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Judicial Ethics in the Confluence of National Security and Political Ideology: William Howard Taft and the “Teapot Dome” Oil Scandal as a Case Study for the Post-Trump Era

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ARTICLE

JUDICIAL ETHICS IN THE CONFLUENCE OF NATIONAL SECURITY AND POLITICAL IDEOLOGY: WILLIAM HOWARD TAFT AND THE “TEAPOT DOME” OIL SCANDAL AS A CASE STUDY FOR THE POST-TRUMP ERA

JOSHUA E. KASTENBERG*

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I. INTRODUCTION

On January 17, 1927, Chief Justice William Howard Taft penned to his brother, Horace Taft, that later in the day Justice Willis Van Devanter would be reading aloud “a very important opinion . . . on the question of the right of the Senate to investigate matters in the *Daugherty* case”¹ Three years earlier, on the morning of March 5, 1924, the *Los Angeles Times's* editors assailed former treasury secretary and presidential aspirant, William Gibbs McAdoo, and oil magnate, Edward Doheny, for lack of ethics and rampant influence peddling.² “To say the least, neither McAdoo nor Donheny was squeamish about trafficking in prestige[.]” the *Los Angeles Times* printed before contrasting the two men with another prominent citizen.³ “There is still living, however, at least one noted American who holds that prestige acquired through holding a high political position is not something to barter and exchange.”⁴ The person the *Los Angeles Times's* editors referred to was Taft, who, after leaving the presidency in 1913, became a professor at Yale’s

1. Letter from William Howard Taft [hereinafter WHT], C.J. of the U.S. Sup. Ct., to Horace Taft, William Taft’s brother [hereinafter HT] (Jan. 17, 1927) (on file with the Library of Congress).

2. *Trafficking in Prestige*, L.A. TIMES, Mar. 5, 1924, at 24 [hereinafter *Trafficking in Prestige*]. On McAdoo, who was also President Woodrow Wilson’s son-in-law, see James C. Prude, *William Gibbs McAdoo and the Democratic National Convention of 1924*, 38 J. S. HIST. 621, 621–28 (1972). On Doheny, see DAN LA BOTZ, EDWARD L. DOHENY: PETROLEUM, POWER, AND POLITICS IN THE UNITED STATES AND MEXICO 2–13 (1991). On the relationship of the two men, see JONATHAN DANIELS, THE TIME BETWEEN THE WARS: ARMISTICE TO PEARL HARBOR 116 (1966).

3. *Trafficking in Prestige*, *supra* note 2.

4. *Id.*

law school and an advocate for achieving world peace through international law before ascending to the Court.⁵ There is a connection between the editorial and Taft's letter to his brother in that both involved Doheny. Taft's letter originated in an executive branch scandal involving the collective greed of at least one cabinet officer and powerful men in oil and finance, including Doheny, who threatened to undermine national security. But Taft's participation in the "*Daugherty* case,"⁶ an appeal involving the brother of a former attorney general, was problematic to the principles of judicial ethics, even if neither the public nor the legal academy questioned it.

The "Teapot Dome" scandal first came to the public's attention as a minor news story, albeit one in which the public was unlikely aware of the scandal itself. On June 2, 1921, the *New York Times* informed its readers on its twelfth page that Secretary of the Navy, Edwin Denby, transferred control over the Navy's petroleum reserves to the Secretary of the Interior, Albert Fall.⁷ Other newspapers also reported the story in the middle of their dailies. These publications do not appear to report opposition to the shift of control from the Navy to the Interior Department.⁸ Perhaps this was because, as one author posited, President Warren G. Harding had only recently assumed office and enjoyed the longest post-election "honeymoon"

5. See *id.*; see also John Paul Frank, *Conflict of Interest and Supreme Court Justices*, 18 AM. J. COMPAR. L. 744, 749 (1970) (demonstrating Justice Douglas's efforts at achieving peace through international law and arbitration); JOSEPH FRAZIER WALL, ANDREW CARNEGIE 978 (1970) ("As early as May 1909 Taft indicated that he favored the arbitration of all disputes except those that involved an 'attack upon a country's honor or independence.'"); LEWIS O. GOULD, CHIEF EXECUTIVE TO CHIEF JUSTICE: TAIT BETWIXT THE WHITE HOUSE AND SUPREME COURT 41 (2014). See generally Hamilton Holt, *The League to Enforce Peace*, 7 PROC. ACAD. POL. SCI. CITY N.Y. 257, 259–60 (1917) (pointing out a contemporary view of peace attempts); see also Henry Winthrop Ballantine, *Shall the United States Join a League to Enforce Peace*, 79 ADVOC. PEACE 54, 54 (1917) (suggesting the benefits of joining a League to Enforce Peace in order to properly balance power).

6. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

7. See Burl Noggle, *The Origins of the Teapot Dome Investigation*, 44 MISS. VALLEY HIST. REV. 237, 245–46 (1957) (referencing the newspaper's lack of emphasis on the article); see also *Historical Recognition*, LSU FOUNDATION (Sep. 4, 2021, 1:03 PM), <https://www.lsufoundation.org/s/1585/17/interior.aspx?sid=1585&gid=1&pgid=1469> [<https://perma.cc/PP9Y-6K5L>] (discussing Professor Burl Noggle becoming a leading historian on the United States in the 1920s). In his examination on the roots of the scandal, Noggle noted that conservationists led by Gifford Pinchot, a fellow Republican and former chief of the United States Forest Service under President Theodore Roosevelt, were angered at Fall's desire to transfer federal forest lands to corporations. Pinchot, according to Noggle, began a public campaign to oppose Fall and brought Fall's anti-conservationist plans to the Senate's attention. See Noggle, *supra*, at 250–55 (detailing Pinchot's plan to bring down Fall).

8. See *Fall Takes Over Naval Oil Reserve: President Shifts Lands as First Step in Oil Reorganization*, WASH. POST, June 2, 1921, at 1.

of any president in history.⁹ Moreover, as a result of the 1920 elections, the House of Representatives had 300 Republicans to 132 Democrats and a Senate comprised of 59 Republicans and 37 Democrats.¹⁰ While not all Republicans backed Harding in all matters, he had a commanding majority in both houses of the legislative branch.¹¹ Yet, the transfer of the Navy's petroleum reserves to the Interior Department for private drilling might have surprised members of the public interested in national defense given Denby's articulated goals for the United States to have the mightiest Navy in the world.¹² The petroleum reserve transfer certainly surprised a number of legislators in both parties.

In spite of the post-election "honeymoon," Harding's administration quickly became embroiled in two major scandals. Charles Forbes, the Veterans Bureau Director, was accused of receiving kickbacks for hospital construction projects and the sale of surplus equipment.¹³ Although Harding forced Forbes to resign, he first sent the director to Europe.¹⁴ Forbes' assistant, Charles Cramer, committed suicide before being called to testify on the scandal.¹⁵ The Veteran's Bureau scandal would shortly be overshadowed by "Teapot Dome." Prior to Richard Nixon's presidency, the Harding administration was viewed as the most corrupt of

9. See FRANCIS X. BUSCH, ENEMIES OF THE STATE: AN ACCOUNT OF THE TRIALS OF THE MARY EUGENIA SURRETT CASE, THE TEAPOT DOME CASES, THE ALPHONSE CAPONE CASE, AND THE ROSENBERG CASE 93 (1954) (demonstrating Harding's extra-long "honeymoon" period of presidential popularity due to his stellar cabinet selections); see also JEFF GUINN, THE VAGABONDS: THE STORY OF HENRY FORD AND THOMAS EDISON'S TEN-YEAR ROAD TRIP 171 (2019) ("The senators and congressmen of his party appreciated his hands-off approach to legislation. . . . The press, so critical of Harding before his election, mostly demonstrated respect for him after his victory."); Gary M. Pecquet & Clifford F. Thies, *Reputation Overrides Record: How Warren G. Harding Mistakenly Became the "Worst" President of the United States*, 21 INDEP. REV. 29, 31 (2016) (pointing out "[a]t the time of [Harding's] death in 1923, [he] was beloved by [the public]").

10. See Robert P. Saldin, *World War I and the "System of 1896,"* 72 J. POL. 825, 827 (2010) (demonstrating Republican and Democratic seats from 1894–1928).

11. See Erik Olssen, *The Progressive Group in Congress*, 42 THE HISTORIAN 244, 251–53 (1980) (discussing interparty alignments of Republicans and Democrats who considered themselves "Progressives" and opposed some of Harding's policies).

12. See Edwin Denby, *Our Naval Policy*, OUTLOOK, Mar. 23, 1921, at 453.

13. See ROSEMARY STEVENS, A TIME OF SCANDAL: CHARLES R. FORBES, WARREN G. HARDING, AND THE MAKING OF THE VETERANS BUREAU 109–10 (2016); CHARLES L. MEE, JR., THE OHIO GANG: THE WORLD OF WARREN G. HARDING 153–55 (1981).

14. *Declares President Harding Ordered Forbes to Resign*, S.E. MISSOURIAN, Nov. 7, 1923, at 1.

15. See BUSCH, *supra* note 9, at 94 (1954) (discussing Forbes's assistant, Charles Kramer, committing suicide rather than address allegations that Forbes received "kickbacks" by contractors to whom contracts for the construction of veterans' hospitals had been given"); STEVENS *supra* note 13, at 174–75.

administrations.¹⁶ Harding died on August 2, 1923, and therefore did not live to see the oil scandal traverse through the federal courts.¹⁷

This Article is not a legal history of the “Teapot Dome Scandal.” There are several scholarly books and articles on the subject.¹⁸ Rather, it is a study in the confluence of national security and judicial ethics as centered on Chief Justice William Howard Taft during the scandal. In 1927, the Court issued three opinions arising from the scandal: *Pan-American Petroleum and Transport Company v. United States*,¹⁹ *Mammoth Oil v. United States*,²⁰ and *McGrain v. Daugherty*.²¹ Taft, to be sure, did not author any of the three opinions, but he contributed to each of the three, and his participation in all three opinions raises a question as to whether there are similar judicial ethics questions in our own time. Most notably, as president, Taft exercised his authority to issue an executive order creating two of the naval oil reserves that Fall leased out. Additionally, Harry Daugherty assisted in Taft’s election to the presidency in 1908 and his attempted reelection four years later, and Taft thought highly of Daugherty, whose fate rested in one of the three pending opinions. Taft should have recused himself on either of these grounds, and a question arises as to why he did not do so.

These points are only two of the ethical questions involved in this study. Two other ethics questions are presented in this Article: (1) whether Taft was initially convinced that the scandal was manufactured to discredit President Harding, and (2) whether the same was done to

16. See Ruth P. Morgan, *Nixon, Watergate, and the Study of the Presidency*, 26 PRESIDENTIAL STUD. Q. 217, 234 (1996) (suggesting a hypothetical in which Nixon passed away before his indiscretions were exposed as Harding did); see also Gary M. Maranell, *The Evaluation of Presidents: An Extension of the Schlesinger Polls*, 57 J. AM. HIST. 104, 105 (1970) (comparing Harding with other Presidents); *Presidential Historians Survey 2017*, C-SPAN, <https://www.c-span.org/presidentsurvey2017/?page=overall> [<https://perma.cc/7L87-6P4S>] (discussing Harding’s rank among previous Presidents).

17. See PHILLIP G. PAYNE, *DEAD LAST: THE PUBLIC MEMORY OF WARREN G. HARDING’S SCANDALOUS LEGACY* 1 (2009); Mark Byrnes, *The Presidency and Domestic Policy*, 11 OAH MAG. HIST. 21, 22 (1997) (“Despite Harding’s failures, Congress did pass a vital piece of legislation during his administration—the Budget and Accounting Act of 1921.”).

18. See DAVID HODGES STRATTON, *TEMPEST OVER TEAPOT DOME: THE STORY OF ALBERT B. FALL* 252–56 (1988) (summarizing major points of Teapot Dome incident); see also Gary D. Libecap, *The Political Allocation of Mineral Rights: A Re-Evaluation of Teapot Dome*, 44 J. ECON. HIST. 381, 381–82 (1984) (discussing literature’s de-emphasis on the Teapot Dome scandal’s consequences at an institutional level); Robert A. Waller, *Business and the Initiation of the Teapot Dome Investigation*, 36 BUS. HIST. REV. 334, 334 (1962) (demonstrating an economic and business history of the scandal).

19. *Pan Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927).

20. *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927).

21. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

President Calvin Coolidge.²² In October 1923, Taft insisted on making a large donation to a memorial for Harding's legacy and wanted both of his sons to take a part in the memorial.²³ More than three years past from the beginning of the *McGrain* appeal arguments to the published opinion, and, in that time, a national election and a midterm congressional election occurred, and Taft sought to keep Harding's legacy and Coolidge's reputation free from aspersion.²⁴ Clearly this is not the duty of a Justice, but one may wonder whether, since that time, a federal court has delayed issuing a ruling to protect either an important person or a political institution. And, Taft had engaged in extrajudicial activity while on the Court, including supporting international peace efforts, such as the reduction of naval armaments.²⁵ Should this have disqualified him?

This Article is divided into four sections. Section I presents the government's oil policy regarding the public and the United States Navy. It also highlights Taft's role in national defense while serving as both Secretary of War and President. Finally, it includes a background and timeline for the "Teapot Dome" scandal. Section II examines the traverse of the three government lawsuits against Doheny, Fall, and Mally Daugherty through the district courts and appellate courts. A basic outline of prior precedent on congressional authority to compel individuals to testify or produce evidence is presented in this section as well, for the purpose of gauging Taft's influence in the *Daugherty* case.²⁶ Included in this section, is an analysis of Taft's relationships with the district court judges, in particular, Andrew McConnell January Cochran of the United States District Court for the Eastern District of Kentucky who issued a ruling favorable to Daugherty. Section III presents Taft's activities and opinions on the scandals from the time of their discovery through the Court's issuance of the three opinions. In his personal correspondences, Taft cast aspersions on numerous senators investigating the scandal and expressed his views on Daugherty and Fall. The section also analyzes the three opinions regarding prior caselaw and the

22. See J. Leonard Bates, *The Teapot Dome Scandal and the Election of 1924*, 60 AM. HIST. REV. 303, 310 (1955) ("Like Chief Justice Taft and many other Republicans, he even suspected a Democratic plot to discredit his administration.")

23. Letter from WHT, C.J. of the U.S. Sup. Ct., to Robert Taft, WHT's eldest son [hereinafter RT] (Dec. 2, 1923) (on file with the Library of Congress).

24. *Daugherty*, 273 U.S. at 135.

25. Ballantine, *supra* note 5, at 54 (stating Taft was a leading member of the League to Enforce Peace and describing difficulties, such as the peace plan providing "no adequate guaranty of peace and will not make possible any real reduction of armaments").

26. *Daugherty*, 273 U.S. at 135.

lower courts' decisions. Taft voted with the other Justices to uphold the Senate's authority to compel a person to testify and to uphold the voiding of leases obtained by fraud, but having done so does not mean he influenced the timing or nature of the opinions.

Before proceeding, there are four points important to this study. First, Taft is one of the most instrumental federal jurists in shaping modern judicial ethics rules.²⁷ Taft crafted an important part of the nation's naval oil policies, and he also had relationships with some of the key individuals involved in the legal fights over the scandal. As the current Court and the lower judiciaries have grappled with, and continue to review, suits from former President Donald Trump's conduct and business holdings (as well as the likelihood that suits involving future presidents will arise), the legal profession and the judiciary alike may well wonder whether the timing of the release and content of the rulings and opinions have been treated in a more careful manner than Taft employed.

Second, this Article utilizes primary source material from several collections, particularly Taft and his sons, Robert and Charles Taft, which are located at the Library of Congress. This Article also presents some of the major reporting on the scandal as it unfolded. Whether or not the reporting was objective or accurate, the interested public would have partly gauged the judicial branch's decisions based on publicly available information. As noted later, one of the district court judges decried "sensational features [of reporting] surrounding the transactions involved" before issuing a ruling against the government.²⁸ Although the press may present a flawed presentation of the evidence in trials, an impartial and fair judiciary, and the appearance of an impartial and fair judiciary, are important to the public's confidence in judicial integrity.²⁹ Third, Taft was a judicial

27. See Robert Post, *The Incomparable Chief Justiceship of William Howard Taft*, 2020 MICH. ST. L. REV. 1, 107–08 (2020) (emphasizing Taft's commitment to judicial reform); Robert B. McKay, *The Judiciary and Nonjudicial Activities*, 35 L. & CONTEMP. PROBS. 9, 15 (1970); Joshua Kastenberg, *Chief Justice William Howard Taft's Conception of Judicial Integrity: The Legal History of Tumey v. Ohio*, 65 CLEV. ST. L. REV. 317, 340–41 (2017). Dean McKay noted, however, that Taft, while serving as Chief Justice, undertook activities that would, by 1970, appear to violate norms of judicial conduct. McKay, *supra*, at 13.

28. See *United States v. Mammoth Oil Co.*, 5 F.2d 330, 354 (D. Wyo. 1925), (pointing out the court's acknowledgement of the public's possible disdain with the court's decision), *rev'd*, 14 F.2d 705 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927).

29. See *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (asserting the Due Process Clause clearly requires a "fair trial in a fair tribunal" (citing *In re Murchison*, 349 U.S. 133, 136 (1955))); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–22 (1986) (demonstrating a case involving a judge with no actual bias against the defendant or interest in the outcome of his particular case).

conservative, who viewed the Court as protecting a status quo based, in part, on prejudicial beliefs and fear of the electorate embracing socialism.³⁰ For instance, Taft and former Attorney General George Wickersham lobbied the Coolidge presidency to not appoint Jews to the federal bench, fearing the judiciary would follow Justice Louis Brandeis' jurisprudence, at the very time that Wickersham presented the government's argument in the *Daugherty* case to the Court.³¹

Finally, graft and corruption involving vast sums of monies or higher ranks were not new to either the war or naval departments. In 1876, the House of Representatives impeached Secretary of War William Belknap after discovering he received payoffs in exchange for trading stores at military posts.³² The Belknap impeachment trial in the Senate became important to the question of whether the Senate maintained jurisdiction over President Trump after he left office. In 1885, the Court in *Wales v. Whitney*³³ denied a habeas writ to the Navy's surgeon general, Commodore Philip Wales, who faced a court-martial for failing to safeguard naval funds and medical instruments after subordinates engaged in fraudulent contracting and pilfered thousands of dollars in equipment.³⁴ In

30. See ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 163–64 (1964) (detailing Taft's views on the need for a conservative Court and the combatting of socialists and bolshevist); WHT Statement (Feb. 26, 1911) (on file with the Library of Congress) (asserting “the march of socialism will find no obstacle in its pathway more serious than a piece of paper once called a Constitution”).

31. See Letter from George Wickersham, U. S. Att'y Gen. [hereinafter George Wickersham], to WHT, C.J. of the U.S. Sup. Ct. (Dec. 4, 1924) (on file with the Library of Congress). In this letter, former Attorney General Wickersham wrote to an agreeing Taft:

All of the Jews in Jewry are now in full cry after the place and I am terribly afraid from what I hear that Stone has weakened to the extent of feeling that he must select a Hebrew, not realizing that every time he gives in to them, he makes a lot more trouble for himself, because they are boldened by the surrender.

Id.; see also Letter from WHT, C.J. of the U.S. Sup. Ct., to George Wickersham (Dec. 3, 1924) (on file with the Library of Congress) (discussing Taft's response); Alan Rappeport, *That Judge Attacked by Donald Trump? He's Faced a Lot Worse*, N.Y. TIMES (June 3, 2016), <https://www.nytimes.com/2016/06/04/us/politics/donald-trump-university-judge-gonzalo-curiel.html> [https://perma.cc/KH V3-T8PM] (discussing how Taft and Wickersham prestaged Donald Trump's belief that judges determine cases in concert with their ethnicity or faith).

32. See, e.g., WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY 428–30 (1982) (discussing Belknap's accusation of selling government arms to the French during the Franco-Prussian War of 1870–1871).

33. *Wales v. Whitney*, 114 U.S. 564 (1885).

34. See *The Case of Surgeon Wales: A Writ of Habeas Corpus Refused—The Court-Martial Meets*, N.Y. TIMES, Apr. 15, 1885, at 2 (demonstrating a news outlet reporting on the Court's refusal to issue

1899, Secretary of War Russell Alger was accused of permitting corruption in War Department contracting, which led to the sickness and deaths of thousands of soldiers during the Spanish-American War in the so-called “Embalmed Beef Scandal.”³⁵ In a court-martial related to that scandal, the Army prosecuted its commissary general, General Charles Patrick Eagan.³⁶ In 1910, the Court issued *United States v. Carter*,³⁷ which involved a long-lasting investigation into allegations that an Army captain had taken kickbacks during harbor reconstruction projects in Savannah, Georgia.³⁸ Partly in response to this corruption, Denby’s predecessor as Naval Secretary, Josephus Daniels, undertook significant efforts to end waste and corruption in the Navy.³⁹

II. TAFT, HARDING, THE BATTLESHIP, AND THE ORIGINS OF THE SCANDAL

On April 29, 1922, a little more than five years before Taft’s letter to his brother, the *New York Times*’ front page headline read, “Naval Oil Leases by Secretary Fall to be Investigated” and noted that Secretary of the Interior Fall permitted private corporations to drill naval oil.⁴⁰ The *Chicago Tribune* headlined its front page, “Senate is Told Interior ‘Reeks in Graft.’”⁴¹ Readers of the *Los Angeles Times* were greeted with the title, “Naval Leases Under Attack.”⁴² The *Washington Post* informed its front page readers that the Senate would soon investigate the transfer of the Navy’s petroleum reserves from the Department of the Navy to the Department of the

Surgeon Wales a writ of habeas corpus); *Surgeon Wales’s Sentence*, N.Y. TIMES, Aug. 1, 1885, at 2 (reporting on the outcome of *Wales v. Whitney*).

35. See Edward F. Keuchel, *Chemicals and Meat: The Embalmed Beef Scandal of the Spanish-American War*, 48 BULL. HIST. MED. 249, 251 (1974) (providing further detail on the scandal); see also *Mr. Alger’s Defense: The Leader in the London Times to Which the ex-Secretary of War Replied*, N.Y. TIMES, Aug. 3, 1899, at 10 (reporting Alger’s resignation as Secretary of War).

36. See JAMES R. ARNOLD, *HEALTH UNDER FIRE: MEDICAL CARE DURING AMERICA’S WARS* 115 (2014).

37. *United States v. Carter*, 217 U.S. 286 (1910).

38. *Id.* at 298. See generally PHILLIP LEON, *FIRST IN HIS CLASS: CAPTAIN OBERLIN CARTER AND THE SAVANNAH HARBOR SCANDAL* (2013) (providing a full history of the *Carter* case).

39. See Melvin I. Urofsky, *Josephus Daniels and the Armor Trust*, 45 N.C. HIST. REV. 237, 240–42 (1968) (highlighting Daniel’s efforts to eliminate wasteful practices in the Navy).

40. See *Naval Oil Leases by Secretary Fall to be Investigated*, N.Y. TIMES, Apr. 29, 1922, at 1.

41. *Senate is Told Interior Bureau “Reeks in Graft”*, CHICAGO DAILY TRIBUNE, Apr. 29, 1922, at 6; see GREGORY L. SCHNEIDER, *THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION* 17 (2009) (discussing the Tribune’s owner and editorial’s conservatism);

42. *Naval Leases Under Attack*, L.A. TIMES, Apr. 30, 1922, at 6.

Interior, and why two oil corporations were permitted to drill, store, and profit from the extraction of oil critical to national defense.⁴³ Thus, it took nine months for the public to learn that drilling in three of the nation's critical naval oil reserves were granted without an open bidding process, to oil magnates Edward Doheny and Harry Sinclair, from the first notice that oversight of the naval petroleum reserves were transferred to the Interior Department.⁴⁴ The public would later learn that Fall received tens of thousands of dollars from Sinclair and Doheny, and that Fall, Sinclair, and Doheny claimed secrecy in the leases was important to keep the Japanese government from ascertaining the petroleum needs of the Navy.⁴⁵ Fall was a rancher, lawyer, and prospector prior to his election to the Senate.⁴⁶ He also repeatedly faced allegations of bribery and fraud before Harding appointed him Interior Secretary.⁴⁷ These actions proved problematic. On April 15, 1923, the Senate voted to investigate the leasing of oil.⁴⁸ But, it was not until June 9 that Harding informed the Senate that he approved of the transfer through a previously unpublished executive order.⁴⁹

A. *William Howard Taft: A Career in Law, Politics and the National Defense*

Near the beginning of his presidency, Taft issued an executive order setting aside two tracts of land—Elk Hills and Buena Vista—in California, as federal oil reserves.⁵⁰ The set-aside occurred following Secretary of the Interior Robert Ballinger's conclusion that production rates of oil would

43. See *Senate Orders Inquiry into Oil Leases: Fall, Denby, and Daniels Are Expected to Appear at Public Lands Hearing*, WASH. POST, Apr. 30, 1922, at 5.

