



CHIEF JUSTICES OF THE UNITED STATES IN MAINE

D. Brock Hornby

This article is based on remarks Judge Hornby delivered at the Nathan & Henry B. Cleaves Law Library Bicentennial Celebration on August 1, 2011. John Roberts, Chief Justice of the United States since 2005 and a regular summer vacationer in Maine since long before that, was the guest of honor.

— *The Editors*

WE ARE HERE to celebrate Cleaves Law Library on its 200th anniversary. Also, just about ten days ago, July 20, was the 100th anniversary of the opening of the federal courthouse in Portland, where Cleaves was housed for a short period, as Hugh MacMahon's delightful history of Cleaves will tell you.¹

Cleaves has done remarkable things for me over the years — first, as a lawyer seeking law review articles to cite in a brief; then as a Justice on the Maine Supreme Court looking for treatises or legislative history; most recently as a federal trial judge working with our longtime librarian, Nancy Rabasca, on the library's oral history project, or sending my law clerks to be educated on how to do legislative history research.

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¹ See HUGH G.E. MACMAHON, A BRIEF HISTORY OF THE NATHAN AND HENRY B. CLEAVES LAW LIBRARY ON THE OCCASION OF ITS 200TH ANNIVERSARY IN THE YEAR 2011 (2011).

Without Cleaves and its librarians, I – and I think many other Maine lawyers – would look a lot dumber. If you don’t know what I’m talking about, I suggest you visit Cleaves and talk to Nancy Rabasca to see what you have been missing. In the meantime, let’s talk lightheartedly about a little history.

By my count, there have been three Chief Justices of the United States with a Maine connection: William Cushing, Melville Weston Fuller, and John Glover Roberts, Jr. The connection seems to turn up in roughly 100-year intervals.

WILLIAM CUSHING

Now as to the first, William Cushing, his Maine connection is undisputed. But whether he was Chief Justice, we shall see, is a matter of some debate. Born in Scituate, Massachusetts, Cushing settled in Pownalborough on the Kennebec River around 1755, the only lawyer in that part of Maine at the time.² Pownalborough was part of Lincoln County, then still part of Massachusetts.³

Pownalborough is where the colonial courthouse was built in 1761, and there it still stands.⁴ John Adams and William Cushing both tried cases in that courthouse.⁵

Cushing became the first Lincoln County Probate Judge in 1760.⁶

I pass over the important judicial roles Cushing played in colonial and revolutionary Massachusetts, and jump to September 24, 1789, when President George Washington nominated Cushing to be an Associate Justice of the U.S. Supreme Court.⁷ Cushing was the first Supreme Court

² MELVIN I. UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 127 (1994); 22 *REPORT OF THE MAINE STATE BAR ASSOCIATION FOR 1920 AND 1921* at 76-77 (Norman L. Bassett ed., 1921).

³ *REPORT OF THE MAINE STATE BAR ASSOCIATION FOR 1920 AND 1921*, *supra* note 2, at 76.

⁴ A.J. Hungerford, *The 1761 Pownalborough Court House Revisited in 2010*, 25 *MAINE BAR J.* 139, 141 (2010).

⁵ *Id.*; *REPORT OF THE MAINE STATE BAR ASSOCIATION FOR 1920 AND 1921*, *supra* note 2, at 76.

⁶ 3 *LAW REPORTER: NOTES ON THE EARLY JURISPRUDENCE OF MAINE* 45 (Peleg W. Chandler ed., 1840).

