued the second administration of President Ulysses S. Grant. It was charged that an extensive conspiracy was cheating the United States Treasury out of millions of dollars of taxes on liquor. Alleged conspirators included distillers, revenue agents, and even President Grant’s private secretary.<sup>35</sup> The investigation of the ring stalled, as it was not possible for the government to obtain access to distillers’ secret ledgers containing crucial proof. The government had already instituted proceedings to seize and sell Distillery No. Twenty-Eight in Evansville, Indiana, to pay taxes that had been avoided by the distilleries participating in the conspiracy. The prosecutor asked Judge Gresham to issue an order requiring the owners, who had intervened in the suit, to produce all their records. Judge Gresham granted the motion, but the owners moved to vacate it, claiming the statute authorizing production of the documents violated the Fourth and Fifth Amendments of the United States Constitution.<sup>36</sup> Judge Gresham refused to vacate his order, ruling that the evidence could not be and was not being used in a criminal proceeding—rather, the proceeding was in rem and the property, not the owners, was the party. Thus, the evidence could not be used against the owners but only against their property. This opinion coincided with District Judge Henry Blodgett’s view in a similar case.<sup>37</sup>

Judge Gresham tried thirty-one other cases involving the Whiskey Ring,

32 *Id.* at 37-38; GRESHAM, *supra* at 366-401.

33 EGGERT, *supra* at 38-39.

34 *Id.* at 40.

35 GRESHAM, *supra* at 437-53. For a fine discussion of the scandals, see R. WEBB, BENJAMIN HELM BRISTOW, BORDER STATE POLITICIAN, chap. 8 (1969), and M. KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA, 245 (1977).

36 *United States v. Distillery No. Twenty-Eight*, 25 F.Cas. 868 (D. Ind. 1874) (No. 14, 966).

37 *United States v. Mason*, 26 F.Cas. 1189 (N.D. Ill. 1875) (No. 15, 735). The legal importance of the opinions by Judges Gresham and Blodgett was short-lived as their in rem distinction was specifically rejected by the United States Supreme Court in the famous Fourth and Fifth Amendment case of *Boyd v. United States*, 116 U.S. 616, 637-38 (1885).

and in thirty the defendants were found or pleaded guilty. A permanent split developed between Gresham and his long-time fellow Republican, Benjamin Harrison, as a result of these trials. Harrison represented several of the members of the Whiskey Ring. He openly criticized the judge's handling of the cases, while Judge Gresham countered with a statement that Harrison's conduct at the trials had been unprofessional.<sup>38</sup> This rift led Gresham to support Grover Cleveland in the presidential contest of 1892 and resulted in Gresham's appointment as secretary of state in the Cleveland administration.

In 1882 Judge Gresham decided to retire from the district court bench and renew the more lucrative practice of law, which would also give him more freedom to pursue his political ambitions. While still on the bench, he had contemplated running for either the Senate or the governorship of Indiana, but decided to wait until after he had resumed practice. His proposed partnership with Joseph E. MacDonald never materialized, however, because President Chester Arthur selected him as his postmaster-general. As postmaster, Gresham's prime concern was implementing the Congressional statutes that prohibited the use of the mails for lotteries. He also worked to lower the cost of sending first-class mail and opposed government takeover of the telegraph service.<sup>39</sup>

Following the death of Secretary of the Treasury Charles Folger, Walter Gresham was appointed to fill that vacancy, serving for two months. On the eve of the presidential election of 1884, Judge Thomas Drummond of the Seventh Circuit resigned, and President Arthur appointed Gresham circuit judge. Gresham and his family moved to Chicago, where he began his duties on November 2, 1884.<sup>40</sup>

Although Judge Gresham returned to the bench, he remained in the center of national political life. When Chief Justice White died in 1888, Judge Gresham played a key role in the selection of Melville W. Fuller as chief justice of the United States Supreme Court by recommending Fuller in a letter to President Cleveland. Fuller's reputation as a northern Democrat who never became an ardent Unionist during the Civil War caused a tough fight for his confirmation in the Republican-controlled Senate. Gresham, using his Republican and Union Army contacts, lobbied in behalf of Fuller and helped convince Illinois' two Republican senators, among others, to vote for Fuller.<sup>41</sup>

Judge Gresham became a front-running candidate for the Republican presidential nomination in 1888. He led the reform elements in the party, who

38 GRESHAM, *supra* at 447-48. The secretary of the treasury, Benjamin Bristow, was extremely pleased with Gresham's "able" performance. WEBB, *supra* at 207.

39 *Id.* at 489-503.

40 17 Chicago Legal News, 61 (Nov. 1, 1884). Following his departure from the bench in 1884 at age 75, Judge Drummond lived in quiet retirement with his three daughters (his wife had died in 1874) at his home in Wheaton, Illinois. He died on May 15, 1890, and was buried at Graceland Cemetery in Chicago.

41 W. KING, MELVILLE WESTON FULLER: CHIEF JUSTICE OF THE UNITED STATES, 1888-1910, 108-09, 121-22 (1950).

avored sound money and moderate tariffs. At the outset of the Republican Convention in Chicago, Gresham controlled about twenty percent of the delegates. He expected to pick up additional votes through political manipulation at the convention, but failed because of his refusal to support the high-tariff plank of the platform. Instead of nominating Gresham, the delegates chose his Indiana political rival, Benjamin Harrison. Gresham offered Harrison no support, either in that campaign or during his campaign for reelection.<sup>42</sup>

Having failed in his bid for the presidency, Judge Gresham turned his attention again to the bench. He enjoyed his duties as circuit judge, and his caseload was similar to that in the district court, except that as circuit judge he traveled more frequently. He held court in Milwaukee, Madison, Indianapolis, Springfield, Peoria, and Chicago. While he usually sat alone, he often sat with a district judge. As we saw earlier, it was a common practice to hold over difficult cases until Circuit Justice John Harlan could attend court, most often during summer recess at the Supreme Court. If the justice were unavailable and Judge Gresham believed a case to be unusually complex, he would submit his opinion to the justice.<sup>43</sup> The jurisdictional origin of the cases heard by Judge Gresham remained patent, diversity, bankruptcy, and disputes involving railroads. It must again be emphasized that most of the work of the circuit court at this time consisted of trial, not appellate, work.

Although the Seventh Circuit and the other circuit courts were able to keep their dockets clear, the backlog of cases before the United States Supreme Court became burdensome during the last quarter of the nineteenth century. The justices were dissatisfied with the pressures of their workload, and litigants objected to the lengthy delays before decisions were handed down. The increase in the caseload reflected both an expansion of federal jurisdiction after the Civil War and the increased national scope of manufacturing and business in the last half of the nineteenth century. The limits of jurisdiction were broadened by the passage of the National Bank Act,<sup>44</sup> the Bankruptcy Act,<sup>45</sup> the Removal Act of 1875,<sup>46</sup> and by the grant of general federal question jurisdiction to the federal courts in 1875.<sup>47</sup> In addition, the Civil War constitutional amendments and their enforcement legislation engendered much litigation.<sup>48</sup> The expansion of jurisdiction coincided with the period of greatest economic growth in American history and the beginning

42 GRESHAM, *supra* at 561-601. *See also* the nominating speech for Judge Gresham at the Republican Convention by Leonard Swett; 20 Chicago Legal News, 348 (June 16, 1888) at 348, col. 1; WEBB, *supra* at 291, 296-97.

43 GRESHAM, *supra* at 515.

44 Act of June 3, 1864, 13 Stat. 118.

45 Act of Mar. 2, 1867, 14 Stat. 517.

46 Act of Mar. 3, 1875, 18 Stat. 470. *See also* Act of Mar. 3, 1887, 24 Stat. 552.

47 Act of Mar. 3, 1875, 18 Stat. 470.

48 For a discussion of the various enforcement laws, *see* FRANKFURTER and LANDIS, *supra* at 62-69.

of nationally based trusts and cartels in such important areas of the economy as oil, steel, and sugar.<sup>49</sup>

As the Supreme Court backlog worsened, Congress came under increased pressure to solve the problem. It reacted by renewing debates on several plans that had been proposed as reforms since the Judiciary Act of 1789, namely, creating intermediate appeals courts, enlarging the Supreme Court, and limiting federal jurisdiction.

A detailed chronicle of the Congressional debates and votes on these proposals from the 1870s to 1891 is unnecessary here, but it is important to notice that a split, based on political party and sectional affiliations, developed between the House and Senate. The House, reflecting its generally Democratic control and dominated by southerners and westerners from agricultural regions, favored the restriction of federal jurisdiction. The Senate, controlled by eastern Republican manufacturing interests, sought to alleviate the Supreme Court workload by setting up intermediate courts and providing more justices, thereby keeping open the federal courts for eastern capitalists sued while conducting business in the South or West.<sup>50</sup> The deadlock between the House and Senate continued until Republican Senator William M. Evarts of New York, an influential member of the Judiciary Committee, devised a compromise.

The Evarts Bill, which passed the Senate on September 24, 1890, combined some features of all the proposals.<sup>51</sup> The bill created nine intermediate appeals courts but preserved the traditional circuit and district courts. It did this by removing appellate jurisdiction from the circuit courts, thus making them only trial courts, and routed all appeals—except a limited class which was to go directly to the Supreme Court—through the newly created courts. The decision of one of the courts of appeals became the final judgment of cases within a portion of its jurisdiction. The United States Supreme Court could review any of these cases, when a writ of certiorari was requested and granted by the Supreme Court. This innovation became a crucial tool in the Supreme Court's effort to control its own docket and to prevent the staggering backlog from continuing to grow.<sup>52</sup> Each circuit received an additional circuit judgeship.

Each of the new appellate tribunals was to consist of three judges—the two circuit judges plus the circuit justice or a district court judge. However, no judge who had been the trial judge in a case could sit on a panel considering that case. This reform thus eliminated one feature of the old federal court

49 See the excellent and important work on late-nineteenth-century American history, R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, ch. 2 (1967). For classic views of the economic history of the period, see E. KIRKLAND, *INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY, 1860-1897* (1961); T. COCHRAN and W. MILLER, *THE AGE OF ENTERPRISE* (1942).

50 A detailed legislative history of the proposals leading to the Evarts Act can be found in FRANKFURTER and LANDIS, *supra* at 77-102.

51 *Id.* at 98-99.

52 *Id.* at 100.

system that was most repugnant to both the bar and the public. Further, the Act mandated the Seventh Circuit Court of Appeals to hold at least one term every year in Chicago; it allowed the judges to appoint a marshal and a clerk of the court, and establish rules and regulations of the court. The bill also allowed the circuit justices or the chief justice to continue to sit with the court, but it did not require them to do so.

After continued vigorous lobbying by the American Bar Association and the justices of the Supreme Court, especially Chief Justice Fuller, the House accepted the Evarts Bill, and President Benjamin Harrison signed it into law on March 3, 1891.<sup>53</sup>

Even before the president signed the bill, amendments were required. Section 3 had designated the second Monday in January 1891 as the date for the first session of the nine new courts of appeals. Congress adopted a resolution moving that date to the third Tuesday in June 1891.<sup>54</sup> Between March and June several necessary administrative details had to be arranged. A clerk and a marshal needed to be selected; rules of the court drawn up; a courtroom obtained; and, most important, the judges had to be selected. Gresham, as circuit judge, automatically became presiding judge of the United States Court of Appeals for the Seventh Circuit. Therefore, it became his responsibility to select the marshal and clerk. As clerk, he chose Oliver Throck Morton, the son of Gresham's long-time political rival and opponent, Oliver P. Morton, Indiana's wartime governor. Although at odds with the father, Gresham had developed a friendship with the son. The friendship stemmed from the defense that the younger Morton made of Gresham after Gresham's announcement of his intention to vote for Cleveland against Harrison in 1888.<sup>55</sup> Only thirty-one when appointed, Morton was the youngest man ever to serve as clerk of the Seventh Circuit.

Oliver T. Morton was born in Indianapolis in 1860 while his father was serving as lieutenant governor.<sup>56</sup> He received a B.A. degree from Yale College and then traveled to England to study at Oxford University for two years. On his return to Indianapolis, he gained admission to the bar and began a successful law practice. Morton spent considerable time writing literary reviews and also wrote a history of Reconstruction. He served as clerk only seven years before his death at the age of thirty-eight from complications associated with a chronic heart ailment.

The Evarts Act stated only that

[the clerk] shall perform and exercise the same duties and powers in regard to all

<sup>53</sup> Act of March 3, 1891, 26 Stat. 826. For Chief Justice Fuller's role, see KING, MELVILLE WESTON FULLER, *supra* at 150-51.

<sup>54</sup> Surrency, *A History of the Federal Courts*, *supra* at 233-34.

<sup>55</sup> GRESHAM, *supra* at 675.

<sup>56</sup> Biographical information about Morton is taken from 31 Chicago Legal News, 62 (Oct. 15, 1898).

matters within its jurisdiction as are now exercised and performed by the Clerk of the Supreme Court of the United States, so far as the same may be applicable.<sup>57</sup>

This meant that the clerk had responsibility for filing, docketing, scheduling, and reporting all appeals. Additionally, the clerk conducted all communication with attorneys about rules and procedures of the court; registered all attorneys admitted to practice before the court; kept the clerk's journal, listing all orders entered by the court; and maintained the financial records of the court.

Judge Gresham named a long-time associate and fellow Hoosier, Captain L. O. Gilman, as the first marshal of the Seventh Circuit. Gilman had served as an officer on the judge's army staff during the Civil War.<sup>58</sup> The duties of the marshal, like those of the clerk, were described as similar to the duties of the United States Supreme Court marshal. Thus, it was the marshal's responsibility to protect the judges and to maintain order in the courtroom.

Judge Gresham selected Circuit Justice Harlan's courtroom as the meeting place for the first session. The room was located in the Chicago Post Office and Custom House, located on the square block bounded by Adams, Jackson, Dearborn, and Clark. The building, built in 1879 and in great disrepair by 1891,

was four stories high, with one basement, and was supported on a concrete mat covering the ground area. The foundation was very inadequate and the building settled and cracked badly; hence its short life.<sup>59</sup>

The final step before opening court for the first session was to select the judges. The Evarts Act allowed the appointment of one additional circuit judge. However, there was not enough time between the passage of the Act and the opening of the courts of appeals for President Harrison to nominate the judges and have the Senate confirm them. Therefore, the original court consisted of the present circuit judge, the circuit justice, and, as provided by the statute, a district judge designated by the two other judges. Thus, the judges of the Seventh Circuit were Judge Gresham, Justice John M. Harlan, and Judge Henry W. Blodgett, whom the other two designated to sit on the new tribunal.

Circuit Justice Harlan had a long and close relationship with the Seventh Circuit, having been its circuit justice since his appointment to the United States Supreme Court in 1877. His career somewhat paralleled Judge Gresham's. Born in Boyle County, Kentucky, on June 1, 1833, he was the son of a

57 Act of March 3, 1891, chap. 517, §2, 26 Stat. 826.

58 23 Chicago Legal News, 349 (June 20, 1891).

59 F. RANDALL, HISTORY OF CHICAGO BUILDING, 44-45, as quoted in speech by C. Ooms, Annual Judicial Conference of the Seventh Circuit and Bar Association of the Seventh Circuit, May 23, 1955.

leading Whig politician who staunchly supported Henry Clay.<sup>60</sup> Harlan attended Center College and then studied law at Transylvania University. He prepared for the bar by reading law, first with his father, then with other lawyers in Frankfort, Kentucky. After becoming a member of the bar, he opened what proved to be a highly successful practice in Frankfort. In addition to his law practice, Harlan actively engaged in politics. When the Whig party died, he joined the Know-Nothings and won election to several important posts. He became city attorney of Frankfort, then adjutant general of Kentucky. In 1858 he won election and served as county judge.

At the outbreak of the Civil War, Harlan shared the dilemma of his fellow border-state residents. He believed in the right of the Southerner to hold slaves as property but, like Clay, he had a deep reverence for the Union. His abhorrence of secession prevailed over his feelings for the South, and he joined the Kentucky Constitutional Unionists. Having organized a regiment of volunteer soldiers, he was commissioned colonel and fought the Confederates in several battles in Kentucky and Tennessee. On the death of his father in 1863, he left the Union army and returned home to care for his mother. Although he continued to support the Union cause, he opposed the Emancipation Proclamation and the Thirteenth Amendment.<sup>61</sup>

Following the defeat of the South, Harlan underwent a political conversion. He renounced his conservatism and became associated with the radical Republicans. He entered law partnership with Benjamin Bristow, one of the radical leaders. Although opponents charged him with opportunism, Harlan continued to be guided by the radical Republican philosophy throughout the remainder of his life.<sup>62</sup> He campaigned for Grant in 1868 and vigorously supported the passage of both the Fourteenth and Fifteenth Amendments. Harlan did more than campaign for others. He ran for governor of Kentucky on the Republican ticket in 1871 and in 1875 but was resoundingly defeated by the border-state voters, who rejected his radical Republicanism. His partnership with Benjamin Bristow, plus his vigorous support of the goals of Congressional reconstruction, gave Harlan national exposure. He was considered

60 Unless otherwise cited, the details of Justice Harlan's life are taken from L. Filler, *John M. Harlan*, in 2 L. FREEDMAN and F. ISRAEL, *THE JUSTICES OF THE SUPREME COURT*, 1281-324 (1969) and G. WHITE, *THE AMERICAN JUDICIAL TRADITION*, ch. 6 (1976); see also L. Hartz, *John M. Harlan in Kentucky, 1855-1877*, 14 *FILSON CLUB HISTORICAL QUARTERLY* 17 (1940) and Westin, *Mr. Justice Harlan* in A. DUNHAM and P. KURLAND, *MR. JUSTICE* (1964).

61 Filler, *John M. Harlan*, *supra* at 1283.

62 Briefly, the Radical Republicans were those who sought to dismantle totally the system of slavery in the South and guarantee the freed blacks economic, political, and even social equality. Led by Charles Sumner and Thaddeus Stevens, they sought to use the full extent of federal power—through military force and constitutional amendment—to accomplish their goals. The radicals were vilified in the historical works of the early twentieth century, but have since been cast in a favorable light. See STAMPP, *supra*; J. H. FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* (1961). On the Harlan-Bristow friendship, see WEBB, *supra*.

a possible vice-presidential candidate in 1872. In 1876 he served as manager of Bristow's presidential campaign, which represented an effort by reformers to wrest control of the Republican party from the regulars, led by James G. Blaine. After a deadlocked convention, Harlan helped arrange a compromise, which resulted in Rutherford B. Hayes's receiving the nomination. According to the biography of Judge Gresham, who was aligned with Bristow and Harlan, part of the compromise included Harlan's appointment to the Supreme Court.<sup>63</sup> That opportunity arose immediately after the election, when Justice David Davis resigned to take a seat in the United States Senate. Although Harlan's nomination encountered vigorous opposition, the Senate confirmed it. He took his seat on the United States Supreme Court on December 10, 1877.

Justice Harlan distinguished himself in his career on the bench through his sharp and critical dissents. He developed this reputation not only for the number he authored (316) but for the often strident language they contained.<sup>64</sup> His oral delivery of dissents from the bench frequently created great drama and excitement. It is reported that when he dissented in *Pollock v. Farmers Loan & Trust Co.* (the invalidation of the first income tax law), he

pounded the desk, [shaking] his finger under the noses of Chief Justice [Fuller] and Mr. Justice Field. . . .<sup>65</sup>

In addition to being argumentative, Harlan's opinions are unique because of their substantive results and their jurisprudence. His ideology combined a steadfast advocacy of blacks' civil rights (he wrote the famous dissent in *Plessy v. Ferguson*),<sup>66</sup> and approval of broad powers of economic control by the federal government.

Unlike other late nineteenth-century judges, Harlan was result-oriented. The legal historian G. Edward White has commented,

Harlan's theory of judging was primarily designed to implement his individual convictions. It placed a premium on arriving at desirable results, not on internal consistency. It bound a judge only to his own intuitive sense of what was right.<sup>67</sup>

White referred to Harlan as a "maverick," while Felix Frankfurter called him "an 'eccentric exception' to the distinguished majority of judges."<sup>68</sup> However, as White observed,

[T]he same factors that alienated him from most of his peers and the scholarly public during his lifetime and long after his death have formed the basis of his reincarnation.<sup>69</sup>

63 GRESHAM, *supra* at 459; WEBB, *supra* at 269-73.

64 Filler, *John M. Harlan*, *supra* at 1284.

65 158 U.S. 601 (1895); WHITE, *supra* at 123.

66 163 U.S. 537 (1896).

67 WHITE, *supra* at 119.

68 *Id.* at 118.

69 *Id.*

Although Harlan was alienated from many of his fellow justices, he was not alienated in his role as Seventh Circuit justice. Circuit Judge Gresham and Justice Harlan began their friendship as political allies fighting the “regular” Republicans in 1876. They shared a strong reverence for private property and a vigorous opposition to trusts and monopolies.<sup>70</sup> Although Gresham did not champion social equality for blacks, the Seventh Circuit during the 1880s never received cases in which that issue would have caused antagonism between the two men. Rather, they had a close friendship and, as mentioned earlier, often conferred on cases before the Seventh Circuit.

There was no disagreement at all between Judge Gresham and Justice Harlan when it came to selecting the third member of the first session of the Seventh Circuit. Judge Henry W. Blodgett was both the senior district judge in the circuit and a highly respected and much admired jurist. Blodgett, a true Chicago pioneer, was born on July 21, 1821, in Amherst, Massachusetts, and migrated west with his parents around 1830. They settled first in what is now Will County, Illinois, and then moved to DuPage County. Although during his childhood skirmishes between Indians and settlers were common, Blodgett’s family lived at peace with the local tribes who frequently traded at their blacksmith shop.<sup>71</sup>

Henry Blodgett left Illinois in 1838 and returned to Massachusetts to study at Amherst. After only a year, he traveled back to his home state, where he took a job as a surveyor and engineer with the Michigan Canal Company. When the company went bankrupt he began teaching school but left in 1842 to begin reading law at the offices of O. Y. Scammon and Norman B. Judd in Chicago. He gained admission to the bar on December 4, 1844, and began a very successful private practice in Waukegan, where he lived the rest of his life. His career then followed a pattern similar to that of Judge Drummond. He sought a seat in the state legislature. He campaigned as an abolitionist and was the first antislavery candidate to win an election in Illinois. He served only one term in the Illinois House, moving to the Illinois Senate, where he held office for one term. While in the legislature, he became a key leader, writing and sponsoring many of the early laws of Illinois.<sup>72</sup>

Blodgett left elective office in 1855 to begin a lucrative career in railroad promotion and development. He served first as an attorney for the Chicago & Milwaukee Railroad (later the Chicago & North Western) and helped launch that new venture through his efforts in obtaining financing and securing its charter. He became a director and later president of the line, serving as solicitor for several other railroads headquartered in Chicago and northern Indiana.<sup>73</sup>

Judge Blodgett’s antislavery views made him an ardent Union supporter during the Civil War. At the outbreak of the fighting, he tried to get a com-

<sup>70</sup> GRESHAM, *supra* at 456-60.

<sup>71</sup> 37 Chicago Legal News, 209 (February 11, 1905).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

mission in the Union army but was physically unable to serve. Instead, he organized money and equipment to outfit regiments and worked hard to improve the facilities of field hospitals.<sup>74</sup>

Following Judge Thomas Drummond's appointment to the Seventh Circuit judgeship, President Grant nominated Henry Blodgett as district judge for the Northern District of Illinois on January 11, 1870. The Senate quickly confirmed the appointment, and Judge Blodgett assumed his new duties, holding court in Chicago. He often traveled to other cities in the circuit to assist judges who had a backlog of cases or to sit in difficult trials with the circuit judge.<sup>75</sup>

The caseload before Judge Blodgett did not differ substantially from those of Judges Gresham and Drummond which have already been described. The majority of cases were patent, bankruptcy, and criminal. The Northern District had a greater number of admiralty cases than did Indiana. Judge Blodgett built his intellectual reputation on the strength of his admiralty and patent cases.<sup>76</sup>

The bar also respected Blodgett for his honesty and integrity. That respect, however, was put to the test in 1878, when some members of the Chicago Bar Association charged him with official misconduct. He was accused of taking loans from court-appointed referees in bankruptcy who made the loans from their official funds. They alleged that he showed "gross favoritism toward his friends and exert[ed] severe pressure against his foes."<sup>77</sup> Among the most conspicuously mentioned "friends" were the railway corporations with whom the judge had been associated. The accusers persuaded the Chicago Congressman, Carter H. Harrison, to introduce an impeachment resolution. The House Judiciary Committee investigated the charges and issued a report that found the allegations concerning the loans to be correct but noted that the judge had promptly repaid them. The report, although critical of the judge, recommended that no further steps toward impeachment be taken. The members of the Chicago bar and the press hailed the report as a great victory for the judge.<sup>78</sup> The entire incident was quickly forgotten, as evidenced by the actions of the City Council, the *Chicago Legal News*, Carter H. Harrison (who had introduced the impeachment resolution and was now mayor of Chicago), and leaders of the bar, when they petitioned President Arthur to name Judge Blodgett to the circuit judgeship in 1884. Again in 1892 the legal community sought to have him elevated to the Seventh Circuit.<sup>79</sup>

Judge Blodgett remained on the bench only eighteen months after the organization of the court of appeals. During that time he sat on only four cases in the Seventh Circuit. He resigned on December 5, 1892, when President

74 37 *Chicago Legal News*, 277 (April 15, 1905).

75 24 *Chicago Legal News*, 28 (Sept. 24, 1892).

76 37 *Chicago Legal News*, 277-79 (April 15, 1905).

77 H. KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION 1874-1974*, 49 (1974).

78 The full details of this controversy are found in KOGAN, *supra* at 47-51.

79 17 *Chicago Legal News*, 187 (Feb. 16, 1884); 23 *id.* 349 (June 20, 1891).

Benjamin Harrison appointed him one of the United States counselors to Paris for the Bering Sea arbitration. That dispute, between Canada and the United States, centered on the respective rights of each country to kill seals on the islands off Alaska. Judge Blodgett served as a trial counsel and had principal responsibility for preparing and presenting the case for the United States claims before the international tribunal. After the successful completion of the arbitration, Judge Blodgett returned home and lived in retirement with his family in Waukegan. He did not remain idle, though. He served as dean of the Faculty of Northwestern Law College and also lectured there. On occasion Judge Blodgett represented clients, but never appeared in court. He died at home on February 9, 1905, leaving a large estate (exceeding \$180,000) to his wife and two daughters.<sup>80</sup>

With the selection of Judge Blodgett, all preparations were complete for the opening of the United States Court of Appeals for the Seventh Circuit. Before turning to that first session we may summarize the circuit's early history.

In tracing the various ways states have been grouped to form the Seventh Circuit, this chapter has shown that as the United States grew geographically and in economic complexity during the nineteenth century, Congress created new federal courts and restructured the circuits until the Seventh Circuit became permanently made up of Illinois, Indiana, and Wisconsin. This same growth created a volume of work for the courts with which they were unable to cope. Congress initially responded to the problem by providing a circuit court judge for each circuit (Thomas Drummond was the first judge of the Seventh Circuit). When that solution proved inadequate, Congress sought to alleviate the overburdened condition of the judiciary by reforming the federal system. The courts of appeals were created, a second circuit judge was added in each circuit, and most appeals were now handled by the new court. The district courts and the old circuit courts were retained as trial courts.

We have seen that the work of the federal courts prior to 1891 mostly involved civil cases. It is not surprising that the railroads, which many historians regard as one of the greatest factors in the rapid economic development of the United States, also generated a large number of cases in the federal courts. These suits included labor disputes, bond forfeitures, diversity tort claims, and land title controversies. In addition, the federal courts' workload

<sup>80</sup> 37 *Chicago Legal News*, 209 (Feb. 11, 1905); 37 *id.* 277 (April 15, 1905); 24 *id.* 393 (June 4, 1892). Northwestern Law College was the oldest law school in Illinois. It began in 1859 as a department of the first University of Chicago. When that university ceased operation in 1886, the Union College of Law became the Northwestern College of Law and was operated by Northwestern University exclusively. The Seventh Circuit judges had close connections with the law school. In addition to Judge Blodgett's serving as dean, several judges taught courses, including Judges Kohlsaet, Jenkins, and Grosscup. Judge Grosscup served as dean following Judge Blodgett's resignation, until his judicial duties forced him to resign in 1901. 25 *Chicago Legal News*, 28 (Sept. 24, 1892); 33 *id.* 362 (June 15, 1901); 34 *id.* 51 (Oct. 5, 1901).

reflected the expanding economic development of the country in such cases as patent claims, admiralty suits, and bankruptcy petitions.

This chapter has also sketched the careers of the judges of the old circuit court for the Seventh Circuit, as well as those of the men who were to sit on the newly created court of appeals. A pattern emerges from their biographies. Uniformly these men were: extremely successful trial attorneys; politically active party loyalists in addition to being candidates for public office; and district judges before their elevation to the circuit court judgeship. After 1865 Seventh Circuit judges were men who had had prominent roles in the Union army during the Civil War.

Having discussed the judges and the early institutional development of the Court of Appeals for the Seventh Circuit, we may now turn to that new court's first session.



U.S. Courthouse and Post Office,  
Dearborn Street between Jackson and  
Adams, was the location of the Seventh  
Circuit, 1905 to 1938.  
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## Organization and Early Operation of the Court of Appeals 1891-1895

**A**t noon on Tuesday, June 16, 1891, Justice John M. Harlan called to order the United States Court of Appeals for the Seventh Circuit.<sup>1</sup> With Circuit Judge Gresham on his right and Judge Blodgett on his left, Justice Harlan addressed the large group that had assembled to watch the opening of the new tribunal. Present were the two district judges from Wisconsin, Judges James G. Jenkins and Romanzo Bunn; Judge William A. Woods of the United States District Court of Indiana; and Judge William J. Allen of the United States District Court of the Southern District of Illinois. Many attorneys from the three-state region also attended.

Justice Harlan announced that the first order of business was the designation of Judge Blodgett. He then called forward the court's newly appointed officers, Clerk Oliver T. Morton and Marshal L. O. Gilman. They took their oaths of office, swearing to uphold the Constitution and laws of the United

<sup>1</sup> The account of the opening session is taken from 23 Chicago Legal News, 349 (June 20, 1891). *See also* the official record of the proceedings contained in COURT JOURNAL, June 16, 1891 (JOURNAL found in the office of the clerk, United States Court of Appeals for the Seventh Circuit). The JOURNAL is the official record of all orders entered by the court and recorded by the clerk. Special ceremonies such as the administering of oaths or memorials were often ordered to be spread upon the record in the JOURNAL.

States and to perform their duties without malice or favor. The third order of business consisted of the adoption of the rules of practice, which were the same as those the other circuits had adopted.

Justice Harlan's fourth announcement caused the most excitement and controversy. The justice stated:

[I]n answer to many inquiries that have been made by members of the bar and to settle a question that has been much discussed . . . this Court of Appeals, after it has been fully organized and has entered upon its business, will adopt and wear the usual judicial gown such as is worn by members of the Supreme Court at Washington, but no formal order will be made.<sup>2</sup>

The controversy existed because no judge in Illinois, in either state or federal court, had ever worn robes. The fight against their use was championed by the *Chicago Legal News* which expressed the view that the

courts are the tribunals of the people and judges should be near the people. Justice should be administered in accordance with the simplicity of our Government and without pomp and show.<sup>3</sup>

Although the editors seriously pleaded with the Court to keep robes out of the courtroom, they did not lose their sense of humor.

In many cases there would be more reason for some of the judges to wear wigs than gowns, but the wig has never been popular in America as a judicial head-dress. Gowns are unmanly, and in warm weather do not add to the comfort of the man who wears them. If a gown would add to the ability or wisdom of a judge, there would be some reason for adopting the gown as a court dress. There is no dress that becomes an American judge so well as that of a plain American citizen. If the gown is thought to be necessary to the proper administration of justice, would it not be well to so change the law that women who know how to wear the gown with dignity and grace should occupy the bench.<sup>4</sup>

The *Legal News* took its defeat in lawyerlike stride:

We do not believe that the gown will add anything to the dignity, wisdom or comfort of this or any other court. It was a question within the jurisdiction of the

2 23 *Chicago Legal News*, 349 (June 20, 1891).

3 23 *Chicago Legal News*, 341 (June 13, 1891). The *Chicago Legal News* was a weekly newspaper which has been described as "a fascinating and instructive weekly compendium of cases, opinions, gossip, aphorisms, anecdotes, and information about a miscellany of matters dealing with the law." H. KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION, 1874-1974*, 1 (1974). Its publishers were James Bradwell and Myra Bradwell, a crusading feminist and reformer who unsuccessfully sought to become the first woman admitted to the bar in Illinois. Her efforts led to the famous case *Bradwell v. Illinois*, 83 U.S. 130 (1872) which left admission to the bar in the total discretion of the state and thus sanctioned the Illinois Supreme Court's decision to deny Bradwell's admission solely because she was a woman. For a more complete account of her life, see KOGAN, *supra* at 24-33.

4 23 *Chicago Legal News*, 341 (June 13, 1891).

court, and having been decided, there being no appeal or writ of error allowed, it becomes all good lawyers to stand by the judgment of the court.<sup>5</sup>

However, it could not resist one final jab:

A very few of the lawyers here who practice in the Federal Courts are talking about asking the members of the bar who will practice in the new Court of Appeals to wear a professional gown when they appear in that tribunal, the same as is done in England.<sup>6</sup>

Following the announcement of the decision to wear robes, the Seventh Circuit adjourned until the next day. On Wednesday at noon, the court met to receive the \$10,000 bonds entered into by the clerk, Oliver T. Morton, and by the marshal, L. O. Gilman.<sup>7</sup> The court transacted no further business until the next day, when it met to issue an order instructing the clerk to provide the books and forms necessary for its operation.<sup>8</sup> It also ordered the marshal of the Northern District to procure office space in the Federal Building for the court and its offices. The court then adjourned until the beginning of its October term. However, it did meet once in August and three times in September. At each meeting only one judge sat, and the purpose of each session was to order the clerk to print the record of a case or to grant an extension for filing a record.<sup>9</sup>

Before the convening of the first term of the Seventh Circuit, President Harrison failed to send to the Senate a nomination for the circuit judgeship created by the Evarts Act. Therefore, on Monday, October 5th, Justice Harlan and Judge Gresham again designated Judge Blodgett to sit as a circuit judge.<sup>10</sup> On that day, as the clock struck twelve, the door to the conference room opened and the three judges in their black gowns entered Justice Harlan's courtroom in the Federal Building. The crowd stood as the court crier, George Allen, announced: "The Honorable Judges of the Court of Appeals for the Seventh Judicial Circuit." The judges bowed to the spectators, who had filled the courtroom to overflowing. The gathering included many leading practitioners from Illinois, Indiana, and Wisconsin who sought admission to practice before the court, as well as the friends and families of the judges. When the judges took their seats, Crier Allen opened the court by proclaiming:

Oyez! Oyez! Oyez! all persons having business with the honorable court are admonished to draw near. God save the United States and this honorable court.<sup>11</sup>

5 23 Chicago Legal News, 349 (June 20, 1891).

6 *Id.*

7 COURT JOURNAL, June 17, 1891.

8 COURT JOURNAL, June 18, 1891.

9 COURT JOURNAL, Aug. 8, 1891; Sept. 12, 1891; Sept. 15, 1891; Sept. 23, 1891.

10 The information regarding the Seventh Circuit's first day of operation is taken from 24 Chicago Legal News, 44 (October 10, 1891). See also COURT JOURNAL, October 5, 1891.

11 24 Chicago Legal News, 44 (October 10, 1891).

Justice Harlan began the session by stating that, under rule 7 of the Seventh Circuit Rules, any attorney admitted to practice before the United States Supreme Court or any United States circuit court could be admitted to practice before the Seventh Circuit without paying a fee. The attorneys who were present and desired admittance were asked to come forward. The clerk of the court then administered the oath, which was the same as that prescribed by the United States Supreme Court rules. Each attorney swore or affirmed to "demean yourself uprightly and support the Constitution of the United States." The list of attorneys admitted to the rolls that day included James S. Harlan, the justice's son; John W. Showalter, a future judge of the court; and Mary A. Aherns, the lone woman attorney seeking admission during that first term. A total of sixty-five lawyers gained admission.<sup>12</sup>

Following this ceremony the panel heard arguments in its first case, *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.*<sup>13</sup> The plaintiff in the case had been granted summary judgment in the district court in an action for replevin of 300 steers. The decision turned on the interpretation of the contract between the plaintiff and his agent, who was hired to drive the cattle to market. The attorney for the defendant made a motion to dismiss for lack of jurisdiction. Judge Blodgett recused himself, as required by the Evarts Act, since he had been the trial judge in the district court. Justice Harlan and Judge Gresham listened to the arguments of both counsel and then announced that they were taking the motion under advisement. The *Clerk's Docket* reveals that eight months later the court denied the motion.<sup>14</sup> The case was then heard on the merits on May 25, 1893, and an opinion was issued by Judge Jenkins on December 1, 1893. Three other cases were called at that first session; one was partially heard and then postponed until the next day, and two were scheduled for argument in January 1892.<sup>15</sup>

The postponed case, *Smale v. Mitchell*, provided the court its first opportunity to certify an important or difficult question to the United States Su-

12 *Id.* See also ROLL OF ATTORNEYS, which is the official list kept by the clerk of the Seventh Circuit of all court attorneys admitted to practice before the court. Attorneys were admitted to practice at no charge until the rules were amended to require a \$10.00 fee. COURT JOURNAL, June 1, 1895.

13 59 F.49 (7th Cir. 1893). See COURT JOURNAL, October 5, 1891.

14 See CLERK'S (GENERAL) DOCKET, Appeal No. 8. (This docket may be found in the office of the clerk, United States Court of Appeals for the Seventh Circuit.) Each appeal was assigned a docket number, with the appeals being numbered consecutively in order of their filing date. The DOCKET contains a separate page for each appeal and on that page the clerk recorded all aspects of the history of the appeal: the date it was docketed; the attorneys for each party; the district court which tried the case; the date of filing and description of briefs, motions, and all other official papers; the date of oral argument and the panel of judges; the date the appeal was decided, its disposition, and the judge who authored the opinion (plus any dissents or concurrences); the filing and disposition of a petition for rehearing; and the date of application of a writ of certiorari.

15 COURT JOURNAL, October 5, 1893.

16, 1862. After four years of successful practice, he ran on the Republican ticket for the Indiana legislature and won a seat. Serving as a member of the Judiciary Committee, he authored and steered several judicial reform bills through the legislature. In 1873 he was elected as an Indiana circuit court judge, a position which he held until 1880, when he successfully ran as the Republican candidate for the Indiana supreme court. He sat on that bench only three years, as President Arthur nominated him to fill the vacancy on the United States District Court for Indiana when Judge Gresham was appointed postmaster general.

Judge Woods' service on the district court resembled that of the other judges we have examined. The most controversial trial over which he presided—and the one said by some to be responsible for his elevation to circuit judge—involved the prosecution of five officials of the Harrison presidential campaign staff in 1888.<sup>25</sup> Indiana Democrats had discovered a letter, sent on stationery of the Republican National Committee to key Indiana Republicans, which urged them to secure the money necessary to pay “floaters” to vote Republican and thus carry Indiana for Harrison. After the election but before Harrison was sworn in as president, a grand jury was impaneled. Judge Woods at first instructed the grand jury that the applicable federal statutes stated that it was a crime for A to advise B to bribe C. Under this interpretation, the grand jury reportedly was ready to vote a true bill. However, as explained by Mrs. Walter Gresham, Harrison and others pressured Judge Woods, and he changed his instruction. He stated to the grand jury that the mere sending of a letter urging the bribery of a voter was not indictable. The grand jury thus refused to indict the author, and Judge Woods later quashed the indictments returned against his accomplices. Intense controversy surrounded the affair. The Democratic press vilified Judge Woods as an opportunist seeking to take care of his political friends and hoping to be rewarded with elevation to the United States Supreme Court.<sup>26</sup> The Supreme Court nomination never materialized, but the promotion to judge of the Seventh Circuit came three years later. At that time emotions had died down, and Judge Woods' nomination was generally supported by the Bar. However, when Harrison sent the judge's name to the Senate, over 172 pages of testimony regarding the “blocks-of-five” case (as the election controversy had been popularly named) was taken before the Senate was satisfied that the judge had done nothing to disqualify him from confirmation as judge of the Seventh Circuit.<sup>27</sup>

When the court convened in January 1892, there were only six or seven cases in which records were printed, the briefs filed, and the cases set for a hearing. The most interesting and important was *Cincinnati, Hamilton, &*

25 EGGERT, *supra* at 168. GRESHAM, *supra* at ch. 38, contains a complete account of the events surrounding the trial.

26 GRESHAM, *supra* at 613-14.

27 EGGERT, *supra* at 168.

preme Court.<sup>16</sup> Because Judge Gresham had served as trial judge, he recused himself, leaving only Judge Blodgett to certify the question to the Supreme Court. The dispute arose out of an ejectment proceeding filed in an Illinois state court, which defendants removed to the United States Circuit Court for the Northern District of Illinois. That court divided title between the parties. Plaintiff appealed to the United States Supreme Court, which reversed the circuit court and entered a mandate declaring that plaintiff be awarded title.<sup>17</sup> Under then current Illinois law the losing party in an ejectment suit, upon payment of costs, was entitled to a new trial as a right. Defendant paid costs and asked the circuit court to order a new trial. Judge Gresham refused, citing the mandate of the Supreme Court. Defendant then appealed to the Seventh Circuit. After certification the Supreme Court, through Justice Stephen Field, reversed Judge Gresham and ordered a new trial holding that in these cases state law must be followed.<sup>18</sup>

These two cases were the only ones heard until January 12, 1892, when the Seventh Circuit began its second session of the October 1891 term. The court, however, did convene several times during the intervening months to attend to "housekeeping" duties. On December 5, 1891, Judge Gresham, Judge Blodgett, and Justice Harlan entered an order designating Samuel A. Blatchford, son of United States Supreme Court Justice Samuel Blatchford, as the official reporter. The judges directed the clerk to send Blatchford, without expense, a copy of the records, briefs, and a copy of all opinions, as soon as they were available.<sup>19</sup> The correspondence between Blatchford and Clerk Oliver Morton reveals that it took some time to routinize these procedures. Since Blatchford's reports contained more information than those of West Publishing Company, Blatchford often wrote the clerk for the names of counsel or the name of the judge who wrote a per curiam opinion. West also received opinions, but published only selected ones until it became the official reporter in 1899.<sup>20</sup>

In addition to selecting the official reporter during the period between the October and January session, the court entered into a contract with a printer to print its records and briefs. In keeping with the Indiana dominance of the court, the first printer was Henry Goodman, the owner and editor of the Indiana *La Porte Journal*. It appears that Goodman retained the printing business

16 CLERK'S DOCKET, Appeal No. 11; COURT JOURNAL, Oct. 8, 1891. The power to certify the question was given to the court of appeals in §6 of the Evarts Act; Act of March 3, 1891, 26 Stat. 826, 828.

17 *Smale v. Mitchell*, 140 U.S. 406 (1891).

18 *Smale v. Mitchell*, 143 U.S. 99 (1892).

19 COURT JOURNAL, Dec. 5, 1891.

20 See, for example, letter from Samuel A. Blatchford to Oliver T. Morton, Nov. 11, 1892 (Seventh Circuit Archives). In 1894 the court ordered the clerk to send a copy of all opinions to West also, in exchange for West reports and digests. COURT JOURNAL, Dec. 14, 1894. Blatchford resigned as official reporter on Feb. 2, 1901 (see COURT JOURNAL that date), and the COURT JOURNAL of June 25, 1901, reveals the appointment of West as the official reporter.

until March 1893, when the judges ordered the clerk to advertise for bids in the *Chicago Legal News*. No printer had submitted a bid by the deadline, but after the ad had been run again, J. C. Benedict of Chicago placed an acceptable bid of \$.85 per page for records and \$1.00 per page for opinions.<sup>21</sup>

One further development occurred before the court convened for the January session. On December 16, 1891, President Benjamin Harrison sent the name of William Allen Woods, judge of the United States District Court of Indiana, to the Senate to fill the vacancy on the United States Circuit Court of Appeals for the Seventh Circuit. The Senate, after a protracted debate, confirmed Judge Woods on March 17, 1892.<sup>22</sup> The clerk of Woods' district court administered his oath of office on March 21st, and the judge first took his seat on the Seventh Circuit on June 6, 1892.<sup>23</sup>

It surprised no one that President Harrison had selected Judge William A. Woods for the Seventh Circuit. Not only were the two men fellow Hoosiers, but also long-time friends and Republican party allies.

Judge Woods' career differed in certain respects from those of the other judges we have so far examined. Although, like Gresham and Drummond, he was elevated from the district to the circuit court, his state political career was mainly in the judicial, not the legislative branch, and unlike Gresham and Harlan, he was not a Civil War hero.

Judge Woods was born on May 16, 1837 near Farmington, Tennessee.<sup>24</sup> His father, a Presbyterian minister, died a month after his birth. His mother remarried in 1844, and his stepfather, John Miller, resettled the family—William and his two older sisters—on a farm in Iowa in 1847. Woods attended school there until he was fourteen, at which time he left to go to work, first at a sawmill and then as a clerk in a general store. After a few years he arranged to attend college preparatory courses at Troy (Iowa) Academy by exchanging work for tuition. He began as a hod carrier on a construction crew building one of the school's classrooms and later served as an assistant instructor. In 1855 Woods entered Wabash College in Crawfordsville, Indiana. He received his B.A. in liberal arts in 1859 and then taught at the college for a year. Later he taught high school for a year in Marion, Indiana. During his two years of teaching, Woods began studying law. In 1861 he was admitted to the Indiana bar.

After rejection for service in the Union army because of an accidental injury to his foot, Woods opened a law office in Goshen, Indiana, on March

21 COURT JOURNAL, May 2, 1893. Benedict was the printer until Gunthorp-Warren submitted a lower bid. COURT JOURNAL, Feb. 13, 1899.

22 Judge Woods' appointment was detailed in 24 *Chicago Legal News* 125 (Dec. 19, 1891). See also, G. EGGERT, RAILROAD LABOR DISPUTES: THE BEGINNINGS OF FEDERAL STRIKE POLICY, 168 (1967); 24 *Chicago Legal News*, 231 (March 19, 1892).

23 COURT JOURNAL, June 6, 1892.

24 Biographical information on Judge Woods is found in 33 *Chicago Legal News*, 389 (July 16, 1901); 32 *Chicago Legal News*, 95 (Nov. 11, 1899); C. TAYLOR, THE BENCH AND BAR OF INDIANA, 174-77 (1895).

*Dayton Railroad v. McKeen.*<sup>28</sup> An extremely complicated case, it involved the rights and powers of the railroad corporation to use certain financing methods. The case had been tried in the circuit court of Indiana by Judge James Jenkins of the Eastern District of Wisconsin, who sat by designation in Indiana. The importance of the case stems from what it reveals about the confusion engendered by the establishment of the new court. When the case reached the Seventh Circuit in January, Circuit Justice Harlan was unable to be present in Chicago because of Supreme Court business in Washington. Circuit Judge Walter Gresham recused himself for unknown reasons, and District Judge Jenkins, who had been designated to sit in the Seventh Circuit, was statutorily barred from hearing the appeal because he had been the trial judge. This left only District Judge Blodgett to decide the case. Under the Circuit Rules, a single judge did not constitute a quorum and could not render a decision. It had been hoped that the December appointment of District Judge Woods to the Circuit Court would provide a second judge, but Senate confirmation of Woods had been delayed.

The court attempted to solve the dilemma by certifying the case to the United States Supreme Court.<sup>29</sup> In a short opinion by Chief Justice Fuller, the Supreme Court dismissed the certificate. The chief justice used the case as an opportunity to clarify the procedures of certification. His opinion stated that the Seventh Circuit erred in two respects. First, a quorum must sit to certify a question to the Supreme Court. Second, the request for certification must contain a full statement of the facts and questions of law. The chief justice, with due concern for his court's time and efficiency, held that the circuit courts could not simply certify questions of law and forward the entire record for the Supreme Court to search. Instead, the court of appeals must provide the facts necessary for the Supreme Court to rule on the case, and if the Supreme Court determined that the record was needed it could request it. Thus, the guidelines for certification established by the *McKeen* case protected the Supreme Court from a large volume of work caused by the courts of appeals, which after all had been designed to relieve the workload of the Supreme Court.

The *McKeen* case is also of some interest because of the counsel who worked on the appeal. It is probably one of the few cases in which a future vice-president opposed a former president of the United States. C. W. Fairbanks, Theodore Roosevelt's vice-president, represented the appellant railroad throughout the course of the litigation. Former President Benjamin

28 149 U.S. 259 (1893).

29 See COURT JOURNAL, Jan. 13, 1892.

30 *Cincinnati, Hamilton, & Dayton R.R. v. McKeen*, 64 F.36 (1894). The panel consisted of Justice Harlan, and District Judges Romanzo Bunn and William Seaman. The court affirmed the judgment of the trial court; thus the ex-president prevailed over the future vice-president. See C. Ooms, *History is a Ragbag of Odds and Ends* (speech delivered at Annual Judicial Conference of the Seventh Circuit and the Bar Association of the Seventh Circuit, May 23, 1955) at 10-12.

Harrison served as counsel for the defendant, McKeen, after the case had been remanded to the Seventh Circuit for a hearing on the merits.<sup>30</sup> Harrison successfully appeared in several other cases in the Seventh Circuit, most notably *O'Brien v. Wheelock*, a case involving the financing of a levee on an island along the Mississippi River, which "had been in litigation almost as long as any living person could remember."<sup>31</sup>

The remainder of the first term of the court proved uneventful. Only about a dozen cases were argued. Several others were dismissed under rule 16 for failure to be docketed timely.<sup>32</sup> Circuit Justice Harlan returned to Chicago to sit in June and joined Judge William Woods, who first sat and heard arguments on June 6, 1892. The bench of the Seventh Circuit then consisted of Judges Woods and Gresham. The district court judges were designated to fill the third position on the panels. Judge James Jenkins of the Eastern District of Wisconsin most often sat, but to ensure that the judges did not hear appeals in cases they had decided below, there was a fairly steady rotation of district judges.<sup>33</sup>

Early in 1893, for the second time, Judge Walter O. Gresham resigned the federal bench to accept a cabinet position. Soon after his election, President Grover Cleveland invited Judge Gresham to become his secretary of state. The judge at first declined, partly because he enjoyed his work at the Seventh Circuit and life with his family in Chicago.<sup>34</sup> He also feared angering his Republican supporters by serving in a Democratic administration, even though he had openly supported Cleveland over Harrison. However, after conferring with several long-time Republicans and after a second call from Cleveland, Gresham relented. He became secretary of state, and, as Cleveland had promised, the leader of the cabinet. The judge's resignation became effective on March 3, 1893, and he took his cabinet seat three days later.<sup>35</sup>

To fill the Gresham vacancy, President Cleveland nominated Judge James G. Jenkins of Milwaukee. He seemed the natural choice, as he was the most prominent district judge in the Seventh Circuit at that time, and Cleveland

31 *O'Brien v. Wheelock*, 95 F.883 (1899); see also the remarks on the case by E. Evans, unpublished article on the history of the Seventh Circuit, at 8-9 (the article is found in the personal papers of Judge Evan A. Evans which are retained by the family).

32 See *COURT JOURNAL*, April 13, 1892; May 18, 1892.

33 The information on the designation of district judges is taken from the *COURT JOURNAL*, which records all such orders and lists the judges of the panels at each oral argument. Justice Harlan appears in the *COURT JOURNAL* entries from June 6-13, 1892.

34 GRESHAM, *supra* at 678-87.

35 Judge Gresham served in Cleveland's cabinet for only two years, as he died from the complications of pneumonia on May 28, 1895. He was buried in Arlington National Cemetery. See GRESHAM, *supra* at 790-92; 27 *Chicago Legal News*, 345 (June 1, 1895).

During his brief tenure as secretary of state, Judge Gresham was occupied with United States relations with Latin America and the Pacific—most notably Hawaii, Nicaragua, Brazil, and Cuba. According to his widow he opposed an imperialist or expansionist American role in foreign affairs and attempted to maintain Hawaii's independence. GRESHAM, *supra* at chs. 47-48.

had appointed him to the district bench during his first presidential administration. Judge Jenkins' career resembled that of Judge Woods—his political experience was judicial, not legislative, and he had not gained his fame during the Civil War.

Judge Jenkins was born in Saratoga Springs, New York, on July 18, 1834.<sup>36</sup> His father, a prosperous New York City merchant, had married the daughter of a leading New York jurist. Jenkins attended Plattsburg Academy and later other private schools in Saratoga Springs.

In 1855 he began to read law in the offices of Ellis, Burrill & Davison in New York City, was admitted to the New York bar in 1855, and entered private practice there. His decision to move west two years later resulted in his settling in Milwaukee, Wisconsin. According to a newspaper account, "he came to Milwaukee, arriving on Saturday, September 30th, without an acquaintance in the city and only 25 cents in his pocket, but an appeal to his home soon remedied his straitened finances."<sup>37</sup>

After entering private practice in Milwaukee, Jenkins rapidly established a reputation for excellence, trying his first case in 1858. One leader of the Wisconsin bar attributed Jenkins' success to his experience with the code system of pleading. This system had recently been enacted in Wisconsin, and Jenkins' New York code training made him a valuable associate to many of the older lawyers in the city.<sup>38</sup> Jenkins' skill and value as an attorney are evidenced by the prestigious partnerships into which he later entered. His first firm (Downer, La Due, & Jenkins) included Jason Downer, later a Wisconsin Supreme Court justice. He then became the partner of the future United States Senator Matthew Hale Carpenter and future Wisconsin Supreme Court Chief Justice Edward G. Ryan in the firm of Ryan, Carpenter, & Jenkins. Later he entered partnership with two other widely respected Milwaukee attorneys, Theodore B. Elliott and General Fredrich C. Winkler—first under the name "Jenkins, Elliott, & Winkler," then as "Jenkins, Winkler, Fish, & Smith," and finally "Jenkins, Winkler, Smith, & Vilas."<sup>39</sup>

Jenkins' general practice, which included being counsel for Chicago & North Western Railroad Company, was reputed to be the largest in Milwaukee.<sup>40</sup> His strength was trial work. A fellow attorney eulogized him as

36 Biographical information on Judge Jenkins is taken from numerous newspaper articles at his death. A comprehensive source is the memorial resolution presented by the Milwaukee County Bar Association at the memorial service for Judge Jenkins at the Wisconsin Supreme Court on December 13, 1921. See B. Poss, *James Graham Jenkins* in 175 Wis., *lii* (1921).

37 Milwaukee Journal, Aug. 6, 1921, at 1, col. 2.

38 Poss, *James Graham Jenkins*, *supra* at *liii*.

39 Milwaukee Sentinel, August 7, 1921, at 1, col. 2.

40 *Id.*; 37 Chicago Legal News, 281 (April 15, 1905).

a jury lawyer . . . without a peer. His participation as an advocate in any cause attracted to the court-room an admiring public, and his addresses to the jury captivated the jury, the court, and all within hearing.<sup>41</sup>

Judge Jenkins had been admitted to practice in both the Eastern District of Wisconsin and the Southern District of New York, and in 1879 on motion of Senator Carpenter he was admitted to practice before the United States Supreme Court.<sup>42</sup>

Judge Jenkins not only became a prominent and wealthy attorney but also a leading figure in Milwaukee society. For several years he served as a commissioner/trustee of the Milwaukee County Insane Asylum. His wedding to Alice M. Miller on February 22, 1870, attracted much newspaper coverage. Her father, Judge Andrew G. Miller, was the first federal judge appointed in Wisconsin, occupying the bench from 1848 until his retirement in 1873.<sup>43</sup>

The Jenkins were members of St. Paul's Episcopal Church, but in an interesting exchange of letters with Reverend Paul Jenkins in 1914, the judge revealed himself to be a member, not a believer. In discussing with the Reverend whether there was any "hard" proof of Christ's resurrection, he wrote:

Although I was educated in the Calvinist faith, I was never able to reconcile the cardinal doctrine of predestination, election, foreordination, and free will. They produced in me mental indigestion.<sup>44</sup>

Judge Jenkins advanced as rapidly to the head of the Wisconsin Democratic party as he had to his preeminent position in the legal community. Six years after his arrival in Milwaukee, Jenkins received the Democratic nomination for city attorney and won the election. Four times he successfully campaigned, retaining the post from 1863 to 1871. The city elections proved to be his only electoral triumphs, however. He lost the 1879 gubernatorial race and then failed to be elected United States senator in 1881, despite unanimous Democratic support in the state legislature. Twice Jenkins even refused party nominations (once for governor and once for county judge), deciding not to leave his lucrative law practice. He served as a delegate to national and

41 Poss, *James Graham Jenkins*, *supra* at *liv*.

42 See Certificates of Admission to Practice before the United States Supreme Court, the District Court of Wisconsin, and the Southern District of New York contained in the James G. Jenkins Papers at the Wisconsin Historical Society.

43 See Judge Jenkins' appointment as a commissioner/trustee contained in the James G. Jenkins Papers at the Wisconsin Historical Society; also contained in the Jenkins Papers are a wedding invitation (the wedding was at Judge Miller's home) and several newspaper announcements of the ceremony.

44 Letter from James G. Jenkins to Rev. Paul B. Jenkins, July 14, 1914 (Jenkins Papers, Wisconsin Historical Society).

combining or conspiring together . . . as committees, or as officers of any so-called "labor organization" with the design or purpose of causing a strike. . . .

Not only the railway employees could be held in contempt, but also labor officials. The judge's lengthy opinion cited the irreparable harm to the public that would result from a strike and the inevitable violence that would accompany it. Since neither could be compensated for by money damages, an injunction was a necessity.

The opinion provoked a great public uproar, only partially because of its result and its reasoning, both of which were typical of nineteenth-century labor decisions. What distinguished Judge Jenkins' opinion was the outspoken language denouncing any conspiracy to force owners to manage their property in accordance with workers' demands.<sup>50</sup> Although granting that workers could quit, the judge wrote,

All combinations to interfere with perfect freedom in the proper management and control of one's lawful business, to dictate the terms upon which such business shall be conducted, by means of threats or by interference with property or traffic or with the lawful employment of others, are within the condemnation of the law.<sup>51</sup>

Opposition to the opinion became vocal enough that some union supporters in Congress introduced a bill of impeachment. A House subcommittee investigated the charges and held hearings in Milwaukee. Jenkins refused an invitation to testify before the committee, steadfastly maintaining that there was no basis for the impeachment charges except "the propriety and legal correctness of the orders of the court."<sup>52</sup> Since there were no "charges affecting [his] personal or official integrity," he believed there were no grounds for impeachment, and, therefore, it would not be proper for him to argue with the committee over the legal principles. The Seventh Circuit and the United States Supreme Court were the proper forums to rule on the "legal correctness."<sup>53</sup> The subcommittee report criticized Jenkins' decision on the law but found no evidence of corruption or misconduct.<sup>54</sup> The impeachment proceedings died in committee. During this time the judge received overwhelming support from the press and members of the bar.<sup>55</sup> It should be noted that this controversy occurred during Judge Jenkins' elevation to the Seventh Circuit and did not delay it.

When the Senate confirmed Jenkins' nomination to the Seventh Circuit on March 23, 1893, the news received enthusiastic comment from the spokesmen of the Chicago bar. The *Chicago Legal News* praised the judge's

50 *Id.* at 132-33.

51 60 F. at 821.

52 Poss, *James Graham Jenkins, supra* at lviii. The Poss article thoroughly discusses the House investigation, as does EGGERT, *supra* at 133-35.

53 Poss, *supra* at lviii.

54 EGGERT, *supra* at 134-35; one newspaper commented, "The impeachment talk died away and nothing came of it." *Milwaukee Journal*, August 6, 1921, at 1, col. 2.