44. See David H. Stratton, *Behind Teapot Dome: Some Personal Insights*, 31 BUS. HIST. REV. 385, 387 (1957) (asserting Fall's immediate negotiations with oil magnates after he became Secretary of the Interior).

45. See *id.* at 391 ("Fall defended his personal acquisitions from Sinclair and Doheny as legitimate loans and normal business transactions having no bearing on his leasing policy for the naval oil reserves.").

46. See *id.* at 386 (discussing Fall's extensive experience in the oil industry).

47. BURL NOGGLE, *TEAPOT DOME: OIL AND POLITICS IN THE 1920S*, at 9–16 (1961).

48. See 67 CONG. REC. 5567 (1922).

49. See *Harding Approves Fall-Denby Leasing of Navy Oil Lands*, N.Y. TIMES, June 9, 1922, at 1 ("President Harding in a message to the Senate today assumed full responsibility for the leasing to private interests of the naval oil reserve in California and in Wyoming.").

50. See *Pan-American Petroleum v. United States*, 273 U.S. 456, 484–86 (1927) (discussing the two tracts of land that were to be set aside as federal oil reserves); see also John A. DeNovo, *Petroleum and the United States Navy Before World War I*, 41 MISS. HIST. REV. 641, 647 (1955) (noting that Taft designated Elk Hills and Buena Vista as naval oil reserves in 1912); WILLIAM R. BRAISTED, *THE UNITED STATES NAVY IN THE PACIFIC, 1909–1922*, at 38 (2008) (same).

decrease because of oil depletion.⁵¹ Taft also had a role in the growth of the Navy. In 1902, the United States Navy “ranked seventh amongst the world’s” navies, but in the last year of Taft’s presidency the Navy was the third-largest in the world.⁵² In 1910, Congress authorized in statute what Taft had already accomplished with his executive order, and in 1915 the Court in *United States v. Midwest Oil Company*⁵³ upheld Taft’s—and later President Wilson’s—authority to set aside land for the federal government’s use or protection.⁵⁴ Authored by Justice Joseph Lamar, the Court in a five to three vote accepted that a president, as a commander in chief, had the authority to set aside lands that had previously been open to the public for exploration and drilling.⁵⁵ Hailed as a victory for conservation, the decision also upheld a significant national security decision that Taft, as president, had undertaken to ensure that the Navy had a ready reserve of oil in case of war.⁵⁶

Born into a prominent Ohio family, Taft’s ascension to the chief justiceship followed a historically unparalleled career in federal and state government service.⁵⁷ This partly explains why he became a justice at the (then) advanced age of sixty-three.⁵⁸ After his admission to the bar in 1880, he served as Hamilton County’s prosecutor, and then in 1882, President Chester Arthur appointed him as a federal revenue collector.⁵⁹ At the age of twenty-seven, he became a state trial judge.⁶⁰ In 1890, President Benjamin Harrison appointed Taft Solicitor General of the United States and then, two years later, as a judge on the United States Court

51. See DeNovo, *supra* note 50, at 646 (explaining Ballinger’s prediction that current oil production practices are not sustainable for long term oil extractions).

52. PAOLO E. COLETTA, *THE PRESIDENCY OF WILLIAM HOWARD TAFT* 210–16 (1973).

53. *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

54. *Id.* at 483 (declaring the Executive had the power to make withdrawals).

55. *Id.* at 468–69.

56. See J. Leonard Bates, *The Midwest Decision, 1915: A Landmark in Conservation History*, 51 PAC. NW. Q. 26, 26–27 (1960) (explaining the victory for the conservationists).

57. See TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DIRECTORY* 275–78 (2001) (explaining Taft’s father, Alphonso Taft, had served as both Secretary of War and Attorney General during Ulysses S. Grant’s presidency, and later as both United States Minister to Austria-Hungary and Russia during Chester A. Arthur’s presidency). Additionally, Taft was educated at Yale University as well as the Cincinnati Law School, the predecessor of the University of Cincinnati’s law school. *Id.*

58. Post, *supra* note 27, at 3.

59. PETER RENSTROM, *THE TAFT COURT: JUSTICES, RULINGS, AND LEGACY* 72–73 (2003).

60. See Earl Warren, *Chief Justice William Howard Taft*, 67 YALE L. J. 353, 355 (1958) (discussing Taft’s early legal career).

of Appeals for the Sixth Circuit.⁶¹ In 1900, Taft acceded to President William McKinley's request to leave the federal bench and serve as the Governor General of the Philippines.⁶² President Theodore Roosevelt appointed Taft as Secretary of War in 1904.⁶³ This position placed Taft in close proximity to the presidency in both a practical and legal sense. On August 7, 1789, Congress established the Department of War with a Cabinet Secretary in charge of the department, and its responsibilities included ensuring the Army was capable of defending the United States, as well as, by the time of Taft's appointment, governing and protecting the nation's growing overseas empire.⁶⁴

As Secretary of War, Taft not only oversaw the training and equipping of the nation's military forces, he also undertook responsibility for the garrisoning of forces in the Philippines and Cuba.⁶⁵ As one scholar noted, Taft "had direct or indirect oversight over most of America's scattered empire."⁶⁶ Taft's early actions, involving Japan, may have influenced his

61. *Id.* at 355–56 (explaining when President Benjamin Harrison appointed Taft as Solicitor General, he had less than three years of experience as a jurist); *see also* DAVID HENRY BURTON, TAFT, HOLMES, AND THE 1920S COURT 44 (1993) (explaining that the appointment was a "quantum leap" which came about as a matter of "political grounds").

62. JEFFREY ROSEN, WILLIAM HOWARD TAFT, THE AMERICAN PRESIDENTS SERIES: THE 27TH PRESIDENT, 1909–1913, at 31–32 (2018).

63. *E.g.*, *William Howard Taft*, HISTORY (June 7, 2019), <https://www.history.com/topics/us-presidents/william-howard-taft> [<https://perma.cc/S9WL-QJMV>].

64. Act to Establish the Department of War (1789). The bill read:

[Be] it enacted by the Congress of the United States, [t]hat there shall be an executive department, to be denominated [the Department of War], and that there shall be a principal officer therein to be called the Secretary to the United States, for the Department of War, to be removable from office by the President of the United States, and who shall perform and execute such duties, services, and functions, as shall, from time to time be enjoined on, or entrusted to him, by the President of the United States, agreeable to the Constitution, relative to military commissions, or to the troops, fortresses, or warlike stores of the United States, or to such other matters respecting military affairs, as the President of the United States shall assign to the said department, or relative to the granting of lands to persons entitled thereto by reason of military services rendered to the United States, or relative to Indian affairs; [a]nd furthermore, that the said principal officers shall conduct the business of the said department in such manner as the President of the United States shall, from time to time, order or instruct. *Id.*

65. *See* REO MATSUZAKI, STATEBUILDING BY IMPOSITION: RESISTANCE AND CONTROL IN COLONIAL TAIWAN AND THE PHILIPPINES 132–51 (2019) (describing Taft's involvement with the American occupation of the Philippines as governor and later as secretary of war); WILLIAM HOWARD TAFT, SPECIAL REPORT OF WM. H. TAFT, SECRETARY OF WAR, TO THE PRESIDENT ON THE PHILIPPINES 13–14 (1908) (providing there were "12,000 American soldiers in the islands . . .").

66. Truman R. Clark, *President Taft and the Puerto Rican Appropriation Crisis of 1909*, 26 AMERICAS 152, 152 (1969).

view of the national security aspect of Fall's, Sinclair's, and Doheny's fraud as being a matter of corruption rather than a corrupt act undermining national security. On July 27, 1905, Taft and Prime Minister of Japan, Katsura Tarō, met in Tokyo and agreed that Japan would not make any claim to the Philippine Islands and, in return, the United States government recognized the importance to the Japanese government of creating a "protectorate" over Korea.⁶⁷ Taft described to Elihu Root, his predecessor in the War Department, that "Japan's only interest in the Philippines would . . . be to have these islands governed by a strong and friendly nation like the United States . . ."⁶⁸ After blaming pro-Russian propaganda for creating a false sense of fear of Japan, Taft added that "insinuations of the yellow peril type are nothing more or less than malicious and clumsy slanders calculated to do mischief to Japan."⁶⁹ The agreement remained out of the American public's knowledge until a historian revealed its existence in August 1924.⁷⁰

The agreement between Taft and Tarō was notable for several reasons. Both the United States and Japan were relative newcomers in creating overseas empires, and both had extended their imperial designs into the Pacific. In the 1870s, Japan emerged from the "Meiji Restoration" and took steps to gain control in Korea.⁷¹ Japan's control of Korea became complete after its military defeated China in the first Sino-Chinese War in 1895.⁷² Following that conflict, Japan's military was instrumental in the defeat of the Boxer Rebellion and then surprisingly defeated Russia in a major war in

67. See Kirk W. Larsen & Joseph Seeley, *Simple Conversation or Secret Treaty? The Taft-Katsura Memorandum in Korean Historical Memory*, 19 J. KOREAN STUD. 59, 59–60 (2014) (explaining Taft and Katsura Tarō's meeting led to the Taft-Katsura Memorandum); Jongsuk Chay, *The Taft-Katsura Memorandum Reconsidered*, 37 PAC. HIST. REV. 321, 321–22 (1968) ("As stated in the memorandum which was drawn up later and agreed to by both parties, the conversation had three major subjects.").

68. See Letter from WHT, Sec. of War, to Elihu Root, Predecessor, Sec. of War under Roosevelt and President William McKinley [Hereinafter Elihu Root] (July 29, 1905) (on file with the Library of Congress (adding "and not to have them placed either under the misrule of the natives, yet unfit for self-government, or in the hands of some unfriendly European power").

69. Letter from WHT, Sec. of War, to Elihu Root (July 29, 1905) (on file with the Library of Congress).

70. John Gilbert Reid, *Taft's Telegram to Root, July 29, 1905*, 9 PAC. HIST. REV. 66, 67 (1940).

71. See Marlene J. Mayo, *The Korean Crisis of 1873 and Early Meiji Foreign Policy*, 31 J. ASIAN STUD. 793, 798–800 (1972) (detailing the steps Japan took to gain control in Korea).

72. S.C.M. PAINE, *THE SINO-JAPANESE WAR, 1894-95: PERCEPTIONS, POWER, AND PRIMACY* 5–8 (2003); S.C.M. PAINE, *THE JAPANESE EMPIRE: GRAND STRATEGY FROM THE MEIJI RESTORATION TO THE PACIFIC WAR* 41–42 (2017).

1905.⁷³ After the agreement, in World War I, the United States and Japan fought on the same side, and both contributed forces to the containment of communism in Russia in 1918–1919.⁷⁴

Taft was elected president in 1908, but in 1912, he lost to Woodrow Wilson in a four-way race against Wilson, Theodore Roosevelt, and Eugene Debs.⁷⁵ In contrast to Debs, who ran as a socialist, Roosevelt, who ran as a liberal progressive, and Wilson, who also ran as a progressive reformer, Taft was the most conservative of the candidates, even though he too embraced aspects of progressivism.⁷⁶ Prior to and during his presidency, Taft sought to establish a lasting relationship with Japan.⁷⁷ His other peace efforts included aligning with steel magnate Andrew Carnegie to the point that Carnegie contributed the large sum of \$75,000 to Taft's 1912 reelection campaign based on Taft's stated platform of creating an international peace arbitration body.⁷⁸ Taft's conception of peace, however, was partly based on commercial trade and imperialism.⁷⁹ That is, as long as nations freely engaged in commerce, war would be unlikely. And because of China's instability, he welcomed Japan's position of strength in the Eastern Pacific.⁸⁰

From 1913 until 1920 when Harding nominated Taft as Chief Justice, Taft taught at Yale, remained active in the law, and generally supported

73. See, e.g., JOHN ALBERT WHITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR 186 (2015) (explaining the Russian surrender to the Japanese resulting in the end of the war).

74. See CARL J. RICHARD, WHEN THE UNITED STATES INVADED RUSSIA: WOODROW WILSON'S SIBERIAN DISASTER 81 (2013) (describing the dispatch of American and Japanese troops along the Siberian border).

75. *United States Presidential Election of 1912*, BRITANNICA, <https://www.britannica.com/event/United-States-presidential-election-of-1912> [<https://perma.cc/QV4P-HMRV>].

76. *Id.*; see JONATHAN LURIE, WILLIAM HOWARD TAFT: THE TRAVAILS OF A PROGRESSIVE CONSERVATIVE 153 (2011) (noting Taft considered himself a progressive conservative).

77. See Ralph Eldin Minger, *Taft's Missions to Japan: A Study in Personal Diplomacy*, 30 PAC. HIST. REV. 279, 291–92 (1961) (explaining several tactics Taft used to establish a relationship with Japan).

78. DAVID NASAW, ANDREW CARNEGIE 742–65 (2006).

79. See ELLEN D. TILLMAN, DOLLAR DIPLOMACY BY FORCE: NATION-BUILDING AND RESISTANCE IN THE DOMINICAN REPUBLIC 1 (2016) (explaining the original idea of dollar diplomacy); DANA G. MUNRO, INTERVENTION AND DOLLAR DIPLOMACY IN THE CARIBBEAN 1900–1921, at 162–63 (1964) (discussing the promotion of the United States' political objectives regarding dollar diplomacy).

80. See ATUL KOHLI, IMPERIALISM AND THE DEVELOPING WORLD: HOW BRITAIN AND THE UNITED STATES SHAPED THE GLOBAL PERIPHERY 247 (2020) (discussing China's instability and Japan's rise to power in the region).

Wilson's efforts to have the country join the League of Nations.⁸¹ Thus, in addition to having taken a role in national security policy, Taft also believed that international arbitration and laws could prevent a war from occurring.⁸² After he left the presidency and while teaching at Yale, Taft served as president of the League to Enforce Peace.⁸³ The League advocated, among other ideas, for the establishment of an international court to enforce treaties and settle disputes between nations.⁸⁴ He encouraged Harding to enter into an international maritime arms limitations treaty known—as further addressed below—as the Washington Naval Treaty.⁸⁵ After World War I, it became commonplace to think that the prewar battleship arms race—which led to a quest for oceanic hegemony—was one of the causes of the war.⁸⁶ Although an agreement for naval reductions took place in 1922, the battleship remained central both to the United States' defense and a projected war against Japan (or even Britain in which oil became a crucial naval commodity).

“Taft's reputation for supporting international peace negotiations [had become so broad, it] led to Tomas Masyryk, the first president of Czechoslovakia, and President Eleftherios Kyriakou Venizelos, the

81. Donald F. Anderson, *Building National Consensus: The Career of William Howard Taft*, 68 U. CIN. L. REV. 323, 344 (2000).

82. See, e.g., James Hindman, *The General Arbitration Treaties of William Howard Taft*, 36 HISTORIAN 52, 52 (1973) (“Taft spoke before [Theodore] Marburg's society, saying that ‘if we do not have arbitration, we shall have war.’”).

83. See William Howard Taft, *League to Enforce Peace*, in THE COLLECTED WORKS OF WILLIAM HOWARD TAFT: TAFT PAPERS ON LEAGUE OF NATIONS 3 (Frank X. Gerrity ed., 2003) (providing the Proposal of the League to Enforce Peace).

84. See RUHL J. BARTLETT, THE LEAGUE TO ENFORCE PEACE, at v (1944) (offering a solution when deciding “what place [the United States] should take in world affairs”).

85. See Letter from WHT, Prof., Yale L. School, to HT (Nov. 29, 1921) (on file with the Library of Congress). Taft wrote to Horace:

I saw Harding yesterday. He is very serious about the Conference and tells me that things are working well and that they are going to get something real out of it. He complained that Borah and others were, as he said, “crabbing” the situation. I told him I would send him a little memorandum I had of what Lincoln said about complaints of an Administration in order to cheer him up at times. As Root told me that he thought the thing as going to be a success, Harding's assurance is a confirmation.

Id.

86. See, e.g., John H. Maurer, *Arms Control and the Anglo-German Naval Race Before World War I: Lessons for Today?* 112 POL. SCI. Q. 285, 285 (1997) (explaining England and Germany's competition of building battleships before World War I).

president of Greece, asking him to campaign for the League of Nations.”⁸⁷ By 1927, he had been a part of (or observed) the United States and Japan acting harmoniously, and as a result, may have discounted the claims of officials in the Harding administration who claimed that secrecy, regarding the naval petroleum leases, was important as a matter of national security.

B. *United States Naval Policy: Oil-Fired Battlefleets and Mahan's Doctrine*

The office of Secretary of the Navy was established as a separate cabinet department on April 30, 1798, to alleviate the Secretary of War of responsibility over the United States' naval defense.⁸⁸ In 1842, Congress enacted a statute authorizing the Secretary of the Navy to establish and construct coal depots to supply the nation's warships.⁸⁹ Congress's action was a response to Secretary of the Navy Abel Upshur's efforts to modernize the Navy by converting it from sail power to steam propulsion.⁹⁰ The Navy had made a vital contribution to the defeat of the Confederacy in 1865, and shortly after the end of the war, naval policy centered on the question of whether there would be a future war with Great Britain.⁹¹ However, by the 1870s, naval budgets began to shrink as war with Britain or another European power appeared unlikely.⁹² To be sure, in 1873, there was a brief “war scare” with Spain resulting from the Virginius Affair, but this brief crisis was diplomatically resolved.⁹³

European imperialism and the corresponding growth of their navies resulted in a gradual retooling and enlargement of the United States Navy

87. Joshua Kastenber, *National Security and Judicial Ethics: The Exception to the Rule of Keeping Judicial Conduct Judicial and the Politicization of the Judiciary*, 12 ELON L. J. 282, 304 n.122 (2020) (citing Letter from WHT to Thomas Mazaryk, First President of Czechoslovakia (Sep. 23, 1919) and Letter from WHT to Eleftherios Kyriakou Venizelos, President of Greece (Sep. 23, 1919) (on file with the Library of Congress)).

88. See ROBERT BRENT MOSHER, EXECUTIVE REGISTER OF THE UNITED STATES 1789–1902, at 59–60 (1903) (providing the “Act to establish an Executive Department, to be denominated the Department of the Navy”).

89. See 9 Rev. Stat. § 1552 (1842) (repealed 1913) (reading “[t]he Secretary of the Navy may establish at such places as he may deem necessary, suitable for depots of coal, and other fuel, for the supply of steamships at war”).

90. See NORMA LOIS PETERSON, THE PRESIDENCIES OF WILLIAM HENRY HARRISON AND JOHN TYLER 151 (1989) (discussing Upshur's modernization efforts); Matthew J. Karp, *Slavery and American Sea Power: The Navalist Impulse in the Antebellum South*, 77 J. S. HIST. 283, 312–16 (2011) (noting that Upshur and other southerners partly wanted an expanded Navy to protect slavery).

91. KENNETH J. HAGAN, THIS PEOPLE'S NAVY: THE MAKING OF AMERICAN SEA POWER 177–79 (1991).

92. *Id.*

93. *Id.* at 180–81.

beginning in 1883 with the construction of four armored cruisers, powered primarily by coal generated steam.⁹⁴ In 1885, President Grover Cleveland convinced Congress to fund newer and heavier armored ships like the armored cruiser *Maine*, which became central to the war with Spain in 1898.⁹⁵ Following Spain's defeat, the United States held possessions across the Pacific Ocean including Hawaii, Guam, and the Philippines, and the Navy became essential in maintaining these possessions in the United States' control.⁹⁶ In 1901, a brief war scare with Chile erupted over the "Baltimore incident," and had war occurred, the Navy would have steamed thousands of miles to South America.⁹⁷ In 1903, President Roosevelt's naval advisors called for the construction of forty-eight battleships with commensurate numbers of smaller supporting vessels.⁹⁸

Although in 1903, the battleships would have been powered by coal, by 1915, new naval battleships were constructed to be powered by oil.⁹⁹ A similar process of moving from coal to oil occurred with Britain's Royal Navy.¹⁰⁰ In 1885, naval engineers started to urge the adoption of petroleum as a substitute for coal since it burned faster and delivered more power for ship acceleration.¹⁰¹ In 1897, Congress opened up federal lands for oil exploration and purchase.¹⁰² One year later, Congress allocated the small

94. *Id.* at 185–86.

95. WALTER R. HERRICK, JR., *THE AMERICAN NAVAL REVOLUTION* 33–37 (1966).

96. HAGAN, *supra* note 91, at 227; *see also* HERRICK, *supra* note 95, at 105 (discussing American annexation of Hawaii).

97. *See* HAGAN, *supra* note 91, at 198–200.

98. *See, e.g.*, UNITED STATES CONGRESSIONAL AFFAIRS, ESTIMATES SUBMITTED BY THE SECRETARY OF THE NAVY: HEARINGS BEFORE COMMITTEE ON NAVAL AFFAIRS OF THE HOUSE OF REPRESENTATIVES 569 (1914) [hereinafter ESTIMATES SUBMITTED BY THE SECRETARY OF THE NAVY] (explaining the recommendations made by Admiral C.E. Vreeland regarding the battleship fleet).

99. *See* ROBERT K. MASSIE, *DREADNOUGHT: BRITAIN, GERMANY, AND THE COMING OF THE GREAT WAR* 784–85 (1991) (explaining how the use of oil in small vessels led the way to bigger vessels using oil instead of coal).

100. *Id.* at 784–86 (“Converting dreadnoughts to oil meant giving them greater speed; it also meant basing British naval supremacy on a fuel obtainable only from overseas.”).

101. HERRICK, *supra* note 95, at 32–33.

102. Act of February 11, 1897, ch. 216, 29 Stat. 526 (current version codified at 30 U.S.C. § 161). This act reads:

Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor under the provisions of the laws relating to placer mineral claims: Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed or improved

sum of \$15,000 to investigate the practicality of converting the Navy from coal to oil.¹⁰³ In 1904, Secretary of the Navy, Paul Morton, informed Congress that oil enabled longer cruising ranges of vessels and less crew.¹⁰⁴ However, when, in December 1907, President Theodore Roosevelt ordered a fleet of battleships and other vessels—known as the “Great White Fleet” for the painting scheme on the vessels—to sail around the world, all of the capital ships were coal-powered and reliant on fuel resupply from British and other European sources.¹⁰⁵

Another important change occurred in naval expenditures and construction. In 1905, the Royal Navy—the name given to the Navy of the British Empire—began to build a revolutionary battleship titled as the *Dreadnought*.¹⁰⁶ The *Dreadnought*, when completed, became the largest and most powerful surface vessel of any Navy in terms of size, speed, armament, and armor.¹⁰⁷ Before long, the governments of Germany, France, Italy, Japan, and the United States began to construct navies based on the British *Dreadnought* design, and a naval arms race ensued.¹⁰⁸

as mineral but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Id.

103. See DeNovo, *supra* note 50, at 641 (citing Act of May 4, 1898, Pub. L. No. 76, 54th Cong. 2d Sess, and explaining the allocation for the following: experiments with liquid fuel on steam tug, New York Yard; experiments with liquid fuel on two torpedo boats, fifteen thousand dollars).

104. *Id.* at 642–43 (suggesting a transition from coal to oil, even though Morton did not advocate for a rapid transition); see also GERALD D. NASH, UNITED STATES OIL POLICY, 1890–1964: BUSINESS AND GOVERNMENT IN TWENTIETH CENTURY AMERICA 10 (1968) (describing why the transition to oil was criticized, despite oil providing significant advantages over coal).

105. See RUSSELL F. WEIGLEY, THE AMERICAN WAY OF WAR: A HISTORY OF UNITED STATES MILITARY STRATEGY AND POLICY 188–89 (1973) (showing how the Great White Fleet was a major achievement in that time); Christopher McMahon, *The Great White Fleet Sails Today? Twenty-First Century Logistics Lessons from the 1907–1909 Voyage of the Great White Fleet*, 71 NAVAL WAR COLL. REV. 67, 73–74 (2018) (giving details of how the ships in the Great White Fleet operated); Oreste Foppiani, *The World Cruise of the U.S. Navy in 1907–1908*, 71 IL POLITICO 110, 115–16 (2006) (“[T]he world tour of the battle fleet of 1907–1909 . . . transformed [the US Navy] from a joke into a war machine.”).

