



PIERCE BUTLER
(1866 – 1939)

MR. JUSTICE BUTLER

SUPREME COURT OF THE UNITED STATES

THURSDAY, NOVEMBER 16, 1939

Present: The CHIEF JUSTICE, MR. JUSTICE McREYNOLDS, MR. JUSTICE STONE, MR. JUSTICE ROBERTS, MR. JUSTICE BLACK, MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE DOUGLAS.

The CHIEF JUSTICE said:

“It is my sad duty to announce the passing, early this morning, of our brother, Mr. Justice Pierce Butler. After a long and distinguished career at the Minnesota Bar, he was appointed Associate Justice of this Court and took his seat in January 1923. Trained in the exacting school of a most active professional practice, Pierce Butler brought to this Court not only his learning in the law, but a rich store of practical experience. His fidelity, his courage and forthrightness, which were his outstanding characteristics, made him a doughty warrior for his convictions, and he served the Court with great ability and indefatigable industry and an unwavering loyalty to its traditions and to his lofty conception of its function in preserving our constitutional heritage.

“The funeral services in Washington will be held tomorrow morning at 11 o’clock at Saint Matthew’s Cathedral, and the Court will attend. A committee of the Court composed of Mr. Justice McReynolds, Mr. Justice Stone, and Mr. Justice Roberts will attend the services to be held in St. Paul.

“As a further token of respect for the memory of our brother, the Court, immediately upon the conclusion of the hearing in the case now on argument, in which counsel from the Pacific coast are engaged, will adjourn until Wednesday, November 22 next, at noon.”

[308 U. S. v (1939)]

**Proceedings of the BAR and OFFICERS of the
SUPREME COURT of the UNITED STATES
in Memory of PIERCE BUTLER, January 27, 1940**

WASHINGTON

NINETEEN HUNDRED AND FORTY

[MLHP: There are two versions of the memorial proceedings for Justice Pierce Butler in the Supreme Court on January 27, 1940, and May 20, 1940. The one that follows is taken from 1 *Memorials of the Justices of the Supreme Court of the United States* 325-382 (Fred R. Rothman & Co., 1981), compiled by Roger F. Jacobs. It is complete; spelling and punctuation have not been changed. A shorter version, which does not include the eulogies of Wilfred E. Rumble, George I. Haight, Robert A. Taft, Thomas D. Thacher, and William D. Mitchell, appears at 310 U. S. v-xx (1940). The painting of Butler has been added by the MLHP.]

[1]

COMMITTEE ON ARRANGEMENTS



Mr. Solicitor General BIDDLE, *Chairman*

Mr. FRANK J. HOGAN
Mr. T. HARRY COVINGTON
Mr. CHARLES WARREN
Mr. SETH W. RICHARDSON

PROCEEDINGS

City of Washington, Saturday, January 27, 1940

The Bar of the Supreme Court of the United States and the Officers of the Court met in the Court Room at 11 o'clock a. m.

The meeting was called to order by Mr. Solicitor General BIDDLE.

Mr. BIDDLE said:

This meeting of the Bar of the Supreme Court of the United States is called in commemoration of the late Mr. Justice Butler who died on November 16, 1939. He had not sat since June 5th of that year, the last day of the term, when in the absence of the Chief Justice and of Mr. Justice McReynolds, he presided over the Court.

Justice Butler was born six years after the Civil War, and grew up in Minnesota during the reconstruction period, and in the vigorous and unregulated thrust of immense material expansion. He was self-made, working his way through Carleton College by teaching; admitted to the bar when he was twenty-two; serving as Assistant County Attorney, County Attorney and Special Assistant to the State Attorney General. When President Harding appointed him to the bench in 1922, his firm was one of the leading law offices in St. Paul. He was a regent of the University of Minnesota for more than fifteen years.

Justice Butler was a court lawyer, trained in the rough and tumble of general practice. He had the trial

IN MEMORY OF MR. JUSTICE BUTLER

lawyer's conviction that the trial and argument of cases were necessary to turn out a complete lawyer. He was a voracious worker, absorbing and disentangling the tough material of facts with skill and patience, and arranging them with clear precision. He was conscious of his office as a judge, scrupulous to maintain its high dignity, and somewhat withdrawn into the reserve which he felt should characterize the position.

But behind any aloofness, members of the highest court hold and express convictions. Difference in point of view on great national issues finds its way not only into Congress, but ultimately in the Court, sometimes with urbanity, as with Justice Sutherland, often with a passionate conviction, as with Pierce Butler, who stood by his guns and would not be silenced. By such stuff, whatever the immediate result in a particular case, is the democratic process enriched.

He was brought up in a school of thought which had not learned to doubt the implications of its perhaps oversimplified assumptions—laissez-faire, individualism, free competition—these things meant the American way. By this way he had come to the top and the failure of others to arrive seemed to indicate personal fault rather than economic disadvantage. The frontiers were open. Success was at the end of a straight road.

He did not change as the frontiers changed; and perhaps this quality of steadfast resistance to a different world was what Justice Holmes had in mind when he spoke of him as a "monolith". He had courage and unalterable convictions. To those to whom his outlook seemed inexpressive of our changed economy, and narrow in dealing with the human problems of constitu-

REMARKS OF MR. BIDDLE

tional construction, Pierce Butler appeared ultra-conservative. For those who thought like him he expressed the American way. We all know that he filled his high office with zeal and a courteous dignity.

His partner, for many years in St. Paul, was the Honorable William D. Mitchell, a former Solicitor General and Attorney General of the United States. I move that Mr. Mitchell be elected Chairman, and Mr. Charles Elmore Cropley, Clerk of the Supreme Court of the United States, Secretary of this meeting.

On the motion of Mr. Solicitor General BIDDLE, Mr. WILLIAM D. MITCHELL was elected Chairman and Mr. CHARLES ELMORE CROPLEY, Secretary.

On taking the Chair, Mr. MITCHELL called upon the Committee on Resolutions for its report.

COMMITTEE ON RESOLUTIONS

COMMITTEE ON RESOLUTIONS

Mr. WILLIAM D. MITCHELL, *Chairman*

Mr. CHARLES B. RUGG	Mr. WILLIAM L. FRIERSON
Mr. BARTON CORNEAU	Mr. J. E. McCADDEN
Mr. ROBERT G. DODGE	Mr. LOUIS QUARLES
Mr. CHARLES EVANS HUGHES, Jr.	Mr. JAMES M. SHEEAN
Mr. JOHN W. DAVIS	Mr. MICHAEL J. DOHERTY
Mr. DANIEL J. KENEFICK	Mr. CHARLES W. BUNN
Mr. NATHAN L. MILLER	Mr. DANIEL N. KIRBY
Mr. ARTHUR T. VANDERBILT	Mr. FRED B. SNYDER
Mr. GEORGE WHARTON PEPPER	Mr. CHARLES J. MURPHY
Mr. JOHN G. BUCHANAN	Mr. HENRY F. ASHURST
Mr. J. CRAWFORD BIGGS	Mr. GARETT W. McENERNEY
Mr. P. F. HENDERSON	Mr. GEORGE T. DONWORTH
Mr. WILLIAM L. RAWLS	Mrs. MABEL WALKER WILLEBRANT
Mr. HATTON W. SUMNERS	Mr. ROBERT STONE
Mr. J. BLANC MONROE	Mr. ROBERT M. RAINEY
Mr. ALEXANDER W. SMITH, Jr.	Mr. GEORGE E. HAMILTON
Mr. WILLIAM MARSHALL BULLITT	Mr. JOHN SPALDING FLANNERY
Mr. PATRICK J. FARRELL	

Mr. GEORGE WHARTON PEPPER, acting on behalf of this Committee, presented the following:

RESOLUTIONS

At a meeting of the members of the Bar of the Supreme Court of the United States held on January 27th, 1940, to take appropriate action following the death of Mr. Justice Butler, the Committee appointed by the Solicitor General reported this Minute for submission to the meeting:

Pierce Butler's life story is an epic of America. From his birth on a small Minnesota farm to the day of his death while a Justice of the Supreme Court of the United States his record was one of obstacles surmounted, of professional distinction achieved, and of merit appropriately rewarded.