⁷ *Timeline of the Justices: William Cushing, 1790-1810*, *SUPREME COURT HISTORICAL SOCIETY*, supremecourthistory.org/timeline_cushing.html (giving September 24, 1789 as

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Justice to administer the oath of office to a President, doing so on March 4, 1793, for the second inaugural.⁸

But was Cushing ever Chief Justice? Washington nominated William Cushing as Chief Justice on January 26, 1796. The next day, the Senate unanimously confirmed him, Washington signed the commission, and Secretary of State Pickering issued it.⁹ According to an 1854 biography of Oliver Ellsworth:

The first intimation Judge Cushing received of his appointment [as Chief Justice] was at a diplomatic dinner given by the President [that evening]. In seating the guests, Washington, with the stately etiquette of the day, bowed to Judge Cushing, and pointing to a vacant place near him, said, “The Chief-Justice of the United States will please take the seat on my right.” The next day [Cushing] received his commission.¹⁰

A 2006 law review article says that “What followed was a week or two of dithering and confusion. Cushing – on the one hand dutiful and honored, and on the other hand old, in uncertain health (he had been suffering from lip cancer), exhausted by circuit riding, and averse to the kinds of controversy that the office of Chief Justice seemed to attract – was of two minds about the job.”¹¹

There is a draft letter dated February 2, declining the appointment, but no evidence that it was ever sent. The rough Supreme Court minutes for February 3 and 4 record Cushing as “Chief Justice,” a phrase later crossed out. But by February 5, they were calling Cushing once again one of the

the date of Cushing’s nomination to the U.S. Supreme Court) (last visited May 24, 2016). In his biographical dictionary of U.S. Supreme Court justices, Melvin Urofsky says that Washington nominated Cushing to be an Associate Justice on September 30, 1789. UROFSKY, *supra* note 2, at 127.

⁸ 3 HENRY SWEETSER BURRAGE & ALBERT ROSCOE STUBBS, *GENEALOGICAL AND FAMILY HISTORY OF THE STATE OF MAINE* 1199 (George Thomas Little ed., 1909).

⁹ Ross E. Davies, William Cushing, Chief Justice of the United States, 37 U. TOL. L. REV. 597, 620-21 (2006).

¹⁰ GEORGE VAN SANTVOORD, *SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES OF THE SUPREME COURT OF THE UNITED STATES* 245 (1854), cited in Davies, *supra* note 9, at 621.

¹¹ Davies, *supra* note 9, at 621.

“associate judges.” Consistent with his having declined the nomination, Cushing was permitted to stay on as Associate Justice. On the other hand, when Washington then nominated Oliver Ellsworth, he stated that Ellsworth would replace “William Cushing, resigned.”¹²

Cushing died September 13, 1810,¹³ the year before Cleaves was founded. An 1840 account says that he “was the last judge who continued to wear the large wig of the English judges, which gave to him upon the bench an air of superior dignity and gravity.”¹⁴

But Cushing gave up the wig, and there are two versions why. One story says that when the Court sat in New York, boys followed Cushing in the streets with silent admiration and that Cushing was unaware of the throng until he heard the exclamation of a sailor, who came suddenly upon him, and blurted out: “My eyes what a wig!”¹⁵ The other story says that Cushing wore the wig to the first session of the U.S. Supreme Court in 1790, was the only one wearing a wig, and that Thomas Jefferson convinced him to give it up, allegedly saying that wigs made judges “look like rats peeping through bunches of oakum.”¹⁶

Cushing’s legacy? In 21 years, he wrote only 19 opinions.¹⁷

MELVILLE WESTON FULLER

For Melville Weston Fuller, there is no controversy about his having a Maine connection or being Chief Justice.

Fuller was born in Augusta, Maine, on February 11, 1833. His family were Mayflower people and leading Democrats in Augusta. His mother was the daughter of Judge, later Maine Chief Justice, Nathan Weston.¹⁸

¹² See generally *id.* at 600-03, 605-06, 622-26.

¹³ UROFSKY, *supra* note 2, at 127.

¹⁴ LAW REPORTER, *supra* note 6, at 46.

¹⁵ *Id.* at 46 n.1.

¹⁶ David Usborne, Supreme Court Justice Defends His Five-Year Vow of Silence, THE INDEPENDENT, Feb. 15, 2011, at 22.

¹⁷ UROFSKY, *supra* note 2, at 127.

¹⁸ 47 REPORT OF THE MAINE STATE BAR ASSOCIATION FOR 1958 at 61 (Sanford L. Fogg ed., 1958).

