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Is Hugo L. Black a Supreme Court Justice De Jure?

IS THE appointment of Hugo L. Black to the office of Associate Justice of the Supreme Court of the United States invalid on the ground that he was legally ineligible at the time the appointment was made?

On June 2, 1937, Justice Willis Van Devanter retired from "regular active service on the bench" of the Supreme Court under the Act of March 1, 1937. On August 12, 1937, the President sent to the Senate the nomination of Hugo L. Black to be an Associate Justice of the Supreme Court. On objection to immediate consideration, made by Senator Hiram Johnson, the consideration of the nomination was postponed. Five days later, after reference to the Judiciary Committee of the Senate, thence to a sub-committee which had a short session, and after debate in the Senate for part of two days, the Senate confirmed the nomination by a vote of 63 to 16, an ample vote since all that is required is a bare majority of those voting provided a quorum is present, and a quorum is one more than half the total membership.¹

The Constitution provides that the President "by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court."² Practice for a century and a half has interpreted this to mean that the President shall nominate and that the Senate shall vote to confirm or decline to confirm the nomination. The Senate's power to refuse confirmation is absolute. Confirmation may be refused without reason or for any reason. Consequently the Senate is not confined to the consideration of the legal eligibility of the candidate. Indeed, in my opinion, the social and economic philosophy of a nominee is an element far more important for the President and the Senate to consider than is the narrow question of legal eligibility. I say this, in passing, to disclose that while I am consciously confining this discussion to the narrow issue of legal eligibility, I am not unaware of its minor importance. Nothing is clearer than that the nominee's having or not having some particular

¹ U. S. CONST., Art. II, § 2, cl. 2; Art. I, § 5, cl. 1. See the Supreme Court's holdings on analogous points in *National Prohibition Cases* (1920) 253 U. S. 350, 386; and *Missouri Pac. Ry. Co. v. Kansas* (1919) 248 U. S. 276.

² U. S. CONST., Art. II, § 2, cl. 2.

social, economic or political philosophy has nothing whatever to do with his legal eligibility.

Coming now to our question of legal eligibility. The Constitution declares no person is eligible to be President who did not acquire citizenship at the time of his birth, has not reached the age of thirty-five and been a resident of the United States for fourteen years.³ To be legally eligible to be a Representative in Congress a person must have been a citizen for at least seven years, twenty-five years of age, and an inhabitant of the State in which he is elected.⁴ A Senator must have been nine years a citizen, thirty years of age and an inhabitant of the State in which he is elected.⁵ But the Constitution does not require that Justices of the Supreme Court shall be citizens, residents, or inhabitants, or be of any particular age. Nor does it require that they be lawyers, or have had experience as judges, or indeed have a legal education. Any male or female in the world is legally eligible to appointment to the Supreme Court, save only a Senator or Representative in the United States Congress, in certain circumstances. The sole rule of eligibility to appointment to the Supreme Court, the sole rule of qualification or disqualification prescribed by the Constitution is:⁶

"No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time"

A Supreme Court Justiceship is undoubtedly a "civil office."⁷ The time for which Senator Black was elected a Senator was the six year period ending January 3, 1939.⁸ Senator Black was ineligible during the whole of that period of time, whether he resigned from the Senate or not, if the Justiceship to which he was appointed was created or the emoluments of it were increased within that six year period. But, parenthetically, if a Justiceship was created during that six year period, or its emoluments increased during that period, Senator Black would have become eligible to an appointment to it made after January 3, 1939, even if at that later time he was again a member of the Senate, that is,

³ U. S. CONST., Art II, § 1, cl. 4.

⁴ U. S. CONST., Art. I, § 2, cl. 2.

⁵ U. S. CONST., Art. I, § 3, cl. 3.

⁶ U. S. CONST., Art. I, § 6, cl. 2.

⁷ The distinction here is between civil and military offices. It seems to have been thought that even this limited ineligibility of Senators and Representatives should not extend to military offices. See remarks of Gouverneur Morris and Edmund Randolph. 2 FARRAND, DOCUMENTS (1911) 289-290. Almost immediately after these remarks the word "civil" appears in the proposal drafted by the "Committee of eleven."

⁸ See U. S. CONST., Amend. XX, § 1.

by a subsequent election.⁹ This was the material point in the appointment of Senator Kenyon to be a Circuit Judge. It is not material here and is mentioned merely to show that we are dealing with a rather technical rule of ineligibility. Senator Black would have been legally eligible beyond question if his appointment had come a year and a half later.

Firstly, it is contended that the Justiceship to which Hugo L. Black was appointed was created by the Act of March 1, 1937; that Justice Van Devanter in retiring under that Act did not relinquish his office, that he still retains the same Justiceship from which he retired and that the Justiceship to which Hugo L. Black has been appointed is a new tenth Justiceship made potential by the Act of 1937 and actual by the retirement of Justice Van Devanter.

Secondly, or as an alternative, it is contended that the Act of March 1, 1937 increased the emoluments of the Justiceship to which Hugo L. Black was appointed.

To a layman reading the Act of March 1, 1937, it would not appear in the slightest degree to have either of these effects. When analyzed, however, it presents some extraordinary and puzzling difficulties.

I.

THE CREATION OF OFFICE QUESTION

The title of the Act is: "An Act To provide for retirement of Justices of the Supreme Court" and it reads as follows:

"That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code [U.S.C., title 28, section 375], and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake."

Focusing on the purpose of this new statute, to give to Supreme Court Justices the "same rights and privileges with regard to retiring, instead of resigning" that a prior law still in force gave to certain other judges, we have to ascertain what this statutory vocabulary means in its distinction between "resigning" and "retiring," a distinction that is not made in common parlance. We may look to the old statute to which reference is made in the new. The old statute, section 375 of Title 28 of the United States Code, has its origin in an Act of April 10, 1869.¹⁰ This original act

⁹ See McGovney, *Ineligibility of a United States Senator or Representative to Other Federal Offices* (1922) 7 IOWA L. BULL. 152-163; (1922) 33 OPS. ATTY. GEN'L 88.

¹⁰ § 5, 16 STAT. (1869) 45, REV. STAT. (1878) § 714.

gave to *any* judge of any federal court who *resigned* after ten years' service and attainment of the age of seventy "the same salary" for the rest of his life that he was receiving at the time of his resignation. A judge who resigned ceased to hold any office. Obviously the "salary" after resignation was a pension. Later this pension privilege was limited to federal judges whose tenure is during good behavior,¹¹ including Supreme Court Justices, Circuit Judges, District Judges and some others. With other minor changes,¹² immaterial here, the pension law so stood in 1919 and so stands today.

The pension law standing so, an Act of February 25, 1919¹³ added a new feature, an alternative. The Act, while expressly excluding Supreme Court Justices from this alternative, enacted that any other judge who became entitled to a pension upon resignation under the prior law might, instead of resigning with a pension, elect to "retire" and draw the same salary for life that he was receiving just before he retired. In dollars the pension and retired pay were identical in amount. On the face of it it seems another tweedle-dee and tweedle-dum distinction. But the Supreme Court purporting to speak the voice of the Constitution found a material difference.

This Act of 1919 became section 260 of the Judicial Code referred to in the Act of March 1, 1937. Its exact language is:

"But, instead of resigning, any judge other than a justice of the Supreme Court, . . . may retire, upon the salary of which he is then in receipt, *from regular active service on the bench*, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge of that circuit and be by him authorized to perform such judicial duties in such circuit *as such retired judge may be willing to undertake . . .*"¹⁴

United States Circuit Judge Wilbur F. Booth, after the required years of service and after attaining seventy years of age, retired January 1, 1932 under the above provisions. When first appointed a Judge, his salary had

¹¹ Act of February 15, 1909, 35 STAT. (1909) 619.

¹² By the Act cited in note 11, a change was made in the measure of the pension, but the old measure was restored in 1911. Judicial Code § 260, 36 STAT. (1911) 1161. By the same Act the ten year service was required to be continuous, but service in two or more federal courts might be tacked together, if continuous, to make up the ten years. But continuity is no longer required. Act of March 1, 1929, c. 419, 45 STAT. (1929) 1422. For the fiscal year 1932-33 the pension was cut one-half. See note 79, *infra*.

¹³ Act of February 25, 1919, c. 29, § 6, 40 STAT. (1919) 1157, 28 U. S. C. A. § 375.

¹⁴ Italics added. The detail here omitted is: "or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake, or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake." 28 U. S. C. A. § 375.

been \$8,500. It had been increased, and at the date of his retirement it was \$12,500. The latter was the measure of his retired pay.

Along with reductions in salaries of nearly all federal officers and in pensions and retired pay of numerous classes of retired officers, Congress by Act of June 16, 1933¹⁵ reduced the retired pay of judges by fifteen per centum. Judge Booth brought suit in the Court of Claims to compel the United States to pay the amount withheld from him by this cut. The Court of Claims in *Booth v. United States*¹⁶ certified two questions to the Supreme Court. The first was whether Judge Booth in his "retirement" held a judicial office or judgeship of a kind the salary of which is protected against diminishment by Congress.