His father and mother, Irish immigrants from County Wicklow, had settled in Dakota County, Minnesota, where they lived the life of pioneer farmers. They reared a family of eight children, of whom the future jurist was one. He was born on St. Patrick's day (March 17th), 1866. Strong of body and of vigorous mind, he dominated his environment and used its limitations as opportunities for self-development. A country school-teacher at sixteen, he qualified for admission to Carleton College at Northfield, Minnesota, from which he was graduated in 1887. During his student days he did farm chores early and late, and in the daily interval rode a farm horse to school. Having determined to become a lawyer, he moved to Saint Paul and in 1888 was admitted to the bar.

His abilities were early recognized, and after serving for two years as an assistant he became the County At-

[11]

IN MEMORY OF MR. JUSTICE BUTLER

torney of Ramsey County. In this way he acquired proficiency in the art of the successful trial lawyer and was noted for his capacity to win the confidence of all the diverse elements of which local juries were composed.

In 1897 he began the general practice of the law. Here again his character and ability made their mark and important clients were eager to retain him. While throughout his career he represented great railroads and other powerful corporations and became in this sense a corporation lawyer, he never sacrificed his independence of judgment and it was always he who dominated the client. His professional services were often placed at the disposal of the Government and he figured in many important cases arising under the Anti-Trust Laws and the Railroad and Utility Statutes. He was of the sort that men instinctively trust. He became one of the notable figures in the life of the great Northwest. When it was known that he was to appear the court room was wont to be crowded with people eager to hear him and to see him in action.

He had great energy, prodigious memory and large capacity for logical thinking. His character was a unit without internal stress. There was inherent a belief that there exists a philosophical rightness and he sought to apply it to each matter in hand. A skillful legal tactician, his sole strategy was to drive forward unswervingly in the direction which he regarded as the right one. Expediency never justified retreat or indirection.

As senior member of the firm of Butler, Mitchell and Doherty, he was constantly at work and always with

RESOLUTIONS

notable fidelity to court and client. For the five years from 1913 to 1918 he served as a member of the Committee of Counsel for the Federal Valuation of Railroads. In 1919 he was of counsel for shareholders in proceedings in Canada under the Canadian Northern Acquisition Act. Later he was appointed one of the counsel for the Dominion of Canada in the Arbitration at Montreal held under the Grand Trunk System Acquisition Act. In this proceeding William H. Taft sat as one of the arbitrators. Although Mr. Taft dissented from the decision supporting the views urged by Mr. Butler, their association led to a warm friendship. The acquaintance with his powers and fairness gained in the course of that association doubtless was a factor in Chief Justice Taft's later recommendation of Mr. Butler for appointment to the Supreme Court when a vacancy was caused by the retirement of Mr. Justice Day. It was on November 23, 1922, while he was serving as counsel in the Toronto Railway Arbitration, that he, a Democrat, was nominated by President Harding to be an Associate Justice of the Supreme Court of the United States. The nomination not having been acted upon at that session of Congress, the President re-nominated him on December 5, 1922. He was confirmed by the Senate on December 21, 1922, and on the 2nd of January, 1923, the judicial oath was administered and he took his seat upon the Bench.

During his seventeen years of service on the Court he saw his country pass through an era of unstable prosperity and into a period of resulting depression. Under such circumstances it was not surprising that many should lose faith in the soundness of the American tra-

IN MEMORY OF MR. JUSTICE BUTLER

dition; but with such a life story behind him, it was inevitable that the faith of Mr. Justice Butler should never waver. He had, indeed, that capacity for deep emotion which was his by inheritance, but his experience had taught him to think realistically.

Fearful of the rule of men in place of the rule of law, he appealed to the accumulated body of the law as a continuous social expression and not as what might appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges may from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its mis-application merely because the end in view appeared at the moment to be desirable.

He had faith in the power of objective reasoning and in the intellectual integrity of man, with correlative responsibility of the individual to develop himself and pursue the course that to him seemed right. This faith in the individual man was expressed by resistance to any attempted infringement of the bill of rights, and, in the absence of constitutional amendment, to centralization of government and to extension of its powers over the individual. He felt that greater material welfare under a paternal government if possible of achievement rather than ennobling the citizen would debase him by destroying his integrity and denying his will to exercise his moral and intellectual forces. He refused to concede that the individual is a helpless creature of an environment built by others, and opposed the kind of humanitarianism that would relegate him to that position.

RESOLUTIONS

It would be out of place in this Minute to attempt an analysis of his judicial opinions. That will follow in due course. Suffice it to say here that during all the years of his service he contributed to the Court not merely sound learning and ripe experience, but calm judgment and the stabilizing influence of tested character.

While Mr. Justice Butler was a man of deep conviction, he could differ from other men without losing their good will. He was far from being a bitter partisan. Rather he was a man of generous sympathy and broad comprehension. His friends included old and young alike. Institutions of learning conferred honorary degrees upon him. The law students of Georgetown university named a law club in his honor. An American in the best sense of the word, he retained throughout his life an affectionate regard for the land of his ancestors. A visit to Ireland in 1934 was esteemed by him to be one of the happiest episodes in life. He was a lover of outdoor life and on his farm in Maryland sought refreshment of spirit—whenever the rigorous round of judicial duties permitted.

The land and people of Minnesota remained close to him, and he carried with him great and irreplaceable knowledge of the history of the Northwest, gathered from his own youthful experiences, from delighted reading of earlier days, and from wide personal knowledge of most of its later leaders and characters. The mention of a name would start a flow of reminiscence and anecdote reaching back into the development of that country, all full of the color of its personalities.

[15]

IN MEMORY OF MR. JUSTICE BUTLER

The domestic life of such a man was certain to approximate the ideal. Happily married and deeply devoted to wife and children, his was a Christian household characterized by plain living and high thinking. He was a devoted member of the Roman Catholic Church. The reality of his religion brought him comfort at times of domestic affliction. The high pressure of judicial work and disease common to advanced years overcame the powerful physique which was his by inheritance and conservation. After a brief illness he died in Washington on November 16, 1939. At his Funeral in St. Matthew's Cathedral all sorts and conditions of men attended in silent tribute to his memory. Today representative members of the Bar of the Supreme Court of the United States are in their turn witnessing to their admiration and affectionate regard for one whose simple godliness and faithful public service endeared him to all who came within the circle of his influence.

Resolved, that the foregoing Minute be adopted; that a copy of it be transmitted to the Attorney General of the United States for presentation to the Court and that the Chairman of this meeting be directed to forward a copy of it to the family of Mr. Justice Butler.

REMARKS

of

Mr. WILFRID E. RUMBLE

Pierce Butler was my employer, my partner, and my friend. I admired and loved him.

All of his life at the bar was spent in Saint Paul. He held only two public offices before coming to this Court in 1923. Soon after entering the practice he was elected county attorney of the county in which he lived. Much later in his career he was appointed a regent of the University of Minnesota. During the years immediately preceding his appointment to the Court he was the outstanding trial lawyer of the Northwest, and he and Mr. William D. Mitchell, his partner during the last twenty years of his practice, were recognized as the leading lawyers of that territory.

