

Misfits During a Turbulent Term

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THE FORGOTTEN MEMOIR OF JOHN KNOX
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JOHAN KNOX WAS A LAW CLERK to Justice James C. McReynolds during the October 1936 Term of the Supreme Court, sometimes called the year of constitutional revolution. I had been law clerk to Justice Harlan Fiske Stone during the 1934 Term and was active, in the Department of Justice, in the “court-packing” controversy of the 1936 Term. I looked forward, accordingly, to reading the opposing views of my contemporaries.

My expectations for the most part were disappointed. There were, it is true, two revealing passages from the enemy territory. One is a step-by-step demonstration of how an opinion can be created, or tossed off, in two-and-a-half hours by a justice who does not really care (pp. 130-142). The other is a description, from the next room, of the week-long agony of the dissenting justices in their effort in the watershed case of *Jones* &

Laughlin to say what they all agreed upon (pp. 189-192). What we have beyond this are, first, a day-by-day demonstration that McReynolds was unfit for civilized society; second, an occasional recording of whether the “conservative” or “liberal” group of justices gained the majority in an important case;¹ and, third, a sad but reassuring reminder that hubris and (presumed) social charm will not alone always produce success at the bar.

THE MEMOIR

Knox started a daily diary during his senior year in high school and apparently continued the practice throughout his professional career. He considered the 1936-1937 account to be of large interest and value. After all there was no other law clerk account presenting

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¹ Chief Justice Charles Evans Hughes, when viewed by Knox, was without explanation counted with the “liberals,” Justices Stone, Louis Brandeis and Benjamin Cardozo.

from within the Court a day-by-day account of its workings.² In 1952, after Reynolds' 1946 death, Knox began reworking the diary. After 11 years of his attention it reached in 1963 to 978 double-spaced pages of memoir (p. viii).

Knox retired in 1973 and turned his full attention to his memoir. He tried unsuccessfully to sell it to at least two publishers. He gave a copy to the Supreme Court library, and different portions of the book to four law school libraries. He made it freely available to many scholars. Yet, the editors say, only one "cites the work, and even then only in passing. ... The work ... has been neglected to the point of being forgotten" (p. ix).

I regret that Knox died five years before publication of this book. He would have been pleased with the appealing production of the University of Chicago Press and justifiably delighted with the approving attention given his memoir by two distinguished professors of law. For my own part, I doubt that even auspices so favorable can relieve this memoir from its half-century of deserved neglect.

THE AUTHOR

The editors say that Knox was a "painfully shy teenage boy" (p. xv). If so, he completed within the decade a spectacular metamorphosis into a brazen youth. At the age of 17 he wrote Justice Oliver Wendell Holmes, who unaccountably answered and in 1930 agreed that Knox might visit him in Massachusetts. There he lunched with Holmes and his clerk, Alger Hiss, and put the resulting photograph of him standing with Holmes to continuing use in his subsequent applications for employment (pp. xv, xvii). He entered law school in 1931, visiting Justices McReynolds, Stone, Cardozo and Willis Van

Devanter in the years at school, and probably writing to all other sitting justices as well (p. xv, xviii).

Knox must have possessed a large measure of social charm. Even with the handicap of having thrust himself upon them he achieved with both Van Devanter and Cardozo an intimacy or friendship that supported over the years recurrent half- or full-hour visits at his will and the dispatch of birthday cards or flowers. He wrote about 20 letters a week to his friends when working for McReynolds (p. 41). His hunger for social engagements was generously met by Katherine Ogden Savage, a wealthy widow occasionally escorted by McReynolds, whom Knox had met on an opinion day at Court. His memoir itself is rather endearing when he records, after he sat silent while McReynolds denounced the New Deal laws as incompetent adventures by young Harvard law school graduates, "One of my difficulties as secretary to McReynolds was that I often thought of what should have been said – but not until long after it was too late to say it" (p. 114).

Knox frequently visited Stone, whom he admired for his candor. Thus, on Knox's first visit, Stone told him in some unexplained connection, "McReynolds has set the law of admiralty back a full century!" (p. 120). With Brandeis, however, Knox had but a single interview, which he relates (pp. 55-58) without discernible embarrassment that his was the role of a persistent straight man in a standard and rather faded jest:

B: "And how did you get here, Mr. Knox?"

K: "Oh, I came over in a taxi"

B: "No, ... I am referring to the court."

K: "Well, you see I'm not at the Court. Justice McReynolds works at his apartment"

² While in law school he confided to his diary, "My name will survive as long as man survives, because I am writing the greatest diary that has ever been written. I intend to surpass Pepys as a diarist" (p. xiv).

B: [Shaking his head slowly back and forth,] "What I mean is – how did you get from Harvard to the Supreme Court?"

K: "Well, one of the Justices appointed me to the Court. ... It was Justice Van Devanter, and I was assigned to Justice McReynolds."

