

# PATHFINDER

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## Justice McReynolds



James Clark McReynolds is the only one of the nine members of the United States Supreme Court who lists himself in the Washington telephone directory as "Justice." His eight colleagues content themselves with the abbreviation "Hon." after their names.

In view of his human and legal personality, it is not impossible that the 75-year-old southerner chose that minor mark of distinction deliberately. Certain it is that on occasion he has seemed to regard himself as the last bulwark of a social order which Woodrow Wilson deemed too antiquated in 1914.

Two years ago, on the occasion of the 5-to-4 Supreme Court decision which upheld the right of the Federal government to suspend its promise of gold payment on the demands of holders of yellow-back bills and U. S. bonds, McReynolds declared in his dissenting opinion: "The Constitution is gone."

Presumably that ended Mr. Justice McReynolds' term of usefulness as an interpreter of the highest written law of the land. Actually it meant that he had "just begun to fight."

While the gold clause case was favorable to the New Deal by a narrow margin, the NRA, the AAA, the Guffey Coal Act and the Railroad Retirement Act were invalidated one by one. After the TVA decision, which went to the New Deal by an 8-to-1 vote, McReynolds had the somewhat dubious honor of being the only justice, conservative or liberal, who had never once crossed from his own side of the line to the other.

His other opinions have not been so consistent. In fact, before the New Deal test cases, McReynolds was regarded as "turbulent and uncertain."

In the Carroll case, he dissented from the decision which said that an automobile could be searched without a warrant. But later he sided with a majority which held that prohibition agents could listen in on telephone conversations to gain evidence for convictions, regardless of the laws of the State of Washington. According to McReynolds' point of view, one act violated the rights of private domain, the other did not.

### Justice McReynolds

He wrote the opinion which denied Massachusetts the right to tax royalties from patents. In an about-face, he then upheld a New York tax bill which made a levy on incomes from copyrights.

McReynolds is often spoken of as a Democrat of the oldest line. But even here there is no certainty. In spite of the ancient Democratic tradition of States' rights, McReynolds has more than once sought to hamper the power of the Governors. He threw out Wisconsin's attempt to gather inheritance taxes by enacting that gifts within a certain time before the donor's death were made "in contemplation of death" and were therefore taxable. In another instance he helped annul Missouri legislation which taxed bonds and bank accounts of non-resident owners.

In another matter, McReynolds is perfectly predictable. He has no patience with the Negroes and the Jews. In 1931 he dissented from a majority opinion which reversed the conviction and death sentence of a District of Columbia negro whose attorney had not been allowed to ask would-be jurors whether or not they would be prejudiced on account of race.

A year later, when Benjamin Nathan Cardozo was being mentioned as a strong possibility to replace Mr. Justice Holmes, McReynolds, referring to the liberal Brandeis, was speaking plainly enough when he complained that the Court was already burdened with "one Jew too many."

His prejudice against color is perfectly understandable in view of the fact that he was born in the South. His prejudice against the Jews may root from something more intangible: the Scotch and the Jew are both migratory races which by shrewdness and thrift have achieved great success in lands other than their own. In literature at least, neither race has been described as ever having had any love for the other.

At any rate, James Clark McReynolds was born of predominantly Scotch ancestry at Elkton, Ky., in 1862. His father, Dr. John McReynolds, was a well-to-do physician and the family amounted to something in the town.

When James was 17 years old, it was no strain on the family finances to send him 60 miles south to Vanderbilt University at Nashville, Tenn. The boy went through the full course in three years and graduated in 1882 with a Bachelor of Science degree and a medal for proficiency in scientific courses. Like many another southern boy, after his first college work McReynolds migrated to the genteel atmosphere of the University of Virginia, where he obtained his law degree two years later.

For the next fifth of a century, McReynolds was in private practice, mostly at Nashville. His specialty was chancery law, which deals with writs of restraint and surrender and with divorce actions.

In 1896 the smooth flow of the lawyer's life was interrupted. In that year William Jennings Bryan received the Democratic nomination for the Presidency on a platform which advocated that silver, as well as gold, should be a basis for U. S. currency.