Mr. Butler had a tremendous capacity for work, and even if pressed for time was painstakingly careful and deliberate in the performance of it. The demand for his services was so great that for many years he devoted most of his waking hours to work. Regardless of the difficulties of the problems upon which he worked he enjoyed doing them, and strange as it may seem they furnished him with much of the relaxation and recreation which other men find in sports and activities wholly disconnected from their labors. He had a splendid constitution and unlimited vitality and endurance, so that he was able to carry a volume of responsible work which soon would have broken many lawyers. Often during

[17]

IN MEMORY OF MR. JUSTICE BUTLER

long trials of complicated and difficult lawsuits he spent his evenings working upon important matters wholly foreign to the litigation. The strain and tension of a hard-fought legal battle affected him less than any lawyer I have known. In a way he was a hard taskmaster, but he never asked of anyone more time or effort than he himself was giving, and his genuine interest in the welfare of those who worked with him, and his friendliness, made the most exacting work with him a pleasure.

His success in the trial of lawsuits was phenomenal. He always said that the most important part of any case was the preparation and presentation of the facts, and his cases were thoroughly prepared. He had a remarkable memory, and this, with his impressive appearance, quick wit, mental alertness, and complete mastery of facts, made him a formidable and effective cross-examiner. He was essentially an advocate and I think never tried a case in which he was not absolutely convinced of the righteousness of his cause. He was fair and accommodating to opposing counsel, and no matter how hard fought the contest his opponents were as friendly after the battle as they had been before it. He possessed in the highest degree those other attributes which are fundamental essentials of a good lawyer—absolute honesty, courage, and common sense.

His clients were from all classes and his cases of wide variety. Often he represented the plaintiff, but in later years most of his trial work was for the defense. His ability to analyze and master intricate facts and complicated legal problems, coupled with a genius for figures, made him especially capable in rate litigation,

REMARKS OF MR. RUMBLE

and he handled important cases of this class for various utilities. While doing so he found time to handle many other cases. I recall a personal injury case in which he represented the plaintiff and recovered from the Twin City Street Car System the largest verdict ever rendered against it; another in which he represented St. Olaf's College, a prominent Lutheran educational institution, in a will contest involving large amounts, and another in which he appeared for a group of Minnesota farmers who had been indicted for an alleged violation of the Minnesota anti-trust statutes because of their efforts to market milk cooperatively. The United States Government employed him to prosecute the meat packers and the flour processors—cases of national scope and importance. I mention these few not to indicate the importance of the matters in which he was engaged but merely to evidence the broad field of his activities. Is it any wonder that after thirty-five years of active practice at the bar, he said in the *Pacific Gas* case (302 U. S. 388):

“Our decisions ought to be sufficiently definite and permanent to enable counsel usefully to advise clients. Generally speaking at least our decisions of yesterday ought to be the law of today.”

He served for years as a member of the Board of Regents of the University of Minnesota and gave generously of his time to that institution. He was instrumental in securing the affiliation of the University Medical School with the Mayo Foundation, as a result of which the facilities of that great organization were made available to University medical students.

IN MEMORY OF MR. JUSTICE BUTLER

Despite a somewhat austere appearance he was in fact a simple, modest man, without pretense or sham and with a genuine love of people. He had innumerable friends and was never too busy to advise and aid them in their personal troubles or to stop for a friendly chat. I think if we in his office had any complaint about him, it was that he spent more time than he should upon matters of this kind. Next only to the time he spent with his family he enjoyed spending occasional hours with his lawyer friends. He was a charming companion, and his memory and wit and keen insight into human nature made him a famous story-teller.

He was deeply religious, if by this is meant a genuine belief in a Divine Being and a sincere effort to live a Christian life. A member of the Roman Catholic Church, he was noticeably tolerant in his views upon religion. I never knew him to either favor or criticize one for his religious beliefs, and when he left his law firm to go upon the Bench most of his partners were not members of that church. His religion undoubtedly was in part responsible for the rare fortitude with which he met during his later years domestic tragedies such as few men suffer. They did not embitter him, nor did he complain about them.

He had eight children, and for years finances were with him, as with the average American, a serious problem. When he was appointed to the Court he was far from wealthy, and acceptance of that honor meant a heavy personal sacrifice which he gladly assumed.

When his appointment came to him, he believed that he was becoming a member of the world's greatest court and was receiving the highest honor that could come to

REMARKS OF MR. RUMBLE

an American lawyer. He felt that great responsibilities had been placed upon him, not only in the way of rightly deciding the great and important cases which come to that Court but also in his conduct as a member of the Court. He fully lived up to all of them. He believed that great judges of the past had lighted a path which led straight to the proper construction and decision of constitutional questions. Born and reared on a farm in a rural western state, by his own efforts he reached the heights. It is not strange that he passionately believed in the right of individuals to forge their own careers or to find him saying in the *Senn* case (301 U. S. 468), referring to the Fourteenth Amendment:

“Our decisions have made it known everywhere that these provisions forbid state action which would take from the individual the right to engage in common occupations of life, and that they assure equality of opportunity to all under like circumstances. Lest the importance or wisdom of these great declarations be forgotten or neglected, there should be frequent recurrence to decisions of this court that expound and apply them.”

During his career at the bar he had seen his country under its Constitution, as declared and expounded by men whom he idealized, come successfully through two wars and depressions; he had himself, under it, attained great honors; he believed in that Constitution, so expounded, with all his heart and soul, and he fought courageously and ably against what he thought were contrary and unsound views with respect to it.

In writing he was not a stylist and had no flair for an unusual turn of a phrase or for the use of uncommon

IN MEMORY OF MR. JUSTICE BUTLER

language, but he did have the ability to express himself clearly. His decisions evidence a searching knowledge of the facts involved and a logical, concise treatment of them. No lawyer can complain of any decision of his that it was based on only part of the established facts or that he made the facts fit his views of the law. He was careful to limit his opinions to the questions actually presented, and in writing them his sole effort was to lay a factual foundation for the opinion he intended to express and then state it clearly and concisely. I venture to assert that there never will be any doubt or uncertainty as to what the Court held, or meant to hold, in any case in which he wrote.

Pierce Butler was a great American. In his death we in Minnesota lost a true friend and this nation a valuable and loyal servant.

I began this brief talk upon a personal note. I should like to end it on one which I know he would approve. I probably have created the impression that Mr. Butler's success was due wholly to his own efforts. That is not the fact. He himself attributed much of his success to his wife, who for forty-eight years smoothed the rough spots in his road, furnished him with a happy, tranquil home, encouraged and comforted him, and was his constant, cheerful companion.

REMARKS

of

Mr. GEORGE I. HAIGHT

The frontier has been a vital influence in our country's history. It began at the margin of the first settlements on the Atlantic Seaboard. Through three centuries it steadily made its Westward way. It lived not in geography alone. Its spirit still endures.

Wherever the frontier extended or remained, it has been always a place of growth and achievement. It demanded strengths in men. Among these were courage, energy, endurance and genuineness. It brought forth qualities of inquiry, of research, of inventiveness, and of practical analysis. It developed directness of approach and plain speech. However humble, the frontier's first public buildings were the school house and the church. It had its ideals—ideals held by men ready to assail or defend—men of personal independence, men conscious of their strengths, men who knew their responsibilities.