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Hence Fuller's middle name. Fuller's parents divorced and Fuller grew up in his grandparents' – the Westons' – household. Judge Weston was "a very strict person, opposed to drinking and smoking," but he did approve of dancing and the Congregational Church put him on trial for his dancing efforts. As a result, the Westons became Episcopalians, and Melville Fuller was always strongly opposed to Calvinism.¹⁹

Fuller graduated from Bowdoin in 1853, studied law in Bangor with two of his mother's brothers, then attended Harvard Law School. He did not complete law school, but still he was the first Chief Justice in U.S. history to have even attended a law school! Fuller was admitted to the Maine bar in 1855 and returned to Augusta to practice law, become an alderman, city solicitor, and junior editor of the *Augusta Age*. There he courted and became engaged to Susan Rice. However, her stepfather, Judge Richard D. Rice, opposed the marriage. So Susan Rice went on to marry John Noble Goodwin of South Berwick, Maine, a lawyer, congressman, and later first territorial governor of Arizona.²⁰

Fuller, on the other hand, left Augusta to practice law in Chicago because of his failed "affair of the heart" and because there was so little chance for a Democrat in Augusta, since Maine then was going strongly Republican.²¹ Fuller was very successful in his Chicago law practice and also in marrying well there, twice.²²

When Chief Justice Morrison Waite died in March 1888, President Cleveland eventually appointed Melville Fuller as Chief Justice. One account says that Fuller gave up a larger income to take the bench than anyone previously. He was reputedly earning about \$75,000 per year at his appointment.²³ As Chief Justice he received \$10,500.²⁴ Plus ça change, plus c'est la même chose!

¹⁹ Id. at 61-62.

²⁰ Id. at 62-63.

²¹ Id.

²² Id. at 64-66.

²³ Id. at 67-68.

²⁴ JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER 1888-1910* at 19 (Herbert A. Johnson ed., 1995).

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*Melville Weston Fuller monument erected in 2013
at the Kennebec County Courthouse in Augusta, Maine.*

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Not long after Fuller's appointment as Chief Justice, he was back in Maine, and riding up to the State House in Augusta. Recognizing the bus driver, Fuller asked him, "Have the boys heard that I have been appointed Chief Justice?" The driver said; "Oh yes." Fuller asked "What did they say?" to which the bus driver replied: "Oh – they laughed."²⁵

Fuller returned to Maine each summer, to Sorrento. He died at his summer home there on July 4, 1910,²⁶ one hundred years after Cushing died, 99 years after Cleaves was founded.

Although he is buried in Chicago, there is a plaque to Fuller in the Episcopal Church in Sorrento. It does not mention that he was Chief Justice.

Fuller's legacy? Fuller was very highly regarded for his administrative skills as Chief Justice.²⁷

"Further your affiant sayeth naught."

JOHN GLOVER ROBERTS, JR.

So, Chief Justice Roberts, you are continuing the tradition of Maine Shaving an involvement in the affairs of the Chief Justice about every 100 years. Although you are a Midwesterner, like Fuller you retreat here every summer. I don't know your views on Calvinism or dancing. Unlike Cushing you do not wear a wig. I do know that you carry on Cushing's tradition of administering the oath of office to the President, and that you will beat Cushing's record of 19 opinions in 21 years. And I am confident beyond a doubt that your place in Supreme Court history will be far greater than that of either Cushing or Fuller. But I suspect that if you asked the boys around Port Clyde, near where you summer, about your being Chief Justice – well, like the Augusta boys with Melville Fuller, they would just laugh.

I hope that's why you like Maine. We are so glad to have you here every summer and especially today to celebrate our beloved Cleaves.



²⁵ REPORT OF THE MAINE STATE BAR ASSOCIATION FOR 1958, *supra* note 18, at 68.

²⁶ *Id.* at 73-74.

²⁷ *Id.* at 69-70. Editors' note: Two years after Judge Hornby's remarks, a statue of Chief Justice Fuller was erected in Augusta, Maine.