The actual path Knox followed to the Court was about as feckless as this description. He graduated from Northwestern Law School in 1934 but, "dissatisfied with his opportunities in Chicago," concluded to take graduate work at Harvard. He was awarded a modest scholarship in his first year, but it was withdrawn in his second year. His ultimate goal was a position with Ropes & Gray but he looked to Washington for intermediate employment after leaving Harvard. He wrote to all 96 Senators (enclosing to each a copy of his photograph with Holmes), apparently without any reply. He journeyed to Washington in search of help from Van Devanter. After six months Van Devanter reported that he had recommended Knox to a Justice in need of a secretary (pp. xvi-xviii, 6-7). On the day he graduated from Harvard Knox was summoned to an interview with McReynolds. The interview was confined to assurance that he did not smoke, a sample of his handwriting, and his typing speed. He was rejected when McReynolds learned that he used a stenotype in taking dictation, but reinstated upon his promise to learn to use only a pencil (pp. 8-10).³

The memoir contains only one mention of law work, other than the flood of one-page summaries of certiorari petitions. That mention is a pathetic account of judicial cruelty. McReynolds was going to New York on the last

weekend of October and asked Knox to prepare an opinion in a recently assigned case. Knox had a euphoric weekend, with every waking minute devoted to producing, in fourth draft, what he felt to be a splendid opinion (pp. 130-134). Harry Parker, McReynolds' messenger, tried to dampen his enthusiasm; Parker had seen the same game played before. When McReynolds returned on Tuesday he called for the briefs in the case and, when reminded by Knox, his draft opinion as well. An hour later he called Knox to come and take dictation. "We will now start writing the opinion as it should be written." Then he "silently, almost gently let my opinion glide downward into his wastebasket" (p. 136).

Beginning in the spring of 1937 Knox became interested in, indeed obsessed with, the D.C. bar examination. He enrolled in a preparation course and seems to have spent every available minute studying. There were, it is true, fewer minutes available than one might think. McReynolds insisted that his clerk be present in his office in the Justice's apartment and that he do nothing there but his work for the Court even though there was, in Knox's view, no such work to be done. He welcomed news of McReynolds' intention to go to Tennessee immediately after the Court's adjournment because he would have an undisturbed time to study for and take the bar examination. He did the studying in the Justice's unused chambers in the Supreme Court building.

McReynolds came back unexpectedly on June 16 to find an empty Knox office in the apartment. On June 17 he summoned Knox to declare that he was hired to be his clerk,

3 The editors seem to credit Felix Frankfurter with converting the clerk position in the mid-1930s into its current "full-time professional research assistantship" and with selecting Cardozo's clerk as well as Brandeis' (p. xxi). The practice in fact started with Holmes in 1915 and was taken up by Brandeis, Stone and Cardozo chiefly because they sought thereby to ensure their systematic exposure to new ideas. Cardozo did not confine his recruiting to Harvard and did not necessarily rely on Frankfurter. Justices Hugo Black and Stanley Reed and all subsequent appointees naturally followed the precedent of the liberal bloc of justices.

not to study for bar examinations and would be discharged at once if he did not reform. Knox, to his credit, said that he must take and pass next week's bar examination if he was to become a lawyer. McReynolds immediately phoned the Court's Clerk to demand that Knox's salary be stopped as of that morning. Even one not an admirer of Knox could weep upon learning that he failed the examination (pp. 242-252, 259).

Knox returned to Chicago. He was hired by Mayer, Meyer, Austrian, and Platt, which we in Washington knew as a good firm with an especial interest in recruiting Supreme Court law clerks. They were not happy to learn that he had failed his D.C. bar examination and fired him when he failed the Illinois bar examination in the spring of 1938. He then went to a firm headed by Frank Loesch, a family friend. He failed the Illinois bar examination for the second time in September 1938 but finally passed in March 1939. When the Loesch firm disintegrated he joined the regional staff of the War Production Board, which he left upon change of regional counsel. He then went to Cravath in New York, but on a "for the duration" of the war basis. When asked to leave in 1947 there followed a few months in solo practice, which collapsed with the fortunes of his only client. He returned to Chicago and spent several years in an ultimately unsuccessful effort to resuscitate the family's publishing business before taking employment as an insurance claims adjuster, never to return to the law (pp. 272-275). He retired from Allstate in 1973. He then returned to his memoir and efforts to have it published. These were unsuccessful except for a couple of extracts. He lived, unemployed and impoverished, until his death in 1997, after a decade made agonizing by cancer (pp. 275-277).

I know nothing of John Knox but that which is in this book, and have no discernible psychiatric qualifications. It may yet be worth noting that my strong distaste for his brazen self-

promotion had shifted, by the final page, to the sad analogy to the six-year-old who confidently says that he will be a fire engine driver when he grows up. Knox more enduringly than any other embraced the *non sequitur* that, as the one-term Supreme Court law clerks were among the country's best law graduates, and as he was a law clerk, so he was among the country's best.

THE JUSTICE

The memoir, whatever its defects in other areas, does an admirable job in reminding us that Justice McReynolds was a surly beast. He had come to Washington, after a brilliant academic record, in the Theodore Roosevelt administration to work on antitrust prosecutions. Woodrow Wilson appointed him Attorney General but after a year and a half found him such a disturbing factor in the cabinet that in 1914 he was elevated to the Supreme Court (pp. xviii-xix, 264-265). There he, in some eyes, was a disturbing factor for 21 years.