To such a frontier came Patrick Butler and his wife Mary Butler. They were born and educated in Ireland. Patrick Butler was a graduate of Trinity College. Following the Irish famine of 1848, they came to Galena, Illinois. Thence they moved to Minnesota, where their first home was burned by Indians. They then took up a homestead in Dakota County, 35 miles south of St. Paul. There in 1866, in a farm house of logs, their sixth child, Pierce Butler, was born. Four years before,

[23]

IN MEMORY OF MR. JUSTICE BUTLER

Little Crow had led his fierce Sioux in the Massacre at New Ulm, on the Minnesota River. The new State was in its building. Agriculture, industry and transportation were developing. Its area, 400 miles long and averaging over 200 miles wide, contained, in 1850, a population of 6,000. By 1860 it had increased to 172,000. In 1885, three years before Pierce Butler was admitted to the Bar, its population had passed the million mark.

The State, in the main, was still of the frontier when he began his law practice. To that practice, he brought all of the frontier's best qualities of heart and mind. They were born in him. They inhered throughout his life. They were evidenced in his varied general practice—whether he appeared as the Attorney of Ramsay County or for a private client; whether as Prosecuting Attorney for the City of St. Paul or as counsel for the Canadian Government in the Grand Trunk Railway Case; whether as Special Counsel for the Federal Government in the Bleached Flour Cases under the Food and Drug Act or as counsel for the Great Northern Railroad; whether as Special Government Counsel in the *Meat Packers' Cases* under the Sherman Law or as counsel for the Railroad interests in the *Minnesota Rate Cases*; whether in State Courts or in Federal Courts; and whether before Court or Jury. These strong qualities appeared also in his civic and in his educational work, on St. Paul's first Charter Commission, on the Public Library Board, and on the Board of Regents of the University of Minnesota.

It is difficult to recount a lawyer's history. So much of the quality and character of his service rests in

REMARKS OF MR. HAIGHT

knowledge that is fugitive. Records give only partial revelations. Controversy largely passes away. From his contemporaries of the Bench and Bar much of it can be learned, but little is preserved in libraries.

We, now living, know that Pierce Butler, during his 35 years of practice, was a realist possessed of great character, of intellectual honesty, and of that human virtue among the rarest—moral courage. These made the foundation—but they were not all. To them was added hard work, given day by day and year by year. With him that work had good direction both in its breadth and in its depth. For it, brilliancy is no substitute. He became and was a prime lawyer—with a master key to all the rooms of the storehouse of his science. He was not one who ever hopefully searches a bunch of rusty keys to find one fitting.

He had the craftsmanship of a lawyer—the keenness of observation, the power of analysis, the clarity of reasoning, the understanding of principles, and the virtue of lucid statement. A distinguished advocate who worked with him for the Government in an important Federal Case has said of him:

“He was a hard-working, successful lawyer—keen in analysing facts, thorough in his preparation, and simple and direct in his presentation of his case to court or jury. There was nothing of the unique or sensational about him. He drove home his points in the vigorous Anglo-Saxon which always has been the language of our great lawyers and jurists.”

When Pierce Butler came to this Court in January, 1923, he brought with him that valuable accumulation

IN MEMORY OF MR. JUSTICE BUTLER

of experiences at the Bar in which were wrapped the frontier's virilities of body, mind and spirit. Here he used them, giving his full part to the performance of great tasks—many of them momentous and of infinite difficulties. Many of them related to institutions. Institutions are expressions of men. They are as mortal as mankind. Their final shaping interpretations, on which depends the measure of our liberties, are confided to this Court.

The cases in which he wrote opinions cover all fields of the law. His opinions are notable for their obviously careful recognition of the issues that fairly emerge from the record; their directness; their simplicity of treatment; their clarity; and their decisiveness. It would seem that to him the law, with its necessary inexactness, is a complete science—one that is fair, broad, and wholesome—one in which principles are applied and developed, and in which cases illustrate and illuminate rather than generate the fundamentals upon which that science is based.

His contributions to the Law, to this Court, and to our Country are invaluable. For them—all are grateful. The story of Pierce Butler as a lawyer, and the story of Mr. Justice Butler as an able jurist on this Bench, are grounded in strengths. An understanding of them is found in the words of the Prophet Isaiah:

“Look unto the Rock, whence ye are hewn.”

REMARKS

of

Senator ROBERT A. TAFT

(Delivered on his behalf and in his absence by
Senator JOHN A. DANAHER.)

We meet here today to pay tribute to the memory of Pierce Butler, for seventeen years a Justice of the Supreme Court; seventeen years during which the Court has had to consider every phase of the American constitutional system; seventeen years which have seen a great change in the whole character of the Government of the United States. To the solution of the problems raised by this change, Mr. Justice Butler brought his extraordinary ability, his courage, learning and intense application. He was one of my father's dearest friends, and I speak from personal knowledge when I say that he was loved by all those who knew him, and universally admired and respected by the Bar of the United States.

Mr. Justice Butler was conservative in his viewpoint on legal and political questions. He had an intense respect for the law, and believed in the duty of the Court to interpret the laws and the Constitution strictly in accordance with their terms. It is interesting and significant that a conservative viewpoint should develop in a man whose beginnings were so humble as those of Pierce Butler.

His father, Patrick Butler, and his mother, Mary Gaffney Butler, were immigrants from Ireland, who lived in Minnesota, not far from the town of Northfield.

IN MEMORY OF MR. JUSTICE BUTLER

He was born in a simple cabin, one of eight children, and was small and feeble himself during his early childhood. Yet from his own efforts he rose to the highest position in the land. He went to a one-room school, and at the age of sixteen was a teacher in a one-room school. He worked on his father's farm, and finally went to Carleton College at Northfield, five miles from the farm, riding back and forth every day on one of his father's two farm horses. He studied law late at night, and worked in a dairy wrestling milk cans early in the morning when most of his classmates were still in bed.

After he graduated from Carleton College in 1887, Pierce Butler went to St. Paul, and continued to study law while working in a law office there. In 1891 he was appointed Assistant County Attorney, and in 1893 he was elected County Attorney of Ramsey County, the only elective office he ever held. Then he went into the general practice of the law, and from 1897 until 1922, when he was appointed to the Court, his success was steady and certain. He became counsel for various railroads, but engaged in all phases of general practice. His outstanding knowledge of the law, his earnest application, and his ability to make a forcible statement of legal principles were soon recognized, and he was often employed by other lawyers to present their cases.

Mr. Butler specialized to some extent in railroad law, and represented the railroads in the famous Minnesota rate cases. He represented the Dominion of Canada in the arbitration concerning the acquisition of the Grand Trunk Railway by the Canadian Government, in which my father acted as one of the arbitrators. Their friendship began at that time. Mr. Butler was also counsel

REMARKS OF MR. TAFT

for the Government in several anti-trust cases, notably that against the packers. He was for years a member of the Board of Regents of the University of Minnesota. He was a Democrat, but never very active in politics.

In 1922 he was appointed by President Harding to be a Justice of the Supreme Court of the United States to succeed Mr. Justice Day. In his long service on the Court he more than pulled his oar in the boat. During that period he wrote three hundred and twenty-two majority opinions, thirty-three dissenting opinions, and four concurring opinions. His work was thorough and his opinions clear, so that his part in the building of American law is assured for all time to come. While Mr. Justice Butler usually took the conservative side, he took that side because of his devotion to the liberal principles of the Constitution in the protection of individual rights. He recognized, as in the case of *Highland v. Russell Car and Snow Plow Company*, 279 U. S. 253, that liberty of contracts "is not absolute or universal, and that Congress may regulate the making and performance of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created." But he was more concerned that liberty of contract be not lightly impaired than most other judges. His belief in personal liberty was shown by his opposition to the many attempts to restrict that liberty in prohibition legislation. He was devoted to the Constitution, but he particularly objected to legislation which in his opinion violated the individual rights assured in the first ten Amendments. He had succeeded through his own ef-

IN MEMORY OF MR. JUSTICE BUTLER

forts, over serious obstacles and lack of opportunity. He was more concerned that the government should keep open the channels of individual liberty than he was that the government should extend a paternalistic protection to those who were not so well able, or determined, to succeed through their own efforts. He was determined to retain as far as possible the conditions which permit men to rise from humble beginnings to the highest positions of honor and responsibility. Yet he was most generous in helping others himself, and particularly liked to help others make their own way. He was a deeply religious man, a Catholic, and very active in the affairs of the Catholic Church in the United States.