The Supreme Court answered "Yes," that Judge Booth, though "retired," occupied an office within the protection of section 1 of Article III of the Constitution, which reads:

"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

It was not necessary to the decision to say that the Judge occupied after retirement the identical judgeship that he held before. It was enough to hold that Judge Booth in retiring from "regular active service on the bench" of the Circuit Court of Appeals of the Eighth Circuit passed into a judgeship in which he might exercise some of the judicial power of the United States defined in Article III, section 2 of the Constitution, for the salary protection given by section 1 extends to all such judges.

The Court was quite right in saying that Judge Booth after "retiring" held a judicial office. It is true that by the statute a "retired" judge is not required to perform any further judicial service. He need render no further service if he is not "willing to undertake" any. Even though willing and desirous of performing judicial functions, he cannot unless he is "called upon" and "authorized" by certain other judges. Yet, the statute makes him eligible to perform them. As Justice Roberts said, "It is scarcely necessary to say that a retired judge's judicial acts would be illegal unless he who performed them held the office *of judge*. It is a contradiction in terms to assert that one who has retired in accordance with the statute may continue to function as *a federal judge* and yet not hold the office of *a judge*."¹⁷ The words I have italicized were enough to dispose of the issue. For if Judge Booth swapped one federal judgeship for another, the Court would reach its objective by holding that the pay provided at the time of the swap for that second judgeship could not be diminished by Congress during his continuance in that second office.

¹⁵ 48 STAT. (1933) 283, 307.

¹⁶ (1934) 291 U. S. 339.

¹⁷ *Ibid.* at 350. Italics added.

Unfortunately Justice Roberts used some additional and unnecessary words, unnecessary to the decision that Judge Booth's retired pay was undiminishable. These superfluous words will be seized upon as applicable to the case of Associate Justice Black. Attempt is made to read these words as meaning that a judge retired under the Act of 1919 still holds the identical office he held before retirement. Just prior to the words above quoted, Justice Roberts, for the Court, had said: "By retiring pursuant to the statute a judge *does not relinquish his office.*" Do the words I have italicized mean merely—does not cease to be a judge? Considering the irrelevancy to Judge Booth's case of deciding whether Judge Booth held the same or merely *some* judicial position, it is quite understandable that the writer of the Court's opinion might slip into ambiguous phrases capable of both meanings.

Later on Justice Roberts says that the retired judge "does not surrender his commission, but continues to act under it. He loses his seniority in office, but that fact, in itself, attests that he remains in office." These words likewise are ambiguous. A reader is not justified in concluding from them that the Court had definitely decided that Judge Booth still held the identical office from which he had retired. It would be in accordance with common usage to say that a Secretary of the Treasury who resigns and accepts appointment as Secretary of State "remains in office." As to the point that the "retired" judge "does not surrender his commission, but continues to act under it," that is offered to support the conclusion that the "retired" judge "remains in office." Moreover, that remark may have been made in the light of historical precedents in which Congress has transferred a judge from one judgeship to another without a new appointment and without a new commission. To these I shall refer later.

Mr. Justice Roberts goes on to say: ¹⁸

"Some reference is made to the fact that under the Act a successor to the retiring judge is to be appointed, and it is claimed the direction is inconsistent with his *retention of office.* The phraseology may not be well chosen, but it cannot be construed to *vacate the office of the retiring judge,* in light of the evident purpose that he shall *continue to hold office* and perform judicial duties."

The words I have italicized, "retention of office" and "continue to hold office" may express merely the idea that the retired judge holds *a* judicial office. They are not the words that would be chosen by one bent upon clearly saying that the judge retains his former office. Indeed there is an incongruity between retiring from an office and still retaining that very office. So the statement that the statute "cannot be construed to vacate the office of the retiring judge," while the most difficult phrase in the opinion, may mean merely that the position vacated, to which a suc-

¹⁸ *Ibid.* at 351. Italics added.

cessor is to be appointed, is the judgeship held by the retiring judge before he retired, and that the statute does not "vacate the office of the retiring judge," that is, the office held by him after retirement. A retired judge holds an office which is not vacated until his death, and the statute does not intend that that shall be filled by a new appointment.

The second question certified to the Supreme Court by the Court of Claims in *Booth v. United States* was: What if a judge's salary of \$8,500 when first appointed is increased to \$12,500 a year and is the latter figure when he retires, is Congress forbidden thereafter to cut the retired pay down to an intermediate figure, say \$10,625 a year, as in Judge Booth's case? The Supreme Court answered "Yes," the Constitution forbids. This is a logical consequence of the answer to the first question, that Judge Booth occupied an office which carried a protected compensation. It is entirely consistent with the idea that Judge Booth retired from one judicial office into another. At the time he took that other office, the statute fixed his pay in it at \$12,500 a year. Granting the major point decided, that Judge Booth after his retirement occupied an office the pay of which the Constitution protected, it logically followed that the sum protected was \$12,500, the pay of that office.

On this point also, Justice Roberts, for the Court, used some ambiguous language, in rephrasing the question thus, "In other words, is a diminution after an increase banned, if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office? The answer must be in the affirmative."¹⁹

In view of the slight consideration given this second question it is not a strong inference from this language that the Court definitely regarded Judge Booth as having been continuously in a single office. The passage quoted may mean only that where a judge has had different salaries at different times, whether in a single judgeship or a succession of judgeships, the salary that cannot be cut is the one he is receiving when the cut is attempted. As the Court adds, to hold otherwise "would be subversive of the purpose of § 1 of Article III."

Of course, the actual decision in the *Booth* case, that the retirement allowance is protected by the Constitution, is itself questionable. The Constitution in forbidding diminishment of judges' salaries "during their Continuance in Office," assumes that the existence of a power in Congress to diminish their salaries will make them subservient to Congress in their decisions. The Court in *Booth v. United States* assumes that a power in Congress to diminish retired pay would enable Congress to exert the same sinister coercion over the decisions of a judge whom Congress has permitted to retire without obligation ever to sit in any court or ever render

¹⁹ *Ibid.* at 352.

any decision. Moreover, this retired judge cannot sit in any case except upon the call of a Circuit Judge or the Chief Justice, who would never call any retired judge to activity if this fancied coercive power of Congress became an actuality. To say that this is the kind of official compensation that the Constitution means to protect is going far. It causes us to reflect how lacking in a sense of humor are the members of any profession when discussing the perquisites of their profession. The letter of the Constitution may serve although the spirit is lacking, just as may the spirit when the letter is lacking.

In summary, it may be said that in *Booth v. United States* the Supreme Court held that the retired pay of a judge who retired under the Act of 1919 could not after his retirement be cut by Congress below the figure fixed by law at the time of his retirement.

This was the outstanding point in the minds of Representatives and Senators when they were drafting and debating the bill which became the Act of 1937. It will be recalled that the latter Act reads: "That Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 260 of the Judicial Code," that is, the Act of 1919 passed upon in *Booth v. United States*.

This Act of March 1, 1937 passed the House of Representatives by a large majority and the Senate almost unanimously.²⁰ It would be interesting to digress into the politics and the variety of motives that produced its enactment, and into its alleged relation and alleged lack of relation to the President's proposal to reorganize the judiciary including the Supreme Court. There is no doubt that many of its backers desired the retirement of some of the six Supreme Court Justices who had attained the age and length of service entitling them to pensions if they resigned but who had not chosen to resign. Some thought the privilege of "retirement" with pay would be regarded by the Justices as sufficiently more attractive than resignation with a pension to induce their retirement. Others purported to support the Act solely out of fairness to the Supreme Court Justices, putting them on equal footing with the other judges.

But whatever else may be in doubt there is no doubt whatever that Congress believed that the Supreme Court had drawn a distinction between retired pay under the Act of 1919 and the pension to which Supreme Court Justices were eligible upon resignation. Now there is not a word in the opinion in *Booth v. United States* about pensions. There is no other decision of the Court that the pension of a resigned judge can be cut down or cut off. There seems, however, to be no doubt about it. When a judge

²⁰ The vote in the Senate, February 26, 1937, was: yeas, 76; nays, 4. Without accounting for the attitude of all absentees it was announced that at least ten would have voted yea, if present.

"resigns," within the meaning of all the statutes from 1869 to 1919, he ceases to hold any office whatever. The Constitution only forbids diminishing compensation of judges "during their Continuance in Office." It seems that the Court, in *Booth v. United States*, assumed that a pension after resignation could be diminished by Congress, otherwise it would not have labored so much to find that the judge who "retired," instead of resigning, under the Act of 1919 held some kind of office, the pay in which could not be diminished during his continuance in that office.

Congress, desiring by the Act of March 1, 1937 to make the retirement allowance of Supreme Court Justices undiminshable, adopted the technique of the Act of 1919 and provided a judicial position into which a retiring justice would pass. This is the purpose of the last clause of the act:

"... but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired justice may be willing to undertake."