55 *Milwaukee Sentinel*, August 7, 1921, at 1, col. 2.

intelligence, temperament, and style, while predicting that “he cannot fail to do honor to the high position he has been called to fill.”<sup>56</sup>

Only six weeks after Judge Jenkins took his seat on the court, the Seventh Circuit became literally the center of world attention. The controversy concerned the question whether the corporation organized to plan and operate the 1893 World’s Columbian Exposition in Chicago could order the fair to open on Sundays. Congress had appropriated \$2.5 million dollars in commemorative half-dollar pieces to be given to the corporation, provided the exposition remained closed on Sundays.<sup>57</sup> The United States Treasury failed to pay approximately one-sixth of that amount. When it became apparent that the directors of the corporation intended to open on Sunday, the United States filed a bill in equity on May 27, 1893, in the circuit court of the Northern District of Illinois, seeking an injunction blocking Sunday operation. The importance of and public interest in the case prompted Judges Woods and Jenkins to make the proceedings a rare three-judge trial court, Judge Grosscup of the Northern District of Illinois being the third member. The judges orally announced their decision on June 8. In a 2-1 opinion (Grosscup dissenting), the court held that the injunction should issue. Judges Jenkins and Woods stated that the money appropriated by Congress constituted a gift, and the condition that the fair be closed on Sunday was valid and enforceable under existing gift law. Grosscup’s dissent did not disagree with their characterization of the case, but he believed it would be inequitable to enforce the condition because the United States had failed to deliver the entire sum to the corporation. The World’s Columbian Exposition Corporation filed an appeal to the Seventh Circuit two days later, on June 10, 1893. The court immediately suspended the enforcement of the circuit court’s injunction.<sup>58</sup>

As in the *McKeen* case,<sup>59</sup> a problem arose in finding three judges to hear the appeal. Jenkins and Woods were disqualified, since they had sat on the trial court. The chief justice, Melville Fuller, was present in Chicago to attend the opening of the fair, and since the Evarts Act made him eligible to preside, he did. He then designated the two most senior district judges,

<sup>56</sup> 25 Chicago Legal News, 263 (April 1, 1893).

<sup>57</sup> For a complete history of the fair and the Sunday closing controversy, see D. BURG, CHICAGO’S WHITE CITY OF 1893 (1976); see also Ooms, *History is a Ragbag of Odds and Ends*, *supra* at 7-9; E. Evans, *Fifty Years Ago—In the United States Circuit Court of Appeals of the Seventh Circuit*, 13-16 (Address at Chicago Bar Association dinner, Nov. 12, 1941); 3 B. PIERCE, A HISTORY OF CHICAGO: THE RISE OF A MODERN CITY, ch. XIV (1957). The Seventh Circuit did in fact review the case. *Arthur v. Oakes*, 63 F.310 (7th Cir. 1894). Justice Harlan’s opinion affirmed the basic decision of Judge Jenkins and modified it only in slight detail—requiring greater specificity of the prohibited strikes and eliminating the language which would have required workers (absent a conspiracy) to continue to work if their quitting would have crippled the operation of the railroad.

<sup>58</sup> *United States v. World’s Columbian Exposition*, 56 F.630 (C.C.N.D.Ill. 1893); see COURT JOURNAL, June 10, 1895.

<sup>59</sup> See text at n.28, *supra*.

Romanzo Bunn and William Allen, to sit with him. The court conducted oral argument in the case on June 15 and 16, each side using its entire allotted three hours. On June 17 the panel handed down its unanimous opinion, delivered by the chief justice.<sup>60</sup> The court reversed the circuit court and refused to enjoin the Sunday opening. The chief justice rejected the characterization of the congressional appropriation as a gift to a charitable corporation, holding instead that the corporation was organized for profit and the transaction was a loan. He then held that no injunction should issue because there was no showing that there was not an adequate remedy at law for any damage the government suffered by the breach of the agreement. The Seventh Circuit opinion met with great enthusiasm from the public, and enormous crowds gathered each week on Sunday to enjoy the exposition.<sup>61</sup>

Having brought the story of the Seventh Circuit up to the end of its second term, it is perhaps best to examine now several aspects of the court's practice and procedure which, although not firmly fixed by that time, were introduced then and remained a permanent part of the court's organization. The rules and procedures for administration of the circuit, established during the first year, were experiments that required modification but yet proved to be successful. Their evolution also provides some insight into the guidance supplied by the Supreme Court during this early period and the cooperation between the circuits. The Evarts Act delegated to each circuit the responsibility for adopting its own rules.<sup>62</sup> Since the act required some of the rules to be in conformity with the practice of the Supreme Court, and since the circuit judges believed in the desirability of making procedures in the new courts as uniform as possible, a model set of rules was drawn up before the first session. The rules announced by the Seventh Circuit at its June organizational meeting differed only in slight detail from the model.<sup>63</sup>

However, by the time the court opened for its first session in October, one of the rules—rule 23—had already proved unworkable. As adopted, the rule placed responsibility for printing the records of the cases on the individual parties and required that they file them with the clerk's office at least six days before the case was called for argument. Failure to do so resulted in dismissal.<sup>64</sup> The apparent difficulty with the rule was that it neither demanded the records be indexed, so they could be more easily used, nor prescribed a uniform style of printing. Therefore, the amended rule shifted the responsibility of printing the record from the parties to the clerk of the court. The new rule

60 COURT JOURNAL, June 10, 15, 16, 17, 1893; *United States v. World's Columbian Exposition*, 56 F.654 (7th Cir. 1893).

61 Burg, *supra* at 91. Burg writes, "Thus, the courts helped to promote the success of the fair and to save the company from the financial disaster that threatened as a result of congressional inconsistency."

62 Act of March 3, 1891, 26 Stat. 826, 827 (§2).

63 See 1 C.C.A. XI-XXVI (1892).

64 The text of rule 23, adopted at the Court's organizational session (June 16, 1891) may be found in the COURT JOURNAL, June 16, 1891. See also 1 C.C.A. XIX-XX (1892).

commanded the clerk to provide the judges with uniform, properly indexed records. To ensure payment for the clerk's work in having the record printed, the party had to post a bond when the clerk docketed an appeal. The clerk then made an estimate of the total cost, which the appellant had to pay to the court within ten days; if payment was not made, the case could be dismissed.<sup>65</sup>

Problems soon arose with the interpretation of the new rule. One question concerned what to do with appeals brought by the United States. Must the federal government post a bond and pay costs ten days after notice of printing? To resolve the issue, Clerk Morton sought guidance from the Supreme Court. The Supreme Court clerk, by letter, outlined the procedure later adopted by the Seventh Circuit. He stated that when the United States is a party, no deposit or bond is required. The costs incurred, plus clerk's fees, are taxed against the government, and at the end of the term a bill, which has been approved by the presiding judge, is sent to the Treasury Department.<sup>66</sup> The Seventh Circuit was not alone in this problem. The clerk of the First Circuit wrote the clerk of the Seventh Circuit, Oliver Morton, inquiring as to the practice in the Seventh Circuit. He explained that before advising the judges of the First Circuit how best to amend their own rule 23, he wanted to survey the practice of other circuits.<sup>67</sup>

During these early years there were several other instances in which the Supreme Court clerk provided assistance to the circuit court clerks to help determine procedures. In answer to inquiries from Clerk Morton, for example, Supreme Court Clerk James H. McKenney explained that under the statute regulating the use of the mail, it was improper for the clerk's correspondence with attorneys and parties to be sent in official business envelopes. McKenney also furnished information on the style of printed opinions and the fees the circuit court should charge.<sup>68</sup>

The development and clarification of the Seventh Circuit's practice and procedure were also worked out through consultation between the clerk and the Seventh Circuit judges. Prior to the October 1893 term, Clerk Morton wrote Judge James G. Jenkins to obtain interpretations of section 3 of rule 23 and rule 17. The former involved deciding whether the fifteen days in which an appellant must file a brief began to run following the mailing of printed record by the clerk, receipt by the attorney, or when the return receipt is received by the clerk. Morton indicated the problem caused confu-

65 The court amended its rule by order on October 8, 1891; *see* COURT JOURNAL entry of that date. The court accomplished the amendment by adopting a new rule, "rule 35," which spelled out the new procedures and specifically repealed rules 23, 26, and 27. By order of May 24, 1893 (*see* COURT JOURNAL), rule 35 was to be renumbered as rule 23.

66 Letter from James H. McKenney to Oliver T. Morton (Nov. 19, 1892, Seventh Circuit Archives).

67 Letter from John G. Stetson to Oliver T. Morton (Sept. 9, 1892, Seventh Circuit Archives).

68 Letter from James A. McKenney to Oliver T. Morton (Dec. 6, 1892, Seventh Circuit Archives).

sion because attorneys were often out of town when records were mailed, or delays occurred because of slow mail service to out-of-town attorneys. Judge Jenkins replied that the rule used the word "furnished" and that should mean "when mailed." He added that, if that interpretation caused hardship for whatever reason, the counsel could routinely be granted an extension.<sup>69</sup> Judge Jenkins answered Morton's question concerning rule 17<sup>70</sup> by stating that its object was to make certain that only cases ready for argument by the first day of the term should be placed on the calendar. This issue continued to disturb Jenkins, however, and two weeks later when the circuit's term began, he wrote a letter criticizing Clerk Morton for not following the principal of rule 17. Morton had included fourteen cases on the calendar in which no briefs or only briefs on one side were filed.<sup>71</sup>

The discussion of the development of the rules and practice before the Seventh Circuit not only serves to point out how procedure evolved from the experience of administering the court during its first several years, but also helps to demonstrate the role of the clerk and the clerk's office during this period. The clerk and his assistant, whose position was first authorized by the judges of the court on October 1, 1892, were the center of the court's activity.<sup>72</sup> First, they performed the traditional recordkeeping function. The clerk had responsibility for docketing cases and maintaining files containing all motions, appearances, and orders; additionally, he preserved a permanent copy of all opinions. As already indicated, the clerk supervised the printing and indexing of the record and the collection of all fees. This latter task was not always easy. A letter written by Morton to a county judge in Indiana seeks financial information about a company that had failed to pay costs eight months after a mandate had been issued ordering it to pay the remaining costs. The clerk's fee book reveals that the debt was never paid.<sup>73</sup>

The clerk also served as liaison between the bar and the court. Morton's correspondence contains numerous requests for copies and interpretations of rules and information on fees. Attorneys sought to learn when the court would be in session or when an opinion would be handed down. The clerk

69 Letter from Oliver T. Morton to James G. Jenkins (Sept. 13, 1893, Seventh Circuit Archives). The judge wrote his reply on Morton's letter and returned it to him.

70 Rule 17 stated:

The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and such docket shall be called at every term, or adjourned term; and if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

71 Letter from James G. Jenkins to Oliver T. Morton (Sept. 30, 1893, Seventh Circuit Archives).

72 COURT JOURNAL, October 1, 1892.

73 Letter from Oliver T. Morton to Judge R. S. Taylor (Aug. 24, 1893, Seventh Circuit Archives). Judge Taylor's reply, dated Aug. 26, 1893, was written on the original letter. The FEE BOOK kept by the clerk of the Seventh Circuit records all monies received during an appeal. The record of docket No. 28 shows the costs were not collected.

also facilitated communication between the judges. As the judges lived in their hometowns the clerk's office handled the task of circulating opinions, drafts, and page proofs to the various panel members.

One further aspect of the Seventh Circuit's operation that needs to be examined is the court's schedule, i.e., when and where it met. The Evarts Act provided limited guidance to the circuit courts in determining the time or place the court was to sit. The act stated merely that one term was to be held annually in Chicago.<sup>74</sup> The Circuit's first rules required only that the court was to meet the first Monday every October and then convene as necessary.<sup>75</sup> During the first year, 1891-1892, the Seventh Circuit held sessions in October, January, and March. Since the October session was more ceremonial than substantive, the judges decided to convene for a fourth session in June. The following year they found three sessions were sufficient. Therefore on March 29, 1894, the judges formalized the practice by amending Circuit rule 3. The new rule required sessions to be held the first Monday in October, January, and May. This rule remained in effect for the next twenty years, although minor changes were made such as moving the day of the week from the first Monday to the first Tuesday.<sup>76</sup>

In these first years the court set the pattern for the way in which it would call and hear cases.<sup>77</sup> On the first day of a session the court convened and set the docket for that session. The presiding judge announced the date of oral argument for each case on the printed calendar, that is, for the cases in which briefs had been completed. On the first day the judges also announced their decisions in cases in which opinions had been completed since the preceding adjournment. Following the opening day, court would convene five or six days a week at 10:00 a.m. On an average, one or two cases a day would be called for oral argument. Additionally, several motions, such as petitions for rehearing or motions to dismiss, might be argued. Each session lasted approximately five or six weeks. Following adjournment, the judges left Chicago for their homes to write the opinions that had been assigned to them. During these recesses, the clerk's office remained open to handle the docketing of new cases and the filing and printing of briefs. In recess periods the judge who lived in Chicago held court once or twice a week. At these sessions attorneys could make motions for extensions of time to file briefs, to make corrections in the record, or to enter any stipulations to which the parties agreed.

The Seventh Circuit continued to sit in Chicago and maintain its offices in the old Federal Building until the October term of 1893. At that time government inspectors condemned the building, declaring it to be totally unsafe. The judges adjourned after two weeks of the session and announced they

74 Act of March 3, 1891, 26 Stat. 826, 827.

75 COURT JOURNAL, June 16, 1891.

76 COURT JOURNAL, March 29, 1894; *id.*, Feb. 10, 1899.

77 The information for this paragraph is taken from a survey of the COURT JOURNAL from 1891 to 1912.

would reconvene in Milwaukee on November 2, the only instance during the court's history when it regularly sat outside Chicago.<sup>78</sup> This marked the beginning of a seminomadic period for the court. The clerk's office continued to conduct business in its old office in Chicago, but the judges traveled back and forth to Milwaukee to hear appeals. By March 1894, the attorney general had authorized the Seventh Circuit to rent temporary quarters in Chicago, and the court selected office space in the recently built Monadnock Building.<sup>79</sup> The rented rooms in the Monadnock were superior to the old Federal Building but were still disappointing. Since the courtroom overlooked the street, traffic noises often interrupted arguments. The court solved this problem by renting vacant offices on the other side of the fourth floor. In commenting on the beauty of the draperies and carpeting of the new room and how they greatly reduced noise, the *Chicago Legal News* could not resist reopening the robe controversy. It reported that

the Judges are pleased with their new courtroom, and in their black robes, with the new surroundings, look more dignified than ever.<sup>80</sup>

The Seventh Circuit remained in the Monadnock Building until the completion of the new Federal Building on the site of the old building (Clark, Adams, Dearborn, and Jackson). The court began its move into its new chambers about April 15, 1905, and had settled in by June 1. The court of appeals occupied the top floor, the seventh. The courtroom, clerk's office, and one judge's suite (which two circuit judges shared) were located on that floor. Two other circuit judges had chambers on the sixth floor, where the

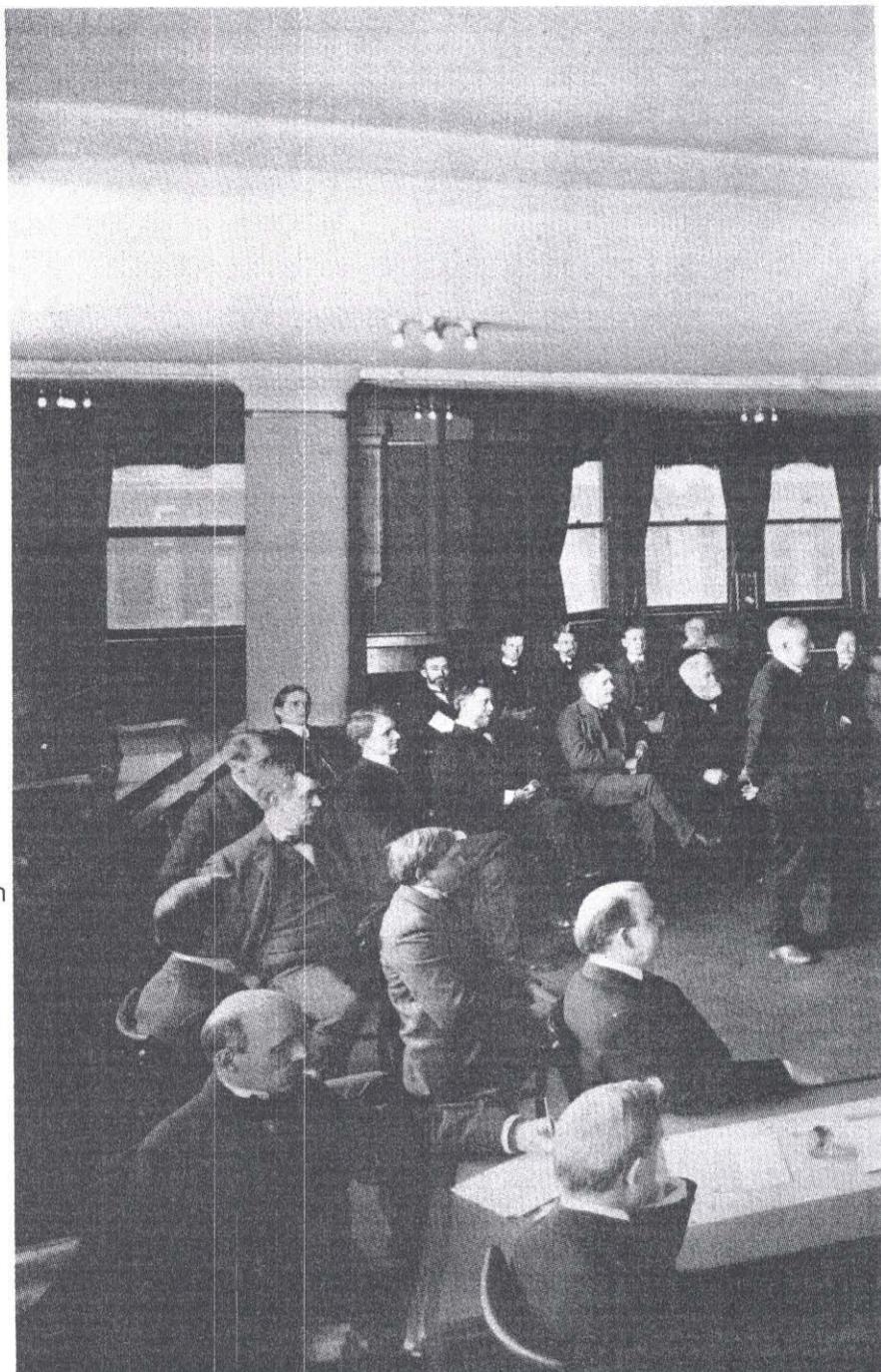
78 COURT JOURNAL, October 12, 1893.

79 COURT JOURNAL, March 7, 1894; 26 *Chicago Legal News*, 208 (Mar. 10, 1899).

80 The new courtroom was first used on November 7, 1899; 32 *Chicago Legal News*, 89, 95 (November 11, 1899). The *Legal News* described the room as follows:

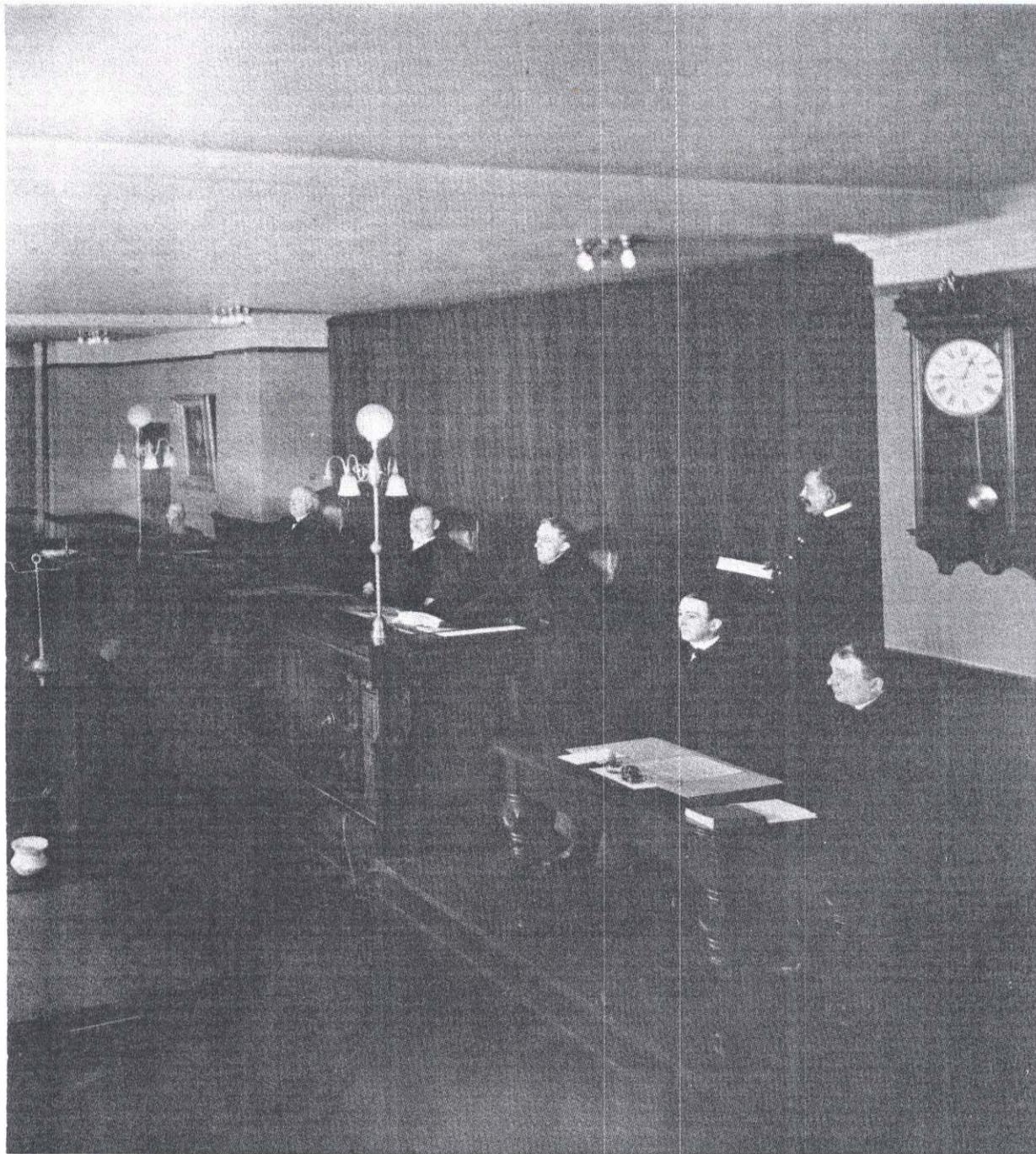
The furnishings are elegant but of such a nature as to impress upon the mind of any one upon entering the importance and dignity of the court in session. Brown is the prevailing color, and from the carpet to the ceiling that shade predominates. The windows are draped with soft dark brown curtains and hangings. Back of the judges' bench is a heavy curtain concealing the robing room of the judges. The judges' bench and the clerk's and crier's desks are of dark rosewood, and scattered throughout the rooms are colonial style benches of the same material. The walls are decorated in a heavy drab, and clusters of electric lights, shaded with frosted globes, throw a soft radiance about the room. On the walls are several oil paintings of former judges of the court. It is to be hoped that this list may be extended until it includes all the Federal judges who have ever held court in Chicago. For the judges' use there are three high-back revolving chairs, upholstered in brown; in front of each is a large electric reading lamp. The lawyers who are to plead in this court will find a desk at each side of the inclosure reserved for them. Directly in front of the bench is a table with an elevated reading stand, lighted by a handsome electric lamp. This stand is intended for attorneys when they make their arguments before the court.

The courtroom in the Monadnock Building, Jackson Boulevard, was the temporary quarters for the Seventh Circuit from 1894 to 1905. Seated, *from left to right*, are Circuit Judges Jenkins, Woods, and Grosscup; and Clerks Campbell and Holloway.



district and circuit courts maintained offices. These offices housed the court for the next thirty-three years.<sup>81</sup>

81 The cornerstone of the new Federal Building was laid on October 9, 1899. President William McKinley set the stone and delivered an address to a large crowd, which included all the federal judges in the Seventh Circuit. The building was designed by Architect Henry Ives Cobb. A list of the rooms occupied by the Seventh Circuit can be found in 37 *Chicago Legal News*, 300 (April 29, 1905); a story on the Court's move appears in *Chicago Record-Herald*, March 27, 1905, at 2.



This chapter has viewed the development of the Seventh Circuit as a working institution. During the two years following the first session, the basic pattern of the court's operation was established. The time, place, and manner of hearing and deciding appeals took the form that was to remain essentially the same throughout the first fifty years. The various components of the court's rules and procedures evolved during these early years through the cooperation of the judges, the clerk, the bar, the other courts of appeal, and the United States Supreme Court. In the next chapter we turn from the early history of how the court functioned to an examination of the bench during its first two decades.



## Judges and Controversies 1895-1912

**D**uring the first five years of the Seventh Circuit's existence, the number of appeals filed and cases heard grew steadily. This increase emphasized the inherent weakness caused by grafting the new court of appeals onto the old circuit and district courts, and only providing one additional circuit judge. It created great difficulty in coordinating the selection of panels, since circuit judges were needed as trial judges, thus causing them to be disqualified on appeals.<sup>1</sup> Conversely, the fact that the circuit justice only rarely sat with the Seventh Circuit meant that a district judge was continually required to serve as the third member on the court of appeals. Because all five districts in the circuit were single-judge districts, when the district judge sat in the court of appeals, that judge's trial docket could not be called. The overwhelming volume of litigation in the Northern District of Illinois further complicated the problem, as district judges from other districts were required to assist the Northern District in calling its docket. When Judge Jenkins became a circuit judge he attempted a solution by arranging for district judges to come to Chicago, hear appeals in the morning, and then

<sup>1</sup> The problems facing the Seventh Circuit are detailed in H.R.Rep. No. 1481, 53d Cong., 3d Sess. (1894).

try chancery and jury cases in the district and circuit courts in the afternoon.<sup>2</sup> Although this provided some relief, it was not an adequate solution.

The only answer seemed to be the creation of additional judgeships. An Illinois congressman sponsored legislation to add a third circuit judgeship. He put together a report for the Judicial Committee showing that all federal judges in the circuit expressed their belief in the absolute necessity of another judgeship. They unanimously agreed that both an additional district and circuit judge were required. The judges backed their opinions with statistics showing that, except for the Third Circuit, the Seventh Circuit had the worst ratio of judges to population (1:1,100,000 versus 1:213,000 in the Ninth Circuit).<sup>3</sup> Further evidence showed that, because of its heavy caseload, the Northern District of Illinois had not tried any admiralty cases for more than a year. Judge Peter S. Grosscup identified for the congressional committee the source of the Northern District's problem: Chicago's position as second largest corporate, manufacturing, railroad, and commercial center caused numerous diversity, patent, and bankruptcy cases to be filed there.<sup>4</sup>

The attempt to create another Seventh Circuit judgeship received additional support in Washington from the secretary of state, Walter Gresham, who had observed the problems firsthand while a member of the court. His personal secretary, Kenesaw Mountain Landis, wrote Judge Grosscup for his views in the fall of 1894. Grosscup's reply covers much the same ground as does his public letter to the House committee. But he revealed a disagreement between the circuit and district judges, which may explain why Congress added only a circuit and not a district judge. Grosscup explained that, unlike judges in the other circuits, the Seventh Circuit judges refused regularly to handle trial work. He believed that if a new circuit judge were added and if the new judge conducted jury trials, the other two circuit judges would follow, thus freeing the district judges of enough of their caseload to allow the system to work. Additionally, a third circuit judge would eliminate most of the necessity of having a district judge sit on the court of appeals.<sup>5</sup> Regardless of how influential this letter was, Congress adopted the Grosscup plan unanimously on February 1, 1895.<sup>6</sup>

To fill the new judgeship, President Grover Cleveland made his second appointment to the United States Court of Appeals for the Seventh Circuit. On February 25, 1895, he nominated John William Showalter, a Chicago attorney. The nomination came as a tremendous surprise to the Chicago legal community. The newspapers carried reports of many candidates, but none

2 Statement of Judge James G. Jenkins, in *id.* at 4.

3 *Id.* at 2.

4 *Id.* at 1-2.

5 Letter from Peter S. Grosscup to Kenesaw Mountain Landis, Dec. 7, 1894 (Landis Collection, Chicago Historical Society). Landis began his career serving as Gresham's personal secretary, later became a judge on the United States District Court for the Northern District of Illinois, and then became the first commissioner of baseball.

6 27 CONG. REC. 1652 (1895).

had mentioned Showalter. Among those rumored to have the inside track were the son of a United States senator, an Illinois representative who had played an important role in Cleveland's campaign, two Illinois state appellate judges, and District Judge Grosscup.<sup>7</sup> Cleveland never seriously considered Grosscup because it was unlikely he would give the post to a Republican. The favorite candidate appeared to be Judge Henry M. Shepard of the Illinois Appellate Court, whose supporters included powerful Chicago businessmen such as Potter Palmer and Joseph Medill. In addition, Shepard had been the law partner of Chief Justice Melville Fuller. Supporters of other candidates, however, argued that it would be harmful to Democratic politics to nominate Shepard, as a Democrat could not be elected to fill the state court vacancy.<sup>8</sup>

Out of all this controversy emerged the nomination of John Showalter. He did not fit the pattern of Seventh Circuit judges previously observed. He was younger, had held no prior political office, nor had he any prior judicial service. He was, however, a prosperous attorney who had strong Democratic ties. His selection probably stemmed from the support of two of his close friends who served in the Cleveland cabinet. Judge Gresham had known Showalter from his practice before the district court and the court of appeals.<sup>9</sup> Additionally, Showalter's college classmate and President Cleveland's former law partner, Wilson Bissell, held the office of postmaster general.<sup>10</sup>

John William Showalter was born in Georgetown (Mason County), Kentucky on February 8, 1844.<sup>11</sup> His mother's family were Scotch-Irish farmers who moved to Kentucky in the early nineteenth century, while his father's family were Germans who immigrated to Virginia just before the Revolution. Showalter's father started his career as a newspaper editor but moved to Georgetown, Kentucky, to open a boys' academy. On March 3, 1893, he married Margaret Whipps, the daughter of a wealthy farmer in the county, and took over the management of the family farm. Although the Showalters owned slaves, one of the judge's eulogizers reported that (unlike another young Kentuckian, John Harlan) Judge Showalter often "stated to his friends in boyhood that the idea of men being chattels was ever obnoxious."<sup>12</sup>

7 27 Chicago Legal News, 235 (March 2, 1895); Chicago Tribune, February 14, 1895, at 3.

8 *Id.*

9 GRESHAM, LIFE OF WALTER QUINTIN GRESHAM, 716, 821 (1919). According to Mrs. Gresham, the gossip of the time was that Chief Justice Fuller was so angered by the selection of Showalter instead of Shepard that he voted against the Cleveland administration in the famous case *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429 (1895), on rehearing, 158 U.S. 601 (1895), which voided the Cleveland administration's federal income tax statute.

10 Chicago Tribune, Feb. 26, 1895, at 2. The Tribune reported, "Their [the cabinet officers'] recommendation counted a great deal more than if it had been a politician backed by Congressional influence."

11 Biographical information about Judge Showalter is taken from 27 Chicago Legal News, 235 (March 2, 1895).

12 31 Chicago Legal News, 211 (Feb. 11, 1899).

Showalter first attended public schools in his hometown and then transferred to his father's academy. After his graduation, he entered Yale University, an indication that the family tobacco business continued to prosper during the Civil War. Showalter showed great ability at Yale and was honored by being asked to deliver the class oration at the spring graduation in 1867. He decided to continue his education by studying law. He chose Chicago and entered the law offices of Moore & Caufield. The firm was considered one of the most prestigious in the city; both lawyers enjoyed widespread reputations. After two years of reading law, John Showalter was admitted to the Illinois bar on October 27, 1869.

The new attorney continued as an associate in Moore & Caufield, remaining there until Samuel Moore's election to the superior court caused the firm to dissolve in 1875. Showalter then joined the law offices of Abbott, Oliver & Showalter. Upon Abbott's death in 1890, the firm became Oliver & Showalter, which it remained until the Judge's appointment to the court of appeals.<sup>13</sup>

In his law practice Showalter specialized in corporate work but represented a variety of clients in both civil and criminal matters. He had an extensive federal practice and sought admission to the Seventh Circuit bar at the court's first session.<sup>14</sup> His eulogizers refer to the many trials he conducted, and the court of appeals docket records his appearance in at least one appeal. In that case he unsuccessfully represented the owner of a horse that ran second in the Hyde Park Stakes at Washington Park. The Seventh Circuit, in an opinion by Judge Woods, refused to accept Showalter's argument that the terms of the race made it a "stake race," for which the first-place horse would have been disqualified, making Showalter's client the winner.<sup>15</sup>

Very little is known of Judge Showalter's life outside his professional career. He never married, and for many years he and his law partner, John M. Oliver, shared a house near the Loop in Chicago. Showalter was active in several social, professional, and civic clubs, among them the Lawyers Club, the Illinois Club, and the Chicago Bar Association. He was an Episcopalian. The judge actively participated in city Democratic politics, but only once ran for office. In 1893 he received one of the four Democratic nominations for judge of the Superior Court of Cook County, but lost by a large margin to three Republicans and one of his fellow Democrats.<sup>16</sup>

Although Showalter's nomination to the court of appeals was a political surprise, he was highly respected by fellow attorneys and faced no organized opposition once Cleveland selected him. The Senate quickly consented

13 *Id.*

14 ROLL OF ATTORNEYS, U.S. Court of Appeals for the Seventh Circuit, Oct. 5, 1891; 31 Chicago Legal News, 212 (Feb. 11, 1899).

15 Stone v. Clay, 61 F.889 (7th Cir. 1894).

16 Judicial Biography Worksheet, Bicentennial Project at the U.S. Judicial Conference (prepared by K. Hall) (unpublished); 31 Chicago Legal News, 143 (Dec. 17, 1898); 26 Chicago Legal News, 51 (Oct. 14, 1893); 26 Chicago Legal News, 87 (Nov. 11, 1893).

(March 1, 1895), and the new judge took the oath and his seat on the bench on March 30, 1895.

Judge Showalter served only three years on the court. According to the newspaper accounts at the time, he caught a severe cold from the drafts in the courtroom in the Monadnock Building. Judges Woods and Jenkins became ill at the same time and left Chicago to recuperate at their homes. Judge Showalter, however, continued to call his docket until his friends finally prevailed upon him to call a recess on November 22, 1898. The cold worsened, developed into pneumonia, and the judge died at his home within a matter of weeks (December 10, 1898).<sup>17</sup> A large number of lawyers representing the Chicago Bar Association, the Patent Law Association, the Chicago Law Institute, and all the federal judges in the Seventh Circuit attended the judge's funeral. An Episcopal clergyman conducted the service, which was held at the home of the judge and his law partner, John M. Oliver. A funeral train carried the body to Georgetown, Kentucky, where it was interred in the family plot.<sup>18</sup>

Almost immediately after Judge Showalter's death, newspapers began to speculate on his successor. Peter S. Grosscup, district judge of the Northern District of Illinois, seemed the most likely choice. Not only did he enjoy an excellent reputation among the bench and bar of the Seventh Circuit, but he was a political associate and campaign manager for President William McKinley when they both were young congressional aspirants in Ohio.<sup>19</sup> The Chicago Bar Association strongly endorsed Grosscup. On December 14 the president of the association notified the judge that the board of managers had unanimously endorsed his elevation to the court of appeals and urged him to allow the board to put the resolution before a meeting of the association. The judge refused openly to encourage President Towle, but made no attempt to halt the presentation of the resolution. He did take the opportunity to state publicly that he would remain neutral in the selection of a new district judge if he should be nominated for the court of appeals. This promise was prompted by what was developing as a bitter contest between aspirants to the district court—a fight which, if he were to become involved, could only alienate some of Grosscup's then solid support.<sup>20</sup>

President McKinley formally nominated Peter S. Grosscup on January 18, 1899. Senate confirmation never was in doubt, but several representatives of labor, populist, and antiexpansionist groups talked of attempting to block it. Labor remained enraged at Grosscup for his role in the *Debs* case, and antiexpansionists objected to his views on the recent acquisition of territory following the Spanish-American War.<sup>21</sup> Grosscup made a token gesture at mollifying his opposition. He argued that his views on United States ownership of

17 Chicago Tribune, December 11, 1898, at 3.

18 31 Chicago Legal News, 143 (Dec. 17, 1898).

19 25 Chicago Legal News, 137 (Dec. 17, 1892).

20 31 Chicago Legal News, 137 (Dec. 17, 1898); Chicago Tribune, Dec. 15, 1898, at 7.

21 For discussion of the *Debs* case see text at n.42 ff.; Chicago Tribune, Jan. 18, 1899, at 3.

foreign land were irrelevant to the issue of his confirmation. "A man's political views ought not to be confused with his judicial acts when they are entirely separate as in this case."<sup>22</sup> He countered labor charges by reminding people that Judge Woods, not he, had sentenced Debs, and that the trial in his (Grosscup's) court had resulted in a mistrial. While neither of these arguments convinced any of his opponents, the simple truth was that Grosscup and the press knew the opposition did not have nearly enough votes in the Senate to block the nomination. Senate confirmation came on January 23, 1899, and Judge Grosscup took his oath of office on January 31. One week later, at the memorial service for Judge Showalter, he first sat as circuit judge.<sup>23</sup>

Peter S. Grosscup was in many ways the most complex and fascinating personality to serve on the Seventh Circuit during its first decades. He was an ardent and articulate advocate for many causes. After beginning his judicial career, he involved himself in public affairs to a greater degree than any of the other early Seventh Circuit judges. Controversy surrounded his entire life on the bench; yet his biography is not unlike those of the other judges so far examined.

Grosscup was a member of a distinguished pre-Revolutionary War American family.<sup>24</sup> His father's ancestors were Dutch who settled in Pennsylvania. His great-grandfather was a colonial official who served in both Pennsylvania's judiciary and legislature before the Revolutionary War and who helped write the Pennsylvania state constitution of 1792. Judge Grosscup's middle name, Stenger, was a family name; the Stenger family included United States representatives and prominent Philadelphia lawyers. Both his father's and mother's family moved west to Ohio in the first quarter of the nineteenth century, where Peter S. Grosscup was born on February 15, 1852.

Grosscup attended public schools in Ashland, Ohio, and then studied at Wittenberg College, where he excelled. He graduated as valedictorian of his class, receiving his B.A. in 1872. After reading law in Boston for two years in the office of a state judge, he returned to his hometown, where he formed a partnership with an older practitioner who was later appointed to the bench. Grosscup soon became a well-known and successful trial lawyer. He also devoted much time and energy to politics, quickly becoming in demand as a stump speaker at political rallies.

He ventured into electoral politics for the first time in 1876, although not yet twenty-five years old, when he ran for United States representative on a Republican ticket that lost badly in a heavily Democratic district. Two years later he considered making a second try, but a gerrymander by the Democratic Ohio legislature put Grosscup in the same district as William McKinley. In-

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

<sup>23</sup> 31 Chicago Legal News, 187 (Jan. 14, 1899); COURT JOURNAL, Feb. 6, 1899; 31 Chicago Legal News, 212 (Feb. 11, 1899).

<sup>24</sup> A biographical sketch of Peter Grosscup appears at 25 Chicago Legal News, 137 (Dec. 17, 1892).

stead of challenging him, Grosscup nominated McKinley and helped run his campaign. Despite the district's Democratic majority, the voters elected McKinley, and it was at this time that the two men became close friends.<sup>25</sup> A subsequent Republican gerrymander cleared the way for Grosscup's second try at a seat in Congress, but his Democratic opponent staged an upset, and Grosscup decided to end his quest for elective office.

After returning to his law practice in Ashland, the young lawyer decided to move to a more lucrative practice in Chicago. He joined the firm of Swett, Haskell & Grosscup. Although the firm underwent three partnership changes during the nine years he practiced with it, the nature of Grosscup's work remained the same. He specialized in probate work, and in addition to this practice conducted many civil jury trials and several important criminal trials in the state courts.<sup>26</sup>

The future judge was equally familiar with federal practice. Upon his appointment to the bench, a close friend remarked that Grosscup had handled more business in federal than in state courts and had argued more cases in the United States Supreme Court than any other lawyer his age in Chicago. By the age of forty Peter Grosscup had established himself as one of the bright, young attorneys in Chicago.<sup>27</sup>

Along with a growing reputation among Chicago lawyers as a litigator, Grosscup began to receive large fees. His partner estimated that at the time of his appointment Grosscup earned over \$20,000 per year.<sup>28</sup> His wealth stemmed not only from his lucrative law practice. In December 1885, he married Virginia Taylor, the daughter of a wealthy northern Ohio flour manufacturer. He greatly added to this family fortune through his management and investment of his wife's inheritance.<sup>29</sup> Although their wealth put them among the upper class of Chicago, the Grosscups did not participate in that social world in the 1880s and 1890s. According to an old friend, the judge's family preferred the comfort of their Highland Park home to attending parties in Chicago.<sup>30</sup> The judge did belong to several private clubs and served as president of several civic organizations, including the Crerar Library and the Illinois Soldiers and Sailors Club.<sup>31</sup>

Peter Grosscup's judicial career began on December 12, 1892, when he took his oath as judge of the District Court of the Northern District of Illinois. He succeeded Judge Henry Blodgett, who resigned to become counsel

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* Grosscup was a member of the following firms in Chicago: Osborn & Grosscup; Swett, Haskell & Grosscup; Swett, Grosscup & Swett; Swett, Grosscup & Wean; Grosscup & Wean.

<sup>27</sup> Chicago Tribune, Dec. 13, 1892, at 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; 25 Chicago Legal News, 137 (Dec. 17, 1892).

<sup>30</sup> Chicago Tribune, Dec. 13, 1892, at 3.

<sup>31</sup> *Id.*; Chicago Tribune, Jan. 18, 1899, at 3. Judge Grosscup served as Dean of Northwestern Law School from 1898 to 1901. <sup>34</sup> Chicago Legal News, 51 (Oct. 5, 1901); J. RAHL and K. SCHWERIN, NORTHWESTERN SCHOOL OF LAW: A SHORT HISTORY, 85 (1960).

for the United States in the Bering Sea arbitration. Senator Cullom of Illinois favored Grosscup's nomination, and the Democratic senator, John M. Palmer, did not object. Two other midwesterners, Attorney General W. H. Miller and Solicitor General Charles Aldrich, vigorously supported the nomination. Although other Illinois political powers put forth their own candidates, Peter Grosscup was everyone's second choice. This fact, plus Palmer's tacit approval, proved necessary to carry the nomination. In three months the Democrats would take over the White House, and some Democratic senators were attempting to create a filibuster over Grosscup's nomination, thus leaving the judgeship for the new President, Grover Cleveland, to fill. Senator Cullom argued that a four-month vacancy on the district court in Chicago would create an irremediable case backlog. This argument carried less weight with the senators than did word from their fellow Democrats, Senator Palmer and Illinois congressmen that Grosscup's appointment should not be blocked. The opposition having dissolved, the Judiciary Committee and the Senate confirmed Judge Grosscup within a week.<sup>32</sup>

What separated Peter Grosscup from the other judges so far examined was not his social origins or professional career, but rather the degree to which he spoke out on public affairs while on the bench and the controversial events that surrounded his tenure as judge.

The judge's outspokenness can be measured partly by the volume of addresses he made during his twenty years on the federal bench. He was highly sought after as a toastmaster as well as a graduation and after-dinner speaker. But unlike Judge Woods, who avoided commenting on current or controversial events, Judge Grosscup never hesitated. For example, in the midst of the Pullman strike he delivered a speech whose very title "Labor and Property" demonstrates this point.<sup>33</sup> Similarly, in August 1898, immediately following the Spanish-American War, President McKinley faced the difficult question of annexation of the Philippines. Judge Grosscup delivered the keynote speech at the Civic Federation's National Conference in Saratoga, New York, in which he declared that the acquisition of the newly conquered territories was an absolute necessity to secure naval ports for the protection of the United States' rapidly expanding foreign commerce with Japan and China. The favorable reaction to the speech resulted in the judge's being placed on a committee to make foreign policy recommendations to the president.<sup>34</sup>

Judge Grosscup's speech "Labor and Property" is interesting, not only because of its timing, but also for its economic views. Indeed, several historians

32 Chicago Tribune, Dec. 13, 1892, at 3; Chicago Tribune, Dec. 20, 1892, at 4.

33 The speech was reprinted in 26 Chicago Legal News, 367 (July 14, 1894). The Legal News between 1895 and 1910 reprinted numerous speeches by Judge Grosscup given to social clubs, bar groups, or law school graduating classes. The editor commented: "Judge Grosscup's remarks are always full of new points and suggestions." 35 Chicago Legal News, 217 (Feb. 14, 1903).

34 31 Chicago Legal News, 1 (Aug. 27, 1898).

have used the speech to portray the judge as belonging to the group of late-nineteenth-century jurists who were staunch defenders of laissez faire capitalism and corporations.<sup>35</sup> While it is beyond dispute that the judge was a steadfast champion of private property and capitalism, he cannot be characterized as a devoted corporation defender. He argued in "Labor and Property" that the threat to American society came from both "big labor" and "the trusts." Longing for a return to economic individualism, he sanctioned trade unions but believed the large industrial unions, such as Debs' American Railway Union, were dangerous. He worried, however, that trusts and monopolies posed an even greater menace. He continued to develop this theme, first articulated in the 1890s, in countless speeches over the next twenty years.<sup>36</sup> He advocated federal regulation of trusts as the only effective solution. Therefore, far from using his position on the bench to block all efforts at federal corporate reform, he acted and spoke out in favor of it. On May 21, 1902, he issued an injunction *against* the Packers' Trust, restraining the companies from operating in violation of the Sherman Act.<sup>37</sup> His views on trust regulation were so well known that in 1908 at a Chicago Lawyers' Association dinner, James Hamilton Lewis, a future United States senator, denounced Grosscup as one of the judges who were helping the federal government usurp state power to regulate corporations.<sup>38</sup> Grosscup's support of federal reform led him to defend the policies of President Theodore Roosevelt. He consistently backed Roosevelt in all of his campaigns, most notably Roosevelt's 1912 third-party bid for the presidency on the Bull Moose ticket.<sup>39</sup> Grosscup had just resigned from the bench at this time—in large part, he said, to carry the Roosevelt message to the people. Historians have overlooked the reformist strain in Judge Grosscup's ideology, which is understandable since the most notable controversies during his judicial tenure found him aligned against labor and municipal ownership of public utilities, or ruling in favor of Standard Oil.<sup>40</sup>

By far the most famous incident in which Grosscup played a key role was the Pullman strike. Rather than giving a comprehensive history of the strike, we shall focus on the actions of the federal judges, Grosscup and Woods.<sup>41</sup>

President Eugene Debs and the members of the American Railway Union had decided in June 1894, to refuse to handle trains with Pullman cars. The

35 G. EGGERT, *RAILROAD LABOR DISPUTES*, 167 (1967); *see also* A. NEVINS, *GROVER CLEVELAND: A STUDY IN COURAGE* (1933); R. GINGER, *THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS* (1949); A. LINDSEY, *THE PULLMAN STRIKE* (1942); A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, ch. VII (1960).

36 *Chicago Tribune*, Oct. 2, 1921, at 1; *Chicago Tribune*, Jan. 23, 1908, at 5.

37 E. L. MASTERS, *LEVY MAYER AND THE NEW INDUSTRIAL ERA*, 98 (1927).

38 *Chicago Tribune*, Jan. 23, 1908, at 5.

39 *Chicago Tribune*, Oct. 2, 1921, at 1.

40 *See* chapter IV at notes 10-21.

41 For a comprehensive history of the Pullman strike, *see* EGGERT, *supra*; NEVINS, *supra*, and GINGER, *supra*; LINDSEY, *supra*.

purpose of this was to exert pressure on George Pullman to reverse recent wage cuts. The boycott embroiled Debs and his men in a job action against the General Managers Association (GMA), a combination of the leading railroads in the country. The GMA decided to support Pullman and attempt to break the power of the growing American Railway Union. As tension mounted, Attorney General Richard Olney decided to use the power of the federal government to assist the GMA. The chief weapon the federal government wanted to employ to break the strike was an injunction ordering Debs and his supporters to refrain from interfering with interstate commerce or the shipment of mail. On July 2 Olney sent his special prosecutor, Edwin Walker, to meet with District Judge Grosscup and Circuit Judge William Woods, who were sitting in the Circuit Court for the Northern District of Illinois, to discuss the situation. The judges adopted the injunction as written by the government.<sup>42</sup> The United States asserted, and the judges agreed, that the right of the United States to seek an injunction arose from its power under the Sherman Antitrust Act to destroy conspiracies in restraint of trade. Judge Woods believed the government pursued the proper course. Grosscup, on the other hand, privately expressed doubt. He wrote his friend and former colleague, Secretary of State Gresham, "I am not prepossessed in favor of this injunction method of repressing violence . . . . It is altogether wrong to call judges into the midst of such turmoil and compel them, apparently, to take sides."<sup>43</sup> But Grosscup disliked and feared violence even more; he therefore went along with the sweeping injunction and signed the telegram to President Cleveland requesting troops when Debs and the union refused to obey the injunction. The appearance of the army signalled the beginning of the end. By July 13 the trains were back on schedule, and on July 17 Debs was arrested.<sup>44</sup>

Immediately following the army's entry into Chicago, Judge Grosscup convened a grand jury in the District Court of the Northern District of Illinois and instructed the jurors to consider whether indictments should be brought against Debs and other union officials for criminal conspiracy to interfere with the transportation of mail. In his charge the judge again demonstrated his hostility to violence and anarchy, not to reform.

You doubtless feel as I do, that the opportunities of life, in the present conditions, are not perhaps entirely equal, and that changes are needed to forestall some of the tendencies of current industrial life; but neither the torch of the incendiary nor the weapon of the insurrectionist . . . is the instrument to bring about reforms . . . . Men who appear as the advocates of great changes must first submit them to discussion . . . and must be patient as well as persevering until the public intelligence has been reached and the public judgment made up. An appeal to force before that hour is crime . . . . The law as it is must first be vindicated before we

42 EGGERT, *supra* at 168-69.

43 *Id.* at 169-70.

44 *Id.* at 172-75.

turn aside to inquire how the law or practice as it ought to be can be effectively brought about. Government of law is in peril and that issue is paramount.<sup>45</sup>

The judge's instructions also reveal that those unwilling to pursue gradual reform would receive no sympathy in his court. The grand jury quickly returned indictments against Debs and others, but these never resulted in criminal convictions. The trial began in February 1895, but a mistrial occurred due to a juror's illness. The government declined to retry the defendants for fear the public might think the prosecution was persecuting Debs, thus making him a martyr.<sup>46</sup>

Judge Grosscup played no further part in the Pullman strike, since he had recused himself from the contempt proceedings in the circuit court. He stated at their outset (July 24) that since the evidence in the contempt hearing would be substantially the same as in the criminal charges pending in his district court, he wanted to avoid expressing any views before the later trial. It therefore fell to Judge Woods to hear whether Debs and eight others had knowingly and intentionally violated the terms of the injunction and thereby placed themselves in contempt. In his opinion Judge Woods justified on the basis of the Sherman Antitrust Act both the role of the United States in seeking the injunction and the propriety of issuing it.<sup>47</sup>

The timing of Woods' decision shows the degree to which the executive branch and the courts accommodated each other to ensure that there was no possibility of the Debs contempt proceedings triggering a sympathy strike or some other disorder. Judge Woods began the proceedings on July 24, but had to travel to Indianapolis two days later, so hearings were suspended until September 28. The special prosecutor, Walker, was in favor of this delay because he believed the American Railway Union would be in total disarray by then and powerless to call a general strike. Judge Woods waited until December 14, 1894, to hand down his decision, using the ten weeks to write a lengthy opinion, replete with supporting citations, which he expected to be the most important decision of his judicial career.<sup>48</sup> In August, 1894, Debs filed an appeal in the Seventh Circuit, but the matter was continued until a month after the Woods opinion, when the record could be filed. Both Debs and the government wanted to have the Supreme Court hear the case immediately, so they decided to bypass the Seventh Circuit. A writ of error and a writ of habeas corpus were brought before the Supreme Court. The Court dismissed

45 Judge Grosscup's charge to the grand jury is printed in 26 Chicago Legal News, 368-69 (July 14, 1894).

46 EGGERT, *supra* at 200-01. See K. TIERNEY, *DARROW: A BIOGRAPHY* (1979), Chapter 9 103-16. Tierney argues that the government failed to retry Debs following the mistrial because it was feared by the prosecutor, Judge Grosscup, and the members of the GMA that if the trial continued Clarence Darrow would embarrass George Pullman in his examination of Pullman before the jury. Tierney claims that the judge wanted to see Pullman avoid this embarrassment.

47 *In re Debs*, 64 F.724 (7th Cir. 1894); TIERNEY, *supra* at 111-15.

48 EGGERT, *supra* at 192-97.

the former because the circuit court order holding the defendants in contempt was not a final order, but it heard argument on the latter on March 25 and 26, 1895. On May 27, 1895, Justice Brewer delivered the opinion of a unanimous Supreme Court, denying the habeas writ. While the Court did not disagree with Judge Woods' reading of the Sherman Act nor his use of it to sustain the injunction and the government's role, it upheld the decision on the "broader" ground that the Constitution vested the regulation of interstate commerce in the federal government and it might use whatever means necessary to remove public nuisances that obstruct or threaten to destroy that commerce.<sup>49</sup> Woods wrote several years later that he found himself in total agreement with the Brewer opinion and, as his opinion stated, he would have decided the case on the same grounds but for the existence of the statute. Not all critics were as kind as Judge Woods. Most contemporaries applauded the result, but deplored the perceived expansion of the role of the federal government in the affairs of the state.<sup>50</sup>

Next to the *Debs* case, Judge Grosscup aroused the greatest public uproar for his rulings in the *Union Traction Line* case. In fact, this controversy cost him the possibility of a Supreme Court appointment. For in 1903 his support of President Roosevelt's economic policies had led to much speculation that the president would nominate him for a vacancy on the court. Roosevelt's correspondence reveals that Grosscup did not receive serious consideration because of the furor caused by his actions in the case.<sup>51</sup> The controversy was quite complicated and was intertwined with Chicago mayoral politics, but the basic issue was whether the city would be allowed to take over ownership and operation of one of the trolley lines in Chicago. In 1859 the Union Traction Company had received a ninety-nine-year corporation charter from the state of Illinois to operate trolley service on the north and west sides of Chicago. The city had granted the company a twenty-five-year franchise in 1883. As the expiration date neared, the company applied to the Circuit Court of the Northern District of Illinois for the appointment of a receiver. Judge Grosscup complied, and the receivers immediately asked that the city be enjoined from taking over control and operation of the lines. The judge granted the injunction, despite the protests of the mayor and mayor-elect, who had made municipal ownership of the traction lines key objectives of their administrations. Many politicians denounced Grosscup as a tool of the companies

49 In re *Debs*, 158 U.S. 564 (1895).

50 W. A. Woods, *Injunction in the Federal Courts*, 6 YALE L.J. 245-51 (1897); for the reactions of contemporaries, see the articles cited in 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY*, 700-02 (1928); for a more contemporary condemnation, see O. FISS, *INJUNCTIONS*, 596 (1972); see also F. FRANKFURTER and N. GREENE, *THE LABOR INJUNCTION*, 17-20 (1930).

51 Letter from Theodore Roosevelt to Charles J. Bonaparte, June 6, 1908, in *LETTERS OF THEODORE ROOSEVELT*, 1059 (No. 4744) (E. MORISON, ed.) (1952); *Chicago Tribune*, Oct. 2, 1921, at 1.

and celebrated the reversal of his injunction by the Supreme Court three years later.<sup>52</sup>

Whatever defense the judge had against the attacks by the municipal leaders was undermined by the even greater controversy he caused when he selected a receiver for the bankrupt company. The judge appointed the clerk of his court, Marshall E. Sampsell, as receiver. After graduation from law school, Sampsell had served as secretary and law clerk to Grosscup. A close father-son relationship developed between them, and when the position of clerk of the circuit court became vacant, Grosscup named Sampsell. Sampsell served as clerk and receiver for five years, despite intensive public outrage over the blatant patronage. The furor did not die down even after Sampsell resigned as clerk. During this period newspapers and politicians leveled charges of fraudulent payment of receivership funds at both Sampsell and the judge. The end of the controversy added fuel to the fire, as Sampsell, who had by then become a wealthy man, resigned the receivership to take a job as an executive with one of the utility companies owned by Samuel Insull, who also owned one of the traction lines. The judge remained silent in the face of the charges of impropriety and never offered any defense of his actions in the matter.<sup>53</sup>

As the receivership controversy began to die down, Judge Grosscup again was thrust into the center of a storm. In August, 1907, a car of the Mattoon City Railway, crowded with passengers on their way to a county fair, collided with a freight train. Fifteen citizens were killed and many others injured. The railway filed bankruptcy papers. Critics charged it did so to avoid the more than \$200,000 worth of damage suits that had been filed. The citizens of Charleston, Illinois, where the accident took place, were enraged by these deaths and the apparent irresponsibility of the railroad. (There had been two previous accidents involving serious injuries during the past months.) A politically ambitious prosecutor decided to capitalize on the town's hatred of the railroad's Chicago owners by seeking their indictments on charges of criminal negligence. The president and principal owner of the railroad was Judge Peter S. Grosscup, who had bought the railroad before he took the bench and who continued to serve as president. Another officer and director was Marshall B. Sampsell.

After the original indictments were quashed because of technical defects, the grand jury returned a second indictment in January 1908. Grosscup, Sampsell, and five other directors began trial in the Coles County (Illinois) Circuit Court on February 26, 1908. A large number of spectators cheered

52 C. HARRISON, *STORMY YEARS: THE AUTOBIOGRAPHY OF CARTER H. HARRISON, FIVE TIMES MAYOR OF CHICAGO*, 240-57 (1935); *City of Chicago v. Chicago City Ry. Co.*, 205 U.S. 449 (1907).

53 An article detailing the facts of the Sampsell-Grosscup friendship and tracing Sampsell's career both before and after his term as receiver of the traction line can be found in the *Chicago Tribune*, Sept. 14, 1932, at 2; see also 34 *Chicago Legal News*, 269 (April 12, 1902).

the prosecutor as he opened his case. Judge Grosscup hired as his defense attorney Levy Mayer, probably the finest trial attorney in Chicago at the time. For three days opposing counsel argued the defense motion to quash. Mayer maintained that there could be no criminal liability against the directors unless they were actually present and in control of the train. On the third day the judge quashed the indictments, freed the defendants, and in an oral opinion agreed completely with Mayer's position.<sup>54</sup>

Although it was noted that Grosscup was the first sitting federal judge to be indicted, the parties failed to address the important question of whether he must be impeached before he could be indicted. Following the trial Judge Grosscup wrote to Mayer:

That prosecution was the sorest thing that has ever befallen me, it touched me where I was the most sensitive. And it dragged in—exultingly it seemed to me—the great trust I hold. I have always felt toward my Judgeship as a bridegroom feels toward the bride—a jealousy almost passionate of its good name.

This letter serves to emphasize the complexity of this man who valued his office and held the respect of many of the bench and bar of Chicago, yet whose conduct, both to enhance his own fortunes and the fortunes of his closest associates, placed this respect in jeopardy.<sup>55</sup>

Two months prior to Judge Showalter's death and the appointment of Judge Grosscup, another personnel change occurred at the Seventh Circuit. Oliver T. Morton, clerk of the court since its opening, died on October 12, 1898. Judges Woods and Showalter appointed in his place Edward M. Holloway, one of the first assistant clerks Morton hired. Holloway, like Morton, was a Hoosier with a strong family connection to the Republican party of his state. His grandfather held a seat in Congress for many years and also served as United States commissioner of patents. His father had served as ambassador to Russia. Holloway was only thirty-seven years old at the time of his appointment and remained in his office until his death thirty-three years later. He enjoyed a close working relationship with both the bench and bar, which resulted in the *Chicago Legal News* calling him "one of our most efficient and gentlemanly officers."<sup>56</sup>

When Judge Grosscup took the bench, the Seventh Circuit consisted of Presiding Judge William A. Woods, Judge Jenkins and Judge Grosscup. This changed when Judge Woods suddenly died in his apartment in Indianapolis

54 E. L. MASTERS, *LEVY MAYER AND THE NEW INDUSTRIAL ERA*, 88-90 (1927); *Chicago Tribune*, Feb. 26, 1908, at 2; *id.*, Feb. 27, 1908, at 3; *id.*, Feb. 28, 1908, at 3; *id.*, Feb. 29, 1908, at 2.

55 The February 29 article in the *Chicago Tribune* was headlined, *Only Federal Jurist Ever Under Indictment Freed*; MASTERS, *supra* at 89-90. The complexity is even greater when it is realized that Grosscup for years taught the legal ethics course at Northwestern University Law School. 34 *Chicago Legal News*, 51 (Oct. 5, 1901).