In the death of Pierce Butler, those who knew him have lost a beloved and devoted friend, the Supreme Court of the United States has lost a capable and valuable member, and the country has lost a sincere and faithful public servant.

REMARKS

of

Mr. THOMAS D. THACHER

Pierce Butler was preeminently the product of individual freedom under the American system of government. When he came to the Bench he brought the experience of long training at the Bar, where through sheer force of character he attained a dominating position of eminence. His life experience gave him faith in the individual and love of his country and its institutions. This faith is evidenced in his written opinions, many of which are concerned with the rights and obligations of the individual under the American system of government.

In reading his opinions one is constantly impressed with the strength of his determination that the individual should have a fair deal under law. He stood alone in his first dissent against the forfeiture under a state statute of intoxicating liquor lawfully acquired and kept only for the use of the owner in his own home, before there was any law which forbade such acquisition and use. He dissented upon the ground that such possession and use could not injure the public, characterizing the suggestion that the destruction of such liquors had any relation to the protection of the public as fanciful and without foundation. (*Samuels v. McCurdy*, 267 U. S. 188.)

When in a criminal case the Government relied upon a statutory presumption which he considered groundless, he put his dissent upon principles which he de-

IN MEMORY OF MR. JUSTICE BUTLER

clared the people, the bar and the courts of this country have rightly cherished as fair play. (*Casey v. United States*, 276 U. S. 413.)

When in his own Circuit a number of bootleggers were convicted and denied bail by the District Court and by two of the Judges of the Circuit Court of Appeals, Mr. Justice Butler heard their applications as Circuit Justice. In granting these applications he said:

“The proper exercise of judicial discretion is never arbitrary, fanciful or capricious; it is deliberate and governed by reason and the law applicable to the cases under consideration. Abhorrence, however great, of persistent and menacing crime, will not excuse transgression in the courts of the legal rights of the worst offenders. The granting or withholding of bail is not a matter of mere grace or favor. If these writs of error were taken merely for delay, bail should be refused; but, if taken in good faith, on grounds not frivolous but fairly debatable in view of the decisions of the Supreme Court, then petitioners should be admitted to bail.” (*United States v. Motlow*, 10 F. (2d) 657, 662.)

With Justices Holmes, Brandeis and Stone he dissented from the decision of the Court permitting the use of evidence procured by wire-tapping (*Olmstead v. United States*, 277 U. S. 438), and in a recent case (*Nardone v. United States*, 302 U. S. 379) was with the majority of the Court in holding that under the Communications Act of 1934 evidence obtained by Federal agents by tapping telephone wires is not admissible in a criminal trial in the Federal Courts.

REMARKS OF MR. THACHER

He gave broad scope under the due process clause to the right of an individual to engage in a lawful calling. He believed that there were definite limitations upon the powers of government to regulate any business, and declared:

“Also it must be accepted as settled that the right to regulate a business does not necessarily imply power to fix the scale for services therein or to trespass on the duties of private management. . . . In order to justify the denial of the right to make private contracts, some special circumstances sufficient to indicate the necessity therefor must be shown by the party relying upon the denial.”
(*O’Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 268-269.)

He considered a state statute unconstitutional which in effect gave union tile layers the right to force the plaintiff, a non-union tile layer who worked at his trade, taking jobs for his own account and hiring a few men to help him, to give up working with his hands although he was willing to employ union members. (*Senn v. Tile Layers Union*, 301 U. S. 468.)

In *Sinclair v. United States*, 279 U. S. 263, he emphasized the right of the citizen to be protected against the excesses of government (p. 292):

“It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries

IN MEMORY OF MR. JUSTICE BUTLER

and disclosures in respect of their personal and private affairs.”

But sustained the power of the Senate to compel all pertinent disclosures in aid of its constitutional functions. His disposition of cases of unreasonable search, arising out of prohibition, discloses his determination to enforce the Fourth Amendment.

On the last day in which he sat in this room he joined with Justice McReynolds in statements reminiscent of his early life:

“True, production and distribution of milk are most important enterprises, not easy of wise execution; but so is breeding the cows, authors of the commodity, also sowing and reaping the fodder which inspires them. If, perchance, Congress possesses power to manage the milk business within the various states, authority so to do cannot be committed to another. A cursory examination of the statute shows clearly enough the design to allow a secretary to prescribe according to his own errant will and then to execute. This is not government by law but by caprice. Whimsy may displace deliberate action by chosen representatives and become rules of conduct. To us the outcome seems wholly incompatible with the system under which we are supposed to live.”
(*United States v. Rock Royal Co-Op.*, 307 U. S. 533, 582.)

In these and many other instances he showed his conviction that the constitution and the laws should be administered to protect the rights of the individual against all invasion by the Nation or the State. He was as firmly insistent that the obligations of the individual to government should be observed.

REMARKS OF MR. THACHER

He had little patience with aliens seeking to become citizens without assuming the obligations of natural-born citizens to bear arms in defense of the country, whether upon conscientious or religious grounds. (*United States v. Schwimmer*, 279 U. S. 644; *United States v. MacIntosh*, 283 U. S. 605), and had no hesitation in ruling that the liberty guaranteed by the Fourteenth Amendment does not confer the right to be students in a State University free from obligation to take military training as one of the conditions of attendance. (*Hamilton v. Regents*, 293 U. S. 245.)

In *Near v. Minnesota*, 283 U. S. 697, he could not concur in extending the freedom of the press against the prohibitions of a statute of his own State so as to permit the continuance of the publication of a scandal sheet, shown to be malicious, scandalous and defamatory, directed against public officers, leading newspapers, many private persons and the Jewish race, and used for blackmail and to dominate public gambling and other criminal activities. There is no doubt that the decision of the Court from which he dissented established the press far beyond the reach of control or suppression by government, but on the facts of the particular case Justice Butler and three other Justices were of the opinion that the State was not without power to suppress such a publication upon proof of such facts.

Deep moral conviction added force to his vigorous dissent from the ruling of the Court in *Hansen v. Haff*, 291 U. S. 559, that “extra-marital relations” of an unmarried woman are not immoral within the condemnation of our immigration laws.

IN MEMORY OF MR. JUSTICE BUTLER

The Chief Justice has spoken of Justice Butler's "unwavering loyalty to the traditions of the Court and to his lofty conceptions of its function in preserving our constitutional heritage". He deeply felt the responsibility of judicial power. As was said of Justice Blatchford (150 U. S. 711), he did not attempt "to bestow conclusions on after generations". He did not concern himself with filling up the interstices of the law, but only with the solution of the controversy in court. He mastered the facts in every case, found the applicable law, and applied the law as he found it. He could not conceive that it was his duty to do otherwise. He accepted the doctrine of *stare decisis*. His fundamental conception of a Judge's duty to follow precedent necessarily brought him into conflict with decisions overturning long-established precedents. His opinion in *Erie R. Co. v. Tompkins*, 304 U. S. 64, is an earnest and convincing statement of his conception of the Court's duty to refrain from overruling a decision of the Court rendered almost a century before and followed during all that time, and further, to refrain from declaring the Judiciary Act of 1789 unconstitutional, when neither question had been raised or discussed by counsel.