106. MASSIE, *supra* note 99, at 468–69 (offering a description as to the size and strength of the *Dreadnought*).

107. See *id.* at 470–71 (“Being a battleship, she will have to fight other battleships. Having speed she can choose the range at which she will fight.”); see also Holger Herwig, *The German Reaction to the Dreadnought Revolution*, 13 INT’L HIST. REV. 273–74 (1991) (offering a comparison to the German creation of a similar dreadnought-type battleship); RICHARD HOUGH, THE GREAT WAR AT SEA: 1914–1918, at 1–12 (1984) (“Germany has been paralyzed by the *Dreadnought*,” Admiral Sir John Fisher, First Sea Lord wrote gloatingly . . .”).

108. See WEIGLEY, *supra* note 105, at 188 (providing an example of how the United States decided to build battleships after the *Dreadnought* model); Matthew Seligmann, *Intelligence Information and*

In 1914, during a hearing on future naval estimates, Admiral Robert S. Griffin, the chief of the Navy's Bureau of Steam Engineering, testified that although two of the Navy's newest battleships, the *Oklahoma* and the *Nevada*, were the only oil-burning battleships in the fleet, oil had become critical to the national defense. "[A] supply of oil is absolutely necessary for us and is becoming more and more necessary every year, because all of the vessels we are now building are exclusively oil burners," he warned.¹⁰⁹ Contemporaneously, Admiral T.J. Cowie, the chief of the Navy's Bureau of Supplies and Accounts, testified that the advantages of oil over coal were the "[a]bility to maintain high speed as long as fuel lasts, better construction of vessel, saving of weight, absence of smoke and noninterference with gunnery, reduction of the complement [size of the ship's crew, and] ease and cleanliness of refueling."¹¹⁰

In 1916, with the World War in its second year, and the United States maintaining a tenuous neutrality, President Wilson announced that the United States would build a "Navy second to none."¹¹¹ Less than a year later, at his request, Congress declared war on the Imperial German government and eventually, its allies: the Austro-Hungarian Empire, the Ottoman Empire, and Bulgaria.¹¹² The United States entered World War I

the 1909 Naval Scare: The Secret Foundations of a Public Panic, 17 WAR IN HIST. 37, 40–41 (2010) ("Intelligence received on the German naval armaments industry suggested that a formidable new competitor had emerged" leading to new "naval shipbuilding capabilities"); Charles H. Fairbanks Jr., *The Origins of the Dreadnought Revolution: A Historiographical Essay*, 13 INT'L HIST. REV. 246, 247 (1991) (providing insight from World War I military historians).

109. See ESTIMATES SUBMITTED BY THE SECRETARY OF THE NAVY, *supra* note 97, at 325 ("All the ships we build will be oil burners, and unless we are sure of a cheaper supply of oil our fuel bills are going to mount up very rapidly.").

110. *Id.* at 123.

111. Naval Act of 1916, 39 Stat. 556 (1916); see also WEIGLEY, *supra* note 105, at 244 (explaining Wilson's neutrality within the building program that began in 1916); ADAM TOOZE, *THE DELUGE: THE GREAT WAR, AMERICA, AND THE REMAKING OF THE GLOBAL ORDER, 1916–1931*, at 35–36 (2014) ("Wilson's view was blunt: 'let us build a [N]avy bigger than hers and do what we please.'"); EDWARD M. COFFMAN, *THE WAR TO END ALL WARS: THE AMERICAN MILITARY EXPERIENCE IN WORLD WAR I*, at 87 (1968) (discussing that according to Professor Coffman, Wilson actually called for "incomparably the greatest [N]avy in the world"); HAROLD & MARGARET SPROUT, *THE RISE OF AMERICAN NAVAL POWER, 1776–1918* 334 (1939) (describing Wilson's expansion of the Navy as an "armament program without precedent in American history"); Jerry W. Jones, *The Naval Battle of Paris*, 62 NAVAL WAR COLL. REV. 77, 77–78 (2009) ("The challenge to British naval supremacy alarmed the British and nearly alienated the European partner most sympathetic to Wilson's vision of the peace.").

112. See Gerhard Peters & John T. Woolley, *Woodrow Wilson, Fifth Annual Message*, AMER. PRESIDENCY PROJECT (Dec. 4, 1917), <http://www.presidency.ucsb.edu/ws/index.php?pid=29558> [<https://perma.cc/3KKC-Z2K6>] ("We must meet its force with our own and regard the Central Powers as but one . . . They also are the tools of Germany.").

with one of the largest navies in the world.¹¹³ It had been constructed almost as a mirror of the Royal Navy, replete with modern battleships.¹¹⁴ With a degree of prescience, in 1915, Secretary of the Navy, Josephus Daniels, designated the Teapot Dome oil area as a naval reserve to provide a ready supply of oil for the Navy in case of war.¹¹⁵ Beginning in late 1917, part of the U.S. Navy served alongside the Royal Navy in blockading Germany.¹¹⁶ Although Wilson pushed for the establishment of a League of Nations and sought peace during the Versailles negotiations, he also continued to plan for the United States to possess the world's most powerful Navy.¹¹⁷

After Wilson's failure to have the United States join the League of Nations, President Harding pursued disarmament through a series of treaties by inviting the governments of the world's major powers—Britain, France, Italy, and Japan, as well as the governments of Portugal, Belgium, the Netherlands, and China—to Washington D.C.¹¹⁸ This conference produced the Four-Power Treaty between the United States and the governments of Great Britain, Japan, and France.¹¹⁹ As a result, Japan was assured of the continued possession of the Korean Peninsula and likewise, the United States would retain the Philippines and Guam.¹²⁰ The treaty

113. LEE A. CRAIG, JOSEPHUS DANIELS: HIS LIFE & TIMES 231 (2013).

114. *See id.* (“[Theodore Roosevelt’s] obsession with a big [N]avy helped propel the United States from the world’s twelfth-largest [N]avy in the late nineteenth century to the third-largest by 1914.”); James C. Bradford, *Last of the Independent Naval Diplomats*, in ADMIRALS OF THE NEW STEEL NAVY: MAKERS OF THE AMERICAN NAVAL TRADITION 263–71 (James C. Bradford, ed., 2012).

115. *See* Craig, *supra* note 113, at 242 (explaining Daniels’s solution to the nation’s oil needs).

116. *See* ROBERT K. MASSIE, CASTLES OF STEEL: BRITAIN, GERMANY, AND THE WINNING OF THE GREAT WAR AT SEA 689–92, 695–700 (2003) (explaining the peace efforts by Wilson and how peace efforts ultimately led to the U.S. in battle alongside Britain); COFFMAN, *supra* note 111, at 96–99 (“The American contribution to the convoy operation was an integral part of the Allied system.”).

117. *The Washington Naval Conference*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/naval-conference> [<https://perma.cc/TT4X-XQ9E>].

118. *See* Winston B. Thorson, *Pacific Northwest Opinion of the Washington Naval Conference of 1921–1922*, 37 PAC. NW. Q. 109, 109–10 (1946) (noting in the aftermath of World War II, the Naval Treaty proved unpopular because it was believed to have weakened the United States military and given Japan an advantage). The conference also resulted in the Washington Submarine Treaty. *See generally* Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, art. V, Feb. 6, 1922, 25 L.N.T.S. 202 (1922) (providing, in relevant part, for the protection of the lives of neutrals and noncombatants at sea in time of war and prevention of use of war noxious gases and chemicals).

119. *See generally* Insular Possessions and Dominions in the Pacific (Four-Power Treaty), art. I, Dec. 13, 1921, 43 Stat. 1646 (providing an overview of the contents of the treaty).

120. *See* J. Chal Vinson, *The Parchment Peace: The Senate Defense of the Four-Power Treaty of the Washington Conference*, 39 MISS. VALLEY HIST. REV. 303, 308 (1952) (offering why the Four-Power treaty made it unnecessary to fortify Guam).

had the effect of curbing Japanese expansion in the Pacific, a main goal of the State Department.¹²¹ Also, the majority of the Senate, in voting for the treaty, believed it was an important agreement to narrow the possibility of a new war.¹²²

As part of the Washington Conference on February 6, 1922, the governments of France, Italy, Japan, the United States, and Britain signed a naval treaty proportioning naval strength in which the United States and Britain would each possess a tonnage ratio that roughly equated to five capital ships to Japan's three, and France and Italy would have 1.75 tons respectively.¹²³ Put another way, the battleship and battle-cruiser (a less armored but faster type of battleship) fleets of the United States and Great Britain could not exceed 525,000 tons, and Japan was limited to 310,000 tons.¹²⁴ While the Washington Naval Treaty proved publicly popular—and Taft supported it—the Navy's response is important in placing the national security aspects of Teapot Dome into context. After learning of Harding's plans for naval disarmament, Secretary of the Navy, Edwin Denby sought the advice of the Navy's senior leadership, many of whom were opposed to the treaty.¹²⁵

Some of the Navy's senior leaders warned that Japan, as well as Britain, were “grave menaces to American security.”¹²⁶ In 1902, the governments of Britain and Japan signed a treaty in which one nation would come to the aid of the other, unless the basis for the conflict involved Russian aggression

121. *Id.* at 308 (describing how the Four-Power treaty prevented Japan from expanding into the Pacific).

122. *See id.* at 305–306 (offering substantial information on the goals of the Four Power Treaty and the interest in peace).

123. *See* Limitation of Naval Armament (Five-Power Treaty or Washington Treaty) art. 4, Feb. 6, 1922, 43 Stat. 1655, at 353 (“The total ship replacement tonnage of each of the Contracting Powers shall not exceed [the following]”); RICHARD W. FANNING, PEACE AND DISARMAMENT: NAVAL RIVALRY AND ARMS CONTROL 1922–1933, at 3–7 (1995) (“The Five-Power Treaty established ratios in capital ships of 5-5-3-1.75-1.75 for the United States, Britain, Japan, France, and Italy.”); *see also* DUDLEY W. KNOX, THE ECLIPSE OF AMERICAN SEA POWER 28 (1922) (describing bases for 5-5-3 ratio). The actual tonnage ratio was 500,000 tons to Japan's 300,000 with Italy and France at 175,000. BRAYTON HARRIS, THE AGE OF THE BATTLESHIP 1890–1922, at 203 (2015).

124. LARRY H. ADDINGTON, THE PATTERNS OF WAR SINCE THE EIGHTEENTH CENTURY 174 (2d ed. 1994); *see also* Donald G. White, *The Misapplication of a Weapons System: The Battle Cruiser as a Warship Type*, 23 NAVAL WAR COLL. REV. 42, 47–49 (1970) (establishing the difference between the battleship and battlecruiser).

125. *See* Ernest Andrade Jr., *The United States Navy and the Washington Naval Conference*, 31 THE HISTORIAN 345, 346 (1969) (“Denby asked the Board to consider a number of questions relating to armaments limitation.”).

126. *Id.* at 347.

over Korea or Britain's defense of its colony, India.¹²⁷ Even if, the Navy's leaders stressed, the Washington Conference resulted in the termination of the 1902 Anglo-Japanese alliance, the Navy would have to achieve parity with the British Navy and still be able "to contemplate war" with Japan.¹²⁸ Testifying to the House on March 31, 1920, Admiral Bradley Fiske, a commander in the Navy's Atlantic fleet, implored Congress to continue with Wilson's naval plans prior to signing a disarmament agreement.¹²⁹ At the same time, a retired naval captain, Dudley Knox, published a book condemning the treaty for placing the United States in a disadvantaged position and enabling Japanese aggression.¹³⁰ The treaty was signed despite the Navy's protests, and the need for the naval petroleum reserves remained. On December 8, 1922, Denby realigned the Navy to place the bulk of its battleships in the Pacific. But the Pacific ports were unprepared for the larger naval presence, which meant a buildup in Hawaii.¹³¹ In terms of naval personnel movement to western ports and the possibility of war, "[i]n 1922, the U.S. Navy consisted of 7,855 officers and 89,482 enlisted sailors."¹³² Sending a fraction of these sailors to the Pacific would have also entailed the use of oil.

There is one more matter important to naval policy. While presidents and the legislative branch are responsible for the size of the Navy, no examination of naval policy, or foreign policy for that matter, at the time of the scandal can be understood without acknowledging the influence of

127. See Charles Nelson Spinks, *The Termination of the Anglo-Japanese Alliance*, 6 PAC. HIST. REV. 321, 321–22 (1937) (explaining the relationship between Britain and Japan during the early 1900s); Jonathan P. Dolliver, *Significance of the Anglo-Japanese Alliance*, 174 N. AM. REV. 594, 602 (1902) (noting how Senator Dolliver (R-IA) insisted that the treaty was a means to warn Russia from dismembering China).

128. Andrade Jr., *supra* note 125, at 347.

129. See *Naval Investigation: Hearings Before the Subcomm. of the Comm. on Naval Affairs*, 66th Cong. 678–84 (1920) (describing proposed development of pre-war military strategy to make U.S. forces immediately deployable upon declarations of war).

130. KNOX, *supra* note 123, at 131–40. Before Knox authored this book, he wrote an editorial warning that the reduction in naval personnel had led to the superiority of British and Japanese sailors in terms of training and war readiness. See Dudley Knox, *The Limited Navy: Personnel and Efficiency Still of Great Importance*, N.Y. TIMES, Dec. 12, 1921, at 18 [hereinafter *The Limited Navy*] (condemning the reduction of naval personnel).

131. WILLIAM STILL, VICTORY WITHOUT PEACE: THE UNITED STATES NAVY IN EUROPEAN WATERS, 1919–1924, at 9 (2017); Gerald E. Wheeler, *The United States Navy and the Japanese "Enemy": 1919–1931*, 21 MIL. AFFS. 61, 74 (1957).

132. JOHN T. KUEHN, AGENTS OF INNOVATION: THE GENERAL BOARD AND THE DESIGN OF THE FLEET THAT DEFEATED THE JAPANESE NAVY 9 (2008).

Admiral Alfred Thayer Mahan.¹³³ Prior to World War II, the militaries of the “Great Powers” were built and utilized along the lines of a small number of influential military theorists. Carl Von Clausewitz, a Prussian officer who fought against Napoleon and later authored *Vom Kriege* (On War), and Antoine-Henri Jomini, a French-Swiss who fought in Napoleon’s armies and then authored the *Art of War*, dominated Army policy and strategy, and to a degree the foreign policies of the Great Powers.¹³⁴ In 1890, Mahan authored *The Influence of Sea Power Upon History*, in which he focused on the years 1660 to 1783.¹³⁵ Mahan, interestingly, was raised near the United States Military Academy where his father, Dennis Hart Mahan, was a distinguished professor and military theorist for the Army and conveyed to future officers the importance of Jomini to campaign planning.¹³⁶

Mahan’s naval doctrine was partly based on the United States’ growing economy and population with an attendant growth of international commerce.¹³⁷ He noted that while the United States had a leading role in the world’s commerce, it was reliant on foreign shipping and foreign navies for its protection.¹³⁸ Later in his life, he authored *The Problem of Asia: Its Effect upon International Politics*, in which he described the development of China—the establishment of western institutions and Christianity—as a duty of the western nations and Japan.¹³⁹ And he opposed Russian expansion, believing that Japan would be instrumental in containing Russia

133. See Walter LaFerber, *A Note on the “Mercantilist Imperialism” of Alfred Thayer Mahan*, 48 MISS. VALLEY HIST. REV. 674, 674 (1962) (noting that Mahan influenced Theodore Roosevelt, Henry Cabot Lodge, John Hay, and at least two secretaries of the Navy); see also Peter Karsten, *The Nature of “Influence”: Roosevelt, Mahan and the Concept of Sea Power*, 23 AM. Q. 585, 589 (1971) (arguing Roosevelt praised Mahan and the two men worked in a partnership for naval growth).

134. Mark T. Calhoun, *Clausewitz and Jomini: Contrasting Intellectual Frameworks in Military Theory*, 80 ARMY HIST. 22, 23 (2011).

135. See PAUL M. KENNEDY, *MAHAN VERSUS MACKINDER: TWO INTERPRETATIONS OF BRITISH SEA POWER, IN STRATEGY AND DIPLOMACY* 41, 43–44 (1974) (providing greater clarity on Mahan’s purpose). See generally A.T. MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660–1783*, at 1 (1890) (“The clash of interests, the angry feelings roused by conflicting attempts thus to appropriate the larger share, if not the whole, of the advantages of commerce [by sea], and of distant unsettled commercial regions, led to wars.”).

136. See SUZANNE GEISSLER, *GOD AND SEA POWER: THE INFLUENCE OF RELIGION ON ALFRED THAYER MAHAN* 7 (2015) (offering a detailed history of the Mahan family).

137. See LaFerber, *supra* note 133, at 678–79 (offering an explanation on the growth of the United States economy).

138. See MAHAN, *supra* note 135, at 83 (describing the U.S. ships of war as “land birds, unable to fly far from their own shores” without foreign establishments).

139. Tyler Dennett, *Mahan’s “The Problem of Asia”*, 13 FOREIGN AFFS. 464, 465–66 (1935).

from further expansion into China and along the far Western Pacific.¹⁴⁰ President McKinley appointed Mahan as a representative to the 1899 Hague Peace Conference as well.¹⁴¹

As for Mahan's influence on naval policies, he envisioned a powerful Navy to secure the nation's commercial power.¹⁴² This required overseas ports in places such as Hawaii and the Philippines.¹⁴³ Indeed, Mahan argued to the Senate that it was critical for the United States to annex Hawaii, claiming the islands were "one of the most important strategic points in the world."¹⁴⁴ If war occurred with another nation, control of the seas would be paramount to a United States victory, if not survival.¹⁴⁵ Rather than engage in commerce raiding, the Navy had to concentrate its most powerful ships into a massed fleet and seek a decisive battle.¹⁴⁶ Based on Mahan's ideas, in 1913, a war was to occur with Germany, and the United States response was to lure the German fleet into the Caribbean and destroy it.¹⁴⁷ Known as "War Plan Black," its planners also noted that the German Navy could not transport enough coal for its fleet to reach the proposed site of battle.¹⁴⁸ "War Plan Black" was only one of several United States war plans, which were titled in a "color scheme."¹⁴⁹

Although Mahan, like Taft, did not specifically focus on Japan as a future enemy, naval leadership considered Japan as a likely adversary as early as

140. *Id.* at 467–68. Dennett wrote, "In Washington it had become apparent by 1920 that cooperation with Japan to secure peace in China would always fail because of Japan's published desire to dominate China both politically and commercially. . . . Neither Hong Kong nor the Philippines are now regarded as strategically located. Japan, not Russia, is the aggressor." *Id.* at 468.

141. *See, e.g.*, David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT'L L. 4, 13, 30 (2000) (noting certain members of the U.S. delegation present at the 1899 Conference).

142. Dennett, *supra* note 139, at 469.

143. *See* Bradford, *supra* note 114, at 46–49 (discussing Mahan's vision for American military and economic influence through Pacific islands).

144. S. Rep. No. 681, at 39 (1898), in 7 COMPILATION OF REPORTS OF COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE, 1789–1901, at 285 (1901).

145. George W. Baer, *U.S. Naval Strategy 1890–1945*, 44 NAVAL WAR COLL. REV. 6, 7 (1991).

146. *Id.* at 10.

147. *Id.* at 12.

148. *Id.*

149. *See* Louis Morton, *War Plan Orange: Evolution of a Strategy*, 11 WORLD POL. 221, 222 (1959) (explaining the series of "color plans" which "usually corresponded to the code name of the nation involved"); *see also* Michael Vlahos, *The Naval War College and the Origins of War-Planning Against Japan*, 33 NAVAL WAR COLL. REV. 23–24 (1980) (recounting two war strategies and the corresponding opposing nations: "Black" against Germany, and "Orange" against Japan).

1907 in crafting War Plan Orange.¹⁵⁰ By 1920, the Navy's leadership focused on Japan as the most likely enemy.¹⁵¹ In 1923, the Navy possessed eighteen battleships, and it had begun a modernization program to convert its older coal-burning vessels to oil.¹⁵² That same year, the Department of the Navy began its first of several "Fleet Problem" exercises in order to prepare for a future war.¹⁵³ The fleet exercises were designed around the concept that in a future war, the Navy would have to "move a large fleet across the Pacific, absorb or avoid Japanese attritional attacks, . . . and retain sufficient fighting strength to defeat Japan's" remaining naval defense forces, and impose a blockade, which would force Japan's surrender.¹⁵⁴ If "War Plan Orange" were to be initiated, immense quantities of oil would be essential.

The Navy publicized its fleet exercises during the period of the Teapot Dome appeals, which made it likely Taft knew of the Navy's increased use of oil in case of war. In late 1922, Denby announced to the nation that the Navy would begin to conduct battle simulation exercises and that all eighteen of the Navy's battleships would be involved in defending the Panama Canal.¹⁵⁵ On March 17, 1923, the *New York Times* headlined that fifteen battleships and dozens of smaller vessels staged a mock invasion of the Panama Canal area in the first large post-war naval exercise.¹⁵⁶ The press reported another battleship exercise off the coast of Panama in 1925.¹⁵⁷ In May 1927, the Navy staged a mock invasion of the East Coast.¹⁵⁸ Given the widespread reporting on the Navy's activities in the period between 1921 and 1927, it was evident that its battleships were still

150. Vlahos, *supra* note 149, at 31.

151. WEIGLEY, *supra* note 105, at 245; see ALBERT A. NOFI, TO TRAIN THE FLEET FOR WAR: THE U.S. NAVY FLEET PROBLEMS, 1923–1940, at 19 (2010) (naval tactical training focused primarily on Japan); BRAISTED, *supra* note 50, at 466 (2008) (denoting naval leadership's concern that American and Japanese press were causing heightened tensions).

152. NOFI, *supra* note 151, at 11–12.

153. See *id.* at 51 ("The objectives of the problem were to train leaders in the conduct of large-scale operations, to examine war plans and tactical doctrine, and to exercise the fleet . . ."); see also Trent Hone, *The Evolution of Fleet Tactical Doctrine in the U.S. Navy, 1922–1941*, 67 J. MIL. HIST. 1107, 1108–09 (2003) (detailing the development of battleship tactical doctrine from the study of fleet action).

154. Trent Hone, *U.S. Navy Surface Battle Doctrine and Victory in the Pacific*, 62 NAVAL WAR COLL. REV. 67, 67 (2009).

155. *Battle Fleet Tests Jutland Problems*, N.Y. TIMES, Mar. 17, 1923, at 1.

156. *Id.*

157. *Great War Dogs of East Ready for Battle: Battle Near in Navy Game*, L.A. TIMES, Mar. 7, 1925, at 4.

158. *Army Defends Coast Against Fleet Attack*, WASH. POST, May 16, 1927, at 3.

the primary instrument of war, and this meant the naval oil remained important to the national defense.

C. *The Teapot Dome Scandal's Timeline*

The scandal arose, in one sense, because Fall's grant of two secretive bids was contrary to long-standing policy. In 1809, Congress articulated a broad requirement that naval and War Department contracting be both advertised to the public and competitive.¹⁵⁹ Moreover, the law required the treasury, war, and naval departments to report contracting to Congress annually.¹⁶⁰ In 1829, Attorney General John Berrien issued an opinion advising the government that "Congress intended, by the act of 1809, to throw additional guards around this subject; to prevent favoritism, and to give to the United States the benefit of competition between those who were disposed to render the services or furnish the supplies which the [g]overnment might require."¹⁶¹ Thus, the secretive leases to Doheny's Pan-American Petroleum and Sinclair's Mammoth Oil violated these laws, though no person was specifically charged for such violation.

In another sense, the scandal was noticed because neither the issue of naval petroleum nor the Veterans' Bureau were the Harding administration's first scandal. In September 1921, a national from Germany claimed the government had illegally seized assets of the American Metals Corporation.¹⁶² During World War I, the properties of German or other enemy companies based in the United States, were held by a presidential appointee titled the Alien Property Custodian.¹⁶³ After the property

159. Act of March 3, 1809, 10th Cong. ch. 28 § 5 (1809). The act reads:

That all purchases and contracts for supplies or services which are or may, according to law, be made by, or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase, or by previously advertising for proposals respecting the same

Id.

160. *Id.*

161. See 2 Op. Att'y Gen. 257 (1829) (opining to the Secretary of the Navy, based on Attorney General Berrien's study of public newspapers and congressional documents).

162. See Frank M. Tuerkheimer, *The Executive Investigates Itself*, 65 CALIF. L. REV. 597, 603 (1977) (providing an account of former Attorney General Daugherty being accused of fraud); see also JAMES N. GIGLIO, H.M. DAUGHERTY AND THE POLITICS OF EXPEDIENCY 183 (1978) ("The American Metal Company decision was first questioned in June 1922, when Charles Calvert . . . complained to Harding that Daugherty and Miller had allowed claims for reasons other than a fair consideration of the facts?").