56 31 *Chicago Legal News*, 79 (Oct. 29, 1898); 32 *Chicago Legal News*, 139 (Dec. 16, 1899).

on June 29, 1901. Judge Woods had been presiding judge of the court for eight years, becoming the senior judge when Judge Gresham resigned to become secretary of state, and his death left Jenkins as presiding judge.<sup>57</sup>

The search for a successor to Judge Woods was delayed by the assassination of President William McKinley on September 6, 1901. The new president, Theodore Roosevelt, used the appointment to help establish his control of the Republican party. At that time the Republican party in Indiana was split into two factions. Former President Harrison and Senator Charles W. Fairbanks controlled the wing of the party that had close ties to Senator Mark Hanna and President McKinley. In 1898 Albert J. Beveridge forged an alliance of insurgent young Republicans and won election to the United States Senate. John H. Baker, a leader of the Republican party in northern Indiana and judge of the United States District Court for Indiana, played a key role in Beveridge's victory. Judge Baker, who had admired the young lawyer since Beveridge had outargued former President Harrison in a jury trial in his first federal court case wrote letters to his friends and allies to assure them of Beveridge's maturity, experience, intelligence, and ability. The senator later wrote that:

[W]hen my race for the Senate seemed hopeless, Judge John H. Baker and his son [Francis] . . . voluntarily came to my aid with their great influence. He wrote letters for me all over the State—two hundred of them. He adjourned court and personally saw members of the Legislature in my behalf. His son threw several northern members to me without reward or hope of it.<sup>58</sup>

The "reward," however, came in 1901 when Theodore Roosevelt nominated Judge Baker's son, Francis E. Baker, to fill the vacancy on the United States Court of Appeals for the Seventh Circuit. Roosevelt selected Baker over the favorite candidate of Senator Fairbanks. A bitter fight had been waged by both senators in support of their nominees. Beveridge sought to repay his loyal friend, John Baker, for the years of advice and support he had given him. Beveridge knew that "the father's dearest wish [was] to see his son upon the bench."<sup>59</sup> In addition, the senator sought to exert his influence with the new president and to enhance his political prestige in Indiana.<sup>60</sup>

The Fairbanks organization, which included the entire Indiana congressional delegation, refused to endorse Baker because they feared their Indiana supporters would interpret it as a sign of political weakness. They employed several tactics in seeking to influence Roosevelt. First, they tried to arouse

57 33 Chicago Legal News, 389 (July 6, 1901); Chicago Tribune, June 29, 1901, at 1.

58 C. G. BOWERS, BEVERIDGE AND THE PROGRESSIVE ERA, 86 (1932). The Bowers book details the split in the Indiana Republican party and the intense rivalry between the factions. The development of the close relationship between Beveridge and John Baker is found *id.* at 36, 43. For a view of politics during the Roosevelt presidency, see G. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912 (1958); J. BLUM, THE REPUBLICAN ROOSEVELT (1954).

59 BOWERS, *supra* at 175.

60 *Id.*, at 175-76.

labor opposition to Baker by circulating an antilabor opinion written by the elder Baker. This failed because labor was not strong enough to pose a serious threat. Secondly, rumors were spread that Baker opposed Roosevelt's foreign policy. Beveridge and his allies countered this by bombarding the White House with pro-Baker letters from powerful business and political leaders who were sympathetic to Roosevelt.<sup>61</sup>

After almost two months of fighting, Roosevelt settled the matter by sending Francis E. Baker's name to the Senate on December 11, 1901. When the Fairbanks forces objected, Roosevelt issued a statement, the tone of which was set in the first sentence: "Places on the bench, like places in the army, are not political."<sup>62</sup> He then lauded Judge Baker as the most qualified candidate in Indiana. Fairbanks, joined by Senator Mark Hanna, the "boss" of the regular Republican party, swiftly undercut the validity of the first half of Roosevelt's statement. They argued, quite persuasively, that Baker's nomination was an attempt by Roosevelt to cripple the Fairbanks wing of the Indiana Republican party and to establish Beveridge as leader of the state's Republicans. At the same time the nomination served to further Roosevelt's goal of establishing himself as leader of the national Republican party by wresting control away from the Hanna-McKinley organization.<sup>63</sup> The nomination faced a tough fight, but the Senate confirmed Judge Baker on January 21, 1902, and he took his oath of office on February 4.

Despite the bitter contest over the appointment, no one took issue with President Roosevelt's contention that Baker was extremely well qualified to be a federal judge. As is apparent from the preceding paragraphs, Francis Elisha Baker grew up in an intensely political household. His father, John H. Baker, originally from New York, moved with his family to Ohio, where he attended Ohio Wesleyan University.<sup>64</sup> After reading law for two years, John Baker moved to Indiana in 1857 and began the practice of law. He entered politics five years later, first serving as a member of the Indiana Senate. He ran successfully for three terms in the United States Congress (1875-1881), after which he voluntarily left Congress to resume his private law practice. Upon the elevation of Judge Woods to the Seventh Circuit, President Harrison appointed John Baker to the United States District Court for Indiana in 1892. The elder Baker remained on the bench until 1904. That may have been the only time a father and son have both been active members of the federal bench at the same time.

61 *Id.*; Chicago Tribune, Dec. 12, 1901, at 1. The controversy between the two senators became more heated when a personal letter from Beveridge to a friend's wife was disclosed to Fairbanks. In the letter Beveridge gloated over his apparent victory over Fairbanks in securing Baker's nomination.

62 34 Chicago Legal News, 133 (Dec. 14, 1901).

63 Chicago Tribune, Dec. 12, 1901, at 1.

64 The biographical details of Judge John H. Baker are taken from BIOGRAPHICAL DIRECTORY OF THE AMERICAN CONGRESS, 1774-1949, 806 (J. HARRISON, compiler) (1950); C. TAYLOR, THE BENCH AND BAR OF INDIANA, 177-81 (1895).

Francis Baker was born in Goshen, Indiana, on October 20, 1860.<sup>65</sup> He spent much of his early childhood with his father in Washington, but attended public and private schools in Goshen. At sixteen he enrolled in Indiana University, later transferring to the University of Michigan in 1879; there he majored in English and received his B.A. degree in 1882. He had a distinguished career: he edited the student newspaper for three years, received a Phi Beta Kappa key, graduated first in his class, and was selected class poet, reading his own poem at graduation exercises.

Following graduation, Baker returned to Goshen and read law at Baker & Mitchell, the firm of his father and uncle. He was admitted to the Indiana bar in 1885 and continued to work in the same firm. His entire professional career was spent in law offices with Republican political leaders. His uncle was elected a justice of the Indiana Supreme Court in 1885, and the firm became Baker & Baker. Upon his father's appointment to the United States District Court, Baker opened an office with Charles W. Miller, future Indiana attorney general and United States attorney.

Francis Baker established a reputation as an excellent trial lawyer. He often served as trial counsel for attorneys who had prepared their cases but wanted to call on his expertise. His clients included several railroads and many other major corporate interests located in northern Indiana.<sup>66</sup> In 1898 Judge Baker ran successfully for a seat on the Indiana Supreme Court, where he served as justice for four years before he received his appointment to the Seventh Circuit.

So completely did the Baker family involve themselves in Republican politics that, even after their judicial service began, they continued active participation in campaigns. The vital role the elder Baker played in securing the senatorial nomination for Albert Beveridge has already been described. Francis E. Baker served in a similar capacity in the election of 1902, several months after his oath of office. The story emerged in 1905 and proved to be a great embarrassment to the judge.<sup>67</sup> In that year a postal employee in Goshen, Indiana, filed charges before the United States Civil Service Commission alleging that he had been forced to make campaign contributions to the state Republican party in 1902. The commission investigated the matter and issued findings in October 1905. Their report detailed a story, corroborated by several witnesses, in which employees were told by the assistant postmaster to pay a visit to Judge Francis Baker. The judge explained to the employees that it was in the workers' best interests to ensure that Republicans were kept in office, as Democrats would probably fire them. The judge

65 Biographical information on Judge Francis E. Baker may be found in 34 Chicago Legal News, 141 (Dec. 21, 1901); *see also* the Presentation of Portrait and Resolutions in Respect to the Memory of the Honorable Francis E. Baker, U.S. Court of Appeals for the Seventh Circuit, June 10, 1924.

66 34 Chicago Legal News, 141 (Dec. 21, 1901); Presentation of Portrait, *supra* at 9.

67 Chicago Tribune, Oct. 12, 1905, at 1; *id.*, Oct. 13, 1905, at 5; *id.*, Oct. 15, 1905, at 5; Chicago Record - Herald, Oct. 13, 1905, at 2; *id.*, Oct. 16, 1905, at 6; *id.*, Nov. 14, 1905, at 8.

then told the employees that he gave liberally to the party (about 5 percent of his salary) and that they should do the same. One worker said he could not afford that amount, and the judge is reported as replying, "You can afford to do without a suit of clothes and make the payment."<sup>68</sup> Another clerk received a fifty dollar advance on his pay to make the contribution. The Civil Service Commission reported that Judge Baker's testimony admitted that the workers' accounts were accurate.<sup>69</sup> The commission stated that it could not take any action against the judge, but believed that since postal supervisors were being dismissed, the charges should be made public and the matter turned over to the Department of Justice for further action.<sup>70</sup>

Justice Department officials' reaction was that there appeared to be nothing they could do. Both legal and political barriers blocked them. First and foremost, the department contended that no sitting judge could be indicted without first being removed from office by impeachment. Second, even if it were possible to indict without impeachment, it seemed clear that the statute of limitations for the offenses had run out. The department further argued that impeachment was politically infeasible, as it believed Congress would neither vote a bill nor convict on these charges alone. The Justice Department did conduct an investigation that supported the findings of the commission and reaffirmed the department's own view of the impossibility of indictment or impeachment.<sup>71</sup> As one newspaper concluded, "The only punishment is exposure and loss of reputation and Judge Baker is already suffering this."<sup>72</sup> Another paper editorialized, "He will be known hereafter as the statute of limitations judge."<sup>73</sup> This, however, proved not to be the case. Although several years later President Roosevelt indicated that he felt Judge Baker had become embittered against his administration and its handling of the charges against him, Roosevelt did not regret his appointment. He stated that as regards Baker and the eleven other judges he had appointed, "there is nothing save the heartiest commendation to be bestowed upon what I have done."<sup>74</sup> Judge Baker served in an exemplary manner for almost twenty years after this episode.

In fact, Judge Baker performed his duties so well that in 1922 he received serious consideration for a vacancy on the United States Supreme Court. While Pierce Butler obtained the seat on the Court, Baker was one of three finalists.<sup>75</sup> The 1905 incident had apparently been totally forgotten, as no

68 Chicago Tribune, Oct. 12, 1905, at 1; Chicago Record-Herald, Oct. 13, 1905, at 2.

69 Chicago Tribune, Oct. 12, 1905, at 1.

70 *Id.*

71 *Id.*; Chicago Record-Herald, Nov. 14, 1905, at 8.

72 Chicago Tribune, Oct. 15, 1905, at 5.

73 Chicago Record-Herald, Nov. 14, 1905, at 8.

74 Letter from Theodore Roosevelt to Mark Sullivan, May 13, 1907 (No. 4320) in LETTERS OF THEODORE ROOSEVELT, *supra* at 665-66 (No. 4320).

75 D. DANIELSKI, A SUPREME COURT JUSTICE IS APPOINTED, 64-69, 73 (1964). The Danielski book details the selection process used to choose Justice Butler.

mention of it occurred during the judge's consideration for the Supreme Court.<sup>76</sup>

In addition to the Baker affair, the Seventh Circuit experienced other turmoil in 1905. The addition of another circuit judgeship triggered one of the controversies. On March 3, 1905, President Roosevelt signed a bill that not only authorized an increase in the number of circuit judges from three to four, but also added a second district judge for the Northern District of Illinois.<sup>77</sup> The law also carved the state of Illinois into three districts, thereby creating a judgeship in the newly formed Eastern District of Illinois. This bill was the culmination of five years of work by the bench, bar, and elected officials of the three states in the circuit. These groups argued that the creation of a third circuit judgeship in 1895 had aided the effort to handle the large volume of work in the Northern District of Illinois, but that this benefit had been totally offset by the increased caseload created by the Bankruptcy Act of 1898. As early as 1900 the Illinois State Bar Association had petitioned Congress for an additional district judge. By 1903 the attorney general concurred in the recommendation of a district judge, but the Illinois and Indiana Senators would not approve the bill without the inclusion of the fourth Seventh Circuit judge. By 1905 all details were settled and the way cleared for the statute to pass.<sup>78</sup>

Most observers speculated that Judge Christian C. Kohlsaas of the United States District Court for the Northern District of Illinois would be elevated to fill the new circuit judgeship. A letter from the clerk of the Seventh Circuit to Presiding Circuit Judge James Jenkins reveals that this had been expected since 1903.<sup>79</sup> Kohlsaas's elevation, plus the new district judgeship, would give the two Illinois senators each a district court appointment. President Theodore Roosevelt seemed prepared to send Kohlsaas's name to the Senate when there appeared newspaper allegations charging the judge with judicial maladministration.<sup>80</sup> The charges merited serious attention when the former United States solicitor general and well-known Chicago attorney Charles Aldrich identified himself as the accuser. President Roosevelt, who was under pressure to send nominations to the Senate before Congressional recess, ordered an immediate Department of Justice investigation. The major charges were: (1) Judge Kohlsaas had violated a federal statute by appointing several relatives and clerks as receivers; (2) the judge employed his own son as his private secretary, contrary to federal law; and (3) to receive favorable rulings

76 An investigation of the Justice Department appointment files of Judge Baker in the National Archives revealed no mention of the 1905 scandal during the selection process.

77 Act of March 3, 1905, 33 Stat. 992.

78 32 Chicago Legal News, 386 (July 7, 1900); 33 Chicago Legal News, 239 (March 2, 1901); 34 Chicago Legal News, 255 (March 29, 1902); *id.* at 409 (Aug. 2, 1902); Chicago Tribune, Feb. 26, 1905, at 8; Chicago Tribune, March 1, 1905, at 6.

79 Letter from Edward Holloway to Judge James G. Jenkins, February 20, 1903 (Archives of the U.S. Court of Appeals for the Seventh Circuit).

80 Chicago Inter Ocean, March 13, 1905, at 3; Chicago Record-Herald, March 13, 1905, at 4.

in his court, it was necessary to employ the firm in which the judge's former partner practiced.<sup>81</sup> Two assistant attorney generals, after taking testimony and examining the evidence, concluded that "such mistakes and irregularities as had been discovered were excusable on the ground that they were honest blunders void of culpability."<sup>82</sup> The investigators found no evidence of undue influence by the judge's former law partner. While there existed a question of whether the receivership appointments violated the statute, the investigators accepted the judge's reasoning that they were made to promote efficiency and had at all times received the consent of the parties.<sup>83</sup> The judge explained that his son had been appointed so that he could gain legal experience after law school, and the judge had received permission from the attorney general to hire him.<sup>84</sup> In addition to the report from the investigation, Roosevelt received strong letters of endorsement of the judge from influential members of the Chicago legal community such as Levy Mayer and Judge Nathaniel Sears. Having been reassured of Kohlsaats fitness for the post of circuit judge, the president submitted his nomination to the Senate on March 18, 1905, and the Senate approved it on the same day without opposition.<sup>85</sup>

Judge Christian Kohlsaats appointment marked the second time his nomination had stirred a controversy. The center of the storm over his nomination to the district court bench, however, had not been the judge but his brother, Herman H. Kohlsaat, who at that time edited and published the *Chicago Times-Herald*. Herman Kohlsaat had been one of the earliest and most ardent backers of William McKinley for president. Although he exaggerated his own role and influence, it was indisputable that Herman Kohlsaat had provided key financial advice and support at a critical juncture in McKinley's quest for the Republican presidential nomination of 1896.<sup>86</sup> It surprised no one, then, when upon Grosscup's elevation to circuit judge McKinley sought to reward his friend's loyal support by naming Kohlsaats brother to the vacancy on the Northern District bench. McKinley hoped he could clear this with the Illinois senators, but he quickly realized this would be impossible. Senator William Mason and the entire congressional delegation supported a Chicago attorney, Ephraim Banning. Whatever slim chance of compromise had existed vanished when Herman Kohlsaat, to McKinley's great embarrassment and horror, editorialized in his newspapers that, despite the president's show of loyalty to him, he would continue to oppose the Chicago Republican organization of which both senators were members.<sup>87</sup> Senator

81 *Chicago Inter Ocean*, March 15, 1905, at 3.

82 *Id.*, March 19, 1905, at 4.

83 *Chicago Tribune*, March 19, 1905, at 6.

84 *Id.*; *Chicago Inter Ocean*, March 16, 1905, at 5.

85 *Chicago Record-Herald*, March 20, 1905, at 14; *Chicago Inter Ocean*, March 19, 1905, at 4.

86 H. KOHLSAAT, FROM MCKINLEY TO HARDING: PERSONAL RECOLLECTIONS OF OUR PRESIDENTS, 1-50 (1923); *Chicago Inter Ocean*, Feb. 24, 1899, at 3.

87 *Id.*, Feb. 25, 1899, at 1, 16.

Hoar of Massachusetts, head of the Senate Judiciary Committee, vowed to follow the wishes of his fellow senators, and Kohlsaats nomination appeared doomed. His brother, however, relented just before Congressional recess and sent emissaries to Washington to placate the Illinois senators.<sup>88</sup> A truce having been arranged, the president nominated and the Senate confirmed Christian C. Kohlsaat as judge of the United States District Court for the Northern District of Illinois on March 1, 1899.

Nothing in Christian Kohlsaats career indicated that his judicial nomination would provoke controversy. He had established a reputation as an intelligent attorney and highly regarded state court judge. He was born on a farm in Edwards County, Illinois, on January 8, 1844.<sup>89</sup> His father had emigrated to Illinois in 1835, after service in the Danish army. His mother's family had moved from England to the United States several years earlier. In 1854 the Kohlsaat family moved to Galena, Illinois, where Christian attended public school until his graduation in 1862. He enrolled at the University of Chicago for two years, leaving to read law first in the offices of Gallup & Hitchcock and then with Bates & Towsler. The first named partners in both firms were among the foremost attorneys practicing in Chicago at that time. The aspiring attorney studied law until his admission to the bar in 1867. He preceded his younger brother, Herman, in the newspaper business by working as legal reporter for the *Chicago Evening Journal* to earn a living while studying law.

Christian Kohlsaats years as a practicing attorney were spent mainly specializing in probate law.<sup>90</sup> He first entered a partnership with Fred A. Smith, a future Republican county judge. His work in probate had begun when the clerk of the Cook County Court appointed him deputy clerk in 1868. His responsibilities included being minute clerk for Judge James B. Bradwell, who was then handling all probate, bankruptcy, and civil commitments. After two years' work, Kohlsaat accepted a job in Springfield in 1871 as engrossing clerk for the legislature. He later decided to return to Chicago to resume his practice and take advantage of the expanded opportunities there brought about by the rebuilding following the great fire. This firm, Smith & Kohlsaat, dissolved around 1873, and the young attorney joined Ward, Stanford & Kohlsaat. When this firm disbanded a few years later, Kohlsaat became a sole practitioner. In 1890 Governor Joseph Fifer appointed him to fill an unexpired term as the Cook County probate judge. Three times he was elected probate judge, twice running unopposed. When others described his work on the probate bench, two adjectives seemed to be used constantly—"speedy" and "honest." In fact, his record was so widely regarded as outstanding that

88 *Id.*, Feb. 28, 1899, at 3, 6; *id.*; March 1, 1905, at 1.

89 Biographical information on Judge Kohlsaat may be found in *Chicago Tribune*, May 12, 1918, at 1; 31 *Chicago Legal News*, 227 (March 14, 1899); Presentation of Portrait and Memorial Proceedings, May 6 and October 7, 1919 (U.S. Court of Appeals for the Seventh Circuit).

90 24 *Chicago Legal News*, 56 (Oct. 17, 1891).

those opposing his nomination to the district court argued that there could be no acceptable replacement for him on the state bench.<sup>91</sup>

Judge Kohlsaas and his family held as high a status in the social and civic community of Chicago as he did in the legal world. In 1871 the judge married Frances Smith, the daughter of a pioneer Chicago family. She was active in several organizations, including the Chicago Home for the Friendless. The judge served on the boards of several groups, among them the YMCA, Mary Thompson Hospital, and the Second Baptist Church. He was also a former president of the Union League Club. The mayor appointed him a commissioner of the West Park Commission in 1880, and Kohlsaas took an active role in promoting and planning the boulevard system, the city parks, and the forest preserves.<sup>92</sup> He also taught a course in probate administration at Northwestern University Law School and received an honorary doctor of laws degree from Illinois College of Law in 1903. He and his wife and their four children spent summers at Lake Geneva, where their home, a replica of an English castle, was considered a showplace.<sup>93</sup>

In addition to the new judge, another personnel change occurred in the Seventh Circuit in 1905. On February 23 Judge James Jenkins wrote a letter of resignation to President Roosevelt. He had turned seventy in July, 1904, and could retire at full pay. His poor eyesight caused him to decide that a younger man should replace him.<sup>94</sup> Judge Jenkins did not remain idle in retirement. At the age of seventy-three he accepted the deanship at Marquette University Law School. While a federal judge, he had taught at John Marshall Law School in Chicago and had received two honorary doctor of laws degrees. As both teacher and dean he commanded the respect of the faculty and was extremely popular among students. Judge Jenkins retired from his deanship in 1917 and died on August 6, 1921, at the age of eighty-seven.<sup>95</sup>

Political considerations also played a role in Judge Jenkins' decision to leave the bench. In the Wisconsin senatorial race of 1904 the insurgent, Robert M. LaFollette, defeated the stalwart Republican incumbent, Joseph F. Quarles. Quarles, Jenkins, and the judge of the Eastern District of Wisconsin, William H. Seaman, were friends. An agreement was worked out whereby Jenkins would resign, Seaman would be elevated to replace Jenkins, and Quarles could receive the district court judgeship. President Roosevelt was willing to make the necessary nominations (even though Seaman was a Democrat) because this enabled him to make peace with the regular wing of the Wisconsin Republican party, who believed Roosevelt had sided with LaFollette in the bitter election.<sup>96</sup> One complication arose that almost de-

91 Chicago Tribune, Jan. 17, 1899, at 3; *id.*, Jan. 19, 1899, at 3.

92 31 Chicago Legal News, 227 (March 14, 1899).

93 Chicago Tribune, Sept. 21, 1941, sec. 6, at 1.

94 Milwaukee Journal, Aug. 6, 1921, at 1.

95 Milwaukee Sentinel, Aug. 7, 1921, at 1.

96 Chicago Tribune, Feb. 26, 1905, at 8; Wisconsin State Journal, Feb. 28, 1905, at 4.

stroyed the plan. In 1903 Quarles had voted for a raise in the amount of salary for district judges from \$5,000 to \$6,000. Article I, section 6 of the United States Constitution barred Quarles from being appointed to the bench until after the expiration of his term on March 4, 1905. It was feared that LaFollette, who would then be senator, would block the appointment. However, intervention by Roosevelt persuaded LaFollette to consent to Quarles's nomination. President Roosevelt sent both names to the Senate on February 25, 1905. Judge Seaman received Senate confirmation three days later. He took his oath and place on the bench April 11, 1905, the same day the bench and bar gathered to honor Judge Jenkins.<sup>97</sup>

It is fitting to end this section of the biographies of the judges of the Seventh Circuit with William Henry Seaman, as he was the last judge to serve on the court who had begun his judicial career in the nineteenth century. Seaman was also the last judge to have served in the Civil War. In fact, his life is very similar to those of the other judges discussed so far.

Judge Seaman was born on November 15, 1842, in New Berlin, Wisconsin. At the age of three he moved with his parents to Milwaukee and then to Sheboygan, where he remained a resident for seventy years.<sup>98</sup> His father had migrated west from Buffalo to operate a sawmill, but when the mill burned, he relocated in Sheboygan and worked as a tradesman. Seaman attended public school there and learned the printing trade. He worked days at the *Sheboygan Times* and spent his evenings reading law with a local practitioner. He stopped his studies in 1861 to enlist in a Wisconsin regiment of the Union army. Following five years of service, during which he became a sergeant, he returned to the study of law—this time in the office of J. A. Bentley, a well-known attorney and future United States commissioner of pensions. Seaman obtained admission to the Wisconsin bar in 1868 and formed a partnership with his mentor. When this firm dissolved in 1877 due to Bentley's acceptance of the commissionership, Seaman began a practice with Francis Williams. Their partnership continued until Seaman's nomination to the district judgeship in 1893. The firm represented many corporate clients throughout the state and in Michigan, and handled more probate work than any other in the area. Seaman engaged in a substantial amount of trial work and also argued cases before the Wisconsin Supreme Court.<sup>99</sup>

Although William Seaman had long been identified closely with the Democratic party in Wisconsin, he had never played the role in it that Judge Jenkins had. His interests were centered on the local level. The only elective

97 Chicago Tribune, Feb. 27, 1905, at 1; Sheboygan Herald, March 4, 1905, at 2.

98 Biographical sketches of Judge Seaman appear in *William Henry Seaman* in 2 HISTORY OF THE BENCH AND BAR OF WISCONSIN, 13-15 (J. BERRYMAN, ed.) (1898); *William Henry Seaman* in MEN OF PROGRESS, 201-02 (A. AIKENS and L. PROCTOR, eds.) (1897); 47 Chicago Legal News, 309 (May 1, 1915); Chicago Tribune, March 9, 1915, at 7; *id.*, March 28, 1893, at 5; Presentation of Portrait of the Honorable William H. Seaman, June 18, 1915 (U.S. Court of Appeals for the Seventh Circuit).

99 MEN OF PROGRESS, *supra* at 201; HISTORY OF THE BENCH AND BAR OF WISCONSIN, *supra* at 14-15; 26 Chicago Legal News, 404 (Sept. 11, 1894).

office he ever sought or held was that of mayor of Sheboygan. He also served on the local school board. However, he came to statewide prominence when he was elected president of the Wisconsin Bar Association, a post he held at the time of his appointment to the United States District Court.<sup>100</sup>

This chapter has surveyed the lives and careers of the judges of the Seventh Circuit during the court's first two decades. One striking feature is their similarities. The judges are all drawn from the same socioeconomic background. They are white Protestant males, in their forties and fifties, who (with the exception of Grosscup and Jenkins, both of whom moved westward in their early twenties) were raised in the midwest. Although several came from lower-middle-class families, the judges were well educated (four had college degrees), and all gained admission to the bar by reading law with the leading practitioners of their hometowns. The future judges enjoyed lucrative law practices, representing a wide variety of corporate and individual clients. The income from their practices had made them wealthy by the time of their appointments.

In both political involvement and political philosophy the judges were quite similar also. Without exception the group had extensive political contacts, chiefly among the leading politicians of their home states. Woods had long supported President Harrison in Indiana; Jenkins counted among his close friends and law associates a Wisconsin governor and two United States senators; Showalter's college friends served in President Cleveland's cabinet, as did his friend Judge Gresham; Grosscup had managed McKinley's early political campaigns. Baker was the son of a federal judge and a leading supporter of the United States senator from Indiana; Kohlsaats brother had been a key supporter of President McKinley; and Seaman was a political ally of Judge Jenkins and a friend of the United States senator from Wisconsin. In addition to friendships with politicians, each of the future judges had run at least once for elective office. These political careers centered on state and local offices. With the exception of Jenkins' unsuccessful attempt at a United States senate seat, Grosscup's early campaigns for the United States House of Representatives, and Gresham's campaign for the Republican presidential nomination, the future judges made their political reputations in local executive (Seaman) and judicial (Kohlsaats, Showalter) and state judicial (Woods, Baker) offices.

During the first two decades, five Republicans and three Democrats were appointed to the bench of the Seventh Circuit. However, the differences in party affiliation did not signify great differences in political philosophy. Recent scholarship has shown that during the late nineteenth and very early twentieth centuries a consensus existed among the majority of regular Democrats and Republicans with regard to fundamental social and economic

100 26 Chicago Legal News, 404 (Sept. 11, 1894); Sheboygan Herald, March 4, 1905, at 2; Judge Seaman was a delegate to several national Democratic party conventions; Presentation of Portrait, *supra* at 22-23.

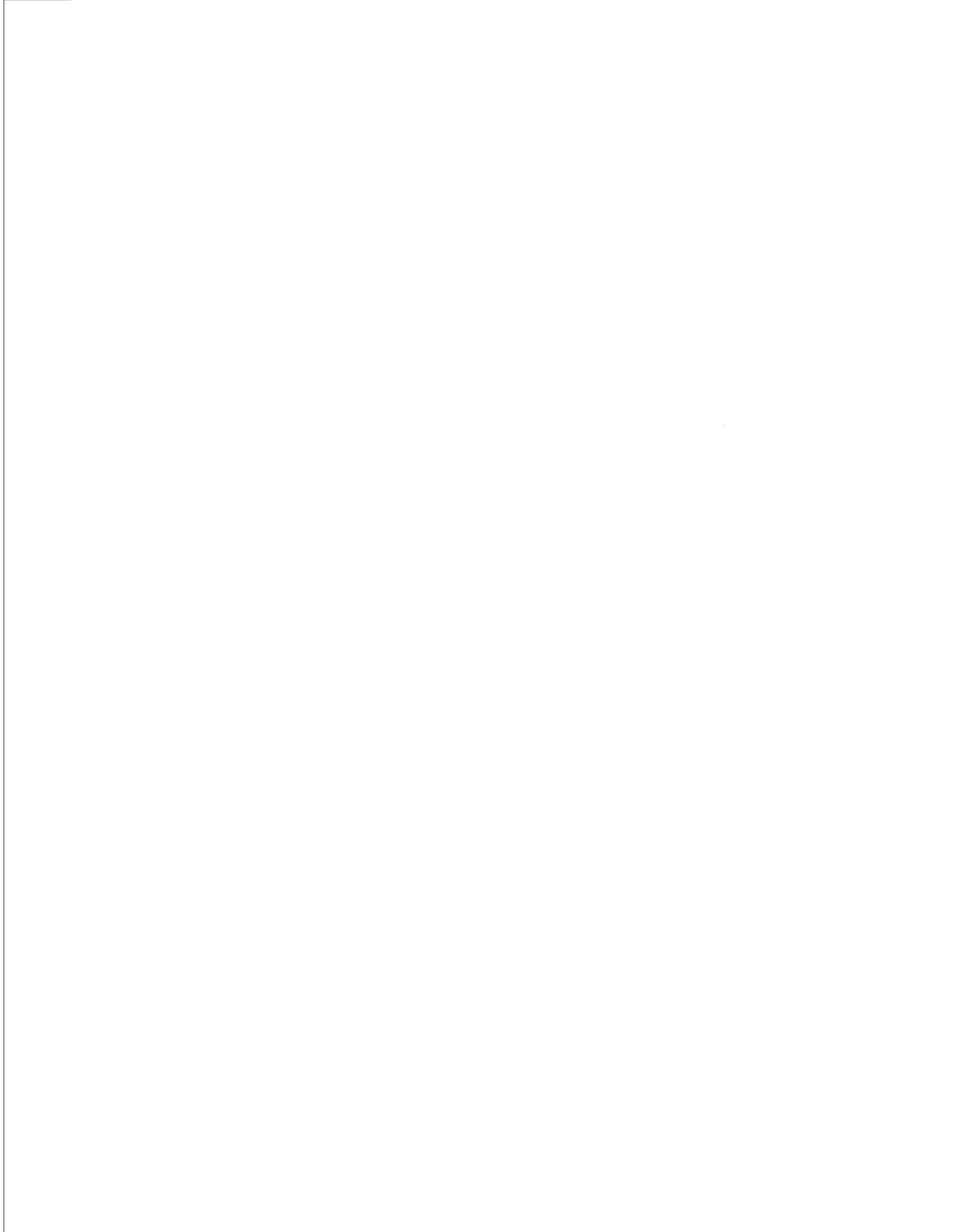
issues.<sup>101</sup> While the gold versus the silver standard or high versus low tariffs might cause division between certain branches of the two parties, the majority of both parties were in agreement on these issues. With the exception of Judge Grosscup's views regarding the need to exercise some control over the growth of large corporations, most of the judges subscribed to the conservative economic views of the majority of their party and the judiciary in general.<sup>102</sup>

The following chapter will examine the cases and opinions of the judges of the Seventh Circuit. One conclusion to be noted is that, with the exception of the labor injunction cases already examined, the cases coming before the Seventh Circuit during its first twenty years seldom forced the judges to address constitutional issues. The private law disputes that comprised the court's docket did not require the judges to express their views about the proper role of legislative action in regulating social and economic conditions—the crucial question identifying conservative jurisprudence at the end of the nineteenth century. Although the labor cases reveal the position of the Seventh Circuit judges, the best-known of these economic regulation cases came to the United States Supreme Court from the state courts, not the United States Courts of Appeal.<sup>103</sup>

101 See P. KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900* (1970); R. JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT, 1888-1896* (1971). Both of these works conclude that the major factor determining allegiance to the Republicans or Democrats at the end of the nineteenth century was religion. Therefore, economic issues that split the parties on class lines did not predominate. Rather, urban ethnics who opposed Prohibition voted for the party supporting their position. Before 1896 this meant that the ethnic groups, largely Catholics and Jews, voted for Democrats while Protestants supported the Republicans. The election of 1896 reversed this pattern.

102 For an excellent description of the conservative philosophy in the judiciary at this time, see A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960).

103 *Id.*



## Cases and Caseloads 1891-1911

**T**his study has so far examined the judges, controversies, and administration of the Seventh Circuit during its first two decades. What has yet to be discussed is the output of the court, i.e., its caseload and opinions. This investigation will cover such areas as the volume of appeals, their jurisdictional basis, and their dispositions. However, before proceeding to that, an extended discussion of two cases from that period is merited because they focused public attention on the Circuit.

The first case (actually a decision from the Northern District of Illinois) was part of the United States government's ten-year legal battle against the Beef Trust. The most controversial aspect of this lengthy litigation, which was centered in the Seventh Circuit, concerned District Judge J. Otis Humphrey's March 21, 1906, decision quashing indictments against the individual packers who formed the trust.<sup>1</sup> Judge Humphrey held that they could

<sup>1</sup> *United States v. Armour & Co.*, 142 F.808 (N.D.Ill. 1906). An excellent chronology of the federal government's battle is provided by E. L. MASTERS, *LEVY MAYER AND THE INDUSTRIAL ERA*, 98-101 (1927). (Mayer represented the packers against the government.) *See also* F. FRANKFURTER and J. LANDIS, *THE BUSINESS OF THE SUPREME COURT, A STUDY IN THE FEDERAL JUDICIAL SYSTEM*, 115-19. Judge Humphrey of the Southern District of Illinois was sitting by designation.

not be prosecuted under the Sherman Act because their involuntary testimony before the Bureau of Corporations, a federal administrative agency set up to investigate possible antitrust violations, had operated to immunize them from prosecution.<sup>2</sup> He based his conclusions on the statute establishing the bureau and granting it investigative powers. Judge Humphrey's ruling in the *Armour* case had both important substantive and procedural repercussions. His decision so crippled the power of the Bureau of Corporations and the government's efforts to use criminal and civil remedies to break up trusts that President Theodore Roosevelt decided to force Congress to amend the statute. Roosevelt used the decision and the specter of corporate wrongdoers escaping punishment because of a technicality to whip up public support for his trustbusting campaign. He wrote a friend that "[i]t is unhealthy that they [courts] should feel above criticism—very unhealthy indeed that, for instance, a man like Judge Humphrey should have nothing said about his recent decision."<sup>3</sup> He used this public support successfully to counter opposition to the bill and force Congress to amend the statute to prevent testimony taken by the bureau from barring future prosecution.<sup>4</sup>

The procedural change brought about by the *Armour* case stemmed from an unintended loophole in the Court of Appeals (Evarts) Act. The act had eliminated appeals from cases in which indictments were quashed because of the construction or constitutionality of a statute. A subsequent Supreme Court decision held that the government was precluded from taking an appeal in a criminal case, even when no jeopardy had attached.<sup>5</sup> For fifteen years various attorney generals had sought legislation to eliminate the possibility that a single judge, sitting in the circuit court and without any review, could frustrate the government's attempts to enforce the criminal laws. Roosevelt seized upon the *Armour* case as his opportunity to force Congress to change this situation. In a letter to Senator Nelson of Minnesota he explained the urgency of passage of the Criminal Appeals Act by stating his belief that, if it were passed, "the actions of the courts in the future will be the reverse of what Judge Humphrey had decided."<sup>6</sup> The bill Congress passed as a result of the dissatisfaction over the *Armour* ruling established the basic scheme for government appeals in criminal cases which is still in force today.<sup>7</sup>

2 United States v. *Armour & Co.*, *supra*. See also G. CHESSMAN, THEODORE ROOSEVELT AND THE POLITICS OF POWER, 85-87 (1969); 5 LETTERS OF THEODORE ROOSEVELT (E. MORISON, ed.) (1952).

3 See FRANKFURTER and LANDIS, *supra* at 116-17; letter from T. Roosevelt to R. L. O'Brien, April 16, 1906, in 5 LETTERS OF THEODORE ROOSEVELT, *supra* at 212.

4 Letter from T. Roosevelt to K. Nelson, July 21, 1906, in 5 LETTERS OF THEODORE ROOSEVELT, *supra* at 190; 40 CONG. REC. 5500, 9531 (1906).

5 United States v. *Sanges*, 144 U.S. 310 (1892); FRANKFURTER and LANDIS, *supra* at 114.

6 *Id.* at 113-15; letter from T. Roosevelt to K. Nelson, *supra*.

7 Act of March 2, 1907, 34 Stat. 1246; 18 U.S.C. § 3731 (1976); see also C. WRIGHT, LAW OF FEDERAL COURTS, 528-29 (3d ed. 1976).

The Beef Trust controversy had just begun to die down when the Seventh Circuit created an even greater public uproar by its opinion in *Standard Oil Co. v. U.S.*<sup>8</sup> The case grew out of another investigation into the monopolization of industry conducted by the newly formed Bureau of Corporations in 1905. One of its reports dealt with the secret freight rate relationship between the Standard Oil Company and the railroads. The Bureau discovered that the below-published-rate price paid by Standard Oil between its principal refinery in Whiting, Indiana, and St. Louis allowed the Corporation to enjoy a virtual monopoly of oil sales in the west and southwest.<sup>9</sup> The Bureau of Corporations believed it had gathered enough evidence to charge Standard Oil with a violation of the 1903 Elkins Act. This statute, in part, made it a crime to offer or receive any rebate or concession in interstate shipment rates.

By 1906 President Roosevelt and his advisors were convinced that they had enough evidence and political strength to go after the most celebrated of all trusts, Standard Oil. The administration calculated that potentially the surest and swiftest method of attack was to prosecute Standard Oil under the Elkins Act.<sup>10</sup> The government thought that the Bureau of Corporations Report, standing alone, would not be sufficient to persuade a jury to convict Standard Oil. The president and the attorney general therefore authorized a promise of immunity from prosecution to the officers of the Chicago & Alton Railroad in exchange for their testimony against the company. The Justice Department appointed a special prosecutor and secured indictments from a grand jury in the Northern District of Illinois on 1,903 counts of violations of the Elkins Act, covering the period between September 1903 and March 1, 1905.<sup>11</sup>

The six-week trial before Judge Kenesaw Mountain Landis produced over three tons of evidence and ended with a jury verdict of guilty on 1,462 counts. Before a packed courtroom on August 3, 1907, Judge Landis read his opinion, which imposed the maximum fine on the Standard Oil Company—\$29,240,000. The enormous amount instantly made the case a national sensation. Publicly Roosevelt and his advisors were ecstatic, although privately the president feared the size of the fine made reversal on appeal more likely.<sup>12</sup>

8 164 F.376 (7th Cir. 1907), *cert. denied*, 212 U.S. 579 (1908).

9 2 A. NEVINS, *STUDY IN POWER: JOHN D. ROCKEFELLER, INDUSTRIALIST AND PHILANTHROPIST*, 356-59, 363-65 (1953); P. GIDDENS, *STANDARD OIL COMPANY (INDIANA)* 99-101 (1955).

10 Act of February 19, 1903, 32 Stat. 847; letter from Theodore Roosevelt to J. R. Garfield, May 31, 1906, in 5 *LETTERS OF THEODORE ROOSEVELT*, *supra* at 292 (Garfield was the Commissioner of the Bureau of Corporations); GIDDENS, *supra* at 100-02.

11 5 *LETTERS OF THEODORE ROOSEVELT*, *supra* at 757, note 1; 5 *LETTERS OF THEODORE ROOSEVELT*, *supra* at 746, note 1; GIDDENS, *supra* at 101.

12 GIDDENS, *supra* at 103-17 provides an excellent description of the trial which received notoriety also because John D. Rockefeller personally appeared and testified; *see also* 2 NEVINS, *supra* at 1442; letter from Theodore Roosevelt to Charles Bonaparte, July 23, 1908, in 6 *LETTERS OF THEODORE ROOSEVELT*, *supra* at 1141-42; 5 *LETTERS OF THEODORE ROOSEVELT*, *supra* at 746, note 1.

Standard Oil attorneys lost no time in docketing their appeal, but numerous motions and petitions from both parties prevented the Seventh Circuit from hearing oral argument until May 7 and 8, 1908.<sup>13</sup> An opinion by Judge Grosscup, for himself and Judge Seaman, with a concurrence by Judge Baker, was issued on July 27, 1908. The panel reversed Judge Landis. Although the appellant listed 169 assignments of error, the court addressed only three issues: (1) whether actual knowledge of the rebate was required; (2) whether the actions by the company constituted one or multiple offenses; and (3) if the amount of the fine imposed was an abuse of discretion. In his published opinion Judge Landis stated that the *mens rea* requirement for a violation of the Elkins statute was negligence; that is, Standard Oil was guilty if it should have known the price it received was below the published rate. The proof adduced at trial from the testimony of the Chicago & Alton employees only showed that Standard Oil paid a 6¢ per hundred rate instead of 18¢ as was published. The government introduced no evidence showing the company's traffic manager had actual knowledge of the lawful rate. The three judges on the panel were unanimous that actual knowledge must be proven to establish a violation and thus the conviction must be reversed. Grosscup held that the Elkins law differed from strict liability statutes regulating liquor or possession of stolen property, because the former was intended to increase competition and commerce. He argued that a *mens rea* of less than actual knowledge would inhibit commerce through the burden it would place on shippers. He believed shippers must be allowed to rely on what carriers tell them, as the costs of individual investigations of lawful rates would be substantial.<sup>14</sup> Baker, in his well-reasoned concurrence, argued that the legislative history and the words of the statute both supported the requirement of actual knowledge. He relied on the statute's use of words such as "solicit" and "offer," plus the debates in Congress which had preceded passage of the statute, all of which implied that any intentional act of favoritism, not negligence, was what Congress sought to remedy.<sup>15</sup>

Even though the question of "knowledge" disposed of the case, the court rested its reversal also on the other two issues. It held that the violation of the Elkins law was receiving a rebate, and that constituted only one offense, regardless of the number of carloads shipped.<sup>16</sup> The court further held that the fine was an abuse of discretion because Landis improperly based his decision on the assets and acts of the parent company, Standard Oil of New Jersey, instead of the defendant, the Indiana subsidiary. Grosscup reasoned that this was in error because the parent company was not a defendant nor before the court.<sup>17</sup>

The Seventh Circuit opinion enraged President Roosevelt and other

13 COURT DOCKET, Appeal No. 1,409.

14 Standard Oil Co. v. United States, 164 F. 376, 382-83 (7th Cir. 1907).

15 *Id.* at 389-95.

16 *Id.* at 385-86.

17 *Id.* at 386-89.

economic reformers. Roosevelt blamed the three judges personally. He wrote the attorney general: "Grosscup I believe to be a scoundrel. The other two judges are merely the ordinary type produced by improper subservience to corporations. [They were] bringing in technicalities which enabled them to throw the whole case open again with the evident purpose of shielding the corporation from all punishment."<sup>18</sup>

It appears, however, that Judges Grosscup, Baker, and Seaman had support for their interpretation of the *mens rea* requirement of the Elkins law. The United States Supreme Court refused to grant certiorari and other courts followed the Seventh Circuit interpretation of the statute.<sup>19</sup> Apparently, the Justice Department and the president had been trapped by their own bargain with the railroad. Once immune from prosecution, the officials of the Chicago & Alton testified that they "misled" Standard Oil, thus preventing a finding of actual knowledge. Roosevelt, the attorney general, the United States attorney, and Judge Landis all, at times, considered breaking their bargain and indicting the railroad, but Roosevelt decided not to prosecute—an agreement concurred in by the Justice Department.<sup>20</sup> Judge Landis refused to accept the president's decision and ordered a grand jury to convene. Not until Roosevelt personally conferred with the judge did the judge consent to save the administration from the political embarrassment of making public their bargain and the railroad's breach of it.<sup>21</sup>

As seen earlier, charges of judicial impropriety had swirled around Judge Grosscup since he had appointed his friend and law clerk as the receiver for the Chicago Traction Company. A month before the Standard Oil decision, H. H. Kohlsaas, newspaper editor and brother of Judge C. C. Kohlsaas, sent his friend President Roosevelt clippings which alleged that Grosscup had received passes on a railroad which had a case currently before him.<sup>22</sup> Roosevelt used these reports to urge his attorney general to seek Grosscup's impeachment. He wrote, "His presence on the bench is a disgrace."<sup>23</sup> Roosevelt began to speak out strongly for "a more responsive judiciary"<sup>24</sup> but refrained from mentioning Grosscup and the Standard Oil case by name. However,

18 Letter from Theodore Roosevelt to Charles J. Bonaparte, July 23, 1908, in 6 LETTERS OF THEODORE ROOSEVELT, *supra* at 1141-42.

19 The Court denied certiorari in 212 U.S. 579 (1908); see *United States v. Merchants' & Miners' Transp. Co.*, 187 F. 363 (C.C.S.D.Ga. 1911), *cert. denied*, 225 U.S. 711 (1912); *United States v. Standard Oil Co.*, 192 F. 438 (W.D.N.Y. 1911).

20 Letter from Theodore Roosevelt to Charles J. Bonaparte, August 17, 1907, in 5 LETTERS OF THEODORE ROOSEVELT, *supra* at 157-58; see especially *id.* at 758, note 2.

21 Letter from Theodore Roosevelt to Charles J. Bonaparte, September 6, 1907, in 5 LETTERS OF THEODORE ROOSEVELT, *supra* at 784-85.

22 Letter from Theodore Roosevelt to Charles Bonaparte, June 6, 1908, in 6 LETTERS OF THEODORE ROOSEVELT, *supra* at 1059, note 1; letter from Theodore Roosevelt to Charles Bonaparte, October 19, 1908, in 6 LETTERS OF THEODORE ROOSEVELT, *supra* at 1295.

23 *Id.*

24 Letter from Theodore Roosevelt to William Allen White, November 30, 1908, in 6 LETTERS OF THEODORE ROOSEVELT, *supra* at 1392-93; see especially *id.* at note 1.

after several months passed, political considerations won out over personal desire and Roosevelt decided not to institute impeachment proceedings against Grosscup. He realized that the Senate, with which he had long had a stormy relationship, might use the trial as a chance to embarrass him. Roosevelt also feared that the resulting failure of impeachment would serve as a vindication of the judge. The irony is that in 1912 Grosscup proved to be one of Roosevelt's most ardent backers in his bid for president as a candidate on the Bull Moose ticket.<sup>25</sup>

In order to shift the focus from individual cases during the Seventh Circuit's first twenty years to an examination of the general patterns of the court's docket and caseload during these years, two types of studies have been prepared. The first (which can be called a "workload survey") categorizes the opinions issued by the court during a calendar year by the subject matter of the appeal. The second is a survey of all appeals docketed during the 1892, 1897, 1902, and 1907 terms of the court. This represents approximately 20 percent of all appeals filed during the first two decades.<sup>26</sup>

The workload study reveals that from 1891 to 1912 two categories of cases dominated the court's work: diversity and patent cases. Diversity cases constituted by far the greatest percentage of the annual caseload, although the numbers begin to decline toward the end of the second decade. The statistics show a high of 73 percent of all opinions in 1899 were diversity cases and a low of 28 percent in 1910, with a mean of 53.7 percent. The suits in diversity covered a wide range of commercial activity. They included contractual disputes, suits involving land titles, and stockholders' actions; but among the most numerous were railroad tort cases. Passengers, employees, and shippers who suffered damages from railroads sought relief in the federal courts.

Patent cases provided the second largest number of suits in the federal courts. In 1892, 37 percent of the cases decided were patent disputes, while in 1896 and in 1902 they were only 11 percent.

Only two other areas of litigation were statistically important during the first twenty years. After the Bankruptcy Act of 1898 a number of appeals reached the Seventh Circuit, amounting to about 9 percent per year. About 3 percent of the cases each year during the first decade were suits in admiralty, but the percentage declined over the second decade.

A noticeable feature of the study of the court's caseload is the existence of

25 Letter from Theodore Roosevelt to Charles Bonaparte, January 11, 1909, in 6 LETTERS OF THEODORE ROOSEVELT, *supra* at 1473; Chicago Tribune, October 2, 1921, at 1. On Theodore Roosevelt's relations with Congress see G. MOWRY, THE ERA OF THEODORE ROOSEVELT, 1900-1912, ch. 11 (1958); I. E. CADENHEAD, JR., THEODORE ROOSEVELT: THE PARADOX OF PROGRESSIVISM, 139-40 (1974).

26 Unless otherwise cited the materials for the remainder of this chapter are taken from the data sheets which were prepared in each of the two studies. These data sheets are located in the Seventh Circuit Archives.

a "step" pattern in the number of appeals docketed. The clerk's docket reveals that the number of appeals filed from 1891 to 1895 ranged between 60 and 75 cases per year. Over the next ten years that range increased to between 85 and 100, and from 1905 to 1912 it grew to 90 to 115. This pattern probably reflects the appointment of a third circuit judge in 1895 and a fourth circuit judge, plus two additional district judges, in 1905. Since the volume of appeals is, in large part, dependent on the number of cases being disposed of in the district court, an increase in the ability of the lower court to handle its case-load should lead to an increase in appeals. It must be remembered that both in 1895 and 1905 the additional circuit judge was appointed not only to lessen the burden of requiring district judges to sit on appeals panels, but also to provide assistance in clearing the district court docket.

One of the first patterns revealed by the docket survey is one which has existed throughout the court's history: each year the Northern District of Illinois has accounted for about 50 percent of the circuit's workload. In the four years examined, the percentage of cases from that district ranged between 52 percent and 60 percent. The remaining appeals were divided almost equally among the other districts in the circuit, but in any given year the volume in one district might be disproportionately heavy.

The sample also indicates the frequency with which the circuit judges sat as trial court judges. In the cases docketed from the Northern District of Illinois during 1897, Seventh Circuit judges had conducted the trial in about 25 percent of the cases. The circuit judges also sat as trial judges in other districts, usually in their native states. An additional 25 percent of the Northern District cases were tried by visiting district judges. The 1907 data shows that Judge Kohlsaas, who had been elevated from the Northern District in 1905, often served as a trial judge. Almost 25 percent of the cases from that district were ones in which he had presided.

In the recent past, attention has been drawn to the importance of controlling the length of the appellate process. Many critics have emphasized the high costs, both to parties and to the government, in protracted appeals. In 1977 the American Bar Association approved "Standards of Timely Disposition" which called for completion of appeals in from five to seven months from the time docketed.<sup>27</sup> Recent statistics from the administrative office of the United States Courts reveal that the median time which elapses between filing and disposition in the courts of appeals is 7.0 months.<sup>28</sup> The statistics from the Seventh Circuit's first two decades show that the appellate process was slower than either the American Bar Association ideal or the present reality. During the first year sampled, 1892, the median time from filing to opinion was 11.6 months. This may reflect some delay caused by the difficulty in drawing panels when there were only two circuit judges. In addition, the judges had to write opinions while maintaining a significant trial court docket in both the circuit and district courts. After the addition of the new judgeship

<sup>27</sup> ABA Standards Relating to Appellate Courts 85-89 (1977).

<sup>28</sup> Administrative Office of the U.S. Courts, ANNUAL REPORT OF THE DIRECTOR, I-8 (1976).

in 1895 the median dropped to 8.9 months (1897), 7.7 in 1902, but rose again to 9.4 months in 1907, possibly because of delays caused by an increase in the volume of appeals. This hypothesis is supported by examining the caseload sample, which shows that, of the 61 appeals docketed in 1892, only 50 required oral argument and an opinion. By 1897 the number had reached 78 out of 90 cases filed, and by 1907 the number of appeals which necessitated oral argument and an opinion had increased to 100.

Discussing the number of appeals which were orally argued and then decided by an opinion raises the question of the disposition of cases. Of the three possible dispositions—affirmance, reversal, and dismissal—dismissal was the least frequently used. Of the sampled cases the orders entered dismissing appeals ranged from a low of 13 percent in 1897 to a high of 25 percent in 1892. The dismissal orders can be broken down into several categories, the largest category being cases dismissed after a hearing. These often involved questions of appellate jurisdiction and usually were accompanied by a published opinion. They therefore represented a substantial investment of judicial time and resources. A second type were dismissals stipulated by counsel. Although only certain orders so stated, apparently these cases had been settled by the negotiation of the parties. The correspondence of the clerk reveals no judicial intervention in forging the settlement. A rather insignificant number of cases were dismissed for violation of a Seventh Circuit rule, such as the failure to post a bond to cover the costs of printing. A final group consists of cases dismissed for failure to prosecute, a number of which remained dormant for as long as 60 months before dismissal.

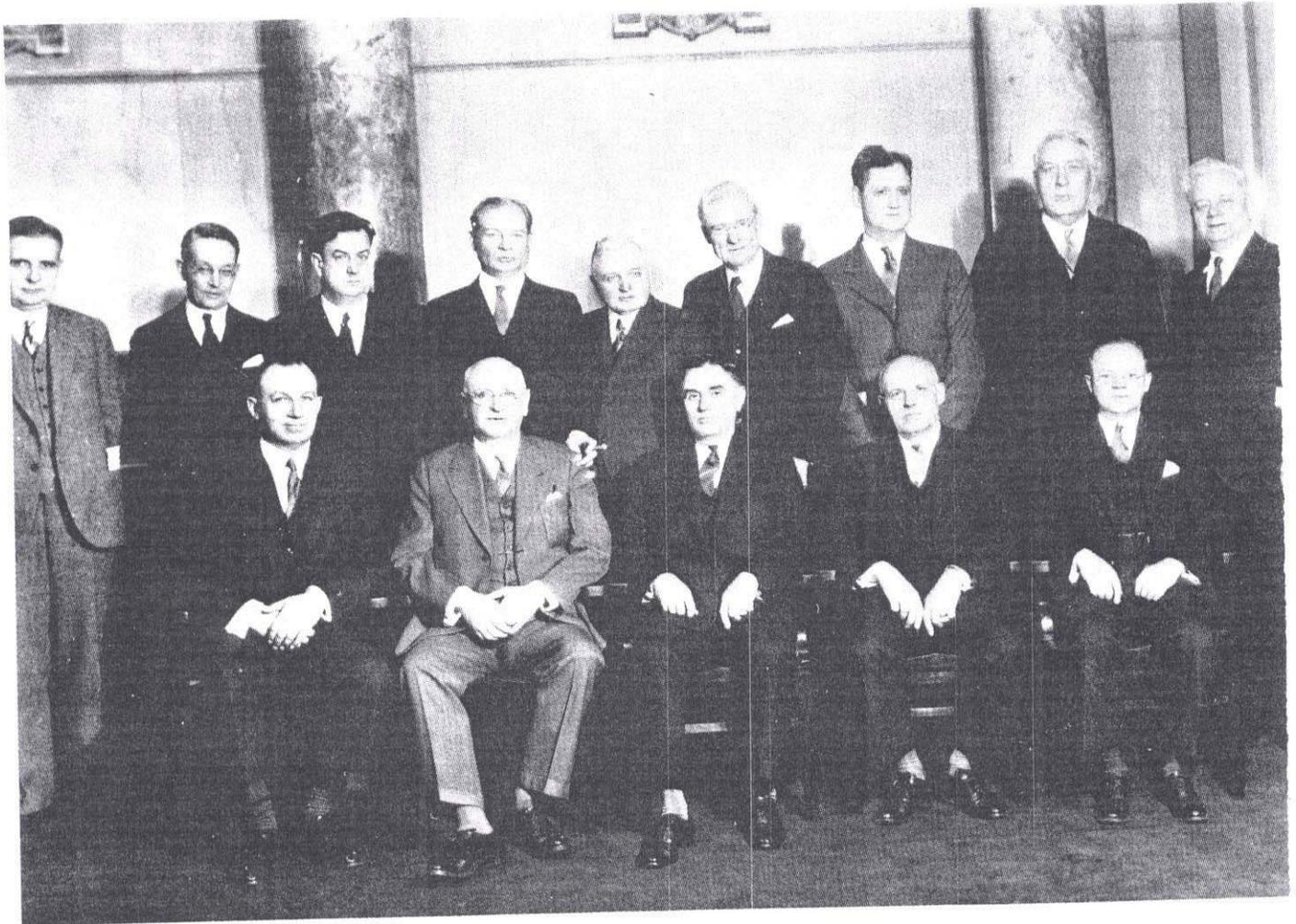
A startling finding taken from the examination of the disposition of cases in the Seventh Circuit is the high reversal rate. Excluding all dismissals, except those following a hearing (which have the same effect as an affirmance) the reversal rates are: 32 percent for the cases docketed in 1892, 53 percent in 1897, 36 percent in 1902, and 34 percent in 1907. This may be compared to an average of between 14 percent (1977) and 19 percent (1972) in recent years for all eleven courts of appeals, and an average of 18 percent (1977) to 25 percent (1973) for the Seventh Circuit during the same period.<sup>29</sup> The accuracy of these 1891-1911 rates was supported by an investigation of the clerk's journal, which shows that for appeals decided in the October term of 1892, 1897, 1902, and 1907, the Seventh Circuit reversed the district court 34 percent, 42 percent, 39 percent, and 22 percent respectively. That these rates are high is corroborated by nonstatistical evidence. On December 7, 1894, Judge Peter Grosscup, then on the bench of the Northern District, replied to a letter of K. M. Landis, then Secretary of State Gresham's private secretary, asking about the necessity for an additional district and circuit judge for Chicago. During his reply Grosscup stated that he thought he might resign.

<sup>29</sup> Administrative Office of the U.S. Courts, ANNUAL REPORT OF THE DIRECTOR, A-2, A-3 (1977).

A powerful incident to this personal conclusion is the tendency, as it appears to me, of the present Court of Appeals, [sic] Its tendency is towards becoming a small bore court. I have heard one of the Judges take pride in saying that it was a reversing court.<sup>30</sup>

During its first two decades the Seventh Circuit took a narrow view of its role as an appellate court. The court examined the legal questions presented, not with an eye to results or innovation, but instead to apply the existing precedents as faithfully as possible. When this style of jurisprudence is considered in connection with the high reversal rate, it suggests that judges may have had a different perspective of their role and function when serving as district judge than as circuit judge. As trial judges these men may have been oriented toward achieving an equitable result. But when sitting as a member of the panel in the court of appeals, with the issues narrowly framed and with the intention of strictly adhering to precedent, a judge's perspective changed and he was likely to find reversible error in the trial court rulings.

<sup>30</sup> Letter from Peter S. Grosscup to K. M. Landis, December 7, 1894 (Landis Collection, Chicago Historical Society).



Judges attending the 1935 Judicial Conference of the U.S. Court of Appeals for the Seventh Circuit  
Standing, *from left to right*:  
District Judge Briggie; Circuit Judges Sparks, Evans, and FitzHenry;  
District Judges Geiger, Carpenter, and Wham; Circuit Judges Page and Alschuler.  
Seated, *from left to right*:  
District Judges Barnes, Slick, Baltzel, Woodward, and Lindley.

## Appointment and Biographies of the Judges of the Seventh Circuit 1912-1941

**T**he third decade of the United States Court of Appeals for the Seventh Circuit marked the beginning of a new era in the court's history. Congress had restructured the federal judiciary, while resignation, death, and presidential politics had altered the composition of the court of appeals. The change in personnel meant more than a new group of judges: in the Seventh Circuit, 1912 is a watershed year which divides the nineteenth-century judges from those of the twentieth century. Judge William Seaman, who took his oath of office in 1905 and died in 1915, was the last judge to serve in the Civil War. He was also the last judge appointed to the Seventh Circuit whose major pre-court of appeals career was in the nineteenth century. But the differences between the two groups of judges are not only generational. Those appointed after 1912 had different career patterns. Most noticeably, service on the district court bench became the exception rather than the rule. Those judges who had legislative careers most likely had served in the United States House or Senate, as opposed to state legislatures. In addition, most twentieth-century judges were law school graduates rather than attorneys admitted to the bar following years of reading law at a practitioner's office. Before further examination of these career patterns, the structural changes in the judiciary will be briefly examined.