The Supreme Court, standing by its decision in *Booth v. United States*, may be counted on to hold that this eligibility to render judicial service constitutes holding a judicial office, and that "retired" pay of a retired justice, such as Justice Willis Van Devanter, is undiminshable. The Court is free, however, to disregard the ambiguous phrases of its opinion in *Booth v. United States* that squint at the notion that the retired Justice still holds in his retirement the very justiceship from which he retired. Even if the Court should hereafter make those superfluous words a ground of decision with respect to District and Circuit Judges retiring under the Act of 1919, it still need not do so with respect to Supreme Court Justices retiring under the Act of 1937. The case is different. Under the Act of 1919 a Circuit Judge may be called back from his retirement, if he is willing, to perform all the functions of a Circuit Judge, while the Act of 1937 provides that a retired Supreme Court Justice may be recalled, if he is willing, to discharge only minor judicial functions to which membership in the Supreme Court is not essential. While the statute says that a retiring Justice retires "from regular active service on the bench" of the Supreme Court, it does not mean that he may be recalled to irregular or intermittent service on that bench. The latter is excluded by definite provision that the recall may be only to render minor services vaguely referred to. If there is any ambiguity about this, it is resolved by reference to the House and Senate Committee Reports which accompanied the bill. The Senate Committee Report²¹ reads:

"A Justice of the Supreme Court, on retiring, under this bill if en-

²¹ Senate Committee on the Judiciary, February 23, 1937. SEN. REP. No. 119, 75th Cong., 1st Sess. (1937).

acted, would not thereafter sit as a member of the Supreme Court nor assume any of the duties or services belonging to or performed by members of that body."

The House Committee Report ²² stated:

"Under the terms of this bill a retired Justice would be relieved of regular active service. He would no longer sit in the Supreme Court, by assignment or otherwise, and a successor to him on that Court would be appointed."

When we examine the statutes to discover what judicial services a retired Justice may be asked to render and which, if asked, he may render, if willing, we enter a field of uncertainty. Provisions scattered here and there make Supreme Court Justices eligible to perform miscellaneous judicial functions. Most of these have become obsolete in practice and almost none of them is essential to the working of our judicial system. I refer to miscellaneous judicial acts which under the statutes a Justice may perform off the bench of the Supreme Court.

I shall run through a list of them. The reader will wonder, as does the writer, which of them Congress meant to refer to in the Act of 1937. That Act defines the functions a retired Justice may be called upon to discharge as "judicial duties, in any judicial circuit, including those of a circuit justice in such circuit." That is, such of these as the Chief Justice may call upon him and authorize him to perform. This surely does not mean that the Chief Justice may "authorize" the performance of judicial acts for which there is no other statutory basis. If some of these statutory functions conferred upon Justices of the Supreme Court acting single handed seem to be tied up inseparably with their character as such Justices, they may be regarded as excluded by the Act of 1937, especially if finding that Act ambiguous and obscure we resort to the Senate Committee Report to resolve our doubts. There it is said that the Act means that a retired Justice could not be called upon to "assume any of the duties or services belonging to or performed by members of that body," the Supreme Court.

This is not so absurd as at first sight it seems. There is much in the history of legislation with respect to our judiciary to sustain the idea that from the Judiciary Act of 1789 to date a person appointed to the Supreme Court has been appointed to two judicial offices—one, membership in the Supreme Court acting as a body, the other, composed of a miscellaneous lot of judicial functions dischargeable by him single handed, merely as a judicial officer of the United States. Which is which, is a puzzle. Moreover, though a statute makes a Supreme Court Justice eligible to discharge a specified function off the bench, it is not at all certain that Congress regarded it as one to which a retired Justice would be eligible.

²²House Committee on the Judiciary, February 4, 1937. H. R. REP. No. 176,

With these doubts and cautions we run through the statutes, though far from exhaustively.

OFF-THE-BENCH FUNCTIONS

1. *Circuit Riding*.—Among the regulations of the Supreme Court made by Congress is one requiring the Court to assign each of its members to a judicial circuit.²³ The United States is now divided into ten such circuits. The problem of assigning nine Justices to ten circuits has been solved by assigning one of them to two circuits.

Congress has given a statutory definition of the expressions "Circuit Justice" and "Justice of a Circuit," applicable wherever they are found in any Act of Congress. These terms are declared to be synonymous and to mean "the Justice of the Supreme Court who is allotted to any circuit,"²⁴ whether he be an Associate Justice of the Supreme Court or the Chief Justice. This function of a Supreme Court Justice as a Circuit Justice dates back to the beginning of our judicial system. Congress, by the Judiciary Act of 1789, subdivided the United States into three regions called "Circuits," and the Circuits into thirteen "Districts." In each District there was a District Court. It was a court for the trial of minor criminal offenses against the United States, of minor civil cases of specified types, and admiralty cases. It was presided over by a District Judge required to reside in the District.

For each Circuit there was a Circuit Court required to hold court once a year in each District within its Circuit. Thus, it was an itinerant court, going horse-back or by coach from District to District. The Circuit Courts were chiefly courts of first resort, while the District Courts were exclusively so. The difference was that the Circuit Courts tried the more serious criminal offenses against the United States and a wider range of civil cases. Until 1891 a Circuit Court also had appellate jurisdiction, hearing appeals from the District Courts in its circuit. When the Circuit Courts of Appeals were created in 1891 all appellate jurisdiction was taken from the Circuit Courts, and from that year until they were abolished in 1911 they were exclusively courts of first resort. Even from 1789 to 1891 the burden of their work had been the initial trial of cases, not the hearing of appeals. From time to time as the country expanded territorially and increased in population, additional Circuits and Districts were created but no essential change in the judicial system of the United States came until 1891, and even then the old Circuit Courts continued for twenty years more.

Who were the judges of the old Circuit Courts? Until 1869, with two

75th Cong. 1st Sess. (1937).

²³ 36 STAT. (1911) 1131, 28 U. S. C. A. § 215.

²⁴ 36 STAT. (1911) 1132, 28 U. S. C. A. § 217.

slight exceptions,²⁵ there were no Circuit Judges. The Circuit Courts were not judgeless; they were manned by District Court judges and by the Chief Justice and Associate Justices of the Supreme Court. This was the "circuit riding" so constantly complained of by the Supreme Court Justices, and this was the origin of the statutory title "Circuit Justice," meaning a Justice of the Supreme Court in his capacity of judge in a Circuit Court. In the earliest days two Supreme Court Justices and the District Judge of the District in which the Circuit Court was being held constituted the bench of the Court. Thus, two Supreme Court Justices were required to sit at least once a year in the trial of cases in every District.

Later the burden was lightened by requiring only one Supreme Court Justice to be assigned to each Circuit. Further relief came by the Act of 1869²⁶ which created the office of Circuit Judge, one for each Circuit. By that Act a Circuit Court could be held by a Supreme Court Justice ("Circuit Justice") alone, by the new Circuit Judge alone, or by a District Judge alone, or by any two of them together.

As late as 1872 it was the practice of the Supreme Court to adjourn in the middle of April to enable the Justices to be on the Circuits several weeks before the Circuit Courts closed for summer vacation.²⁷ As sessions of the Supreme Court lengthened, there was less and less circuit riding.

This circuit riding of the "Circuit Justices" was the first and very burdensome duty of the Supreme Court Justices off the bench of the Supreme Court. In coming later to survey a number of other judicial duties off that bench which the Justices are authorized to perform, it will be discovered that nearly all of them originated in the era of circuit riding and that most of those still authorized are unessential to the judicial system as it is today. Apart from their historical origin most of them would seem anomalous, yet as they still exist in the statutes, if not in practice, they must be taken into account in construing the Act of March 1, 1937.

To complete the story of circuit riding, it should be noted that when the Circuit Courts of Appeals, one for each Circuit, were added to

²⁵ The Act of February 13, 1801 (2 STAT. (1801) 89), repealed March 8, 1802 (2 STAT. (1802) 132), divided the United States into six circuits, and provided for the appointment of three "Circuit Judges" for the Circuit Court in each, except the sixth circuit where the Circuit Court was to be manned by one Circuit Judge and the District Judges in that circuit. These sixteen Circuit Judgeships lasted a little over a year, disappearing with the repeal. They were the "midnight judges" of John Adams' administration. By Act of March 2, 1855 (10 STAT. (1855) 631) a "Circuit Judge" was provided for the Circuit Court in remote California. Thus until the Act of 1869 (16 STAT. (1869) 44) the California circuit was exceptional.

²⁶ Act of April 10, 1869, c. 22, § 2, 16 STAT. (1869) 44.

²⁷ CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES (1880) 11.

the system in 1891, Supreme Court Justices were made competent to sit in those courts also. Congress did not create a new class of judges for those courts. It merely added one more Circuit Judge to each Circuit, and declared that a Circuit Court of Appeals should consist of the Supreme Court Justice assigned to the Circuit and the two Circuit Court Judges in the Circuit, and on failure of one or more of these to attend, then as many of the District Court Judges in the Circuit as were necessary to make up a Court of three judges.²⁸

From 1891 to 1911 the Supreme Court Justices had a double function of circuit riding. The statutes still contemplated that they should sit in the old Circuit Courts, which for that period were exclusively courts of first resort, and that they should sit also in the Circuit Courts of Appeals.