163. GIGLIO, *supra* note 162, at 181.

custodian released seven million dollars of the company's assets to the claimant, Harding asked Daugherty to look into the release and Daugherty, in turn, claimed the release was merited.¹⁶⁴ Following Daugherty's resignation on March 28, 1924, an investigation ordered by his successor, Harlan Fiske Stone, uncovered that the claimant had paid \$391,000 worth of Liberty Bonds to a prominent Republican, and the bonds had been placed in a bank managed by Harry's brother, Mally Daugherty.¹⁶⁵ Liberty Bond payments to Mally Daugherty's bank would also become an issue in the Teapot Dome Scandal.

On November 14, 1921, Sinclair, along with Robert Stewart of Standard Oil and two other associates, travelled to Canada and formed the Continental Trading Company.¹⁶⁶ This company would later become a vehicle to transfer Liberty Bonds—bonds issued by the United States government during World War I—from Sinclair to Fall's son-in-law, M.T. Everhart, and then on to Fall.¹⁶⁷ Although Fall was not part of the Continental Trading Company's formation, it became clear that by moving financial instruments through Canada, Sinclair hoped to shield his transactions with Fall from the United States government.¹⁶⁸ By 1924, newspapers such as the *Atlanta Journal & Constitution* reported that Fall had received Liberty Bonds from both Doheny and Sinclair.¹⁶⁹

On February 25, 1920, Congress passed the Mineral Leasing Act.¹⁷⁰ It permitted the federal government to lease its land to persons to drill for oil or mine for other minerals. On June 4, 1920, Congress passed a bill into law authorizing the Secretary of the Navy to conserve, develop, and use the

164. *Id.* at 182–83.

165. *Id.* at 183.

166. SALT CREEK OIL FIELD, WYOMING: HEARINGS ON S. RES. 202 BEFORE THE S. COMM. ON PUB. LANDS AND SURVS., 70th Cong. 341 (1928) [hereinafter SALT CREEK OIL FIELD].

167. *Id.* at 342.

168. See Fred Thompson, *Why America's Military Base Structure Cannot Be Reduced*, 48 PUB. ADMIN. REV. 557, 561 (1988) (alluding to the parties' intent to hide transactions from the government in saying, "it is possible that the Teapot Dome Scandal was ultimately caused by too much red tape, not too little"); see also Stratton, *supra* note 44, at 387 (characterizing Fall's transactions as being conducted "surreptitiously"); see also Robert T. McCracken, *Owen J. Roberts—Master Advocate*, 104 U. PENN. L. REV. 322, 328 (1955) (listing obstacles to tracing the bonds such as claims of privilege, claims of ignorance, and party refusal to testify).

169. *Federal Counsel Bares New Deals Involving Fall*, ATLANTA J. & CONST., Oct. 2, 1924, at 1.

170. Mineral Leasing Act of 1920, Pub. L. No. 66–146, 41 Stat. 437 (1920) (current version available at 30 U.S.C. § 181).

oil on the three naval reserves.¹⁷¹ The law also enabled the Secretary to exchange and sell the oil for the benefit of the United States.¹⁷² Although the Act of June 4, 1920, maintained control of naval oil in the Department of the Navy, Fall would later claim the Mineral Leasing Act permitted the Interior Secretary to gain control. Harding apparently, but silently, agreed with Fall, and as previously noted, on May 31, 1921, he issued Executive Order No. 3474 without notifying Congress.¹⁷³

On November 30, 1921, Doheny, a long-time friend of Fall's, gave a \$100,000 loan to Fall in proximity to the timing of Pan-American's acquisition of a lease to drill the Navy's oil from the two California reserves in exchange for the construction of fuel storage tanks at Pearl Harbor, and rights to an oil royalty.¹⁷⁴ During World War I, Doheny's son, Edward Doheny Jr., served under the command of Captain John Keeler Robison, a naval officer who became central to the scandal.¹⁷⁵ Doheny would later testify that Robison had encouraged him to consider the oil-leasing and construction scheme as a secret matter of national security because the Pacific Ocean would likely be a future theatre of war with Japan.¹⁷⁶ Sinclair likewise insisted that Robison had informed him that the lease had to be secret, as a matter of national security.¹⁷⁷ If true—though Robison would deny it—this advice was plausible. Since 1907, the United States considered

171. Act of June 4, 1920, ch. 228, 41 Stat. 813 (1920) (codified as amended at 10 U.S.C. § 8724. The exact language of the statute reads:

[T]o conserve, develop, use and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the United States.

Id.

172. *Id.*

173. Exec. Order No. 3474 (May 31, 1921).

174. STRATTON, *supra* note 18, at 24; On Fall's and Doheny's relationship, see LATON MCCARTNEY, THE TEAPOT DOME SCANDAL: HOW BIG OIL BOUGHT THE HARDING WHITE HOUSE AND TRIED TO STEAL THE COUNTRY 78–80 (2009). Doheny also contributed \$25,000 to Harding's election campaign. *Id.* at 42.

175. MARGARET LESLIE DAVIS, DARK SIDE OF FORTUNE: TRIUMPH AND SCANDAL IN THE LIFE OF OIL TYCOON EDWARD L. DOHENY 114 (2001); MCCARTNEY, *supra* note 174, at 94–96.

176. See DAVIS, *supra* note 175, at 143–44; see also *Doheny Declares Robison Said Japan Had Mobilized; Defends His Loan to Fall*, N.Y. TIMES, Dec. 10, 1926, at 1 (describing the interaction between Robison and Doheny, from Doheny's perspective).

177. See DAVIS, *supra* note 175, at 143–44.

Japan a potential enemy. By 1921, its naval war plans included a focus on Japan.¹⁷⁸

In regard to the Wyoming Teapot Dome oil component of the scandal, Fall accepted \$198,000 in Liberty Bonds from Sinclair's corporate officers, as well as a line of credit to finance one of his New Mexico ranches and other projects.¹⁷⁹ The timing of this transaction, which occurred on May 10, 1922, was suspect because Sinclair received the no-bid secretive lease to drill oil fifteen days earlier.¹⁸⁰ Fall's son-in-law also became a part of transactions with Sinclair over the Teapot Dome oil lease after Fall tendered \$35,000 of the Liberty Bonds to him.¹⁸¹ Moreover, on November 12, 1922, Sinclair gave Fall's son-in-law \$10,000 in cash while the two men were at one of Fall's New Mexico ranches.¹⁸² On December 11 of the same year, Fall secretly leased Elk Hills to Doheny.¹⁸³

On May 10, 1922, *National Petroleum News* printed an article titled, "National Producers' Association Protests Teapot Dome Contract."¹⁸⁴ The National Association of Independent Oil Producers was not concerned with national security, but rather with the fact that the government had granted leases to Doheny and Fall without a competitive bidding process.¹⁸⁵ There was a greater concern that because of abundant supplies of commercial oil, and the fact that the oil industry had recently emerged from an economic slump, the drilling of oil in the naval reserves for further commercial uses would result in another downturn.¹⁸⁶ Moreover, the article reported there is "no emergency or necessity which would warrant the opening of the naval [oil] reserves at this time for exploitation in order that the [N]avy might be supplied with the various grades of oil required by

178. See generally EDWARD S. MILLER, *WAR PLAN ORANGE: THE U.S. STRATEGY TO DEFEAT JAPAN, 1897–1945* (2013) ("U.S. industrial might would be harnessed to a vigorous counteroffensive to recover lost territories, control the western Pacific, destroy Japan's military capacity and economic life, and compel it to complete submission."); see also Morton, *supra* note 149, at 222 ("[I]t was not until Japan's attack on Russia in February 1904 threatened to destroy the balance of power in that part of the world that the Board began seriously to develop war plans.").

179. STRATTON, *supra* note 18, at 269. Stratton also points out that Fall arranged loans and credit lines through Sinclair to his son-in-law. *Id.*

180. SALT CREEK OIL FIELD, *supra* note 165.

181. *Id.*

182. *Id.*

183. *Id.*

184. *National Producers' Association Protests Teapot Dome Contract*, NAT'L PETROLEUM NEWS, May 10, 1922, at 29.

185. *Id.*

186. *Id.*

it”¹⁸⁷ Thus, the association argued in the inverse: no national security reason could justify the secretive bidding process. Two days later, *National Petroleum News* cast doubt on Fall’s claims that oil drainage necessitated increased drilling.¹⁸⁸ But still, the editors doubted whether a congressional investigation into Fall, Sinclair, and Doheny would “result in anything more than political thunder.”¹⁸⁹

As congressional and public interest in the oil leasing grew in scope, Fall decided, on March 4, 1923, to resign from the cabinet.¹⁹⁰ At Doheny’s behest, he ventured to the Soviet Union to ascertain whether it would be possible to drill for oil.¹⁹¹ As he left office, he penned an editorial in the *New York Times* in which he underscored that he enjoyed his years of public service but lamented, “There never was a time when the critic on the outside looking in found more to criticise than he can find in these days.”¹⁹² On May 26, the Continental Trading Company folded and its officers destroyed much of the corporation’s records.¹⁹³ On October 22, the Senate investigation into the oil leases began.¹⁹⁴

The Senate’s action led to President Coolidge appointing Atlee Pomerene, a former Ohio senator, and Owen Roberts, a future U.S. Supreme Court justice, to head the investigation.¹⁹⁵ As a result of the Senate passing Joint Resolution 54, on January 31, 1924, one of the initial duties of Roberts and Pomerene was to void the government’s leases to Pan-American and Mammoth.¹⁹⁶ The two men represented the government in the civil cases involving the two companies.¹⁹⁷ They also obtained grand

187. *Id.*

188. Lawrence E. Smith, *Teapot Dome Development to Be No Factor in Market This Year*, NAT’L PETROLEUM NEWS, May 12, 1922, at 60.

189. *Id.*

190. STRATTON, *supra* note 18, at 260.

191. *See id.* at 270–71; *see also* Fall *Visiting Russia with Oil Operators*, WASH. POST, July 4, 1923, at 13 (reporting on Fall accompanying Sinclair to inspect Russian oil drilling opportunities); *Thinks Soviet’s Rule Will Last: Ex-Senator Fall Declares for Trade Agreement*, L.A. TIMES, July 30, 1923, at 4.

192. Albert Bacon Fall, Editorial, *Secretary Fall’s Soliloquy on Quitting Harding’s Cabinet*, N.Y. TIMES, Mar. 4, 1923, at 1.

193. SALT CREEK OIL FIELD, *supra* note 166, at 342.

194. *Id.*

195. *Senate, Confirming Pomerene, Votes on Roberts Tomorrow*, WASH. POST, Feb. 17, 1924, at 1 [hereinafter *Senate, Confirming Pomerene*]; Bates, *supra* note 22, at 312.

196. *Court Action on Oil Leases Will Be Initiated This Week*, WASH. POST, Mar. 3, 1924, at 1 [hereinafter *Action on Oil Leases*].

197. *Senate, Confirming Pomerene, supra* note 194; *Action on Oil Leases, supra* note 196.

jury indictments against Fall, Doheny, and Sinclair.¹⁹⁸ But they did not argue the challenge to Mally Daugherty's refusal to testify before the Court.

As the accusations against Fall, Denby, Doheny, and Sinclair took form, Robison came to Fall's defense. Robison had served as Chief of the Navy's Bureau of Engineering, and in addition to this role, he was placed in charge of determining the future of the naval oil reserves.¹⁹⁹ In December 1923, Robison began making public statements that the construction of oil tanks in Hawaii—paid for through the sale of royalty oils—was beneficial to the national defense.²⁰⁰ But it became problematic when he claimed that the Navy's senior officers were supportive of the leases.²⁰¹ The *Atlanta Constitution*, along with other major newspapers, headlined, "Admiral Robison Declines to Bare Military Secret," highlighting that he and Denby had diverged in their testimony before the Senate committee as to whether the Navy's senior officers were aware of the planned transfer to the Interior Department or if Denby had acted alone.²⁰² Other major newspapers followed suit.²⁰³

There were several other problems with Robison's involvement. In placing Robison in charge of the leases, Denby unexpectedly replaced three other officers.²⁰⁴ This would at least give the impression that Denby believed that some of the Navy's officers disagreed with giving up control of the oil reserves to private corporations.²⁰⁵ It was also during the time of Robison's testimony that it first came to light that Fall's financial fortunes were reported as having markedly improved. On December 1, 1923, the *Atlanta Constitution* reported, "Falls Finances Showed Big Spurt."²⁰⁶

198. SALT CREEK OIL FIELD, *supra* note 166, at 342 ("June 30, 1924: Grand jury indicts Fall, Sinclair, E.L. Doheny, and E.L. Doheny, jr. on charges of bribery and conspiracy to defraud Government.").

199. *Pass Capt. Robison in Navy Promotions*, N.Y. TIMES, June 18, 1925, at 5.

200. *Backs Navy Oil Deals: Explains Teapot Dome Lease; Robison Says Contracts for Storage Essential for the Nation's Defense*, L.A. TIMES, Dec. 2, 1923, at 1.

201. *Id.*

202. *Admiral Robison Declines to Bare Military Secret*, ATLANTA CONST., Dec. 2, 1923, at 9.; *Senate Airls Oil Lease: Dome Field Deal Discussed*, L.A. TIMES, Dec. 1, 1923, at 1.

203. *Teapot Dome Lease Detailed in Secret by Admiral Robison: Admiral Insists Hearing in Public Would Menace Military Plans*, WASH. POST, Dec. 2, 1923, at 2; *Denby's Statement on Teapot Dome is Denied by Admiral: Robison Says Navy Council Approved Transfer to Interior Department*, WASH. POST, Dec. 1, 1923, at 3.

204. *Daniels' Policy Cost U.S. Big Oil Loss, Says Doheny*, WASH. POST, Dec. 4, 1924, at 3.

205. *See id.* (stating Robison denied that the officers' removal was related to their "attitude toward the proposed leases").

206. *Finances of Fall Showed Big Spurt*, ATLANTA CONST., Dec. 1, 1923, at 16.

The *New York Times*, likewise, reported that according to the editor of the *New Mexico State Tribune*, as well as state officials, Fall had declared his financial situation to be dire in 1920, but by 1923, his ranch had been built up and he had the appearance of having obtained significant wealth.²⁰⁷

Robison's claim of the need for secrecy might have also struck the investigators, as well as senior naval officers, as odd. On April 27, 1924, a naval oil expert publicly testified that the Navy's ability to confront either Great Britain or Japan was questionable, partly because of a lack of available oil and partly because of the lack of defensible naval bases, including in Hawaii.²⁰⁸ Thus, the very matter Robison wanted to keep secret was already stated to the public by a former senior naval officer. Moreover, in 1925, Robison contradicted a substantial part of his statements from two years earlier on the need for secrecy of the leasing. In March 1925, he conceded in a sworn deposition, taken for the pending civil trial involving Sinclair's Mammoth Oil lease at Teapot Dome, that the leasing "was deliberately concealed from Congress" because they "wanted to get it done."²⁰⁹ He admitted he failed to fully inform Congressman Patrick H. Kelley (R-MI) of the nature of the lease when Kelley specifically asked him for information.²¹⁰ But the most shocking admission in his deposition was that, while he emphasized the Navy's need for oil in case of a war with Japan, he conceded no military secrecy reason existed for concealing the leases with Sinclair.²¹¹

A further note on Robison is important to highlight the national security aspect of the scandal. In October 1925, Coolidge removed Robison from his Engineer-in-Chief position and replaced him with an officer who had opposed both the transference of the reserves to the Interior Department and the leasing.²¹² Robison was not a political hack, but in retrospect, he appears malleable. He graduated from the United States Naval Academy in 1891 and held a succession of commands, including one of significance in

207. *Witness Says Fall was 'Broke' in 1920: New Mexico Editor Asserts Former Secretary's Ranch Was Improved Later*, N.Y. TIMES, Dec. 1, 1923, at 15.

208. *Navy is Outranked: Expert Critic Says, in Ships, Guns, Fuel*, N.Y. TIMES, Apr. 27, 1924, at 1.

209. *Say Teapot Lease Guarded Naval Oil; Congress Not Told: Deposition Made by Robison Admits Facts of Deed Were Concealed*, WASH. POST, Mar. 20, 1925, at 3.

210. *Id.*

211. *Id.*; *Admiral Robison Defends Oil Lease to Harry Sinclair*, WASH. POST, Mar. 19, 1925, at 3; *see also Robison to Retire: Asks Admiral's Rank*, N.Y. TIMES, June 21, 1925, at 1 (summarizing Robison's military achievements).

212. *Halligan Heads Naval Engineers: Coolidge Promotes Opponent of Naval Leasing Policy to Succeed Robison*, N.Y. TIMES, Oct. 27, 1925, at 1.

World War I.²¹³ Shortly after Denby became Secretary of the Navy, Robison was one of two naval officers to travel with him on a tour of naval bases when Denby was considering concentrating the Navy's strength in the Pacific instead of the Atlantic.²¹⁴ Denby promoted him to the Bureau of Engineering and to the position of Engineer-in-Chief in October 1921.²¹⁵ In June 1925, Robison sought Coolidge's permission to retire from active duty, but he retired as a Captain instead of as a Rear Admiral because the Engineer-in-Chief position elevated him to the rank of acting Admiral, and the President had not approved of his permanent promotion.²¹⁶ The *New York Times* placed Robison's pending retirement on its front page.²¹⁷

On March 31, 1924, a grand jury issued an indictment against Sinclair, charging him with contempt of Congress.²¹⁸ On June 30, 1924, a Washington D.C. grand jury issued indictments against Doheny, his son Edward Doheny Jr., Sinclair, and Fall for "bribery and conspiracy to defraud" the United States.²¹⁹ That same day, another Washington D.C. grand jury issued an indictment against Fall and Sinclair for conspiracy to defraud the United States, and finally, a grand jury issued an indictment against Fall for accepting a bribe from Doheny.²²⁰ Notably, although Fall was convicted in a federal criminal trial, a federal jury acquitted Sinclair of bribery on April 21, 1928.²²¹ However, Sinclair was convicted of contempt of Congress and sentenced to three months in jail and fined \$500.²²² Doheny was twice acquitted of wrongdoing.²²³

Given the open fraud by Fall, Doheny, and Sinclair, the Senate was left to wonder why the Justice Department had not investigated the men. On March 1, 1924, the Senate voted to form a committee of five senators to

213. THE U.S. NAVAL ACAD. GRADUATES' ASS'N: REGISTER OF GRADUATES June 30, 1916, at 108 (1916).

214. *Navy Secretary is Non-Committal: Mr. Denby Refuses to Say Whether U.S. Fleet Will Concentrate in Pacific and Bases Be Strengthened*, CHRISTIAN SCI. MONITOR, Mar. 15, 1921, at 1.

215. *Robison Heads Bureau: Navy Captain Becomes Rear Admiral and Chief Engineer*, WASH. POST, Oct. 2, 1921, at 28.

216. *Robison to Retire; Asks Admiral's Rank*, N.Y. TIMES, June 21, 1925, at 1.

217. *Id.*

218. SALT CREEK OIL FIELD, *supra* note 166, at 342.

219. *Id.*

220. *Id.*; *Four Indicted in Oil Leasing*, L.A. TIMES, July 1, 1924, at 4.

221. *Sinclair Acquitted of Oil Lease Fraud; Jury Out 2 Hours*, N.Y. TIMES, Apr. 22, 1928, at 1.

222. *Sinclair v. United States*, 279 U.S. 263, 284 (1929), *overruled by* *United States v. Gaudin*, 515 U.S. 506 (1995).

223. SALT CREEK OIL FIELD, *supra* note 166, at 342; *Edward L. Doheny*, WAHA, <https://www.westadamsheritage.org/read/472> [<https://perma.cc/V4GZ-Z5P3>].

investigate Mally Daugherty.²²⁴ “On February 19, 1924, [Senator Burton K. Wheeler (D-MT)] introduced a resolution” to investigate Daugherty.²²⁵ The bipartisan committee consisted of Wheeler, Smith Brookhart (R-IA), Wesley Livsely Jones (R-WA), Henry Ashurst (D-AZ), and George Moses (R-NH).²²⁶ On March 24, 1924, the investigation issued a subpoena ordering Daugherty to bring the Midland Bank’s records to the investigation, but he refused to do so.²²⁷ On April 11, Brookhart and Wheeler journeyed to Ohio and served the subpoena on Daugherty.²²⁸ In response to Daugherty’s continuing refusal, the Senate’s Sergeant at Arms arrested him.²²⁹ Daugherty then filed a suit to enjoin the Senate from further actions against him.²³⁰ Taft’s response to this investigation into his friend, Daugherty, would prove, as noted in Section III, vitriolic.

III. IN THE LOWER COURTS

Three district court decisions were issued between 1924 and 1925. Mally Daugherty challenged the Senate’s authority to compel him to testify or produce bank documents related to transactions involving his brother, former Attorney General Harry Daugherty, Fall, Doheny, Sinclair, or other persons involved in the corruption.²³¹ The U.S. District Court for the Southern District of Ohio issued a ruling favorable to Daugherty which, had it remained in effect, permitted the executive branch to shield criminal

224. DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS* 215 (2001). Taft appears not to have been too concerned with the Senate vote. On March 5, 1924, he wrote Daugherty to inform him that he intended to designate Judge Robert Gibson for temporary service in New York. But he made no comment on the Senate vote. *See* Letter from WHT, C.J. of the U.S. Sup. Ct., to Harry M. Daugherty, U.S. Attorney Gen. [hereinafter Daugherty] (Mar. 5, 1924) (on file with the Library of Congress). Ten days later, Daugherty wrote to Taft that he received notice of another temporary designation of a judge to New York. *See* Letter from Daugherty to WHT, C.J. of the U.S. Sup. Ct. (Mar. 15, 1924) (on file with the Library of Congress).

225. James M. Giglio, *Attorney General Harry M. Daugherty and the United Gas Improvement Company Case, 1914–1924*, 46 PA. HIST. 347, 365 (1979).

226. *Id.*

227. *Ex parte* Daugherty, 299 F. 620, 622 (S.D. Ohio 1924), *rev’d sub nom.* McGrain v. Daugherty, 273 U.S. 135 (1927).

228. *Id.*

229. *Id.* at 623.

230. *Id.* at 621.

231. *Id.* at 622 (ruling Congress did not hold judicial power necessary to compel testimony from Mally Daugherty).

conduct from the legislative branch simply by having governmental officers resign from their positions.²³²

Regarding oil leases, there were two pathways to the Court. The U.S. District Court for the Southern District of California determined the law did not permit the leasing to occur, and the leasing between Doheny's Pan-American Petroleum Company was procured by fraud.²³³ The U.S. Court of Appeals for the Ninth Circuit upheld the district court in all but a minor part of the decision, barring Doheny from collecting monies from the government for work already done.²³⁴ The U.S. District Court for the District of Wyoming, in contrast, determined the law permitted the lease between the government and Sinclair's Mammoth Oil, and no fraud had occurred.²³⁵ The U.S. Court of Appeals for the Eighth Circuit reversed the district court on the matter of fraud but agreed with the legal construct permitting the leases to occur.²³⁶ Thus, not only would a split in the circuits involving Fall and the leases ultimately come to the Court, Harding's executive order would be front and center alongside a question of executive branch authority. Thus, the three decisions stemmed from Taft's ties to Daugherty, the Justice Department's failure to investigate a clear fraud, and the Department's incuriosity of the Harding Administration.

A. *Mally Daugherty in the Court of Judge Andrew McConnell January Cochran*

With the events discussed surrounding Mally Doheny's involvement with the controversy and his continuous defiance of the Senate discussed *infra*.²³⁷ On May 1, 1924, Senator Brookhart introduced a resolution seeking President Coolidge's permission to appoint Attorney General Harlan Stone to represent the Senate.²³⁸ The apparent intent was to enforce the Senate's

232. *Id.*; *McGrain v. Daugherty*, 273 U.S. 135, 180 (1927) (holding the Senate legitimately sought Daugherty's testimony based on its constitutional powers).

233. *United States v. Pan-American Petroleum Co.*, 6 F.2d 43, 65 (S.D. Cal. 1925) (defining a "natural and irresistible inference of fraud" in the public contracts), *aff'd in part and rev'd in part*, 9 F.2d 761 (9th Cir. 1926), *aff'd*, 273 U.S. 456 (1927).

234. *See Pan-American Petroleum Co. v. United States*, 9 F.2d 761, 773 (9th Cir. 1926) (holding the United States ineligible for equity relief), *aff'd sub nom. Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927).