The legislative reform of the federal judicial system in 1911 climaxed an almost twenty-year struggle to eliminate the circuit courts. The retention of the *nisi prius* jurisdiction of the circuit courts had been a crucial component of the congressional compromise which enabled passage of the Evarts Act in 1891, that established the courts of appeals.<sup>1</sup> Only three years later, however, the American Bar Association began lobbying to remove the confusion caused by the overlapping jurisdictions of the circuit and district courts. Even though no rational reason existed to separate the functions of the two trial courts (since a single district judge presided over each), the American Bar Association met opposition from lawyers, legislators, and from court personnel in danger of losing their jobs.<sup>2</sup> The Senate began consideration of the proposed elimination of the circuit courts in 1899, but a decision to leave the question until an independent commission could be appointed and make its recommendation eliminated any possibility of quick action. The commission's charter also directed it to consider a revision of the United States statutes, thereby tying together the reform of the court structure with the revision of the federal substantive law. The commission's product, the judicial code, was introduced in both houses of Congress in 1910. The code passed on March 3, 1911, and the circuit courts ceased to exist on January 1, 1912.<sup>3</sup> Under the new system all trial jurisdiction resided in the district court with an appeal of right to the circuit court of appeals. The new code did retain one important feature of the old system: the flexibility produced by authorizing the presiding judge of each circuit to designate circuit judges to hold district court.

The elimination of the circuit court temporarily placed a heavy burden on the Seventh Circuit. The only circuit court which had a difficult or considerable backlog of cases was the Northern District of Illinois. In order to eliminate it, Presiding Judge Peter Grosscup adjusted the assignments of district and circuit judges in order to hold court in Chicago almost continuously. Judge Julian Mack of the Commerce Court was designated by United States Supreme Court Chief Justice Edward White to sit as a judge of the Circuit Court of the Northern District. Judge Grosscup assigned Judge Arthur Sanborn of the Western District of Wisconsin and Judge J. Otis Humphrey of the Southern District of Illinois to assist Judge George A. Carpenter and Judge Kenesaw M. Landis in hearing and deciding the circuit court cases awaiting trial. Circuit Judge Christian C. Kohlsaat also joined the effort which lasted from the fall of 1911 to March 1912.<sup>4</sup>

A second change in the organization of the federal judiciary had an impact on the Seventh Circuit. The creation and demise of the short-lived United States Commerce Court provided the Seventh Circuit with the services of Judge Julian Mack. When in 1911 Congress created the Commerce Court to

1 F. FRANKFURTER and J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM*, 98-101 (1928).

2 *Id.* at 128-31.

3 *Id.* at 131-45; Act of March 3, 1911, 36 Stat. 1087.

4 44 Chicago Legal News, 253 (March 16, 1912).

review all orders and findings of the Interstate Commerce Commission, it authorized for that bench five new judgeships, equivalent in rank and pay to circuit judges.<sup>5</sup> President Taft wanted to appoint one Illinois resident in recognition of the state's importance as a railroad center. Taft faced a difficult upcoming reelection campaign and feared that any choice he might make would alienate either the Theodore Roosevelt or the conservative faction in the Illinois Republican party. A way out of the dilemma was urged upon him by two influential friends: Max Pam, a wealthy and prominent Chicago attorney, and Charles Norton, Taft's private secretary. Their solution called for the appointment of Julian Mack, a Democrat and long-time friend of each. Taft agreed to the plan because, although it angered the Illinois Republican senators, it offered the possibility of a large political dividend—winning the support of Jewish voters.<sup>6</sup>

Julian Mack was the first Jew to be appointed to the federal appellate bench and only the second Jew to serve as a federal judge. Unlike the appointment to the Supreme Court five years later of his close friend, Louis D. Brandeis, Mack's selection did not create intense anti-Semitic or any other type of opposition. When Mack took his oath of office on February 4, 1911, Chief Justice Edward White designated the new judge to serve a term of five years on the Commerce Court and simultaneously assigned him to serve as an additional judge on the Seventh Circuit. During the two and one-half year life of the Commerce Court, Judge Mack maintained an office in Chicago and sat both as a district and court of appeals judge whenever the Commerce Court was recessed. When Congress abolished the Commerce Court, its four remaining judges retained their circuit judgeship rank and were assigned by the Chief Justice to assist the courts of appeals in disposing of their growing caseload. Chief Justice White again assigned Judge Mack to the Seventh Circuit.<sup>7</sup>

Although this permanent assignment to the Seventh Circuit lasted until July 1, 1929, Judge Mack's work effectively covered only the period 1911-1920. During that time he wrote over one hundred opinions and conducted many important trials in the Northern District of Illinois. He often received temporary designations to sit in the Second or Sixth Circuits, and after 1920 he worked almost exclusively in Cincinnati and New York.

Julian William Mack was, at the time of his appointment, a unique figure on the bench of the Seventh Circuit, differing in almost all respects from the men who had served there before. While earlier judges had been participants

5 The history of the Commerce Court is most completely chronicled in FRANKFURTER and LANDIS, *supra* at 153-74.

6 H. BARNARD, *THE FORGING OF AN AMERICAN JEW: THE LIFE AND TIMES OF JUDGE JULIAN MACK*, 111-18 (1974).

7 The story of the Commerce Court's demise is told in FRANKFURTER and LANDIS, *supra* at 168-73. One of the judges of that court, Judge Robert W. Archbald, was impeached for using his influence to secure favorable contracts for his friends from carriers involved in litigation before the Commerce Court. *Id.* at 171. See also BARNARD, *supra* at 119-39.

in the Civil War, Judge Mack was born after the war in 1866. While most earlier judges were born in the Midwest, Mack was born in San Francisco and lived there until his family moved to Cincinnati in 1869. Beyond these apparent differences, however, what most distinguished Mack from his predecessors on the Seventh Circuit were his legal education, his pre-appointment career, and his religion.

Judge Mack was the first law school graduate to sit on the Seventh Circuit. After finishing second in his high school class in Cincinnati in 1884, Mack attended Harvard Law School from 1884-1887, where he excelled. He graduated at the top of his class, was selected as the class orator for graduation, and received a prestigious three-year Parker Fellowship to study comparative law in Germany. Harvard also provided Mack with an opportunity to meet and befriend the foremost legal minds of his time. Among his Harvard associates were John Henry Wigmore, Joseph Beale, Samuel Williston, Louis D. Brandeis, and James Barr Ames. Encouragement from Ames, the distinguished law teacher, enabled Mack and several of his friends to found the *Harvard Law Review* in April 1887. Mack served both as its first business manager and as a member of the editorial board. His devotion to Harvard University and the Law School remained constant throughout his life—even during the period when, as a member of Harvard's Board of Overseers, he fought a losing battle against President A. Lawrence Lowell's attempts to place a quota on the number of Jews admitted to the university.<sup>8</sup>

Unlike previous Seventh Circuit judges, Julian Mack had not had a highly prosperous legal practice nor had he been a powerful politician. Returning to the United States following his three years of study in Germany, he settled in Chicago. He worked first as a clerk in the firm of Rosenthal & Rosenthal, then formed his own firm of Hofheimer, Zeisler & Mack in 1893. In 1898 he left the partnership to practice alone. He never made much money, but he often had interesting cases, including *Levy v. Chicago National Bank* which involved the bankruptcy of a leading Jewish investment banking firm in the wake of the collapse of the traction empire of Charles T. Yerkes. In 1895 Judge Mack joined his friend and former Harvard classmate, John Wigmore, as a professor at Northwestern University School of Law. Mack stayed on the Northwestern faculty until 1902 when another friend, Joseph Beale, dean of the newly established University of Chicago Law School, offered him a professorship. Mack accepted and remained a part-time member of the school's faculty until 1940, earning a reputation as an excellent teacher.<sup>9</sup>

Teaching and practice did not occupy all of Mack's attention. He became an active participant in many of the social reform movements which emerged in Chicago and the nation during the last decade of the nineteenth

8 Biographical material on Judge Mack is taken from BARNARD, *supra*, the only study of his life. The book does not examine his judicial career in detail, as its focus is the Judge's Zionist activities. Judge Mack's Harvard career is discussed in chapter 5 and the confrontation with President Lowell in the 1920s is found in chapter 35.

9 BARNARD, *supra* at 36-44.

and the first two decades of the twentieth century. He worked at Hull House and became a friend of Jane Addams, probably the only Chicago person involved in more reform groups than Judge Mack. He taught social workers at the Chicago School of Civics and Philanthropy and later became president of the National Conference of Charities and Corrections. He helped to organize the Juvenile Protective League which proposed, lobbied, and then assisted in operating Chicago's juvenile court. He was an early supporter of the National Association for the Advancement of Colored People and the American Civil Liberties Union. Judge Mack served as secretary of the United Jewish Charities, the association responsible for overseeing and funding Chicago Jewish philanthropic activities, especially Michael Reese Hospital. In his work with Jewish philanthropy Judge Mack became a close friend and advisor of Julius Rosenwald, president of Sears, Roebuck & Company and one of America's wealthiest men. Rosenwald's trust in Mack's judgment enabled Mack to wield considerable power in reform organizations; for people valued not only the intelligence of Mack's ideas, but also his ability to back them up with Rosenwald's financial support.<sup>10</sup>

Judge Mack's position of influence among reform groups, plus his identification as one of the prominent young Jewish leaders, led to his entry into politics. The Democratic mayor of Chicago, Carter Harrison, sought to win the support of traditionally Republican Jewish voters in his campaign for reelection in 1903. He appointed Julian Mack to a vacancy on the Civil Service Commission. Because of the enthusiastic reception the appointment received, Mayor Harrison offered to slate Mack for a seat on the Circuit Court of Cook County. Although thought by many lawyers to be too young for a judgeship, Mack received support from newspaper editorials, plus the votes of almost all of Chicago's Jewish community, and emerged as the top vote-getter in the election. He took his seat on the bench in July 1903.

Judge Mack's interest in the juvenile court movement led to his assignment to that court. His four years as judge of the juvenile court made him a national figure, and it is for this work that he is still remembered. He became one of the leading advocates of the juvenile court and the child-saving movement which at the time was gaining nationwide support. He delivered speeches around the country to lay groups and conferences of social workers; he wrote articles for law reviews and academic journals; and he was the subject of popular magazine and newspaper articles. The recognition of his leadership role came in 1909 when President Roosevelt chose Judge Mack to serve as one of the three vice-chairmen of the famous White House Conference on the Care of Dependent Children. Following the conference Mack also assisted in drafting legislation to implement the conference recommendations, which resulted in the establishment of the United States Children's Bureau.<sup>11</sup>

<sup>10</sup> *Id.* at 45-55.

<sup>11</sup> *Id.* at 56-63, 64-77.

Despite the judge's prominent role in the juvenile justice movement the members of the Illinois Supreme Court transferred him to a seat on the Illinois Court of Appeals in 1907. This move met with considerable opposition from reform leaders, such as Jane Addams, but the Supreme Court held firm. Judge Mack objected to the inactive life on the appellate court, but decided not to leave the bench when his term expired. Instead he ran a vigorous campaign in 1909 and won reelection. His victory enhanced his standing in political circles and led to speculation that he would be slated for higher office. The newspapers and some lawyers even mentioned him as a potential candidate to fill a vacancy on the United States District Court for the Northern District of Illinois. Mack did nothing to stifle this speculation, as he wanted to leave the state judiciary for a position on the federal court. The opportunity came in 1911 with the creation of the Commerce Court.

As the sketch of Judge Mack's social reform interests and political career reveal, religion played a central role in his life. The Mack family had been among the early German Jews who had rejected Orthodox Judaism in favor of the Reform Judaism taught by Rabbi Isaac Mayer Wise of Cincinnati. As a young man Julian Mack maintained his Jewish identity but rarely observed religious practices. In Chicago he joined Congregation Sinai, whose Rabbi, Emil Hirsch, was one of the most liberal and outspoken reform rabbis in the country. Sinai was an important synagogue both because of its rabbi and because its members included the wealthiest and most influential German Jewish families in Chicago. This group provided most of the financial and political support Judge Mack needed during his early career. However, during World War I Judge Mack became concerned over the plight of eastern European Jewry and began to support the Zionist cause. This led him to drift away from many of the Reform Jews, especially Rabbi Hirsch and Julius Rosenwald.<sup>12</sup>

Julian Mack's interest in Zionism developed into ardent love. Advocacy of this cause became his "off the bench" career. It is not necessary to chronicle his work in its behalf over the years from 1917 until his death, as his biography, *The Forging of an American Jew*, richly details it. Merely listing some of his many activities indicates his influential role. He assisted in organizing and served as an officer of: the American Jewish Committee, Zionist Organization of America, Comité des Délégations Juives, Palestine Endowment Funds, Inc., and the World Jewish Congress. In recognition of his efforts in the creation of the State of Israel the Julian W. Mack School and Workshop was established.<sup>13</sup>

One aspect of the Judge's Zionist activities which should be discussed is his friendship with Louis D. Brandeis. The two jurists had known each other from law school and the founding of the *Harvard Law Review*. As both men

12 *Id.* at 7-17; 101-10. Zionists were committed to the idea of establishing a homeland for Jews in Palestine.

13 Mack's Zionist career is covered in the second half of the Barnard biography, especially chapters 19 to 34.

drifted toward Zionism their friendship deepened. Evidence of this is seen in a letter Brandeis wrote to Attorney General James Clark McReynolds urging that if the Commerce Court and its judgeships were abolished a vacancy on the federal bench be found for Mack. "It would be a calamity to lose him from public service. He is a good Democrat in every sense of the word."<sup>14</sup>

After Brandeis became a justice of the Supreme Court, Judge Mack became the spokesman for the two men. He often took positions or issued statements which were understood to represent the views of Brandeis, who was prevented from speaking because of fear that Brandeis' open involvement in Zionist issues would rekindle the anti-Semitic feelings engendered by his appointment to the Supreme Court. One wing of the Zionist Organization of America was commonly called the "Mack-Brandeis" faction. Judge Mack's outspoken Zionism did attract some criticism from his fellow judges, including his close friend on the Second Circuit, Judge Learned Hand.<sup>15</sup>

Because the major portion of Judge Mack's Zionist activities occurred after his move to New York and the Second Circuit, his tenure on the Seventh Circuit was free from any criticism by the other members of the court—Judges Grosscup, Kohlsaat, Seaman, and Baker. The Seventh Circuit bench, however, was in 1911 the scene of great controversy. Judge Grosscup, no stranger to newspaper headlines, was at the center of a storm that involved vague innuendoes that unspecified evidence had been uncovered which would show that Judge Grosscup had used his office for personal profit.

The first front-page headline appeared September 21, 1911, and indicated that the judge intended to retire. He stated he wanted to leave the bench so that he could be more active in politics. He also added that he believed the court of appeals job would no longer be as interesting since the abolition of the circuit courts would practically eliminate his opportunity to do trial work. His statement in part read:

[U]nder the new act of Congress my work after January 1 would be exclusively appellate, and that, unlike planting a garden and then watching it grow, is too much like merely weeding the garden. The world, . . . politically, is trying to catch up with the world's radically changed economic conditions. [T]he settlement . . . for the future will come not through the courts of law but through the court of public opinion. . . . I wish greater freedom than the bench gives to do my part in this court of public opinion.<sup>16</sup>

14 Letter from L. D. Brandeis to J. C. McReynolds (September 25, 1913) reprinted in 3 LETTERS OF LOUIS D. BRANDEIS, 180 (M. UROFSKY and D. LEVY eds.) (1973). McReynolds later became a justice of the Supreme Court and gained notoriety as one of the opponents of New Deal legislation.

15 BARNARD, *supra* at 190-98, 212-17; Hand's criticism was based on his fear that Mack could not devote sufficient time to his judicial work if he were actively engaged in Zionist activities—a fear Barnard sees as unfounded. *Id.* at 143.

16 Chicago Tribune, September 21, 1911, at 1-2; 44 Chicago Legal News, 53 (September 23, 1911).

This statement has certain credibility, given the Judge's outspoken views on economic policy and given the attitude towards the work of the court of appeals which he expressed in the letter to Judge K. M. Landis which was quoted in chapter IV.<sup>17</sup> However, the newspaper article announcing the judge's resignation contained a startling revelation. The judge had been shadowed for two years by a private detective who had been hired by a muckraking magazine. The detective had investigated every aspect of cases decided by Grosscup in an effort to find evidence of malfeasance; in fact, the judge had been under observation even while traveling in Europe. The detective implied that he had uncovered damaging evidence that would later be divulged in the magazine *Everybody's*.<sup>18</sup> The story became further complicated when former United States Solicitor General Charles Aldrich, the man who had failed to be nominated to the federal bench ten years earlier and who had leveled charges against Judge Kohlsaat, announced that he had supplied information for the investigation. He charged that Grosscup was resigning because he feared the results of the magazine investigation. Additionally, Aldrich urged the Chicago Bar Association to refuse to "indors[e] him [Grosscup] by a banquet or a foolishly eulogistic speech."<sup>19</sup>

Judge Grosscup reacted to the charges by threatening to withdraw his resignation if formal allegations were made against him. He challenged Aldrich and *Everybody's* publisher to make their evidence public. He further charged that the magazine had been guilty of burglary by breaking into the home of his former clerk, Marshall Sampsell, and taking bank records. The magazine declined to accept Grosscup's challenge.<sup>20</sup> Instead, the publisher issued a statement saying he would do nothing which would jeopardize the possibility of Grosscup's resignation.<sup>21</sup> The entire episode thus ended. The judge resigned October 23, 1911, with the allegations of malfeasance never having been formally made or proven—yet, not disproven.

After leaving the bench Judge Grosscup pursued the career he had outlined in his resignation statement. He campaigned vigorously for Theodore Roosevelt and the Bull Moose Party in the 1912 presidential election. In his speeches he advocated national regulation of monopolies and other corporate practice. He and his wife sold their house in Highland Park and moved to an apartment in the Waldorf-Astoria Hotel in New York City, where he joined the law firm of Washburn and Day as advisory and consulting counsel. Even after retirement the many controversies surrounding the judge did not disappear. In 1918 newspaper allegations appeared accusing Grosscup of pro-

17 See p. 149 *infra*.

18 Chicago Tribune, September 22, 1911, at 3. EVERYBODY'S was one of a group of popular "Muckraker's" magazines [which included COLLIER'S, McCLURE'S, and AMERICAN MAGAZINE]. The magazines engaged in investigative journalism and attempted to arouse public opposition to political corruption and the abuses of big business. See J. WOOD, *MAGAZINES IN THE UNITED STATES*, 144-45 (3d ed. 1971).

19 Chicago Tribune, September 21, 1911, at 3.

20 *Id.*

21 Chicago Tribune, September 22, 1911, at 3.

German sympathies during World War I. No damaging evidence was uncovered and the inquiry was dropped. The judge's last three years were spent in relative tranquility as he continued to practice law in New York and travel. He died of heart disease at age sixty-nine on October 1, 1921, while sailing to England. His body was returned to the United States and buried in his hometown of Ashland, Ohio.<sup>22</sup>

The vacancy created by Judge Grosscup's resignation remained unfilled for almost four years, the longest vacancy in the court's history. Judge Mack's designation kept four judges in active service on the bench and prevented a backlog from developing. The story of the lengthy delay in the nomination and confirmation of a replacement for Grosscup illustrates the complex confluence of local and national political factors which go into selection of a judge.

At the time of the Grosscup resignation the Illinois Republican party had been factionalized by disputes between party regulars led by Senator William Lorimer and progressives led by Judge Kohlsaat's brother Herman, among other. Rumors regarding the purchase of votes in Lorimer's election to the Senate began to surface soon after his election in 1909. In 1910 the senator survived a United States Senate motion to declare his seat vacant, but a continuing investigation by both the Illinois and United States Senates uncovered enough evidence to remove Lorimer from his seat on July 13, 1912. Within both the state and national legislatures Lorimer's supporters were regular Republicans and his opponents were Progressives.<sup>23</sup> It was not surprising that President Taft chose to avoid making an appointment to the Seventh Circuit at this time; he justifiably feared that whomever he nominated would be interpreted as a sign that he sided with one of the warring factions. As a result, only after Lorimer's ouster and Taft's defeat for reelection by Woodrow Wilson could a nomination for a court of appeals judge be sent to the Senate.

President Taft decided to elevate District Judge George A. Carpenter of the Northern District of Illinois to the Seventh Circuit and nominate prominent Chicago Probate Judge Charles S. Cutting to the district court. Taft sent the nominations to the Senate a month after his loss to Wilson, but they had no chance of confirmation. A Democratic Senate did not intend to allow a lame duck Republican a chance to appoint a Republican judge, when, for the first time since 1896, a Democrat would occupy the White House. There was not even an opportunity for a recess appointment because Carpenter would not resign his seat on the district court until the Senate had confirmed his new appointment. The Chicago bar, which strongly endorsed Taft's selections, did its best to pressure the Senate into approving Carpenter. It sent a

22 Chicago Tribune, October 2, 1921, at 1.

23 For a summary of the details of the Lorimer scandal see E. DUNNE, 2 ILLINOIS: THE HEART OF THE NATION, 180-87 (1933). A complete and interesting account of Lorimer and the Republican factions in Illinois from 1900-12 can be found in J. TARR, A STUDY IN BOSS POLITICS: WILLIAM LORIMER OF CHICAGO (1971).

delegation to Washington to lobby and tried to arouse public attention through the press. Articles appeared in the *Chicago Legal News* and John H. Wigmore wrote a stinging editorial in the *Illinois Law Review* denouncing the Senate delay. He referred to the two men as "ideal nominees" and after asking rhetorically if the Senate was "determined to keep the judiciary in the trough of partisan politics" he described the Senate as Milton had Belial—"To vice industrious, but to nobler deeds timorous and slothful." The Senate remained unmoved and the vacancy remained unfilled.<sup>24</sup>

After the inauguration of President Wilson, the controversy over the Seventh Circuit judgeship shifted to the Democratic party in Illinois. James Hamilton Lewis had won election as a Democrat to the Senate in 1912 by uniting the three branches of his party. President Wilson and Senator Lewis confronted the problem of how to divide federal appointments so that all three groups were satisfied.<sup>25</sup> In addition, unlike most prior administrations, President Wilson and his attorney general did not allow "senatorial courtesy" to dictate judicial appointments. It therefore took almost two years to find a candidate acceptable to the president and Illinois Democrats. At first Senator Lewis tried to persuade the president to appoint William A. Doyle, for many years a master in chancery in the Cook County Circuit Court and a man all Democratic factions could endorse. However, Wilson refused to appoint Doyle as he did not believe that Doyle would strongly defend Wilson's "New Freedom" legislative and economic programs.<sup>26</sup> When Senator Lewis and Governor Edward Dunne realized the futility of fighting for Doyle, they suggested the president select Samuel Alschuler, who had met with enthusiastic support from the press, the bar, and Illinois politicians. On August 18, 1915, President Wilson named him to a recess appointment as judge of the United States Court of Appeals for the Seventh Circuit. Alschuler, a respected lawyer and a noted politician, had earned a reputation for both his progressive views and his integrity. The *Chicago Tribune* wrote that

he has a personal, legal and political standing throughout the state that brooks no serious comparison.<sup>27</sup>

The *Chicago Legal News* wrote:

In his public life he has been broad minded and progressive. . . . While in the

24 Accounts of the Taft nominations and the activities of its backers and opponents are found in *Chicago Tribune*, December 18, 1912, at 1; 45 *Chicago Legal News*, 173 (January 4, 1913); 45 *Chicago Legal News*, 181 (January 11, 1913); 45 *Chicago Legal News*, 214 (February 8, 1913); 45 *Chicago Legal News*, 246 (March 8, 1913); J. H. Wigmore, *The Federal Senate and the Federal Judges*, 7 ILL.L.REV. 443 (1913).

25 The three factions were the "Democratic machine" controlled by former Mayor John Hopkins and Probate Court Clerk Roger Sullivan; and two reform groups, one led by Carter H. Harrison, the other by Edward F. Dunne, who both served terms as mayor of Chicago. See C. HARRISON, *STORMY YEARS: THE AUTOBIOGRAPHY OF CARTER H. HARRISON* (1935).

26 *Chicago Tribune*, August 17, 1915, at 7.

27 *Chicago Tribune*, August 18, 1915, at 13.

legislature his influence was always on the side of good government and law reform. . . . His work at the bar has been no less noteworthy.<sup>28</sup>

After settling the business of his legal practice, Samuel Alschuler took his oath of office on October 1, 1915. A unanimous Senate confirmed the judge on January 18, 1916, making his recess appointment a permanent one.

Judge Samuel Alschuler was born in Chicago on November 20, 1859. Following the unsuccessful Revolution of 1848 his grandparents and parents had fled from Germany as had countless other Jewish families. Several years after their parents had settled in Chicago (ca. 1850) Jacob Alschuler married Caroline Stiefel. He worked in the real estate and insurance businesses. In 1861 he moved his family from Chicago to Aurora, where the family has lived until the present. The Alschulers had five children; the oldest, Clara, taught school in Aurora. Samuel was second oldest, and the third child, Edward, died at age 24. The remaining two, George and Benjamin, like their brother Sam, were active in Illinois Democratic party politics. George Alschuler served as mayor of Aurora, a member of the Illinois House, and its minority leader from 1909-1913. In addition he ran unsuccessfully as the Democratic nominee for state treasurer in 1928. Benjamin ran unsuccessfully for Congress in 1906 and became a judge of the Illinois Court of Claims from 1913-1917. The Alschuler family remained close throughout the years, as the three brothers supplied assistance and support to the many political campaigns in which the family was involved.<sup>29</sup>

Samuel Alschuler attended Aurora public schools and graduated from Aurora High School in 1875 at age sixteen. During his school years and for three years after he worked at various jobs—laborer in a cotton mill, grocery wagon driver, and clerk-bookkeeper in a clothing store.<sup>30</sup> In 1878 he began his legal studies in the law office of Captain A. C. Little, a well-known Aurora attorney. The years at Little's office were exciting and challenging. As a fellow clerk wrote:

How we used to discuss everything above the sun and everything under the sun. We settled grave questions of State and grave questions of public weal and public woe—somehow they didn't stay settled; but it was a great school.<sup>31</sup>

Though reading law had given him excellent training, Judge Alschuler shared the opinion of many of the members of his generation: the best preparation for law was a liberal arts education followed by law school. If financial necessity required going to work after college then the best solution was to

28 Chicago Legal News, 21 (August 19, 1915).

29 The family information is contained in the biographical questionnaire on Judge Alschuler prepared for the Bicentennial Committee of the Judicial Conference of the United States.

30 Aurora Beacon News, November 9, 1939, at 1; 48 Chicago Legal News, 4 (August 19, 1915).

31 Letter from J. H. Rushton to Samuel Alschuler, December 23, 1914 (Alschuler Collection, Illinois State Historical Library, Springfield, Illinois) (hereinafter Alschuler Collection).

clerk for a firm and attend law school at night. He expressed these views ten years after his admission to the bar in a fatherly letter to a younger cousin. He wrote:

These conclusions are the result of four years of observation and contemplation, and in my case are emphasized by having been necessarily curtailed in these educational advantages.<sup>32</sup>

Alschuler completed his clerkship with Captain Little in three years and was admitted to the Illinois bar in 1881. He immediately began a successful practice in Aurora. His general practice included a large amount of trial work in most of which he was a plaintiff's attorney. One of his eulogizers stated that the future judge represented no large corporate clients or railroads. In 1890 he formed a partnership with John C. Murphy, a former fellow clerk at Little's office. The two men established an excellent reputation as plaintiff trial attorneys. This partnership lasted until Alschuler moved to Chicago in 1901.<sup>33</sup>

During the early years of his law practice, Samuel Alschuler became involved in Democratic party politics both in Aurora and around the state. Throughout his career he remained a loyal party man even though he allied himself with the liberal wing of his party and was in constant opposition to the boss-controlled Chicago faction.<sup>34</sup> His liberal allegiance was evident early, as he vigorously campaigned for the free-silver Democrat, John Peter Altgeld, for governor in 1892. Altgeld rewarded his support with an appointment to the State Commission on Claims in 1893. Alschuler resigned as commissioner in 1896 to campaign for the Illinois House of Representatives. He defeated his Republican opponent and became a Democratic leader in the House. After reelection in 1898 Alschuler served as minority leader. His reputation for honesty and liberalism received public attention in 1897 when he led the opposition to the Humphrey and Allen bills. The two laws, sponsored by the Yerkes Street Car Line and the utilities interests, sought to increase the available benefits the Chicago City Council could bestow on utility franchises. The sponsors spared no expense in buying the Illinois legislature, and Alschuler and his allies waged a losing fight, but they gained wide public respect.<sup>35</sup>

Twenty years later, writing about his legislative years Alschuler stated that he never introduced a legislative bill during his two terms in the House. His

32 Letter from Samuel Alschuler to Leon Alschuler, July 20, 1892 (Alschuler Collection).

33 G. Haight, *Memorial Resolution* in PROCEEDINGS IN RESPECT TO THE MEMORY OF THE HONORABLE SAMUEL ALSCHULER (1940).

34 The bosses of the Chicago Democratic Party were former Mayor John Hopkins and Roger Sullivan. See HARRISON, *supra*.

35 Aurora Beacon Journal, November 9, 1939, at 2; HARRISON, *supra* 136-82, has a detailed account of the intrigue of the Yerkes interests to secure the Allen Bill; telegram from John P. Altgeld to Samuel Alschuler, July 13, 1893 (Alschuler Collection).

explanation shows not a lack of imagination or initiative but rather why he gained a reputation for honesty in a corrupt legislature.

Tho' I had in mind various subjects ripe for legislation, it soon became apparent that a member pushing bills of his own, was at more or less disadvantage in respect to the bills of other members, all zealously crowding along their own pet projects. It invited trading and log-rolling whereby undesirable legislation was at least facilitated.<sup>36</sup>

In recognition of Samuel Alschuler's popularity and in an attempt to win over Jewish voters from the Republican party, the Democrats slated him for governor in 1900 against Richard Yates, the popular son of Illinois' famous Civil War governor. Though he lost, Alschuler carried the City of Chicago, a rare occurrence at the end of the nineteenth century.<sup>37</sup>

Out of public office, Samuel Alschuler moved to Chicago and entered full-time private law practice again. He joined the firm of Kraus, Alschuler & Holden. Adolf Kraus, a Democrat and holder of various city offices, eagerly sought Alschuler as a partner. He promised Alschuler that he would be able to make twice his present salary and stated

I have sufficient confidence in the combination to be willing to agree . . . to wait for any income until you and Mr. Holden are first made as good as you have been heretofore.<sup>38</sup>

The attorney's expectations were not disappointed. The firm prospered, representing many plaintiffs in jury suits along with handling other standard matters of a general civil and criminal practice. Alschuler worked with Clarence Darrow in several cases, including one involving William Randolph Hearst and some of his employees who were charged with contempt of court for ridiculing the opinion of a state court judge in several newspaper cartoons. Sam Alschuler also handled many *pro bono* cases, including work on the reform of the Chicago public schools. He became recognized as one of the leading attorneys in the city, a position evidenced by his election to the Board of Managers of the Chicago Bar Association in 1909.<sup>39</sup>

Alschuler's return to private practice did not lessen his involvement in politics or public affairs. In 1901 the Democrats in the Illinois Senate cast

36 Letter from Samuel Alschuler to D. E. Ellis, December 30, 1914 (Alschuler Collection).

37 HARRISON, *supra* at 319; 2 E. DUNNE, ILLINOIS: HEART OF THE NATION, 312 (1933); 1 W. TOWNSEND, ILLINOIS DEMOCRACY, 249-52 (1935).

38 Letters from Adolph Kraus to Samuel Alschuler, January 7, 1901; January 14, 1901; and January 18, 1901 (Alschuler Collection). See also the Memorandum of Office and Services Arrangement from October 1, 1914 (Alschuler Collection) which details the new partnership agreement drawn when Holden's son joined the firm.

39 Letter from the treasurer of the Merchants Club of Chicago to Samuel Alschuler, May 31, 1907 (Alschuler Collection) urging Alschuler to reconsider his refusal to accept a fee for his work in drafting a school reform plan for Chicago. Letter from Farlin H. Ball, Secretary of the Chicago Bar Association to Samuel Alschuler, April 17, 1909 (Alschuler Collection); 2 E. F. DUNNE, ILLINOIS: HEART OF THE NATION, 192 (1933); letter from J. H. Lewis to Samuel Alschuler, April 17, 1913 (Alschuler Collection).

their minority votes for him in the election for the United States Senate. Though not a candidate himself, he campaigned for many Democrats; these included Henry Horner and Julian Mack in judicial races; Carter Harrison for mayor, and former Vice-President Adlai Stevenson, Sr., for governor. Alschuler also participated in party organizational decisions. When James Hamilton Lewis, the future senator, sought a post at the 1904 Democratic National Convention he solicited Alschuler's assistance in arranging it. Similarly, he received many requests from party workers to help them secure jobs with the city or for other favors.<sup>40</sup>

In 1912 Sam Alschuler returned to the campaign trail when he sought the Democratic nomination for governor. This race demonstrated the splits in the Illinois Democratic party. Alschuler received the backing of Carter H. Harrison, the liberal mayor of Chicago. His opponent, Edward F. Dunne, like Alschuler and Harrison, opposed the regular party Chicago boss, Roger Sullivan. They also maintained similar ideological positions. Dunne, however, was more willing to work out an accommodation with the boss-controlled factions and thus easily won the nomination and the subsequent general election. Alschuler, despite the disappointment of losing, enthusiastically supported Dunne. They remained close friends, proving Dunne's preprimary letter correct. He wrote

I can assure you that the long-time personal friendship existing between us will in no way be disturbed by the concurrence of our political ambitions.<sup>41</sup>

In fact, Governor Dunne appointed Alschuler chairman of the Illinois Waterway Commission in 1915, a position of importance as it made him responsible for overseeing one of the governor's pet projects. Additionally, the governor appointed Benjamin Alschuler, Samuel's brother, to the Illinois Court of Claims.<sup>42</sup>

The twice-defeated gubernatorial candidate continued to occupy a valued position of trust in the Democratic party. With the election of President Wilson and Senator Lewis, Samuel Alschuler was called upon regularly to give advice on appointments. He worked hard to ensure that the nominees for postmasterships in and near Aurora came from the ranks of his supporters. When another friend sought a federal post in the Wilson administration, Alschuler wrote an endorsement letter which praised the man's timeless

40 Aurora Beacon-News, November 12, 1939; letter from J. J. O'Connor to Samuel Alschuler, May 1, 1903 (Alschuler Collection); letter from F. S. Peabody to Samuel Alschuler, November 18, 1908 (Alschuler Collection); letter from Adlai E. Stevenson to Samuel Alschuler, November 8, 1908 (Alschuler Collection); letter from Henry Horner to Samuel Alschuler, July 25, 1914 (Alschuler Collection).

41 HARRISON, *supra*; letter from E. F. Dunne to Samuel Alschuler, January 22, 1912 (Alschuler Collection); letter from Carter H. Harrison to Samuel Alschuler, April 3, 1912 (Alschuler Collection).

42 Dunne, *supra* at 461; letter from Samuel Alschuler to E. F. Dunne, April 24, 1913 (Alschuler Collection).

work for the party and expressed the hope that he would "not be one of those who will have only his labor for his pains."<sup>43</sup>

In keeping with his reputation for honesty and integrity he took seriously the task of dispensing patronage. Sam Alschuler had successfully lobbied with Attorney General James McReynolds and Senator Lewis to have Charles Clyne, a close family friend and son of the man who gave Sam Alschuler his start in politics, appointed United States attorney for the Northern District of Illinois. In writing to congratulate Clyne he wrote:

If, as the Tribune recently put it, you ought to be opposed because . . . you had the support of the Alschulers, I trust that to the very end of a very long, honorable and distinguished service in your high office, no one may say with truth that the Alschulers, or any of them at any time ever requested you to do or to leave undone anything which would in the slightest be inconsistent with the strictest integrity and with your most scrupulous discharge of every duty which your office will devolve upon you.<sup>44</sup>

Samuel Alschuler himself received several offers of federal appointments before his nomination to the Seventh Circuit. Senator Lewis urged him to accept the position of assistant attorney general or second assistant secretary of the treasury. He refused because of the lack of security and the low pay. He feared that having left his successful practice for Washington, if he resigned or was forced to leave, he would have trouble finding a position he enjoyed as much upon his return to Chicago. He did, however, express a willingness to accept a commissionership on the Interstate Commerce Commission, but Senator Lewis did not receive the opportunity to make his appointment. It was therefore not surprising when Attorney General Gregory wired Alschuler on August 13, 1915 asking

Will you accept appointment [to the court of appeals] if tendered without application on your part.

It was ironic that Alschuler received the nomination to fill the vacancy caused by Judge Grosscup's resignation, for twice he had written letters of endorsements for potential replacements. In 1911 he had written supporting Jesse Baldwin. Then in 1913, on the eve of Wilson's inauguration, he wrote the president to urge the appointment to the court of appeals of Sigmund Zeisler, well-known Chicago attorney and former law partner of Julian Mack.<sup>45</sup>

43 Letter from Samuel Alschuler to Dr. Garret Norton, February 25, 1913; letter from Samuel Alschuler to "To Whom it May Concern," February 25, 1913 (Alschuler Collection).

44 Letter from Samuel Alschuler to Charles F. Clyne, September 9, 1914 (Alschuler Collection).

45 Telegram from J. H. Lewis to Samuel Alschuler, July 29, 1913 (Alschuler Collection); letter from Samuel Alschuler to Attorney General J. C. McReynolds, August 28, 1913 (Alschuler Collection); telegram from J. H. Lewis to Samuel Alschuler, November 22, 1913 (Alschuler Collection); telegram from Samuel Alschuler to J. H. Lewis, November 24, 1913 (Alschuler Collection); letter from Samuel Alschuler to Woodrow Wilson, March 10, 1913 (Alschuler Collection); letter from Samuel Alschuler to Attorney General George Wickersham, October 30, 1911 (Alschuler Collection).

When Samuel Alschuler took his seat on the Seventh Circuit on October 1, 1915, he joined Judges Baker, Kohlsaas, and Mack. It would be natural to compare Judges Alschuler and Mack. Both were well-known Democrats from the progressive faction of their party. Both were German Jews who belonged to reform congregations. The two men were markedly different, though. As described earlier, Mack was an activist, social reformer, and intellectual who only tangentially became involved in elective politics and the Democratic party. Alschuler was a consummate politician and loyal Democrat who supported progressive reforms within the party organization, not, as Mack did, by joining myriad special issue groups.

The difference between the Judaism of Judge Mack and Judge Alschuler was also one of style as opposed to substance. Judge Alschuler was the first Jew in the history of the federal judiciary to be nominated as a judge of the circuit court of appeals and, like Judge Mack, experienced no organized opposition at his confirmation. Judge Alschuler, like Mack and other reform Jews, was an assimilationist. He was proud of his religion and a source of pride to the Jewish community of Illinois, but he sought to be judged by his performance in public office, not by his religion. He angrily wrote the editor of a Baptist newspaper who had inquired about the religion of the Democratic ticket in the 1912 election that:

I did not think it was any of my business what the religion of the candidate was or is, and hence I have not concerned myself with that question and am unable to supply the information you request.

My general information is that all those whose names appeared on the primary tickets were qualified American citizens, and being such, our constitution and laws are such that all inquiry as to faith or creed should be precluded.<sup>46</sup>

He expressed a similar view in answering a letter from a friend who sought support for a Jewish woman's candidacy for the Chicago School Board. He wrote:

It is deplorable that in filling such Boards matters of birth or race, or even sex should be given controlling importance—but such is unfortunately largely the case.<sup>47</sup>

Where Mack and Alschuler differed in style was on the question of Zionism. By 1918 Mack had become a visible and vocal leader of the Zionist movement in America. Judge Alschuler, although a strong supporter of Zionism, preferred to lobby privately with friends to aid the cause. He responded to a friend and politician who had solicited his advice on what position to take regarding the Balfour Declaration by urging his friend to issue a "statement of approval of the general purport of the declaration of the British

<sup>46</sup> Letter from Samuel Alschuler to J. Q. Ramsey, September 24, 1912 (Alschuler Collection).

<sup>47</sup> Letter from Samuel Alschuler to B. W. Alpiner, June 2, 1913 (Alschuler Collection).

government and of the doing of those things by nations and individuals which would tend to make that declaration effectual.”<sup>48</sup> His sympathy for his fellow Jews was strong.

It is very plain that for a long time hitherto, and probably in the indefinite future as well, the condition of Jews in various countries has been absolutely intolerable. It is supposed that of such there are many who would infinitely prefer to betake themselves to some country they might call their own, and I am quite convinced that such country would attract large numbers of them. . . . In my judgment it is well worth the experiment.<sup>49</sup>

Judge Alschuler found his first few years on the bench a radical change from his twenty years in politics. Having been at the center of activity of state and federal elections and appointments he felt cut off from his former world. He wrote a very close friend, E. G. Cooley:

I see very little of mutual friends and acquaintances, and it would surprise you to realize how little association I have with others. People just seem to keep away from me. . . . I have come to be a good deal of a hermit, without, I assure you, having the slightest desire to be in such a state. But I presume that willy nilly it goes with the position I hold.

As to politics I know nothing except what comes through the newspapers. . . .<sup>50</sup>

Judge Alschuler was not, however, cut off from all politics. During the Wilson administration, Attorney General Gregory called on him for advice regarding appointments. In 1918 the attorney general wired the judge requesting a recommendation for solicitor general. A year earlier, when a vacancy had occurred in the Eastern District Court of Illinois, Gregory had listed the nine potential nominees and sought the judge’s candid opinion of each man. The judge complied, expressing his view more often regarding the candidate’s character and politics than legal talent or type of practice. He explained that “lawyers practicing in Chicago would ordinarily have but slight, if any, knowledge of leading lawyers in other parts of the state.”<sup>51</sup> One final incident serves to illustrate Judge Alschuler’s limited involvement in politics after taking the bench. Before the 1928 election Franklin D. Roosevelt, a key supporter of the Democratic candidate Al Smith, wrote the judge to ask whether he would vote for Smith or Hoover in November. Roosevelt promised the reply would be strictly confidential. The judge replied to Roosevelt that he wondered what would prompt him to inquire about his vote,

48 Letter from Samuel Alschuler to I. C. Copley, October 12, 1918 (Alschuler Collection).

49 *Id.*

50 Letter from Samuel Alschuler to E. G. Cooley, August 26, 1916 (Alschuler Collection).

51 Letter from Attorney General T. W. Gregory to Samuel Alschuler, November 3, 1917 (Alschuler Collection); letter from Samuel Alschuler to T. W. Gregory, November 5, 1917 (Alschuler Collection); letter from Samuel Alschuler to T. W. Gregory, January 27, 1917 (Alschuler Collection); telegram from T. W. Gregory to Samuel Alschuler, September 20, 1918 (Alschuler Collection).

well knowing that mine is just one vote, as that of any other individual. I am sure you agree that my holding a commission as federal judge should in no manner be employed as an example or warning to others in casting of their votes.<sup>52</sup>

He ended by stating that the assurance of confidentiality convinced him no public use would be made of his decision to vote for Smith.

The letter to Franklin Roosevelt also emphasizes the point that through the years Judge Alschuler privately retained his loyalty to the progressive wing of the Democratic party. He remained a silently enthusiastic supporter of President Wilson during his two terms in the White House. He believed in the necessity of preparation for war in 1916, but also thought that Wilson was a man of peace who would risk political defeat to avoid war. Of the 1916 election he wrote:

If I said that Mr. Wilson would be re-elected I fear it would be my wish that is thus signified rather than any judgment I might have formed from experience and observation.<sup>53</sup>

Private letters like this to old, trusted friends remained the medium of political expression for the judge for the entire period he remained on the bench.

Because of the death of seventy-two-year-old Judge William Seaman on March 8, 1915, a vacancy remained on the Seventh Circuit bench even after the nomination of Judge Alschuler. Judge Seaman died unexpectedly while on vacation at his daughter's home in Coronado Beach, California. His body was returned to Wisconsin and he was buried in his hometown of Sheboygan.

The Wilson administration faced an equally intense, though less protracted, intra-party dispute when they attempted to fill the vacancy caused by Judge Seaman's death. Two powerful leaders of the Wisconsin Democratic party squared off in a battle to name the appointee. Senator Paul Husting sought to have Judge M. L. Lueck named to the judgeship. Joe Davies, chairman of the Federal Trade Commission and a former Democratic national committeeman from Wisconsin, backed John Aylward, United States attorney for the Western District of Wisconsin and the chairman's former law

52 Letter from F. D. Roosevelt to Samuel Alschuler, September 25, 1928 (Alschuler Collection); letter from Samuel Alschuler to F. D. Roosevelt, October 5, 1928 (Alschuler Collection); letter from F. D. Roosevelt to S. A. Alschuler, October 12, 1928 (Alschuler Collection). The extent to which Judge Alschuler refrained from any active involvement in politics can be seen in a letter the judge wrote to a friend who had asked him to sponsor her for a federal job.

The judge stated:

I think you will understand that my position is such that so long as I hold it I cannot undertake to exercise influence with other departments of the government for the purpose of obtaining situations for friends. To this I have rigidly adhered since my appointment, for it would be considered quite unethical for me to do otherwise.

Letter from Samuel Alschuler to Harriet Tatham, April 4, 1918 (Alschuler Collection).

53 Letter from Samuel Alschuler to E. G. Cooley, August 26, 1916 (Alschuler Collection); letter from Samuel Alschuler to Representative W. E. Williams, February 8, 1916 (Alschuler Collection).

partner. Both candidates' sponsors came from the progressive wing of the Democratic party; both had been key figures in securing the Wisconsin vote for Wilson in 1912; and each believed that he was a closer advisor of the president than the other. In short, the appointment had become a test of political strength between Chairman Davies and Senator Husting. Attorney General Gregory realized that with the 1916 presidential reelection campaign beginning, it would be a political mistake to alienate either man. Gregory recommended to the president that the Justice Department find its own candidate. Following an extensive canvassing by Justice Department lawyers, the name of Evan A. Evans, a well-known and respected progressive Democrat, emerged as a clear choice. Although newspaper accounts did not reveal Evans' name until April 23, 1916,<sup>54</sup> letters to the Justice Department show that as early as February he had become the favored candidate. He received high praise from the eminent jurist John B. Winslow, chief justice of the Wisconsin Supreme Court, and also from Justice Roujet Marshall, the greatly respected senior associate justice of that court. In addition, lawyers from Wisconsin and Chicago endorsed Evan Evans. A former president of the Chicago Bar Association explained to the attorney general that his high regard for Evans' ability stemmed from having worked with him in several cases in which Evans had done brilliant work. A Wisconsin state trial judge who had observed Evans both from the opposite counsel's table and from the bench wrote, "His arguments are models of clear and accurate reasoning. No more helpful briefs ever came to me than [his]."<sup>55</sup>

In addition to the enthusiastic support from the state bench and bar, the choice of Evan Evans satisfied both Senator Husting and Chairman Davies. Evans had been a friend and supporter of both men, having run in the 1912 Democratic primary for attorney general on the Aylward-Husting ticket. Evans' support from both politicians is reflected in the statewide press accounts of his nomination. The editors of papers owing allegiance to either Davies or Husting enthusiastically endorsed Evans, both because of his own splendid qualifications and because it prevented the "disaster" of the other man's candidate receiving the appointment.<sup>56</sup>

54 State Journal (Madison), April 23, 1916, at 1; Milwaukee Sentinel, April 26, 1916, at 1; Kewaunee Enterprise, April 28, 1916, at 3; Portage Democrat, April 24, 1916, at 1.

55 Letter from Judge James O'Neill to Attorney General T. W. Gregory, March 21, 1916; letter from Horace S. Oakley to T. W. Gregory, February 29, 1916; letter from M. D. Follansbee to T. W. Gregory, March 1, 1916. (All letters are found in the Justice Department personnel files housed in the Records Center in St. Louis, Mo.) The importance of the support of the two Wisconsin Supreme Court justices can be found in two letters: (1) from Evan Evans to Judge Thomas Slick, November 1, 1944 (Evans papers retained by the family) (hereinafter Evans Papers); (2) from Evan Evans to Sherman Minton, October 8, 1945 (Evans Papers). Evans wrote that he had no political support and that Winslow was the key to his appointment. *Evan Alfred Evans: Senior Circuit Judge: Seventh Circuit*, 33 A.B.A.J. 554 (1947).

56 See note 54, *supra*.

The president formally sent the Evans nomination to the Senate on May 1, 1916. The confirmation proceeded quickly and without dissent, and the Senate on May 10 voted unanimously to approve President Wilson's choice. Judge Evans took his oath of office on May 17. The illness of Presiding Judge Baker required Judge Kohlsaas to administer Judge Evans' oath of office.

Evan A. Evans was born March 19, 1876. He grew up and resided in Sauk County, Wisconsin, where his father, Evan W. Evans, owned a farm (near Spring Green) and represented the county in the Wisconsin legislature for many years. Judge Evans attended elementary and high school in Spring Green, graduating in 1893. The fall of that year he entered the University of Wisconsin and began his fifty-five year association with the school. As a student there he excelled. He received a B.A. in liberal arts in 1897 and earned an LL.B. two years later from the law school. He achieved prominence on campus as an orator and debater. While in school he received invitations to give Fourth of July speeches throughout the state and was asked to deliver one of the principal addresses at the university's commencement ceremony in 1899. After leaving Madison, Evans devoted much of his time and energy to working for the university. In 1915 he was among the leaders of the successful effort to block the governor's attempt to take away some of the independence and power of the university president. In later years he served as a trustee of the Wisconsin Alumni Research Foundation (which raised funds to finance faculty research), president of the Alumni Association, and as a member of the Board of Visitors. To acknowledge the judge's many years of support, the university granted him an honorary doctorate of laws in 1933.<sup>57</sup>

Following law school Evan A. Evans entered practice in Omaha, Nebraska. However, a serious illness forced him to return to Wisconsin less than six months later. He formed a partnership in Baraboo, Wisconsin, with a law school classmate, Herbert H. Thomas, and Herman Grotophorst, an older attorney with an established reputation. During his sixteen years of practice, Judge Evans' only firm was Grotophorst, Evans & Thomas. His practice rapidly became one of the largest in Wisconsin. The firm had a general civil practice with a large number of plaintiff suits against corporations. As the volume of work and the firm's reputation increased, many other attorneys in the counties around Sauk began to retain Judge Evans as associate counsel, especially to handle appeals. At the time of his appointment he had argued over seventy-five cases before the Wisconsin Supreme Court, more than any other attorney in the state during those years. Representative of these cases is *Village of West Salem v. Industrial Commission of Wisconsin*, in which Evans represented the widow of a part-time deputy marshal who had been killed while assisting the marshal in breaking up a fight. The Supreme Court accepted Judge Evans' argument that the village was liable under the Workmen's Compensation Act and that damages were to be based, not on the deceased's salary as a plumber, but on the higher salary of policeman, the occupation in

<sup>57</sup> *Evan Alfred Evans, supra* at 556-57; *State Journal* (Madison), April 23, 1916, at 1; G. Haight, Address in Memorial Ceremony for Judge Evan A. Evans, November 4, 1948.

which he was “employed” when killed. The Supreme Court evidenced its respect for Judge Evans’ ability in 1910 when, after he placed first in a competitive exam, the justices recommended him for the post of first assistant attorney general. He declined the position, choosing instead to remain in private practice.<sup>58</sup>

In addition to his law practice Evan Evans involved himself in Democratic party politics. He aligned himself with the progressive wing of his state party. Only twice did he attempt elective office, failing both times. In 1908 he lost in the general election as the Democratic candidate for attorney general, and again in 1912, trying for the same office, he lost in the Democratic primary. He played an active role in both state and national party conventions. He served as permanent chairman of the 1908 Wisconsin Democratic party convention. His keynote address eloquently advocated two of the central economic tenets of progressivism—tariff reductions and regulation of railroads and trusts. He helped organize the Wisconsin delegation for Wilson in 1912. Although completely and thoroughly a lifelong Democrat he placed his progressive philosophy above party loyalty. During his years of active politics, he felt on occasion bound to assist Senator Robert LaFollette and his progressive Republican organization in order to help achieve the economic reforms he believed essential. As an editorial writer expressed the Judge’s position:

While a Democrat Mr. Evans has had the courage to differ with and oppose his party when it went wrong . . . when his party was attempting to climb into power by repudiating the constructive policies advocated and put into practice by Robert M. LaFollette, he advised his party that the only way it could be entitled to the confidence of the people was to advocate more rather than less constructive legislation than their opponent, to say nothing of opposing those constructive policies.<sup>59</sup>

Although not a well-known social reformer as Judge Mack nor a highly regarded politician as Judge Alschuler, Judge Evans came to the Seventh Circuit with two major qualifications which impressed the Wilson administration. He had a highly distinguished appellate legal practice, free from the taint of representing “vested” interests, and he had a well-known devotion to progressive principles. Statements from two associates emphasize this point. A former teacher wrote:

In these days, lawyers who have had many and large retainers from corporations are deemed to be more or less disqualified for judicial preferment. . . . But he [Evans] happens to be one whose large and lucrative practice has been along other

58 162 Wisc. 57, 155 N.W. 927 (1916); letter from H. Thomas to Evan A. Evans, November 25, 1899 (Evans Collection); remarks by Burr Jones in *Baraboo News*, May 3, 1916, at 1; *Evan Alfred Evans, supra* at 556.

59 Unidentified editorial in Evans Papers; the Evans Papers also contain a copy of his keynote address and several items of campaign literature from his unsuccessful attempts at political office.

lines. In his litigation, as a rule, he has not been employed by the corporations, but against them.<sup>60</sup>

The Justice Department lawyer who conducted the search which resulted in his selection wrote the judge on the eve of his appointment:

I hope you will bear in mind the assurances which I have given to the effect that you will be strong enough to meet and overcome any attempt which may be made to dominate you or turn you into a backward looking man.<sup>61</sup>

When Judge Evans assumed his seat on the Seventh Circuit, the court consisted of Presiding Judge Baker, Judge Kohlsaas, Judge Mack, and Judge Alschuler. A vacancy occurred two years later when on May 13, 1918, Judge Kohlsaas died suddenly following a cerebral hemorrhage. Except for the controversy at the time of his appointment, Judge Kohlsaas's career on the bench had been quiet. He had labored tirelessly both in trying cases in the old circuit court and district court in Chicago and in hearing appeals in the Seventh Circuit. Because of the large amount of time he spent at trials Judge Kohlsaas wrote far fewer appellate opinions than Judge Seaman did in a comparable period on the court of appeals, and he did not sit in highly publicized appeals, such as the *Standard Oil* case.<sup>62</sup>

The political difficulties which the Wilson administration faced in appointing Judge Alschuler and Judge Evans never materialized when Attorney General Gregory studied the possibilities for Judge Kohlsaas's replacement. Newspaper speculation on a successor showed that the old divisions in the Illinois Democratic party still existed. The frontrunners reportedly were William A. Doyle, whom Governor Dunne had favored in 1915 for a Seventh Circuit judgeship; Charles Clyne, United States attorney for the Northern District of Illinois; and an unidentified member of the Sullivan faction of the Democratic party. The last possibility existed because political analysts believed that in a reelection campaign, Senator Lewis might desire to spread federal appointments among the various groups in the party, and Sullivan's forces had yet to receive a judicial appointment. President Wilson, however, again decided to sidestep the morass of state party politics and attempt to find a progressive Democrat whom he could endorse but who would not anger any Illinois Democrats. Attorney General Gregory found such a man in George True Page of Peoria. Although a member of the progressive faction of the Illinois Democratic party, Page had never sought elective or appointive office in government. Rather, he had gained prominence through his work with bar associations. At the time of his appointment he served as president of the American Bar Association. The *Chicago Tribune* commented:

The appointment of Mr. Page carried with it no political significance. While a Democrat he has never taken part in factional politics and his appointment was for

<sup>60</sup> Baraboo News, May 3, 1916, at 1.

<sup>61</sup> Letter from William Fitts to Evan A. Evans, April 24, 1916 (Evans Papers).

<sup>62</sup> Chicago Tribune, May 13, 1918, at 7.

other than political reasons. His appointment is satisfactory to the regular Democratic organization.<sup>63</sup>

President Wilson sent Page's name to the Senate on March 2, 1919. After almost immediate Senate confirmation, Judge Page took his oath of office from Presiding Judge Baker on March 27, 1919.

George T. Page spent his entire life in Peoria, Illinois, and its surrounding area. He was born September 22, 1859, in Spring Bay and then moved with his family to Tazewell County where he attended elementary school. This was followed by a move to Metamora where he entered high school, graduating in 1876. The following fall he attended the University of Illinois at Champaign, but left school after six months. He returned to Metamora to begin teaching public school. While earning a living as a schoolteacher he started to read law under the supervision of his brother, S. S. Page, at the firm of Page & Ellwood. After four years of study, George Page gained admission to the Illinois bar. That same year, 1882, he traveled to Denver for "reasons of health." Although admitted to the Colorado bar he chose to remain there in practice for only a year. He returned to Peoria to enter partnership with his brother in the firm of Page & Page. When his brother was elected state court judge, George Page opened his own office. Several months later he joined two other Peoria attorneys to form Worthington, Page & Brady. When that partnership dissolved Page established the firm of Page, Wead & Ross which later became Page, Wead, Hunter & Scully. Throughout his career with these various firms George Page specialized in handling corporate matters. He represented several banks and other leading corporations headquartered in Peoria. He served on the board of directors of several corporations and just prior to his appointment to the bench he became a vice-president of the Merchants and Illinois National Bank of Peoria.<sup>64</sup>

During his nearly thirty-five years of practice in Peoria, Judge Page invested a great deal of time in organizing and working for local, state, and national bar associations. In 1888 Page helped incorporate the extremely short-lived Peoria Bar Association. He signed its constitution and served as vice-president for the two months the association survived. In 1905 he helped to charter a second Peoria Bar Association. Judge Page worked on countless committees of the Illinois Bar Association and in recognition of his efforts the Association elected him president for the 1905-1906 term. In addition to service at the state and local level, Judge Page participated actively in the American Bar Association. He represented Illinois on the A.B.A. General

63 Chicago Tribune, March 2, 1919, at 1; Chicago Tribune, May 13, 1918, at 7.

64 Biographical information on George T. Page may be found in *George T. Page*, 24 CHI.B.REC. 69 (1942); 21 Chicago Legal News, 285 (April 3, 1919); 2 J. RICE, HISTORY OF PEORIA CITY AND COUNTY ILLINOIS: A RECORD OF SETTLEMENT, ORGANIZATION, PROGRESS AND ACHIEVEMENT, 778-80 (1912); Chicago Tribune, March 28, 1919, at 4.

Council for several terms and in 1917 won the A.B.A. presidential election for the 1918-1919 term.<sup>65</sup>

George Page's A.B.A. presidential year was significant mainly for his efforts to reform the military justice system. At a January, 1919, executive committee meeting in New York, Page denounced the present court's martial procedure as archaic, and condemned its severity, lack of effective procedural protections, and the great disparity between courts in sentencing. He used as an example the execution of black soldiers before they had a chance to appeal their court-martial convictions and concluded that "our military laws and system of administering military justice are unworthy of the name of law or justice." Page's attack attracted the attention of President Wilson and Secretary of War Newton D. Baker. It was widely believed that Attorney General Gregory also took notice, and Page's reformist stance convinced Gregory to recommend Page for the Seventh Circuit judgeship. Secretary Baker asked Page to appoint an A.B.A. study committee which resulted in a massive overhaul of the military justice system.<sup>66</sup> George Page's effort to change the military justice system was not his first reform attempt. As president of the Illinois Bar Association he spoke out in favor of criminal sentencing reforms and closer state supervision of banks and of corporations.<sup>67</sup> Although he never sought elective office he allied himself with the progressive wing of the Illinois Democratic party. In the 1912 Democratic primary Judge Alschuler wrote to Page to solicit his support. Page responded by pledging to do what he could, but added "I do not think I have any political standing." Judge Alschuler reciprocated George Page's support during Page's selection for the Seventh Circuit judgeship. Attorney General Gregory traveled to Chicago in January, 1919, to seek Judge Alschuler's advice on the Page nomination and the judge recommended him without reservation.<sup>68</sup>

When Judge Page joined his fellow Wilsonian Democrats, Judges Alschuler and Evans, the Seventh Circuit for the first time in its history had a majority of Democrats on the bench. It would not be until more than thirty years had passed that the Republicans would again be in the majority on the court. However, the Republicans always retained at least one judgeship. Until 1948 that position was occupied by an Indiana judge (Judge Albert Anderson, 1925-1929; Judge Will Sparks, 1929-1948). When Judge Grosscup resigned the Hoosier Republican, Judge Francis Baker, had become presiding judge

65 1 RICE, HISTORY OF PEORIA, *supra* at 382-83; 38 Chicago Legal News, 383 (July 14, 1906); George Page's membership on A.B.A. committees can be found in the list of committees contained in volumes 1-3 of the A.B.A.J.; his election as president is noted in *Officers*, 4 A.B.A.J. 535 (1918).