The Act of 1911²⁹ very materially altered our judicial system. It abolished the old Circuit Courts.³⁰ As a minor incident this legally terminated the old circuit riding of Supreme Court Justices. The jurisdiction of the old Circuit Courts was assigned to the District Courts, which thus became the great courts of first instance in the federal court system that they are today. The "Circuit Judges" in office lost their functions as Circuit Court Judges and became exclusively³¹ judges of the Circuit Courts of Appeals. Additional "Circuit Judges" were appointed, and the number has been increased from time to time, with a view to having a sufficient number to man the Circuit Court of Appeals in each Circuit, in theory at least. Nevertheless the Act of 1911 continued the provision of the Act of 1891 making "the Chief Justice and the Associate Justices of the Supreme Court assigned to each circuit . . . competent to sit as judges of the Circuit Court of Appeals within their respective circuits." So far as this function may be regarded as circuit riding, it is by the very language of the statute one of competency or eligibility, not one of legal duty. The statute authorizes no one to call or require a Supreme Court Justice to exercise it. The voluntary exercise of it has ceased in practice. If this is the sole reason the statutes still solemnly require the Supreme Court to allot each of its members to a circuit, they require an idle gesture.

Instances in which Supreme Court Justices have sat in a Circuit Court of Appeals in recent years are "very rare," say competent writers,³² listing Justice Holmes in 1908,³³ Justice Day in 1915,³⁴ both in criminal

²⁸ Act of March 3, 1891, § 3, 26 STAT. (1891) 827.

²⁹ Act of March 3, 1911, 36 STAT. (1911) 1087.

³⁰ *Ibid.* § 289, 36 STAT. (1911) 1167.

³¹ This is slightly inaccurate because Circuit Judges are eligible to act as District Judges, 28 U. S. C. A. (1936 Supp.) § 213, and may be required to do so. 28 U. S. C. A. § 22.

³² FRANKFURTER AND LANDIS, *BUSINESS OF THE SUPREME COURT* (1927) 78.

³³ *Johnson v. United States* (C. C. A. 1st, 1908) 163 Fed. 30.

³⁴ *Patterson v. United States* (C. C. A. 6th, 1915) 222 Fed. 599.

appeals, and Chief Justice Taft in 1923³⁵ in a patent infringement appeal which seems to have been the last instance of attendance of a Supreme Court Justice in the Circuit Courts of Appeals.³⁶

2. *Sitting in a Three-Judge Court.*—There is another court, other than the Supreme Court and the Circuit Courts of Appeals in which Supreme Court Justices are eligible to sit. The statute which confers competency to do so, speaks of them as "Justices of the Supreme Court" not as "Circuit Justices."

When a person desires to apply for an injunction to restrain the execution of a State statute or an order of a State administrative board, on the ground that the statute or order violates the Constitution of the United States, he ordinarily applies to a United States District Judge, but he may apply to a "Justice of the Supreme Court, or to a Circuit or District Judge," and the application must be heard and passed upon by three judges of whom "at least one shall be a Justice of the Supreme Court or a Circuit Judge."³⁷ The statute clearly provides that when any one of these three types of judges is applied to for the purpose above indicated he shall "immediately call to his assistance to hear and determine the application two other judges," but one of the three thus assembled must be either a Justice of the Supreme Court or a Circuit Judge. The statutes do not make it clear whether this three-judge court is a District Court of special makeup³⁸ or just a special unnamed court. It is commonly called "the three-judge court," although there are others in the federal system.

I know of but one instance in which a Justice of the Supreme Court has rendered this service.³⁹ It is to be noted that this potential service is not rendered actual by assignment made by the Chief Justice or by the Supreme Court. By the terms of the statute a Justice of the Supreme Court may find himself called upon to sit in such a court either because the litigant first applies to him, or because where the litigant applies to a Circuit Judge or District Judge the judge applied to chooses to call a Justice of the Supreme Court.

This is an unnecessary⁴⁰ and seemingly unwise statutory provision. If in practice Justices of the Supreme Court frequently were required at

³⁵ *Wire Wheel Corp. v. Budd Wheel Co.* (C. C. A. 4th, 1923) 288 Fed. 308.

³⁶ For this statement I am relying upon the memory of one long intimately familiar with the work of the Justices.

³⁷ 28 U. S. C. A. § 380.

³⁸ The language of 28 U. S. C. A. § 345 implies that it is a "District Court."

³⁹ Associate Justice Holmes in *Lindsey v. Allen*, Att'y Gen. of Massachusetts, *et al.* (D. Mass. 1920) 269 Fed. 656.

⁴⁰ 28 U. S. C. A. § 47, providing another three-judge court for suits to restrain enforcement of orders of the Interstate Commerce Commission does not mention Supreme Court Justices as subject to duty thereon.

the beck and call of litigants or of Circuit and District Judges, to perform this duty, the bench of the Supreme Court might at times be left without a quorum.

So far with respect to competency of Supreme Court Justices to sit in other courts. We pass now to judicial functions which the statutes authorize each of them to perform individually.

3. *Grant Writs of Habeas Corpus*.—"The several Justices of the Supreme Court" as well as the Circuit and District Judges severally are authorized to grant writs of habeas corpus "for the purpose of an inquiry into the cause of restraint of liberty." The statutes clearly provide that a Supreme Court Justice, single-handed, may issue the writ upon the application of a person who alleges that he is unlawfully restrained of his liberty, ordering the alleged restraining person to appear before him and show the true cause of the restraint, and bring with him the restrained person. The Justice is authorized to proceed in a summary manner, without a jury, to decide the issue "as law and justice require."⁴¹ The broad language by which this judicial power is vested in the Justices seems to make it immaterial by whom the restraint is being exercised, whether a State officer, a federal officer, or some private person, but obviously the restraint must be alleged to be in violation of the Constitution, a law or a treaty of the United States or otherwise within the judicial power of the national government as delimited in Article III, section 2 of the Constitution.⁴²

A petition for the writ was presented to Associate Justice Strong in 1879 while he was on vacation in the Catskill Mountains. He issued a writ, had the petitioner brought before him, and admitted him to bail.⁴³ Up to that point Justice Strong was exercising a judicial power vested in himself alone. His next step seems not to have had any express statutory authority. It was to issue an order directing that a hearing be had, on the merits, before the Supreme Court in bank.

Surprisingly, the Court accepted this procedure as invoking its appellate jurisdiction, that is, as an appeal from a judgment of the Circuit Court of the United States under which the petitioner was suffering the imprisonment complained of.⁴⁴ It heard the case on the merits, affirmed the judgment of the Circuit Court and remanded the petitioner to cus-

⁴¹ 28 U. S. C. A. §§ 454, 455, 457, 458, 461; 28 U. S. C. A. (1936 Supp.) § 452.

⁴² 28 U. S. C. A. § 453.

⁴³ *Ex parte Clarke* (1879) 100 U. S. 399, 402.

⁴⁴ Before 1889 the statutes did not provide for appeals to the Supreme Court from the inferior courts of the United States in criminal cases. In *Ex parte Siebold* (1879) 100 U. S. 371, the Court by judicial legislation partially filled this gap by permitting a petition to the Court, as such, for a writ of habeas corpus to operate as a writ of error. It did so where the petition alleged that the statute defining the offense for which the petitioner was convicted violated the Constitution, resorting

tody. Its action is not relevant here except to show that its remarks about the power of a Justice of the Supreme Court acting single-handed were *dicta*.

On the latter point the Court said, "A Justice of this court can exercise the power of issuing the writ of *habeas corpus* in any part of the United States where he happens to be." It further said that Justice Strong "could undoubtedly have disposed of the whole case himself," and that "no justice will needlessly refer a case to the court when he can decide it satisfactorily to himself, and will not do so in any case in which injury will be thereby incurred by the petitioner."⁴⁵

Statutory authorization of this power in the Justices acting singly began with the Judiciary Act of 1789.⁴⁶ It may have had more application when the Justices severally rode circuit. In 1852 a petition by a person detained for extradition was presented to Associate Justice Nelson, at his chambers while he was on circuit. He issued the writ and on the return made to him ordered the case to be heard by all the Justices of the Supreme Court, which was done accordingly,⁴⁷ establishing a precedent for *Ex parte Clarke*. In 1879 five petitions were made to Chief Justice Waite while on vacation at a place outside the circuit to which he was assigned. He ordered the alleged restrainer to appear before him in Washington to show cause why a writ should not issue. Before this hearing the Chief Justice induced the petitioners to apply to the Supreme Court,⁴⁸ which heard and disposed of the petitions.

On August 10, 1927, Nicola Sacco and Bartolomeo Vanzetti applied to Associate Justice Holmes for a writ of *habeas corpus*. He declined to act on the ground that he could find in the petition and affidavits no facts that warranted his issuing the writ.⁴⁹ Later he amplified his reasons. He emphasized that the case was a conviction in a State court for violation of a State law, and that there was no basis for a federal judge "to meddle

to the false rationalization that if the statute was unconstitutional, the trial court acted without jurisdiction in giving a judgment of conviction. *Ex parte Clarke*, described in the text above, was decided at the same term as *Ex parte Siebold*, and was merely an extension of the doctrine of the latter case, by treating Justice Strong's reference of the case to the Court in bank as being equivalent to a petition filed in the Court itself. Subsequently the Court has frowned upon its own practice of permitting a petition for *habeas corpus* to serve as a writ of error, except in unusual circumstances which were not present either in *Ex parte Siebold* or *Ex parte Clarke*, unless the exception lay in the fact that there was then no statutory mode of appeal by writ of error or otherwise in such cases. For the present day rule see *Glasgow v. Moyer* (1912) 225 U. S. 420, and *McGovney*, *CASES ON CONSTITUTIONAL LAW* (1st ed., 1929) 188-200.