Horried, McReynolds ran as a Gold Democrat against the Bryan candidate for the U. S. House of Representatives and was soundly defeated. Nearly 40 years later, when the New Deal

**Justice McReynolds**

gold clause case came up before the Supreme Court, he still felt strongly on the subject. He said that assumption of the power to take the United States off the gold standard was like the power that "Nero undertook to exercise when he was in Rome."

Nevertheless his political insurgence brought him a kind of prominence. In 1903 Republican President Theodore Roosevelt appointed him an Assistant Attorney General.

Able pleadings before the Supreme Court finally got McReynolds a job with the prominent New York legal firm of Cravath, Henderson & de Gersdorff, which had acted as counsel for Thomas Fortune Ryan, an important figure in the Duke tobacco "monopoly."

After a short time, McReynolds was recalled to Washington by Roosevelt to act as a special Assistant in the anti-trust attack on the tobacco firm. Immediately howls went up that he was a "Ryan" lawyer. No less promptly, McReynolds turned around and called the Duke organizers "commercial wolves and highwaymen." In spite of McReynolds' efforts, the final settlement of the case altered only the outward appearance, and not the fundamental workings of the trust.

His 400-page brief had not gone to waste, however. With an idea that McReynolds was a capable "trust-buster," Wilson appointed him U. S. Attorney General in 1913. A few months proved that he was no man for the job, and a year later Wilson kicked him upstairs into the Supreme Court.

In his early years on the bench McReynolds was indeed unpredictable. But after the New Deal, he formed a unique legal philosophy.

This was illustrated in the *Nebbia Company* case which sought to determine the validity of a New York State law fixing the price of milk. In upholding the State law, the New York Court of Appeals had declared: "With the wisdom of the legislation we have nought to do." It was a statement perfectly in accord with the traditional concept of the judicial function.

When the case came to the Supreme Court in 1934, McReynolds dissented from the opinion which upheld the decision of the lower body. He said: "But plainly, I think, this court must have regard to the wisdom of the enactment." This is Exhibit A in the New Deal argument that the Supreme Court has constituted itself a third and policy-making body with veto powers over the House, the Senate and the President.

Personally, McReynolds has most often been described with the word "crusty." Since the resignation of the late and tolerant Oliver Wendell Holmes, McReynolds has had no personal friend on the bench. His critics darkly hint that his heckling resulted in the resignation of Mr. Justice Clark some years ago, and that he was a contributing factor in the collapse of Solicitor General Stanley Reed in the AAA case.

It is certain that he has a harder time keeping secretaries than any other member of the Court. Anyone who lights a cigarette within 20 feet of the august McReynolds meets with a bellow of disapproval. Anyone who wears anything but a plain white shirt is apt to be contemned by the Justice as being collegiate or radical.

Last January, when strollers in the

### Justice McReynolds

DuPont Circle region of Washington began to mistake McReynolds for Col. Starling of the White House Secret Service detail, the Justice was highly displeased. Another man might have been amused that two Kentuckians, born in neighboring counties, should have wound up at Washington and should have looked enough alike to be mistaken for each other.

An early stickler for the rules of debate in his Vanderbilt days, McReynolds often ignores the rules of the Chevy Chase Golf Club, to the great annoyance of players who have waited long beyond the stipulated time limit for the Justice to find a lost ball.

But within the crust there is something softer and less easy to explain. McReynolds broke down and wept when Mrs. Oliver Wendell Holmes died. On another occasion, he was moved to tears by the picture of the late Justice McKenna in an office in the Department of Justice. His few friends refer to him affectionately as "Old Mac."

McReynolds has never married, but he is no woman-hater. His Sunday morning breakfasts for Washington society ladies are well known, and he never loses a chance to squire the sub-deb daughters of his friends. For a time he was the devoted attendant of Mrs. Jacob Leander Loose, of the Loose-Wiles biscuit fortune. But he seldom attends White House judicial receptions.

There is one thing about McReynolds—once he makes up his mind he never changes it. After he had dissented from the majority which allowed search of an automobile without a warrant during the prohibition era, two officers stopped his Buick on the way back from a Maryland fishing trip to make a search for liquor. They afterwards sheepishly reported that the Justice had again gone on record against the majority—forcefully and with words of one syllable.