235. *See United States v. Mammoth Oil Co.*, 5 F.2d 330, 350 (D. Wyo. 1925), *rev'd*, 14 F.2d 705 (8th Cir. 1926) (characterizing the transaction as suspicious but not illegal).

236. *See Mammoth Oil Co.*, 14 F.2d at 730 (acknowledging the evasiveness of witnesses as indicative of their guilt).

237. *See supra* notes 216-226 and accompanying text.

238. *See Asks Coolidge to Act on Mal Daugherty*, N.Y. TIMES, May 2, 1924, at 1 (reporting Chairman Brookhart's resolution to appoint Attorney General Stone to represent the Senate).

authority in the United States District Court after Mally Daugherty refused to submit to the committee investigating former Attorney General Harry Daugherty. The news surrounding both the former attorney general and his brother turned negative when the district court took up arguments on the Senate's authority. Jess Smith's former wife testified that at "a little green house in K Street" in Washington D.C.—a residence where the "Ohio Gang"²³⁹ met—the former Attorney General had sold government jobs and implied that the money went into Mally Daugherty's bank.²⁴⁰ She also accused Daugherty of taking payoffs from bootleggers, and claimed she was threatened by Daugherty's associates.²⁴¹

The Senate's power over Daugherty was not quite a case of first impression to Judge Cochran. In his view, Daugherty appeared to fall into a separate category from prior Supreme Court precedent. Four prior opinions became central to assessing the power of the Senate to compel Mally Daugherty to testify and provide evidence. In 1818, Speaker of the House Henry Clay ordered the House Sergeant at Arms Thomas Dunn to arrest "Colonel" John Anderson for attempting to bribe a member of the House.²⁴² Dunn did, in fact, arrest Anderson and held him in confinement for two months, and Anderson sought tort damages from Dunn in turn.²⁴³ Despite the lack of unanimity in the House as to whether it had the authority to adjudge contempt, the House ultimately voted that it did.²⁴⁴ In a very short opinion authored by Justice William Johnson, the Court determined in *Anderson v. Dunn*²⁴⁵ that although the Constitution was silent on the legislative branch's power of contempt, an implied power existed because

239. The term refers to members involved in the Teapot Scandal, including former President Harding, Daugherty, Fall, and Smith. *Ohio Gang*, BRITANNICA, <https://www.britannica.com/topic/Ohio-Gang> [<https://perma.cc/P6M7-AR4V>]. See generally CHARLES L. MEE, JR., *THE OHIO GANG: THE WORLD OF WARREN G. HARDING* (1981), for an in-depth telling of the relationship of the Ohio Gang members.

240. *See Daugherty's Friend Quoted*, N.Y. TIMES, Mar. 14, 1924, at 1 (detailing testimony of Miss Roxy Stinson implicating Daugherty in accepting deposits from backroom deals).

241. *Sees Move to Silence Her*, N.Y. TIMES, Mar. 23, 1924, at 22.

242. *Anderson v. Dunn*, 19 U.S. 204, 210–15 (1821); *see also* PHILLIP I. BLUMBERG, *REPRESSIVE JURISPRUDENCE IN THE EARLY AMERICAN REPUBLIC: THE FIRST AMENDMENT AND THE LEGACY OF ENGLISH LAW* 296 (2010); ALVIN LARROY DUCKETT, *JOHN FORSYTH: POLITICAL TACTICIAN* 26 (2010).

243. *Dunn*, 19 U.S. at 205.

244. BLUMBERG, *supra* note 242, at 296–97.

245. *Anderson v. Dunn*, 19 U.S. 204 (1821).

without it, Congress's other authorities would be thwarted.²⁴⁶

In 1880, the Court unanimously determined in *Kilbourn v. Thompson*²⁴⁷ that the House lacked the power to compel a private citizen to testify or provide evidence when there is no valid legislation being sought in relation to the testimony.²⁴⁸ Like *Dunn*, the House Sergeant at Arms arrested Kilbourn, and he was detained for over a month until securing his release through a habeas writ.²⁴⁹ Authored by Justice Samuel Miller, *Kilbourn* arose as a challenge to an arrest of a citizen similar to what occurred in *Dunn*, albeit one in which Hallet Kilbourn had not attempted to interfere in the House's legislative business. Kilbourn was a corporate officer of the failed Jay Cooke & Company Bank, and Congress wanted him to provide evidence as to where other former bank officials resided to determine the remaining real-estate assets of the bank.²⁵⁰

The House's investigation into Jay Cooke & Company involved the United States Navy, specifically, the Secretary of the Navy.²⁵¹ But the reason the House called Kilbourn did not appear to be directly related to corruption. Perhaps, Kilbourn conceded if the House had clearly articulated that his testimony or papers would uncover corruption, he would have no choice but to comply with a subpoena.²⁵² But then he concluded, "On the other hand, I cannot acknowledge the naked arbitrary right of the House to investigate private business, in which nobody but me and my customers have any concern."²⁵³ Justice Miller's *Kilbourn* opinion was also premised on the fact that, because a judicial remedy existed in the courts to recover debts owed to it by Jay Cooke & Co., the House exceeded its authority by

246. *Id.* at 233 ("This argument proves too much; for its direct application would lead to the annihilation of almost every power of Congress.").

247. *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

248. *See id.* at 190 (holding that neither the House nor the Senate has the power to compel testimony from a person unless Congress has jurisdiction over the matter).

249. *Id.* at 4; *see also The Kilbourn Case*, N.Y. TIMES, Apr. 20, 1876, at 1 (reporting details from Kilbourn's indictment).

250. *See Kilbourn*, 103 U.S. at 2–3 (describing purpose of committee to investigate Jay Cooke & Co.).

251. *See id.* at 193 (discussing the House's conduct when investigating misconduct in the Navy and analyzing the powers of Congress to compel testimony).

252. 44 CONG. REC. 1715 (1876) (citing Letter from Hallet Kilbourn, Corporate Officer, Jay Cooke & Company Bank, to House of Representatives, Mar. 13, 1876).

253. *Id.* (quoting same).

acting as a court instead of suing in the courts.²⁵⁴

Seven years after issuing *Kilbourn*, the Court decided *In re Chapman*,²⁵⁵ an opinion that arose out of a challenge to the Senate's authority to compel a private citizen to provide evidence to a legislative investigation.²⁵⁶ In 1894, Elverton R. Chapman was arrested, prosecuted for contempt, and sentenced to thirty days in jail after being found guilty in the Supreme Court for the District of Columbia.²⁵⁷ The Senate formed a committee to discern whether several senators took bribes from the sugar trust or speculated in sugar company stocks.²⁵⁸ Chapman's arrest was controversial because he claimed to have proof against one or more of the senators accused in the bribery scheme but he was frightened from testifying against them.²⁵⁹ He also asserted as a defense in his 1896 trial that *Kilbourn* protected him from being held in contempt.²⁶⁰ Chapman's appeal to the Court was centered on whether the District of Columbia's Supreme Court had jurisdiction to try him, and if so, whether he was shielded from prosecution because he was a private citizen like *Kilbourn*.²⁶¹ The Court, determined that because the Senate possessed the authority to investigate the conduct of its own members, it also possessed the authority to compel testimony related to that investigation.²⁶² H. Snowden Marshall's appeal to the Court presented a unique issue in contrast to the three prior opinions. In *Dunn*, the private citizen had attempted to bribe a member; and in *Chapman*, the private citizen

254. See *Kilbourn*, 103 U.S. at 196 (explaining the limits of congressional power over private citizens and holding that the House of Representatives exceeded its power by authorizing its investigation of a private citizen).

255. *In re Chapman*, 166 U.S. 661 (1897).

256. *Id.* at 664.

257. *Id.*; see *Found Guilty of Contempt: Verdict of the Jury in the Witness Chapman Case*, WASH. POST, Jan. 19, 1896, at 4.

258. *Chapman to Appear: No Petition for Pardon Has or Will be Filed*, WASH. POST, May 13, 1897, at 1.

259. See *id.* (describing Chapman's unwillingness to testify). Senator William Allen (P-NE) stated:

I look upon Mr. Chapman more as a victim than as a criminal. I saw him once in my life and that was when he was before our committee for examination. He was very quiet, orderly, [and] gentlemanly man. He treated the committee with utmost respect, except that he declined absolutely and unconditionally to answer the questions put to him.

Id.

260. *Witnesses Fail to Appear; Prosecution in Broker Chapman's Case Compelled to Close*, N.Y. TIMES, Jan. 15, 1896, at 9.

261. *Chapman*, 166 U.S. at 664.

262. *Id.* at 680.

had information on Senate corruption. As a result, the two citizens in both appeals were determined to be subject to Congress's subpoena authority. But in *Kilbourn*, the private citizen was ordered to testify for a non-legislative reason, and the Court prohibited Congress from using its power to compel citizens to appear when there was an absence of a "legislative purpose." *Gordon* was also the first time several of the Justices—Holmes, Van Devanter, McReynolds, and Brandeis—took part in *McGrain*.

Gordon originated in an appeal by the House Sergeant at Arms Robert Gordon against the arrest of H. Snowden Marshall, the United States Attorney for the Southern District of New York.²⁶³ In late 1915, Marshall convened a grand jury to investigate German influence in the United States prior to Congress's declaration of war on Germany.²⁶⁴ The grand jury indicted Congressman Frank Buchanan (D-IL) after finding probable cause of a link between the congressman and a German agent named Franz Von Rintelen.²⁶⁵ Buchanan responded by introducing articles of impeachment against Marshall, which were referred to a House committee for investigation.²⁶⁶ Marshall, in turn, accused the House of interfering in the grand jury and published the accusation in a newspaper.²⁶⁷ This led to the Speaker of the House ordering Marshall's arrest.²⁶⁸ The Court's opinion, authored by Chief Justice Edward Douglass White, determined that

263. See *Says Strikes Were Bought: Peace Council Used by Von Rintelen, District Attorney Declares*, N.Y. TIMES, Dec. 5, 1915, at 1 [hereinafter *Says Strikes Were Bought*] (discussing the grand jury investigation of H. Snowden Marshall); see also *Funds from Congressmen: Kramer tells How He Understood Peace Council was Supported*, N.Y. TIMES, Dec. 7, 1915, at 2 [herein after *Funds from Congressmen*] (noting Ex-Congressman H. Robert Fowler's response that claimed Marshall was making a false statement).

264. See *Says Strikes Were Bought*, *supra* note 263 (announcing Marshall's investigation into Von Rintelen and his associates); see also *Funds from Congressmen*, *supra* note 263 (reporting Kramer's assertion that Buchanan and Fowler supplied funds for Labor's National Peace Council).

265. See *Marshall v. Gordon*, 243 U.S. 521, 531 (1917) (indicting Buchanan for a violation of the Sherman Anti-Trust Act as a member of the National Labor Council, an organization allegedly used as a conduit for German monies intended for espionage activities in the United States); see also JENNIFER LUFF, COMMONSENSE ANTICOMMUNISM: LABOR AND CIVIL LIBERTIES BETWEEN THE WORLD WARS 37 (2012) (detailing the origins of Buchanan's indictment).

266. See *Marshall Stood up Against Buchanan*, N.Y. TIMES, Apr. 18, 1916, at 10 (reporting Marshall's remarks accusing Buchanan of practicing "defen[s]e by impeachment").

267. See, e.g., *Marshall Refuses Buchanan Evidence*, N.Y. TIMES, Mar. 3, 1914, at 4 (reporting Marshall's accusation that Congress is attempting to obstruct his investigation of Congressman Buchanan's German associations) (detailing the conflict between Marshall and the Congressional Committee investigating him); see also *No Apology to House: U.S. Attorney Marshall Stands Pat on is Buchanan Letter*, WASH. POST, Apr. 11, 1916, at 2 [hereinafter *No Apology to House*] (detailing Marshall's "criticisms of the judiciary subcommittee which investigated Representative Buchanan's impeachment charges against him").

268. *No Apology to House*, *supra* note 267.

although Marshall's letter was insulting to the House, the letter did not interfere with the House's ability to conduct its legislative duties, and therefore the power of contempt did not exist.²⁶⁹ Thus, a private citizen may, while not physically within Congress, denigrate the institution or individual representatives and be free from the Legislative Branch's contempt power.²⁷⁰

On May 31, 1924, Judge Cochran, sitting by special designation in the Southern District of Ohio, issued a decision unfavorable to the Senate.²⁷¹ Appointed to the newly created United States District Court for the Eastern District of Kentucky by President William McKinley in 1901, Cochran was a Harvard Law School graduate and had served as a state trial judge.²⁷² Taft and Cochran corresponded for more than two decades before Daugherty's cause of action against the Senate came to the district court, and it was Taft who brought Cochran to President William McKinley's attention as a judicial nominee. On January 11, Cochran wrote to Taft asking for his support for a nomination to the district court, noting that Kentucky's Republicans almost universally supported him.²⁷³ On February 16, 1901, Taft, then serving as the Governor General of the Philippines, wrote to McKinley: "A new judicial district is about to be created or has been created in Kentucky, and I take the liberty of writing you to remind you of the fine qualifications for that position possessed by A.M.J. Cochran, of Maysville, Kentucky."²⁷⁴ McKinley's nomination of Cochran was met with resistance

269. See *Gordon*, 243 U.S. at 542 (limiting Congress's power to punish for contempt to those cases when its ability to carry out legislative duties is compromised).

270. See *id.* at 546 (stating that negative criticism alone does not adequately prevent Congress from discharging its duties to warrant contempt proceedings).

271. See *Ex parte Daugherty*, 299 F. 620, 632 (S.D. Ohio 1924) (holding that *Kilbourn* and *Gordon* are not controlling on either the Supreme Court or the district courts and that the Attorney General's office attempted to impermissibly usurp a judicial function by attempting to coerce testimony), *rev'd sub nom.* *McGrain v. Daugherty*, 273 U.S. 135 (1927).

272. See *Bradley May Not Get Place*, ATLANTA CONST., Apr. 28, 1901, at 14 (discussing tight race for judge position between Cochran and former Governor Kentucky Governor William O'Connell Bradley); see also *Cochran: Appointed Judge of the United States Court District*, MESSENGER-INQUIRER, Apr. 26, 1901, at 5 (announcing President McKinley's appointment of Judge Cochran); *Confirmed by the Senate: Judge Adams and Mr. Van Cott Among the Nominations Passed Upon*, N.Y. TIMES, Dec. 18, 1901, at 3 (listing various judicial appointments including Cochran and confirming that Judge Cochran was indeed appointed).

273. Letter from Andrew McConnell January Cochran [herein after Andrew Cochran], St. Trial Judge, to WHT, Gov. Gen. to Philippines, Jan. 11, 1901 (on file with the Library of Congress).

274. Letter from WHT, Gov. Gen. to Philippines, to William McKinley, U.S. Pres., Feb. 16, 1901 (on file with the Library of Congress). Taft added, "I earnestly urge that Mr. Cochran be appointed. He is far and away the best man for the place in the Eastern District of Kentucky and

by Kentucky's largely Democrat congressional delegation, but Cochran was able to write Taft on May 21, 1901, that the Senate had voted to confirm him.²⁷⁵

By March 25, 1924, James Alexander Fowler, who assumed Daugherty's duties as assistant attorney general, wrote to Taft suggesting that Cochran be elevated to the Court of Appeals for the Sixth Circuit.²⁷⁶ Fowler also enlisted Sixth Circuit Judge Arthur Carter Dennison to advocate on behalf of Cochran to Taft.²⁷⁷ Taft responded to Fowler that while he had a high opinion of Cochran, "Judge Cochran is now a little past [seventy]. His condition, mental and physical, is 100%; but an appointment at that age is, according to ordinary standards, likely to be too temporary."²⁷⁸ Taft also cautioned Fowler that he ought to ascertain whether Cochran would consider the elevation to the appellate court a "reward."²⁷⁹

Cochran began his decision by recognizing that on March 1, the Senate authorized an investigation into Attorney General Daugherty's alleged failure to bring charges against Fall, Sinclair, Doheny, Forbes and others, along with Daugherty's apparent inability to adequately protect the interests of the United States in the oil leases.²⁸⁰ Cochran also noted that Mally Daugherty had failed to comply with the investigation's subpoena.²⁸¹ But, in reviewing the Senate's authorization, Cochran noted that in no place did the Senate articulate that Attorney General Daugherty had committed any

would honor the bench by accepting the pace. He will greatly relieve the [ci]rcuit [j]udges of the heavy work which they have and will add strength to the judicial timber of the entire circuit." *Id.*

275. Letter from Andrew Cochran to WHT, Gov. Gen. to Philippines, May 21, 1901 (on file with the Library of Congress).

276. *See* Letter from Arthur C. Denison, 6th Cir. Judge, to WHT, C.J. of the U.S. Sup. Ct, Mar. 27, 1924 (on file with the Library of Congress) (referencing Fowler's March 24 letter recommending Cochran for the position).

277. Letter from Arthur Carter Dennison, 6th Cir. Judge, to WHT, C.J. of the U.S. Sup. Ct, Mar. 27, 1924 (on file with the Library of Congress).

278. Letter from WHT, C.J. of the U.S. Sup. Ct, to James Alexander Fowler, Ass't Attn. Gen., Mar. 27, 1924 (on file with the Library of Congress).

279. *Id.* Taft specifically penned:

Returning again to the subject of Judge Cochran: I believe if I had the appointment to make, I would find out whether Judge Cochran would really like it; and if he would, and would think of it as a flattering promotion in the nature of a reward he has so thoroughly earned, that this consideration would overbalance everything else.

Id.

280. *See Ex parte* Daugherty, 299 F. 620, 622 (S.D. Ohio 1924) (detailing the charges brought against Daugherty), *rev'd sub nom.* McGrain v. Daugherty, 273 U.S. 135 (1927).

281. *Id.*

crimes, and rather, the investigation was merely premised on the assumption or possibility that he had done so.²⁸² To Cochran, this meant that the investigation was personal in nature and not appropriately judicial as within the Senate's power.²⁸³

Cochran next acknowledged that *Dunn* permitted the House—and commensurately the Senate—to arrest and then punish a citizen for contempt if the citizen refused to obey a lawful legislative command. However, he interpreted *Kilbourn* as limiting the Legislative Branch's power to arrest and punish to only those governmental areas where a legislative body had jurisdiction to inquire into.²⁸⁴ That is, Congress could only investigate matters in which it contemplated legislation. After evaluating the power of the House, as articulated by the Court in *Dunn* and *Kilbourn*, Cochran considered the subpoena issued against Mally Daugherty to be “personal” rather than in furtherance of an official function.²⁸⁵ He rested his reasoning on the fact that Attorney General Daugherty had already resigned; therefore, the Senate was putting a private citizen on trial as a proxy to his brother when it did not have the authority to do so.²⁸⁶

Cochran's decision garnered national media interest. The *Washington Post* headlined, “Daugherty Inquiry by Senate Invalid, U.S. Court Decides.”²⁸⁷ A separate *Post* article informed its readers that Senator Brookhart intended to seek an immediate appeal to the Court.²⁸⁸ The *New York Times* front page reported that Cochran ruled the Senate lacked authority to compel the testimony of non-governmental persons, even in aid of developing legislation.²⁸⁹ The *Times* further reported that in ordering Mally Daugherty released, Cochran declared the Senate had “usurped [judicial] power and encroached on the prerogative[s] of the House of Representatives”²⁹⁰

282. *Id.* at 623.

283. *Id.*

284. *See id.* at 632–36 (providing Cochran's detailed analysis of relevant precedent) (analyzing *Dunn* and *Kilbourn* as they relate to Daugherty's situation). Cochran also reviewed *Chapman and Gordon*, but concluded that in both of those decisions, the contempt power was exercised against citizens for misbehaving in front of the Legislative Branch rather than for refusing to comply with an order. *Id.* at 631–32.

285. *Id.* at 623.

286. *Id.* at 640.

287. *Daugherty Inquiry by Senate Invalid, U.S. Court Decides*, WASH. POST, June 1, 1924, at 1.

288. *Case Will Go to Supreme Court, Brookhart Says*, WASH. POST, June 1, 1924, at 2.

289. *Frees M. Daugherty on Habeas Corpus*, N.Y. TIMES, June 1, 1924, at 1.

290. *Frees M. Daugherty on Habeas Corpus*, N.Y. TIMES, June 1, 1924, at 2.

B. *Pan-American Petroleum: Judge McCormick Shields Robison and Denby*

On May 28, 1925, Judge Paul J. McCormick on the United States District Court for the Southern District of California issued a decision adverse to Doheny's two corporations.²⁹¹ One year earlier, Coolidge appointed McCormick to the federal bench.²⁹² McCormick believed that he owed his judicial appointment to Taft, and the two men exchanged correspondences.²⁹³ "I am very glad you are appointed, because, from what I observe, your appointment has given satisfaction," Taft wrote.²⁹⁴ "The eligible list is narrowed much by the penuriousness of the [g]overnment in the payment of judicial salaries, and the disposition of Senators and Congressmen to regard the office as nothing but political patronage has seriously hampered the President in his selections."²⁹⁵ McCormick, interestingly, also shared with Taft the *Los Angeles Times* editors' opinions on Doheny and McAdoo referenced in the beginning of this Article.²⁹⁶

After receiving notice of the government's suit, McCormick appointed two receivers to oversee Elk Hills and ordered commercial drilling to cease, except for small amounts that the receivers determined necessary to relieve pressure on the wells.²⁹⁷ Roberts and Pomerene presented an argument to the district court that protected Harding's reputation by asserting that Fall

291. *United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43, 43 (S.D. Cal. 1925), *aff'd in part, rev'd in part and remanded*, 9 F.2d 761 (9th Cir. 1926), *aff'd sub nom. Pan-Am. Petrol. & Transp. Co. v. United States*, 273 U.S. 456 (1927).

292. *Coolidge Appoints McCormick District Judge of U.S. Court*, BULLETIN, Feb. 8, 1924, at 1; *McCormick Takes New Post Today: Leaves Superior Court After Fourteen Years for Federal Bench*, L.A. TIMES, Feb. 23, 1924, at 24.

293. Letter from Paul J. McCormick, Judge, U.S. Dist. Ct. for the S. Dis. of Cal. [hereinafter Paul McCormick], to WHT, C.J. of the U.S. Sup. Ct. (Mar. 5, 1924) (on file with the Library of Congress). McCormick wrote:

It has been represented to me by several mutual friends that during the recent protracted episode which culminated in my appointment by President Coolidge as Judge of the U.S. District Court for the Southern District of California, you manifested sympathy with my aspiration and I am, therefore, desirous of expressing my gratitude for such generous and kindly interest therein.

Id.

294. Letter from WHT, C.J. of the U.S. Sup. Ct. to Paul J. McCormick, Judge, U.S. Dist. Ct. for the S. Dis. Of Cal. (Mar. 11, 1924) (on file with the Library of Congress).

295. *Id.*

296. Letter from Paul J. McCormick, Judge, U.S. Dist. Ct. for the S. Dis. of Cal. [hereinafter Paul McCormick], to WHT, C.J. of the U.S. Sup. Ct. (Mar. 5, 1924).

297. *United States v. Pan-Am. Petrol. Co.*, 6 F.2d 43, 89 (S.D. Cal. 1925) *aff'd in part, rev'd in part and remanded*, 9 F.2d 761 (9th Cir. 1926), *aff'd sub nom. Pan-Am. Petrol. & Transp. Co. v. United States*, 273 U.S. 456 (1927).

had, based on a conspiracy between himself and Doheny, misrepresented to the President the need to have the oil leases transferred from the Department of the Navy to the Department of the Interior.²⁹⁸ The proof of the conspiracy, they insisted, was the \$100,000 “loan” made by Doheny to Fall that accompanied the Pan-American lease.²⁹⁹ As a national security aspect to the case, during the course of the trial, Secretary of State Charles Evans Hughes and Secretary of the Navy Curtis Wilbur advised McCormick that if the court were to divulge certain documents sought by Doheny, it would be inimical to the “public interest.”³⁰⁰

McCormick determined it was not necessary for the United States to prove that it suffered a pecuniary loss, but rather that the conspiracy between Fall and Doheny “defeated” a lawful function of the government.³⁰¹ The standard of proof for proving fraud against the government in a civil case, according to McCormick, was by “clear and convincing” evidence.³⁰² He then made it clear that Doheny’s claims that the leases occurred at Denby’s behest, and that Fall had merely served in the capacity of an agent, were meritless.³⁰³ In the middle of his decision, he noted that at the same time Fall expressed his personal financial woes to Doheny, the oil lease in California and the naval construction project in

298. *See id.* at 80–81, 88 (recognizing the fraud and conspiracy of Fall and Doheny); *see also Doheny Is Enjoined: Halts Operation of Navy Lease*, L.A. TIMES, Mar. 18, 1924, at 1 (reporting the writ of injunction which restrained “Doheny and associations from further exploitation of their leases . . .”).