⁴⁵ 100 U. S. at 403.

⁴⁶ § 14, 1 STAT. (1789) 81.

⁴⁷ *In re Kaine* (1852) 55 U. S. (14 How.) 103.

⁴⁸ *Ex parte Siebold* (1879) 100 U. S. 371, 373.

⁴⁹ *THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD*. Vol. V, p. 5532.

with it," because no provision of the Constitution of the United States had been infringed by the Massachusetts courts. Neither prejudice of a State trial judge against the accused, he thought, nor lack in Massachusetts judicial procedure of an adequate corrective of such prejudice presented any federal constitutional issue. Having in mind the holding of the Supreme Court in *Moore v. Dempsey*,⁵⁰ that conviction by a court dominated by a mob demanding conviction is a denial of the due process required by the Constitution, he said, "in such a case no doubt I might issue a habeas corpus—not because I was a judge of the United States,⁵¹ but simply as anyone having authority to issue the writ might do so, on the ground that a void proceeding was no warrant for the detention of the accused."⁵²

4. *Power to Issue Injunctions.*—"Writs of injunction may be granted by any justice of the Supreme Court in cases where they might be granted by the Supreme Court . . ."⁵³

What occasions are there for the exercise by a single Justice of the power here given? An exhaustive study would require determination of all cases in which the Supreme Court itself may issue injunctions. This will not be attempted. Only a few sketchy suggestions will be made. The United States Code, in the first place, does not enumerate specifically the classes of cases in which the Supreme Court may issue writs of injunction. Authority to do so is included in the provision:⁵⁴

"The Supreme Court . . . shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Clearly the Supreme Court may grant an injunction where it is the appropriate remedy in cases falling within its very limited original jurisdiction, that is, in civil suits to which a State is a party, and suits in which a foreign ambassador, other public minister, or consul is a party.⁵⁵ This jurisdiction depends upon the character of the party, and it is immaterial what the controversy is or whether it requires the application of federal law, state law or any other, in deciding it.

Suppose a foreign minister wants an injunction to restrain a nuisance operating next door to his residence in Washington. Clearly he may apply

⁵⁰ (1923) 261 U. S. 86.

⁵¹ In spite of this curious turn of expression, I cannot believe that Justice Holmes meant that he would have issued the writ in any case where federal judicial jurisdiction was lacking. His authority to issue the writ was derived from an act of Congress which could give no authority beyond the limits of federal jurisdiction.

⁵² *THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD*, Vol. V, p. 5516.

⁵³ 28 U. S. C. A. § 378. This power was first given to Justices of the Supreme Court, individually, by Act of March 2, 1793, § 5, 1 STAT. (1793) 334.

⁵⁴ 28 U. S. C. A. § 377.

⁵⁵ 28 U. S. C. A. § 341.

to the Supreme Court, and the statute also clearly says that a single Justice may issue an injunction in any case where the Supreme Court may issue it. How can a Justice issue an injunction without first hearing the parties and deciding whether an injunction should issue? Call it an absurd anomaly, if you please, but unless statutory language is held not to mean what it says, every Justice of the Supreme Court, singly, is a court of equity, in a few classes of cases. It would be the height of absurdity for a State to apply to a single Justice for an injunction against another State, but even that seems permissible under the statute.

In addition to the power of the Supreme Court to issue injunctions in cases within its original jurisdiction, it may issue them as ancillary to suits before it in the exercise of its appellate jurisdiction. Taken literally, the statute authorizes a single Justice to do so even in such cases.

I know of no instance in which a Supreme Court Justice, acting alone, has issued an injunction or granted a hearing before him on an application for an injunction, under the statute above quoted. I have found two instances in which a Justice of the Supreme Court, both in 1873, acted under the authority of a former statute which authorized such Justices to issue injunctions "in cases where they might be granted by the supreme or a circuit court."⁵⁶ A petition for an injunction addressed to the United States Circuit Court in Kentucky was presented to Associate Justice Miller while he was in New Jersey. He took jurisdiction, and granted an injunction to restrain a Kentucky canal company from interfering with United States engineers engaged in improving the canal. Kentucky was not in the circuit to which Justice Miller was allotted, nor was New Jersey. He was just a Justice of the Supreme Court running at large, having a busman's holiday. He gave as a reason for acting, that the District Judge for Kentucky, the Circuit Judge for that Circuit, and the Supreme Court Justice (Swayne) allotted to the Circuit which included Kentucky, were all absent from the district and circuit. Justice Miller purported to act as a Circuit Justice. His decree apparently was entered as a decree of the Circuit Court for the District of Kentucky.⁵⁷

In the other instance, Associate Justice Bradley entertained a petition for an injunction at his chambers in Washington, D. C., to restrain sale of a railroad under a decree of the Circuit Court of the United States for the Northern District of Florida. He heard arguments of counsel, said that he had power to issue an injunction in a proper case, but declined in this instance because a sufficient case was not made out. He purported to act in his capacity of Circuit Justice for the Fifth Circuit, including Florida.⁵⁸

⁵⁶ Act of March 2, 1793, 1 STAT. (1793) 334. Italics added.

⁵⁷ *United States v. Louisville & P. Canal Co.* (1873) Fed. Cas. No. 15,633.

⁵⁸ *Searles v. Jacksonville P. & M. R. Co.* (1873) Fed. Cas. No. 12,586.

Since the abolition of the Circuit Courts and the creation of Circuit Courts of Appeals with several judges each, there is no need to call on a Supreme Court Justice for the kind of service rendered by Justices Miller and Bradley in the instances just mentioned. In fact the statute now limits their injunction granting authority to cases in which injunctions may be granted by the Supreme Court. This is probably to take care of the need for an injunction from that Court during its vacation.⁵⁹

There is a special power given Justices of the Supreme Court to issue temporary restraining orders. This is by U. S. C., Title 28, section 380, discussed above under the heading, "Sitting in a Three-Judge Court." If the suitor who applies for an injunction, in one of the cases there stated, should make his application to a Justice of the Supreme Court the latter may, by the statute, grant a temporary restraining order, prior to a hearing by the three-judge court of the application for an interlocutory or permanent injunction. To that extent he may act single-handed.

5. *Writs of ne exeat*.—"Writs of ne exeat . . . may be granted by any Justice of the Supreme Court in cases where they might be granted by the supreme or a circuit court." This law enacted in 1793⁶⁰ is still in force except the italicized words⁶¹ which were struck out after the Circuit Courts were abolished. This authority to issue the writ (commanding a defendant not to leave the jurisdiction) has always been qualified by the provision that it should not be issued save where an equity suit has been begun and satisfactory proof is made that the defendant "desigus quickly to depart from the United States."⁶²

Since District Judges as well as Districts Courts have authority to issue the writ and since it is in these courts that equity suits of federal cognizance are begun (except for the limited original jurisdiction of the Supreme Court), it is obvious that Supreme Court Justices acting singly would seldom, if ever, have occasion to issue the writ. Obviously this authority given them is a left-over from the period when as Circuit Justices they sat in the trial of cases.

6. *Arrest or Bind to Keep the Peace*.—"For any crime or offense against the United States, the offender may, by any justice or judge of the United States . . . be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."⁶³ This authority which Supreme Court Justices have in common with all other federal judges, United States Commissioners,

⁵⁹ See Justice Bradley's statement in 21 Fed. Cas. at 930.

⁶⁰ Act of March 2, 1793, 1 STAT. (1793) 334.

⁶¹ 28 U. S. C. A. § 376.

⁶² Act of March 2, 1793, 1 STAT. (1793) 334, 28 U. S. C. A. § 376.

⁶³ 18 U. S. C. A. § 591.

and all State judges, city mayors and justices of the peace dates from 1789.⁶⁴

Similar to this authority to arrest, or order arrest, of federal law offenders, is the authority given "judges of the Supreme Court" and others "to hold the security of the peace and for good behavior, in cases arising under the Constitution and laws of the United States."⁶⁵

7. *Stay of Execution of Judgments.*—Numerous classes of cases may be carried to the Supreme Court from State courts, United States Circuit Courts of Appeals, the Court of Appeals of the District of Columbia, the Supreme Court of the Philippines and other courts only if the Supreme Court of the United States grants a writ of certiorari. That is, a litigant desiring to appeal must petition the Supreme Court for permission. If permission is granted, the Supreme Court orders the lower court to certify the record and send it up to be reviewed. The Supreme Court, as such, discharges this discretionary function of deciding whether to grant or refuse permission. There is a minor function in this connection which a single Supreme Court Justice may discharge. Apparently he may discharge it either while the Supreme Court is in session or during vacation. The function is this: a Supreme Court Justice may be applied to for a stay and single-handed may grant a stay to hold off execution of the judgment of the lower court until the party aggrieved shall have had a reasonable time to apply for a writ of certiorari from the Supreme Court.⁶⁶

An instance is the application made by Nicola Sacco and Bartolomeo Vanzetti to Associate Justice Holmes. The date set for their execution on a conviction by a Massachusetts court on a charge of murder was but a few days off. All procedure to get a further hearing in Massachusetts courts had been exhausted. The Supreme Court of the United States was not in session and would not be until after the date set for execution. The application to Justice Holmes was for an order staying the execution until an application for a certiorari might be made to and considered by the Supreme Court. Justice Holmes, after hearing argument of counsel, denied the petition, saying:⁶⁷

"I assume that under the Statute my power extends to this case although I am not free from doubt. But it is a power rarely exercised and I should not be doing my duty if I exercised it unless I thought that there was a reasonable chance that the Court would entertain the application and ultimately reverse the judgment. This I cannot bring myself to believe."