66 Chicago Tribune, January 4, 1919, at 4; N.Y. Times, March 25, 1919, at 1; Chicago Tribune, March 2, 1919, at 1.

67 38 Chicago Legal News, 383-85 (July 14, 1906).

68 Letter from Samuel Alschuler to George Page, January 24, 1912 (Alschuler Collection); letter from George Page to Samuel Alschuler, January 26, 1912 (Alschuler Collection); Chicago Tribune, March 2, 1919, at 1; telegram from T. W. Gregory to Samuel Alschuler, January 16, 1919 (Alschuler Papers).

of the circuit. He held that position until his death on March 15, 1924, following a lengthy illness. Judge Baker had been the subject of great controversy at the beginning of his judicial career, but later had become widely respected, as evidenced by his consideration for a seat on the United States Supreme Court. His ability as an administrator and as a critic of judicial opinions brought him great admiration from his junior colleagues on the Seventh Circuit. Judge Evans, years later, commented on the strong influence Judge Baker had on him at the beginning of his own career.<sup>69</sup>

The death of Judge Francis Baker created a unique situation for the Seventh Circuit; there existed no immediately obvious answers to the questions of who succeeded Judge Baker as presiding judge and whether a vacancy on the bench existed. The confusion arose because of the designation of Judge Mack to serve in the Seventh Circuit following the abolition of the Commerce Court. The problem of the vacancy proved to be the easier of the two questions. Section 118 of the Judicial Code of 1911 allocated four judges to the Seventh Circuit.<sup>70</sup> If Judge Mack's "permanent" designation made him a member of the Circuit, no vacancy existed as he became the fourth circuit judge. Judge Alschuler, on the other hand, argued convincingly that (1) the statute eliminating the Commerce Court provided that no judge would be appointed to a vacancy created by the death or resignation of one of the five Commerce Court judges, and (2) if Judge Mack were considered the fourth member of the Seventh Circuit, upon his death or resignation there would be only three judges with no possibility of appointing a successor. Congress could not have intended this result, so President Calvin Coolidge had the right to name a successor to Judge Baker.<sup>71</sup>

Deciding who became presiding judge evolved into a long-term embarrassing conflict between Judge Mack and his brethren on the Seventh Circuit bench. Judge Mack's appointment to the federal bench predated Judge Alschuler's by four years and his service in the Circuit by three. Judge Mack and Chief Justice William Howard Taft both assumed that Judge Mack became presiding judge. Judges Alschuler, Evans, and Page, however, believed that Judge Mack was temporarily assigned to the Seventh Circuit; that there could be no "permanent" assignments to a circuit; and that the duties of the senior circuit judge evidenced congressional intent to limit that position to a permanent circuit judge. These arguments surfaced about a month after Judge Baker's death when Judge Mack visited Chicago. Judge Mack explained to Judge Alschuler that he desired to stay in New York, preferring not to become senior judge of the Seventh Circuit. However, if he later changed his mind and returned to Chicago, both he and the Chief Justice understood the statute to require his assuming the position of presiding judge. Mack emphatically denied that he cared about "priorities or the dignity or

69 Letter from Evan A. Evans to Walter C. Lindley, December 2, 1943 (Evans Papers).

70 Act of March 3, 1911, 36 Stat. 1087.

71 See the unpublished memorandum on the subject of Judge Mack's status written by Judge Samuel Alschuler, dated April 15, 1924 (Alschuler Papers).

honor" of being presiding judge, but felt impelled to assume the post when in Chicago because of his (and the chief justice's) interpretation of the statute. The Seventh Circuit judges, especially Judge Alschuler, just as sincerely maintained that it was not a question of egos, but of statutory interpretation. Additionally, they held a fundamental belief that the Seventh Circuit needed a presiding judge who permanently resided in the circuit and who possessed an intimate knowledge of the inner workings of the circuit. Both Alschuler and Mack, who were old friends, wanted to avoid a serious rupture in their relationship, so they sought a compromise. No final determination of the meaning of the statute would be attempted, and confrontation would be avoided by the Seventh Circuit's not calling on Judge Mack to sit with it. In Judge Mack's words, Judge Alschuler became *de facto*, but not *de jure*, presiding judge. This strained situation continued for five years. In June, 1929, Judge Mack wrote Judge Alschuler that, unless there were objections, he had requested Chief Justice Taft to revoke his designation to the Seventh Circuit and to assign him to the Sixth Circuit in Cincinnati. He offered to sit with the Seventh Circuit whenever Judge Alschuler determined he needed assistance. Judge Alschuler gratefully accepted the opportunity finally to resolve the differences between them. They reestablished their friendship, which had suffered during the controversy. Even so, Judge Alschuler never needed to call on Judge Mack to hear appeals in Chicago.<sup>72</sup>

With the decision that Judge Mack would not sit with the Seventh Circuit, attention focused on filling the vacancy created by Judge Baker's death. Pressure from Indiana bar groups plus senatorial politics dictated the selection of Albert Barnes Anderson, the sixty-six-year-old judge of the United States District Court of Indiana. Anderson had been the only federal judge in Indiana for over twenty years. His humorless, autocratic manner in the courtroom had angered leaders of the Indiana bar, causing them to seek a way to lessen his control over the state's federal courts. Their efforts coincided with the desire of Republican Senator James E. Watson of Indiana to create a second judgeship in Indiana in order to be able to appoint another Republican judge. In 1924 Watson introduced a bill which, while keeping Indiana one judicial district, divided the state into two divisions and authorized

72 The controversy is outlined in the following letters and memoranda found in the Alschuler Papers: (1) unpublished memorandum, undated, 9 pages; (2) letter from Chief Justice William Howard Taft to Samuel Alschuler, March 30, 1924; (3) letter from Julian Mack to Samuel Alschuler, April 11, 1924; (4) letter from Samuel Alschuler to William H. Taft, April 18, 1924; (5) letter from Samuel Alschuler to Julian Mack, April 18, 1924; (6) telegram from Samuel Alschuler to Julian Mack, April 15, 1924; (7) letter from Julian Mack to William H. Taft, April 21, 1924; (8) letter from Samuel Alschuler to Julian Mack, December 22, 1925; (9) letter from Attorney General John Sargent to Julian Mack, December 9, 1925; (10) letter from Julian Mack to John Sargent, December 15, 1925; (11) letter from Julian Mack to Samuel Alschuler, March 20, 1929; (12) letter from Samuel Alschuler to Julian Mack, March 25, 1929; (13) letter from Julian Mack to Samuel Alschuler, June 8, 1929; (14) letter from Samuel Alschuler to Julian Mack, June 18, 1929; (15) letter from Julian Mack to Samuel Alschuler, June 18, 1929; (16) letter from Samuel Alschuler to Julian Mack, June 20, 1929.

an additional judge. The bill became law on January 16, 1925. Senator Watson thus enjoyed two opportunities to make judicial recommendations to President Coolidge. Indiana attorneys pressed the senator to recommend Judge Anderson for the Seventh Circuit and nominate two new judges for the district court. The plan met with Watson's approval, but it was unknown if Judge Anderson would accept the appointment to the Seventh Circuit. He preferred not to move to Chicago, but he had strongly opposed the creation of the second district judgeship and resented the idea of the dissolution of his power. He finally decided to accept elevation to the court of appeals. President Coolidge sent Anderson's nomination to the Senate on January 6, 1925. The Judge received confirmation within a week and took his oath of office on January 13, 1925.<sup>73</sup>

Judge Anderson's career followed the same pattern as the man he replaced, Judge Francis Baker. Like Baker, he was a college educated, successful practitioner who belonged to the Beveridge wing of the Indiana Republican party. Albert Barnes Anderson was born on February 10, 1857, on a farm near Zionsville, Indiana. After attending elementary and high school in his hometown Anderson enrolled in Wabash College in nearby Crawfordsville. He received his B.A. from that school in 1879 and moved to Indianapolis to read law in the firm of McDonald and Butler, one of the city's three leading law firms. In 1881 he received admission to the Indiana bar and decided to settle in Crawfordsville. He married the daughter of one of the Wabash College professors and opened his own law office. After three years alone, the judge formed a partnership with Benjamin Crane (Crane & Anderson) which continued from 1885 until his appointment to the bench in 1902. The firm had a large general civil practice, handling mainly probate matters, real estate transactions, and contract and tort litigation.<sup>74</sup>

The disagreement over who would become presiding judge coincided with a great increase in the duties of that office. The Act of September 14, 1922, 42 Stat. 837, amended the Judicial Code by authorizing the Chief Justice of the United States Supreme Court, with the permission of the two presiding judges of the circuits affected, to transfer temporarily judges from districts or circuits where judges were underutilized to cities where there was a growing backlog. Additionally, the statute provided for the establishment of the Conference of Senior Circuit Judges. The conference (now the Judicial Conference of the United States) consisted of the Chief Justice and the eleven senior circuit (presiding) judges. The conference was to advise Congress on legislation needed to improve the judiciary and to oversee the administration of the federal courts. *See* F. FRANKFURTER and J. LANDIS, *supra* at 230-54. A letter from Chief Justice William Howard Taft to Samuel Alschuler, July 10, 1926 (Alschuler Papers) invites the judge to the conference and discusses two items on the agenda—one dealing with a Congressional bill increasing the number of judgeships and one detailing a proposed bill the chief justice wanted introduced which would enlarge the Supreme Court's certiorari jurisdiction.

73 The story of the Anderson nomination was recounted by several knowledgeable Indiana attorneys during personal interviews in the summer, 1975.

74 Biographical information on Judge Anderson may be found in In memoriam, Albert Barnes Anderson, Resolutions prepared by the Marion County (Ind.) Bar Association (unpublished); WABASH COLLEGE BACHELOR, April 26, 1911.

Albert Anderson became active in the Republican party in Indiana. In 1886 he ran successfully for prosecuting attorney of Montgomery County. He served only one term before returning full time to his practice. Anderson assisted Albert Beveridge in his fights against the regular Republican organization in Indiana. One writer has referred to him as "a trusted friend [of Beveridge] of ability and political acumen."<sup>75</sup> It came as no surprise when the senator recommended Anderson to fill the vacancy caused by the resignation of Judge John H. Baker of the United States District Court of Indiana after Judge Baker's son was appointed to the court of appeals. Anderson faced no opposition to his nomination and took his seat on the bench on December 8, 1902.

During his twenty-three years on the district court bench, Judge Anderson decided cases covering the full range of federal law. But it was in his handling of criminal cases that the judge earned national recognition. He attracted widespread attention in 1912 when he conducted the trial of thirty-eight officers and members of the International Association of Bridge and Structural Iron Workers who were alleged to have conspired to transport explosives in interstate commerce. The indictments grew out of evidence produced at the celebrated trial of the MacNamaras, the two union-official brothers who were arrested and convicted of dynamiting the *Los Angeles Times* building. Their trial aroused public notice both because it followed six years of similar bombings of open shop construction sites and also because Clarence Darrow represented the defendants. The trial before Judge Anderson, *United States v. Ryan*, resulted in thirty of the defendants being found guilty on fifty-two counts, all involving charges that explosives were purchased by the union officials and shipped to the MacNamaras or other conspirators around the country. The judge handed down sentences of between one and seven years. On appeal the Seventh Circuit affirmed the convictions of all but six of the defendants, reversing those convictions because, although sufficient evidence existed to prove they were sympathetic to the conspiracy, there was not enough to establish a partnership.<sup>76</sup> The convictions and tough sentences made the judge a hero to those who feared the violent labor unrest that seemed to be spreading unchecked. Newspapers editorially praised him, and magazines such as *Harper's Weekly* wrote features lauding his work. "That justice was done in this case will in the opinion of most newspaper editors be the general sentiment of the American people." The lengthy sentences Judge Anderson later dealt convicted prohibition violators added to his general reputation of being tough on criminals. He often lashed out at city and state officials for laxity in enforcing prohibition, and one such attack led to several investigations and convictions.<sup>77</sup>

75 C. BOWERS, *BEVERIDGE AND THE PROGRESSIVE ERA*, 302-3 (1952).

76 *United States v. Ryan*, 216 F.13 (7th Cir.), *cert. denied*, 232 U.S. 726 (1914). See K. TIERNEY, *DARROW: A BIOGRAPHY*, 236-51 (1979) for an excellent account of the McNamara case.

77 *WABASH COLLEGE RECORD*, January 1913, at 851.

Two descriptions of Judge Anderson illustrate his severity in sentencing and his manner in the courtroom. The first stemmed from a 1920 conspiracy trial against John L. Lewis and forty-two other leaders of the United Mine Workers. The union leaders were defended by the former presidential candidate and future chief justice of the United States Supreme Court, Charles Evans Hughes. Hughes' biographer described Judge Anderson as "a czar on the bench" and the courtroom as

jammed with union officials, attorneys, reporters, and curious bystanders.

Knowing Judge Anderson's arrogance and severity, the Indianapolis lawyers were delighted to let Hughes take the lead in the case.

The trial never took place, however, as Hughes confronted the judge with an error the judge had made in addressing the grand jury. The judge had identified John L. Lewis as having made an incriminating statement which had in fact been made by a non-union official. Although the judge refused to admit his error in open court, the charges against the defendants were subsequently dropped. Hughes' biographer summarized the courtroom scene during Hughes' argument: "Judge Anderson squirmed and spectators struggled to hold their elation in bounds."<sup>78</sup>

An Indiana state court judge in his autobiography recounted witnessing several confrontations between Judge Anderson and defendants. He drew the following portrait of him:

Anderson was a typical Federal Judge, appointed for life or good behavior, and the only way he could be removed was by a vote of two-thirds of the United States Senate. Consequently, he was lord of all he surveyed and brooked no opposition to his Court room, least of all from a defendant or his attorneys.

Judge was a tall, lean man, aged 67 years at the time, and he enjoyed playing cat and mouse with trembling defendants.<sup>79</sup>

The mutual hostility between the bar and Judge Anderson did not characterize his relationship with fellow judges. His closest friend, Judge Kene-saw Mountain Landis (the two families vacationed and fished together in Michigan each summer), invited him to hold court in Chicago to help eliminate part of the large backlog in the Northern District of Illinois. During his years on the Seventh Circuit the judge's behavior toward both his colleagues and the lawyers appearing before him was exemplary. In a letter to Judge Mack, Judge Alschuler wrote

Judge Anderson has taken hold with vigor, is much interested in his work, and proves a most agreeable and efficient colleague.

78 I M. PUSEY, CHARLES EVANS HUGHES, 388 (1951).

79 J. NIBLACK, THE LIFE AND TIMES OF A HOOSIER JUDGE, 174-76 (1973).

Similarly Judge Alschuler did not hesitate to recommend Anderson for assignment to the other district courts.<sup>80</sup>

Judge Anderson came to the Seventh Circuit bench at the age of sixty-eight. Under the Act of February 25, 1919, a judge who reached the age of seventy and had served more than ten years could retire at full pay and a replacement judge could be named. The retired judge was eligible to hold court as often as he was willing, provided the presiding judge designated him. Both Judge Anderson and his wife suffered declining health in 1928, and on October 30, 1929, he became the first judge of the Seventh Circuit to retire under the provisions of the 1919 Act. He and his wife spent their winters in Florida and lived during the summers at their home in Michigan. The Judge died on April 27, 1938, and was buried in his hometown, Crawfordsville, Indiana. During his ten years of retirement his health prevented him from accepting any designation from Presiding Judge Alschuler.<sup>81</sup>

Although Judge Anderson's resignation took effect on October 30, 1929, he had announced his intention to resign the preceding spring, and in early summer the search for a successor began.<sup>82</sup> Senators James E. Watson and Arthur R. Robinson, both Republicans, drew up a list of fifteen names to be considered for the vacancy, after which Senator Robinson met with the newly inaugurated president, Herbert Hoover. After discussing the possibilities, the president suggested the list be given to the attorney general for an investigation of the candidates. Senator Watson wrote Attorney General Mitchell on July 26, 1929, and urged that the investigations be completed by August so that the new judge could be confirmed in time for the October term. Although fifteen names were submitted, there apparently existed little doubt that William Morris Sparks, the first name on the list, would be selected. Of the fifteen only Sparks and one other were rated qualified by the attorney general, and Sparks had strong backing from bar organizations plus the support of Watson, a hometown friend and neighbor.<sup>83</sup> The announcement of the nomination came on October 26. Judge Alschuler wrote both Judge Sparks and Attorney General Mitchell to express his extreme pleasure at the appointment and pleaded for a speedy confirmation. He hoped that the Senate would act within two weeks so that Sparks could sit the final two weeks of the fall session and thus have cases to work on while he prepared

80 The relationship between Judges Anderson and Landis is detailed in their frequent correspondence, which may be found in the K. M. Landis Collection (Chicago Historical Society); letter from Samuel Alschuler to Julian Mack, December 22, 1925 (Alschuler Collection); letter from Samuel Alschuler to Judge Ferdinand A. Geiger, May 2, 1929 (Alschuler Collection).

81 40 Stat. 1156 (1919); S. Alschuler, Response in Proceedings at Presentation of Portrait of the Honorable Albert B. Anderson, November 3, 1931.

82 Letter from Albert B. Anderson to Samuel Alschuler, March 6, 1929 (Alschuler Collection).

83 Senator James Watson to Attorney General William Mitchell, July 26, 1929 (Records Center, St. Louis); Justice Department biographical sketch of Judge Will M. Sparks (unpublished, undated, Records Center, St. Louis).

for his first full session. Two days later the Senate voted unanimously to approve Judge Sparks. Judge Alschuler's letter of welcome suggested the new judge take his oath as soon as he could arrange to be in Chicago. He outlined the court's work schedule (Tuesdays through Fridays), offered to lend him one of the extra robes the court owned, and invited the new judge to take Judge Anderson's old chambers which adjoined his. Judge Sparks finished up his work in Rushville and received the oath of office on November 6, 1929.<sup>84</sup>

The career of William (Will) Morris Sparks was similar to those of the three men he joined on the bench: Judges Alschuler, Evans, and Page. Like Judge Evans he came from a moderately well-to-do family, had earned a college degree and received his legal training at law school. Like Judge Alschuler he had been a political activist (although as a Republican, not a Democrat). Like all three colleagues he had no prior federal judicial experience and had had limited practice in the federal courts.

Will Sparks was born on April 28, 1872, in Charlottesville, Indiana, where his father was a physician. The family moved to Carthage (Rush County) in 1880 where Sparks attended public school. After graduating from high school in 1890, he took a job as deputy clerk of the Sixteenth Judicial Circuit Court, of which he later became judge. He left his job to enter DePauw University in Greencastle, Indiana, where he earned a B.A. in 1896. That fall he enrolled in the Indiana Law School at Indianapolis. The private school's faculty included leading Indiana attorneys and judges. After a year of law school, Judge Sparks gained admission to the Indiana bar and returned to his home county to open a law office in Rushville. For a year Judge Sparks remained a solo practitioner, making a living partly through income received from his salary as deputy prosecuting attorney, a post to which he had been appointed soon after arriving in Rushville. From 1897 to 1901 he maintained a partnership (Sexton & Sparks) with Gates Sexton, a former law partner of then Congressman, later Senator, James E. Watson.

The partnership with Sexton ended with Will Sparks' successful entry into elective politics. He had been a key member of the Republican party in Rush County and in 1901 he won the race in his district for the Indiana legislature. After winning a second term he decided to make the race for judge of the Sixteenth Judicial Circuit which included Rush and Shelby counties. He received the Republican nomination and won, despite the fact that the circuit usually voted Democratic. He narrowly lost (19 votes) in 1910 in an attempt for a second six-year term. The judge returned to practice and again established his own firm which became quite profitable. He represented many of

<sup>84</sup> Letters from Samuel Alschuler to Will M. Sparks, October 26, 1929, October 30, 1929, November 2, 1929 (Alschuler Collection); letter from Samuel Alschuler to William D. Mitchell, October 30, 1929 (Alschuler Collection); letters from Will M. Sparks to Samuel Alschuler, undated (Alschuler Collection); telegram from Samuel Alschuler to Will M. Sparks, November 4, 1929 (Alschuler Collection); remarks of Samuel Alschuler at induction of Judge Will M. Sparks, November 6, 1929 (Alschuler Collection).

the wealthier interests in the county and maintained a varied general practice. Preferring judicial service, he decided to seek the circuit judgeship again after the Republican-controlled Indiana legislature in 1913 redrew the judicial districts so that solidly Republican Rush County constituted its own circuit. Judge Sparks received his party's nomination for the judgeship in 1914 and easily defeated his opponent. He won reelection in 1920 and again in 1926, serving a total of twenty-one years in the state circuit court before his appointment to the Seventh Circuit. Unlike Judge Anderson, his Indiana predecessor on the court of appeals, Judge Sparks had an excellent reputation as a trial judge, whether evaluated by lawyers or fellow jurists. He was often designated to sit in other state trial courts to handle exceptionally complicated or controversial cases.<sup>85</sup>

By far the most important and sensational trial Judge Sparks conducted was the *D. C. Stephenson* case. Stephenson, called the most dynamic and colorful Ku Klux Klan leader in the United States, had become a political power in Indiana in the 1920s. In the state and municipal elections of 1923 and 1925 Klan-supported candidates had swept aside all challengers. Stephenson boasted, "I am the law" in Indiana and he controlled state patronage, "dictating to the Legislature, police, prosecutors, mayors, judges and other high-ranking politicians."<sup>86</sup> Even after he split from the national Klan and organized his own rival secret organization, he remained powerful. Although espousing a combination of anti-Catholicism, anti-Semitism, and an appeal for "law enforcement, motherhood, virtue, patriotism and temperance," Stephenson failed to attain these goals in his personal life. He used money he extorted from bootleggers, politicians, and corporations to live lavishly in Indianapolis where he earned a reputation as "a not-so-secret lecher and drunkard." All appearance of secrecy vanished when the lurid details of his lifestyle emerged at his murder trial. The complex and bizarre facts of that case and the interesting problems of legal causation which it raised produced many sensational headlines and much legal scholarship. But it was also profoundly important as a political event, for it destroyed the grip Stephenson and the Klan had had on Indiana and returned the control of both the Republican and Democratic parties to the regular politicians. For the Republicans this meant Senator James Watson again headed the party. Allegations have been made that the entire trial, including the selection of Judge

85 Biographical information about Judge Sparks may be found in Memorial Service for the Honorable Will M. Sparks, April 10, 1951 (U. S. Court of Appeals for the Seventh Circuit); Justice Department Biographical Sketch of Judge Will M. Sparks (unpublished, undated, Records Center, St. Louis).

86 I. LEIBOWITZ, *MY INDIANA*, 189, 194 (1964). See also Niblack, *supra* at 187-219. Stephenson v. State, 205 Ind. 141 (1932). For a general history of the Klan at this time see K. JACKSON, *THE KU KLUX KLAN IN THE CITY: 1915-1930* (1967) (chapter 10 deals with the Klan in Indianapolis). The details of Stephenson's life and trial are reported in all three works.

Sparks as trial judge, were motivated by this political end.<sup>87</sup> While it is true that Watson and Sparks were political allies and close friends and that Stephenson had opposed any Klan support for Watson in his reelection campaign, it was also widely known at the time that Judge Sparks was the most respected trial judge in Indiana and the man most likely to be selected to handle the emotionally charged case. The judge's even-handed performance during the trial led to widespread public recognition in Indiana, and to the general approval which greeted his appointment to the Seventh Circuit.<sup>88</sup>

Within a year after Judge Sparks filled the vacancy left when Judge Anderson accepted senior status, another judgeship opened. Judge Page, who had reached seventy (and had served the necessary ten years on the bench), announced on July 20, 1930, that he would assume senior status on October 1. The judge's health had been poor and he wanted to spend most of the year in the warmer climate of California. He rarely sat with the court during the eleven years of retirement. He corresponded often with both Judges Alschuler and Evans and returned to Chicago for ceremonial occasions, such as the annual conference of circuit and district judges or the testimonial honoring Judge Evans on his twenty-fifth anniversary on the bench. When not in California the judge lived in his hometown, Peoria. He became active in banking, becoming president of the Commercial Merchants National Bank and Trust Company in 1933 and assuming the chairmanship of its board of directors a year later. The judge died November 4, 1941, while on vacation in California, and his body was returned to Peoria for burial.<sup>89</sup>

Judge Page's retirement triggered a three-year controversy over the selection of a successor. The initial stalemate occurred because the two Illinois senators, both Republicans, could not agree on a recommendation to make to President Hoover. Lame duck Senator Charles Deneen backed one of his long-time supporters, while Senator Otis Glenn sought to appoint one of his own allies. The deadlock remained unresolved for the remainder of Deneen's term (until March 4, 1931). When Democratic Senator James Hamilton Lewis replaced Deneen, the choice of the next judge fell to Glenn alone. An appointment did not materialize, though. Senator Glenn supported the elevation of Judge James Wilkerson of the Northern District of Illinois.

87 Letter from Otto Gresham to Herbert Hoover, September 7, 1929 (Records Center, St. Louis); letter from Otto Gresham to Herbert Hoover, October 21, 1929 (Records Center, St. Louis); letter from Ed Craig to William D. Mitchell, October 18, 1929 (Records Center, St. Louis).

88 LEIBOWITZ, *supra* at 206; letter from Richard Elliott to Herbert Hoover, October 23, 1929 (Records Center, St. Louis); letter from Attorney General William Mitchell to Herbert Hoover, October 18, 1929 (Records Center, St. Louis).

89 Judge Page's association with the bank is found in Roberts, *The Commercial Merchants National Bank and Trust Company* (Peoria Historical Society); the correspondence between Judge Page and Judges Evans and Alschuler is contained in the Alschuler Collection and the Evans Papers; news of Judge Page's announcement of plans to retire may be found in the letter from Louis FitzHenry to Hon. Charles LeForgee, July 20, 1930 (FitzHenry Collection, Special Collections, Illinois State University, Normal, Ill.) (hereinafter FitzHenry Collection).

Labor leaders strongly opposed Wilkerson's nomination because of several sweeping injunctions he had issued against striking railroad workers. Glenn seemed determined to stick with Wilkerson, even after the president balked at sending his name to the Senate in early 1932. The vacancy remained and as the 1932 election neared, President Hoover lost any chance of naming the new Seventh Circuit judge, for it would have been almost impossible to get the Democrats in the equally divided Senate to approve a Republican nominee until after the presidential elections.<sup>90</sup>

The politics of the appointment of a successor to Judge Page were not confined to the Senate. On one front the friends and supporters of Judge Walter Lindley, judge of the Eastern District of Illinois and a man who commanded widespread respect from both bench and bar, lobbied vigorously with Attorney General William Mitchell to have the judge elevated. Letters of recommendation arrived at the Justice Department bearing the signatures of hundreds of businessmen and attorneys from a wide variety of legal, professional, social, and political clubs located in downstate Illinois. Additional support came from University of Illinois law professors, Illinois Supreme Court judges, and U.S. attorneys from several districts in the Seventh Circuit. Labor leaders who denounced Wilkerson threw their support to Lindley. Even a past rival for the district court nomination admitted that he had a high regard for Lindley and believed his work on the district bench had been exemplary. Lindley, however, had to wait almost twenty years before receiving his appointment to the Seventh Circuit. He lost this first opportunity not because Senator Glenn opposed him, but because the senator, in an effort to gain political support from some of Wilkerson's supporters, refused to abandon his selection of Wilkerson until it became politically impossible to confirm a Republican.<sup>91</sup>

While some downstate Illinois groups sought to have Judge Lindley promoted, others favored the elevation of Judge Louis FitzHenry of the Southern District of Illinois. No one advanced FitzHenry's cause with greater

90 The politics surrounding the attempts to appoint Judge Wilkerson are best described in a letter from Louis FitzHenry to Secretary of Commerce Daniel Roper, May, 1933 (Records Center, St. Louis); see also Peoria Evening Star, July 21, 1930, at 1; *id.* at July 31, 1931, at 2. The most famous of Judge Wilkerson's anti-union labor injunctions was the one the judge entered in 1922 against the Railway Shopmen. The text of the injunction is reprinted in F. FRANKFURTER and N. GREENE, *THE LABOR INJUNCTION*, 253-63 (1930). It is discussed also in F. Frankfurter and N. Greene, *Power to Regulate Contempts*, 34 HARV.L.REV. 1010, 1101 (1924).

91 The relationship between Senator Glenn and Judges Wilkerson and Lindley is documented in a "memo for the files" written by Assistant Attorney General Charles P. Sisson, November 6, 1930 (Records Center, St. Louis). The Walter Lindley file at the Records Center, St. Louis, contains the numerous letters favoring the appointment of Judge Lindley. Additional efforts to have Judge Lindley elevated in 1936 failed. He received his appointment to the Seventh Circuit in 1949. Labor support is demonstrated by the letter from American Federation of Labor President William Green to Attorney General William Mitchell, August 19, 1930 (Records Center, St. Louis); letter from June Smith to William Mitchell, September 9, 1930 (Records Center, St. Louis).

force or tenacity than did the judge himself. From the day he learned of Judge Page's decision to retire until the day he took his oath of office for the Seventh Circuit, Judge FitzHenry wrote, called, or personally visited anyone whom he thought could assist him in receiving the coveted judicial nomination. FitzHenry realized he faced an overwhelming obstacle to having President Hoover select him; he had always been a highly partisan Democrat, and with the Seventh Circuit already having two Democrats, it was most improbable that either the Republican senator or president would send his name to the Senate. FitzHenry, aware of this political reality, countered it with the argument that the court of appeals, from a political standpoint, is quite "valueless."<sup>92</sup> "[T]hose concerned with practical politics could well afford to trade a circuit judgeship for a district judgeship any time, inasmuch as the office of Circuit Judge is probably the most worthless important office, politically, in connection with the Government. The only patronage a circuit judge has is that of law clerk and stenographer."<sup>93</sup> In a letter to Judge Evans he stated that

a Circuit Judge has not even a chip or a whetstone with which he can reward any of his political or personal friends. The District Judge hasn't much, but he does have Masters, Special Masters, Referees, Commissioners and a few things of that kind which keen politicians might regard as of considerable value if political considerations were to be permitted to enter the appointment of offices of that character.<sup>94</sup>

Judge FitzHenry made this argument to Senator Glenn and several leading Republican state officials. Additionally he sought the help of influential congressmen and senators from around the country, all of whom were old friends from his days in the United States House of Representatives. The judge contacted Supreme Court Justice James McReynolds, a fellow Wilson Democrat in 1912, but was told by the justice that although he would do whatever he could, it was unlikely the attorney general would consult him.<sup>95</sup> The judge even sought advice from Second Circuit Judges Martin Manton and Augustus Hand, the latter of whom he thought might be helpful because Hoover's solicitor general had been Hand's successor on the District Court of the Southern District of New York.<sup>96</sup> The first group of letters that Judge

92 Letter from Louis FitzHenry to Senator J. Otis Glenn, July 20, 1930 (FitzHenry Collection).

93 Letter from Louis FitzHenry to Rep. Henry T. Rainey, December 7, 1930 (FitzHenry Collection).

94 Letter from Louis FitzHenry to Evan Evans, July 24, 1930 (FitzHenry Collection).

95 Letter from Justice James C. McReynolds to Louis FitzHenry, July 22, 1930 (FitzHenry Collection). The FitzHenry Collection contains the numerous letters to the political leaders contacted by Judge FitzHenry.

96 Letter from Louis FitzHenry to Augustus Hand, July 23, 1930; letter from Louis FitzHenry to Martin Manton, July 23, 1930 (FitzHenry Collection).

FitzHenry wrote were sent to the Seventh Circuit judges. He expressed his desire for the judgeship and wanted assurance that they had no objections to his nomination. All four men replied that they believed him to be qualified, that they would welcome him as a colleague, but that they believed his chances were not good nor would they show any preferences among the three district judges under consideration.<sup>97</sup>

During 1930 and 1931 Judge FitzHenry had no success in convincing either President Hoover or Senator Glenn that the politically correct appointment to the Seventh Circuit was his elevation. However, the failure of Glenn to switch his support to Judge Lindley and the Franklin D. Roosevelt Democratic landslide of 1932 gave the judge the chance to fulfill his ambition. Not only did the Democrats control the White House, but a Democrat, William Dieterich, defeated Glenn. One of the new senator's first acts after taking office was to write the Justice Department that he wanted FitzHenry to have the Seventh Circuit judgeship. The assistant attorney general sent Attorney General Homer Cummings a memo on April 27, 1933, apprising him of the senator's recommendation. The memo further stated that, except for a few protests from losing litigants, correspondence from the bench, bar, and laymen concerning FitzHenry was extremely positive. Finally, he reported that the Federal Bureau of Investigation report on the judge was positive. Attorney General Cummings submitted his recommendation of Judge FitzHenry to President Franklin D. Roosevelt on June 3, 1933. The president submitted the name to the Senate on the same day; confirmation came a week later. The necessity of clearing up district court business prevented Judge FitzHenry from taking his oath of office until October 3, 1933.<sup>98</sup>

During his "self-promotion" campaign Judge FitzHenry asserted that he deserved promotion to the court of appeals. His statement was not without merit, as he had established a reputation as a tough but fair, highly efficient and industrious trial judge. He also asserted that he should be appointed because Judge Page's seat belonged to a downstate Illinois Democrat. Although this geographical consideration had not been a factor in the selection of Page, the election of Senator Dieterich, a fellow downstate Democrat, meant that it now carried great weight.

Judge FitzHenry had spent his entire life in downstate Illinois. He was born on June 13, 1870, in Bloomington, Illinois, and attended both grade and high school there.<sup>99</sup> After graduating from high school he took a full-time

97 Letter from Will M. Sparks to Louis FitzHenry, July 24, 1930 (FitzHenry Collection); letter from Samuel Alschuler to Louis FitzHenry, July 25, 1930 (FitzHenry Collection); letter from George Page to Senator William Dietrich, May 4, 1933 (Records Center, St. Louis).

98 Memo from Assistant Attorney General Dan McGrath to Attorney General Homer Cummings, April 27, 1933; letter from Homer Cummings to President Franklin D. Roosevelt, June 3, 1933 (Records Center, St. Louis).

99 The following biographical information about Judge FitzHenry, unless otherwise noted, is taken from two unpublished biographies of the judge written by his daughter, Mildred FitzHenry Jones, *Daily Pantagraph* (Bloomington, Ill.), July 2, 1918, at 1.

job with one of the Bloomington newspapers. As a child he had earned money delivering newspapers, and during high school he worked part-time as a reporter, copy editor, and editorial writer. From 1888 until 1895 he served as circulation manager, advertising manager, reporter, editor, and proofreader for the largest circulation newspaper in the city. In 1895 FitzHenry decided to enroll in the Illinois Wesleyan College of Law. In order to support himself he purchased and edited the *Trades Review*, a weekly labor paper which was the "official organ of the Trades Assembly of Bloomington." FitzHenry received his LL.B. in two years and gained admission to the bar in June, 1897. Except for some rare special reporting for one of the city newspapers, FitzHenry left his career in journalism and turned full-time to the practice of law.

Louis FitzHenry opened his own law office in 1897 and practiced alone until 1901 when he joined with Lester Martin in the firm of FitzHenry & Martin. The partnership lasted until 1913 when FitzHenry began his term as United States Representative. FitzHenry's practice throughout these years consisted mainly of representing plaintiffs in personal injury suits, often against railroads, and other trial work, almost always as plaintiff. He briefed and argued many cases in the Illinois Appellate Court, and also handled a general range of other small town legal problems.<sup>100</sup>

In addition to his law practice Louis FitzHenry took an active role in local Democratic party affairs in Bloomington. Unlike Alschuler, Evans, or Page his involvement was confined mainly to the local and county party. In 1907 the Democrats in Bloomington sought to capitalize on popular resentment against utilities and ran FitzHenry for prosecuting attorney on a platform which promised to attempt to overturn the utilities' claims that the city was without power to regulate them. FitzHenry won election and reelection on the same platform, and by the conclusion of his second term had won the argument for the city.

In 1912 FitzHenry took advantage of the popularity of his victory over the utilities plus the split between regular Republicans and the Bull Moose Party to win election to the United States Congress by 700 votes. In his term as representative he showed the same tremendous capacity for work which he later displayed on the bench. He proved to be a staunch supporter of Wilson's New Freedom program. He assisted in the drafting and passage of the Federal Reserve Act, the Clayton Act, and the law creating the Board of Mediation and Conciliation. As one House colleague later wrote,

No man in Congress was more loyal to the Administration or more zealous in the performance of his duty while here.

FitzHenry lost his bid for reelection in 1914, when the Republicans in the heavily Republican district were again unified and easily defeated FitzHenry.

100 The FitzHenry Collection contains some of the briefs prepared by Judge FitzHenry for the Illinois Appellate Court and also fragments of correspondence with other attorneys concerning cases.

Some of the ex-congressman's backers claimed he lost because he had neglected his own campaign to work for enactment of several important pieces of the Wilson legislative program.<sup>101</sup>

Following his two years in Congress, Louis FitzHenry returned to private practice for a period interrupted only by an unsuccessful bid to win election to the Illinois Supreme Court in 1915. He showed his popularity in his hometown, though, by losing by less than 3,000 votes in a district that had a 30,000 vote Republican majority. After this defeat FitzHenry attempted to secure a federal judicial appointment. He attempted unsuccessfully to use his contacts in Congress and his reputation as a loyal Wilsonian to obtain the nomination for the vacancy on the court of claims, but did receive an offer to be named federal district judge in the territory of Hawaii.<sup>102</sup> He declined, claiming that an illness in the family prevented him from moving so far away. On June 14, 1918, Judge J. Otis Humphrey of the United States District Court for the Southern District of Illinois died after a prolonged illness. As early as February 8 FitzHenry wrote Attorney General Gregory and expressed interest in Humphrey's seat on the court. He appeared to be the only candidate seriously considered. In a memo to President Wilson the attorney general listed all of the recommendations FitzHenry had received and the service he had rendered the party both in his area and in Congress. He concluded by commenting on FitzHenry's intimate knowledge of his district, his friendly personality, and his thorough knowledge of government and the broad sweep of public questions. On July 1, 1918, his nomination went to the Senate which confirmed him by a unanimous vote on July 6, 1918. He took his oath of office on July 17, 1918.<sup>103</sup>

When Judge FitzHenry assumed office a great backlog of cases existed in the Southern District of Illinois. Over the next decade the annual number of cases filed in the district increased so sharply that, until 1932 when a second judgeship was created and filled by Judge Charles Briggie, Judge FitzHenry had the heaviest docket of any single judicial district in the country. For example, in a two-week period in February, 1925, 191 defendants appeared before Judge FitzHenry. However, he not only managed to keep his own docket current, but he often sat by designation in the court of appeals or one of the other district courts in the Seventh Circuit. In 1923 the chief justice of the United States Supreme Court asked him to assist in clearing up the accumulation of criminal cases in the Southern District of New York.<sup>104</sup>

101 Letter from Rep. Rufus Hardy to Attorney General T. W. Gregory, June 21, 1918 (Records Center, St. Louis).

102 Letter from Louis FitzHenry to Senator O. W. Underwood, August 6, 1915 (FitzHenry Collection).

103 Letter from Louis FitzHenry to T. W. Gregory, February 5, 1918 (Records Center, St. Louis); memo from T. W. Gregory to Louis FitzHenry, June 28, 1918 (Records Center, St. Louis); telegram of congratulations from Sen. James H. Lewis to Louis FitzHenry, July 6, 1918 (FitzHenry Collection).

104 Daily Pantagraph (Bloomington, Ill.), February 18, 1925, at 2; Daily Pantagraph, November 19, 1935, at 5.

His heavy caseload included cases covering all areas of federal law. Although his daughter has written that he derived his greatest pleasure from hearing and deciding patent cases, his reputation, both within the circuit and nationally, came from his experiences in criminal trials. He conducted two sensational trials, one involving the conviction of the Shelton brothers, leaders of a gang of thieves who terrorized a southern Illinois county in the early 1920s. In the other case the judge tried the Colbeck gang and eight criminals known as the "Egan Rats." They had been responsible for a string of robberies, murders, and other crimes in St. Louis and southern Illinois. In both cases the judge gave the defendants lengthy sentences in Leavenworth Penitentiary.<sup>105</sup> But the principal volume of criminal work in the district resulted from violations of the Volstead Act. In 1924 the newspapers claimed that the Southern District set a national record for the number of jail sentences and amounts of fines collected for prohibition violations. FitzHenry constantly received letters from groups such as the Anti-Saloon League or the Women's Christian Temperance Union congratulating him on his efforts to convict prohibition violators. The judge's work went beyond just trying indicted defendants. When he suspected a Bloomington restaurant of serving liquor he informed the Justice Department's Bureau of Prohibition which assigned agents to investigate the situation.<sup>106</sup> Although he had the reputation of handing out stiff sentences, there were never charges made that he was unfair or abusive, as had been the case with Judge Anderson.

Thus, when Judge Louis FitzHenry came to the Seventh Circuit in October, 1933, Judges Alschuler, Evans, and Sparks welcomed him not only because he had extensive background in federal law, but because his reputation for taking on prodigious amounts of work promised to relieve the circuit's heavy workload which had resulted from the three-year vacancy since Judge Page's retirement. This proved not to be the case.

Ironically, after three years of constant effort to be appointed to the court of appeals and after working tirelessly for years, Judge FitzHenry's health rapidly deteriorated when he took the bench and he was unable to hear many appeals. Within a year he suffered a stroke and required long periods of rest during the following year. He became seriously ill in the summer of 1935, and after months of hospitalization he died at his home in Normal, Illinois, on November 18, 1935.<sup>107</sup>

No successor to Judge FitzHenry was immediately named. State, interstate, and national politics all combined to prevent the selection of a new

105 *Id.*; St. Louis Globe-Democrat, February 27, 1927 (Magazine Story Section); Jones, *supra* at 7.

106 Daily Pantagraph, December 14, 1924, at 4; secretary, Anti-Saloon League of Illinois to Louis FitzHenry, December 31, 1919; president, Women's Christian Temperance Union of Bloomington to Louis FitzHenry, April 20, 1923; president, Men's Bible Class of the Laurel M. E. Church to Louis FitzHenry, April 9, 1923; J. Herbert, Prohibition Administrator to Louis FitzHenry, January 8, 1931 (FitzHenry Collection).

107 Daily Pantagraph, November 19, 1935, at 5; Jones, *supra* at 13-16.

judge until 1937. The situation became even more complex when Judge Samuel Alschuler decided to assume senior status in the spring of 1936. Judge Alschuler had been in ill health for several years. But despite an assortment of ailments, his mind was still sharp. His greatest source of concern was a chronic heart condition which impaired his ability to devote the long hours necessary to attend to his judicial administrative duties. On December 1, 1934, Judge Alschuler lightened his workload by stepping down as presiding judge and turning over those duties to Judge Evan Evans.<sup>108</sup> Judge Alschuler continued to sit regularly with the court. He soon became involved in a short-lived but highly distressing controversy. On May 7, 1935, Congressman Everett M. Dirksen, a Republican from Pekin, Illinois, presented impeachment charges against Judge Alschuler. Dirksen claimed that the judge had participated in a patent case (*Pullman Inc. v. Marshall Electric Co.*)<sup>109</sup> in which a judgment of the district court had been reversed and awarded to a party whose attorney was Edward F. Dunne, Jr., the son of the judge's longtime friend and fellow Democratic politician. Dirksen charged that Judge Alschuler "had knowingly used his judicial powers as an incident to and an overt act pursuant to a conspiracy to wrongfully and fraudulently" decide the case for the defendants.<sup>110</sup> Dirksen's proof of the connection between the judge and Dunne, Jr., was the fact that the judge was an honorary president of the Edward F. Dunne, Sr., Portrait Association.<sup>111</sup>

Dirksen had not been the first to make this charge against Judge Alschuler. Previously, Thomas Marshall, attorney for the losing appellee, had detailed the judge's alleged impropriety in his petition for certiorari to the United States Supreme Court. On February 18, 1935, three months before Dirksen acted and a month after certiorari had been denied, the Supreme Court entered a contempt order against Marshall. The Court reprimanded the attorney for the unsubstantiated charges in his petition, fined him \$250.00, and suspended him from practice before the Court for six months.<sup>112</sup>

The Supreme Court was not the only institution to find the allegations against Judge Alschuler totally baseless. The House Judiciary Committee took the Dirksen impeachment resolution under advisement and spent the summer investigating the charges. On August 15 the Committee issued a unanimous report, unanimously approved by the House of Representatives, which found the alleged misconduct to be untrue. The report pointed out

108 Letter from Chief Justice Charles E. Hughes to Samuel Alschuler, December 3, 1934 (Alschuler Collection). The letter is the official acknowledgment of the judge's resignation as senior circuit judge.

109 72 F.2d 474 (7th Cir. 1934).

110 H.R. Rep. No. 1802, 74th Cong., 1st Sess. 1 (1935).

111 Letter from William L. Sullivan to U.S. Rep. Mike Igoe, May 8, 1935 (Alschuler Collection).

112 *Id.*; certiorari was denied 293 U.S. 625 (1935); the disciplinary proceedings are reported 79 L. Ed. 1714 (1935).

that Judge Sparks, not Judge Alschuler, wrote the unanimous opinion.<sup>113</sup> All three judges who heard the appeal testified that the case was not unusual in any manner; there had been no disagreement, nor indeed much discussion, concerning the case.<sup>114</sup> The absurdity of the charges was further evidenced by the fact that the Dunne Portrait Committee was organized two weeks after the decision in *Pullman* had been handed down; Judge Alschuler had been only one of nine other ex-governors or gubernatorial candidates who were honorary presidents of the group. Their sole purpose was to raise money to commission a portrait of ex-Governor Dunne to hang in the Cook County Circuit Court.<sup>115</sup>

The House report called Judge Alschuler "an eminent and honorable jurist, [who] enjoys the respect, confidence, and affection of the people." It ended by condemning Congressman Dirksen:

The said Everett M. Dirksen appears to have been motivated, in part at least, in preferring said impeachment charges by the desire and purpose to aid, and in the belief that he might thereby aid, the cause of a person who had been a party in interest in said suit and in which matter the said Everett M. Dirksen estimated there was some twenty-five million dollars involved.

No mitigating facts or circumstances have been discovered by this committee touching the conduct of the said Everett M. Dirksen, in basing upon a misstatement of facts a false accusation of personal and official dishonesty against the said Samuel Alschuler.<sup>116</sup>

Several newspapers joined the House in denouncing Dirksen.<sup>117</sup> One politician sought to explain Dirksen's motives by charging that Dirksen had used the issue to gain publicity in his attempt to run for governor of Illinois.<sup>118</sup>

Although the entire affair proved unpleasant to Judge Alschuler, he was cheered by the voluminous outpouring of support he received from his fellow Seventh Circuit judges, from politicians, members of the bar, and old friends.<sup>119</sup> He and these supporters felt completely vindicated by the House report. Although his stature as a jurist had not diminished, his health continued to deteriorate. In March, 1936, the judge sought the advice of Judge

113 H.R. Rep. No. 1802, *supra*; Aurora Beacon-News, August 16, 1935, at 18; telegram from U.S. Rep. A. J. Sabath to Samuel Alschuler, August 15, 1935 (Alschuler Collection). The Alschuler Collection contains the letters notifying the judge of the formal investigation, and several letters from congressmen advising the judge of the committee's progress.

114 Letter from Louis FitzHenry to Mike Igoe, May 22, 1935 (Alschuler Collection); letters from Samuel Alschuler to U.S. Rep. Hatton W. Summers, May 28 and 29, 1935 (Alschuler Collection).

115 Letter from William L. Sullivan to Mike Igoe, May 8, 1935 (Alschuler Collection).

116 H.R. Rep. No. 1802, *supra* at 2.

117 Aurora Beacon News, undated editorial (Alschuler Collection); DeKalb Daily Chronicle, undated editorial (Alschuler Collection).

118 79 CONG. REC., 7080, 7088 (1937) (Remarks of Rep. Igoe).

119 The Alschuler Collection contains over 50 letters of congratulations.

Evans concerning whether he should retire. In a compassionate letter Judge Evans counseled against leaving the bench, but admonished him above all to make the decision based upon his health. Within several months Judge Evans realized how ill Judge Alschuler was and urged him to retire.<sup>120</sup> Judge Alschuler acquiesced in Judge Evans' advice and submitted his letter of retirement (to become effective May 15, 1936) to President Franklin Roosevelt.

While the search for two nominees to fill the vacant judgeships remained distinct, common political factors did shape both. For example, it became clear that no candidate would be chosen before the 1936 elections. The Illinois Democratic party had split into two factions and President Roosevelt would make no appointment which might anger either side and jeopardize his chances of carrying Illinois in his reelection campaign.<sup>121</sup> The existence of two court of appeals judgeships, in addition to a seat in the Northern District of Illinois, also allowed a degree of bargaining and compromising which could not have taken place if there had only been one vacancy.

The first serious attempt to fill one of the positions began after the November, 1936, elections. Congressman J. Leroy Adair, a close friend and political ally of Illinois Senator William Dieterich, chose not to run for reelection from his downstate congressional district. Adair sought a federal judgeship and Dieterich wanted to accommodate him. However, attempts to nominate him to the Seventh Circuit led to protests by leaders of the Chicago legal community, and the Justice Department realized that while it would be possible to name Adair to a judgeship in the Southern District of Illinois, he should not be slated to fill Judge FitzHenry's seat on the court.<sup>122</sup> This course, though, necessitated the elevation of one of the two Southern District judges to the Seventh Circuit to create a vacancy for Adair. Senator Dieterich decided to nominate Judge Charles Briggie, the senior Southern District judge. Dieterich, however, met fierce opposition to this move, since the Republican Briggie had been a Hoover appointee. Indiana's Democratic senators stated that they would block any appointment of an Illinois Republican. If no Illinois Democrat could be found, Indiana would supply one. Dieterich next turned to the junior district judge, J. Earl Major. Judge Major did not want to leave the district court and continued to back Briggie. When the

120 Letters from Evan Evans to Samuel Alschuler, March 9 and May 15, 1936 (Evans Papers).

121 The two factions were the "regular" organization, led by Chicago Mayor Edward Kelly and Cook County Democratic Control Committee Chairman Patrick Nash, and the reformers led by Governor Henry Horner. The governor's strength was mainly in downstate Illinois while the regulars controlled Chicago. The political fighting between the factions is amply detailed in T. LITTLEWOOD, *HORNER OF ILLINOIS* (1969). See also the letter from Evan Evans to Samuel Alschuler, August 20, 1936 (Evans Papers) (Evans reports no appointment likely until after the election).

122 The opposition to Adair is described in J. Kremer, *The Selection and Characteristics of Judges Appointed to the U.S. District Courts of Illinois from 1933 through 1966*, 15-16 (December, 1968) (unpublished thesis in Regenstein Library, University of Chicago).

senator explained that he would never be able to get Briggles' nomination through the Senate, Major consented.<sup>123</sup> This occurred before mid-February, 1937, but the president did not immediately send the nominations of Major and Adair to the Senate. Instead, Roosevelt characteristically timed the event for maximum publicity and political effect. He revealed the selection of Judge Major on March 9, 1937—the same day as one of his fireside chats discussing his court-packing plan, and the day before the Senate Judiciary Committee began hearings on that subject. Most commentators and politicians saw the move as an attempt to keep Senator Dieterich from defecting to the anticourt-packing members of the Judiciary Committee. The congressional hostility towards Roosevelt and his attempts to enlarge the Supreme Court to secure favorable review of New Deal legislation did not interfere with Judge Major's confirmation. He quickly received confirmation by the Senate and took his oath of office on March 23, 1937.<sup>124</sup>

As this account of Judge Major's appointment shows, the fact that a downstate Democrat replaced Judge FitzHenry stemmed more from Judge Adair's departure from Congress than the desire to ensure a downstate seat on the Seventh Circuit. However, once Major had been chosen, Senator J. Hamilton Lewis, Illinois' other Democratic senator, announced that the successor to Judge Alschuler had to be from Chicago. This involved President Roosevelt squarely in the middle of the bitter feud between Illinois' Governor Henry Horner and the other party faction led by Chicago Mayor Edward J. Kelly and Democratic National Committeeman Patrick A. Nash. The two factions differed less over substantive policies than over the issue of who controlled the party: i.e., who selected the ticket and distributed patronage. Roosevelt had unsuccessfully attempted to solve the intraparty split in 1935 by offering Governor Horner a judgeship in the Northern District of Illinois. The governor had refused and subsequently shown his political muscle by defeating the Kelly-Nash machine and winning reelection, so Roosevelt could not afford openly to alienate either side. Horner wanted his attorney general, Otto Kerner, given the Seventh Circuit judgeship. The Kelly-Nash group, including both Illinois senators, opposed Kerner, seeking instead to place Congressman Michael Igoe on the bench.<sup>125</sup> Neither group would budge and the Roosevelt Justice Department began to look for a compromise candidate or an alternative. By December, 1937, they found their solution: bypass Illinois and select an Indianan. On December 7, 1937, rumors began to circulate in Washington, Chicago, and Indianapolis that the president had

123 Letters from Evan Evans to Samuel Alschuler, February 13, 18, 1937 (Evans Papers).

124 Kremer, *supra* at 15; Chicago Tribune, March 10, 1937, at 13; New York Times, March 12, 1937, at 1. The "court-packing" controversy enjoys a great volume of literature. Some of the most helpful are W. Leuchtenberg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347; P. BATOR, P. MISHKIN, D. SHAPIRO and H. WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 41-45 (2d ed. 1973).

125 LITTLEWOOD, *supra* at 167, 186; KREMER, *supra* at 16-17.

chosen Indiana Supreme Court Justice Walter E. Treanor for the Seventh Circuit. The Illinois senators were angry. Justice Department officials had informed them that the president wanted to make a personal choice for the judgeship, and both men had agreed, assuming that the president had found a compromise candidate from Illinois. They did not vow to block Treanor because Congress had before it a bill to increase the number of judges in the Seventh Circuit from four to five and the senators were promised that the new judge would be a Chicagoan.<sup>126</sup>

The nomination of Walter Treanor also created political ramifications in Indiana. Treanor's nomination was sponsored by Senator Sherman Minton, who had been a close friend since their undergraduate days at Indiana University. Roosevelt had two reasons for wanting to give Minton the right to select the new judge. First, Minton had stuck by the president throughout the court-packing battle, often acting as the pro-Roosevelt leader in the Senate. Roosevelt desired publicly to reward such loyalty. Second, by showing Minton such favor the president hoped to strengthen the New Deal wing of the Indiana Democratic party. Minton's colleague, Senator Frederick Van Nuys, not only vigorously opposed the president's court-packing plan, but as leader of the conservative Democrats in Indiana he posed a threat to any third-term ambitions the president had. Van Nuys' alliance with ex-Governor Paul McNutt was the key to McNutt's bid for the presidency in 1940. Van Nuys' reaction to Treanor's appointment, although not jubilant (Van Nuys had earlier proposed another candidate), was not hostile.<sup>127</sup> The two men had had cordial relations in the past, and on December 3, 1937, the senator gave Attorney General Homer Cummings his consent to the nomination. The attorney general, who had been favorably impressed by Treanor during an interview on December 1, sent Treanor's name to the president on December 6 and the president sent the name to the Senate a week later. The Senate confirmed him within a week and Judge Treanor took his oath of office on January 11, 1938.<sup>128</sup>

For the first time since Judge FitzHenry's death in 1935 the Seventh Circuit had its full complement of four active judges, with Judges Treanor and Major joining Presiding Judge Evans and Judge Sparks. Senior Judges Page and Anderson never participated in the court's business, but Senior Judge

126 Treanor was offered the appointment in two telegrams from Senator Sherman Minton to Walter Treanor, November 30, December 1, 1937 (Treanor Collection, Lilly Library, Indiana University) (hereinafter Treanor Collection); memoranda from Attorney General Homer Cummings to Assistant Attorney General Joseph Keenan, December 4, 1937 (Records Center, St. Louis) (Memo directing papers to be drawn up for Treanor appointment); Indianapolis Star, December 7, 1937, at 1; Chicago Tribune, December 9, 1937; *id.*, December 12, 1937; *id.*, December 13, 1937; Washington Post, December 13, 1937.

127 See newspapers cited *supra*, note 126.

128 Memoranda from Attorney General Homer Cummings to Joseph Keenan, December 3, 1937 (Records Center, St. Louis, Mo.) (both memos report approval of the Indiana senators); letter from Homer Cummings to Franklin D. Roosevelt, December 13, 1937.

Alschuler continued to sit when his health permitted. That proved to be not often. Judge Alschuler died on November 9, 1939, just two weeks short of his eightieth birthday. According to wishes expressed in his will the burial service was quite simple, with his close friend Judge Evans delivering a short eulogy.<sup>129</sup>

The two men President Roosevelt nominated for the Seventh Circuit Court of Appeals in 1937 were markedly different. Judge Major was an outgoing, commonsense politician, who for twenty-five years had fought the Democratic party's battles in a marginally Republican congressional district. Judge Treanor, on the other hand, was a reserved, scholarly man who had never tried a lawsuit, but had spent ten years teaching law and six years on the Indiana Supreme Court. Although they both shared a lifelong affiliation with the Democratic party, Judge Treanor was a committed New Dealer, whereas Judge Major had established a more conservative record in Congress.

J. Earl Major was a lifelong resident of Montgomery County, Illinois. He was born (January 5, 1887) in Donnellson, where his parents owned a farm. As the oldest of seven children he worked on the farm while he attended public school in Donnellson. In 1904 he graduated and received the honor of delivering the class speech. After high school, he enrolled in Brown's Business College in Decatur, Illinois, and graduated in 1907. His last two years at Brown's were completed by correspondence as he moved back to Donnellson to assist his father in running the farm and to help take care of his ailing mother. His mother's death in 1906 allowed him to move to Chicago to begin law school at the Illinois College of Law. He worked for a railroad during the day while studying and attending classes at night. He earned his LL.B. in 1909 and immediately received admission to the Illinois bar. Earl Major returned to his home county and entered the practice of law in Hillsboro with his uncle and brother in the firm of Miller, Major & Major. They had a general small-town legal practice and Earl Major quickly displayed an aptitude for trial work. He enjoyed litigation and handled most trials for the firm.<sup>130</sup>

J. Earl Major's career after age twenty-five was spent mainly in politics. In 1912 he successfully campaigned as a Democrat for state's attorney of Montgomery County. He won a second four-year term in 1916. He had an impressive record as a prosecutor, securing a large number of convictions. During his two terms he convicted fourteen of sixteen defendants indicted for murder. After two years out of office Major ran for Congress from Illinois' Twenty-first District against the Republican incumbent. This marked the first of six elections in which J. Earl Major campaigned as the Democratic

129 *Samuel Alschuler*, 21 CHI. B. REC. 290 (1940).

130 For the details of Judge Major's life see the Judicial Conference Bicentennial Committee biographical questionnaire on Judge Major which was completed by his wife, Ruth Major, and his sister, Mary Alvord; see also Memorial Ceremony for the Honorable J. Earl Major (June 20, 1972) (unpublished pamphlet at Seventh Circuit); Hillsboro and Montgomery Co. News (Ill.), January 7, 1972, at 1.

nominee for the United States House of Representatives. He won his first campaign in 1922, lost in 1924, won in 1926, lost in 1928, and won in both 1930 and 1932. While in Congress he proved to be a popular legislator and served for a time on the House Judiciary Committee. During the periods out of office, Major returned to Hillsboro to practice law.<sup>131</sup>

In 1933 the Democratic Illinois legislature sought to gerrymander the United States congressional districts in Illinois to ensure the reelection of one of the Democratic congressmen. This resulted, however, in the elimination of Earl Major's congressional seat. Major agreed with the redistricting plan on the understanding that he would get primary consideration for a federal district judgeship if it were available. With the elevation of Judge Fitz-Henry to the Seventh Circuit, a seat on the bench of the Southern District of Illinois became open. United States Senator William Dieterich happily supported Earl Major, as they had known each other when they served in Congress together. Additionally, Dieterich sought to repay Major for the favor of relinquishing his seat on the House Judiciary Committee when in 1931 Dieterich, then a Congressman, greatly desired a place on the committee. Judge Major resigned from Congress on October 6, 1933, when he received his commission as district judge of the Southern District of Illinois and took his oath of office.<sup>132</sup>

Judge Walter Treanor's career not only did not resemble Judge Major's, but was unique among the pattern of Seventh Circuit judges whose lives have so far been examined. There are some similarities between Judges Treanor and Mack—both attended Harvard Law School and both taught law, but Treanor, unlike Mack, devoted his attention to scholarship advocating law reform rather than participating in social reform movements. Treanor also became involved in Indiana Democratic politics to a much larger degree than Mack in Chicago politics.