The new Supreme Court building opened for the 1935 Term, the year before Knox entered McReynolds' employ, but all justices except Hughes and Owen Roberts continued to work at home. McReynolds had a large apartment on 16th Street in which he lived with his black messenger, Harry Parker, and maid/cook, Mary Diggs. Knox was initially required to rent, at his own expense, an apartment in the same building. He soon became very friendly with Parker and, even before the 1936 Term opened, was admonished by McReynolds, "[Y]ou are becoming much too friendly with Harry. You seem to forget that he is a negro and you are a graduate of the Harvard Law School. ... I do wish you would think of my wishes in this matter in your future relations with darkies" (p. 51).

McReynolds ruled his small kingdom with implacable tyranny. Perhaps the most distressing of his many cruelties was the requirement that the clerk or messenger, except with

McReynolds' permission, stay in the apartment throughout the working day, even though McReynolds was absent and there was nothing to do. A random selection of his other indecencies includes non-emergency dictation in the evening until it was too late for Knox to attend the annual White House reception for the judiciary (p. 161); making light of Parker's ambition to send his sons to college; refusing to sign the Court's farewell letter to Brandeis; reading a newspaper on the bench while Cardozo was sworn in (p. xix); and using Parker as a retriever when he went duck hunting (p. 24).

McReynolds ate alone at a small table in the dining room of his apartment. The silence of the Knox memoir forcibly indicates that during his year he was never invited to share a meal with the Justice. He was, however, once invited to lunch with Parker and Diggs. They had set up two small tables in the kitchen. He pleasantly surprised them by moving his plate over to their table (pp. 175-176).

McReynolds would have been infuriated had he known of this familiarity, in his own home, with "nigras." His anti-Semitic prejudice was perhaps even stronger. The Court's annual photograph had to be omitted in the years when its seating protocol would have McReynolds seated next to Brandeis. Stone's clerk, Harold Leventhal, was pursued by Knox with some difficulty because he could not be allowed to come by the McReynolds apartment.

The Justice had a spectacular frugality, whether the savings were of personal or public funds. Stone in 1934 paid his clerk \$3,600. McReynolds, two inflationary years later, paid his \$2,750. Parker, tired from a year of long hours without respite, asked for 30 days of vacation while the Justice was touring Europe in the summer of 1937. He got, along with an unfeeling insult ("What have you done to make you tired?"), only 15 days. Out of McReynolds' substantial estate, Parker

received \$5,000 for more than 20 years of work and Diggs \$1,500 for 19 years.

Other than the one ill-fated draft opinion, the only substantive Court work in which Knox appears to have been involved was the preparation of a one-page summary of the facts of each petition for a writ of certiorari. It is safe to assume from his silence, and from the bare-bones McReynolds opinions themselves, that he was never asked to do research of any sort. There is no indication that McReynolds ever criticized or suggested improvement of the cert memos. There is reason to believe that he did not much care about them. As the senior associate justice he did not have to vote in the Court conference until after the Chief Justice had summarized the case and all other associate justices had voted.


According to Parker, Cardozo would have been an enemy even if he hadn't been Jewish. That was because Cardozo, when new to the Court, "went and made a suggestion or two about improving the wording of a few sentences. ... [McReynolds] never had no more to do with Cardozo after that" (p. 37).

I have found nothing in this book, as I know of nothing in my own experience, to make me glad that for a single Term, or a single case, McReynolds had served on the Court. There are, however, two areas, one serious and one frivolous, where I recall him with pleasure.

The last half-century has seen a growing practice by which an oral argument, whether well-considered or not, is converted into an unorganized interrogation session by individual justices competing for the flesh of the advocate. This is bad enough, but it would have been intolerable if McReynolds had joined in, promoting his prejudices with his frequent biting sarcasm. He did not, and seemed to be one of the few who believed that counsel was entitled to present a coherent argument. On a smaller canvas, McReynolds well knew that I was a despised "New Deal lawyer" and moreover one active in the hated

effort to pack the Court. I encountered, in the course of about 20 arguments before him, not a single instance where he sought publicly to harass or humiliate me. I can claim no personal credit for this immunity; it was simply that in his inbred code of conduct judges were polite to the white attorneys who appeared before them.

I presented my first argument to the Court in 1938.⁴ I was 28 years of age, and nervous. I seem to have sprawled over the lectern.

McReynolds dispatched a note to Reed, who had very recently been my superior in the Department of Justice, which asked in the crabbed hand of old age, "Does he think he argues better on his belly?" I considered that Reed found entirely too much pleasure in presenting the note to me. I filed it with care to preserve until framing but misplaced and lost it. I cannot claim that my posture was improved by McReynolds, but at least he tried. 

⁴ *Taft v. Commissioner*, 304 U.S. 351 (1938). My opponent was Robert Taft, a year before his first election to the Senate.