Justice Butler was insistent in many cases that questions not properly raised should not be decided. He regarded the grounds upon which a writ of certiorari is granted as not only limiting the argument of counsel but also restraining the Court from deciding other questions (*Olmstead v. United States*, 277 U. S. 438, 486)—certainly a sound rule if counsel have had no opportunity to argue the point. He was insistent, so long as

REMARKS OF MR. THACHER

he remained on the bench, that decisions of the Court should not be put upon constitutional grounds not properly raised and discussed at the bar (*Coleman v. Miller*, 307 U. S. 433)—a principle not often disputed, but sometimes ignored.

To some, such insistence may appear technical, but with Pierce Butler it was dictated by the very fundamental conception of a fair hearing, including full opportunity to present the facts and to be heard on the law which is to control decision. His opinions reflect his determination to decide only the questions presented in the particular case. These opinions will not be read as legal essays. As judgments of the Court they leave no doubt as to the decision rendered or the grounds upon which it rests. This is as they should be.

On the bench, Pierce Butler was the man he always had been—untiringly industrious, meticulously careful, and thoroughly skilled in his craft, for which he cherished the highest ideals. From his birth until his death he was uncompromising in the performance of duty as he saw it. And so it was when he came to exercise great judicial power.

When life is done, it is well to think of the man who lived. This man had character, firm convictions and rugged determination, which he constantly applied to a very simple but a very fundamental sense of judicial duty. He was possessed of all the qualities of a great judge, but above all else, and to an extraordinary degree, he possessed the essential qualification of absolute and complete independence of all the winds that blow—a quality which was the product of his training and inherent in his character.

REMARKS

of

MR. WILLIAM D. MITCHELL

The tradition that a presiding officer should refrain from addressing his audience has not always been obeyed on occasions like this, but even if it had, I should feel repressed if I were not allowed to record something of the great lawyer with whom I had long professional association. The addresses delivered here this morning have served to sharpen our impression of his outstanding qualities.

First in my mind are his forthrightness and candor. Long and intimate acquaintance with him was not necessary to understand his qualities. There were not two Butlers—one to his close friends and another to those who knew him less. In contacts with him one never felt that below the surface were running undercurrents of calculation or motive. Such words as “subtlety” or “finesse” have no place in any vocabulary needed to describe him. His directness and candor left no room for mistake as to where he stood.

He was steadfast. The roots of his convictions went deep. They were founded on principles. No one who dealt with him one day was afterwards confounded or nonplussed by any subsequent act or declaration of his on the same subject.

Courage and power were personified in him. He was big, physically and mentally,—a leonine figure. In his years at the bar, whenever he entered a trial court he

IN MEMORY OF MR. JUSTICE BUTLER

became instantly the dominating figure, the cynosure of all eyes.

He was always a dreaded antagonist at the bar. His preparation of cases was unfailingly thorough. His personal magnetism helped him. He understood human nature. His Irish wit often bridged over difficult situations. As a cross-examiner he ranked with the greatest advocates of our times.

If any one talent stood out above another in the practice of his profession, it was his marvelous capacity to assimilate great masses of complicated facts and figures, to arrange them in his mind, in orderly fashion for use, and. to hold them in his memory for an indefinite period.

I doubt if any man ever took a seat on this bench with a broader, more varied experience at the bar, or after more of those contacts with human nature which develop practical judgment in dealing with human affairs.

Despite his force and power, he was no grim person, he liked people. He was companionable with a delightful sense of humor, and. an inexhaustible fund of anecdote.

If I were to name any one thing as most influencing his judicial philosophy and expressions, it would be his love of liberty.

Love of liberty, we all know, burns hot in the hearts of Irishmen. For centuries they felt they were oppressed by a foreign government. Many of them in Eire seem to have grown opposed to any government, because now that they have one of their own, the habit of resistance remains strong. No one whose parents were born there could fail to have some of that flame.

REMARKS OF MR. MITCHELL

My thought is that in Pierce Butler it took form as a deep conviction that a government governs best which governs least; that increasing centralization of power in government and increasing interference by government in the ordinary affairs of men, beyond that necessary to prevent abuses, lead to diminution and ultimate loss of liberty; that a system which allowed him, a simple farmer's boy, to rise to the heights, was worth clinging to.

So, it seems to me, he instinctively questioned new efforts by government to interfere with activities which previously had always been free to free men. Whether I am right or wrong, it was on some fundamental conviction, and not on any superficial fact or experience, that his judicial philosophy was founded, and as a judge he satisfied the requirements which Chief Justice Marshall expressed in these words:

“The judge must be perfectly and completely independent with nothing to influence and control him but God and his conscience.”

The resolutions were then adopted and the meeting adjourned.

SUPREME COURT OF THE UNITED STATES
Monday, May 20, 1940

Present: The CHIEF JUSTICE, Mr. Justice McREYNOLDS, Mr. Justice STONE, Mr. Justice ROBERTS, Mr. Justice BLACK, Mr. Justice REED, Mr. Justice FRANKFURTER, Mr. Justice DOUGLAS, and Mr. Justice MURPHY.

Mr. Attorney General JACKSON addressed the Court as follows:

Mr. Chief Justice and Associate Justices: The Bar of the Supreme Court has delegated me to lodge in your keeping its proceedings in memory of Mr. Justice Butler. By resolution it has expressed its high estimate of his life and services. The resolutions adopted by the Bar read as follows:

“At a meeting of the members of the Bar of the Supreme Court of the United States held on January 27th, 1940, to take appropriate action following the death of Mr. Justice Butler, the Committee appointed by the Solicitor General reported this Minute for submission to the meeting:

“Pierce Butler’s life story is an epic of America. From his birth on a small Minnesota farm to the day of his death while a Justice of the Supreme Court of the United States his record was one of obstacles surmounted, of professional distinction achieved, and of merit appropriately rewarded.

“His father and mother, Irish immigrants from County Wicklow, had settled in Dakota County, Minnesota, where they lived the life of pioneer farmers. They reared a family of eight children, of whom the future

IN MEMORY OF MR. JUSTICE BUTLER

jurist was one. He was born on St. Patrick's day (March 17th), 1866. Strong of body and of vigorous mind, he dominated his environment and used its limitations as opportunities for self-development. A country school-teacher at sixteen, he qualified for admission to Carleton College at Northfield, Minnesota, from which he was graduated in 1887. During his student days he did farm chores early and late, and in the daily interval rode a farm horse to school. Having determined to become a lawyer, he moved to Saint Paul and in 1888 was admitted to the bar.

“His abilities were early recognized, and after serving for two years as an assistant lie became the County Attorney of Ramsey County. In this way he acquired proficiency in the art of the successful trial lawyer and was noted for his capacity to win the confidence of all the diverse elements of which local juries were composed.

“In 1897 he began the general practice of the law. Here again his character and ability made their mark and important clients were eager to retain him. While throughout his career he represented great railroads and other powerful corporations and became in this sense a corporation lawyer, he never sacrificed his independence of judgment and it was always he who dominated the client. His professional services were often placed at the disposal of the Government and he figured in many important cases arising under the Anti-Trust Laws and the Railroad and Utility Statutes. He was of the sort that men instinctively trust. He became one of the notable figures in the life of the great Northwest. When it was known that he was to appear the court

REMARKS OF ATTORNEY GENERAL JACKSON

room was wont to be crowded with people eager to hear him and to see him in action.

