

## To the Bag

the “New-York Judicial Repository,” published from Sept. 1818 to Feb/March 1819? This would, among other things, explain the otherwise mystifying appearance of the word “New” in the title – there had not been a “Yale Judicial Repository” for this “new” one to succeed – and the almost perfect congruence of the dates of beginning and cessation also suggest that this may just have been a confusion in the title.

Simon Stern  
Assistant Professor, Faculty of Law  
University of Toronto

### BY ANY OTHER NAME WOULD JUDGE AS WELL

To the *Bag*:

I enjoyed the dueling articles in which Professors Davies and Fisher debate whether a harsh Chief Justice Rehnquist berated counsel for calling him “Judge” and a kindly Justice Stevens comforted the beleaguered advocate by observing that “the Constitution makes the same mistake.”<sup>1</sup>

I fault no former clerk who readily believes and retells a story that magnifies a former boss’s best traits. But it does seem that Professor Davies has the best of it. All of Professor Fisher’s examples involve corrections after someone referred incorrectly to Chief Justice Rehnquist himself.<sup>2</sup> He must be wrong, therefore, simply to affirm a sort of transcendental accuracy of the anecdote by concluding that “[w]hether that person was Chief Justice Rehnquist or someone else is not of central importance.”<sup>3</sup> It is at least close to centrally important, since Justice Stevens’s punchline (the whole point of the tale) just doesn’t work under these circumstances. The Constitution *does* reference the “Chief Justice,” who, under Article

---

<sup>1</sup> Ross E. Davis, *Obi-Wan Stevens vs. Darth Rehnquist*, 13 GREEN BAG 2D 263 (2010); Jeffrey L. Fisher, *Of Facts & Fantasies*, 14 GREEN BAG 2D 53 (2010).

<sup>2</sup> Fisher at 56 & n.20.

<sup>3</sup> *Id.* at 58-59.

## To the Bag

I, Section 3, must preside over presidential trials in the Senate.

Something else struck me even more. The professors have shown the peril of getting a title wrong in the Supreme Court of the United States, but I can hardly imagine any such devastating retort at the Supreme Court of *Texas*. All judicial officers are commonly called “Judge” here, both to their face or to a third-party. At hearings and arguments, I have heard attorneys (some of them former members of the state supreme court) refer to such-and-such an opinion “by Judge Hecht” (referring to Justice Nathan Hecht) or “by Judge Brister” (referring to former Justice Scott Brister). And it’s not just the lawyers doing this. The *Southwestern Reporter* (Texas Cases edition only) reprints the “In Memoriam” transcripts of special sessions of the Texas Supreme Court. The court held such a session in January 1995 to mark the passing of Chief Justice Robert Calvert. Chief Justice Phillips opened the proceedings this way (the italics mine):

The Court is in special session today in memory of former *Chief Justice Robert W. Calvert*. *Justice Calvert* served as an Associate Justice and Chief Justice of this Court for twenty-two years. He was truly one of the giants of the law in Texas. He had a distinguished career both before and after his nearly quarter of a century service on this Court. And we are most pleased that so many of his descendants and friends, so many people who admired his work, have come this afternoon to share with us the memories of *Judge Calvert*.<sup>4</sup>

Within 95 words, and in the context of the greatest respect and formality, one of our state’s greatest chief justices was identified by three different titles: Chief Justice Calvert, Justice Calvert, and Judge Calvert. “Judge Calvert” was most frequently used throughout the proceedings. Former Chief Justice Joe Greenhill, another Texas legend who died this February at 96, spoke; he himself is listed in the transcript not as “Chief Justice Greenhill” but simply as “Judge Greenhill,” and he eulogized Calvert exclusively as “Judge

---

<sup>4</sup> *In Memoriam, Honorable Robert W. Calvert*, 908-909 S.W.2d xxxix, xxxix (Texas Cases ed. 1996) (italics added).

## To the Bag

Calvert.”<sup>5</sup> (By contrast, then-Justice and now-Senator John Cornyn kept it “Chief Justice Calvert” in his own remarks.<sup>6</sup>)

Transcripts of identical special sessions for deceased U.S. Supreme Court justices are printed in the *United States Reports*. It is hard to imagine any of *those* memorial transcripts extolling “Judge” so-and-so. Isn’t it possible that some of the offending advocates – calling the Chief Justice of the United States simply “Judge” – came from places like Texas, where the titles are a lot more fluid?

When I first came back to Texas, where I work in the firm where Chief Justice Phillips is now a partner, it struck me as odd that he was always “Judge Phillips.” It struck me as even odder that people routinely refer to and greet as “Judge” those who are *still* justices or chief justices of our supreme or appellate courts (our highest criminal court, however, is formally composed of “judges” and a “presiding judge”). I am not sure of the source of this titling-down phenomenon; my best guess is that it demonstrates a kind of western egalitarian streak. (The chief justices of our courts have no opinion-assignment powers either; nobody does. Authorship is assigned randomly, also tribute, as I understand it, to the egalitarian streak.)

This doesn’t mean it isn’t best in a Texas court to use a proper title (or “Your Honor”). But it does mean that the sort of exchanges reprinted in the recent editions of the *Bag* are unlikely ever to arise in a Texas oral argument. “Texas” does originally mean “friendly,” after all.

Evan A. Young  
Austin, TX



---

<sup>5</sup> *Id.* at xli-xlv.

<sup>6</sup> *Id.* at xlvi.