Walter Emanuel Treanor was a lifelong resident of Indiana. He was born November 17, 1883, in Loogootee, Indiana. He came from a middle-class family which placed a premium on education. His father was a well-read merchant and public school teacher in Petersburg, Indiana, where the family moved while Walter was in grade school. In 1901 he graduated first in his class at Petersburg High School and delivered the class oration. The following fall he began to teach Latin and History at the high school. He taught for five years until he had saved enough money to attend Indiana University. He received his B.A. in 1912, earning a Phi Beta Kappa key for his excellent record. Treanor returned to Petersburg where he became principal of the high school. Three years later he was named superintendent of the county school system. He served only two years in that capacity, as he was drafted into the United States Army at the outbreak of World War I. He obtained a commis-

131 KREMER, *supra* at 12.

132 *See* note 130, *supra*.

sion as a lieutenant and, after two years of service in France, received his discharge and returned to Indiana.<sup>133</sup>

Walter Treanor had determined to enter law school after his tour of duty in the army. He left his wife, Aline, and infant daughter in Petersburg while he attended Indiana University Law School in Bloomington. He received his LL.B. in 1922 and was elected to the Order of the Coif. Encouraged by his teachers to take an advanced degree, he earned an LL.D. from Indiana in 1923. His brilliance as a law student also led to his appointment to the Indiana faculty as an assistant professor. He began teaching there in 1922, was promoted to associate professor in 1925, and was made full professor in 1927. He taught courses in agency, commercial instruments, and corporation law.<sup>134</sup>

When the school founded a law review in 1926, Walter Treanor was asked to be its editor. He served in this capacity for four years and published four comments and casenotes in these early volumes. He also authored two book reviews of surety casebooks which appeared in the *Harvard Law Review* and the *University of Pennsylvania Law Review*.<sup>135</sup> His writings make clear his jurisprudence. He belonged wholeheartedly to that group of early twentieth-century legal academics who opposed the legal formalism of late-nineteenth-century judges. The antiformalists were characterized by their belief that law needed to be reformed so that it conformed and responded to the needs of modern American social and economic conditions. In a book review Treanor outlined his philosophy of law:

The reviewer, however. . . favors a broader objective . . . to inform students of the conditions which have created the need for the corporate surety, of the business methods and practices of surety companies, . . . to stimulate a critical study of "the nature of the judicial process" and of the working of the process in a particular situation familiar to, and understood by, the student. There ought to result a clearer appreciation on the part of the student that as the facts of life change, becoming more and more complex, legal doctrines must also change, must grow

133 The biographical details of Judge Treanor's life are found in Memorial Service for the Honorable Walter E. Treanor (April 14, 1942) (unpublished pamphlet at Seventh Circuit Court of Appeals); memorandum from Sherman Minton to Homer Cummings, August 9, 1937 (Records Center, St. Louis); letters and speeches contained in the Treanor Collection document in detail the events described in the biographical sketches.

134 The letters in the Judge Treanor collection files for three years reveal the difficulty Treanor and his wife had arranging finances and commuting schedules while in law school. The collection also contains Judge Treanor's lecture notes.

135 Treanor, *Book Review*, 40 HARV. L. REV. 664 (1927); Treanor, *Book Review*, 78 U. PA. L. REV. 288 (1929); Treanor, *Agency in Malpractice Cases: Funk v. Bonham*, 3 IND. L. J. 474 (1928); Treanor, *The Rationale of Corporate and Non-Corporate Suretyship Decisions*, 3 IND. L. J. 105, 196, 281 (1927-28); Treanor, *Burden of Proof of Due Course Holding Under Negotiable Instruments Law*, 1 IND. L. J. 49 (1926); Treanor, *The Family Automobile and the Family Purpose Doctrine*, 1 IND. L. J. 89 (1926).

and expand, or else die. For it is true of suretyship law, as well as of law generally, that, "The law must be stable, and yet it cannot stand still."<sup>136</sup>

The last sentence of the above passage is a quotation from one of the foremost antiformalists, Dean Roscoe Pound of Harvard.<sup>137</sup> It is fitting that Treanor cited Pound, for the dean had a profound influence on the future judge's thinking. Not only had Treanor read Pound's works, but in 1926 he took a leave of absence from Indiana to spend a year studying at Harvard Law School. Treanor always treasured the experience of his year's association with Pound and the other great legal scholars at Harvard during that era. In later years he often wrote these professors expressing his gratitude for their assistance and encouragement. He also sent some of his brightest students from Indiana to Harvard for postgraduate work, expressing to them his opinion that Harvard Law School far exceeded Yale and Columbia in the quality of the professors. This respect and admiration was reciprocal. In 1936 Dean Pound selected Walter Treanor to deliver one of the principal addresses at the Tercentennial celebration of the founding of Harvard University.<sup>138</sup>

In politics Walter Treanor also believed that governmental institutions and policies must change to reflect existing societal needs. He thus followed in his father's footsteps as a member of the liberal wing of the Indiana Democratic party. While being identified as a Democrat, Treanor had only peripherally been involved in party affairs and Democratic campaigns when in 1930 he decided to seek one of the seats in the Indiana Supreme Court. He had cordial relations with all factions in the party and won the nomination for justice of the First Judicial District by better than a 2-1 margin. He easily defeated his Republican opponent and took his seat on the Indiana Supreme Court in 1931.<sup>139</sup> Although his liberal philosophy often clashed with the views of the Republican majority on the court (he wrote a large number of dissent-

136 Treanor, *Book Review*, 78 U. PA. L. REV. 288, 291 (1929); for an excellent discussion of the anti-formalists see R. Gordon, *J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOCIETY REV. 9 (1975). The anti-formalists can be divided into two groups, the "sociological jurists" represented by Dean Roscoe Pound and the "legal realists" represented by Karl Llewellyn. For a discussion of these two movements see G. E. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972). See also the excellent study, W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT*.

137 R. POUND, *INTERPRETATIONS OF LEGAL HISTORY I* (1923); see also D. WIGDOR, *ROSCOE POUND: PHILOSOPHER OF THE LAW* (1974).

138 The 1928 and 1929 folders in the Treanor Collection contain the numerous letters between Treanor and his former students who were studying at Harvard; in those folders are also the letters he wrote to Pound, Thayer and other Harvard professors. W. Treanor, *Comment on Hon. Henry Hanna, The Common Law in Ireland*, in HARVARD TRICENTENARY CELEBRATION, 34 (1936).

139 The 1930 campaign is extensively documented in the Treanor collection. Letters arranging support from lay and bar groups, as well as texts of several speeches, are included.

ing opinions),<sup>140</sup> he was highly regarded by the Indiana bar and by his fellow justices as a learned legal scholar and a judicial craftsman. He easily won reelection in 1936. While on the bench, he refrained from active politics, except for one notable instance. In 1937 the New Deal forces in the Indiana legislature attempted to pass a resolution declaring support for Roosevelt's court-packing plan. Senator Minton and other Democratic leaders called on Justice Treanor to author the resolution, which he did. His efforts led to Minton's suggestion to President Roosevelt that Treanor be appointed to the United States Supreme Court for the seat that Justice Hugo Black eventually received. Several senators left an August, 1937, meeting with Roosevelt convinced that Treanor had been appointed, only to learn the next day that Black had been named. Even if Treanor's role in the court-packing dispute failed to help him win the Supreme Court nomination it proved to be a great factor in his selection for the Seventh Circuit.<sup>141</sup>

Within five months of Judge Walter Treanor's taking the bench the Seventh Circuit received an additional judgeship. As has already been pointed out, the creation of the position was connected with the Roosevelt administration's attempt to mediate between the rival factions of the Democratic party in Illinois. But the idea for the judgeship originated with Presiding Judge Evan Evans. In the spring of 1937 he decided to recommend to the conference of senior judges that they go on record as favoring the increase in judges in the circuit from four to five. Judge Evans deeply desired to keep the court at its present membership, but the dramatic increase in case filings during the previous several years plus the experience of having two vacancies on the court for a two-year period overcame any qualms he had. Additionally, Judge Evans fought for the extra judgeship because he believed that there had to be increased separation between the district court and the court of appeals. He became convinced that the judicial system would function more efficiently if the appeals judges were freed from trial work. An additional judge would also eliminate many of the administrative difficulties caused

140 One of his more controversial dissents was in *Stevenson v. State*, 205 Ind. 141, 199 (1932). The case is discussed in text at note 86, *supra*. Judge Treanor believed the trial court had erred in refusing to strike parts of one count of the indictment and in giving one of the crucial jury instructions, and therefore voted to reverse the conviction and grant a new trial. It is ironic that in coming to the Seventh Circuit he became junior to the judge he was reviewing—Judge Will Sparks. The Treanor file in the Records Center in St. Louis contains a list of the majority and dissenting opinions written by Judge Treanor on the Indiana Supreme Court.

141 Memorandum from Sherman Minton to Homer Cummings, August 9, 1937 (Records Center, St. Louis); letter from Aline Treanor (Judge Treanor's wife) to Mr. Miller (undated) (Treanor Collection). On Black's appointment see W. Leuchtenburg, *A Klansman Joins the Court: The Appointment of Hugo L. Black*, 41 U. CHI. L. REV. 1 (1973). On Treanor's involvement in the court-packing controversy addition to the Minton memorandum see the newspaper articles listed in note 126, *supra*.

by constantly bringing a district court judge to Chicago to hear appeals.<sup>142</sup> The Judicial Conference approved Judge Evans' request and prepared a bill, which Senator Minton sponsored, adding a judge to the Second, Fifth, Sixth, and Seventh Circuits. The bill passed both houses of Congress and became law on May 31, 1938.<sup>143</sup>

The judgeship bill also included authorization for an additional district judge for the Northern District of Illinois. This position made it possible for the Roosevelt administration to arrange a compromise between the warring factions of the Illinois Democratic party. The president offered Governor Henry Horner the right to select the court of appeals judge and allowed Mayor Kelly the choice of the district judge. Horner happily accepted and Mayor Kelly went along, especially after the Horner candidate for the United States Senate defeated the Kelly candidate and thus placed Horner in a position to block the appointment of the new judges if Kelly did not cooperate. Mayor Kelly suggested that Michael Igoe, a former congressman and United States attorney for the Northern District of Illinois, be nominated for the district court. For the Seventh Circuit Governor Horner submitted the name of Otto Kerner, attorney general of Illinois, to Attorney General Cummings. The president approved both nominations and sent both to the Senate on November 17, 1938. Because the Senate was in recess and in order to assure both factions that there would be no cross-ups, the attorney general decided to appoint both judges to recess appointments. The degree of mistrust is evidenced by the fact that the commissions for the two judges were flown by a Justice Department courier to a secret location in Minnesota where a representative of each faction accepted the commission for the judge-designates. Both men took their oaths of office on November 23, 1938. Judge Kerner received Senate confirmation on February 9, 1939, and took his permanent oath of office on February 13.<sup>144</sup>

Like Judge Major, Otto Kerner had spent most of his life before appointment to the federal bench in Illinois Democratic politics. But unlike Judge Major, Judge Kerner was a product of urban ethnic politics. In fact, he was the first highly identified representative of one of Chicago's ethnic minorities to be appointed to the federal courts in the city. Otto Kerner, Sr., was born in Chicago on February 22, 1884. His parents had migrated from Bohemia to

142 Evan Evans to Samuel Alschuler, August 14, 1937 (Evans Papers); Evan Evans to Senator Carl Hatch, May 13, 1939 (Evans Papers); Evan Evans to Senator Robert Bulkley, January 13, 1938 (Evans Papers).

143 Act of May 31, 1938, 52 Stat. 584. The Judicial Conference recommendation, as well as those of the Seventh Circuit judges, may be found in H.R. Rep. No. 2257, 75th Cong., 3d Sess. 11-12 (1937) and S. Rep. No. 1527, 75th Cong., 3d Sess. 4 (1938).

144 KREMER, *supra* at 17-19; LITTLEWOOD, *supra* at 197-98; letter from Evan Evans to Samuel Alschuler, March 23, 1938 (Evans Papers); telegram from Henry Horner to James Hamilton Lewis, June 25, 1937 (Records Center, St. Louis); memorandum from Homer Cummings to Joseph Keenan, November 22, 1938 (Records Center, St. Louis) (report that Horner had agreed and that the Kerner and Igoe appointments should be sent to the President); letter of recommendation of appointments from Homer Cummings to Franklin D. Roosevelt, November 22, 1938 (Records Center, St. Louis); LITTLEWOOD, *supra* at 197-98.

Chicago in the 1870s and lived in the Bohemian community on the west side of the city. Judge Kerner's father was a cabinetmaker. His income did not allow the nine children to stay in school after the compulsory eight years. Otto Kerner thus took a job as a messenger in a law firm to support himself while he attended night school to earn high school credits. He received his diploma and decided to attend law school. He thus continued working while enrolled in the law department of Lake Forest College. In 1905 at age twenty-three he received his law degree and gained admission to the Illinois bar.<sup>145</sup>

Otto Kerner returned to his west side neighborhood and opened an office which serviced the needs of the Bohemian community. He wrote wills, contracts, handled tort claims and house closings. He had evening office hours to enable clients to consult with him after work. He gained a reputation in the community as a bright, hardworking young attorney. This reputation brought Anton Cermak, a skilled Bohemian politician and future mayor of Chicago, to his office to ask Kerner to represent him before the Board of Elections. Kerner successfully forced the commissioners to place Cermak's name on the ballot. The mutual friendship and respect between these two men which began at that time continued to grow stronger through the years.

Under Cermak's guidance the young attorney entered politics. In 1911 Otto Kerner received an appointment as assistant prosecutor and also was elected as precinct committeeman. He served in the prosecutor's office until 1913 when he was elected alderman from his ward. During those scandal-filled years on the Chicago City Council, he established himself as an opponent of Republican boss "Big Bill" Thompson and won the praise of several good-government groups. The Municipal Voters League described him as "a man of independence, honesty and intelligence . . . he is one of the most valuable aldermen."<sup>146</sup> He was reelected alderman in 1917 and remained on the City Council until 1919. While Kerner served as an alderman, the chief judge of the chancery division of the Cook County Circuit Court appointed him a master in chancery. He occupied the position of master for twelve years, until he was slated by the Democrats to run for judge of the Cook County Circuit Court. He easily won election and heard cases in the several branches of the court—law, chancery, juvenile, and criminal.<sup>147</sup>

In 1931 the justices of the Illinois Supreme Court selected Judge Kerner as one of the three judges to sit on the bench of the Second District of the Illinois Appellate Court. In 1932, when Mayor Cermak sought to put together a ticket for the fall state elections, he asked Kerner to run for attorney general.

145 The biographical information about Judge Kerner is taken from the Judicial Conference Bicentennial Committee Biographical Questionnaire on the judge prepared by his wife, Mrs. Rose Kerner. See also *Hon. Otto Kerner*, in 4 W. TOWNSEND, ILLINOIS DEMOCRACY 13-14 (1935); Memorial Service in Memory of the Honorable Otto Kerner (April 7, 1953) (unpublished pamphlet at U. S. Court of Appeals for the Seventh Circuit).

146 TOWNSEND, *supra* at 13; A. GOTTFRIED, BOSS CERMAK OF CHICAGO: A STUDY OF POLITICAL LEADERSHIP, 98-101 (1962).

147 E. MARTIN, THE ROLE OF THE BAR IN ELECTING THE BENCH IN CHICAGO, 370 (1936).

Although Kerner greatly enjoyed the life and challenge of being an appellate judge, he could not refuse his old friend and mentor. Governor Horner and the rest of the ticket, including Kerner, easily won the November election. Kerner also triumphed in his 1936 reelection campaign.<sup>148</sup> Kerner, however, never lost his desire to return to the bench. He backed completely Governor Horner's efforts to obtain his appointment to the Seventh Circuit. In 1940, after only two years on the bench, Kerner emerged as the only potential candidate for governor acceptable to both factions of the Illinois Democratic party. When party leaders called him to Springfield and told him the nomination would be unanimously his, he thought it over and declined. The security and pleasure his work on the Seventh Circuit gave him outweighed any further political ambitions he had.<sup>149</sup>

Throughout his long career both in politics and on the bench, Judge Kerner maintained close ties with his Bohemian friends and neighbors. Both he and his wife, Rose Chmelik Kerner, took an active role in Bohemian civic and social affairs. The judge served at times as president of the Bohemian Fraternal Club and joined several other neighborhood organizations. His wife organized the Bohemian Women's Civic Club and the Bohemian Charitable Organization. The judge also retained ties with relatives and friends in Bohemia. After World War II, when Czechoslovakia became a Soviet-aligned nation, the judge attempted to visit Prague but was unable to obtain a visa because of his contacts with anti-Soviet politicians in Czechoslovakia.<sup>150</sup>

The composition of the bench of the Seventh Circuit (Judges Evans, Sparks, Major, Treanor, and Kerner) remained unchanged for only two years. For the second time in less than a decade, a recently appointed judge developed a terminal illness soon after taking his seat on the bench. Judge Walter Treanor developed cancer in late 1939 and treatment required frequent periods of prolonged hospitalization. The judge was able to sit for short periods but had difficulty working on opinions. Presiding Judge Evans and Judge Sparks were able to take over some of his cases, but a backlog began to develop. Judge Evans called in several district judges to sit for Judge Treanor throughout the 1940 and 1941 terms.<sup>151</sup> Judge Treanor's health steadily declined and he spent almost the entire first three months of 1941 in an Indianapolis hospital. He died there on April 26, 1941, and was buried near his home in Petersburg, Indiana.<sup>152</sup>

148 LITTLEWOOD, *supra* at 69, 186; GOTTFRIED, *supra* at 182-83, 294-95, 310-13, 340-41, 378, 391-92.

149 LITTLEWOOD, *supra* at 218.

150 Judicial Conference Biographical Questionnaire, *supra*; Memorial Service, *supra* at 15.

151 Letters requesting District Judges Walter Lindley, Charles Briggie and Robert Baltzell to sit with the Seventh Circuit during Judge Treanor's illness are among the Evans Papers.

152 The Treanor Collection contains many letters of condolence from Seventh Circuit judges and their wives to Mrs. Aline Treanor. The collection also contains the correspondence between Judges Evans and Sparks and Judge Treanor in which the two judges sought to assure Judge Treanor that he should do only what he could, as they would work on any cases that he did not have the strength to work on.

After Judge Treanor's death, there existed almost no doubt as to whom President Roosevelt would nominate to fill the Seventh Circuit vacancy. Ten days after Treanor's death (May 6, 1941) President Roosevelt sent the name of former Senator Sherman Minton to the Senate. Minton received quick confirmation and took his oath of office on May 29.

Although no organized opposition materialized, a strong sentiment existed among portions of the bench and bar that Minton was an improper choice for the Seventh Circuit. These attorneys believed that the courts should not become the "retirement home" for defeated politicians. They argued that during the court-packing controversy President Roosevelt politicized the judiciary far beyond proper bounds and the appointment of the former senator only exacerbated this situation. Similar concerns had prevented Minton from being appointed to the Supreme Court when Roosevelt named Senator Hugo Black, and from being appointed to the Seventh Circuit instead of Treanor. This opposition was directed neither at Minton's professional capabilities nor personal character, but rather centered on the symbolic necessity of keeping the judiciary separate from the two openly political branches of government.<sup>153</sup>

It is fitting that, in this history of the first fifty years of the Seventh Circuit, Sherman Minton's biography is the final one to be examined. Not only did he become the first Seventh Circuit judge to be elevated to the United States Supreme Court, but his career combines many of the elements that have been seen in the lives of the other judges. Like Judges Mack, Evans, and Treanor, Judge Minton had an illustrious academic career, both as an undergraduate and a law student. Like Judges Alschuler, FitzHenry, Major, and Kerner, Judge Minton had been an active participant in party politics throughout almost all of his adult life.

Sherman (Shay) Minton was born in Georgetown, Indiana, on October 20, 1890.<sup>154</sup> His parents, who were not wealthy, had four children, of whom Sherman was the next to youngest. His mother died when he was ten. In 1905 his father decided to move the family to Texas. Sherman, who had just completed grade school, went to work in the Swift & Company packinghouse in Texas. After a year's employment the sixteen-year-old returned to Georgetown to attend high school. He graduated from New Albany High School in 1910. Debating occupied center stage in Sherman Minton's academic career, as it had for Judge Evans. He served as captain of the first New Albany debate team, a group he helped organize. Following high school graduation Minton returned to Texas to work as a traveling salesman for Swift &

153 Letter from Will M. Sparks to Congressman Raymond Springer, April 22, 1941 (Evans Papers); R. Kirkendall, *Sherman Minton*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT, 1789-1969, 2700 (L. FRIEDMAN & F. ISRAEL, eds.) (1969).

154 The biographical details of Judge Minton's life are taken from K. Pantzer, *Sherman Minton*, in Presentation of the Portrait of Justice Sherman Minton (June 15, 1951) (unpublished pamphlet in the U.S. Court of Appeals for the Seventh Circuit); Kirkendall, *supra* at 2699-2709. See also the sources listed in the selected bibliography following the Kirkendall article.

Co. in order to earn money to attend college. He enrolled in Indiana University in 1911 and began the five-year B.A./LL.B. program. While at Indiana he starred on the football and baseball teams, the debate team, and served as president of the Indiana Union. He graduated a year early (1915), ranked first in his class (*summa cum laude*), and received the William Jennings Bryan award as the most outstanding public speaker in his class. By graduating at the head of his class he outperformed such later-important political figures as Paul V. McNutt and Wendell L. Willkie.<sup>155</sup> The Bryan prize and a fellowship from the American Association of Law Schools enabled Sherman Minton to spend a year of study at Yale Law School. He received his LL.M. in 1916, again ranking at the top of his law school class. Just as his predecessor on the bench, Judge Treanor, had enjoyed the experience of studying with the great legal talent at Harvard, Minton thrived during his year at Yale, whose faculty at that time included ex-President William Howard Taft and Dean (and later Judge) Thomas Swann.<sup>156</sup>

His education completed, Sherman Minton returned to Indiana in the fall of 1916. He opened a law office, but was barely able to set up his practice before he volunteered for army duty in World War I. He obtained a commission as captain in the infantry and saw service in France during the final phase of the war. After the armistice, and while in Paris awaiting his discharge orders, Minton took the opportunity to study international law in the *Faculté de Droit* at the Sorbonne.

He returned to Indiana at the end of 1919 and again opened a law office. But simultaneously he made plans to pursue his love for politics. The next twenty years of Minton's life followed the same pattern: a mixture of politics and the practice of law. Sherman Minton placed his political career before his legal career. He practiced law only when he failed in attempts to gain political office—which was not infrequent. His first try at winning an elective office came in 1920 when the returning veteran entered the Democratic primary for congressman in his district. He lost convincingly and turned his attention to developing a lucrative law practice. He remained a solo practitioner until 1922, when he joined the highly successful firm of Stotsenburg & Weathers (which became Stotsenburg, Weathers & Minton). After several years as a specialist in trial litigation, Minton accepted the offer of two former Indians to join their firm in Miami, Florida. He stayed in Miami from 1925 to 1928, but determined that the firm's practice, which centered around real estate speculation, was not to his liking. He moved back to New Albany, Indiana, and rejoined the Stotsenburg firm. He campaigned for the 1928 Democratic nomination for Congress but again was soundly beaten.<sup>157</sup>

After four more years of law practice, his political fortunes began to

155 McNutt became governor of Indiana during the 1930s and Willkie was the Republican presidential nominee in 1940. Pantzer, *supra* at 11.

156 *Id.* at 12.

157 *Id.* at 14.

change. Minton, who had been an active member of the American Legion since his return from France, threw his support and that of the Legion behind the Indiana gubernatorial campaign of his former Indiana University friend and fellow Legion officer, Paul V. McNutt. McNutt won in the 1932 Democratic landslide and appointed Minton to be attorney for the Public Service Commission, a position created for him. He used his authority to regulate the utilities to significantly lower rates—a move which immensely enhanced his popularity with the voters. Minton turned his public appeal into an election triumph; he won an easy victory in the 1934 United States Senate contest in Indiana. His skill as a public debater and his loyalty to New Deal legislative programs quickly gained him recognition from Democratic leaders in the Senate. Within a year he became an assistant whip, and in 1938 he became whip. He fought hard to pass any bill President Roosevelt wanted as evidenced by his role in the court-packing controversy. The president reciprocated Minton's loyalty and friendship. In 1940 after Senator Minton lost his bid for reelection to the Senate, the president made him a White House staffer with the title of administrative assistant. The ex-senator's job was to serve as White House liaison with Congress: to be Roosevelt's "eyes and ears." Within a few months after assuming his White House duties he received his appointment to fill the vacancy on the Seventh Circuit caused by the death of Judge Walter Treanor.<sup>158</sup>

Judge Minton served on the Seventh Circuit eight years. He resigned on October 5, 1949, to become justice of the United States Supreme Court, succeeding the late Justice Wiley B. Rutledge. Judge Minton's appointment to the Supreme Court, as had his appointment to the Seventh Circuit, stemmed in large part from his years in the Senate. He entered the Senate the same year as Harry S Truman and developed a close rapport with him. As whip Minton helped steer some of Truman's proposals through committees and guided them to passage. When Truman succeeded Roosevelt as president he wrote his old colleague, Minton, "As far as you are concerned I am just as approachable as I was when we sat together in the Senate."<sup>159</sup> Truman showed his confidence in the judge when he appointed him as one of three board members designated to investigate and arbitrate a coal strike called by the United Mine Workers in March 1948. It came as no great surprise when President Truman named Judge Minton to the Supreme Court. His appointment fit the same pattern as Truman's other appointments to the court: a close personal friend of the president; someone not from the east; and a man who had legislative and executive backgrounds.<sup>160</sup> Justice Minton joined the court and helped form a fairly consistent majority voting bloc composed of Chief Justice Fred Vinson and Justices Stanley Reed, Harold Burton, Tom Clark, and Minton. His steadfast support of New Deal programs in the Senate led

158 *Id.* at 16.

159 Kirkendall, *supra* at 2701.

160 *Id.*; see also the letter from Evan Evans to Sherman Minton, March 26, 1948 (Evans Papers).

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158 *Id.* at 16.

159 Kirkendall, *supra* at 2701.

160 *Id.*; see also the letter from Evan Evans to Sherman Minton, March 26, 1948 (Evans Papers).

## The Seventh Circuit as a Working Institution 1912-1941

The preceding chapter concentrated on the careers and appointments of the judges of the United States Court of Appeals for the Seventh Circuit. In contrast, this and the succeeding chapter will take on a composite view of the Seventh Circuit during the period 1912 to 1941. These chapters will be concerned with the court as a working institution rather than with the individual lives of the judges following their appointments. This examination will range from the physical details of the judges' day—a look at the court's location, its schedule, and procedures—to more abstract questions such as the personal relationships between the judges.

It may seem a dubious undertaking to discuss any thirty-year span as a unified period. Doing so for these particular thirty years may seem especially risky, since the period encompasses not only World War I and the beginning of World War II, but also the Great Depression which brought about fundamental alterations in the other branches of government. Chapter VII looks at the impact of these events on the substantive work of the court; that is, how they changed the subject matter and results of cases with which the court dealt. But chapter VI will examine the remarkable continuity and stability in the Seventh Circuit's operations and procedures during three decades.

Following the abolition of the circuit courts in 1911, the court's day-to-day functioning remained almost completely unchanged until 1938, when the



U.S. Court of Appeals, Seventh Circuit,  
around 1939  
Standing, *from left to right*:  
Circuit Judges Kerner, Treanor, and  
Sparks; District Judges Adair, Stone,  
and Wham; Circuit Judge Major; District  
Judge Igoe; Circuit Judge Evans; and  
District Judge Holly.  
Seated, *from left to right*:  
District Judges Briggie, Slick,  
Lindley, Woodward, and Barnes.

Seventh Circuit moved from the old Federal Building to a new home at 1212 Lake Shore Drive. Probably the continuity in the organization and operation of the court was in no small part due to the stability of the court's membership during these thirty years. For all but a few years two of the court's four seats were held by the same two men: Judges Samuel Alschuler and Evan Evans. One of these two men served as senior (presiding) judge of the circuit from 1921 until 1948.

Continuity in the court was provided not only through the longevity of the administrative leadership of Judges Alschuler and Evans but also by the remarkably close relationship they developed during their years on the bench. The two judges conferred almost daily both by personal visits during court sessions and by letter between sessions. Their correspondence reveals they continually exchanged ideas about cases, political gossip, family news, and court administration. They took a great interest in each other's families as evidenced by the many letters and gifts exchanged between Judge Alschuler and Judge Evans' three sons throughout their youth.<sup>1</sup> The judges also provided emotional support for each other during periods of personal tragedy such as the untimely death of Judge Evans' first wife, Mary Roundtree Evans,<sup>2</sup> in 1921, or the difficult decision Judge Alschuler faced when ill health forced him to take senior status in 1936. Judge Evans' correspondence to Judge Alschuler at that time best exemplifies the depth of their friendship. The judge responded to Judge Alschuler's request for advice concerning whether he should retire by writing:

My own reaction is not clouded by doubt. It will be a sad, very sad, day if and when you leave the bench before I do. My obligations are too many and weighty to be ever repaid, or even to be fully stated. I do not refer now to personal matters,—to the encouragement of my early years and to the help you extended when I needed it badly, but I am confining myself to indebtednesses growing out of my official life. . . .

The help I refer to relates to the example of true liberality of thought without which no one is truly worthy or great but which nevertheless is possessed by so very, very few. You have taught me what a liberal is and how he lives up to his ideals in public life and how little and unworthy is the public official who is the champion of a political party or the voice of partisan or racial prejudice. Equally

1 The most complete collection of the correspondence between the two judges is found in the Alschuler Collection. The Evans Papers contain letters covering the period after Judge Alschuler resigned as Senior Judge (1934). The Alschuler Collection has letters between the judge and the Evans children discussing matters of interest such as the Chicago Black Sox scandal trials in 1921, as well as "thank you" notes for the Christmas gifts of toys or candy that Judge Alschuler annually sent to them. The judge's interest in the sons continued as evidenced by a letter of recommendation for law school that Judge Alschuler wrote for Orrin Evans.

2 See letters from Samuel Alschuler to Evan Evans, June 29 and July 11, 1928; August 4 and September 12, 1921 (Alschuler Collection).

devoted to service and duty have you ever been. These are the influence and teachings I refer to when I speak of my indebtednesses to you.<sup>3</sup>

Two months later, on the day that Judge Alschuler was to retire, Judge Evans looked back over their years together:

I find it impossible to write or say the things that are uppermost in my mind today. . . . Do you recall that it was twenty years ago that I came into Room 752 and met you and took my oath of office? Much water has run over the dam since then but one of the gratifying and enriching things of my life has been the fact that I met you here.

It is impossible for me to express my true sentiment without becoming too much overcome. I want you to know that you are just as much a member of the court as ever and will in that same quiet, modest way wield a dominating influence over those who come within your influence.<sup>4</sup>

While the depth and longevity of the friendship between Judges Evans and Alschuler may have been unusual, their relationship set the tone for the interactions of the entire bench of the Seventh Circuit during most of the period 1912-1941. There existed among the members of the court mutual respect and genuine friendship which seemed to go well beyond the formal courtesies men in high office extend toward each other. The friendships cut across party and ideological lines and manifested themselves in various ways — from entertaining each other at their homes to tongue-in-cheek letters circulated around the court before, during, and after baseball season.<sup>5</sup>

The relationships between the judges, however, also showed in more serious ways. For example, the members of the court consistently displayed kindness towards each other in times of personal stress. When Judge Francis Baker's son was notified suddenly that he must sail for Europe from New York during World War I, Judge Alschuler wrote Judge Baker that he, Judge Evans, and Judge Kohlsaat had rearranged the calendar so that the judge and his wife could accompany their son to New York.<sup>6</sup> Similarly, when Judge Treanor became ill soon after coming to the court, Judge Evans and the other judges kept him constantly informed of court events and made all the necessary preparations for him to be able to participate in court sessions.

3 Letter from Evan Evans to Samuel Alschuler, March 9, 1936 (Evans Papers; Alschuler Collection).

4 Letter from Evan Evans to Samuel Alschuler, May 15, 1936 (Evans Papers).

5 The "Major File" in the Evans Papers is filled with letters regarding baseball. Judge Major came to the court with a fierce downstate loyalty to the St. Louis Cardinals which clashed with many of the Chicago area judges' loyalty to the Chicago Cubs. Judge Evans, though seemingly not a partisan of any team, took great delight in stirring up trouble by predicting doom for the Cardinals at the beginning of the season and then pointing out the accuracy of his predictions.

6 Letter from Samuel Alschuler to Francis Baker, January 7, 1918 (Alschuler Collection).

They sent a car to Indianapolis to pick him up and bring him to Chicago for the spring term of 1941.<sup>7</sup>

A further example of the consideration the judges showed each other can be seen in the respect shown a fellow judge when a dissent was being written. Judge Evans could write in 1942 to the chief judge of the Court of Appeals for the District of Columbia,

We are fortunate in some respects in this circuit in that we seldom have, and in fact never have, any serious disputes. This is partly due to the fact that the majority always respects the minority's view, even if they cannot adopt it.<sup>8</sup>

Two examples which bear out Judge Evans' observation can be found in correspondence between panel members attempting to finalize opinions. In the first, Judge Francis Baker, who was known to be rough on attorneys with whom he disagreed in oral argument, wrote an extremely warm letter to Judge Alschuler in 1918 detailing at great length his disagreement with an opinion which Judge Alschuler had circulated. He concluded by stating that he reluctantly would dissent if Judge Alschuler would not alter his position.<sup>9</sup> Even more illustrative is a letter Judge Evans sent to Judges J. Earl Major and Walter Lindley regarding an appeal in a tax case, *Commissioner v. Stillwell*.<sup>10</sup> The case concerned the power of the United States to tax income earned by state officers from their official duties. The entire subject of federal power to tax state officials had been the subject of controversy a year earlier in the Supreme Court. *Stillwell* arose when the commissioner taxed a Chicago master-in-chancery on income he received from fees paid by litigants who appeared before him. Judge Major, who throughout his career wrote vigorous protaxpayer opinions, circulated a draft which affirmed the Board of Tax Appeals' denial of the commissioner's power to tax such income. Judge Evans responded to Judge Major by stating that he did not believe Major's opinion could be squared with the recent Supreme Court opinions and he felt it might be necessary for him to dissent. He explained: "It seems to me that back of my tentative conclusion are views which might be called economical or political, and I want to check on them and if necessary, eliminate them as far as possible."<sup>11</sup> He then detailed his reasons for thinking that the commissioner was correct. After forcefully presenting why he thought Major's opinion was in error, he clearly and consciously attempted to avoid making his criticism seem too harsh. He wrote:

7 Letter from Evan Evans to Walter Treanor, March 8, 1941 (Evans Papers). See also letter from Will Sparks to Walter Treanor, December 20, 1940 (Treanor Collection); letter from Evan Evans to Walter Treanor, December 23, 1940 (Treanor Collection).

8 Letter from Evan Evans to Lawrence Groner, October 27, 1942 (Evans Papers).

9 Letter from Francis Baker to Samuel Alschuler, June 27, 1918 (Alschuler Collection).

10 101 F.2d 588 (7th Cir.), *appeal dismissed*, 307 U.S. 648 (1939).

11 Letter from Evan Evans to J.Earl Major and Walter Lindley, December 20, 1938 (Evans Papers).

As before stated I have not reached any final decision on the subject, but I rather strongly believe that the foregoing represents my analysis and conclusion. I do not know what you, Judge Lindley, may have concluded. ... Judge Major has given us something to shoot at. Personally I think he has found the only tenable ground upon which his conclusion can be logically based. I wondered at the time of the oral argument why the lawyer didn't grab at interference with governmental functions quicker. Factually I think the charge is unsound, but there is something to it theoretically.

To both of you I send my very best wishes for everything good in this world including Christmas and New Years and the years to come.<sup>12</sup>

One of the ways in which the judges of the Seventh Circuit were able to keep their relationships both friendly and relatively informal was by having lunch together almost every day they were in Chicago. Judge Evans once wrote that from the time he first came on the bench, when the court was located in the Federal Building, and continuing after the court moved to 1212 Lake Shore Drive, the judges regularly met for lunch to discuss informally such items as pending cases or possible changes in court procedure. As an example, Judge Evans reported that he discussed at one lunch with his brethren whether there needed to be a written rule regarding the criteria and procedures for deciding when to grant a rehearing *en banc*. After discussion the judges decided that rather than adopt a circuit rule they would retain their informal practice of granting such arguments only on the rare occasions when the majority so voted or "if a minority is quite strong about it."<sup>13</sup>

In addition to illustrating the informality of decision making, the preceding story also points up another feature of the court during these years — the great continuity in court organization and procedure between 1912 and 1941 and the court's great reluctance to alter them. Neither the court's basic structure nor day-to-day operations changed during this period.

Judge Evans provided a survey of the Seventh Circuit as a working institution when, as presiding judge, he was invited by the House Judiciary Committee to give his views on the needs of the federal courts. In responding to the committee's questionnaire the judge had the opportunity to describe in detail the court's operations during his nearly twenty years on the bench. He began by sketching the pattern of the court's sessions.

For the year ending June 30, 1937, a quorum of judges was present on 253 days. In addition, there were 41 days on which one judge was present for the hearing of motions and petitions. The court sat for hearing of cases on 101 days.

<sup>12</sup> *Id.*

<sup>13</sup> Letter from Evan Evans to Lawrence Groner, October 27, 1942 (Evans Papers). In the same letter the judge reported that if only one member of a panel favored reargument the other two "regardless of the certainty that is in their minds" promptly agree to the reargument.

In our court the rule is that counsel must present oral argument. Consequently it is a rare exception when a case is submitted without argument. . . . We hear two to three appeals each day beginning at 9:30 A.M. We start our session with all the cases set for argument. This covers about two months each session. We sit five days each week until we have heard the last appeal on that session's calendar. During that time we are also writing opinions and afterwards we continue to write opinions until the next session.<sup>14</sup>

The judge then provided a glimpse of what he desired to accomplish during oral argument.

On the oral argument it is my effort to get the lawyers to agree upon the important facts and when an important statement is made by one counsel, I generally interrupt him and ask the opposing counsel if that statement is agreed to. In other words, the oral argument is for the purpose of helping us get the facts.<sup>15</sup>

It is apparent from other correspondence, however, that attorneys sometimes prevented the judge from reaching his goal. After attending an annual meeting of the American Law Institute in Washington, Judge Evans wrote to William Draper Lewis to complain of the interminably long speeches given by distinguished academics invited to the conference. He claimed not to know how to cut them short, but added that the situation would never be allowed to continue during arguments before his court. "We judges," he wrote, "resort to sarcasm to counteract the exaggerated ego of certain practitioners."<sup>16</sup>

In his letter to the House Judiciary Committee Judge Evans also detailed the post-argument procedures.

All of the judges who sit in a case in this circuit confer on the decision before the opinion is written. Our conference takes place almost always on the day of the oral argument. Then between that date and the writing of the opinion, informal conferences take place, although sometimes a formal request for a conference is given by the judge who writes the opinion, which is granted, and occasionally rearguments are ordered.

I can not say that we read all of the record. I must say that I do not read all of the record in all cases. . . . I distinguish, of course, between the transcript, which is a true printed copy of all the proceedings, and the briefs of counsel. In some cases we can not dispose of the cases without reading all of the record. That is the exception, however. There are certain parts of the record in any case that are vital, but in a large number of appeals a considerable portion of every record is immaterial in view of the admission of parties. To laboriously read the entire record under those circumstances would be a waste of time.<sup>17</sup>

14 Letter from Evan Evans to Rep. Hatton W. Sumners, February 10, 1938 (Evans Papers) (hereafter cited as Sumners' letter).

15 *Id.*

16 Letter from Evan Evans to William Draper Lewis, June 5, 1934 (Evans Papers). Lewis was a lawyer, law professor, author and for many years director of the American Law Institute.

17 Sumners' letter, *supra*.

A few years earlier Judge FitzHenry had occasion to describe the court's procedures for deciding cases. In addition to what Judge Evans has detailed, Judge FitzHenry explained that:

[E]ach of the four judges would sit substantially the same number of days. This would be an arrangement which normally the senior judge would make but shortly after I joined the Court Senior Judge Alschuler requested Judge Evans to make the designations, and thereafter the designations were made by Judge Evans, or as is usually the case, by his law clerk. . . . [T]he designations are generally made so that each judge would sit in the court three days of each week, leaving the rest of the time free for working on cases. These designations have been customarily made sometimes for the whole session and sometimes a week or two in advance of the actual hearing of the cases.

He added that in conference each judge expressed his tentative view, with the junior judge speaking first. After reaching a decision, one judge would volunteer to work on a draft of an opinion, or if no one asked for the case, the presiding judge would assign it to one of the three. The judge stated that there was no attempt by the presiding judge to assign all cases of a particular type to a particular judge; rather there was only an attempt to divide the difficult cases so that the work was spread evenly. Finally, he noted that if a judge felt that he must recuse himself because of a conflict of interest, then the judge notified Judge Evans or his law clerk so that the designations could be properly made.<sup>18</sup>

Judge Evans also explained in his letter the role of law clerks in providing the judges assistance in the preparation of their opinions. Although the position of law clerk in the federal courts had existed since the nineteenth century, no uniformity in either the selection or tenure of law clerks existed during the first fifty years of the Seventh Circuit. In fact, the funding, and even the titles of the positions, varied over the years. As was seen in the earlier discussions of the controversies surrounding the clerks of Judges Peter Grosscup and Christian Kohlsaas, judges hired young law graduates to work as secretaries during the court's early years.<sup>19</sup> Included in their duties was legal research. These clerks, usually men, stayed several years and then went into practice or business. When Judge Alschuler came on the bench in 1914 a secretary was hired, but the judge also used the appropriation for a librarian to hire a law clerk. The young lawyers hired for this post stayed only a few years before moving into practice. When one such man, Casper Ooms, sought a position with the Internal Revenue Service in Washington in 1930, Judge Alschuler's letter of recommendation described Ooms' responsibilities as follows:

[H]e has done such work which might be classed as that of a law assistant — examining briefs and authorities to see whether citations support

<sup>18</sup> Letter from Louis FitzHenry to Rep. Mike Igoe, May 28, 1935 (Alschuler Collection).

<sup>19</sup> See chapter III at notes 53 and 81.

propositions advanced; examining questions of law submitted to him and reporting findings thereon; and examining transcripts of record to learn whether assertions of fact made in arguments or in briefs are supported by evidence. He has proved to be a very useful man.<sup>20</sup>

Judge Evans made an entirely different selection for his law clerk. He hired a woman who had recently graduated from law school, Rhea Brenwasser, and employed her for the combined position of law clerk and secretary. She did not choose to leave the court for private practice after several years, but instead remained with Judge Evans until his death in 1948. Judge Evans argued vigorously that the system of permanent clerks was preferable and spent considerable time during his tenure as presiding judge of the circuit in trying to persuade the Justice Department and Congress to provide permanent clerks not only a salary which was greater than that of one-year clerks, but also one which would induce young lawyers to make a career out of clerking.<sup>21</sup>

In addition to law clerks the Seventh Circuit support team included the four employees of the clerk's office: the clerk, his chief deputy, an assistant, and a stenographer. The duties of the clerk's office did not change from those which were described for the period 1891-1912. The office continued to serve both administrative and record-keeping functions. The clerks filed and recorded all papers submitted in connection with an appeal: briefs, records, motions, and appearances. They were responsible for overseeing the printing of the record as well as the judge's opinions. Before each session, the clerk also ordered the printing of the calendar which included all cases in which briefing had been completed. On the first day the presiding judge called all cases on that calendar and granted requested argument dates for attorneys present at that session. He then announced a date for the remainder of the hearings. The clerk also attended each day's argument to call cases, swear in newly admitted attorneys, and to record any orders announced by the judges from the bench.<sup>22</sup>

Just as the functions of the clerk's office remained stable during these years, so too did the roster of its personnel. E. M. Holloway became clerk of the Seventh Circuit in 1894 and served in the position until his death in 1931. Upon Holloway's death, Frederick G. Campbell, who had been deputy clerk since 1899, was appointed clerk by the Seventh Circuit judges. Campbell

20 Letter from Samuel Alschuler to Robert Lucas, Commissioner of the Internal Revenue Service, January 11, 1930 (Alschuler Collection).

21 Letter from Evan Evans to Sen. Carl Hatch, May 25, 1939 (Evans Papers); letter from Evan Evans to Sherman Minton, March 26, 1945 (Evans Papers); letter from Evan Evans to Celia Howard, law clerk to Judge Philip Sullivan, December 2, 1947 (Evans Papers); Sumners' letter, *supra*.

22 Letter from Louis FitzHenry to Rep. Mike Igoe, May 28, 1935 (Alschuler Collection). When the Seventh Circuit was housed in the old Federal Building the clerk's office was located on the seventh floor opposite the courtroom, but when the court was relocated to 1212 North Lake Shore Drive the office was on the third floor above the judges' offices.

served until his death in 1940. His successor, Kenneth M. Carrick, like Campbell, had long been associated with the court. Carrick began working in the clerk's office in 1922 and was named chief deputy clerk in 1931. His distinguished service as clerk lasted from 1940 until his retirement in 1973.<sup>23</sup>

Another aspect of the Seventh Circuit's operation which Judge Evans covered in the questionnaire prepared for the Judiciary Committee was the use of court of appeals judges in the district court, and the use of district court judges in the court of appeals. The judge reported that during the mid-1930s, following the retirement of Judge Alschuler, the death of Judge FitzHenry, and the political deadlocks which prevented the nominations of replacements, it was necessary constantly to have a district judge sitting with the court. As was discussed earlier, Judge Walter Lindley of the Eastern District of Illinois sat almost constantly on the Seventh Circuit bench during these years. Judge Charles Briggie of the Southern District of Illinois also assisted the circuit court. The necessity for the district judges to serve as appeals judges ended in 1938, for not only was the political deadlock broken, thus returning the court to its full complement, but Congress also added a fifth judgeship to the circuit.<sup>24</sup>

Judge Evans also commented that the circuit judges did not often leave Chicago. The court sat there entirely, and only when a case required a three-judge panel did the circuit judges visit the district courts. This, of course, represented a major change from the pre-1912 history of the court when the circuit judges often conducted trials both in the district and circuit courts. Several factors combined to produce this shift. Most obviously, the abolition of the circuit courts lessened the demand for circuit judges to serve as trial judges. But, additionally, the increased number of federal district judgeships in the circuit enabled the district judges to shift around from district to district as needed.<sup>25</sup> A third factor in keeping the circuit judges from having to conduct trials was Judge Evans' belief that a greater separation of the circuit and district courts would increase the efficiency and quality of justice within the circuit. As administrative head of the circuit for fifteen years, the judge was able to implement his idea. Judge Evans' decision to attempt to keep the circuit and district courts distinct stemmed from internal disputes in several of the districts in the circuit during the 1930s and 1940s. While the details of those controversies seem unclear—they involved personal, political, and philosophical differences among the judges in both Indiana districts and among judges in the Northern District of Illinois—the intensity of the events convinced the judge that if the circuit judges became involved it would only lessen the effectiveness of both courts. Therefore, he endeavored to leave

23 The information about the clerks of the Seventh Circuit was gathered by former Clerk Kenneth M. Carrick.

24 Sumners' letter, *supra*; letters from Evan Evans to Senator Carl Hatch, May 13, 1939, February 28, 1941 (Evans Papers).

25 Judge Evans' correspondence (Evans Papers), with Judges Lindley and Baltzell provide examples of Judge Evans' designations of the two judges to sit in other district courts in the Seventh Circuit in order to reduce backlogs which had developed in those districts.

all trial work to the district court and allow the circuit judges to handle the ever-increasing volume of appeals.<sup>26</sup>

Although attempting to keep the work of the district and appeals courts separate, Judge Evans did not seek to sever all contact between the courts. Congressional reform of judicial administration also assisted the judge in maintaining this communication. When Congress created the Administrative Office of the United States Courts and transferred responsibility for operating the courts from the Justice Department to the judicial branch, it mandated an annual conference of the circuit and district judges. The first such Seventh Circuit conference was held December 13, 1940, in Chicago. Invited to the conference were not only the active district and appeals judges, but judges on senior status such as Judge George Page. Members of the bar from the Circuit's three states attended. The meeting was both a social affair and opportunity for the district judges, circuit judges, and attorneys to exchange ideas about the "Ways and Means of Improving the Administration of Justice within the Circuit." The Chicago Bar Association reported that as a result of the meeting the court of appeals agreed to amend its rules to allow private printers to print transcripts of records and to lower the costs of the clerk's fees for supervising appeals.<sup>27</sup>

An unexpected by-product of Judge Evans' efforts to separate the district and circuit courts resulted in a major development in the Seventh Circuit's history. In 1937 Judge Evans became aware of the possibility that the United States government could purchase a building at 1212 Lake Shore Drive which had housed the Illinois Life Insurance Company. Since the completion in 1905 of the Federal Building on the square block formed by Dearborn, Clark, Adams, and Jackson Streets in Chicago's Loop, the court of appeals judges had occupied chambers on the sixth and seventh floors of the building, while the district judges for the Northern District of Illinois used the lower floors. Two circuit judges shared chambers on the seventh floor—there were two private offices, each connected to a common reception room where their shared law clerk/secretary worked. The courtroom, library, and conference

26 For a discussion of the need to separate the circuit and district courts, see the letter from Evan Evans to Samuel Alschuler, August 14, 1937 (Evans Papers). References to the controversies in the Indiana district courts may be found in the letter from Evan Evans to F. Ryan Duffy, February 14, 1944 (Evans Papers); letters from Evan Evans to Walter Lindley, March 5 and 8, 1943 (Evans Papers). The differences in the Northern District of Illinois are discussed in the letter (Evans Papers); letter from Evan Evans to F. Ryan Duffy, February 28, 1944 (Evans Papers); letter from Evan Evans to Charles Briggie, October 6, 1938 (Evans Papers).

27 The statute establishing the Circuit Judicial Conference is Act of August 7, 1939, 53 Stat. 1222 (codified as 28 U.S.C. §§444-47 (1940)). See 7B MOORE'S FEDERAL PRACTICE ¶ 15-1, at JC-195 (2d ed. 1979). The conference is reported at 27 A.B.A.J. 1 (1941) and A. Jenner, Jr., *Federal Court Rules*, 22 CHI. B. REC. 522-23 (1941). A report of the third annual conference may be found in E. Evans, *Judicial Conference of the Seventh Circuit*, 29 A.B.A.J. 81 (1943). This conference discussed mainly issues pertaining to criminal sentencing reforms then before Congress and to the difficulties caused by the Selective Service Act violation cases (World War II). See also letter of invitation from Evan Evans to George Page, October 16, 1940 (Evans Papers).

room were also on the seventh floor. On the floor below were two larger offices, each with its own reception room. But the court had no facilities for additional office space which was needed when a judge took senior status, or if Congress created a fifth judgeship for the circuit. In addition to being cramped, the Seventh Circuit quarters in the Federal Building were terribly hot and uncomfortable. Since the quarters were objectionable and he wanted to keep the circuit and district courts separate, Judge Evans began to lobby for the government to buy the 1212 Lake Shore Drive building and convert it for use by the court of appeals. The judge met success when he convinced Congressman James McAndrews of Chicago of the wisdom of his proposal. Judge Evans provided a glimpse into his reasoning and motives when he wrote Judge Alschuler in August, 1937, upon learning that his goal would be accomplished.

I received a wire a few minutes ago from Jim McAndrews, our good friend. The wire reads that the "Deficiency Bill to be reported House next Tuesday carries the appropriation for the North Side project." Hurrah for Jim! I would not be enthusiastic about this were it not for the fact that I am satisfied that the building is costing the Government not more than one-fifth of what it cost and probably not more than one-third of what it is worth. It is highly serviceable for our purpose. It will likewise successfully house the Board of Tax Appeals. I would like to be out of this locality. I think it is harmful to the health and at the same time I would prefer to be in a building other than the one occupied by the District Judges. The last two years have convinced me that it is a good idea to try and keep the Court of Appeals quite separated in its personnel from the District Court. I have studiously endeavored to keep two Judges here steadily rather than scattered for the very reason that I want to keep the two courts separate. Moreover, I think I get more efficient results.<sup>28</sup>

The formal opening of the new United States Court of Appeals Building at 1212 Lake Shore Drive occurred on Tuesday, October 4, 1938. On that day the Seventh Circuit held its first session in its new courtroom and hosted a reception for the lawyers who attended the ceremonies, which were attended by numerous federal legislators and judges from throughout the Seventh Circuit.<sup>29</sup>

<sup>28</sup> Letter from Evan Evans to Samuel Alschuler, August 14, 1937 (Evans Papers). The government paid \$450,000 for 1212 Lake Shore Drive and spent \$245,000 to renovate the building. Judge Evans believed that "this is the best looking courthouse in the country." Chicago Tribune, October 5, 1938, at 7. For the arrangement of the offices in the old Federal Building *see* the letter from Samuel Alschuler to Will Sparks, October 26, 1929 (Alschuler Collection). On Rep. McAndrews' role *see* letters from Evan Evans to Rep. James McAndrews, September 27, 1938, September 26, 1939 (Evans Papers).

<sup>29</sup> Chicago Tribune, October 5, 1938, at 7. Judge Evans invited Rep. McAndrews to the building's opening by writing:

"As you are the man responsible for getting this building for the Court, I think it appropriate that you be present and I can tell the audience what you did for us and introduce you to them. — After a short reception we will proceed with the court work." Letter from Evan Evans to Rep. James McAndrews, September 27, 1938 (Evans Papers).

Before leaving the discussion of the amount of interchange between the district and appeals courts in the Seventh Circuit, it should be pointed out that both Chief Justice Charles Evans Hughes and Chief Justice Harlan Stone often called upon Seventh Circuit judges to assist district courts in other parts of the country. In the 1920s Judge Louis FitzHenry, then judge of the Southern District of Illinois, spent several months in the Southern District of New York. He assisted the judges there in clearing up their extraordinarily large criminal docket which had been caused by a great number of prosecutions under the Volstead Act.<sup>30</sup> In the 1930s both Judge Charles Briggles and Judge Walter Lindley spent a considerable amount of time traveling to New York, Washington, and California to handle the various assignments the chief justice gave them. Judge Lindley, especially, developed a reputation for both outstanding legal ability and rapidity in deciding complicated cases and was much sought out by other district judges when they needed assistance.<sup>31</sup> The court of appeals judges did not sit in other circuits, with one important exception. For several years (1943-1946) Judge Learned Hand invited Judge Evans to sit for a week with the Second Circuit, which at that time was not only the busiest court of appeals, but also the most prestigious. According to one historian, Judge Evans was one of the very few non-Second Circuit judges to be accorded such an honor by Judge Hand.<sup>32</sup> There appears to be no time when the Seventh Circuit requested the chief justice to assign a judge from another circuit to sit in Chicago.

Judge Evans' response to the House Judiciary Committee questionnaire contained a discussion of one further aspect of the Seventh Circuit's operations: the court's vacation. He reported that the circuit generally finished its work in June and recessed for about two and one-half months. No quorum was convened during these months, although often one of the judges who lived in Chicago came to Judge Evans' chambers to dispose of motions, or he would travel to Chicago to tend to administrative matters. As Judge Evans wrote, "I spend my time on a farm in Wisconsin and come back with strength renewed."<sup>33</sup> Like the chief judge, the other judges returned to their

30 Daily Pantagraph (Bloomington, Ill.), November 19, 1935, at 5; St. Louis Globe-Democrat, February 27, 1927, Magazine Section, at 1.

31 The Evans Papers contain the letters between Evans and the Chief Justices making the assignment of Judges Lindley and Briggles. See also Evan Evans to Walter Lindley, October 27, 1944 (Evans Papers). By 1943 Judge Evans could report that, "the district judges from the Seventh Circuit regularly contributed to the congested districts in other circuits which were Washington, Philadelphia, New Jersey, Cleveland, and New York City. Last year, district judges from the Seventh Circuit spent approximately fifteen weeks in other circuits." Evans, Judicial Conference of the Seventh Circuit, 29 A.B.A.J. 81 (1943).

32 See the letters in the Evans Papers between Judge Learned Hand and Evans regarding the arrangements for Judge Evans to sit in the Second Circuit. See also the letter from Evan Evans to Walter Lindley, January 26, 1945 (Evans Papers) which describes Judge Evans' experiences with the Second Circuit. M. SCHICK, LEARNED HAND'S COURT, 80-1 (1970).

33 Sumners' letter, *supra*.

hometowns immediately after the session closed: Judge FitzHenry to Bloomington, Illinois; Judge Sparks to Rushville, Indiana; Judge Major to Hillsboro, Illinois; and Judge Treanor to Indianapolis. While these trips were for relaxation, the judges also saw them as an important way of keeping in touch with their "constituents." For, despite spending nearly three-quarters of the year in Chicago, the judges still considered themselves to be residents of their home communities. This is not surprising, given that they were lifelong members of these communities and were numbered among the preeminent townspeople. In addition, many of the judges had spent a significant part of their pre-judicial careers campaigning for public office in these areas. In the process of renewing their friendships with their neighbors, the judges enjoyed keeping their fingers on the political and social pulse in these familiar locales. It is reported that Judge Major would regularly present to various townspeople of Hillsboro the facts of cases that had been decided by the Seventh Circuit in order to see what commonsense reactions these lay persons had to the legal problems posed.<sup>34</sup>

The impression should not be left, however, that the Seventh Circuit judges did not develop close ties to Chicago. As the highest federal officers in the city they were welcomed into both the legal and social life of the city. The Chicago Bar Association invited the members of the Seventh Circuit to many of its functions and hosted banquets to mark special occasions in the judges' lives, such as Judge Samuel Alschuler's retirement or the twenty-fifth anniversary of Judge Evans' service on the bench.<sup>35</sup> The Patent Bar Association of Chicago frequently featured one of the Seventh Circuit judges as a speaker at its annual banquet. The judges were also occasionally involved in such events as receptions at the law schools of Northwestern University and the University of Chicago, held to honor a given Supreme Court justice or foreign dignitary. Functions unrelated to law which the Seventh Circuit bench attended ranged from luncheons at the Standard and Union League Clubs or meetings of the Wisconsin Society of Chicago to serving as guest speakers at Kiwanis luncheons.<sup>36</sup>

A discussion of the extrajudicial activities of the members of the Seventh Circuit would not be complete without mention of several major interests these men pursued when not engaged in deciding appeals. The variety of activities was great—from avocations such as farming to appointments on presidential commissions. Judges Evans and Major were both farmers who oversaw their agricultural operations upon their return to their respective

34 R. Williams, Tribute, Memorial Ceremony for the Honorable J. Earl Major, II (June 20, 1972) (unpublished, U.S. Court of Appeals for the Seventh Circuit).

35 *Judge Alschuler, Te Salutamus Fratrem!*, 17 CHI. B. REC. 21 (1935); *Bench and Bar Honor Judge Evans*, 22 CHI. B. REC. 390-95 (1941); *Dinner to Judge Minton*, 23 CHI. B. REC. 92-99 (1941).

36 The discussions of these social functions can be found in Judge Evans' correspondence in the Evans Papers.

homes following the end of the June session. (This shared interest led to a long-standing, friendly rivalry regarding the merits of Illinois and Wisconsin corn.)

It was Judge Alschuler who served as a presidential appointee. On February 8, 1918, President Woodrow Wilson named Judge Alschuler to arbitrate the labor dispute between the owners and workers in the nation's packing-houses. When it had appeared that the workers might strike, the president had arranged for arbitration to prevent any serious disruption to the supply of meat to American troops fighting in Europe. Judge Alschuler held hearings at the Federal Building for approximately thirty days, and in addition, personally inspected conditions at Chicago's stockyards (physically a most arduous task evidenced by reports that twice the odor forced the judge to cut short his tour). On March 30, 1918, the judge issued his written findings. He ordered: (1) a basic eight-hour day for all employees (as opposed to the former ten-hour day); (2) 125 percent pay for the first two hours of overtime, 150 percent for each hour after that, and double time on Sundays and holidays; (3) an increase in wages of 3 1/2 to 4 1/2 cents per hour; (4) equal pay for men and women performing the same work; (5) adequate lunchroom, washroom, and changing facilities; (7) a thirty-day trial employment period, after which time an employee was deemed to be competent and must be given written reasons for discharge. One student of labor in the meat-packing industry wrote that Judge Alschuler instituted the most progressive labor-management policy then in existence in any sector of the American economy.<sup>37</sup>

Both sides in the labor arbitration accepted the judge's decision as fair. The proceedings were described as follows:

Before this man of highest judicial discretion and integrity, tempered with human sympathy and understanding, the workers told of privations suffered at the hands of the packers. Brought to the stand the packers in turn laid their case before the Judge. They, no less than the workers, became reassured as to the qualifications of the man who held this position of responsibility.<sup>38</sup>

Further evidence that both sides maintained their trust in Judge Alschuler can be found in their agreement to submit additional disputes to him. He continued his role until he resigned at the war's end (December 13, 1920). By then he was described as a "veritable technician in the meat-packing industry."<sup>39</sup>

37 A. HERBST, *THE NEGRO IN THE SLAUGHTERING & MEAT PACKING INDUSTRY IN CHICAGO 74-78* (1932); *New York Times*, March 31, 1918, at 14. See also various correspondence in the Alschuler Collection between the judge and labor, packinghouse, and government officials. Of particular interest is a letter from Judge Alschuler to Judge Julian Mack, February 16, 1918, which seeks Mack's help in arranging for "non-partisan" social scientists and social reformers to testify as experts on conditions in the packinghouses.