“He had great energy, prodigious memory and large capacity for logical thinking. His character was a unit without internal stress. There was inherent a belief that there exists a philosophical rightness and he sought to apply it to each matter in hand. A skillful legal tactician, his sole strategy was to drive forward unswervingly in the direction which he regarded as the right one. Expediency never justified retreat or indirection.

“As senior member of the firm of Butler, Mitchell and Doherty, he was constantly at work and always with notable fidelity to court and client. For the five years from 1913 to 1918 he served as a member of the Committee of Counsel for the Federal Valuation of Railroads. In 1919 he was of counsel for shareholders in proceedings in Canada under the Canadian Northern Acquisition Act. Later he was appointed one of the counsel for the Dominion of Canada in the Arbitration at Montreal, held under the Grand Trunk System Acquisition Act. In this proceeding William H. Taft sat as one of the arbitrators. Although Mr. Taft dissented from the decision supporting the views urged by Mr. Butler, their association led to a warm friendship. The acquaintance with his powers and fairness gained in the course of that association doubtless was a factor in Chief Justice Taft’s later recommendation of Mr. Butler for appointment to the Supreme Court when a vacancy was caused by the retirement of Mr. Justice Day. It was on November 23, 1922, while he was serving as counsel in the Toronto Railway Arbitration, that he, a

[45]

IN MEMORY OF MR. JUSTICE BUTLER

Democrat, was nominated by President Harding to be an Associate Justice of the Supreme Court of the United States. The nomination not having been acted upon at that session of Congress, the President re-nominated him on December 5, 1922. He was confirmed by the Senate on December 21, 1922, and on the 2nd of January, 1923, the judicial oath was administered and he took his seat upon the Bench.

“During his seventeen years of service on the Court he saw his country pass through an era of unstable prosperity and into a period of resulting depression. Under such circumstances it was not surprising that many should lose faith in the soundness of the American tradition; but with such a life story behind him, it was inevitable that the faith of Mr. Justice Butler should never waver. He had, indeed, that capacity for deep emotion which was his by inheritance, but his experience had taught him to think realistically.

“Fearful of the rule of men in place of the rule of law, he appealed to the accumulated body of the law as a continuous social expression and not as what might appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges may from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its misapplication merely because the end in view appeared at the moment to be desirable.

“He had faith in the power of objective reasoning and in the intellectual integrity of man, with correlative responsibility of the individual to develop himself and pursue the course that to him seemed right. This faith

REMARKS OF ATTORNEY GENERAL JACKSON

in the individual man was expressed by resistance to any attempted infringement of the bill of rights, and, in the absence of constitutional amendment, to centralization of government and to extension of its powers over the individual. He felt that greater material welfare under a paternal government—if possible of achievement—rather than ennobling the citizen would debase him by destroying his integrity and denying his will to exercise his moral and intellectual forces. He refused to concede that the individual is a helpless creature of an environment built by others, and opposed the kind of humanitarianism that would relegate him to that position.

“It would be out of place in this Minute to attempt an analysis of his judicial opinions. That will follow in due course. Suffice it to say here that during all the years of his service he contributed to the Court not merely sound learning and ripe experience, but calm judgment and the stabilizing influence of tested character.

“While Mr. Justice Butler was a man of deep conviction, he could differ from other men without losing their good will. He was far from being a bitter partisan. Rather he was a man of generous sympathy and broad comprehension. His friends included old and young alike. Institutions of learning conferred honorary degrees upon him. The law students of Georgetown University named a law club in his honor. An American in the best sense of the word, he retained throughout his life an affectionate regard for the land of his ancestors. A visit to Ireland in 1934 was esteemed by him to be one of the happiest episodes in life. He was a lover of out-

[47]

IN MEMORY OF MR. JUSTICE BUTLER

door life and on his farm in Maryland sought refreshment of spirit—whenever the rigorous round of judicial duties permitted.

“The land and people of Minnesota remained close to him, and he carried with him great and irreplaceable knowledge of the history of the Northwest, gathered from his own youthful experiences, from delighted reading of earlier days, and from wide personal knowledge of most of its later leaders and characters. The mention of a name would start a flow of reminiscence and anecdote reaching back into the development of that country, all full of the color of its personalities

“The domestic life of such a man was certain to approximate the ideal. Happily married and deeply devoted to wife and children, his was a Christian household characterized by plain living and high thinking. He was a devoted member of the Roman Catholic Church. The reality of his religion brought him comfort at times of domestic affliction. The high pressure of judicial work and disease common to advanced years overcame the powerful physique which was his by inheritance and conservation. After a brief illness he died in Washington on November 16, 1939. At his funeral in St. Matthew’s Cathedral all sorts and conditions of men attended in silent tribute to his memory. Today representative members of the Bar of the Supreme Court of the United States are in their turn witnessing to their admiration and affectionate regard for one whose simple godliness and faithful public service endeared him to all who came within the circle of his influence.

[48]

REMARKS OF ATTORNEY GENERAL JACKSON

“*Resolved*, that the foregoing Minute be adopted; that a copy of it be transmitted to the Attorney General of the United States for presentation to the Court and that the Chairman of this meeting be directed to forward a copy of it to the family of Mr. Justice Butler.”

Men eminent in the legal profession, former associates in the practice of the law, and public leaders have paid him eloquent and affectionate tribute. All of these tributes I offer for your records.

I should not presume to add words of my own, except that the proceedings are lacking in one viewpoint which I should be qualified to supply.

I knew Pierce Butler only as a Justice of this Court. He had reached the full maturity of his great intellectual powers. He was too earnest and forthright to wish me even on such an occasion to deny or minimize the conflict which your reports witness between the general philosophy I have advocated here and much of that to which he was so consistently devoted. But across that gulf, which always exists between two men who regard each other as representing ominous trends, I felt the strength, the warmth, and the sincerity of a great character—one of the most firm and steady men I have known.

His character was shaped by a hard way of life that left lasting convictions and attitudes in men who experienced it. Existence in a pioneer country, where nature is often hard and hostile and the competition of the elements is relentless, presents the choice between courage and self-discipline—or extinction. It offers a simple and rugged society in which place is won and held only

IN MEMORY OF MR. JUSTICE BUTLER

by will and work and worth. It develops intense love of liberty and hatred of restraint and a self-reliance that does not know how to dodge, and never fears to stand firmly and, if need be, alone. These were the primary characteristics of Mr. Justice Butler.

To them he added an accumulation of learning and experience and legal abilities which won for him the respect of all shades of opinion at the Bar. In many cases here I feared his interrogations more than the argument of my adversary. He knew his way among the intricate procedures of the law. He knew from long experience the arts of advocacy. He could sense the point in an argument where the most candid advocate is tempted to stop a little short of a complete revelation, and he knew where there was an urge to overemphasis. His questions from the bench cut to the heart of our cases. He could use his ready wit, his humor, his sarcasm or his learning with equal ease and skill. He was relentless in bringing the lawyer face to face with the issues as he saw them. I think I never knew a man who could more quickly orient a statement of facts with his own philosophy. When the facts were stated the argument was about over with him—he could relate the case to his conceptions of legal principles without aid of counsel.