He felt sure that no provision of the Constitution of the United States had been infringed in the conviction of the petitioners.

⁶⁴ Judiciary Act of 1789, § 33, 1 STAT. (1789) 91.

⁶⁵ 28 U. S. C. A. § 392.

⁶⁶ 28 U. S. C. A. § 350.

⁶⁷ THE SACCO-VANZETTI CASE, TRANSCRIPT OF THE RECORD, Vol. V, p. 5516.

A like application was then made to Associate Justice Stone who denied it for the same reasons.⁶⁸

8. *Administrative Functions of Supreme Court Justices.*—There are other three-judge courts provided for by our statutes—other than the three-judge courts created under United States Code, Title 28, section 380, above described. In suits in equity brought by the United States in a United States District Court to enforce the Sherman Anti-Trust Act or to enforce carriers' tariffs fixed by the Interstate Commerce Commission, if the Attorney General certifies that the case is of general public importance, three judges must be assembled to make up the District Court in hearing the case. Normally this Court is to consist of three Circuit Judges, but may consist of Circuit Judges and District Judges. Supreme Court Justices are not competent to sit in these courts. But the statutes provide, that where because of absence or disqualification of one or more Circuit Judges the formation of the three-judge court is prevented "the Justice of the Supreme Court assigned to that circuit or the other circuit judge or judges" may designate a District Judge or Judges to sit in the court.⁶⁹ This is a minor function in administration of the judicial system. Nevertheless it is another off-the-bench function of a Supreme Court Justice. Similarly "the Chief Justice or the Circuit Justice of any judicial circuit" may assign any Circuit Judge to hold a District Court, if the public interest requires.⁷⁰ There are probably other minor administrative functions which the Justices, individually, are authorized to perform.

Tying this apparent digression into our main theme, it appears that among the above listed judicial functions performable by Justices of the Supreme Court single-handed are some that a Justice retired under the Act of 1937 is eligible to perform. This is enough to give the color required by the decision in *Booth v. United States* to the Act and make it accomplish the purpose of Congress—to create an office for the retired Justice so that his pay therein shall be undiminishable by subsequent legislation.

On this reasoning it seems that the Justiceship to which Hugo L. Black has been appointed is not one created by the Act of 1937, but one of the nine Justiceships created by the Act of April 10, 1869, and that the only office created by the Act of 1937 is the office of retired Justice, a status of eligibility to perform some minor judicial functions.

I have assumed that the Act of 1937 contemplates that a retired Justice shall be assignable, if willing, to discharge only such judicial functions as the statutes make unretired Justices competent to perform. But

⁶⁸ *Ibid.*, p. 5517.

⁶⁹ 15 U. S. C. A. § 28; 49 U. S. C. A. § 44.

⁷⁰ 28 U. S. C. A. § 22.

the words of the Act are: "may . . . be called upon by the Chief Justice and by him authorized to perform such judicial duties, in any judicial circuit . . . as such retired Justice may be willing to undertake."

If these words mean, taken literally, that a retired Justice, with his consent, is assignable to judicial duties which unretired Justices are not competent to perform, the retired Justice is even more clearly a judicial officer at large, which obviously he was not before retirement.

But it is pointed out that the Act of 1937 does not provide for a new appointment when a Justice desires to "retire" into this new office. How, it is asked, can Justice Van Devanter be regarded as now occupying a new judicial office without nomination to it by the President and confirmation by the Senate? It might be answered that the enactment of the Act of 1937 with the consent of the President and the Senate constituted a nomination and confirmation en bloc of all persons who were then members of the Supreme Court to this judicial office dependent, as are all appointments, upon their acceptance signified in each case by announcing an election to "retire." The Constitution prescribes no specific method to be followed when the President makes an appointment with the consent of the Senate. As to future incumbents appointment to the Supreme Court may be regarded as nomination and confirmation for both offices.

There are several instances in the history of our judiciary in which judges were transferred by Congress from one judicial position to another without any formal new appointment by the President and the Senate. When the old Circuit Courts were abolished in 1911⁷¹ the incumbent Circuit Judges were transferred by statute to the Circuit Courts of Appeals without renomination by the President and reconfirmation by the Senate and without new commissions. It is true their statutory title remained the same, namely, Circuit Judges. But this was merely making use of the title of an abolished type of judgeship for a newly created type. Before 1911 the primary function of the incumbent Circuit Judges had been that of *nisi prius* judges in the Circuit Courts, with an eligibility to sit as judges in the Circuit Courts of Appeals, but by the Act of 1911 they were made exclusively⁷² appellate judges. One must be blind to realities to say that the new circuit judgeships were the same as the old.

The same concept of implied or informal appointment is found in the Act of 1910⁷³ creating the Commerce Court. I do not refer to the provision made by that Act for the appointment of five additional Circuit Judges who should be designated by the President to serve one, two, three, four and five years respectively as judges of the Commerce Court. Nor

⁷¹ See *supra* notes 29 and 30.

⁷² See slight exception in note 31, *supra*.

⁷³ Act of June 18, 1910, 36 STAT. (1910) 539, 540.

to the fact that the act further provided that these five Circuit Judges might from time to time, after a period of service in the Commerce Court, be assigned by the Chief Justice "for service in the Circuit Court for any District, or the Circuit Court of Appeals for any Circuit, or in the Commerce Court." When the Commerce Court was abolished by the Act of 1913,⁷⁴ these "additional Circuit Judges" who had manned the Commerce Court were made assignable to any District Court or to any Circuit Court of Appeals. This is not an instance in point, for these judges had been appointed Circuit Judges under the Act of 1910 subject to the provisions therein that they should be assignable to the very services to which they subsequently were assigned.

The Commerce Court Act is in point because of two other provisions. First, it made any judge of the Commerce Court ineligible, after the year 1914, to be reassigned to that court until one year after expiration of a period of service thereon. Second, because this provision would create vacancies, the Act provided that on termination of the assignment of any of the original five "the Chief Justice shall designate a circuit judge to fill the vacancy." Thus rotation of Circuit Judges into and out of the bench of the Commerce Court was intended. The Act contemplated that any Circuit Judge, including one, let us say, who previously had been appointed and commissioned specifically as Circuit Judge in the Ninth Circuit should be transferable from the Pacific Coast to Washington to discharge a very different judicial function, namely, that of a Commerce Court judge. This without a new appointment or a new commission. The Commerce Court was abolished before it became necessary to put this rotational system into operation.

Two other legislative precedents of the same character are found in the legislation with respect to the Court of Customs Appeals. The Act of 1909⁷⁵ creating that court provided for the appointment of five judges for that court. It further enacted that in case of vacancy or temporary inability or disqualification of any judge of the court the President might designate "any qualified United States Circuit or District Judge" to sit in the court. Considering the special jurisdiction and peculiar law of that court, a District Judge so designated would find himself in a judicial office quite different from the one to which he had been appointed and commissioned.

Conversely an Act of 1922 makes the judges who were appointed and commissioned exclusively as judges of the Court of Customs Appeals assignable by the Chief Justice, in certain circumstances, to serve in the Supreme Court of the District of Columbia or the Court of Appeals of

⁷⁴ Act of October 22, 1913, 38 STAT. (1913) 208, 219.

⁷⁵ Act of August 5, 1909, 36 STAT. (1909) 11, 105, 107.

the District of Columbia⁷⁶ without new appointments or new commissions, and obviously it intended to include the previously appointed judges.

This array of instances may be regarded as establishing by practice an interpretation of the Constitution to the effect that when a person is appointed to a federal judicial office, that is, is once nominated by the President and confirmed by the Senate, Congress may assign him or authorize his assignment to other judicial offices without again going through the ordinary method by which the President appoints with the consent of the Senate.

A decision of the Supreme Court going far toward an endorsement of this interpretation may be cited. An Act of October 3, 1913,⁷⁷ to relieve the pressure of judicial business in the Second Circuit, chiefly in New York City, authorized the Chief Justice to "designate and appoint the judge of any district court in another circuit to hold a district court within the said second circuit," first obtaining the judge's written consent. Before this statute was enacted Clarence W. Sessions had been nominated to be District Judge for the Western District of Michigan, so confirmed and so commissioned. Being designated, as by the Act of 1913 provided, to hold District Court in the Southern District of New York, he presided over a trial in which Lamar was convicted of a federal criminal offense. On writ of error Lamar got to the Supreme Court where he contended that "to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and the Senate."