299. *Pan-Am. Petrol. Co.*, 6 F.2d at 53.

300. *Cabinet Members Withhold Defense Data in Oil Hearing*, WASH. POST, Nov. 8, 1924, at 1.

301. *Pan-Am. Petrol. Co.*, 6 F.2d at 54 (citing *Haas v. Henkel*, 216 U.S. 462, 479 (1910)). *Haas*, however, was an appeal against the United States Attorney’s decision to prosecute a criminal trial in Washington D.C., rather than in the defendant’s state of New York. *Haas*, 216 U.S. at 473 (1910).

302. *Pan-Am. Petroleum Co.*, 6 F.2d at 51. Later in the decision, McCormick held:

The conspiracy alleged in the amended bill, while not charged as a crime, contains the elements of a criminal conspiracy. This case, however, is a civil action, and not a criminal prosecution. It is not necessary that the conspiracy be proven to the same degree of certainty as would justify a conviction of Fall and Doheny, if they were on trial for criminal conspiracy.

Id. at 53. The standard for criminal conspiracy was earlier articulated by the Supreme Court “as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means . . .” *Pettibone v. United States*, 148 U.S. 197, 203 (1893), *superseded by statute*, 18 U.S.C. § 1503, *as recognized in Marinello v. United States*, 138 S. Ct. 1101 (2018). The Court applied this definition to civil appeals in *Duplex Printing Press Co. v. Deering*. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 465 (1921). McCormick, however, did not cite to either of these opinions.

303. *Pan-Am. Petroleum Co.*, 6 F.2d at 61.

Hawaii were granted to Doheny's companies.³⁰⁴ In other words, the timing of the lease and of Doheny's loan to Fall were more than a coincidence. McCormick then observed that Robison, more than Denby, bore the Navy Department's responsibility for the transfer, and pointed out that Doheny and Robison had something of a friendly relationship dating to when Edward Doheny Jr. served directly under Robison's command.³⁰⁵

McCormack placed significance on congressional authority to nullify a contract because the lawsuit was brought in compliance with a Senate resolution which determined that the "leases and contract[s] are against the public interest."³⁰⁶ In this respect, his view of congressional authority differed from Cochran's. And importantly, as a national security aspect to his decision, he somewhat exonerated Robison by stating that, "in trying to strengthen the national defense by utilizing the naval oil reserve, [the Admiral] was less vigilant than he intended to be."³⁰⁷ Indeed, McCormick credited Robison only with taking the lead on "constructing and equipping reserve fuel oil stations at strategic points" to include Pearl Harbor.³⁰⁸ Although McCormick had pointed out that Robison had a personal connection to Doheny, he protected the naval officer. This was because his ruling determined that the construction of oil tanks was wholly a naval concern; and therefore, a national security policy, while the responsibility or blame for the actual leasing of oil lands—one McCormick specifically placed on Fall and Doheny—was for a commercial, rather than naval, purpose.³⁰⁹

Having determined that a fraud against the United States could exist as a crime even without the loss of money or property, McCormick then

304. *Id.* at 60–61. McCormick's observation was telling as to the harm committed to the United States by Fall and Doheny:

Whatever the \$100,000 that was transferred to Secretary Fall by Mr. Doheny, the principal officer of the defendant corporations, may be called, and regardless of the question whether Mr. Fall would have obtained it if he had not been Secretary of the Interior of the United States, and at the time transacting public business as such with Mr. Doheny, the fact is that Secretary Fall did obtain it when he was Secretary of the Interior of the United States, and a trustee of the public lands of the United States, and when, as such, he was negotiating with Mr. Doheny concerning such lands; and the effect of such transaction, in and of itself, constitutes a serious injury and damage to the beneficiary, the United States of America.

Id. at 55.

305. *Id.* at 56.

306. *Id.* at 55.

307. *Id.* at 66.

308. *Id.*

309. *Id.*

concluded his ruling by characterizing the nature of Fall's and Doheny's fraud. He began with the observation that Congress created the Department of the Navy and possessed the "sole power to provide and maintain" it.³¹⁰ He then ruled only the Congress, and not a cabinet officer, could transfer control of naval oil reserves to another department of the government.³¹¹ In other words, Fall had usurped Congress's authority and did so for the \$100,000 loan.³¹² This formed the basis for McCormick to nullify the lease. However, the government was not wholly victorious. McCormick also determined that Doheny's company was entitled to fair compensation for the construction of the Pearl Harbor oil facilities, as well as for oil that had already been drilled.³¹³ Perhaps, emblematic of the decision was a May 29, 1925, *Washington Post* story which reported that while Fall "did not make any false representations of fact to President Harding," the former Interior Secretary was nonetheless responsible for the fraud committed to the government.³¹⁴

C. *Mammoth Oil: Judge Kennedy Absolves Fall, Doheny, and Robison*

On March 24, 1924, the committee investigating Fall and the oil leases voted to hold Sinclair in contempt of the Senate and recommended the Senate certify the issue to the Federal District Attorney to charge him with the crime of contempt.³¹⁵ The news for Sinclair grew worse; at the same time the Teapot Dome lease came before the district court in Wyoming. On April 1, he was indicted for contempt.³¹⁶ And then, on July 1, the *New York Times* front page read, "Fall, Two Dohenys, and Sinclair Indicted: Ex Secretary Is Alleged to Have Taken a \$100,000 Bribe."³¹⁷ By the time Judge Thomas Blake Kennedy on the United States District Court for the

310. *Id.* at 87.

311. *Id.*

312. *See id.* at 87–88 ("[T]he attempted transfer of such powers from the Secretary of the Navy renders the contracts and leases void.").

313. *Id.* at 88–89.

314. *Doheny Oil Leases Void, Court Holds; Appeal Announced*, WASH. POST, May 29, 1925, at 1; *see also Harding Exceeded Power: Judge McCormick Finds Transfer of Authority to Fall Unlawful*, N.Y. TIMES, May 29, 1925, at 1 (relaying the Court's conclusion that Secretary Fall's use of fraud did not influence the President).

315. *Oil Committee Acts to Hold H.F. Sinclair on Contempt Charge*, N.Y. TIMES, Mar. 24, 1924, at 1.

316. *Special Counsel Ask Sinclair Indictment: Are Made Assistant District Attorney in Senate's Contempt Action*, N.Y. TIMES, Mar. 29, 1924, at 3.

317. *Fall, Two Dohenys, and Sinclair Indicted: Ex Secretary is Alleged to Have Taken a \$100,000 Bribe*, N.Y. TIMES, July 1, 1924, at 1.

District of Wyoming took up the civil case, it appeared that Sinclair had much to hide and was possibly headed to jail.

On June 19, 1925, Kennedy, however, rejected the government's argument to void the lease to Sinclair's Mammoth Oil Company.³¹⁸ He also noted at the end of the decision that the public's opinion on the matter was shaped by "sensational" reporting which, by its nature, deprived the public of the myriad and complex facts as to why the contract with Sinclair was beneficial to the Navy, and therefore the nation as a whole.³¹⁹ As a result, Kennedy, opposite of McCormick, determined that even if Harding's executive order was unlawful, it could not form the basis for revoking the lease with Sinclair.³²⁰

Unlike McCormick, Kennedy determined that it was more likely that Fall, Denby, and Sinclair had acted in good faith, and at worst, were misguided by an honest, but flawed interpretation of the law.³²¹ This included their collective determination not to inform Congress of the proposed lease.³²² But Kennedy engaged in circular reasoning in concluding that Fall's and Denby's decision not to inform Congress was reasonable because Harding had already issued an executive order directing the transfer of the oil reserves.³²³ In addition to relying on the executive order as justification for the lease, Kennedy placed weight on the alleged good faith of Robison's determination that the private leasing was in the best interests of the Navy

318. *United States v. Mammoth Oil Co.*, 5 F.2d 330, 354 (D. Wyo. 1925), *rev'd*, 14 F.2d 705 (8th Cir. 1926), *aff'd*, 275 U.S. 13 (1927).

319. *Id.*

320. *Id.* at 45.

321. *See id.* at 354 ("[W]e do maintain that in the exercise of that power it may be appropriate legislative authority [to] delegate officers of that department to handle government property in an unrestricted way and in accordance with a vested discretion."). Kennedy penned, near the end of the decision:

The fact that this appears to be a good contract for the government, as testified to by those witnesses who are qualified to speak of its character, coupled with the fact that the courts should be concerned in sustaining formal grants upon which the rights and welfare of many may depend, impels the conclusion that such contracts should not be set aside for light or frivolous reasons, unless fraud in connection with their execution is clearly shown.

Id.

322. *See id.* at 346 (explaining the reasoning for secrecy may have been for national security interests).

323. *See id.* ("[I]t may be fairly held that they conceived their right to do the things they purported to do under the Act of June 4, 1920 . . .").

to conclude that nothing illegitimate had occurred in regard to the transfer.³²⁴

Kennedy also considered it important that Denby had relied on the opinion of the Judge Advocate General of the Navy.³²⁵ But he missed an important point on the nature of a Judge Advocate General's advice. In *Ex parte Mason*, the court determined that the Judge Advocate General's advice was not binding on a military department and, arguably in the inverse, reliance on advice of this nature provides only limited protection from wrongdoing.³²⁶ Had the Navy Judge Advocate General's legal conclusions been the reason for Kennedy's decision to find no fraud occurred, it might have been a basis to explain differences with McCormick. But Kennedy evidenced an animus against the government by refusing to grant the United States a continuance to procure the testimony of H.F. Osler, an attorney and officer of the Continental Trading Company in Canada.³²⁷ Kennedy's refusal to grant a delay to Roberts and Pomerene proved problematic because, on September 24, 1924, the *New York Times* reported on its front page that Ontario Supreme Court Justice William Renwick Riddell threatened Osler with contempt of court for his refusal to testify in the United States.³²⁸ On December 16, the *New York Times* reported that Osler tried to appeal against the order to testify.³²⁹ On March 12, 1925, the *New York Times* noted that Osler became ill while travelling in Egypt and was being medically treated in London but had nonetheless remained under a judicial order to testify.³³⁰ In the same article, the *New York Times* reported that new records of Liberty Bonds had been discovered when investigating Sinclair's dealings with Fall.³³¹ Other newspapers carried similar stories on Canada's cooperation with the investigation and Osler's importance.³³²

324. *Id.* at 336–39.

325. *Id.* at 336–37.

326. *Ex parte Mason*, 256 F. 384, 387 (N.D.N.Y. 1882).

327. *Mammoth Oil Co.*, 5 F.2d at 342.

328. *See Canadian Refuses to Testify on Oil: H.S. Osler Faces Jail at Toronto for Contempt on Silence on Teapot Dome Dealings*, N.Y. TIMES, Sept. 27, 1924, at 9; *see also Canadian Cited in Teapot Case*, L. A. TIMES, Sept. 27, 1924, at 3.

329. *Osler Files Appeal in Canadian Court: Protests Against Decision That He Must Testify—Text of Riddell's Decision*, N.Y. TIMES, Dec. 16, 1924, at 22.

330. *New Bonds Traced in Canada Oil Deal; Osler Must Testify: \$135,000 in Securities, Resale Profits, Credited to O'Neil in National City Bank.*, N.Y. TIMES, Mar. 12, 1925, at 1.

331. *Id.*

332. *See Osler Appeal Lost in Canadian Court*, N.Y. TIMES, Mar. 12, 1924, at 6 (expressing a variety of methods in which Canada cooperated with the investigation); *see also Ontario's Appellate Court Decrees*

Although Kennedy derided the media as “sensational,” prior to issuing his ruling, it became well known through the national newspapers that Ontario Supreme Court Justice Riddell called the Continental Trading Company a “fake,” and that a local judge permitted Osler to journey to Africa for an unknown period of time on an elephant hunting trip even though there was an order to testify.³³³ The *New York Times* also reported that two other key witnesses were mysteriously in France, apparently avoiding a prosecution summons to the trial.³³⁴

Kennedy, unlike McCormick, appeared to place some importance on a shift in the law regarding mining rights.³³⁵ That is, he began his decision with a discussion on how, for most of the region’s history, the Placer Mining Act enabled a person who discovered minerals or oil on public lands to “ripen into a right” without the payment of royalties to the United States.³³⁶ He intimated that in his view, Taft’s executive order exempting certain lands from the Act in 1910 was constitutionally questionable, but nonetheless upheld by the Court in *Midwest Oil*.³³⁷ In the end, Kennedy appeared to accept that even if the leasing was in violation of the law, the leases had occurred because the law itself had been a confusing departure from the traditional treatment of public lands.³³⁸

There was a national security implication to Kennedy’s decision. Fall, along with Denby, argued that one of the key reasons for the secrecy of the lease, and for the construction of storage tanks at Pearl Harbor, was for military considerations.³³⁹ Kennedy determined the court would not use the secrecy in the leasing as clear proof of fraud because Roosevelt and Robison had asked for the lease to remain secret as a matter of national defense.³⁴⁰ Thus, Kennedy was willing to accept the no-bid contracts, as

Osler Must Answer, WASH. POST, Mar. 12, 1925, at 3 (explaining the United States’ purpose in seeking Osler’s testimony).

333. *Witness Is Now in Africa: Formed a Trading Company for Sinclair and Paid Profits in Liberty Bonds*, N.Y. TIMES, Dec. 14, 1924, at 1.

334. *Id.*

335. *United States v. Mammoth Oil Co.*, 5 F.2d 330, 333 (D. Wyo. 1925), *rev’d*, 14 F.2d 705 (8th Cir. 1926) (citing *Union Oil Co. v. Smith*, 249 U.S. 337, 349 (1919)).

336. *Id.*

337. *Id.* at 334.

338. *Id.* at 333–34.

339. *Id.* at 336–37.

340. *Id.* at 346.

well as the failure to notify Congress, as a legitimate exercise in protecting the security of the United States.³⁴¹

D. *Court of Appeals for the Ninth Circuit Upholds the District Court*

McCormick's ruling was a setback for Doheny, but almost immediately, as the *New York Times* reported, Doheny had an avenue to appeal because Kennedy issued a ruling in Sinclair's favor and against the government.³⁴² Although there were different defendants and financial tools of fraud in the two cases—Sinclair's transference of bonds to Fall and his son-in-law through a foreign corporation was more sophisticated than Doheny's loan to Fall—as a matter of public appearance, it would be difficult for both of the decisions to simultaneously remain final.

On July 15, 1925, Doheny convinced McCormick to continue the receivership over the oil reserves while his case was on appeal to the Court of Appeals for the Ninth Circuit.³⁴³ This was the extent of Doheny's success. In a brief decision authored by Judge William Ball Gilbert, with Judge William Henry Hunt and Judge Frank Rudkin in agreement, the appellate court upheld McCormick's ruling against Doheny but also reversed his determination that the United States would have to compensate Pan-American for work that had already finished.³⁴⁴ This was because the court found Doheny culpable in the fraud and not an innocent party to the oil lease.³⁴⁵ The appellate court pointed out Congress could, as a matter of the Constitution's allocation of powers, vote on providing Doheny financial relief.³⁴⁶ But the district court, having determined that a fraud against the United States occurred, possessed no authority to bind the United States to pay compensation to any party involved in the fraud.³⁴⁷

Appointed to the bench by President Benjamin Harrison, Gilbert was

341. *Id.*

342. *Two Decisions Contrary: Sinclair Finding Is Directly Opposite That in the Doheny Case.*, N.Y. TIMES, June 20, 1925, at 1.

343. *Appeals Court Gets Doheny Oil Case: Judge McCormick Grants Defendant Company's Motion in Elk Hills Litigation.*, N.Y. TIMES, July 16, 1925, at 3.

344. *Pan-Am. Petroleum Co. v. United States*, 9 F.2d 761, 768, 773 (9th Cir. 1926), *aff'd sub nom.* *Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927). The three judges on the panel were William Henry Hunt, Frank H. Rudkin, and William Ball Gilbert. *Id.* at 768.

345. *Id.* at 773.

346. *Id.* at 771–72.

347. *Id.* at 771.

perhaps one of the longest serving judges in the federal judiciary at the time he authored the decision.³⁴⁸ Taft had been instrumental in Hunt's ascension to the appellate court.³⁴⁹ In 1910, Taft appointed Hunt to serve as a judge on the United States Court of Customs Appeals and to the Ninth Circuit the following year.³⁵⁰ Prior to that nomination, Hunt served as a federal district court judge, as governor of Puerto Rico, and as a Montana territorial legislator, where he took a prominent role in drafting that state's first constitution.³⁵¹ In 1911, Taft appointed Rudkin to the United States District Court for Eastern Washington, and in January 1923, Harding appointed Rudkin to the appellate court.³⁵²

The Ninth Circuit addressed other matters. For instance, Doheny objected to statements made during his Senate testimony being used against Pan-American because he asserted his right against self-incrimination in court.³⁵³ The appellate court responded that Doheny was Pan-American Petroleum's principal officer and therefore his statements were admissible in the district court.³⁵⁴ As a matter underlying the fraud, the appellate court determined that Denby's actions exceeded the authority granted by Congress in the June 4, 1920 Act.³⁵⁵ This was a simple matter to determine because had the Act enabled the sale of oil, the Navy would have been required to turn over all proceeds of the sale to the Treasury Department.³⁵⁶

348. DAVID C. FREDERICK, *RUGGED JUSTICE: THE NINTH CIRCUIT COURT OF APPEALS AND THE AMERICAN WEST, 1891–1941*, at 19–20 (Univ. of Cal. Press ed. 1994). Professor Frederick notes that “very little is known about Gilbert.” Gilbert was born in 1847 in Fairfax County, Virginia, and was related to President George Washington. He attended the University of Michigan and then moved to Oregon, where he was appointed to the bench in 1892. *Id.*

349. *Id.* at 124.

350. *Id.*; GILES S. RICH, *A BRIEF HISTORY OF THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS* 28 (1980).

351. FREDERICK, *supra* note 348, at 124 (labelling Hunt a “high-caliber jurist”); *see also* RICH, *supra* note 350, at 27–28 (summarizing Hunt's college and professional career). Hunt studied at Yale and was involved in the drafting of Montana's state constitution. In 1900, President William McKinley appointed Hunt as the First Secretary of the civil government in Puerto Rico where he aided in constructing a republican form of government. *Id.*

352. According to Professor Frederick, Rudkin was adamantly opposed to the use of hearsay to convict defendants in prohibition trials. FREDERICK, *supra* note 348, at 159.

353. *Pan-Am. Petroleum Co. v. United States*, 9 F.2d. 761, 769 (9th Cir. 1926).

354. *Id.* (“Clearly if any officer of the defendant corporations was authorized to bind them by declarations after the event, it was Doheny.”).

355. *Id.*

356. *Id.* at 770.

E. *Court of Appeals for the Eighth Circuit Reverses the District Court*

On September 28, 1926, the Eighth Circuit reversed Judge Kennedy's decision.³⁵⁷ It is perhaps ironic that William Squire Kenyon, a Harding appointee, authored the decision.³⁵⁸ Sitting by special designation, William Alexander Cant, another Harding appointee from the United States District Court for Minnesota, and Arba Seymour Van Valkenburgh, a Coolidge appointee from the Eighth Circuit, joined Kenyon.³⁵⁹

The Eighth Circuit's judges grouped the appeal into a three-question rubric.³⁶⁰ The first question was whether the lease and supplemental agreement were made in compliance with law.³⁶¹ Secondly, the court sought to address whether both the lease and supplemental agreement were procured by fraud.³⁶² Finally, the court considered whether Kennedy had abused his discretion in refusing to grant to the United States a continuance to procure the testimony of Osler, the Canadian based witness.³⁶³

It should be noted that when the Eighth Circuit decided the government's appeal from Kennedy's ruling, Doheny's appeal from McCormick's decision and the Ninth Circuit was pending before the Supreme Court.³⁶⁴ The three judges recognized the Ninth Circuit's determination that even if the leasing contract with Pan-American had not been fraudulently procured, the lease would have been unlawful for violating the June 4, 1920 Act.³⁶⁵ While the Eighth Circuit's judges recognized this decision, they had the opposite conclusion; the June 4, 1920 Act would have permitted the lease to occur because Robison represented the Navy in the leasing.³⁶⁶

On the matter of fraud, the court began its decision with the admonition that the crime of fraud could not be presumed on inferential evidence, even though people involved in a criminal conspiracy rarely publish their plans.³⁶⁷ But, having articulated this point, the court then concluded the evidence available to Kennedy more than substantiated the existence of a

357. *United States v. Mammoth Oil Co.*, 14 F.2d 705, 705, 733 (8th Cir. 1925), *aff'd*, 275 U.S. 13 (1927).

358. *Id.* at 707.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 716.

365. *Id.*

366. *Id.*

367. *Id.* at 717.

conspiracy to commit fraud.³⁶⁸ Regarding Fall's conduct, the judges determined "there was an utter lack of faith in the matter."³⁶⁹ They also took aim at Sinclair in finding that, because the Mammoth Oil lease was procured through fraud, Sinclair's company was a trespasser on federal land rather than a corporation doing business with the government.³⁷⁰

IV. AT THE SUPREME COURT

On December 5, 1924, George Wickersham, along with Attorney General Harlan Fiske Stone, and his assistant, William T. Chantland, argued to the Court that each house of Congress possessed an independent power to investigate matters affecting the United States.³⁷¹ By the time Wickersham argued, he was nationally known as a distinguished lawyer having served as attorney general in Taft's administration.³⁷² Although it might seem odd that three executive branch attorneys argued the matter to the Court, this occurred in response to a Senate resolution.³⁷³ Wickersham concluded his argument with the rhetorical question:

Can it possibly be said that the discovery of any facts showing the neglect or failure of the Attorney General or his assistants properly to discharge the duties imposed upon them by law cannot be and would not naturally be used by Congress as the basis for new legislation safeguarding the interests of the [g]overnment and making more improbable in the future the commission of any illegal or improper acts which might be shown to have been committed in the past?³⁷⁴

The importance of the appeal to the legislative branch against Cochran's decision perhaps may be best ascertained by how the Senate treated it. On June 5, 1924, the Senate, by a vote of seventy to two, determined to appeal Cochran's decision to the Court.³⁷⁵ The Senate's vote is understandable

368. *Id.*

369. *Id.* at 720.

370. *Id.* at 733.

371. *McGrain v. Daugherty*, 273 U.S. 135, 137, 164 (1927).

372. See Rayman L. Solomon, *The Politics of Appointment and the Federal Courts' Role in Regulating America: U.S. Courts of Appeals Judgeships from T.R. to F.D.R.*, 9 AM. BAR FOUND. RSCH. J. 285, 327-30 (1984) (summarizing Taft's relationship with Wickersham).

373. *Stone Prepares Fight on Daugherty*, N.Y. TIMES, May 4, 1924, at 3.

374. See *McGrain*, 273 U.S. at 144 (detailing the contents of the brief for appellant).

375. Phillip Kinsley, *High Court to Define Powers of the Senate: Daugherty Issue Will be Taken to Supreme Tribunal for Ruling*, SIOUX CITY J., June 6, 1924, at 1. Two senators, George Wharton Pepper (R-PA) and Seldon Spencer (R-MO) voted against the appeal, but the vote itself was both overwhelming and

because, if Cochran's decision were permitted to become the law of the land, it would allow a president to shield the executive branch from misconduct investigations simply by dismissing officials. Despite the Senate's objection, Cochran was confident his decision would be upheld. In early 1926, he wrote to Taft that "the oil development, out of which grew a great number of suits involving constructions of leases and settlements of boundary lines is largely a thing of the past."³⁷⁶

The Senate vote likely placed Taft in an odd position because of connections to Daugherty, coupled with his desires to keep Harding's legacy untainted and keep Coolidge in the White House. When the Court took up the appeal, Taft assigned Justice Willis Van Devanter to write the unanimous opinion.³⁷⁷ According to the docket book maintained by Justice Pierce Butler, in conference, Justice Louis Brandeis intended to dissent, but did not do so.³⁷⁸ His brief draft dissent argued that the appeal had become moot and implied that the Sixty-Ninth Congress would have to reissue the subpoena because the Congress which issued the subpoena, the Sixty-Eighth Congress, was no longer in session.³⁷⁹ Taft appointed Van Devanter to the Court in 1910 after Van Devanter served the Eighth Circuit for seven years.³⁸⁰ Van Devanter has been characterized as a "failure" and a slow writer of opinions.³⁸¹ One biographer commented that, in addition to Taft placing Van Devanter on the Court, the two men "shared views on virtually all legal and political issues."³⁸² Another biographical sketch on Van Devanter characterized him as being "one of the [least] productive

bipartisan in disagreeing with the limitations placed on Congress by Cochran. Senator Frank Bartlett Willis (R-OH) voted in favor of appealing, but he insisted that Cochran's ruling was a correct constitutional law statement.