38 HERBST, *supra* at 77.

39 *Id.* at 78; Alschuler Collection contains the transcript of the ceremonies held in honor of the judge's services upon his resignation as arbitrator on December 13, 1920.

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38 HERBST, *supra* at 77.

39 *Id.* at 78; Alschuler Collection contains the transcript of the ceremonies held in honor of the judge's services upon his resignation as arbitrator on December 13, 1920.

used the profits derived from selling those patents to finance further research) led him to undertake an extensive investigation of patent law which resulted in several lengthy reform proposals submitted to the Department of Justice.<sup>42</sup> Judge Evans also served as a lecturer at the University of Chicago Law School, annually conducting a series of classes on legal ethics.<sup>43</sup>

This chapter has traced many diverse topics that help picture how the Seventh Circuit was organized between 1912 and 1941 and what the judges' day-to-day life was like. The judges had a close personal and working relationship with each other. They were highly respected in Chicago and developed close ties with members of the Chicago legal community. However, they remained leading citizens of their own hometowns and returned to those communities whenever their judicial work allowed them to.

<sup>42</sup> The judge discussed his work for the foundation in Sumners' letter, *supra*. His patent law proposals are found in the Evans Papers, along with correspondence with Attorney General Robert Jackson regarding the suggestions contained in them.

<sup>43</sup> Judge Evans' lecture notes are in the Evans Papers. *See also* 1936-37 ANNOUNCEMENTS, THE UNIVERSITY OF CHICAGO, THE LAW SCHOOL, 2, 17. The judge was a lecturer from 1935 to 1939.



## Cases and Caseloads 1912-1941

In the preceding chapter VI procedures in the Seventh Circuit from 1912 to 1941 were described as remaining stable. The history is markedly different, however, when the focus shifts from the organization of the Seventh Circuit to an examination of the court's substantive work. Whether studying the volume of appeals, their jurisdictional basis, or the dispositions of cases, one is struck by the differences between the pre- and post-1912 cases. The number of appeals skyrocketed in the second and third decade of the twentieth century; diversity no longer accounted for the largest percentage of decided appeals; and philosophical differences between judges became more apparent.

To account fully for these changes would be beyond the scope of this work, but some general remarks may provide a partial explanation. These changes were caused principally by the federal government's increased intervention in American social and economic life which followed the political activities of the reformers of the late nineteenth and early twentieth centuries (generally known as the Progressives). Among the reformers' accomplishments were the establishment of administrative agencies to regulate such fields as the purity of food, economic competition, and banking. Congress approved, and the states ratified, constitutional amendments which gave the United States a graduated personal income tax and made Prohibition the law

of the land.<sup>1</sup> These innovations, most of which were enacted during the second decade of the twentieth century, had a twofold effect on the federal courts. The new legislation caused a rise in the number of cases filed in federal court, while at the same time increasing the variety of issues which federal judges were asked to decide. The numerous income tax appeals and cases seeking review of administrative agency orders provide two examples of this effect. The extension of federal regulation of the American economy was most notable during the presidency of Franklin D. Roosevelt. The New Deal's unprecedented utilization of regulatory legislation expanded the volume and scope of work in the federal courts even more than had the Progressive Era reforms twenty years earlier.<sup>2</sup>

Throughout the twentieth century, Americans have debated the desirability and effectiveness of federal regulation. Disagreement over the federal government's role in American life has had a noticeable impact on the federal judiciary. During the late nineteenth century, political parties espoused similar political philosophies, and thus differences between Republicans and Democrats centered on issues such as temperance, gold or silver currency, and the tariff. However, demands for governmental reform, coupled with proposals for economic and social programs, produced ideological differences between political parties. The presidential election of 1912 was waged among Wilsonian Democrats and Teddy Roosevelt's Progressives on the liberal side (advocating expansion of the federal government's role in economic and social activities) and Taft Republicans on the conservative side. The Great Depression and the election of Franklin D. Roosevelt in 1932 intensified the cleavage between Democrats and Republicans over federal intervention in economic and social matters. These divisions among political parties began to be reflected in presidential nominations to the federal bench. In selecting Judges Evan A. Evans and Samuel Alschuler to the Seventh Circuit President Wilson appointed men who he knew were sympathetic to his social and economic philosophy. Similarly, subsequent Republican and Democratic judges generally believed in the philosophy of

1 For a general background see B. BAILYN, D. DAVIS, D. DONALD, J. THOMAS, R. WIEBE, and G. WOOD, *THE GREAT REPUBLIC*, ch. 25-27, 29 (1977). On Progressivism and economic and social reform see R. WIEBE, *THE SEARCH FOR ORDER 1877-1920* (1967); A. MANN, *THE PROGRESSIVE ERA* (2d ed. 1975); S. HAYS, *THE RESPONSE TO INDUSTRIALISM, 1885-1914* (1957); R. HOFSTADTER, *THE AGE OF REFORM* (1955). See J. TIMBERLAKE, *PROHIBITION AND THE PROGRESSIVE CRUSADE 1900-1920* (1963); S. RATNER, *AMERICAN TAXATION* (1942).

2 On New Deal reforms see W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940* (1963); J. M. BURNS, *ROOSEVELT: THE LION AND THE FOX* (1956); J. HUTHMACHER, *SENATOR ROBERT F. WAGNER AND THE RISE OF URBAN LIBERALISM* (1968); M. PARRISH, *SECURITIES REGULATION AND THE NEW DEAL* (1970); J. PATTERSON, *THE NEW DEAL AND THE STATES* (1969).

their parties. Thus, the bench became more sharply divided over questions concerning the federal government's role in America's social and economic life.<sup>3</sup>

Before investigating the changes in the substantive work of the Seventh Circuit brought about by the expansion of federal activities, it will be useful to examine briefly those few aspects of the court's caseload that represented a pattern of continuity with pre-1912 experience. For example, studying a sample of cases (those filed in every fifth year—1912, 1917, 1922, 1927, 1932, and 1937)<sup>4</sup> reveals that the length of time necessary to complete the appellate process remained almost identical to the pre-1912 average. As was pointed out in the discussion of the earlier years, it took an average of between seven and nine months for the Seventh Circuit to file an opinion once an appeal had been docketed. The figures for the years 1912 to 1941 are parallel. In 1912 the mean time was 9.3 months; this rose to 9.9 in 1917, fell to 7.7 months in 1927, and returned to 9.1 months by 1937. While these figures remained above the seven-month limit which the American Bar Association has established as the ideal standard for completion of the appellate process, it is quite remarkable that the circuit was able to maintain the average near the nine-month level.<sup>5</sup> For, as we shall see, not only did the number of appeals rapidly increase during these years, but no judges were added to the court until 1938. In fact, the 1937 figure of 9.1 was accomplished by Judges Evans, Sparks, and Major, without the assistance of a fourth full-time circuit judge; Judge Samuel Alschuler retired in 1936 and no replacement was selected until 1938.

Even more impressive are the statistics which reveal that the average length of time between oral argument in a case and the filing of an opinion shortened continuously between 1912 and 1937, while the number of opinions written increased. In 1912 the average time the court took to render an opinion after argument was 3.9 months; this mean fell to 3.1 months by 1922 and reached 2.1 months by 1937. Thus, the major delay in disposing of cases was caused by the length of time for preparation of briefs and records and the scheduling of oral argument, not in the time it took judges to write opinions. This is borne out by Judge Evans' correspondence. In a letter to the House Judiciary Committee the judge reported that,

[for] the twenty-two years I have been on the bench, we have disposed of all appeals presented within the year before the term is over; that is, within the year.

3 On T. Roosevelt and Wilson see G. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA, 1900-1912* (1958); A. LINK, *WOODROW WILSON AND THE PROGRESSIVE ERA, 1910-1917* (1954). On the politics of the late nineteenth century see M. KELLER, *AFFAIRS OF STATE* (1977); P. KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MIDWESTERN POLITICS, 1850-1900* (1970); R. JENSEN, *THE WINNING OF THE MIDWEST* (1971). For a discussion of the appointments of Judges Alschuler and Evans see chapter V, *supra* at notes 26-27 and 54-56.

4 Unless otherwise cited these statistics are taken from two workload studies prepared for this project, which are explained in the text in chapter IV, note 26, *supra*.

5 ABA STANDARDS RELATING TO THE APPELLATE COURTS, 85-9 (1977).

In other words, we carry none over to next term. Probably 80 percent are disposed of at the session at which they are heard.<sup>6</sup>

Another aspect of the Seventh Circuit's caseload between 1912 and 1941 that followed the pre-1912 pattern was that the largest volume of appeals each year came from the Northern District of Illinois. As in the earlier period, the cases from that district amounted to about 50 percent of the total each year, while the other districts supplied cases in about equal proportion—although in any given year the volume might be greater in one than another. The one difference between pre- and post-1912, however, was that the percentage of cases from the Northern District was slightly lower during the 1930s because of the emergence of cases from the Board of Tax Appeals and administrative agencies. In 1912 about 62 percent of the circuit's work came from the Northern District, whereas the figure drops to 48 percent in 1937. But, if administrative cases are excluded and only cases from the seven districts in the circuit are examined, the figure for the Northern District of Illinois becomes 63 percent of the total. These statistics explain why it was necessary for Judge Evans, as presiding judge, to arrange for district judges from throughout the circuit to come to Chicago to assist the judges of the Northern District; the figures also explain why the other judges were available.

Turning to the areas of the Seventh Circuit's work which represent a change from the pre-1912 pattern, one notices first the increase in the court's filings. Prior to 1912 the greatest number of docketed cases in the court's one-year term had been 115. By 1917 this had increased 17 percent to 135 cases per year. This increase remained stable for over a decade. However, by 1932 the volume (222 cases) had nearly doubled the pre-1912 high, and by 1937 the docketed cases (359) showed a 62 percent increase over the 1932 level. In other words, by 1941 the number of appeals filed in a given year more than tripled the largest number docketed in any year prior to 1912. A further demonstration of the dramatic increase in filings can be seen in the fact that between 1891 and 1931 about 4,500 appeals were docketed in the Seventh Circuit, whereas in the next ten years approximately 3,000 cases (or about 43 percent of the fifty-year total) were filed.

A sample of the docketed appeals reveals that the increase in filings between 1912 and 1941 represented a real gain in the number of arguments conducted and of opinions written by the Seventh Circuit. Appeals were not disposed of by stipulated settlement before oral argument, or by summary dismissal after hearing, at any increased rate over that of the pre-1912 period. Dismissals during this period, just as before 1912, ranged from 12 to 25 percent with a substantial number being apparently voluntary settlements between the parties.

<sup>6</sup> Letter from Evan Evans to Representative Hatton Summers, February 10, 1938 (Evans Papers).

An examination of the study of the Seventh Circuit's caseload (which categorizes the decided cases by their jurisdictional basis) indicates that the increase in the volume of litigation in the circuit between 1912 and 1941 resulted chiefly from the growth in public law cases generated by social and economic regulatory legislation enacted during this period. This finding is apparent in two ways. First, one can see that diversity and patent cases, which before 1912 had comprised the majority of the court's caseload, accounted for far less of the total volume of decided cases. Before 1912 diversity cases supplied over 50 percent of the Seventh Circuit's work on the average, with patent cases furnishing another 20 percent. From 1912 to 1941 both declined dramatically. In 1922 diversity cases were only 28 percent of the court's workload, while patent appeals still amounted to around 20 percent. By 1932 diversity cases fell to 20 percent and patent to 7 percent of the total cases the court decided. Throughout the 1930s diversity cases hovered at around 20 percent of the total, reaching a low of 15 percent in 1935. Patent cases during this period averaged about 10 percent of all appeals. Although the percentages of these two categories fell, the number of cases in each category grew slightly after 1912, but at a slower rate than the growth of the total number of cases decided. What added to the volume of litigation in the Seventh Circuit was the addition of cases from the Board of Tax Appeals, those seeking review of administrative agency decisions, and criminal prosecutions for violations of the Volstead Act. Tax cases grew steadily after the establishment of the board in 1924 until by the 1930s an average of 37 appeals (approximately 20 percent of the total number of cases decided by the Seventh Circuit) originated with that board.<sup>7</sup> Similarly, the number of agency cases steadily rose in the 1930s. In addition to the review of Federal Trade Commission orders, which amounted to several cases per year after 1916, Securities and Exchange Commission and National Labor Relations Board cases increasingly occupied the Seventh Circuit's attention. By 1941 almost 20 percent of the court's docket involved these cases, with NLRB orders accounting for about 80 percent of this volume.

The impact of America's great social reform effort to enforce Prohibition and the Eighteenth Amendment is reflected in the increase in the Seventh Circuit's criminal docket between 1919 and 1933. During those years the number of opinions involving criminal statutes rose from an average of less than 10 cases per year to about 20 opinions, with the high reaching 37 in 1933. Of these cases the overwhelming number were prosecutions for violations of the Volstead Act—a point emphasized by the fact that the years following repeal of Prohibition in late 1933 witnessed a 50 percent reduction in the number of criminal decisions handed down by the Seventh Circuit.

A second analysis of the caseload study reveals not only that the increase in litigation in the Seventh Circuit was caused by the social and economic

<sup>7</sup> See letter from Evan Evans to Senator Robert Bulkley, January 13, 1938 (Evans Papers). "Our great increase in business has been due to the additional work arising out of appeals from the Board of Tax Appeals."

regulatory legislation but also that there existed a long-term trend in the circuit away from resolving private law disputes and toward handling public law appeals. This trend appears when the decided opinions of the court are categorized into private law appeals (suits between private parties, i.e., private antitrust claims, patent disputes, diversity or admiralty cases) and public law appeals (a suit in which the United States or one of its agencies is a party, i.e., Internal Revenue cases, Justice Department antitrust suits, criminal cases). A sample of cases decided in every fifth year shows that in 1892 87.5 percent of the cases were private lawsuits; by 1902 the private law cases had reached a high of 96.8 percent of the total cases decided. This percentage fell almost at a constant rate: by 1941 only 55.5 percent of the appeals were private law cases. This trend from private to public law reemphasizes the point made at the outset of this chapter—the federal courts in the twentieth century were increasingly involved with questions concerning the scope and role of the federal government’s involvement in the political, economic, and social life of the United States.

The caseload study, in addition to revealing this long-term trend, also reflects the short-term effects of social and economic events. The decade-long impact of Prohibition on the court’s criminal docket has already been mentioned. The economic ravages of the Great Depression can be seen in the vast increase in bankruptcy cases in the 1930s. The number of bankruptcy opinions issued by the Seventh Circuit had averaged about 10 per year but rose steadily from 1930 to 1935 when they reached a high of 57 (22 percent of the total decided cases). Though these cases declined during the last half of the decade, there remained more than twice as many cases per year as had been decided yearly in the pre-1930 period.

The long-term shift in the court’s caseload from private law to public law cases began to expose philosophical differences among the judges of the Seventh Circuit. As stated at the beginning of this chapter, the explanation for this shift lies primarily in the fact that from the reforms of the first decades of the twentieth century through the New Deal the Democratic and Republican parties were more sharply divided than at the end of the nineteenth century. The disagreement between the parties centered on the scope and role of the involvement of the federal government in American economic and social life. Since presidents appointed judges from their own parties, the philosophical differences between the parties were mirrored on the bench. As more public law cases came before the court, the differences became more evident because appeals raised the specific issues upon which the two sides disagreed. Cases requiring adjudication of the extent of the government’s power to tax and the government’s role in regulating labor-management relations, for example, presented the court with issues which were, at the same time, vital concerns of the political and legislative process.

One measure of the development of philosophical differences among the judges is the growth in the number of dissents filed during the 1930s. In cases decided before 1912 dissents were rare, occurring in fewer than 3 percent of the Seventh Circuit’s opinions. From 1912 to 1937 dissents were similarly

scarce. Beginning in 1938, however, the number began to increase until by 1941 nineteen dissenting opinions were filed—approximately 8 percent of the cases. Almost 60 percent of these dissents appeared in public law cases, mostly dealing with the National Labor Relations Board or the Internal Revenue Service.

An examination of these dissents is useful both to identify the ideological positions of the judges of the Seventh Circuit and also to demonstrate the ways in which their differences were expressed. At one end of the spectrum were Judges Will M. Sparks and J. Earl Major, the former being the Seventh Circuit's lone Republican from 1928 to 1948. Both judges believed in a limited federal governmental role in social and economic matters and generally doubted both the wisdom of Congress' granting broad powers of economic regulation to the myriad federal agencies created during the New Deal and the ways in which those agencies used their power. At the other end were Judges Otto Kerner, Walter Treanor, and Sherman Minton. All were Franklin D. Roosevelt appointees — ardent New Dealers who not only enthusiastically supported the creation of administrative agencies but also leaned toward giving those agencies broad discretion in regulating their jurisdictions. Judge Evan Evans occupied a position between these two groups. Judge Evans, as a supporter of President Wilson, believed in an expanded federal role in economic and social matters, but he was not as convinced as his New Deal Democratic colleagues that the federal agencies were wisely exercising the power that Congress had given them. Judge Evans outlined his view of the National Labor Relations Board in a letter:

It is my opinion that too much authority rests with the examiners who were untrained young men without legal education. It is they who make the findings and the Board accepts them. In the last analysis it is a question of compelling the Circuit Court of Appeals to accept findings which were obviously against the great weight of the evidence and made not by the Board, but by a youthful examiner, who, in some instances, made up his mind too soon. It has led to much ill feeling here, and to wide-spread mistrust of and dislike for the Labor Board.<sup>8</sup>

While to Judge Major he wrote:

We can't help but think the [Supreme] court was right in upholding the powers of Congress. . . . [S]urely the Labor Administration Board has not been wise in executing the power which the Supreme Court recognized as its. I have an idea that we must continue to put the brakes on, and not too willingly and liberally apply the rule that where there is some evidence to support a finding it is our duty to uphold it.<sup>9</sup>

As Judge Evans' statement suggests, dissenting opinions between Seventh Circuit judges most often focused on the question of whether the findings of the administrative agency were supported by substantial evidence. In this way the philosophical differences over the proper role and

<sup>8</sup> Letter from Evan Evans to Judge William Denman, February 20, 1942 (Evans Papers).

<sup>9</sup> Letter from Evan Evans to J. Earl Major, June 29, 1940 (Evans Papers).

functioning of the federal intervention in the economy were translated into a legal question upon which the court of appeals could pass. If a panel in an administrative review case was composed of Judges Sparks, Major, and one of the New Deal appointees the majority (Sparks and Major) would carefully review the factual findings of the agency and conclude that there was not "substantial evidence" to justify the findings. The dissenting judge, giving greater deference to the agency's expertise, would argue that substantial evidence existed. One example occurred in a 1940 case in which a company found to be engaging in unfair competition through the use of a deceptive product name sought review of the Federal Trade Commission's cease and desist order in *Allen B. Wrisley Co. v. FTC*.<sup>10</sup> Judges Sparks, Major, and Treanor decided the appeal with Major writing the majority opinion and Treanor dissenting in part. Judge Major set aside the FTC's order because he rejected the commission's finding that the company's product, "Palm and Olive Soap," misled the public into believing that it contained 100 percent olive oil. The judge held that despite a stipulation in which it was admitted that 80 percent of the public would be so deceived, the commission did not have substantial evidence to support its finding. In his dissent Judge Treanor argued that the commission and the company, not the court, had the expertise to determine how the public would interpret the label in question. Therefore, the stipulation provided substantial evidence to justify the commission's finding.

Two 1941 labor cases serve to further demonstrate this pattern. *NLRB v. Algoma Plywood V. Co.*<sup>11</sup> presented the panel of Judges Sparks, Major, and Kerner with the question of whether the employer had refused to bargain with the United Brotherhood of Carpenters and Joiners and had interfered with employee rights by forming, recognizing, and contracting with an independent union. Judge Major analyzed the extensive record and found no support for the NLRB's finding of unfair labor practices. In concluding, the judge wrote, "[the Board] relies upon evidence that the Union had a majority, the nature of which is so uncertain and speculative that it can not be held to be substantial."<sup>12</sup> Judge Kerner's dissent began by reminding the majority that it is not for the court, but for the board to weigh the evidence and to make inferences from the facts, and he went on to state that he found substantial evidence to support the findings of the board.<sup>13</sup>

Another appeal from an NLRB finding of employer domination of an independent union produced the opposite result, as Judge Major found himself agreeing with Judge Kerner and District Judge Walter Lindley (sitting by designation) that the board's findings were justified. However, in *NLRB v.*

10 113 F.2d 437 (7th Cir. 1940).

11 121 F.2d 602 (7th Cir. 1941).

12 *Id.* at 611.

13 *Id.*

*Reynolds Wire Co.*<sup>14</sup> Judge Major dissented from the portion of the case which concerned the board's order to reinstate an employee whom the board found was discriminatorily discharged. Judge Kerner's majority opinion defers to the board in concluding:

Under all the circumstances, we can not say that the Board was unreasonable and erred in its conclusion that Carlson was in fact discharged because of his union activities, especially if we take in consideration the respondent's hostility to outside unions, Carlson's C.I.O. partisanship, and the unconvincing nature of the reason given for the discharge of an employee of 5 years' standing.<sup>15</sup>

Judge Major believed, on the other hand, that the board was totally unjustified in finding that the employee was discriminatorily discharged. The judge maintained that the company had a valid reason to fire the man (he had written an obscenity on a newly painted toilet wall), while the board relied solely on inferences that he was discharged for union activities. Thus, the board's finding could not be said, he argued, to be supported by substantial evidence.<sup>16</sup>

In addition to cases which presented the correctness of federal agency fact-finding, the Seventh Circuit also split over questions of agency interpretation of controlling statutes. This most often occurred in tax cases where Judges Major and Sparks tended to distrust the Internal Revenue Service's reading of its statutes and regulations while Judges Kerner, Treanor, and Minton, joined by Evans, gave greater deference to the agency. An example of such a case is *Joliet & C.R. Co. v. U.S.*<sup>17</sup> Judge Major, writing for himself and Judge Sparks, rejected the IRS' position that the money paid to a railroad's stockholders by another railroad from a perpetual lease constituted income to the plaintiff railroad; the judge reasoned that the railroad no longer exercised ownership over the property and thus could not earn income from it. He was unpersuaded by the IRS' regulation defining income from corporate lease agreements. Judge Kerner's dissent agreed with the Revenue Service that the payments from the lessee to the plaintiff's stockholders should be treated as income to the railroad which was then distributed as dividends to its shareholders. He reasoned that the Revenue Service's approach should be deferred to because it would prevent form from being elevated over substance and would discourage future circumvention of corporate tax laws.<sup>18</sup>

Several labor appeals present a third type of issue which divided the court, namely, to what extent did an agency exceed the power Congress had delegated to it. The first, *NLRB v. Columbian Enameling & Stamping Co., Inc.*,<sup>19</sup> received much publicity in national news journals and editorially in

14 121 F.2d 627 (7th Cir. 1941).

15 *Id.* at 630.

16 *Id.* at 631.

17 118 F.2d 174 (7th Cir. 1941), *rev'd* 315 U.S. 44 (1942).

18 *Id.* at 177.

19 96 F.2d 948 (7th Cir. 1938), *aff'd* 306 U.S. 309 (1939).

the *New York Times*.<sup>20</sup> Judge Evans (with Judge Sparks concurring in the result) held that the National Labor Relations Act, 29 U.S.C. §151 *et seq.* (1935) was unavailable to workers replaced for striking in violation of a no-strike provision of their contract when their strike occurred four months before the act took effect. The judge held the board did not have power under the act to intervene in a dispute which arose before the effective date of the act. Since the employees had breached their contract, they could be replaced no matter what unfair labor practices the employer had engaged in after the act became law. Judge Treanor argued in dissent that the board had not exceeded its power, as the labor dispute between the company and its employees continued after the effective date of the statute, and thus the board did have jurisdiction to order reinstatement of the discharged employees.<sup>21</sup>

The second appeal, *NLRB v. Barrett Co.*,<sup>22</sup> posed the question of whether the board could issue a subpoena duces tecum and ad testificandum to an employer, before the board issued a complaint against him. Judge Evans (writing for himself and District Judge Briggie who sat by designation) held the subpoenas to be valid, reasoning that not only did the Labor Relations Act expressly or implicitly sanction the practice, but that the power must be recognized if the board were to fulfill successfully the role Congress created for it in adjudicating labor disputes. Judge Evans rejected any attempt to place a "narrow construction" on the powers of the board. Judge Major's dissent rejected any reliance on a "public policy" argument and insisted upon a strict reading of the act, all of which convinced him that the board had power to issue a subpoena only after a complaint had been issued and as part of a hearing on that complaint.<sup>23</sup>

As might be expected, many of the Seventh Circuit cases that spawned dissents were ultimately resolved in the United States Supreme Court. Cases such as *Columbian Enameling* were affirmed, while *United States v. Joliet & Chicago R.R.* and others were reversed.<sup>24</sup> The pattern which emerges reveals that prior to 1938, when Judges Sparks or Major were in the majority, the Supreme Court usually affirmed the Seventh Circuit's decision. However, following the court-packing controversy and the creation of an ardent New Deal majority on the Supreme Court, Seventh Circuit cases in which Judges Treanor, Kerner, or Minton dissented were most often reversed by the Supreme Court.<sup>25</sup> Stated another way, after 1938 cases in which the Seventh Cir-

20 *New York Times*, April 30, 1938 and April 29, 1938; *Newsweek*, May 9, 1938 at 37.

21 96 F.2d at 954.

22 120 F.2d 583 (7th Cir. 1941).

23 *Id.* at 587.

24 See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939) and *United States v. Joliet & Chicago R.R.*, 315 U.S. 44 (1942).

25 For information on the court-packing controversy see chapter V, *supra* at note 124. See also P. MURPHY, *THE CONSTITUTION IN CRISIS TIMES, 1918-1969* (1972).

cuit decided against enforcing an agency order, whether it be the NLRB, the FTC, or the IRS, were more likely to be reversed. An example of the pre-court-packing pattern is *Fansteel Metallurgical Corp. v. NLRB*.<sup>26</sup> The case arose out of a bitter labor dispute in which employees were discharged following a sit-down strike. Judge Sparks (with whom Judge Lindley concurred) refused to enforce the board's order of reinstatement. Both he and Judge Lindley held that the NLRB did not protect employees who committed illegal acts (the seizure of the employer's property during the sit-in) as they could be legally discharged and hence were not employees under the act. Judge Treanor's dissent argued that the illegal acts of the strikers did not automatically justify their discharge. He contended that whether their discharge was proper was a question for the board to determine and that their illegal acts were only one factor in that determination. In his view there was sufficient evidence to support enforcement of the board's order. Chief Justice Hughes wrote for the six justices who affirmed the Seventh Circuit, while the two New Deal appointees, Justices Black and Reed, dissented. The arguments of the majority and dissent in the Supreme Court followed the same lines as those of the Seventh Circuit judges.

A post-1938 example is *NLRB v. Falk Corp.*,<sup>27</sup> where the Seventh Circuit (Judge Evans writing for himself and Judge Major) modified an NLRB order by requiring the board to allow an employee-dominated independent union to be placed on the ballot in an upcoming election. Judge Treanor, in dissent, argued that the court had no power to make such a modification as it had jurisdiction only to review an election after it had occurred. He maintained that it was the province of the board to hear and decide whether the independent union should be allowed on the ballot. Justice Black's opinion for a unanimous Supreme Court completely accepted the position of Judge Treanor, thus not only reemphasizing the limited review that the courts were to exercise over the board, but also lengthening the period of time during which the board was free to exercise its discretion without court intervention.

The Seventh Circuit judges, needless to say, were keenly aware of how their opinions fared in the Supreme Court. As Judge Evans once wrote,

In the not very long time I practiced in Wisconsin I argued 96 cases in the [Wisconsin] Supreme Court. On announcement day I would be in Madison. Now on Mondays [U.S. Supreme Court announcement day] I am listening to the Commerce Clearing House reports which arrive about 2 o'clock in the afternoon, and also I am the recipient of telegrams from victorious lawyers.<sup>28</sup>

The judges used Supreme Court affirmances or reversals as an opportunity

26 98 F.2d 375 (7th Cir. 1938), *aff'd* 306 U.S. 240 (1939). For a discussion of these labor cases from a Marxist perspective see K. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

27 106 F.2d 454 (7th Cir. 1939), *rev'd* 308 U.S. 453 (1940).

28 Letter from Evan Evans to Maxwell Herriott, May 9, 1945 (Evans Papers).

to good-naturedly brag or kid one another. Judge Evans once sent Judge Lindley the following query:

Do you think I ought to write a letter to the senior circuit judges throughout the land, informing them that of the last nine cases decided by the Supreme Court there were nine reversals, and no affirmances, but also noticeable was the fact that there was no case before that court that was decided by the Honorable Circuit Court of Appeals for the Seventh Judicial Circuit.<sup>29</sup>

Judge Evans also sent the following message to Judge Minton who was convalescing in a Washington, D.C., hospital:

Our farmer friend from Hillsboro is madder than a hatter. He has always a pet peeve. Sometimes the peeve is more blistering than at other times. Just now he is ready to cite the Supreme Court to show cause, for what I am not sure. It seems that a decision in a Labor case was rendered by the Honorable Circuit Court of Appeals for the Seventh Circuit. It involved the question of whether a guardsman protecting a war industrial plant was an employee or not. This Honorable Court, with great erudition, decided he was not an employee. Without argument the Supreme Court vacated this decision and sent the case back to consider it in the light of changed conditions. Now Farmer Major wants to know how the Supreme Court took notice and decided without argument that conditions had changed in this plant. Someone has reported that Rutledge was the villain and he may be cited separately.<sup>30</sup>

On a more serious level, the judges were aware in the late 1930s and early 1940s that they were not always in tune with the Supreme Court. However, they followed their convictions unless these directly conflicted with Supreme Court precedent. In discussing a proposed opinion by Judge Major, Judge Evans wrote to the judge:

I appreciate that we have the more difficult task of trying to reconcile our own views with the law as announced by the Supreme Court. However, since I have been on the bench, I have, at times, been greatly annoyed to find myself in the position which all intermediate appellate courts find themselves in, namely, of being after all not a court of final review, but a court of review whose hands are more or less tied so far as independent action is concerned by the decisions of the Supreme Court. After all, we are merely to ascertain what the Supreme Court has ruled, and then to apply it.

I presume we will get jumped on [for] our renewed holding that the employer must sign a written agreement. However, we have spoken and I favor standing by it until the Supreme Court rules otherwise.<sup>31</sup>

Judge Evans perhaps best summed up his philosophy by writing:

I think I can say that I have the record of having been reversed by every justice on the Supreme Court or who sat on that court in the last twenty years. I can not

29 Letter from Evan Evans to Walter Lindley, December 2, 1943 (Evans Papers).

30 Letter from Evan Evans to Sherman Minton, October 29, 1945 (Evans Papers).

31 Letter from Evan Evans to J. Earl Major, June 29, 1940 (Evans Papers).

say that I was ever affirmed by each of them, but the final and vital thing is that I don't give a damn. As long as I decided it as I thought it should have been decided, I am not worried about the reversal. I know that is your philosophy too, Judge [Slick], and it is the only kind to have. In the language of the Baseball Commissioner [Judge Landis], we call them as we see them, and we are going to do it to the end of the chapter.<sup>32</sup>

In discussing the Seventh Circuit's caseload it is useful to mention some cases that are important not because they are examples of a jurisprudential trend, but because they made headlines. These cases are of two types: those that are notorious because of the parties involved or those that are noteworthy because the Supreme Court announced an important legal principle in reviewing them. In the former category are *Haywood v. United States*<sup>33</sup> and *Capone v. United States*.<sup>34</sup> *Haywood* involved the convictions of most of the top leaders of the radical labor union, the Industrial Workers of the World. Big Bill Haywood and the other Wobbly leaders were convicted of conspiracy to violate various federal statutes in connection with strikes designed to protest and interfere with America's involvement in World War I. Judge Baker's opinion for the Seventh Circuit affirmed the conviction on two counts of conspiracy to violate provisions of the Espionage Act and the Selective Service Act. What aroused controversy, however, was the Seventh Circuit's decision to allow Haywood and his fellow union leaders to be released from Leavenworth Penitentiary on bond while their appeal was being decided by the court. Not only did newspapers object, but the judges received mail

32 Letter from Evan Evans to Judge Thomas Slick, June 18, 1945 (Evans Papers). Judge Evans never forgot that he came close to receiving appointment to the United States Supreme Court in the 1930s. He discussed his possible appointment, which he thought was doubtful, in a letter to Judge Walter Lindley, July 19, 1938 (Evans Papers). During an illness shortly before his death he wrote a touching and revealing letter to a friend:

As I lay in the hospital in great doubt about the future, I naturally meditated over my life. I received so many honors and favors which I did not deserve that I hardly could think of others. However, there was a time when Roosevelt was first elected that I was rather assured in Washington that I would be one of the appointees to the Supreme Court. At that time I did not have any real care whether I got the appointment or not. Now I know that I consider my failure to get the appointment one of the great failures of my life and wish I had been appointed. I realize that I was not any more deserving of that appointment than I was of the appointment to this position, but nevertheless I was on the list and the Attorney General thought I ought to be appointed and would surely be appointed. President Roosevelt also made certain qualifications for the appointments to the Supreme Court which I had to measure up to. It seemed I pretty much filled the bill. He wanted a man from Chicago. He wanted one who had been appointed early in life to the bench and one who was not committed in his biases. The Attorney General thought I was it. Unfortunately Mr. Roosevelt did not accept any of the qualifications he had written down for the Attorney General. In fact the appointment did not come until after his first term. Letter from Evan Evans to E. J. Dempsey, July 8, 1946 (Evans Papers).

33 268 F. 795 (7th Cir. 1920), *cert. denied*, 256 U.S. 689 (1921).

34 56 F.2d 927 (7th Cir.), *cert. denied*, 286 U.S. 553 (1932).

and telegrams from organizations such as the American Legion urging them to revoke the defendants' bond and return them to prison.<sup>35</sup> In *Capone* the Seventh Circuit (Judge Sparks writing) affirmed the conviction for tax evasion of Al Capone, the most notorious of Chicago's gangsters of the 1920s.

Among the cases made famous by the legal principles announced in them by the Supreme Court are *Pokora v. Wabash Ry. Co.*,<sup>36</sup> *Carolene Products Co. v. Evaporated Milk Ass'n.*,<sup>37</sup> and its companion case, *United States v. Carolene Products Co.*<sup>38</sup> The *Pokora* case was a "railroad crossing case" where the Seventh Circuit followed Justice Holmes' famous opinion in *Baltimore & O. R.R. v. Goodman*,<sup>39</sup> which required a traveler to "stop, look, and listen" before crossing a railroad track. Justice Cardozo used the *Pokora* case to cut back on Justice Holmes' rule and held that rather than make the failure to "stop, look, and listen" per se contributory negligence, as the Holmes opinion had done, the jury was to determine if plaintiff was contributorily negligent in not getting out of his truck to look down the track.

The *Carolene Products* cases involved the constitutionality of federal laws prohibiting "filled milk" (a skimmed milk which has been mixed with coconut oil and then evaporated). The Seventh Circuit had upheld the constitutionality of the statute in the appeal before it, but in the companion criminal case the district court had earlier quashed the indictment against the company as it declared the statute unconstitutional. In writing the opinion reversing the district court in the criminal case, Chief Justice Harlan Stone wrote perhaps the most famous footnote in Supreme Court history.<sup>40</sup> The importance of the case has been widely noted. One scholar stated that the footnote has had a "pervasive influence" on the modern court.<sup>41</sup> Another wrote:

In *United States v. Carolene Products Co.*, the case in which Justice Stone's famous footnote 4 would later support increased judicial intervention in non-economic affairs the Court declared that it would sustain regulation in the socioeconomic sphere if any state of facts either known or reasonably inferable afforded support for the legislative judgment. Even this limited scrutiny soon gave way to virtually complete judicial abdication.<sup>42</sup>

35 The report of bail being granted is found in Chicago Tribune, April 3, 1919, at 12. Telegram from David Jones, American Legion Adjutant, to Samuel Alschuler, Dec., 1919 (Alschuler Collection). For biographical information on Haywood and the IWW see M. DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (1969); J. CONLIN, BIG BILL HAYWOOD AND THE RADICAL UNION MOVEMENT (1969).

36 66 F.2d 166 (7th Cir. 1933), *rev'd* 292 U.S. 98 (1934).

37 93 F.2d 202 (7th Cir. 1937).

38 7 F. Supp. 500 (S.D. Ill. 1934), *rev'd* 304 U.S. 144 (1938), on remand 104 F.2d 202 (7th Cir. 1939).

39 275 U.S. 66 (1927).

40 304 U.S. at 152.

41 G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW, 584-85, 592-94 (9th ed. 1975).

42 L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 450 (1978).

This chapter has examined the workload of the Seventh Circuit during the period 1912 to 1941 by looking both at quantitative measures of the volume of work and also at type and disposition of appeals. To summarize, we have seen that the increase in federal economic and social regulatory legislation during this period increased the number of cases coming to the court and raised new issues which were left to the federal courts to resolve. Just as American political parties differed in their approach to these public law questions, so did the judges of the Seventh Circuit differ in their positions. Those differences, expressed in correspondence and in dissenting opinions, have been traced in the last sections of this chapter. But before concluding, two further points should be emphasized about the philosophical differences among the judges. First, although dissents almost doubled after 1938, they still appeared in less than 10 percent of the Seventh Circuit's cases. Thus, in over 90 percent there was unanimity among the judges on a panel. Clearly, in the overwhelming number of cases Supreme Court law directly controlled, facts clearly dictated a particular result, or the issue in a case was one upon which all members of a panel held similar philosophical views. The dissents are important, as they reflect major concerns that were to continue to divide the court in the future, but it must be remembered that they were rare. Second, although the judges of the Seventh Circuit disagreed, they were not disagreeable. Relationships on the court, as was demonstrated in the previous chapter, were strong; the judges treated each other with mutual friendship, intellectual respect, and genuine warmth.



Judges and attorneys attended the luncheon of the 1950 Judicial Conference of the U.S. Court of Appeals for the Seventh Circuit.

## Epilogue 1942-1980

Although this book officially covers the first fifty years of the United States Court of Appeals for the Seventh Circuit this chapter will provide a brief sketch of the court's history from 1941 to the present. Additionally, Appendix A contains more detailed biographical information about the judges appointed after 1941.

The description of the Seventh Circuit's bench, its organization, and its substantive work between 1912 and 1941 is also applicable to the period 1941 through 1948. There were no appointments to the court nor did the volume of appeals significantly vary from the earlier period. Perhaps the most notable case during these years was *United States v. Montgomery Ward & Co.*<sup>1</sup> It involved the seizure by United States troops of Ward's offices and several of its plants following labor disputes which President Franklin Roosevelt and his cabinet officers believed threatened the United States' military effort during World War II. Although the Seventh Circuit case arose out of the second seizure of Ward's, the notoriety of the case came from the famous picture of two soldiers bodily removing Sewell Avery, Ward's president,

<sup>1</sup> 150 F.2d 369 (7th Cir.), *dismissed as moot*, 326 U.S. 690 (1945).



Judges attending the 1950 Judicial Conference of the U.S. Court of Appeals for the Seventh Circuit  
Standing, *from left to right*:  
District Judges Barnes, Tehan, Platt, Steckler, LaBuy, Campbell, Wham, Stone, Sullivan, Shaw, Igoe, Briggie, Holly, Swygert, and Adair; and Henry Chandler, Administrative Office of the U.S. Courts.  
Seated, *from left to right*:  
Circuit Judges Finnegan, Duffy, and Major; Supreme Court Justice Minton; Circuit Judges Kerner, Lindley, and Swaim.

from his office during an earlier takeover. The dramatic picture came to symbolize business opposition to President Roosevelt's handling of the wartime economy. The Seventh Circuit, with Judge Otto Kerner joining Judge Evan Evans' opinion, reversed the district court and held on narrow statutory grounds that the seizure was authorized by the War Labor Disputes Act. The Supreme Court did not review the Seventh Circuit opinion, as the case had been mooted when the government returned control of the plants to the company on October 18, 1945.

In 1948 and 1949 the membership of the bench of the Seventh Circuit underwent great change. Judge Evans' long (over 32 years) and distinguished service on the court ended with his death on July 7, 1948. Only four months later Judge Will M. Sparks retired to his home in Rushville, Indiana, where he remained until his death on January 7, 1950. Judge Evans' death caused Judge Sparks to become senior circuit judge of the circuit. In August, with the passage of the Judicial Code, his title changed to "chief judge."<sup>2</sup> Upon Judge Sparks' resignation Judge J. Earl Major assumed the duties of chief judge, a position he held until he relinquished it on September 1, 1954.

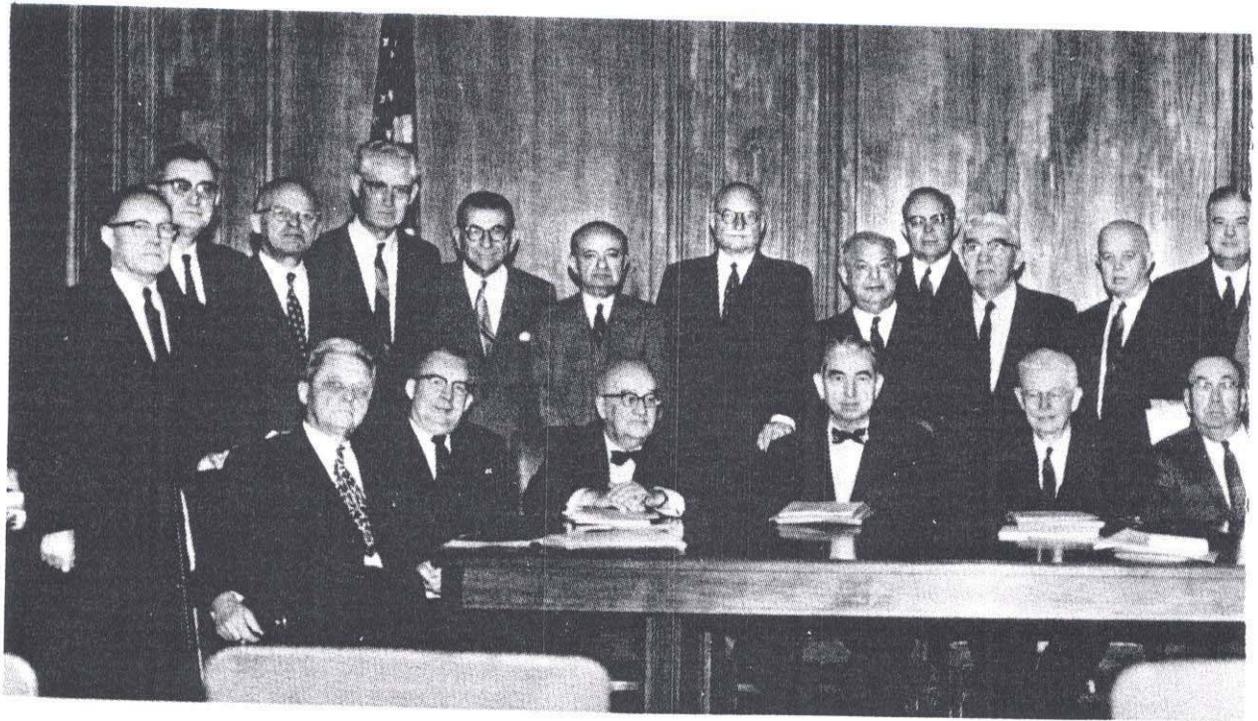
President Harry Truman did not fill these two vacancies on the Seventh Circuit until 1949. He also had two additional appointments to make to the court that year as in August, 1948, Congress authorized a sixth judgeship for the Seventh Circuit.<sup>3</sup> Then, on October 5, Judge Sherman Minton was elevated to the United States Supreme Court. Judge Evans' seat was taken by United States District Judge F. Ryan Duffy. Not only had Judge Duffy served on the district court bench of the Eastern District of Wisconsin but he had been a United States senator from Wisconsin (1933-1939). To replace Judge Sparks, President Truman named Philip J. Finnegan, who was a judge on the Circuit Court of Cook County, Illinois. The new judgeship was filled by H. Nathan Swaim, an Indianapolis attorney and former justice of the Indiana Supreme Court. District Judge Walter Lindley of the Eastern District of Illinois was appointed to the judgeship vacated by Justice Minton. Judge Lindley's appointment marked the successful completion of many years of work by the judges of the Seventh Circuit to have recognized Judge Lindley's remarkable and extensive efforts on both the district and court of appeals benches.

The addition of four new judges brought about a realignment of the geographical representation on the court. Indiana lost the second judgeship it had acquired when Judge Treanor had been appointed in 1938. Judge Swaim became the lone Hoosier judge and joined Judge Duffy from Wisconsin as the only non-Illinoisans on the Seventh Circuit. The political composition of the court, however, was not altered. As had been true since 1919, there was only one Republican, Judge Lindley, on the bench of the Seventh Circuit.

The political makeup of the court did shift when Judge Otto Kerner died on December 13, 1952. President Eisenhower appointed to the vacancy a

2 Act of June 25, 1948, 62 Stat. 870.

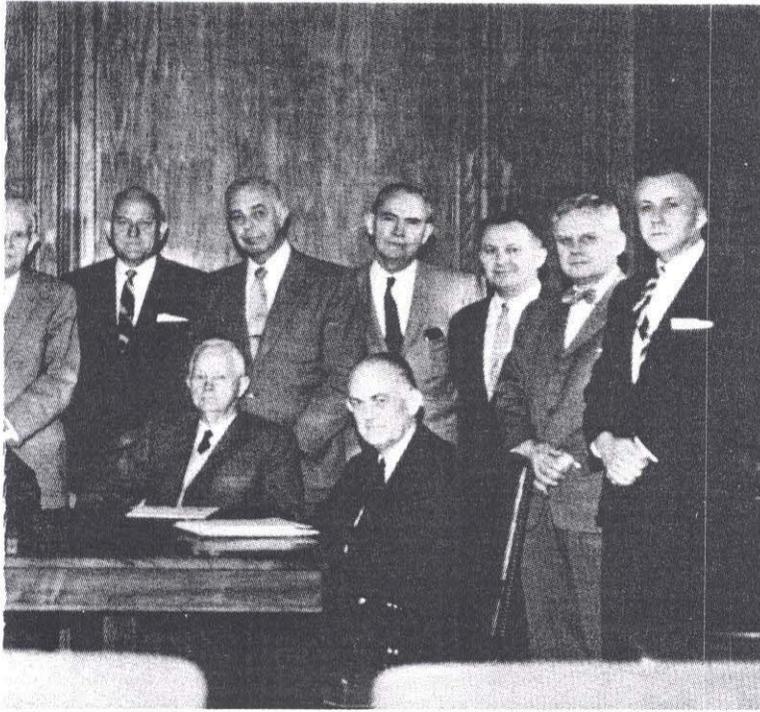
3 Act of August 3, 1949, 63 Stat. 493.



Republican, Elmer J. Schnackenberg, a judge on the Circuit Court of Cook County and a former speaker of the Illinois House of Representatives. Judge Schnackenberg accepted a recess appointment on November 17, 1953 and took his oath of office for his lifetime appointment on February 23, 1954. Seven months later on September 1, 1954, Judge J. Earl Major relinquished his duties as chief judge and Judge Duffy became the chief. Judge Major remained an active judge until March 23, 1956, when he took senior status. For over fifteen years Judge Major continued to sit regularly with the court. He died in Hillsboro, Illinois, on January 4, 1972.

Before President Eisenhower could name a successor to Judge Major another vacancy occurred on the Seventh Circuit. On July 30, 1957, Judge H. Nathan Swaim died following a lengthy illness. To each vacancy the president named a prominent Indiana Republican. Judge Major's seat was taken by John S. Hastings, a lifelong resident of Washington, Indiana, who had been a highly successful trial attorney. The other judgeship went to William Lynn Parkinson. Judge Parkinson practiced law in Lafayette, Indiana, for fifteen years and then served as judge of the Circuit Court of Tippecanoe County, Indiana, for seventeen years. In 1954 he had been appointed by President Eisenhower to a judgeship which was created in the Northern District of Indiana and had served as a district judge until his elevation to the Seventh Circuit. Both judges took their oaths of office on September 10, 1957.

Before the end of his term in office, President Eisenhower made two more appointments to the Seventh Circuit. On January 3, 1958, death ended the



Judges attending the 1958  
Judicial Conference of the  
U.S. Court of Appeals for  
the Seventh Circuit  
Standing, *from left to  
right:*

District Judges Perry,  
Mercer, Platt, Wham, Knoch,  
Hoffman, LaBuy, Miner,  
Swygert, Sullivan, Igoe,  
Tehan, Briggie, Stone,  
Campbell, Grubb, Grant,  
Juergens, and Holder.

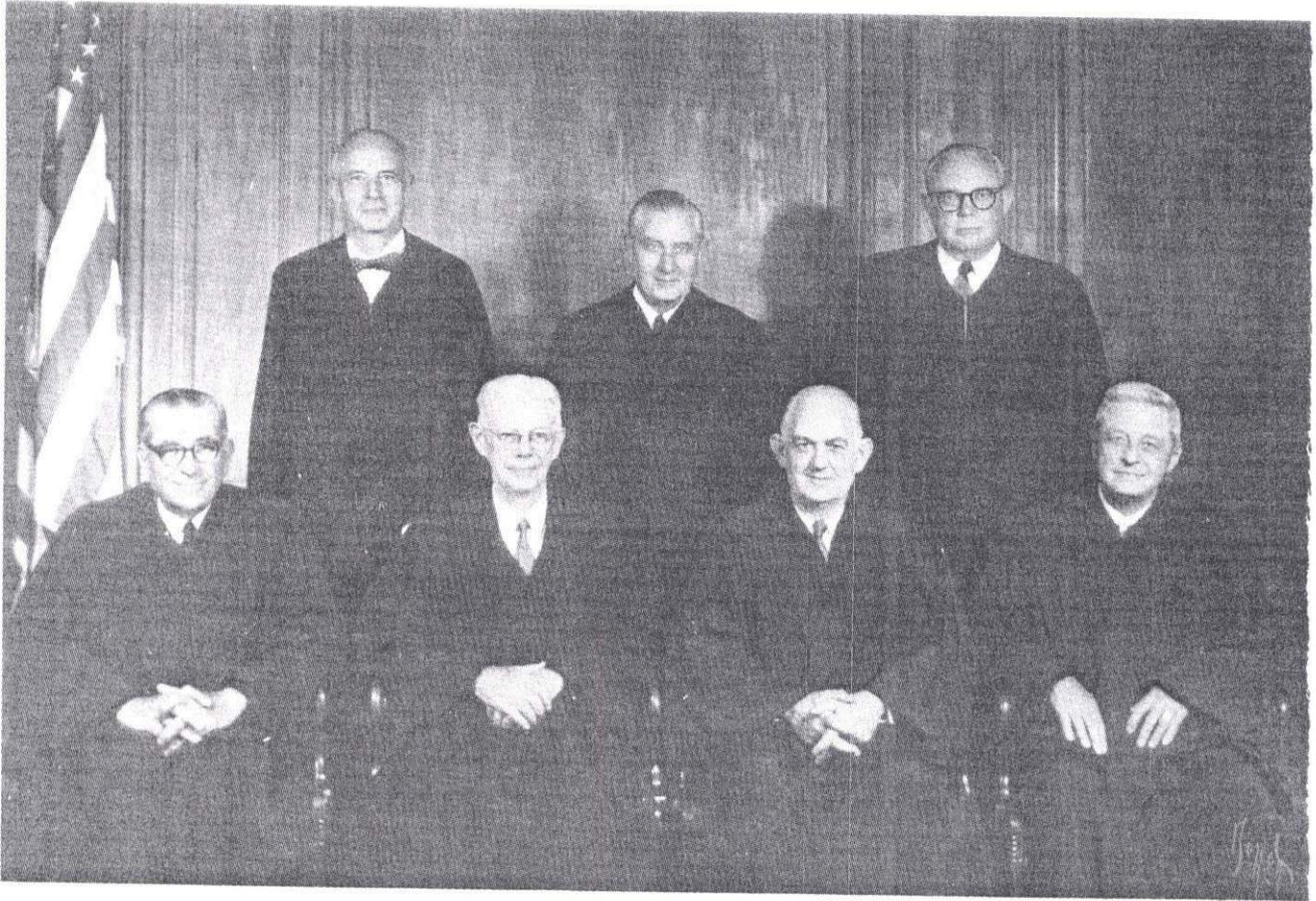
Seated, *from left to  
right:*

Circuit Judges  
Schnackenberg,  
Parkinson, and Finnegan;  
Supreme Court Justice Clark;  
Circuit Judges Duffy (chief  
judge), Major (retired  
judge), Hutcheson (chief  
judge, Fifth Circuit), and  
Hastings.

long and distinguished judicial career of Judge Walter Lindley. He was succeeded by Winfred G. Knoch, a lifelong resident of Naperville, Illinois, who had practiced law there for two decades before serving for fifteen years as judge of the Circuit Court for the Sixteenth Judicial Circuit of Illinois. President Eisenhower had appointed Judge Knoch to be district judge of the Northern District of Illinois on May 14, 1953, and elevated him to the Seventh Circuit on August 21, 1958. Judge Knoch took his oath of office on September 15, 1958. Four months later on January 4, 1959, Judge Philip Finnegan died. The President nominated Latham Castle to succeed him. Judge Castle, at the time of his nomination, had been attorney general of Illinois since 1953. Prior to that office he had been in private practice in Sandwich, Illinois; had been state's attorney of DeKalb County; had held the post of assistant attorney general of Illinois; and had served as county judge of DeKalb County. Judge Castle took his oath of office on May 8, 1959.

On August 6, 1959, Judge F. Ryan Duffy, having celebrated his seventieth birthday the previous year, was required by an amendment to the Judicial Code to step down as chief judge.<sup>4</sup> He remained a judge in regular active service, however. Judge Elmer Schnackenberg was next in seniority but since his seventieth birthday was less than a month away, he waived his right to the chief judgeship. Thus, on August 6, 1959, less than two years after he

<sup>4</sup> Act of August 6, 1958, 72 Stat. 497.



U.S. Court of Appeals, Seventh  
Circuit, 1964  
Standing, *from left to right*:  
Circuit Judges Kiley, Castle, and  
Swygert.  
Seated, *from left to right*:  
Circuit Judges Knoch, Duffy, Hastings,  
and Schnackenberg.

came to the Seventh Circuit, Judge John S. Hastings became chief of the circuit.

Within the two terms of the Eisenhower presidency five appointments to the Seventh Circuit were made, thereby altering the political composition of the court from one Republican and five Democrats to one Democrat, F. Ryan Duffy, and five Republicans. The geographical makeup of the court also changed. In 1959 the court consisted of two Indiana judges, one Wisconsin judge, and only three Illinois judges. This number of Indiana and Wisconsin judges remained constant until 1979, when President Jimmy Carter named Richard Cudahy, a native of Milwaukee, Wisconsin, to a newly created judgeship.

The next change in personnel on the Seventh Circuit was occasioned by the mysterious disappearance of Judge W. Lynn Parkinson on October 26, 1959. Despite an intensive search by Chicago police and the Federal Bureau of Investigation no trace of the judge was found until his body was recovered from Lake Michigan on April 24, 1960. A successor to Judge Parkinson was not named until after President Kennedy's inauguration. The president nominated Roger J. Kiley, a former Democratic Chicago alderman, judge of the Superior Court of Cook County, and judge of the First District Appellate Court of Illinois. Judge Kiley took his oath of office on July 10, 1961. In 1961 Congress authorized a seventh judgeship for the Seventh Circuit.<sup>5</sup> On September 11, 1961, President Kennedy elevated District Judge Luther M. Swygert of the Northern District of Indiana to the Seventh Circuit bench. Judge Swygert began his career in private practice in Michigan City, Indiana; he served as deputy prosecuting attorney for Lake County, Indiana; and he then became an assistant United States attorney for the Northern District of Indiana (1934-1943). At the time of his oath of office as circuit judge on October 11, 1961, Judge Swygert had been a district judge for eighteen years.

Following Judge Swygert's appointment the membership of the Seventh Circuit remained unchanged for four years. In 1966 President Lyndon Johnson made two appointments to the court: Thomas E. Fairchild and Walter J. Cummings. Judge Fairchild replaced Judge Duffy who took senior status on July 1, 1966. Judge Duffy continued to sit with the court in Chicago until 1973 and participated in opinions submitted without oral argument until he retired in 1978. He died in Milwaukee at the age of ninety-one on August 16, 1979.

At the time of his appointment, Judge Fairchild had been a justice of the Wisconsin Supreme Court for nine years. Prior to that he had engaged in private practice in Wisconsin and served one term (1948-1951) as attorney general of Wisconsin. He had also served as United States attorney for the Western District of Wisconsin (1951-1952). Judge Fairchild took his oath of office on August 24, 1966. Judge Walter Cummings took his oath of office on August 15, 1966. He was appointed to fill the eighth judgeship which Congress had created for the Seventh Circuit.<sup>6</sup> Judge Cummings, who had practiced law in

<sup>5</sup> Act of May 19, 1961, 75 Stat. 80.

<sup>6</sup> Act of March 18, 1966, 80 Stat. 75.



U.S. Court of Appeals, Seventh  
Circuit, 1971  
Standing, *from left to right*:  
Circuit Judges Stevens, Kerner,  
Cummings, Pell, and Sprecher.  
Seated, *from left to right*:  
Circuit Judges Kiley, Swygert  
(chief judge), and Fairchild.

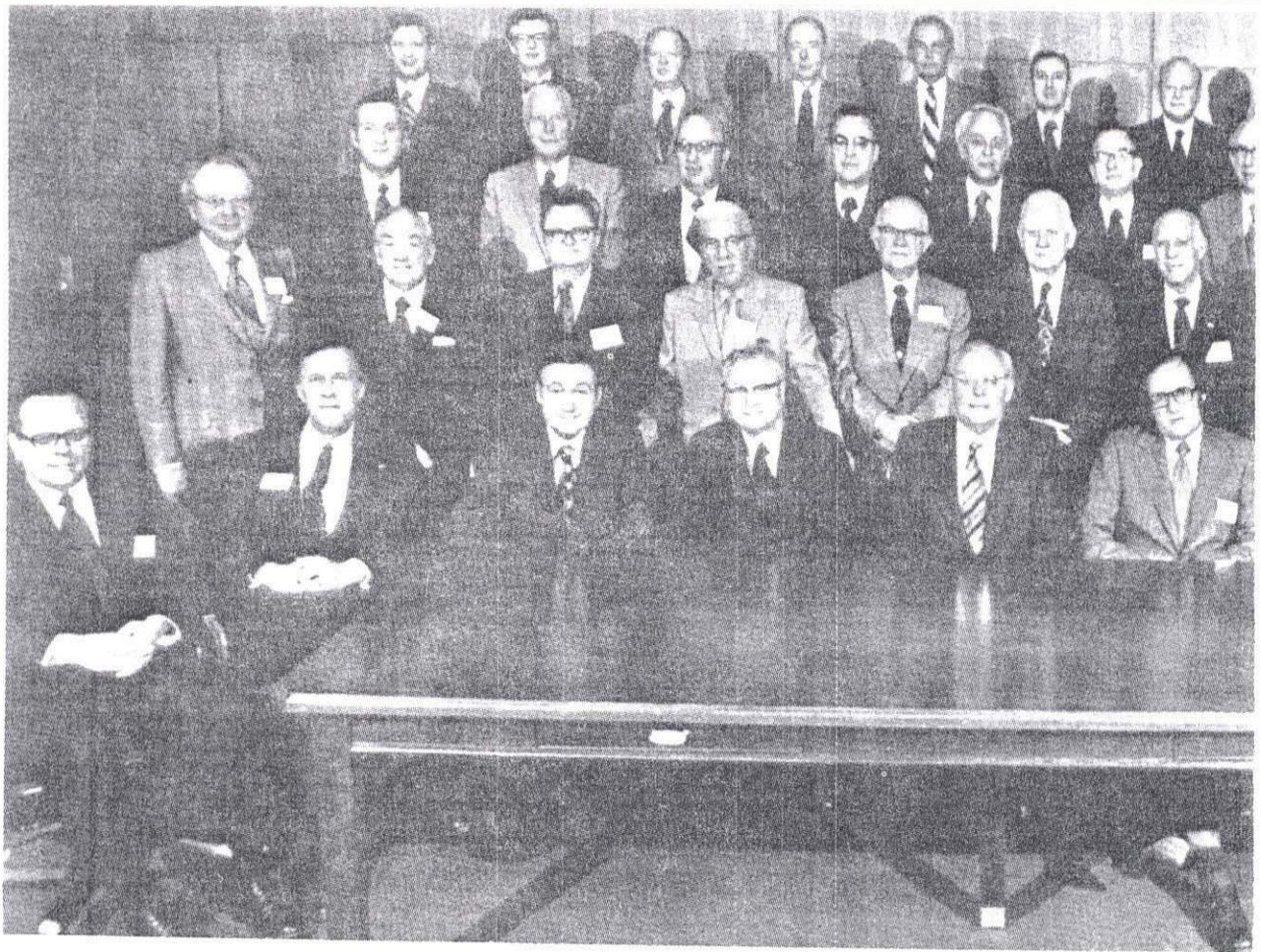
Chicago, was a past president of the Seventh Circuit Bar Association. In addition, he had served as assistant to the solicitor general of the United States and was the solicitor general from 1952 to 1953.