Even if it were otherwise appropriate, I have neither the perspective nor the detachment necessary to appraise the place that his work as a Justice will take in the annals of this Court. Time only will write the verdict on its permanence and its significance. He has left a body of deliberate comment and seasoned judgment on the problems that have vexed this Court, as well as government and society, during his judicial life. The fu-

REMARKS OF ATTORNEY GENERAL JACKSON

ture will have no difficulty learning what he meant and what he stood for. A man of no subtlety or sham, he pronounced his judgments without finesse, indirection, or obscurity. He has recorded the measure of his disagreement with the currents, and his deep anxiety about the drifts of our time.

If only time can judge the verity of his work it is equally true that only contemporaries can appraise the verity of his character. While the future will find that his work will speak for itself, it will turn to the testimony of contemporaries to learn the elusive qualities of the man.

For those who shall ask "What of the man?" we may record that in the memory of those who sought to win him in argument he will stand out as an impressive and formidable figure even among associates in whom those qualities were by no means rare. His judicial attitude was not one of frosty neutrality, but one of intensity and certitude of conviction on basic philosophies of life and society and law and government. He had no merely negative standard of goodness; experience and conviction committed him to profound affirmations, and he exemplified them unceasingly and with power. Among the public men of my time, I have known no one of more affirmative and immovable and masterful character than Mr. Justice Butler.

The CHIEF JUSTICE responded:

Mr. Attorney General: The resolutions you have presented on behalf of the Bar fittingly epitomize the traits of character and outstanding achievements of an eminent advocate and judge,—who would have considered this tribute by his professional brethren as the best possible reward for his long and arduous service.

The early environment of Pierce Butler suited his ambition and talent. It was not ill fortune that in his childhood and youth he had to meet the rigorous demands of pioneer life in the northwest; that he had to win by self-denial and strenuous exertion the educational advantages which seem slender indeed as compared with the abundance of a later day. For he was in the midst of the opportunities of a fast developing community, where the very air quickened endeavor and the abilities and eager efforts of those endowed with physical and mental vigor received almost instant recognition. It was not ill fortune that he began the practice of the law in Saint Paul at a time when great enterprises were in the making, when legal talent held the key to a career of distinction and the standards of Bench and Bar were as high as in the older eastern States.

The opportunities for practice had a most desirable variety, but, in accord with the traditions of the Bar, the highest prizes were to be won in the field of advocacy. Pierce Butler by temperament and aptitude was especially fitted for the contests of the forum. He had the fighting instinct, and his training developed rare skill in the use of the advocate's weapons. He soon had opportunity for public service as prosecuting at-

IN MEMORY OF MR. JUSTICE BUTLER

torney, and thus early secured wide recognition of his unusual talents. Favored by nature with a powerful physique, and with a distinguished mien aided by a deliberate and impressive manner of speech, he became a respected but dreaded antagonist. He was not content with showy and superficial successes with juries. He aimed at a thorough knowledge of the law and a complete mastery of facts, which especially commended him to the higher courts. He had a passion for exactness. He was not addicted to subtlety and he hated pretence. He recognized just authority. He was faithful to every trust. He was rigorous in his self-discipline and spared no effort to realize his ideal of the careful and exact adviser, the zealous but accurate advocate, the intrepid vindicator of what he conceived to be the legal rights of those whose causes he espoused.

It is not extraordinary that with the natural advantages of a noble bearing, with his indomitable will and courage both in attack and defense, with his unflagging industry and devotion to what he believed to be justice according to law, he rapidly rose to eminence, and his expert advice and assistance were sought in matters of the gravest importance of both private and public concern. There are not wanting those who disparage the training and experience of the successful advocate, ignoring the fact that among the varied activities of our democratic society there exists no harder school of discipline, no wider opportunity for the study of human relations or for the detection of faults and abuses, no more insistent demand for a sound practical judgment and for rectitude and fair dealing, than are found in the exacting daily work of the legal practitioner who

[54]

REMARKS OF CHIEF JUSTICE HUGHES

tries to live up to the ethical standards of the best traditions of the Bar and thus to win the highest professional esteem which is denied to the trickster and shallow pretender however otherwise apparently successful.

It was with these qualities, and with that reputation, that Pierce Butler came to this Court at the height of his powers. He had already shown at this Bar his exceptional skill and thoroughness in the presentation of cases. In the Minnesota Rate Cases (230 U. S. 352) he presented one of the ablest, most comprehensive and most careful briefs ever submitted to this Court. On the bench, he at once demonstrated an extraordinary capacity for the sustained judicial labor which our work demands, and to the last he was faithful in every task, indefatigable, fearless, conscientious. At the conference table, he was ever ready to present and defend his views with keenness, always with earnestness, and not infrequently with the thrusts of wit and eloquence which brought vivid reminders of forensic battles. He was always thoroughly prepared by close study of records and, endowed with an extraordinary memory, he justly took pride in his ability to marshal facts and precedents in the most impressive manner.

It was natural that with his success in winning his way to distinction in an expanding community, with his appreciation of liberty and law, he should have been eager to conserve both the essential authority of government and the freedom of enterprise. The former was necessary in order to insure the latter. His conservatism was rooted in profound religious convictions. It was always manifest that he had definite principles and he had no sympathy for those whose only principle

IN MEMORY OF MR. JUSTICE BUTLER

was to be without principle. Cherishing the ideals of authority and certainty, he demanded adherence to precedent and deplored what he considered to be an undue flexibility in constitutional interpretation. As he put it,—“Generally speaking, at least, our decisions of yesterday ought to be the law of today”. He was a strong defender of the conception of property rights which he believed to be secured by the accepted construction of the due process clause. He believed in that conception as an essential stimulus to effort and as holding a better promise of social progress than governmental plans involving restriction of individual initiative. He believed in the right to choose one’s calling, to pursue it unfettered, so far as consistent with good order and the equal rights of others, and to maintain and hold the material rewards of honest endeavor. In short, he sought to keep open the traditional path to individual achievement which he himself had trod.

While solicitous for the public order and the authority of law, he was equally a stickler for the rights of those accused of crime to be protected against the abuses of authority. He was zealous for the maintenance of just government but vehemently opposed to any action under any guise which he deemed to be arbitrary and capricious. He expressed his thought in the words of one of his opinions, which was quoted in one of the addresses at the meeting of the Bar: “Abhorrence, however great, of persistent and menacing crime will not excuse transgression in the courts of the legal rights of the worst offenders”. (*United States v. Motlow*, 10 F. (2d) 657, 662). And in his dissent in the first *Wire-tapping* case, he thus voiced his conception of the

REMARKS OF CHIEF JUSTICE HUGHES

appropriate interpretation of the great clauses of the Constitution for the safeguarding of personal liberty:

“This Court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since *McCulloch v. Maryland*”. (*Olmstead v. United States*, 277 U. S. 438, 487, 488.)

And with these views which I have endeavored briefly to interpret,—as I think he would wish them expressed—he wrought to the end,—a man of deep-seated convictions, religious and political, with unflinching loyalty to basic principles as he conceived them,—a personality of rare force and determination, and yet with the kindest disposition, the most generous sympathy, the warmest heart.

It is not for us to speak of the sorrows that afflicted him, of his fortitude in severe trials, of the depth of his affection for those united to him by the strongest human ties. In the midst of judicial responsibilities which he was fully sharing with us, we were keenly aware of the private burdens which pressed upon him and were so bravely borne.

We mourn the loss of a great co-laborer. As the scenes of particular controversies swiftly shift, there abides the treasured memory of strength, of trained tal-

REMARKS OF CHIEF JUSTICE HUGHES

ent industriously applied, of unswerving integrity and fidelity,—the virtues of the just judge, always an exemplar and an inspiration,—the virtues which make secure the foundations of the temple of justice. ■

Π—Π

Posted MLHP: February 19, 2011.

[58]