As to this contention Mr. Chief Justice White, for the Court, in his characteristic Jovian manner said, "... we think merely to state it suffices to demonstrate its absolute unsoundness."⁷⁸

Supposing, therefore, that there is no constitutional difficulty with holding that under the Act of 1937 a Justice may by "retiring" become the legal holder of a new judicial office without reappointment, it is argued that that new office was created by the Act of 1937 and that the appointment of Hugo L. Black is illegal because it includes appointment to that office. It is argued that his appointment is to two offices, the offices of Associate Justice which he may occupy for life, and another which he may elect to pass into at the age of seventy. *Non constat* that he will ever elect to occupy that second office. He may resign before reaching the age of seventy. He may at the age of seventy elect to resign with a pension

⁷⁶ Act of September 14, 1922, 42 STAT. (1922) 839.

⁷⁷ 38 STAT. (1913) 203.

⁷⁸ *Lamar v. United States* (1916) 241 U. S. 103, 118.

instead of electing to "retire." Would anyone but a medieval schoolman contend that the creation of this new office by the Act of 1937, a sort of judicial office so contingently related to the office of Supreme Court Justice, rendered Hugo L. Black ineligible to the latter?

It may be that the Constitution bars him from that newly created office. He has not yet accepted it and under the Act of 1937 he is ineligible to accept it until he attains the age of seventy. If he then attempts to accept it by giving notice of his retirement under the Act, the attempt may be held ineffectual. It may be held that he cannot become the legal holder of the judicial office created by the Act. If so, it will be because his then acceptance would relate back to his present appointment as one made during his term in the Senate when the office was created. Of course, if his appointment to that second office could be regarded as one made at the time he attains seventy and elects to accept the office, there would be no constitutional difficulty whatever, for the appointment then would not be one made within the time for which he was elected to the Senate.

II.

THE EMOLUMENTS QUESTION

Assuming that the Justiceship to which Hugo L. Black has been appointed was created in 1869, did the Act of 1937 increase the emoluments of that Justiceship? We need not pause to explore fully the meaning of increasing the emoluments of an office. Undoubtedly it includes increasing the pecuniary gain to be derived therefrom. Our issue is whether the retirement allowance under the Act of 1937 is pecuniarily superior to the pension available under prior law.

The pension and the retired pay are on the face of the statutes the same in amount, the amount of the salary of the Justice just prior to his withdrawing from the Court. The length of service and age to be attained to make a Justice eligible are the same for both. But it is said that one is liable to diminishment by Congress and the other not.

Assume that the Constitution does not forbid Congress to reduce or entirely cut off the pension of a resigned Justice by a statute enacted after his resignation. Assume that the Supreme Court would decline to distinguish the position of a Justice retired under the Act of 1937 from that of a District or Circuit Judge retired under the Act of 1919. That is, assume that the Court will hold that the Constitution forbids Congress to diminish the retirement allowance of a retired Justice by a statute enacted after his retirement. On these assumptions it is obvious that Justice Van Devanter, in electing to retire with pay instead of resigning with a pension, chose the alternative that was pecuniarily more valuable. Con-

gress has never but once cut the Justices' pension, and then for one year only and may never do so again,⁷⁹ but the difference between \$20,000 a year for life certain and \$20,000 a year for life contingent upon the good will of Congress is, legally speaking, a material difference. The inferiority of the pension because of its uncertainty as compared with the retired pay is not offset by the fact that the pensioner is subject to no further service, for the retired judge is subject only to such service as he is willing to perform. He need perform none. Yes, as to Justice Van Devanter or any other Justice who retires under the Act of 1937, before it is repealed, obviously election to "retire" is pecuniarily preferable to "resignation" with a pension.

It will be nineteen years, however, before Associate Justice Black will be eligible to make that election. As to *him* is the promised retired pay less subject to diminishment by Congress than is the promised pension? The retired pay is attached to the new office of retired judge. It is for that reason that the retired pay of a judge who has already retired under the Act is protected against diminishment during his continuance in that office. Associate Justice Black does not hold that office. Before he becomes eligible to retire into that office, may not Congress cut down or cut off the retired pay or by repeal of the Act of 1937 abolish the retirement privilege? Of course, Congress can repeal that Act effectively as to all persons appointed to the Court after the repeal. Our question precisely put is, can Congress do so effectively with respect to Associate Justice Black who was appointed while the Act of 1937 was in force?

We must consider the relative vulnerability of the pension and the retired pay to being cut off or diminished, with respect to a Justice appointed while the Act of 1937 was in force, by a statute *enacted before* he becomes eligible to either.

Let us assume the case of appointment after March 1, 1937 of Mr. *A*, a person whose eligibility is unquestionable, and that before he reaches seventy Congress repeals the Act. Has Mr. *A* any constitutional ground for complaint? Will the repeal be inoperative as to him and he be entitled, notwithstanding, to retire with pay for life? Upon what theory can an affirmative answer be given? It may be said that the Act of 1937 attached the privilege of retiring on full pay for life to the office of Supreme Court Justice, and that because this retired pay is to come for little additional service or none whatever it must be regarded as deferred compensation

⁷⁹ Justice Holmes resigned January 12, 1932, after attaining the age and length of service entitling him to a pension of \$20,000 a year as the law then stood. By section 107(a)(5) of the "Economy Act of 1933," enacted June 30, 1932, 47 STAT. (1932) 402, his pension was cut to \$10,000 a year. (Compare the apparently conflicting provision of section 106 which purports to make the cut only 20%.) The 50% cut remained in force for one year only. See section 4, Act of March 3, 1933,

for the services rendered as a Justice on the bench before he retired. By thus regarding it as part of the compensation attached to the office of fully active Supreme Court Justice, Mr. *A* can claim that any repeal of the retirement privilege *before* he retires would violate the prohibition against diminishing his compensation during his continuance in office. But note that if Mr. *A*'s contention is right, it follows that the pension alternative is equally unrepealable by any statute passed before Mr. *A* resigns. The pension is even more clearly deferred pay for services rendered before resignation, for the resigned judge is not eligible to render any afterward.

This is a very remarkable result in view of what is assumed to be the law, that a resigned Justice's pension may be cut off by a statute enacted the day after he resigns. The pension is secure until Mr. *A* becomes eligible to draw it and then it may be cut off before he draws a cent! Realism and common sense tell us that if Mr. *A*'s pension may be cut off by a statute enacted immediately after he resigns it may be abolished before he resigns. Realism and common sense also tell us that our major premise is true, that with respect to Mr. *A* the prospective pension is just as plainly deferred pay for his work in the Court as is his prospective retired pay, and that if one can be abolished before he becomes eligible to it the other can also. If logic requires a court to hold that neither may be abolished before Mr. *A* becomes eligible to make his election or that either may, is it not likely to hold the latter? Even as a matter of judicial policy there is a limit beyond which courts will hesitate to go in reading the Constitution favorably to the judiciary.

If the court of last resort holds that the Act of 1937 is repealable with respect to Mr. *A* before he attains eligibility to retire, it results that Congress by that Act did not attach an undiminishable retirement allowance to the office of Supreme Court Justice.

We are led back to our prior analysis, that the Act created a new office, that of retired Justice, and the retired pay is the compensation attached to that office. If *Booth v. United States* is held to apply, a statute enacted after a Justice has passed into that office cannot diminish his pay during his continuance in that office.

It may be argued that Associate Justice Black's case is different from Mr. *A*'s. It may be argued, as above,⁸⁰ that Associate Justice Black can never legally occupy that new office, and that this immunity from diminishment subsequent to retirement does not affect him—does not, as to the Justiceship to which he has been appointed, constitute an increase of its emoluments. But the justiceship made vacant by the retirement of

47 STAT. (1933) 1489, 1513. The 20% cut (whether applicable, query) remained in force for only nine months. See Act of March 20, 1933, § 4 (4), 48 STAT. (1933) 14.

⁸⁰ See p. 25 *ante*.

Justice Van Devanter must be regarded as one and the same whether Mr. A or Hugo L. Black was appointed to it. It results that the remote possibility of retiring with retired pay undiminishable after retirement must be regarded as attached to the justiceship now occupied by Associate Justice Black. What are the contingencies upon which it will become an actuality for him? First, that Congress does not repeal the Act before he attains seventy; second, that he does not resign before attaining seventy; third, that he lives that long.

Let us suppose that each of two corporations offers a lawyer permanent employment to give his services exclusively to it, and that the two employments are equally attractive unless there is a pecuniary difference. Both have long maintained voluntary pension systems under which long serving employees have been retired at seventy on full pay, and though not bound by contract, they have both honorably lived up to their assurances except that during a severe depression they cut the pensions by half for a single year. One corporation declines to make any contractual engagement with respect to the pension. The other, while reserving the right to abolish his pension privilege before he attains seventy, is willing to contract that if it does not abolish it within that time it will pay the pension annually thereafter until his death. The lawyer asks an actuary, a statistician, a financier, anybody, what is the pecuniary difference between those two offers. Is there any kind of an expert that can answer that question?