376. Letter from Andrew Cochran, Judge, U.S. Dist. Ct. for the E. Dist. of KE, to WHT, C.J. of the U.S. Sup. Ct. (Dec. 4, 1926) (on file with the Library of Congress).

377. Letter from WHT, C.J. of the U.S. Sup. Ct., to HT (Jan. 17, 1924) (on file with the Library of Congress).

378. Barry Cushman, *Inside the Taft Court: Lessons from the Docket Books*, 2015 SUP. CT. REV. 345, 348 (2016).

379. Louis Brandeis, Memorandum on McGrain v. Daugherty (Aug. 11, 1926) (on file with author).

380. M. Paul Holsinger, *The Appointment of Supreme Court Justice Van Devanter: A Study of Political Preferment*, 12 AM. J. LEGAL HIST. 324, 329 (1968).

381. See Robert W. Langran, *Why Are Some Supreme Court Justices Rated as "Failures?"*, in YEARBOOK 1985: SUPREME COURT HISTORICAL SOCIETY 8-9 (1985) (characterizing Van Devanter as a "failure" and a slow writer). But see WALTER F. PRATT, JR., THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910-1921, at 22 (1999) (noting Taft "could have hardly avoided Van Devanter's appointment to the Court").

382. RENSTROM, *supra* note 59, at 54.

justices” during his judicial tenure.³⁸³ Van Devanter attended the Cincinnati Law School, the same law school as Taft, but ventured to the Wyoming Territory where he rose to chief justice of the territorial court, a state legislator, and then as an assistant attorney general under McKinley.³⁸⁴ There is one final note on Van Devanter worthy of mention in discussing judicial ethics: He recused himself from the appeals involving Sinclair and Doheny.

The timing between the arguments and the issuance of the two opinions in the civil leasing cases were much quicker than in *McGrain*. The Senate’s appeal from Cochran’s decision, after all, had languished at the Court without an intermediate court of appeals review for more than two years. On October 5 and 6, 1926, Pomerene and Roberts argued *Pan-American Petroleum* and the Court issued its opinion on February 28, 1927. On April 12 and 13, 1927, Pomerene and Roberts argued *Mammoth Oil* and the Court issued its opinion before the end of that year. During the first part of the year, Coolidge made it publicly known that he intended to begin new warship construction in the category of “cruisers.”³⁸⁵ Coolidge also, however, sought a new naval limitations treaty, and Taft was aware of both policies.

In early 1927, Taft indicated his disgust with the Democrats’ opposition to Coolidge’s plans to construct a larger Navy: “Congress is in an active session and the Democrats are lining up in every possible way to embarrass the President, and even the Regulars have thought it necessary to differ with him on the subject of a larger Navy, but with the aid of Burton in the House, the President beat them by nearly twenty votes, and I am not sure what he will do in the Senate.”³⁸⁶ However, Taft apparently was unaware that Coolidge also sought naval reductions as a matter of international agreement.³⁸⁷ Specifically, in early February 1927 Coolidge asked for the “Big Five” governments—Britain, France, Japan, Italy, and the United

383. REBECCA S. SHOEMAKER, *THE WHITE COURT: JUSTICES, RULINGS, AND LEGACY* 78 (2004).

384. PRATT, *supra* note 381, at 22–23.

385. B.J.C. McKercher, “A Certain Irritation”: *The White House, the State Department, and the Desire for a Naval Settlement with Great Britain, 1927–1930*, 31 *DIPLOMATIC HIST.* 829, 840 (2007).

386. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT, (Jan. 9, 1927) (on file with the Library of Congress).

387. See, e.g., Tadishi Kuramatsu, *The Geneva Naval Conference of 1927: The British Preparation for the Conference, December 1926 to June 1927*, 19 *J. STRATEGIC STUD.* 104, 104 (1996) (stating President Coolidge sent an invitation to the signatory nations to negotiate an agreement limiting certain classes of naval vessels).

States—to meet in Geneva to extend the Washington Naval Treaty's ratio-based limitations to smaller naval vessels.³⁸⁸

Although the Geneva conference attendees would not meet until after the issuance of *Pan-American Petroleum*—and before *McGrain* and *Mammoth*—Coolidge's actions highlight that the Court would give the three opinions when the major global powers were pursuing a means of maintaining peace.³⁸⁹ In the month prior to the issuance of *Pan-American Petroleum*, the news media presented an image to the public that Japanese military power was seen as less of a threat and more of a matter controllable by international law. On February 18, the *New York Times* reported on its fourth page that the Japanese government favorably viewed further naval arms limitations set by treaty.³⁹⁰ Two days later, *The Washington Post* reported that Japan's government had been more cooperative than the French in working toward new naval arms limitations.³⁹¹ Coolidge's efforts at naval reductions ultimately ended in failure because of obstruction from the governments of Britain, France, and Italy, rather than from the Japanese government.³⁹²

A. *Taft's Ethics: Activities, Opinions, and the Senate Investigation*

Harry Daugherty is remembered today as an Ohio lawyer who represented Harding in “a smoked filled room” at the 1920 Republican Convention in Chicago's Blackstone Hotel.³⁹³ Daugherty is also remembered of course for being one of the more corrupt, if not unqualified, attorney generals in United States history.³⁹⁴ He was a political operator in

388. DUDLEY KNOX, A HISTORY OF THE UNITED STATES NAVY 428 (1948); David Carlton, *Great Britain and the Coolidge Naval Disarmament Conference of 1927*, 83 POL. SCI. Q. 573, 573–74 (1968).

389. See FANNING, *supra* note 123, at 19. Fanning notes that “a peace psychology” had taken root in the United States. Carlton, *supra* note 387, at 573–74, 598.

390. *Japan's Arms Reply Will Affect Amity*, N.Y. TIMES, Feb. 18, 1927, at 4.

391. *Japan Acceptance of Navy Arms Plan May Result in Pact*, WASH. POST, Feb. 20, 1927, at M4. The Post also reported that Benito Mussolini was opposed to Italy signing a new agreement as a result of the French government's reticence to do so.

392. McKercher, *supra* note 385, at 831; Norman Gibbs, *The Naval Conferences of the Interwar Years: A Study in Anglo-American Relations*, 30 NAVAL WAR COLL. REV. 50, 53(1977).

393. For a consistent view of Daugherty over time, see JOE MITCHELL CHAPPLE, LIFE AND TIMES OF WARREN G. HARDING: OUR AFTER WAR PRESIDENT 135 (1924); Wesley M. Bagby, *The “Smoked Filled Room” and the Nomination of Warren G. Harding*, 41 MISS. VALLEY HIST. REV. 657, 659–660 (1955); and JOHN DEAN, WARREN G. HARDING: THE AMERICAN PRESIDENT'S SERIES: THE 29TH PRESIDENT, 1921–1923, at 56 (2004). John Dean, who served as White House counsel under Nixon was later convicted for crimes arising from the Watergate scandal. See, e.g., John W. Dean & James Robenalt, *The Legacy of Watergate*, 38 LITIGATION 19, 24 (2012).

394. See Giglio, *supra* note 223, at 347; STRATTON, *supra* note 18, at 108, 332; WILLIAM ALLEN WHITE, AUTOBIOGRAPHY 620 (1946).

Ohio who earned a law degree from the University of Michigan in 1881 and then aligned with Republican icons, including Senators Joseph Foraker and Mark Hanna, Governor William McKinley, and of course, Harding.³⁹⁵ Less understood about Daugherty is that, before his allegiance to Harding, he contributed to Taft's rise to presidency.³⁹⁶ Prior to the 1908 election, Taft apparently felt strongly enough about Daugherty to ascertain whether he should become the chairman of the Republican National Committee.³⁹⁷ On June 8, 1908 Taft expressed his "delight" that Daugherty would attend the nominating convention "in order to straighten [out] the cause."³⁹⁸

Moreover, in 1912, Daugherty campaigned for Taft's reelection against Wilson, Roosevelt, and Debs.³⁹⁹ Indeed, when a number of Ohio's Republican legislators appeared to lean toward supporting Roosevelt, Daugherty worked hard to make sure Taft did not lose Ohio and Taft expressed his gratitude for Daugherty's efforts.⁴⁰⁰ After Taft became Chief Justice, he and Daugherty worked with Harding to shape the president's national message on whether a "war bonus" should be paid to World War I veterans.⁴⁰¹ Taft did not view Daugherty as corrupt, but instead considered him to be a Republican loyalist. His opinion on Daugherty would be slow to change, and indeed, his letters to his children and friends evidence a desire to not only protect Harding's reputation, but also, until *McGrain's* issuance, Daugherty.

Taft had a different opinion of Fall and Denby than he did about Daugherty. The chief justice considered Fall dishonest and Denby a well-meaning, but gullible dolt. In January 1924, Taft informed his son Robert that he was not surprised Fall had brought Denby and the Harding

395. Giglio, *supra* note 225, at 361–62.

396. GIGLIO, *supra* note 162, at 33–34.

397. See Letter from Harry Daugherty to WHT, Sec. of War (June 2, 1908) (on file with the Library of Congress) (suggesting Taft nominate Jacob Vorys for the position instead).

398. Letter from WHT, Sec. of War, to Harry Daugherty (June 5, 1908) (on file with the Library of Congress).

399. GIGLIO, *supra* note 162, at 59.

400. Letter from WHT, Pres. of U.S., to Harry Daugherty (June 6, 1912) (on file with the Library of Congress). Taft ended the letter,

"We must not overlook the sentimental value of having controlled it, and I appreciate all that you did. I note all that you say in your letter, and am confident we shall be successful at Chicago. It is a real fight, but so long as we approach it in that spirit we need not fear the result."

Id.

401. *The Role of Chief Justice William Howard Taft as a Presidential Advisor*, 13, in NOMINATION OF ABE FORTAS, UNITED STATES SENATE, Sep. 20, 1968, 90th Cong., 2d Sess. (1968).

administration into disrepute.⁴⁰² “I have no idea that Denby was dishonest—I never thought that,” Taft claimed, “Denby ought not to have been taken into the cabinet, because he is not a big enough man.”⁴⁰³ In spite of Taft’s disdain for Fall, he was highly critical of the witnesses brought in to testify about the former Interior Secretary’s conduct. “The oil mill scandal has been suspended for ten days,” Taft wrote, “Vanderlip’s effort was enough to end anything.”⁴⁰⁴ The name “Vanderlip” referred to Frank Vanderlip, a banker and financier who intimated that Harding knew of Fall’s corruption as it was occurring.⁴⁰⁵ In 1917, Vanderlip was placed in charge of a committee to promote Liberty Bonds and he had sought Taft’s support in advertising the importance of the program.⁴⁰⁶ Taft also added his disdain for the *Denver Post*, adding, “I don’t know whether you have followed the evidence, but the fraud of the newspapers of Denver is about equal to the fraud of Fall.”⁴⁰⁷ Taft’s disgust with the *Denver Post* originated when Senator Thomas Walsh (D-MT), one of the committee’s members, discovered with the help of a *Denver Post*’s editor, that Fall’s financial situation after meeting with Sinclair and Doheny had remarkably improved after the leases were granted.⁴⁰⁸

Perhaps the most outstanding feature of Taft’s letters to his sons about the investigation into Fall is that he actually conferred with Coolidge on the appointment of the investigators. On February 3, 1924, he penned to Charles, “They have employed Pomerene, and I think he is a very good man. I recommended Percy of Alabama. The President telephoned me to ask about [former Attorney General] Gregory whom Hughes and McReynolds

402. See Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 27, 1924) (on file with the Library of Congress) (disagreeing with Senator Cummins’s opinion of Fall’s good character).

403. *Id.*

404. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT (Feb. 17, 1924) (on file with the Library of Congress).

405. See *Harding’s Friends Aroused: Rumors of Profiting in High Places Stir Washington*, N.Y. TIMES, Feb. 14, 1924, at 1; *Vanderlip Admits Only Hearing Gossip: But he Questions Reported Payment of \$550,000 for Marion Newspaper*, N.Y. TIMES, Feb. 14, 1924, at 1; *Vanderlip’s Testimony Evokes Pointed Comment by Editors*, WASH. POST, Feb. 17, 1924, at 2.

406. Letter from Frank Vanderlip, banker and financier, to WHT (May 16, 1917) (on file with the Library of Congress).

407. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT (Feb. 17, 1924) (on file with the Library of Congress).

408. J. LEONARD BATES, SENATOR THOMAS J. WALSH OF MONTANA: LAW AND PUBLIC AFFAIRS, FROM TR TO FDR 217–220 (1999).

had recommended to him.”⁴⁰⁹ Thus, in this letter, Taft implicated Justice James C. McReynolds as having also met with Coolidge to recommend investigators.⁴¹⁰ Like Taft, McReynolds would not recuse himself from any of the appeals.

On February 25, 1924, six days after Wheeler introduced the resolution to investigate Daugherty, Taft wrote to Robert that “politics continued to be sensational” partly because of “Bolshevik” influences that had arrayed against Daugherty.⁴¹¹ He was convinced that Wheeler and Brookhart had created a committee specifically to embarrass and convict Daugherty before an investigation commenced.⁴¹² He also called Henry Cabot Lodge (R-MA), William Borah (R-ID), and George Pepper (R-PA) cowards for not defending Daugherty.⁴¹³ Thus, from the start, Taft not only believed in Daugherty’s innocence and Fall’s malfeasance, he also was angry with at least five Senate Republicans and, over time, his anger did not abate.

In mid-March Taft wrote to Charles, “the vicious piffle, as characterized by Secretary [of the Treasury] Mellon, continues in the attack on Daugherty.”⁴¹⁴ He went on to disparage the investigation, calling the senators “really crazy to delve into all sorts of rottenness,” and accusing them of basing their conclusions of Daugherty’s malfeasance on “the most disrespectful witnesses.”⁴¹⁵ He singled out the fact that Senator Ashurst had relied on Gaston Means, a discredited bootlegger and con artist, to publicize the Harding administration’s connection to criminals.⁴¹⁶ However dubious Means’ past was, at one time he worked as an agent for the Justice Department and one of Daugherty’s associates, Jess Smith, supervised him.⁴¹⁷

409. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT (Feb. 3, 1924) (on file with the Library of Congress).

410. *Id.* Taft also added, “It is quite possible that we shall have the Fall business before us very quickly if he refuses to testify before the Senate Committee and they attempt to compel him by imprisoning him. A writ of habeas corpus could be brought pretty promptly up to us and we may have it.” *Id.*

411. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Feb. 24, 1924) (on file with the Library of Congress).

412. *Id.*

413. *Id.*

414. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT (Mar. 16, 1924) (on file with the Library of Congress).

415. *Id.*

416. *Id.*

417. WILLIAM A. COOK, KING OF THE BOOTLEGGERS: A BIOGRAPHY OF GEORGE REMUS 44 (2008).

Another example of Taft's questionable conduct is evidenced in a late March letter to Max Pam, an attorney he was acquainted with. On March 30, Taft gave legal advice to Max Pam, the general counsel of the American Steel and Wire Company, on his relationship to Daugherty and the possibility that the Senate might call him to testify.⁴¹⁸ One day earlier, the *New York Times* published accusations that Daugherty had promised federal judgeships in exchange for thousands of dollars, and Pam was concerned that if he ventured to Europe, the investigation would consider him complicit in Daugherty's corruption.⁴¹⁹ Although Pam was named in the article, Taft advised him to continue with his planned trip to Europe.⁴²⁰ The same day he advised Pam to proceed with travelling to Europe, Taft informed Robert that Coolidge had no choice but to push for Daugherty's resignation, even though Daugherty was innocent.⁴²¹ To his brother Horace, Taft penned, "Daugherty has come out with a manly statement in respect to Coolidge, and after the evidence with respect to him has been digested, all it will disclose, so far as he is concerned, is that he had some very undesirable associates."⁴²²

Taft continued to denigrate the Senate's investigation into Daugherty in April. On April 20, Taft penned to Charles, "The Democrats have overplayed their hand in the foolish evidence that they have been continuing to introduce by convicts and persons utterly lacking in their credibility. Walsh is wildly attempting to implicate the Republican Party in 1920 in an effort to steal oil lands from the government for the oil kings, while Wheeler is occupying himself in ghost stories with reference to a lot of things that have lost interest because Daugherty is out of office."⁴²³ Earlier, Charles had cautioned Taft that while Daugherty's resignation should have ended

418. Letter from WHT, C.J. of the U.S. Sup. Ct., to Max Pam, Gen. Counsel, Am. Steel and Wire Company [herein after Max Pam] (Mar. 30, 1924) (on file with the Library of Congress); see William T. Hart, *An Admired Colleague in the Practice of Law*, 62 WASH. L. REV. 619, 619 (1987) (regarding Pam).

419. *Judgeship for Sale, Olcott Was Told; Appointment Priced to Him at \$35,000, New York Lawyer Tells Daugherty Committee*, N.Y. TIMES, Mar. 29, 1924, at 1; Letter from Max Pam, to William Howard Taft, WHT, C.J. of the U.S. Sup. Ct. (Mar. 29, 1924) (on file with the Library of Congress).

420. Letter from WHT, C.J. of the U.S. Sup. Ct., to Max Pam (Mar. 30, 1924) (on file with the Library of Congress).

421. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Mar. 30, 1924) (on file with the Library of Congress).

422. Letter from WHT, C.J. of the U.S. Sup. Ct., to HT (Apr. 2, 1924) (on file with the Library of Congress).

423. Letter from WHT, C.J. of the U.S. Sup. Ct., to CT (Apr. 20, 1924) (on file with the Library of Congress).

the investigation, the former attorney general was unpopular in Southern Ohio.⁴²⁴ To his son, Robert, he penned, “The Democrats love investigations so much that they are quite disposed to go on no matter how the [g]overnment suffers.”⁴²⁵ He added that he had sought out Walsh to ascertain how long the investigation might continue so that he could plan for an appeal on the subject of the Senate’s right to question witnesses.⁴²⁶

Taft however, had an unrealistic opinion on Daugherty. While it was true that on May 31, Judge Cochran issued his ruling favorable to Mally Daugherty, this did not end the Senate’s pursuit of the investigation and, as earlier noted, the Senate voted to appeal the decision. A new attack by Harding’s supporters against the investigation was a close reprise of the facts in *Marshall v. Gordon*.⁴²⁷ Just as the House had turned on U.S. Attorney H. Snowden Marshall in 1915, Harding’s and Daugherty’s allies—particularly an individual named Blair Coan—turned on Wheeler, accusing him of ties to communism.⁴²⁸ The Justice Department pursued Wheeler on a different matter, however. The United States Attorney presented evidence to a federal grand jury that Wheeler—an attorney prior to his Senate tenure—represented a client before a federal agency.⁴²⁹ And on May 16, the *New York Times* reported that Thomas Miller, the Alien Property Custodian, had complained to Harding about Attorney General Daugherty and Jess Smith pressuring him to deposit government funds into Midland National Bank.⁴³⁰

On November 4, 1924, when Americans cast their votes for president, they overwhelmingly supported Coolidge’s reelection over that of John W. Davis, a conservative Democrat, Robert La Follette, and ironically, Wheeler, who were partnered under the Progressive Party banner.⁴³¹ Perhaps because Coolidge had acted to appoint Roberts and Pomerene to investigate

424. Letter from CT, to WHT, C.J. of the U.S. Sup. Ct. (Apr. 2, 1924) (on file with the Library of Congress).

425. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Apr. 13, 1924) (on file with the Library of Congress).

426. *Id.*

427. *Marshall v. Gordon*, 243 U.S. 521 (1917).

428. RICHARD GID POWERS, *NOT WITHOUT HONOR: THE HISTORY OF AMERICAN ANTICOMMUNISM* 71–73 (1998).

429. *Id.* at 71 (1998).

430. *Daugherty Friends Angered Col. Miller*, N.Y. TIMES, May 16, 1924, at 21.

431. DAVID JOSEPH GOLDBERG, *DISCONTENTED AMERICA: THE UNITED STATES IN THE 1920s* 61–65 (1990); see WILLIAM H. HARBAUGH, *LAWYER’S LAWYER: THE LIFE OF JOHN W. DAVIS* 222 (1990) (noting by the time of the election, “an aura of granite-like integrity had settled in on Calvin Coolidge”).

corruption, a majority of the electorate did not hold him responsible for the scandal.⁴³² Davis's biographer has noted that the scandal also affected the Democrats in the election because one of the early leading presidential aspirants, McAdoo, had received \$150,000 from Doheny, and Davis had long-standing ties to billionaire J.P. Morgan.⁴³³ In early December, Taft reflected on the election and Daugherty in a letter to Charles D. Hilles, a fellow Ohioan and one time chair of the Republican National Party, that political patronage had brought about the ruin of the Justice Department. "I am sorry to say that Daugherty's office was filled with people who were not competent, due to unyielding to this very method," Taft lamented.⁴³⁴

Coolidge's reelection did not cause Taft to cease disparaging the investigations. In late November 1924, Taft had not merely soured on Walsh, to his son Robert he poured invective on the legislator by calling him "the narrowest man in the Senate."⁴³⁵ In January 1925, Taft told Robert that he had spoken with Attorney General Stone about the case against Wheeler and then added, "Wheeler is a vicious man, a man irresponsible, and with a very bad reputation in Montana."⁴³⁶ Wheeler would be rapidly acquitted in what became considered a sham trial, but if he had been convicted and appealed to the Court, one might well wonder whether Taft would have recused himself.⁴³⁷ Recusal might have become an open argument as Walsh had defended Wheeler.⁴³⁸

Taft added that Borah had interfered with the Justice Department with "utter inconsistency" and "in an unconstitutional way."⁴³⁹ Borah had supported both Harding and Coolidge, but was known as a "liberal" Republican, and had been one of four senators to oppose Taft's nomination to the Court.⁴⁴⁰ In early February 1925, Taft penned his opinions on

432. Bates, *supra* note 22, at 309–314.

433. HARBAUGH, *supra* note 431, at 197.

434. Letter from WHT, C.J. of the U.S. Sup. Ct., to Charles D. Hilles, Former Chair, Republican National Party (Dec. 5, 1924) (on file with the Library of Congress).

435. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Nov. 30, 1924) (on file with the Library of Congress).

436. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 25, 1925) (on file with the Library of Congress).

437. *Court Throws Out Wheeler Charges*, N.Y. TIMES, Dec. 30, 1925, at 1.

438. *Id.*

439. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 25, 1925) (on file with the Library of Congress).

440. GOULD, *supra* note 5, at 170–71; see Darrell LeRoy Ashby, *William E. Borah and the Politics of Constitutionalism*, 58 PAC. NW. Q. 119, 121–23 (1967) (pointing out Borah was both pro Prohibition and pro wanting the party to not oppose southern segregationist laws); Robert James Maddox,

Wheeler to Robert once more, this time chastising the Senate for permitting the Senator to cross examine Stone while at the same time the Justice Department had secured an indictment against him.⁴⁴¹ Taft had a high opinion of Stone, and was happy to see that Coolidge nominated him to the Court, but he did not relish that Borah, Walsh, and Wheeler would get to question him in the midst of Wheeler's criminal trial.⁴⁴²

Taft's extrajudicial activities, including some that would have related to the three pending opinions, continued through 1925. In January, he advised Coolidge against appointing Charles Beecher Warren to serve as Stone's successor as attorney general.⁴⁴³ "I don't think so highly of the selection of Charles Warren of Michigan for Attorney General," Taft wrote to his son. "He has quite enough capacity to fill the office well, but I am not so confident of his sturdy honesty and hewing to the line."⁴⁴⁴ Taft added in his letter that Secretary of State Hughes was soon to depart, and Coolidge intended on nominating Senator Frank Kellogg to take his place. "I don't think this adds much to the strength of the cabinet," Taft penned.⁴⁴⁵ "Kellogg is a hard worker but isn't a man of force or courage. He is shifty, just as Warren is."⁴⁴⁶

The 1926 midterm elections resulted in the Republican Party losing nine seats in the House of Representatives but still maintaining a majority of 238 seats to the Democratic Party's 194.⁴⁴⁷ The Democratic Party picked up eleven seats, while the third party Farmer-Laborer—a Minnesota Party—

William E. Borah and the Crusade to Outlaw War, 29 HISTORIAN 200, 200–201 (1967) (noting Borah sought to outlaw war but opposed the United States becoming a part of a binding world organization to do so).

441. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Feb. 1, 1925) (on file with the Library of Congress).

442. *Id.*; Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 11, 1925) (on file with the Library of Congress).

443. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 11, 1925) (on file with the Library of Congress); *see* Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Feb. 3, 1925) (on file with the Library of Congress) (stating he was happy Stone's nomination to the Court succeeded despite Walsh's pushback).

444. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 11, 1925) (on file with the Library of Congress). The Senate twice rejected Charles B. Warren, in part based off his close ties to the "Sugar Trust" which had been accused of unlawfully monopolizing sugar to the point of manipulating prices. JOSEPH PRATT HARRIS, THE ADVICE AND CONSENT OF THE SENATE 260 (1953).

445. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Jan. 11, 1925) (on file with the Library of Congress).

446. *Id.*; HARRIS, *supra* note 444, at 260.

447. MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997: THE OFFICIAL RESULTS OF THE ELECTIONS OF THE 1ST THROUGH 105TH CONGRESSES 468 (1998).

lost one of their two seats and the Socialist Party maintained one seat.⁴⁴⁸ Likewise, in the Senate, the Republican Party lost seven seats to the Democratic Party but maintained their majority of forty-nine to forty-six seats.⁴⁴⁹ One of the Republican losses in the Senate, that of James Wadsworth (R-NY), was particularly troubling to Taft (as he described to Elihu Root on the eve of the 1926 midterm congressional election) that “it would be a great loss to the Senate if Wadsworth is not elected”⁴⁵⁰

Taft’s letter to Root may be the most consequential of all his letters in evidencing his mindset on Daugherty and Harding. “I have been following with a great deal of interest the trial of the indictment of Harry Daugherty and Miller, the Alien Property Custodian,” Taft penned. “I don’t know how much dirty linen of the Republican Party is going to be exposed on the wash lines.”⁴⁵¹ He then added that if the trial court in the Alien Custodian charges against Daugherty followed the rules of evidence, there was a chance for Harding’s legacy to survive.⁴⁵² Taft stated that he had known Harding, as a fellow Ohioan “for a good many years,” and considered him “a man of fine address, very handsome in his bearing and appearance,” and a hard worker.⁴⁵³ But, he also recognized that Harding “did not object to hard liquor, and he loved poker and speculation” To this end, Taft speculated that had Harding given up his carousing once he became president, he would have lived until the end of his term.⁴⁵⁴ Perhaps in an anthem to Harding’s presidency, Taft concluded on Harding, “[H]e did not observe the caution that most Presidents have (and it is a good thing for them to have) of living a life wholly free from the practice of habits that if disclosed would shock the sense of propriety of the great body of the people.”⁴⁵⁵

To Taft, Daugherty was a “a man of personal honesty,” but had made enemies as a result of his ambition “to achieve a standing in the higher rank

448. *Id.*

449. *Id.* at 468–69.

450. Letter from WHT, C.J. of the U.S. Sup. Ct., to Elihu Root (Sep. 17, 1926) (on file with the Library of Congress). In this same letter, Taft also asked Root to lobby President Coolidge to appoint August Hand, then a judge on the United States District Court for the Southern District of New York, to the Court of Appeals for the Second Circuit. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.*

455. *Id.*

of the profession.”⁴⁵⁶ Although Daugherty had surrounded himself with corrupt men such as Jess Smith and John King, Taft insisted that Daugherty’s faults were only in his efforts to “suppress evidence that might reflect in some way on Harding”⁴⁵⁷ In other words, Taft refused to believe that Daugherty had engaged in corruption for the purpose of self-enrichment, but only out of a sense of loyalty to Harding’s memory and the Republican Party. And Taft appreciated that Daugherty “did more good work in preventing the politicians from putting in bad District and Circuit Judges than any recent [a]ttorney [g]eneral.”⁴⁵⁸ But, while Taft conceded that Daugherty was a poor judge of character, the enemy of the government remained not its corruptors, but Daugherty’s opponents, like Wheeler and Walsh.⁴⁵⁹

B. *McGrain v. Daugherty in the Court*

Taft did have an indirect role in the delay between the arguments and the Court’s opinion in that he assigned Van Devanter to author the opinion: “Van Devanter is our strongest man.”⁴⁶⁰ But then he noted “the trouble with him is that he insists on writing opinions which involve too great individual investigation and he is not content therefore to get through an opinion within a reasonable time, so that now he has carried opinions for one or two years and he is way behind and this has become a nerve straining situation.”⁴⁶¹ Still, Taft concluded that although *McGrain* was argued over two years earlier, it was “a fine opinion.”⁴⁶²

Van Devanter began the Court’s opinion by acknowledging that the Department of Justice was the nation’s primary agency with the duty of initiating civil and criminal suits in the name of the United States.⁴⁶³ And he noted the attorney general supervised the functions of the department.⁴⁶⁴ He found it important to highlight that after serious allegations against Daugherty were brought to the Senate’s attention, the Senate and House almost unanimously voted to create a committee of five

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. Letter from WHT, C.J. of the U.S. Sup. Ct., to HT (Jan. 17, 1927) (on file with the Library of Congress).

461. *Id.*

462. *Id.*

463. *McGrain v. Daugherty*, 273 U.S. 135, 150 (1927).

464. *Id.*

senators to investigate Daugherty's alleged failure to prosecute frauds against the government, specifically those frauds allegedly committed by Fall, Sinclair, Doheny, and Forbes.⁴⁶⁵ Van Devanter also quickly dispatched Mally Daugherty's claim that the delegation of the subpoena to McGrain was impermissible.⁴⁶⁶ At the very end of the opinion, Van Devanter noted that because the Senate, unlike the House, was an ongoing body and not subject to complete overturn every two years, the issue before the Court was not mooted simply because there had been an election.⁴⁶⁷

The main issue before the Court, Van Devanter recognized, was whether the Senate can compel a private citizen to testify before it, and not whether either of the two subpoenas were defective or enforceable.⁴⁶⁸ To this end, he reached back in time to pre-constitutional history and noted that in Parliament, as well as in the colonial legislatures, such a power to compel private citizens existed.⁴⁶⁹ He also pointed out that early in United States history, Congress investigated the St. Clair expedition, and James Madison—then a representative—who was the primary author of the Constitution voted in favor of the investigation.⁴⁷⁰ Van Devanter observed that Congress had also investigated John Brown's raid of Harper's Ferry and ordered Thaddeus Hyatt, a leading abolitionist, to testify even though senators as powerful as Charles Sumner (R-MA) objected to the power of that body to do so.⁴⁷¹

Just as the district court analyzed *Dunn, Kilbourn, Chapman, and Marshall*, so too did Van Devanter. He noted that in *Dunn*, the House had punished

465. *Id.* at 150–51 (noting the Senate resolved to investigate failures to civilly prosecute anti-trust violations).

466. *Id.* at 155. The Court determined, that in spite of prior case law, such as *Sanborn v. Carleton*, 81 Mass. 399 (MA 1860), because the Senate, in 1889, adopted rules permitting the Sergeant at Arms to appoint deputies to carry out the functions of the Sergeant at Arms, Daugherty's contention lacked merit. *Id.* Likewise, the opinion held that because senators have taken an oath to the Constitution, Daugherty's claim that the subpoena violated the Fourteenth Amendment was without merit. *Id.*

467. *Id.* at 181–82.

468. *Id.* at 160.

469. *Id.* at 161.

470. *Id.*

471. *Id.* at 161–62. On the issue of Hyatt, Van Devanter noted:

Sectional and party lines were put aside, and the question was debated and determined with special regard to principle and precedent. The vote was taken on a resolution pronouncing the witness' answer insufficient and directing that he be committed until he should signify that he was ready and willing to testify. The resolution was adopted—44 senators voting for it and 10 against. Cong. Globe, 36th Cong., 1st Sess., pp. 1100-1109, 3006-3007.

Id. at 162.

a citizen with contempt after the citizen attempted to bribe a member of the House.⁴⁷² He conceded that the Court in *Kilbourn* held that although Congress's inquiry power is broad, it was impermissible to extend the power into the personal affairs of private citizens.⁴⁷³ Yet, he also noted *Kilbourn* did not prevent the power of congressional inquiry against gaining evidence in aid of contemplated legislation.⁴⁷⁴ To Van Devanter, that fact that in *In re Chapman* the Court concluded that Congress did not have to announce its intentions to expel or censure a member of government prior to conducting an inquiry, meant that an inquiry to protect the integrity of the government also enabled the exercise of the contempt power.⁴⁷⁵ Finally, Van Devanter recognized that the Court in *Marshall* determined limits to holding private persons in contempt, such as in matters which did not directly impact legislative functions.⁴⁷⁶

Van Devanter ended the opinion with a general discussion of what occurred in Daugherty's case as well as the nature of legislative authority.⁴⁷⁷ The opinion held that the power to investigate was "auxiliary" to the power to legislate, and both powers had been exercised since the beginning of the nation.⁴⁷⁸ In reply to Daugherty's admonition that the power of inquiry could become abusive, he answered that, while this might be true, it did not form a basis for denying the existence of the power.⁴⁷⁹ Faced with Cochran's assertion that Harry Daugherty was a former attorney general and therefore a private citizen, Van Devanter countered that this was irrelevant because the Senate's demand for Mally Daugherty was "to obtain

472. *Id.* at 168–69.

473. *Id.* at 170–71.

474. *Id.* at 171. Van Devanter penned:

The case has been cited at times, and is cited to us now, as strongly intimating, if not holding, that neither house of Congress has power to make inquiries and exact evidence in aid of contemplated legislation. There are expressions in the opinion which, separately considered, might bear such an interpretation; but that this was not intended is shown by the immediately succeeding statement (page 189) that "This latter proposition is one which we do not propose to decide in the present case because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function."

Id.

475. *Id.* at 172.

476. *Id.* at 173.

477. *Id.* at 175–80.

478. *Id.* at 174.

479. *Id.* at 175.

information for legislative purposes.”⁴⁸⁰ Further, the Senate’s demand for Mally Daugherty’s testimony was specific to an investigation as to whether the Department of Justice had comported with its duties to represent the United States.⁴⁸¹ Although, Van Devanter opined, it “would have been better” had the Senate expressly stated that the investigation was in aid of legislating, this was unnecessary because of the clear object of the investigation, namely to determine if the Justice Department had complied with the law.⁴⁸² Thus, the Court’s opinion to uphold the Senate’s investigative power over Mally Daugherty was a blow to Harry Daugherty and reinforcement that government officers remain amenable to Congress’s jurisdiction after leaving office. The Court’s opinion also enabled what Taft wanted to prevent: the uncovering of evidence that would further tarnish Harry Daugherty as well as Harding’s legacy.

C. *The Oil-Lease Fraud Cases: Sinclair, Doheny, Fall . . . and Harding Lose in the Court*

On March 1, the *New York Times* headlined on its front page that the Court voided Doheny’s oil leases with the United States government.⁴⁸³ The paper went on to report that while the Elk Hills oil lease and the construction of oil storage facilities had been obtained by fraud and corruption, the Justice Department stated that the pending appeal involving Sinclair and Mammoth Oil involved an even greater degree of corruption than that of Doheny’s dealings with Fall.⁴⁸⁴ Other major newspapers followed suit. The *Los Angeles Times* reported under the front page banner, “Doheny Beaten in Battle over Oil Reserve Leases,” that although Doheny had been acquitted in a criminal trial, the Court “[t]hroughout the decision referred by way of emphasis to the fraud and corruption marking the transactions.”⁴⁸⁵

On February 28, 1927, the Court issued *Pan-American Petroleum*.⁴⁸⁶ In an opinion authored by Justice Butler, the Court accepted McCormick’s factual

480. *Id.* at 177.

481. *Id.*

482. *Id.* at 178.

483. *See Doheny Oil Leases Voided for Fraud by High Court; His Loss Over \$10,000,000*, N.Y. TIMES, Mar. 1, 1927, at 1 (demonstrating the urgency of the Doheny oil lease story).

484. *Id.*

485. *Doheny Beaten in Battle over Oil Reserve Leases*, L.A. TIMES, Mar. 1, 1927, at 1; *see also* Albert W. Fox, *High Court Cancels Doheny Oil Leases; Corruption Found*, WASH. POST, Mar. 1, 1927, at 1 (reporting the Supreme Court’s finding that Doheny’s leases were obtained by corruption and fraud).

486. *Pan-Am. Petroleum & Transp. Co. v. United States*, 273 U.S. 456 (1927).

and legal conclusions with one significant exception. McCormick had exempted Denby from the fraud and presented him as a passive participant in the Elk Hills oil reserve transfer.⁴⁸⁷ Butler, in contrast, characterized the oil lease as being “tainted with corruption” and characterized Denby’s passivity as being a part of the fraud.⁴⁸⁸ Importantly, Butler agreed with McCormick that the government did not need to prove that the Navy suffered a pecuniary loss or any harm at all.⁴⁸⁹ Rather, the only proof necessary was that Doheny corruptly obtained Fall’s influence through the \$100,000 loan. “It is clear that, at the instance of Doheny, Fall so favored the making of these contracts and leases that it was impossible for him loyally or faithfully to serve the interests of the United States,” Butler critically noted.⁴⁹⁰

Butler found as part of fraud that Fall knew well in advance of the bidding that Doheny’s company would offer to build fuel storage facilities at Pearl Harbor, while other companies were not informed that this type of offer would have received more favorable reviews by the government, had there actually been a normal bidding process.⁴⁹¹ Moreover, the Court refused to exonerate Denby in large measure because he was not called as a witness, and he had a statutory responsibility to administer the petroleum reserves. But the Court remained silent as to whether the excuse of national security required secrecy in granting Doheny access to the California oil fields. And in sustaining the appellate court’s determination that Doheny was not entitled to any compensation, Butler noted any redress sought had to be through the legislative branch.⁴⁹²

On October 10, 1927, the Court, in an opinion also written by Butler, issued *Mammoth Oil*⁴⁹³ and upheld the Eighth Circuit in all but one substantial matter.⁴⁹⁴ Butler’s opinion sided with the Ninth Circuit and determined that regardless of whether a fraud was committed against the

487. *See id.* at 498 (“We have considered the evidence, and we are satisfied that the findings as to the matters of fact here controverted are fully sustained, except the statement that Denby signed the contracts and leases under misapprehension and without full knowledge of the contents of the documents.”).

488. *Id.* at 498, 500.

489. *Id.* at 500.

490. *Id.*

491. *Id.* at 494.

492. *Id.* at 510.

493. *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1927).

494. *Id.* at 30.

government, the June 4, 1920 Act prohibited the lease.⁴⁹⁵ “A construction of the act authorizing the agreed disposition of the reserve would conflict with the policy of the government to maintain in the ground a great reserve of oil for the [N]avy,” Butler concluded.⁴⁹⁶ The biggest difference between *Pan-American* and *Mammoth* was that the Court agreed with the Ninth Circuit that the lease violated the statutory law. Still, the opinion did not exonerate Robison. This was because Butler noted that after July 29, 1921—and therefore after he negotiated with Sinclair for the lease—Denby replaced Admiral Griffin as Chief of the Engineering Bureau with Admiral Robison and replaced a lower ranking officer who had overseen the petroleum reserves with Robison.⁴⁹⁷

Taft’s involvement in the oil lease opinion was clearly different, as evidenced by his letter to his brother Horace shortly before the Court issued *Pan-American Petroleum*:

We had one week of a four-week’s session, and begin another week this morning. I delivered six opinions last week, but don’t expect to deliver any again until next week. We have two opinions to-day from the Court, one in the California phase of the Fall and Doheny corrupt conspiracy. Doheny and Fall were acquitted by the jury, but as you will see they will not be acquitted by our Court. Doheny may escape imprisonment, but his attempted manipulation of the Interior Department will cost him a very pretty penny and it ought to be.⁴⁹⁸

Whatever Taft may have believed about Harding’s administration in 1924, by 1927, he at least had determined that Fall and Doheny committed an egregious crime against the United States. But in conveying his opinion to his brother, he also exposed that his anger may have played a role in shaping the Court’s opinion. On the other hand, in a letter written prior to the issuance of the *Mammoth Oil* opinion, he informed his son Robert that his influence over Butler’s opinion was, at best, minimal. “Pierce Butler will announce our opinion in the Sinclair case tomorrow morning,” Taft wrote.⁴⁹⁹ “He has written a very good opinion, though there are one or

495. *Id.* at 34–35.

496. *Id.* at 34.

497. *Id.* at 40.

498. Letter from WHT, C.J. of the U.S. Sup. Ct., to HT (Feb. 28, 1927) (on file with the Library of Congress).

499. Letter from WHT, C.J. of the U.S. Sup. Ct., to TT (Oct. 9, 1927) (on file with the Library of Congress).

two things I suggested to him that on the whole he thought it wiser not to put in, and I yielded.”⁵⁰⁰ Nonetheless, he concluded his letter with the observation that “[t]he case presents one of the most outrageous instances of a conspiracy of silence that I know of in the books.”⁵⁰¹

Interestingly, Taft was willing to frame Fall’s conduct as an outrageous corruption, but during the 1920s corruption appeared to occur in his favored Republican Party in three other instances. In 1921, the Court issued *Newberry v. United States*,⁵⁰² in which the justices overturned a senator’s conviction under the Federal Corrupt Practices Act.⁵⁰³ Truman Newberry (R-MI) had been accused of violating Michigan’s campaign finance laws during the 1918 primary against Henry Ford, and while Newberry prevailed on his appeal to the Court, there was an effort to remove him from the Senate following the Court’s opinion.⁵⁰⁴ On May 27, 1929, a scant thirty-four days after oral argument, the Court issued *Barry v. United States*,⁵⁰⁵ in which the justices unanimously determined that the Senate had the power to compel evidence from state officials while investigating alleged election improprieties of one of its own members.⁵⁰⁶ Senator William Scott Vare (R-PA) defeated his opponent William B. Wilson; but after discovering thousands of suspicious ballots, Governor Gifford Pinchot, also a Republican, refused to certify the election.⁵⁰⁷ In early 1927, the Senate refused to seat Frank L. Smith (R-IL) after it was uncovered that he had engaged in fraud and payoffs in his election.⁵⁰⁸

500. *Id.*

501. *Id.*

502. *Newberry v. United States*, 256 U.S. 232 (1921).

503. *Id.* at 295.

504. *See, e.g.*, PAULA BAKER, CURBING CAMPAIGN CASH: HENRY FORD, TRUMAN NEWBERRY, AND THE POLITICS OF PROGRESSIVE REFORM 3 (2012) (describing how unlawful campaign spending affected the 1918 Senate election in Michigan).

505. *Barry v. United States*, 279 U.S. 597 (1929).

506. *Id.* at 619–620.

507. *See, e.g.*, Samuel J. Astorino, *The Contested Senate Election of William Scott Vare*, 28 PA. HIST.: J. MID-ATL. STUD. 187, 192 (1961) (describing the contested race for the Pennsylvania Senate seat in 1926).

508. *See* Richard D. Cudahy & William D. Henderson, *From Insull to Enron: Corporate (Re)Regulation After the Rise and Fall of Two Energy Icons*, 26 ENERGY L. J. 35, 59–61 (2005) (explaining the fallout resulting from Samuel Insull’s illicit contributions to Frank L. Smith’s campaign for the Illinois Senate seat in 1926).

V. CONCLUSION

In 1929, Taft persisted to call Van Devanter “the ablest man on the Court.”⁵⁰⁹ While Van Devanter had authored a unanimous opinion which enabled Congress to investigate the executive, the opinion’s issuance had taken so long that it enabled two election cycles to pass in which the Republican Party maintained control of the presidency and Congress. This too, was Taft’s desire. On March 8, 1930, Taft passed away and President Herbert Hoover appointed Charles Evans Hughes. Taft did not live to see that an Ohio state court convicted Mally Daugherty of five charges of bank fraud, including lying about the bank’s funds, declaring bankruptcy with \$300,000 of the bank’s assets, and falsification of bank records.⁵¹⁰ He also did not live long enough to learn that his extrajudicial activities would be studied for their deleterious effect on the judiciary. In 1970, while the House investigated the extrajudicial activities of Justice William O. Douglas, it was pointed out that Taft had advised three Presidents.⁵¹¹ That same year, a law review note on extra judicial activities pointed out that Taft “was so close to the . . . Harding administration that many sought patronage from the national [g]overnment through him.”⁵¹² In neither the House investigation nor the article did it appear that Taft had a unique and questionable role in the oil-scandal cases.

Because Taft had been president, his example of non-recusal in the face of ethical questions could appear to be a never-again repeated event. Yet, questions may very well linger about the Court to this day. After all, Associate Justice Abe Fortas was rightfully accused of advising President Lyndon Johnson on foreign and domestic policy matters and, Justice Douglas also engaged in extrajudicial activities.⁵¹³ In 1972,

509. Letter from WHT, C.J. of the U.S. Sup. Ct., to RT (Mar. 17, 1929) (on file with the Library of Congress).

510. See *Mal S. Daugherty Convicted of Bank Fraud; Ohio Jury Finds Him Guilty on First Ballot*, N.Y. TIMES, Mar. 5, 1931, at 1 (reporting on Daugherty’s conviction in Ohio state court); *Daugherty Gets Retrial*, N.Y. TIMES, Nov. 26, 1931, at 16 (reporting the Ohio Supreme Court’s refusal to review the appellate court’s ruling); *Mal Daugherty Dies; Defied U.S. Senate*, WASH. POST, Dec. 16, 1948, at B2 (announcing the death of Mally Daugherty).

511. *Assoc. Just. William O. Douglas, Final Rep. of the Spec. Subcomm. on H.R. 920*, 445 (197) (1970) (statement of Simon Rifkind to Emanuel Celler).

512. Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 STAN. L. REV. 587, 590–91 (1970).

513. See BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 238–249 (1998) (discussing extrajudicial activities from Supreme Court justices); see generally JOSHUA E. KASTENBERG, THE CAMPAIGN TO IMPEACH JUSTICE WILLIAM O. DOUGLAS: NIXON,

Justice William Rehnquist took part in *Laird v. Tatum*, a decision in which the Court determined that the Army's domestic surveillance program was not subject to judicial review, even though as an assistant attorney general he provided Nixon advice on the legality of the program.⁵¹⁴

Most recently, the House and the Manhattan District Attorney independently subpoenaed President Donald Trump's tax records, and although the Court determined that a sitting president was not immune from a grand jury subpoena, the release of the second opinion—in reality a denial of review without comment—after the inauguration of Trump's opponent, Joseph Biden, rather than before the election, may come under question.⁵¹⁵ Perhaps this was the proper timing, but it should not escape notice that one sitting justice's spouse was heavily engaged in Trump's reelection campaign and contributed to a section of the public's belief that the election, in spite of evidence to the contrary, was corrupt.⁵¹⁶ The timing rather than the content of the opinion may have been driven by political considerations. Taft kept much of his opinions, and perhaps his extrajudicial activities—such as advising friends subject to the Senate investigation and Coolidge on the appointment of investigators—hidden from public view. Because there remains a lack of transparency on the Court, there will also remain the possibility that a justice—in a case directly involving national security or a presidential administration—will have past or present ties making recusal the better course to follow, but not doing so. Greater transparency on past associations with the government can only be healthy for the judicial branch and democracy.

VIETNAM, AND THE CONSERVATIVE ATTACK ON JUDICIAL INDEPENDENCE 69–110 (2019) (outlining details of Justice Douglas's extrajudicial activities regarding foreign policy).

514. See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 592–93 (1987) (describing Justice Rehnquist's participation in *Laird v. Tatum*).

515. *Trump v. Vance*, 140 S. Ct. 2412 (2020) (argued May 12, 2020, and decided on July 9, 2020); *Trump v. Vance*, 977 F.3d 198 (2d Cir. 2020) (argued September 25, 2020, decided October 7, 2020). In October 2020, Trump sought an emergency stay from the Court of Appeals for the Second Circuit's decision, and the court denied the stay without comment on February 22, 2021, a full three and a half months after the election.

516. See John Fritze, *Ginni Thomas, Wife of Supreme Court Justice Clarence Thomas, Apologizes for Pro-Trump Remarks*, USA TODAY (Feb. 2, 2021) (reporting Ginni Thomas's vocal support of Republicans and former President Donald Trump); Mark Sherman, *Justice Thomas' Wife Boosts Unsupported Claims Against Biden*, ASSOCIATED PRESS (Oct. 27, 2020) (describing Ginni Thomas's political social media presence).