President Johnson made a third appointment to the Seventh Circuit when in 1968 he named Otto Kerner, Jr., to replace Judge Win Knoch. Judge Knoch took senior status on December 4, 1967, and continued to sit with the court until after the 1973-1974 term, when he retired to his home and farm in Naperville, Illinois. Judge Kerner, whose father had served on the Seventh Circuit from 1938 to 1952, had been governor of Illinois, a judge of the Circuit Court of Cook County, and United States attorney for the Northern District of Illinois. Judge Kerner took his oath of office on May 20, 1968.

Two other personnel changes occurred that year. On June 1, 1968, a month before his seventieth birthday, Chief Judge John Hastings relinquished his duties as chief judge, though he remained a judge in regular active service. Judge Latham Castle became chief. Then, on September 15, 1968, Judge Elmer Schnackenberg died. No replacement for the judge was named for two years. However, in the interim Judge John Hastings took senior status on February 1, 1969. Judge Hastings continued to sit regularly with the court until his death on February 7, 1977. Before a replacement for either Judges Schnackenberg or Hastings was nominated, Chief Judge Latham Castle announced his decision to assume senior status as of February 26, 1970. Judge Castle continued to sit regularly with the court. Judge Luther Swygert became chief judge on February 27, 1970.

President Richard Nixon filled the three vacancies on the Seventh Circuit in 1970 and 1971. On April 24, 1970, he appointed Wilbur F. Pell, Jr., to Judge Hastings' judgeship. Judge Pell had practiced in Shelbyville, Indiana, for many years. He had also been a special agent of the Federal Bureau of Investigation and had served as president of the Indiana Bar Association. Judge Pell took his oath of office on May 11, 1970. Five months later the president nominated John Paul Stevens to the vacancy caused by Judge Schnackenberg's death. Judge Stevens, who took his oath of office on November 2, 1970, had been in private practice in Chicago. He was the first judge on the court to have been a former Supreme Court clerk, having clerked for Justice Wiley B. Rutledge in the Supreme Court's 1947 term. On April 23, 1971, President Nixon named another Chicago attorney, Robert A. Sprecher, to the Seventh Circuit bench. Judge Sprecher succeeded Judge Castle and took his oath of office on May 7, 1971.

Judge Roger Kiley accepted senior status on January 1, 1974. He continued to sit with the court until his death on September 6, 1974. On May 14, 1974, President Nixon appointed United States District Judge Philip W. Tone of the Northern District of Illinois to replace Judge Kiley. The president had appointed Judge Tone to a new judgeship on the district court on January 26, 1972. Judge Tone had been in private practice in Chicago before his judicial service. He, like Judge Stevens, had clerked for United States Supreme Court Justice Wiley Rutledge (1948-1949). Judge Tone took his oath as circuit judge on May 17, 1974, and served until his retirement on April 30, 1980, when he resigned to return to the practice of law.



On July 22, 1974, Judge Otto Kerner, Jr., resigned. Following his indictment on charges of conspiracy, bribery, mail fraud, and income tax evasion on December 15, 1971, the judge had taken a leave of absence from the bench. He was convicted on February 19, 1973. After the affirmance of his conviction on appeal by a panel of judges from outside the circuit, who were designated to sit by Chief Justice Warren Burger, Judge Kerner spent eight months in prison. He died in Chicago on May 9, 1976. To succeed Judge Kerner President Gerald Ford appointed United States District Judge William J. Bauer of the Northern District of Illinois on December 20, 1974. Judge Bauer had been appointed to the district court by President Nixon on November 10, 1971. Prior to his judicial career Judge Bauer had served (1970-1971) as United States attorney for the Northern District of Illinois. He had been in private practice in Elmhurst, Illinois, and had served both as the state's attorney of DuPage County and as a judge of the circuit court for the Eighteenth Judicial Circuit of Illinois. Judge Bauer took his oath as judge of the Seventh Circuit on January 3, 1975.

A month later on February 7, 1974, Chief Judge Luther Swygert, upon celebrating his seventieth birthday, turned over the duties of chief judge to Judge Thomas E. Fairchild. Judge Swygert remained a judge in regular active service.

The bench of the Seventh Circuit next changed when President Gerald Ford appointed Judge John Paul Stevens to the United States Supreme



Judges attending the 1974  
Judicial Conference of the U.S.  
Court of Appeals for the Seventh  
Circuit

Standing

Fourth row, *from left to right:*

District Judges Foreman, Marshall,  
McGarr, McMillen, Wood, Doyle,  
Beamer, Parsons, and Holder.

Third row, *from left to right:*

District Judges Gordon, Morgan,  
Wise, Steckler, Will, Noland,  
Dillin, Grant, and Eschrach.

Second row, *from left to right:*

District Judges Reynolds, Lynch,  
Sharp, Austin, Decker, Juergens,  
Marovitz, McLaren, Bauer, Tone,  
and Robson.

Seated, first row, *from left to  
right:*

Circuit Judges Sprecher, Pell,  
Cummings, Fairchild, and Swygert;  
Supreme Court Justice Rehnquist;  
Circuit Judges Duffy, Knoch,  
Hastings, and Stevens.

Court on November 28, 1975. Justice Stevens took the seat of retiring Justice William O. Douglas. Justice Stevens thus became the second Seventh Circuit judge to serve on the Supreme Court (Justice Minton was the other). He took his oath of office on December 19, 1975, and on that day Justice Stevens replaced Justice William H. Rehnquist as the circuit justice assigned to the Seventh Circuit. To succeed Justice Stevens in the Seventh Circuit President Ford nominated United States District Judge Harlington Wood, Jr., of the Southern District of Illinois on May 7, 1976. Judge Wood had served as district judge from 1973 to 1976. Judge Wood began his career in private practice in Springfield, Illinois, and later served as United States attorney for the Southern District of Illinois (1958-1961). He held posts in the Department of Justice from 1969 to 1973, including associate deputy attorney general for United States attorneys, 1969-1970; associate deputy attorney general, 1970-1972; and assistant attorney general, Civil Division, 1972-1973. Judge Wood took his oath of office on May 28, 1976.

In 1978 Congress authorized a ninth judgeship for the Seventh Circuit.<sup>7</sup> President Jimmy Carter nominated Richard D. Cudahy on September 25, 1979, and he took his oath of office on October 10, 1979. Judge Cudahy had practiced law in Chicago, Milwaukee, and Washington, D.C., for many

<sup>7</sup> Act of October 20, 1978, 92 Stat. 1632.

years. He had served as a lecturer at several law schools and also was a member and chairman of the Wisconsin Public Service Commission.

Since 1941 there have been significant changes in the personnel of the Seventh Circuit. On October 1, 1973, Kenneth J. Carrick retired after thirty-three years as clerk of the Seventh Circuit. He was replaced by Thomas F. Strubbe who had begun work at the court as a deputy clerk while attending law school and who had served seven years as chief deputy clerk before his appointment as clerk. During the almost forty years (1941-1980), the clerk's office personnel has grown from fewer than five persons to its present level of over twenty employees.

An important innovation in the administration of the court was the appointment by the Seventh Circuit Judicial Council of Collins T. Fitzpatrick as circuit executive on September 16, 1976. Congress had authorized the executives to exercise administrative control of all nonjudicial activities which each circuit council delegates to the circuit executive.<sup>8</sup> Before becoming circuit executive, Collins Fitzpatrick had been senior staff attorney of the court and a law clerk to both Judges Roger Kiley and Luther Swygert. The circuit executive's staff includes the senior staff attorney and staff attorneys, who are responsible for handling all motions and cases decided without oral argument.

On February 28, 1973, Joseph M. Thinnes retired after serving thirty-five years as the bailiff of the Seventh Circuit Court of Appeals. He was succeeded by Henry C. Parks who held the post until his retirement on July 29, 1978. Charles Roberts replaced Henry Parks.

In addition to the increase in the number of judges in the Seventh Circuit and the size of their staffs (the number of law clerks increased to two per judge in the 1960s and to three by 1979), two important events occurred which altered the judges' day-to-day life on the court. Beginning around 1960, when Chief Judge John S. Hastings moved his chambers permanently to Chicago, a tradition began where the judges on the Seventh Circuit lived in Chicago. The last judge to maintain chambers outside Chicago was Judge Fairchild who moved his chambers from Milwaukee to Chicago in 1974. No longer did judges maintain two chambers, one in Chicago and one in their hometown. It has been argued that this innovation has not only increased the collegiality among the members of the court, but has resulted in greater efficiency in matters such as routine motions which can be handled orally rather than by time-consuming circulation of written memoranda.<sup>9</sup>

A second important event occurred on December 10, 1964, when the Seventh Circuit moved from its home at 1212 North Lake Shore Drive to its present location at 219 South Dearborn Street. The court occupied the twenty-seventh floor of the Everett M. Dirksen Building, which is directly across the street from the court's former location from 1891 to 1938. The

<sup>8</sup> See 28 U.S.C. §332 (1976); act of January 5, 1971, 84 Stat. 1907.

<sup>9</sup> L. Swygert, *Bench and Bar Work Together in the Seventh Circuit*, 61 A.B.A.J., 613 (1975).

move not only represented a physical return but also resulted again in the sharing of the building between the court of appeals and the United States District Court for the Northern District of Illinois. The Seventh Circuit's first court session in its new courtroom was on January 4, 1965. A formal dedication ceremony was held on May 12, 1965.<sup>10</sup>

The new building was designed by the renowned architect, Ludwig Mies van der Rohe. The court's expanded library was located on the fourteenth floor and was supervised by Frank Di Canio, a highly experienced professional law librarian.

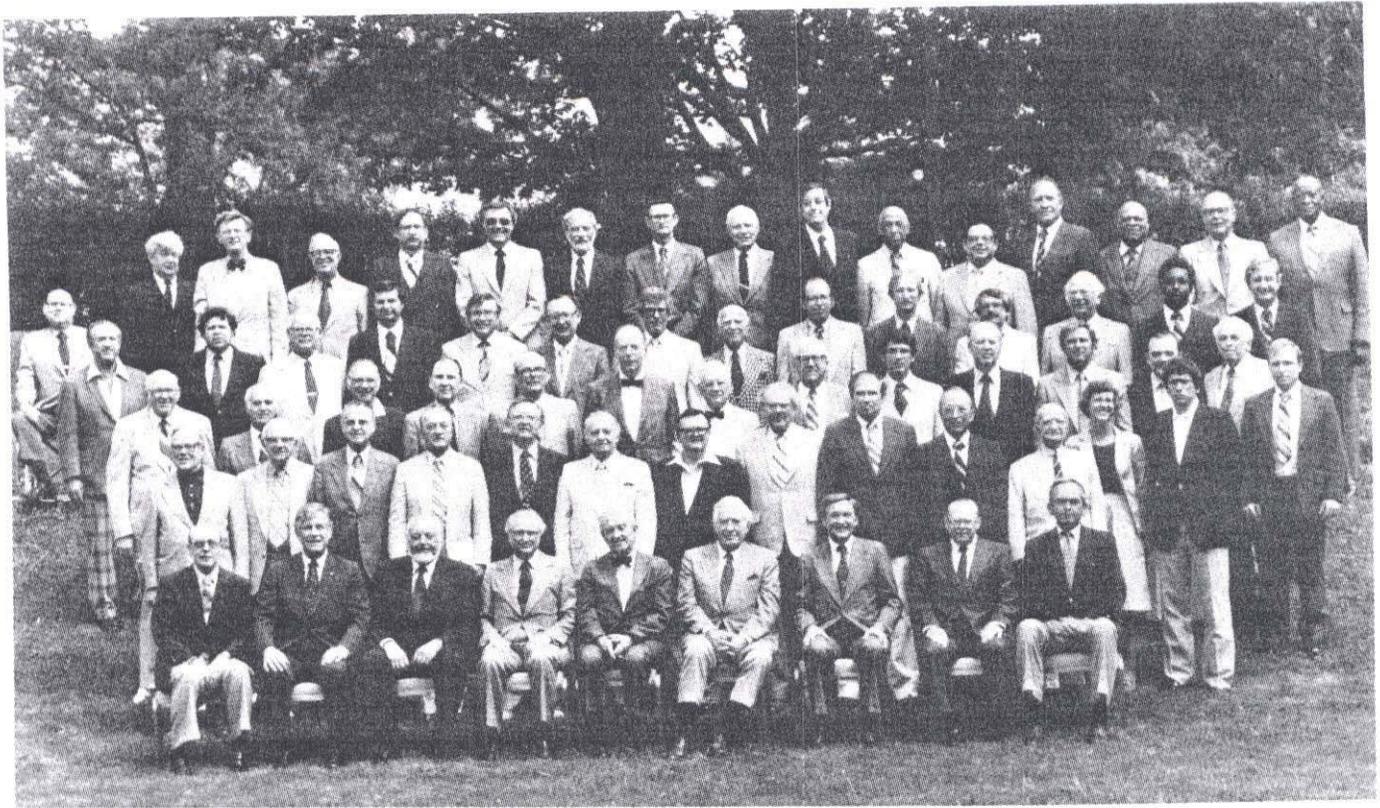
Besides the judges' conference room, the two courtrooms, the judges' chambers, and the clerk's office, the twenty-seventh floor also housed the attorney's room adjacent to the main courtroom. The attorney's room was furnished by the Seventh Circuit Bar Association, a unique organization which was formed in 1950 by six leading practitioners from Wisconsin, Indiana, and Illinois.<sup>11</sup> Those attorneys were Percy B. Eckhart, George I. Haight, Carl L. Latham, Casper W. Ooms, Kurt F. Pantzer, and Louis Quarles. The association meets annually in conjunction with the statutorily mandated Seventh Circuit Judicial Conference. The association plans one day of programs at the conference and also hosts a luncheon and banquet for the judges and members of the association. The program involves discussions among the judges and members of the bar on a current important area of federal law. The association also oversees and supports the court's library, and has donated an oil portrait of each Seventh Circuit judge which hangs in the courtroom.<sup>12</sup> In addition, various committees of the organization study aspects of the court's work and procedures, such as its rules.

The increase in the number of active judges assigned to the Seventh Circuit from five in 1938 to nine in 1979 reflects the vast increase in the number of appeals filed in the court. The 1938 total of cases filed (359) was not eclipsed until 1962, as the number of appeals hovered around 300 between 1942 and 1960. When the volume began to grow, the number of cases accelerated at a rapid rate. In 1962, 392 appeals were commenced; in 1964, 464; and by 1968 the number had reached 691. The number of appeals in 1972 fell only one short of 1,000, while in 1976 the figure was 1,247 and in 1979 it reached 1,540 or over five times the number filed in 1947. As has been constant throughout the history of the court, the majority of appeals docketed in the Seventh Circuit originated in the United States District Court for the Northern District of Illinois. The major growth in the court's caseload came from the larger volume of criminal appeals, the expansion of the number of both state and federal habeas corpus suits, and the increase of appeals from

10 Transcript of Proceedings of Dedication of New Facilities for the United States Court of Appeals for the Seventh Circuit (unpublished May 12, 1965) (Seventh Circuit Archives).

11 Remarks of Walter J. Cummings, *id.* at 20-34.

12 *Id.*; M. Crane, *Seventh Circuit Bar Association*, 61 A.B.A.J., 616 (1975).



Judges and magistrates  
attending the 1980  
Judicial Conference  
of the Seventh  
Federal Circuit

Row 1

- 1 Bauer **C**
- 2 Pell **C**
- 3 Swygert **C**
- 4 Fairchild **C**
- 5 Stevens **S**
- 6 Burger **S**
- 7 Cummings **C**
- 8 Sprecher **C**
- 9 Wood **C**

Row 2

- 1 Nehrig **B**
- 2 Decker **D**
- 3 Steckler **D**
- 4 Eschbach **D**
- 5 Noland **D**
- 6 Grant **D**
- 7 Sharp **D**
- 8 Reynolds **D**
- 9 Ackerman **D**
- 10 Wise **D**
- 11 Hoffman **D**
- 12 Crabb **D**
- 13 Flaum **D**

Row 3

- 1 Frawley **B**
- 2 Sufana **B**
- 3 C. Evans **M**
- 4 Doyle **D**
- 5 Beatty **D**
- 6 McMillen **D**
- 7 Juergens **D**
- 8 Holder **D**
- 9 Meyers **M**
- 10 McGarr **D**
- 11 Brooks **D**
- 12 Trabue **B**
- 13 Will **D**
- 14 Fitzpatrick **EX**

Row 4

- 1 Gordon **D**
- 2 Endsley **M**
- 3 Faulconer **M**
- 4 Bayt **B**
- 5 Ihlenfeldt **B**
- 6 Spaniol **AO**
- 7 Lee **M**
- 8 Marovitz **D**
- 9 Aspen **D**
- 10 Godich **M**
- 11 Goodstein **M**
- 12 Dillin **D**
- 13 Clevert **B**
- 14 Foreman **D**

Row 5

- 1 Hertz **B**
- 2 James **B**
- 3 Marshall **D**
- 4 Moran **D**
- 5 Fisher **B**
- 6 DeGunther **B**
- 7 Eisen **B**
- 8 Vandivier **B**
- 9 Morgan **D**
- 10 Grady **D**
- 11 Leighton **D**
- 12 Warren **D**
- 13 Balog **M**
- 14 Toles **B**
- 15 Rodibaugh **B**
- 16 Parsons **D**

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**S** – Supreme Court  
**C** – Circuit Court  
**D** – District Court  
**B** – Bankruptcy Court  
**M** – Magistrate  
**AO** – Administrative Office  
**EX** – Circuit Executive

administrative agencies. Correspondingly, the percentage of diversity, patent, and bankruptcy cases fell during the period from 1942 through 1980.<sup>13</sup>

The dramatic increase in the volume of appeals filed and opinions issued between 1941 and 1980 has made it impossible at this time systematically to study the case law developed by the court. However, the following cases are significant either because of the notoriety of the parties or because the opinion (either that of the Seventh Circuit or the United States Supreme Court) is an important legal precedent.

- 13 The statistics regarding the number of appeals is taken from:
- (a) CLERK'S DOCKET, United States Court of Appeals for the Seventh Circuit (clerk's office, Seventh Circuit);
  - (b) STATISTICAL REPORTS TO THE ADMINISTRATIVE OFFICE, 1951-60 (clerk's office, Seventh Circuit);
  - (c) ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1964 and 1972);
  - (d) THE JUDICIAL BUSINESS OF THE UNITED STATES COURTS OF THE SEVENTH CIRCUIT;
  - (e) FEDERAL JUDICIAL WORKLOAD STATISTICS (1979).

## Significant Appeals in the Seventh Circuit since 1941

*United States v. Haupt*, 152 F.2d 771 (7th Cir. 1946), *aff'd*, 330 U.S. 631 (1947) (conviction of Hans Max Haupt for treason in that he assisted his son, Herbert Haupt, a German spy during World War II who was caught in Florida and later executed).

*United States v. Morton Salt Co.*, 174 F.2d 703 (7th Cir. 1949), *rev'd*, 338 U.S. 632 (1950) (a leading case involving the power of administrative agencies to investigate corporations and to require them to report periodically).

*United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), *aff'd*, 344 U.S. 604 (1953) (famous case involving a conspiracy to bring illegal aliens into the United States by claiming they were lawful spouses and allowed to enter the United States under the War Brides Act).

*Howes Leather Co. v. LaBuy*, 226 F.2d 703 (7th Cir. 1955), *aff'd*, 352 U.S. 249 (1957) (important for the Supreme Court's discussion of when mandamus was proper).

*Irvin v. Dowd*, 251 F.2d 548 (7th Cir. 1958), *rev'd*, 359 U.S. 394 (1959) (established that habeas petitioner exhausted his state remedy if he raised constitutional issues in state courts even though state court opinion may have been based on other ground).

*Chicago & North Western Ry. Co. v. Order of Railroad Telegraphers*, 364 F.2d 254 (7th Cir. 1959), *rev'd*, 362 U.S. 330 (1960) (important labor case dealing with relationship between the NLRA and the Railway Labor Act and under what terms the union may demand to bargain under the NLRA).

*Times Film Corp. v. City of Chicago*, 272 F.2d 90 (7th Cir. 1959), *aff'd*, 365 U.S. 43 (1961) (upheld constitutionality of city ordinance requiring films to be reviewed by censorship board before permits issued).

*Monroe v. Pape*, 272 F.2d 365 (7th Cir. 1959), *rev'd*, 365 U.S. 167 (1961) (municipality not liable for damages under 42 U.S.C. §1983).

*Townsend v. Sain*, 276 F.2d 324 (7th Cir. 1961), *rev'd*, 372 U.S. 293 (1963) (sets forth standard to determine when a federal district court must hold a hearing to determine facts in a habeas petition).

*McNeese v. Board of Education*, 305 F.2d 783 (7th Cir. 1962), *rev'd*, 373 U.S. 668 (1963) (no need to exhaust administrative remedies in suit under 42 U.S.C. §1983).

*Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (7th Cir. 1963), *rev'd*, 376 U.S. 225 (1964) (Supreme Court opinion held that a state could not protect an invention when the item was not patentable under federal law).

*Borak v. J.I. Case Co.*, 317 F.2d 838 (7th Cir. 1963), *aff'd*, 377 U.S. 426 (1964) (important case in the development of the law governing when a private right of action may be implied by the federal courts).

*Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964), *rev'd*, 381 U.S. 676 (1965) (case involving agreement between union and grocers not to sell meat after 6:00 P.M.; important case involving the exemption of union-employer agreements from the Sherman Act).

*Miller v. Pate*, 342 F.2d 646 (7th Cir. 1965), *rev'd*, 386 U.S. 1 (1967) (Supreme Court granted habeas where the conviction was secured by the state's withholding knowledge that stain on shorts was paint and not blood).

*National Woodwork Manufacturers Association v. NLRB*, 354 F.2d 594 (7th Cir. 1965), *aff'd in part, rev'd in part*, 386 U.S. 612 (1967) (leading case concerning secondary boycotts and the limits of permissible activities by union).

*United States v. Hoffa*, 367 F.2d 698 (7th Cir. 1966), *vacated*, 387 U.S. 231 (1967), *conviction affirmed*, 402 F.2d 380 (7th Cir. 1968) (Teamsters president convicted of wire fraud and conspiracy to defraud the Teamsters Pension Fund. The conviction was vacated because of government admission of unauthorized eavesdropping but upon remand it was determined that no evidence was obtained through the illegal acts).

*Allis-Chalmers Manufacturing Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), (*en banc*), *rev'd*, 388 U.S. 175 (1967) (established right of union to fine members who crossed a picket line; held such action was not an unfair labor practice).

*United States v. Will*, 389 U.S. 90 (1967) (unpublished 7th Cir. opinion) (Supreme Court vacated mandamus against district judge as it found no extraordinary circumstances to justify the interruption of the normal appeals process).

*United States v. McCarthy*, 387 F.2d 838 (7th Cir. 1968), *rev'd*, 394 U.S. 459 (1969) (one of the first cases interpreting Rule 11 of Fed. R. Crim. P., which governs guilty pleas; Supreme Court required strict compliance with the provisions of rule 11).

*Mills v. Electric Autolite Co.*, 403 F.2d 420 (7th Cir. 1968), *vacated*, 396 U.S. 375 (1970) (leading case determining the requirements for a course of action in a suit brought under the Securities Act).

*University of Illinois Foundation v. Blonder-Tongue Laboratories, Inc.*, 422 F.2d 769 (7th Cir. 1970), *vacated*, 402 U.S. 313 (1971) (allowed offensive use of collateral estoppel by a defendant in a patent infringement suit when plaintiff's patent had been found invalid in an earlier suit).

*Groppi v. Leslie*, 436 F.2d 326 (7th Cir. 1970), *rev'd*, 404 U.S. 496 (1972) (contempt citation of activist priest by the Wisconsin legislature violated due process).

*Roth v. Board of Regents of State Colleges*, 446 F.2d 806 (7th Cir. 1971), *rev'd*, 408 U.S. 564 (1972) (leading case defining a property interest under the Fourteenth Amendment; nontenured teacher held to have no property interest and therefore no right to a hearing before dismissal).

*Dionisio v. United States*, 442 F.2d 276 (7th Cir. 1971), *rev'd*, 410 U.S. 1 (1973) (requirement that defendant furnish voice exemplar to grand jury did not violate Fourth Amendment).

*Jordan v. Weaver*, 472 F.2d 985 (7th Cir. 1973), *rev'd sub nom. Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment bars suit against state to recover retroactive welfare payments).

*Gertz v. Welch*, 471 F.2d 801 (7th Cir. 1972), *rev'd*, 418 U.S. 323 (1974) (leading libel case; established that "public figure" did not apply to attorney who, in the subject matter of the libel, had not participated in public affairs, nor was the underlying incident so notorious that he became a public figure).

*United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (reversed convictions of the "Chicago Seven" for their participation in the riots which took place in Chicago during the 1968 Chicago Democratic National Convention).

*Hampton v. City of Chicago*, 484 F.2d 602 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974) and *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part*, 48 U.S.L.W. 3780 (1980) (suit by survivors of slain Black Panther leaders Fred Hampton and Mark Clark against law enforcement officials who planned and executed the raid on the Panthers' apartment).

*Gautreaux v. City of Chicago*, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974) (court ordered City and HUD to provide integrated housing in areas where there were few or no blacks).

*Hochfelder v. Ernst & Ernst*, 503 F.2d 1100 (7th Cir. 1974), *rev'd*, 425 U.S. 185 (1976) (major securities decision holding that to maintain a suit under §10(b) of the Securities Exchange Act of 1934 there must be an allegation of "scienter").

*Burns v. Elrod*, 509 F.2d 1133 (7th Cir. 1975), *aff'd*, 427 U.S. 347 (1976) (firing of nonpolicy-making patronage appointees violates the First and Fourteenth Amendments).

*Metropolitan Housing Corp. v. Village of Arlington Heights*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977), *on remand*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 98 S.Ct. 752 (1978) (lengthy controversy determining that the refusal to rezone property to allow the construction of low-income housing was not proven to be racially motivated and thus did not violate the Fourteenth Amendment; however, the impact of the refusal did violate the Fair Housing Act).

*In re Dellinger*, 502 F.2d 813 (7th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (upheld contempt convictions against several of the defendants of the "Chicago Seven" trial for their behavior during the trial).

*State of Illinois v. Ampress Brick Co., Inc.*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom. Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (in Clayton Act suit indirect purchasers could not recover treble damages for an illegal overcharge which had been passed on to them).

*United States v. Board of School Commissioners*, 503 F.2d 68 (7th Cir. 1974), *cert. denied*, 421 U.S. 929 (1975) (finding that Indianapolis schools were illegally segregated); 541 F.2d 1211 (7th Cir. 1976), *vacated*, 429 U.S. 1068 (1977), *on remand*, 573 F.2d 400 (7th Cir. 1978) (question of whether the busing remedy must be confined to the city or may be county-wide).

*Stern v. United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1976), *cert. denied* 434 U.S. 975 (1977). (42 U.S.C. §1985) (1) does not subject corporation to liability in a suit by a government agent who had been removed from an audit after corporation's officers complained about the agent's manner in handling the complaint).

*Sparkman v. McFarlin*, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom. Stump v. Sparkman*, 435 U.S. 349 (1978) (judge who ordered sterilization of a minor had immunity from suit under 42 U.S.C. §1983).

*Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979) (NLRB's exercise of jurisdiction over the Catholic schools of Chicago violated the First Amendment).

*Daniel v. International Brotherhood of Teamsters*, 561 F.2d 1223 (7th Cir. 1977), *rev'd*, 439 U.S. 551 (1979) (Securities Act and Securities Exchange Act do not apply to a noncontributory, compulsory pension plan).

*Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd* 441 U.S. 91 (1979) (testers seeking to determine if realtors were engaging in racial steering had standing under the Fair Housing Act of 1968).

*First Wisconsin Mortgage Trust v. First Wisconsin Corp.*, 571 F.2d 390 (7th Cir.), *rehearing en banc* 584 F.2d 201 (7th Cir. 1978) (when an attorney is disqualified due to his prior representation of the opposing party, the availability of his work product to successor counsel rests on its being untainted by confidentiality, which must be determined on a case-by-case basis).

*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied* 439 U.S. 916 (1978) (notwithstanding purpose or motive, Skokie, Illinois, ordinance that attempted to control content of Nazi demonstrations violates the First Amendment when, in fact, it places undue prior restraints on constitutionally protected speech).

*Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977) (major securities case in which the court defined recklessness under the Securities Exchange Act).

*Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978) (major decision concerning the question of disqualification of attorneys for conflict of interest).

*Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978), *rev'd*, 443 U.S. 111 (1979) (senator's remarks about research scientist in awarding Golden Fleece Award were not protected by speech and debate clause nor was scientist a "public figure").

*Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), *aff'd*, 448 U.S. 358, 100 S.Ct. 2694 (1980) (under Hyde Amendment to Medicaid Act states are not required to pay for therapeutic abortions).

*Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied* 100 S.Ct. 1278 (1980) (Sherman Act suit against drive-thru photo finisher reversed since defendant and its processing arm were one entity and could not conspire; case also requires district courts to have parties exchange all trial briefs before trial).

*United States v. Walus*, 616 F.2d 282 (7th Cir. 1980) (district court judgment cancelling defendant's naturalization for failure to disclose his membership in the Gestapo and his commission of atrocities vacated and remanded for consideration of new evidence).



## Appendices



## MEMBERS U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

<i>Name</i>	<i>Date of judicial oath</i>	<i>Date service terminated</i>
Drummond, Thomas Gresham, Walter Q.	Dec. 22, 1869 Oct. 30, 1884 (recess); Dec. 26, 1884 (life- time).	July 18, 1884 Mar. 3, 1893
Woods, William Allen Jenkins, James Graham Showalter, John W. Grosscup, Peter Stenger Baker, Francis Elisha Seaman, William H. Kohlsaatt, Christian Cecil Mack, Julian W. (assigned while serving on commerce court by Chief Justice White, see Justice Depart- ment Registers, vols. 20 through 33).	Mar. 21, 1892 Apr. 1, 1893 Mar. 30, 1895 Feb. 1, 1899 Feb. 4, 1902 Apr. 11, 1905 Mar. 24, 1905 Feb. 4, 1911	June 29, 1901 Feb. 23, 1905 Dec. 10, 1898 Oct. 23, 1911 Mar. 15, 1924 Mar. 8, 1915 May 11, 1918 June 30, 1929 (when assigned by Chief Justice Taft as addi- tional circuit judge, Second and Sixth Circuit Courts under provision act of Oct. 22, 1913; vacancy created upon transfer not filled in ac- cordance with act of Oct. 22, 1913)
Alschuler, Samuel	Oct. 5, 1915 (recess); Jan. 31, 1916 (lifetime).	May 15, 1936
Evans, Evan A. Page, George True Anderson, Albert B. Sparks, William Morris FitzHenry, Louis Major, J. Earl Treanor, Walter Emanuel Kerner, Otto	May 17, 1916 Mar. 27, 1919 Jan. 13, 1925 Nov. 6, 1929 Oct. 3, 1933 Apr. 6, 1937 Jan. 11, 1938 Nov. 23, 1938 (recess); Feb. 13, 1939 (life- time).	July 7, 1948 Oct. 1, 1930 Oct. 31, 1929 Nov. 13, 1948 Nov. 18, 1935 Mar. 23, 1956 Apr. 26, 1941 Dec. 13, 1952
Minton, Sherman Duffy, F. Ryan Finnegan, Philip J. Lindley, Walter C. Swaim, H. Nathan	May 29, 1941 Feb. 14, 1949 Aug. 12, 1949 Oct. 24, 1949 Nov. 7, 1949 (recess); Feb. 24, 1950 (life- time).	Oct. 5, 1949 July 1, 1966 Jan. 4, 1959 Jan. 2, 1958 July 30, 1957
Schnackenberg, Elmer Jacob Hastings, John S. Parkinson, W. Lynn Knoch, Winfred George Castle, Latham Kiley, Roger Joseph Swygert, Luther Merritt Cummings, Walter J., Jr. Fairchild, Thomas Edward Kerner, Otto Pell, Wilbur F., Jr. Stevens, John Paul Sprecher, Robert A. Tone, Philip W. Bauer, William J. Wood, Harlington Jr. Cudahy, Richard D.	Feb. 23, 1954 Sept. 10, 1957 do Sept. 15, 1958 May 8, 1959 July 10, 1961 Oct. 11, 1961 Aug. 15, 1966 Aug. 24, 1966 May 20, 1968 May 11, 1970 Nov. 2, 1970 May 7, 1971 May 17, 1971 Jan. 3, 1975 May 28, 1976 Oct. 10, 1979	Sept. 15, 1968 Feb. 1, 1969 Oct. 26, 1959 Dec. 4, 1967 Feb. 28, 1970 Jan. 1, 1974 Now serving Do Do July 22, 1974 Now serving Dec. 19, 1975 Now serving Apr. 30, 1980 Now serving Do Do

Source: Staff of Senate Comm. on the Judiciary, 92d Cong., 2d Sess., Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served during the Period 1801 through May 1972, 141 (Comm. Print 1972)

APPENDIX II

**SUPREME COURT OF THE UNITED STATES ASSIGNMENT OF JUSTICES FOR THE SEVENTH CIRCUIT**

<i>Date of assignment</i>	<i>Justice</i>	<i>Source</i>
Mar. 5, 1845	McLean, John do	40 United States Reports 44-47 United States Reports
Apr. 8, 1867	Swayne, Noah H.	65-69 United States Reports
Apr. 1, 1874	Davis, David do	71-85 United States Reports 86-94 United States Reports
Apr. 22, 1878	Harlan, John M.	96-142 United States Reports
Oct. 17, 1892	do	146 United States Reports
Dec. 19, 1892	Fuller, Melville W.	146-147 United States Reports
July 15, 1893	do	150 United States Reports
Apr. 2, 1894	Harlan, John M.	152 United States Reports
Feb. 3, 1896	Brown, Henry B.	160-187 United States Reports
Dec. 8, 1902	do	187 United States Reports
Mar. 9, 1903	Day, William R.	189-218 United States Reports
Jan. 9, 1911	do	219-222 United States Reports
Mar. 18, 1911	Lurton, Horace	223-234 United States Reports
Oct. 19, 1914	McReynolds, James	235-240 United States Reports
June 12, 1916	do	241 United States Reports.
Oct. 30, 1916	Clarke, John H.	242-256 United States Reports
Oct. 24, 1921	do	257-259 United States Reports
Oct. 16, 1922	Sutherland, George	260 United States Reports.
Feb. 23, 1923	do	261-266 United States Reports
Mar. 16, 1925	Butler, Pierce	267-278 United States Reports
Apr. 10, 1929	Van Devanter, Willis	279-280 United States Reports
Mar. 28, 1932	do	285-301 United States Reports
Nov. 8, 1937	Cardozo, Benjamin	302 United States Reports.
Feb. 7, 1938	do	303-305 United States Reports
Feb. 6, 1939	Frankfurter, Felix	306 United States Reports.
Apr. 24, 1939	Douglas, William O	307-308 United States Reports
Feb. 12, 1940	Murphy, Frank	309-313 United States Reports
Oct. 14, 1941	Byrnes, James F.	314-317 United States Reports
Mar. 1, 1943	Murphy, Frank	318-328 United States Reports
Oct. 14, 1946	do	329-337 United States Reports
Oct. 14, 1949	Minton, Sherman	338-347 United States Reports
Apr. 4, 1955	do	348-351 United States Reports
Oct. 16, 1956	Burton, Harold	352 United States Reports
Mar. 25, 1957	Clark, Tom C.	353-387 United States Reports

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Oct. 11, 1965	do	388 United States Reports
Oct. 9, 1967	Marshall, Thurgood	389-398 United States Reports
June 9, 1970	do	399-402 United States Reports
Jan. 7, 1972	Rehnquist, William H.	vol. 403-423
Dec. 19, 1975	Stevens, John Paul	vol. 424-

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Source: Staff of Senate Comm. on the Judiciary, 92d Cong., 2d Sess., Legislative History of the United States Circuit Courts of Appeals and the Judges Who Served during the Period 1801 through May 1972, 154 (Comm. Print 1972)

## JUDGES OF THE SEVENTH CIRCUIT, 1945-1980

### F. RYAN DUFFY/Wisconsin/Democrat

June 23, 1888	Born in Fond du Lac, Wisconsin
1910 to 1912	University of Wisconsin, B.A., LL.B., LL.D.
June 3, 1912	Admitted to Wisconsin bar
March 4, 1933 to January 3, 1939	United States senator from the state of Wisconsin
July 1, 1939	Appointed district judge for the Eastern District of Wisconsin by President Franklin D. Roosevelt to succeed Judge Geiger
February 2, 1949	Judicial oath of office as district judge taken Appointed circuit judge by President Harry S Truman to succeed Judge Evans
February 14, 1949	Judicial oath of office as circuit judge taken
June 15, 1954	Became chief judge of the Seventh Circuit, effective September 1, 1954, to succeed Chief Judge Major
1954 to 1958	Member, Judicial Conference of the United States
1955	DePaul University, LL.D.
August 6, 1959	Relinquished position as chief judge of the Seventh Circuit upon reaching the age of seventy and resumed position as active associate circuit judge (pursuant to Act of June 25, 1948, 62 Stat. 871; CH.646; as amended by Act of August 6, 1958, 72 Stat. 497; Public Law 85-593); succeeded by Judge Hastings as chief judge of the Seventh Circuit, effective August 6, 1959
June 30, 1966	Accepted senior judge status
August 16, 1979	Died (age 91) <i>9 years of service as district judge</i> <i>17 years of service as active circuit judge</i> <i>13 years of service as senior circuit judge</i>

### PHILIP J. FINNEGAN/Illinois/Democrat

June 25, 1886	Born in Chicago, Illinois
1913	Chicago Law School, LL.B. Admitted to Illinois bar
1922 to 1929	Commenced practice of law at Chicago, Illinois
1929 to 1949	Judge, Municipal Court of Chicago
May 5, 1949	Judge, Circuit Court of Cook County, Illinois Appointed circuit judge by President Harry S Truman to succeed Judge Sparks
August 12, 1949	Judicial oath of office as circuit judge taken
January 4, 1959	Died (age 72) <i>9 years of service as circuit judge</i>

### WALTER C. LINDLEY/Illinois/Republican

July 12, 1880	Born in Neoga, Illinois
1901, 1904, 1910	University of Illinois, B.A., LL.B., J.D., LL.D.
1904	Admitted to Illinois bar
1904 to 1922	Commenced practice of law at Danville, Illinois Master in Chancery of U.S. District Court for the Eastern District of Illinois

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	Member, Board of County Commissioners of Vermilion County, Illinois
	Member, Danville Illinois Board of Education
September 22, 1922	Appointed district judge for the Eastern District of Illinois by President Warren G. Harding to fill additional judgeship (second judgeship pursuant to Act of Sept. 14, 1922, 42 Stat. 837)
	Judicial oath of office as district judge taken
1944	Appointed member of the U.S. Emergency Court of Appeals
October 13, 1949	Appointed circuit judge by President Harry S. Truman to succeed Judge Minton
October 24, 1949	Judicial oath of office as circuit judge taken
January 3, 1958	Died (age 77)
	<i>27 years of service as district judge</i>
	<i>9 years of service as circuit judge</i>

**H. NATHAN SWAIM/Indiana/Democrat**

November 30, 1890	Born in Zionsville, Indiana
1913 and 1949	DePauw University, B.A., LL.D., J.D.
1916	University of Chicago School of Law, J.D., Order of the Coif
July 1, 1916	Admitted to the Indiana bar
1916 to 1939	Practice of law at Indianapolis, Indiana
January 3, 1939 to 1945	Justice of the Supreme Court of Indiana
October 21, 1949	Appointed circuit judge by President Harry S. Truman to fill additional judgeship (sixth judgeship pursuant to Act of August 4, 1949) (recess appointment)
November 7, 1949	Judicial oath of office as circuit judge taken (recess appointment)
February 10, 1950	Permanent appointment as circuit judge
February 24, 1950	Judicial oath of office as circuit judge taken (permanent appointment)
July 30, 1957	Died (age 66)
	<i>7 years of service as circuit judge</i>

**ELMER JACOB SCHNACKENBERG/Illinois/Republican**

August 22, 1889	Born in Indianapolis, Indiana
1910 to 1912	University of Chicago, LL.B.
1912	Admitted to Illinois bar
	Commenced practice of law at Chicago, Illinois
1912 to 1915 and 1922 to 1944	Member, Illinois legislature
1941 to 1944	Speaker, Illinois House of Representatives
1945 to 1954	Judge, Circuit Court of Cook County, Illinois
November 17, 1953	Appointed circuit judge by President Dwight D. Eisenhower to succeed Judge Kerner (recess appointment)
	Did not enter on duty under recess appointment
February 10, 1954	Permanent appointment as circuit judge by President Dwight D. Eisenhower
February 23, 1954	Judicial oath of office as circuit judge taken
August 5, 1959	Waived right to serve as chief judge of the Seventh Circuit in favor of Judge John S. Hastings
September 15, 1968	Died (age 79)
	<i>14 years of service as circuit judge</i>

**JOHN S. HASTINGS/Indiana/Republican**

June 30, 1898 Born in Washington, Indiana  
1916 to 1918 Indiana University  
1920 United States Military Academy, West Point, N.Y., B.S.  
1924 Indiana University School of Law, LL.B., Order of the Coif  
Admitted to the Indiana bar  
1924 to 1957 Practiced law in Washington, Indiana  
1936 to 1959 Trustee, Indiana University (president of the board of trustees,  
1951-1959)  
1949 to 1954 Member, Indiana State Board of Law Examiners  
August 26, 1957 Appointed circuit judge by President Dwight D. Eisenhower to  
succeed Judge Mayor  
September 10, 1957 Judicial oath of office as circuit judge taken  
1958 to 1968 Member, Judicial Conference Committee on Court Administration  
Member, Judicial Conference of the United States  
1959 Indiana University, Honorary LL.D.  
August 6, 1959 to Chief judge of the Seventh Circuit, succeeding Judge Duffy  
June 1, 1968  
1964 to 1972 Member and chairman, Judicial Conference Committee to  
implement the Criminal Justice Act  
June 1, 1968 Relinquished position as chief judge of the Seventh Circuit upon  
reaching the age of seventy and resumed position as active  
associate circuit judge (pursuant to Act of June 25, 1948, 62 Stat.  
871, CH.646; as amended by Act of August 6, 1958, 72 Stat. 497,  
Public Law 85-593); succeeded by Judge Castle as chief judge of  
the Seventh Circuit  
February 1, 1969 Accepted senior judge status  
February 7, 1977 Died (age 78)  
*12 years of service as active circuit judge*  
*8 years of service as senior circuit judge*

**WILLIAM LYNN PARKINSON/Indiana/Republican**

September 18, 1902 Born in Attica, Indiana  
1920 to 1921 Purdue University  
Valparaiso University, Honorary LL.D.  
1923 Admitted to Indiana bar  
1923 to 1937 Practiced law at Lafayette, Indiana  
1937 to 1954 Judge, circuit court of Tippecanoe County, Indiana  
August 6, 1954 Appointed district judge for the Northern District of Indiana by  
President Dwight D. Eisenhower to fill additional judgeship  
(pursuant to Act of Feb. 10, 1954, 68 Stat. 9)  
September 1, 1954 Judicial oath of office as district judge taken  
August 26, 1957 Appointed circuit judge by President Dwight D. Eisenhower to  
succeed Judge Swaim  
September 10, 1957 Judicial oath of office as circuit judge taken  
October 26, 1959 Disappeared  
April 24, 1960 Body recovered from Lake Michigan  
April 27, 1960 Burial at Lafayette, Indiana (age 59)  
*3 years of service as district judge*  
*2 years of service as circuit judge*

**WIN GEORGE KNOCH/Illinois/Republican**

May 24, 1895  
1917 and 1918  
Born in Naperville, Illinois  
De Paul University, LL.B., Honorary LL.D.s from North Central  
College, Illinois Benedictine College and De Paul University

October 3, 1917  
Admitted to the Illinois bar  
Commenced practice of law at Naperville, Illinois, on return from  
military service

1922 to 1930  
Attorney, board of supervisors, DuPage County, Illinois  
Attorney, Forest Preserve Commission, DuPage County  
Assistant states attorney, DuPage County

1930 to 1939  
County judge, DuPage County

1939 to 1953  
Judge, circuit court for the Sixteenth Judicial Circuit of Illinois,  
then comprising the counties of DuPage, Kane, DeKalb and  
Kendall

May 14, 1953  
Appointed district judge for the Northern District of Illinois by  
President Dwight D. Eisenhower to fill an additional judgeship  
(seventh judgeship pursuant to Act of August 14, 1950, 64  
Stat. 443)

May 21, 1953  
Judicial oath of office as district judge taken

August 21, 1958  
Appointed circuit judge by President Dwight D. Eisenhower to  
succeed Judge Lindley

September 15, 1958  
Judicial oath of office as circuit judge taken

December 4, 1967  
Accepted senior judge status and continued to sit with the court  
until the end of the 1973-1974 term  
*5 years of service as district judge*  
*9 years of service as circuit judge*  
*7 years of service as senior circuit judge*

**LATHAM CASTLE/Illinois/Republican**

February 27, 1900  
1924  
Born in Sandwich, Illinois  
Northwestern University Law School, LL.B.  
Admitted to the Illinois bar

1925  
Commenced practice of law at Sandwich, Illinois

1925 to 1928  
City attorney, Sandwich, Illinois

1928 to 1940  
States attorney, DeKalb County, Illinois

1933 to 1935  
Corporation counsel, Sycamore, Illinois

1940 to 1942  
Assistant attorney general, state of Illinois

1942 to 1952  
County judge, DeKalb County, Illinois

1953 to 1959  
Attorney general, state of Illinois

April 30, 1959  
Appointed circuit judge by President Dwight D. Eisenhower to  
succeed Judge Finnegan

May 8, 1959  
Judicial oath of office as circuit judge taken

June 1, 1968 to  
February 26, 1970  
Chief judge of the Seventh Circuit, succeeding Judge Hastings as  
chief judge

1968 to 1970  
Member, Judicial Conference of the United States

February 27, 1970  
Relinquished position as chief judge of the Seventh Circuit upon  
reaching the age of seventy and resumed position as active  
associate circuit judge (pursuant to Act of June 25, 1948 as  
amended by Act of August 6, 1958); succeeded by Judge Swygert  
as chief judge of the Seventh Circuit

February 28, 1970  
Accepted senior judge status  
*10 years of service as active circuit judge*  
*11 years of service as senior circuit judge*

**LUTHER MERRITT SWYGERT/Indiana/Democrat**

February 7, 1905  
1927 Born in Miami County, Indiana  
Notre Dame Law School, LL.B., Magna Cum Laude  
Admitted to the Indiana bar  
Commenced practice of law at Michigan City, Indiana

1931 to 1934 Deputy prosecuting attorney, Lake County, Indiana  
1934 to 1943 Assistant U. S. attorney, Northern District of Indiana  
October 16, 1943 Appointed district judge for the Northern District of Indiana by  
President Franklin D. Roosevelt to succeed Judge Slick (first  
judge appointed directly to the District Court for the Northern  
District of Indiana)

October 20, 1943 Judicial oath of office as district judge taken  
1945 Member, Judicial Conference Committee on Uniform Admissions  
to the District Courts and Courts of Appeal

1950 Member, Judicial Conference Committee to Study and Consider  
the Problem of Venue and Jurisdiction of the District Courts

1954 to 1961 Chief judge, District Court for the Northern District of Indiana  
1955 to 1959 Member, Judicial Conference Committee on Habeas Corpus and  
on Revision of the Laws

September 22, 1961 Appointed circuit judge by President John F. Kennedy to fill  
additional judgeship (seventh judgeship of the United States  
Court of Appeals for the Seventh Circuit, pursuant to Act of May  
19, 1961, 75 Stat. 80; Public Law 87-36)

October 11, 1961 Judicial oath of office as circuit judge taken  
1964 Valparaiso School of Law, LL.D.  
1969 to 1975 Member, Judicial Conference Subcommittee on Federal  
Jurisdiction

February 27, 1970 to Chief judge of the Seventh Circuit, succeeding Judge Castle;  
February 6, 1975 member, Judicial Conference of the United States  
February 6, 1975 Relinquished duties as chief judge of the Seventh Circuit;  
succeeded by Judge Thomas E. Fairchild  
*18 years of service as district judge*  
*14 years of service as circuit judge*

**ROGER J. KILEY/Illinois/Democrat**

October 23, 1900  
1923 Born in Chicago, Illinois  
University of Notre Dame, LL.B.  
Admitted to Illinois bar  
Commenced practice of law in Chicago, Illinois

1933 to 1940 Alderman, Chicago City Council  
1940 to 1941 Judge, Superior Court of Cook County, Illinois  
1941 to 1961 Judge, Appellate Court of Illinois, First District of Illinois  
June 30, 1961 Appointed circuit judge by President John F. Kennedy to succeed  
Judge Parkinson

July 10, 1961 Judicial oath of office as circuit judge taken  
1971 University of Notre Dame, Honorary LL.D.

January 1, 1974 Accepted senior judge status  
September 6, 1974 Died (age 73)  
*13 years of service as active circuit judge*  
*1 year of service as senior circuit judge*

**THOMAS EDWARD FAIRCHILD/Wisconsin/Democrat**

December 25, 1912	Born in Milwaukee, Wisconsin
1929 to 1931	Deep Springs College
1931 to 1933	Princeton University
1934	Cornell University, B.A.
1938	University of Wisconsin, LL.B. Admitted to the Wisconsin bar Commenced practice of law at Portage, Wisconsin
1941 to 1945	Attorney, Office of Price Administration
1945 to 1948	Practice of law in Milwaukee, Wisconsin
1948 to 1951	Attorney general, state of Wisconsin
1950	Democratic nominee from Wisconsin, United States Senate
1951 to 1952	U. S. attorney, Western District of Wisconsin
1952	Democratic nominee from Wisconsin, United States Senate
1953 to 1957	Practice of law in Milwaukee, Wisconsin
1957 to 1966	Justice, Supreme Court of Wisconsin
1960 to 1965	Chairman, Governor's Commission on Constitutional Revision
1966	St. Norbert College, Honorary LL.D.
August 11, 1966	Appointed circuit judge by President Lyndon B. Johnson to succeed Judge Duffy
August 24, 1966	Judicial oath of office as circuit judge taken
February 7, 1975 to present	Chief judge of the Seventh Circuit, succeeding Judge Luther M. Swygert

**WALTER J. CUMMINGS/Illinois/Democrat**

September 29, 1916	Born in Chicago, Illinois
1937	Yale University, B.A.
1940	Harvard University, LL.B. Admitted to the Illinois bar
1940 to 1946	Assistant to the U.S. solicitor general
1944 to 1946	Special assistant to the U.S. attorney general
1946	Commenced practice of law at Chicago, Illinois
1952 to 1953	U.S. solicitor general
August 11, 1966	Appointed circuit judge by President Lyndon B. Johnson to fill additional judgeship (eighth judgeship pursuant to Act of March 18, 1966, 80 Stat. 75)
August 15, 1966	Judicial oath of office as circuit judge taken

**OTTO KERNER, JR./Illinois/Democrat**

August 15, 1908	Born in Chicago, Illinois
1930	Brown University, B.A.
1934	Northwestern University Law School, J.D. Admitted to Illinois bar Commenced practice of law in Chicago, Illinois
1947 to 1954	U. S. attorney, Northern District of Illinois
1954 to 1960	County judge, Cook County, Illinois
1961 to 1968	Governor, state of Illinois
1967 to 1968	Chairman, President's Commission on Civil Disorders
April 22, 1968	Appointed circuit judge by President Lyndon B. Johnson to succeed Judge Knoch
May 20, 1968	Judicial oath of office as circuit judge taken
July 22, 1974	Resigned as circuit judge
May 6, 1976	Died (age 67) <i>6 years service as circuit judge</i>

**WILBUR FRANK PELL, JR./Indiana/Republican**

December 6, 1915 Born in Shelbyville, Indiana  
1937 Indiana University, B.A.  
1940 Harvard University, LL.B., Cum Laude  
Admitted to Indiana bar  
1940 to 1942 Commenced practice of law in Shelbyville, Indiana  
1942 to 1945 Special agent, Federal Bureau of Investigation  
1945 to 1970 Resumed practice of law in Shelbyville, Indiana  
1953 to 1955 Deputy attorney general, state of Indiana  
1957 to 1958 President, Shelby County Bar Association  
1962 to 1963 President, Indiana State Bar Association  
1968 to 1969 Chairman, house of delegates, Indiana State Bar Association  
Member, Board of Managers, Indiana State Bar Association  
April 24, 1970 Appointed circuit judge by President Richard M. Nixon to succeed  
Judge Hastings  
May 11, 1970 Judicial oath of office as circuit judge taken  
1972 Yonsei University, Seoul, Korea, Honorary LL.D.  
1973 John Marshall School of Law, Honorary LL.D.

**ROBERT A. SPRECHER/Illinois/Republican**

May 30, 1917 Born in Chicago, Illinois  
1938 Northwestern University, B.S.  
1941 Northwestern University School of Law, J.D., Order of the Coif  
1942 Admitted to Illinois bar  
1942 to 1971 Practiced law in Chicago, Illinois  
1949 to 1971 Member, Illinois Board of Law Examiners  
1957 to 1963 Special assistant attorney general, state of Illinois  
1967 to 1969 Member, Board of Managers, Chicago Bar Association  
1968 to 1971 Chairman, Standing Committee on Law Lists, American Bar  
Association  
1959 to 1960 Chairman, National Conference of Bar Examiners  
April 23, 1971 Appointed circuit judge by President Richard M. Nixon to succeed  
Judge Castle  
May 7, 1971 Judicial oath of office as circuit judge taken

**PHILIP W. TONE/Illinois/Republican**

April 9, 1923 Born in Chicago, Illinois  
1943 University of Iowa, B.A.  
1948 University of Iowa, J.D.  
Yale Law School, Graduate Fellow  
1948 to 1949 Law clerk to Hon. Wiley B. Rutledge, justice of the United States  
Supreme Court  
1949 Commenced practice of law in Washington, D.C.  
1950 Commenced practice of law in Chicago, Illinois  
January 26, 1972 Appointed district judge for the Northern District of Illinois by  
President Richard M. Nixon to fill additional judgeship (thirteenth  
judgeship pursuant to Act of June 2, 1970, 84 Stat. 294)  
March 2, 1972 Judicial oath of office as district judge taken  
May 14, 1974 Appointed circuit judge by President Richard M. Nixon to succeed  
Judge Roger J. Kiley  
May 17, 1974 Judicial oath of office as circuit judge taken  
April 30, 1980 Resigned from the court of appeals to return to the practice of law  
*2 years service as district judge*  
*6 years service as circuit judge*

**WILLIAM J. BAUER/Illinois/Republican**

September 15, 1926 Born in Chicago, Illinois  
1949 Elmhurst College, B.A.  
1951 Admitted to Illinois bar  
1952 De Paul University College of Law, J.D.  
1952 to 1956 Assistant states attorney, DuPage County, Illinois  
1953 to 1964 Practice of law in Elmhurst, Illinois  
1959 to 1964 States attorney, DuPage County, Illinois  
1964 to 1970 Judge, circuit court for the Eighteenth Judicial Circuit of Illinois  
1969 Elmhurst College, Honorary LL.D.  
1970 to 1971 U. S. attorney, Northern District of Illinois  
November 10, 1971 Appointed district judge by President Richard M. Nixon to succeed  
Judge Perry  
November 29, 1971 Judicial oath of office as district judge taken  
December 20, 1974 Appointed circuit judge by President Gerald R. Ford to succeed  
Judge Otto Kerner, Jr.  
January 3, 1975 Judicial oath of office as circuit judge taken

**HARLINGTON WOOD, JR./Illinois/Republican**

April 17, 1920 Born in Springfield, Illinois  
1942 University of Illinois, B.A.  
1942 to 1946 Major, United States Army  
1948 University of Illinois, J.D.  
1948 to 1958 Practice of law in Springfield, Illinois  
1958 to 1961 U. S. attorney, Southern District of Illinois  
1961 to 1969 Resumed practice of law in Springfield  
1969 to 1970 Director, executive office for U.S. attorneys, U.S. Department of  
Justice, Washington, D.C.  
1970 to 1972 Associate deputy attorney general, U. S. Department of Justice  
1972 to 1973 Assistant attorney general in charge of civil division, U. S.  
Department of Justice  
July 18, 1973 Judicial oath of office as district judge taken  
May 7, 1976 Appointed circuit judge by President Gerald R. Ford to succeed  
Judge John Paul Stevens  
May 10, 1976 Judicial oath of office as circuit judge taken

**RICHARD D. CUDAHY/Wisconsin/Democrat**

February 2, 1926 Born in Milwaukee, Wisconsin  
1944 to 1951 United States Army and Air Force, First Lieutenant  
1948 United States Military Academy, B.S.  
1955 Yale Law School, J.D.  
1955 to 1956 Law clerk, U.S. Court of Appeals, Second Circuit  
1956 to 1957 Assistant to legal adviser, U.S. Department of State, Washington,  
D.C.  
1957 to 1961 Practice of law in Chicago, Illinois  
1961 to 1971 President (later chairman of board and chief executive officer),  
Patrick Cudahy Inc. (meat processing firm)  
1962 to 1965 Practice of law (part-time) in Milwaukee, Wisconsin  
1962 to 1965 and Lecturer in law, Marquette University Law School, Milwaukee,  
1973 to 1974 Wisconsin  
1966 to 1967 Visiting professor of law, University of Wisconsin Law School,  
Madison, Wisconsin  
1968 to 1972 Practice of law (part-time) in Milwaukee

1972	Practice of law (full-time) in Milwaukee
1972 to 1975	Commissioner, Public Service Commission of Wisconsin
1975 to 1976	Chairman, Public Service Commission of Wisconsin
1976 to 1979	Practice of law (full-time) in Washington, D.C.
1978 to 1979	Professorial lecturer of energy law at the George Washington University Law Center, Washington, D.C.
September 25, 1979	Appointed circuit judge by President Jimmy Carter
October 10, 1979	Judicial oath of office as circuit judge taken



## **COLLINS FITZPATRICK**

September 28, 1944	Born in Chicago, Illinois
1962 to 1966	Marquette University, B.A.
1966 to 1969	Harvard University, J.D.
1969	Admitted to Illinois bar
1969 to 1971	Reginald Heber Smith Community Lawyer Fellowship from University of Pennsylvania and Howard Law School
1971	Law clerk to Honorable Roger J. Kiley, United States Court of Appeals for the Seventh Circuit
1972 to 1975	Law clerk and administrative assistant to Chief Judge Luther M. Swygert, United States Court of Appeals of the Seventh Circuit
1975	Certified as Fellow of Institute for Court Management
1975 to 1976	Senior law clerk, United States Court of Appeals for the Seventh Circuit
1976	Appointed circuit executive, United States Court of Appeals for the Seventh Circuit

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