The United States, a very honorable corporation, has maintained a pension system for Supreme Court Justices for three-quarters of a century, falling down on its moral assurances only once in that time,—full pay for life after ten years of service and attainment of seventy. This was the statutory offer made to appointees before the Act of 1937. That Act made an additional offer. It said, to subsequent appointees, unless we repeal this Act before you attain seventy, we give you, in effect, a contractual assurance that we shall not do so thereafter. Does the uncalculable pecuniary superiority of the latter make it an increase in the emoluments of the office, within the meaning of the Constitution? Does the Constitution deal with technical niceties or with common sense materialities?

Finally, it is said that if the Act of 1937 is not repealed before Associate Justice Black attains the age of seventy he may then elect to take retired pay for life not subject to income tax whereas the pension assured by prior law is subject to income tax, a real dollars and cents difference. This requires a bit of examination. We must start with *Evans v. Gore*.⁸¹ In that much criticized decision the Supreme Court held that, if at the time a person is appointed to any judgeship created under Article III of

⁸¹ (1920) 253 U. S. 245.

the Constitution the salary of that office is not by any statute then in force expressly subjected to federal income tax, to apply any subsequently enacted federal income tax to it would fall foul of the Constitutional prohibition that such judge's compensation shall not be diminished during his continuance in office. Justice Holmes, with whom Justice Brandeis concurred, saw nothing in either the letter or spirit of the Constitution to show that subjecting a judge's salary to a general, non-discriminatory tax is the kind of diminishment the Constitution speaks of, saying, "To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge."⁸²

In stating the point decided in *Evans v. Gore*, I state is as going no further than the case before the Court required. It was that of a judge appointed in 1899 when there was no federal income tax applicable to judges' salaries, and the statute the court passed upon was one enacted in 1919. The decision "went to the very verge of judicial power," to make use of Justice Shiras' characterization of another of the court's constitutional interpretations.⁸³

Congress believes that the decision will not be extended. Ever since June 6, 1932, there has been a standing provision of the federal income tax law that the salaries of all federal judges taking office after that date shall be subject to income tax, and that all statutes fixing their salaries shall be read accordingly.⁸⁴

It may be noted in passing that Associate Justice Black's appointment is the first made to the Supreme Court since June 6, 1932. He alone of the present incumbents will be required to include his salary as a Justice in his gross income in arriving at the net income that is subject to tax. Popularly stated, he alone of the present nine Justices will be required to pay federal income tax on his salary.

What we are concerned with, however, is whether a Justice who retires under the Act of 1937 is subject to pay income tax on his retired pay. Undoubtedly if that Act is construed to mean that a retiring Justice does not retire into the very office from which he retires but does pass into a judicial office created by that Act, *every* instance of retirement under it will be "taking office after June 6, 1932." While the Act of 1937 fixes the retired pay at the salary the Justice is receiving before he retires, this is one of the acts "fixing the compensation of . . . judges" which the stand-

⁸² *Ibid.* at 265.

⁸³ *St. Louis & San Francisco Ry. Co. v. James* (1896) 161 U. S. 545, 563.

⁸⁴ 47 STAT. (1932) 178, 26 U.S.C.A. § 22: "In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly."

ing law says is to be read in the light of the provision that it is subject to income tax.⁸⁵ It follows that with respect to income taxation there is no difference between the old pension and the new retirement allowance, unless it be held that the salary of a judge taking office after June 6, 1932, is subject to no higher rate of income tax than that in force when he took office. If the Court desires to press *Evans v. Gore* to this extreme, it may do so on strict logic. It might, however, say that under the Act of June 6, 1932, a judge takes his salary subject to any rate of income tax Congress may subsequently impose. On the other hand, it might say that while Congress having power to fix the salary may make it subject to whatever rate is in force when a judge takes office, yet to give Congress power, by such a device as the Act of June 6, 1932, to make any higher rate applicable would be subversive of the purposes of the prohibition against diminishment! This would be giving the doctrine of *Evans v. Gore* a meticulous application, and land us again in unrealities. The Court might well say of the word "encreased" in the phrase, "the emoluments whereof shall have been encreased" what Chief Justice Marshall said of another word in the Constitution:⁸⁶

"Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies."

Does the word "encreased" include an increase that is remotely contingent and uncalculable?

In conclusion on the question whether the Act of 1937 increased the emoluments of the Justiceship to which Hugo L. Black was appointed, it seems that the increase, if any, is so remote, so contingent, and uncalculable that it would take a great deal of judicial hardihood to hold it to be such an increase as the Constitution contemplates. No one charges that Congress was consciously up to the skulduggery of increasing the emoluments of an office for the benefit of one of its members. Is Congress, when in good faith it is considering legislation with respect to existing offices, bound to use a microscope to see that it contains no remote, contingent, speculative increase in pecuniary advantage, on pain of finding its members ineligible to appointment?

⁸⁵ When the bill that became the Act of March 1, 1937 was pending in the House, an amendment was offered to make the retired pay expressly subject to income tax. On objection the amendment was ruled out of order on the ground that it was not germane. CONG. REC. 75th Cong., 1st Sess., 1350. However questionable this ruling, it prevented any expression of opinion by the House on the meaning of the bill without such amendment. The incident has no evidential value. Had the proposed amendment been voted on, and voted down, the vote would have been some evidence of the House's understanding of the bill.

⁸⁶ *McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat.) 316, 414.

III.

CONCLUSION

Some writers have purported to find the elements of this question quite simple and have arrived at an answer adverse to Associate Justice Black with dogmatic assurance. But I am reminded of Sherlock Holmes' remark, "It seems, from what I gather, to be one of those simple cases that are so extremely difficult."

I have been asked, "How do you arrange the pieces in this legal chess-problem of Justice Black's eligibility?" Well, I have given them some alignment and must leave it to the master chess players to say whether it is the true one. The analogy, however, is very remote. Legal concepts do not have their scope of action precisely defined as do the pieces in a chess game. The reach of a legal concept often exceeds its grasp. Its powers may be redefined just before it closes upon its prey. One who is not clothed with the authority of a lawgiver must speak modestly.

Here we have a legal concept, a constitutional concept, that it would corrupt Congress to permit its members to be appointed to offices during the very term in Congress in which those offices were created or the pay in them increased. The authoritative interpreter or definer of that concept will view it in the light of its policy and bring within its grasp what is essential to make it defeat the evil it is intended to prevent. To go beyond that would hamper legislative action more than was intended.

On the emoluments issue another constitutional concept comes collaterally into play,—what is meant by diminishing a judge's pay during his continuance in office. The grasp of that concept is still in the process of authoritative definition. I have assumed in my discussion that the decisions in *Evans v. Gore* and *Booth v. United States*, which have partially defined it, will not be overruled. Neither stand upon unassailable grounds.

Finally there is the question of statutory interpretation, under the settled maxim that a statute will be so read as to give it the maximum of constitutional effect and at the same time realize the expectations of its enactors. It is a well known historical fact that a large proportion of all parties in the Senate, a Senate that voted almost unanimously for the bill that became the Act of 1937, expected the first vacancy that occurred by retirement of a Justice under its provisions, to be filled by the appointment of Senator Joseph T. Robinson. Far from showing that the Senate was bent upon an unconstitutional appointment, that fact goes far toward fixing the legislative interpretation of the meaning and effect of the Act. Consistently with that legislative intent, it seems that a court would hold

that the Act of 1937 does not create any new Supreme Court justiceship, and that the retirement of a justice under its terms vacates one of the nine justiceships created by the Act of 1869. Secondly, it seems that a court would hold that the speculative possibility of greater pecuniary returns which may accrue to a justice from the retirement privilege does not amount to an increase in emoluments within the meaning of the Constitution.

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When Is It Vacant?

WHEN Mr. Justice Van Devanter "retired" and the President nominated Senator Black to fill the "vacancy", some persons, even some of high degree, insisted, and do yet insist, that while the acceptance of a resignation creates a vacancy, a retirement, which requires no acceptance, causes no vacuum. An Act of Congress fixed the number of Justices of the Supreme Court; the President and Senate have no authority to increase the number.

Probably few now living ever knew and most of them have forgotten, that eighty-five years ago the question "When is a Vacancy?" was heavily debated in California, and that the arguments are embalmed in 2 Cal. 198 to 236, both inclusive. The title of the case is *People v. Wells*.

The story runs thus: Solomon Heydenfeldt was elected to the Supreme Court in 1851, took his seat in January, 1852, participated in the labors of the Court for some six weeks; then obtained from the Legislature leave of absence from the state for six months to visit his home town in Alabama. That left the Court with but two justices in attendance. What if they should not agree? The Legislature passed an act in March, 1852, empowering the Governor to fill "temporary vacancies" caused by absence of a judge, the appointee to hold office during such vacancy and no longer.¹

Solomon having departed, Governor Bigler appointed Alexander Wells, who took the oath of office and then suggested to the Court, or at least to the two justices of the Court—or at any rate to the two *other* justices of the Court—that doubts having been expressed concerning the validity of the Act providing for appointments such as his, Attorney General Hastings might well be directed to take proceedings by writ of *quo warranto* to determine the question.

¹ Cal. Stats. 1852, c. 87, p. 162, repealed Cal. Stats. 1853, p. 23.