

## THE QUEST FOR MATERIAL

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A practicing lawyer undertakes judicial biography only as an avocation. But he brings to his hobby some of the skills and the training accumulated in his law practice. The first job of a biographer is imaginative, resourceful, and persistent investigation. A practicing lawyer has had experience in the field of factual investigation. Very little material for a biography comes to him without long and persistent effort. And a great mass of material is necessary. Through the years I have collected more than 5000 documents for a biography of Chief Justice Melville W. Fuller.

No biography of Fuller has ever been written,<sup>1</sup> probably because his family refused to aid by supplying his papers. My first task was to overcome the reluctance of the surviving grandchildren. They have finally given me every scrap of paper in their possession.<sup>2</sup>

An example may illustrate the degree of persistence necessary. Fuller had a law partner in Chicago, Judge Henry M. Shepard. I knew that a great many letters had passed between them because I found many Shepard letters in the Fuller papers. But I wanted the other half of the correspondence. I made many inquiries about Judge Shepard's descendants and finally found that he had a son living in Geneva, New York. I wrote him but received no response. I wrote him every three months for two years, but without result. Then I made inquiries as to any friends whom he

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1. Fuller's life divides naturally into three periods. He was born in 1833 in Maine and lived there until 1856, when he went to Chicago. He practiced law in Chicago for thirty-two years until in 1888 he was appointed Chief Justice of the United States by President Cleveland. He served in that position until his death in 1910, a longer term than any Chief Justice except Marshall or Taney.

2. Fuller had been editor of a newspaper at Augusta, Maine, before he moved to Chicago and I turned up an anonymous series of articles which he had written to the *Augusta Age* on conditions as he found them in Chicago in 1856-57. In the attic of his summer home at Sorrento, Maine, I found ten bound volumes of the *New York Herald* to which Fuller had contributed in the period 1858 and 1861. One of his granddaughters had a trunk of his papers and I spent considerable time in two summers examining them and microfilming the great bulk of them. They were especially rich in the period of his early life and in letters from his colleagues on the Court. I have ransacked manuscript collections in several libraries and have secured several hundred letters from Fuller in the hands of descendants of close friends.

might have in Chicago. I found that a leading lawyer was a close friend. It was easy for me to persuade the Chicago lawyer to write Mr. Shepard, Jr. But he got no answer. Another letter had the same result. Then one day I had the Chicago lawyer telephone him. He said that he might have some letters from Chief Justice Fuller and that some day when he had time he would go through the family papers and see. My last resort was to go to Geneva, New York, and see him. I wrote to a lawyer there and secured all the information available about the man whom I was to see. I procured letters of introduction from all possible sources in Chicago. When I turned up in Geneva, he was glad to see me. I spent an hour showing him the pictures of Chief Justice Fuller which I had collected. He finally said: "You didn't come down here to show me pictures—you want to know whether I have any letters from the Chief Justice, don't you?" I nodded, and he said: "Wait." He returned in about ten minutes and threw two packages of letters on the table beside me. "There you are, you may keep these," he said. Since then he has sent me from time to time additional letters and pictures which he has turned up.

Of course a single letter standing alone is rarely of any significance. It is only when all of the letters are arranged chronologically and read in the background of the other material that a story emerges. In a trunk of papers of a granddaughter I found letters from each of the nineteen Associate Justices who had sat with Fuller. But again I was very much more interested in the letters from the Chief Justice to them. I have unearthed many of them after long effort. From the trunk I secured about seventy letters from Justice Holmes. I exchanged copies of these with Mark DeWolfe Howe, who has the Holmes papers, with the result that each of us now has practically the complete correspondence between them. It runs over a period of eight years and makes a fascinating story.<sup>3</sup>

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3. Here is one letter that shows Fuller's efforts to keep the dissents from growing acrimonious:

"Dear Chief

I will omit 'anomalous.' I half forgot it. I meant to speak with you also about any expression that seems to chafe the majority. Nothing was further from my mind. I shall have a chance to talk with you before anything is done I hope.

Yours ever

O. W. Holmes."

One quest was unsuccessful. In my early work, the three great mysteries of Fuller's life were:

1. Why in 1856, just after he had been elected President of the City Council of Augusta, Maine, he suddenly removed to Chicago.
2. How within two years after his arrival in Chicago, Fuller became, at the age of 25, the principal lieutenant in Chicago of Stephen A. Douglas.
3. Why President Cleveland picked Fuller, a nationally unknown lawyer, as Chief Justice.

Once I thought I had the key to all of these mysteries. Fuller was a relative of Dr. George Bancroft, the famous historian. The year before Fuller arrived in Chicago, Bancroft had been, with ex-President Fillmore, the guest of the city at the celebration of the opening of the Rock Island Railroad depot. Bancroft was a close friend of Stephen A. Douglas. Bancroft was a frequent dinner guest of President Cleveland prior to Fuller's appointment. I spent months of effort trying to confirm these surmises. I corresponded with Bancroft's grandson and with his biographers, Nye and Howe. All of them agreed that my hypotheses were possibly correct and encouraged me to work on them. I spent much time and effort examining the Bancroft and Douglas papers. I could confirm that Bancroft was close to Douglas but not that he recommended Fuller to Douglas. I could confirm that Bancroft was close to Cleveland but not that he mentioned Fuller to Cleveland. I wrote a great many letters and made many trips in search of material on these points. My first great discouragement came from a relative of Fuller's, a Boston lawyer, to whom I outlined my theory. He said: "I am quite sure that you are wrong about that; I talked more than once with the Chief Justice about our mutual relative, Dr. George Bancroft, and if Bancroft had had anything to do with Fuller coming to Chicago, or his tie with Douglas, or his appointment as Chief Justice, I am sure that Fuller would have told me about it." Now that I have so much material, including some letters from Fuller about George Bancroft, I am convinced that my original theory was not correct. I can explain the three mysteries in Fuller's life on other convincing grounds without reference to Dr. Bancroft.

A second advantage which a practicing lawyer has in

writing judicial biography is a deep-seated consciousness of the difference between primary and secondary evidence. American historians have, I believe, sometimes used newspaper sources without a full consciousness of this distinction. Newspaper sources are usually secondary. They are primary only when they contain an article by one's subject. American newspapers have never had any facility in reporting litigation, such as is possessed by the London Times, where the reports of trials are by trained barristers. American historians have often neglected the official reports of the Court in favor of newspaper reports. Here the lawyer has at least the advantage of familiarity.

Another great desideratum in a biographer is objectivity. A lawyer is well acquainted with the difference between the partisan approach and the objective approach. Although partisanship is the practicing lawyer's traditional attitude, he must strive to shed it in the preparation of a judicial biography.

#### WHO IS THE "GREAT" APPELLATE JUDGE?

*Willard Hurst*†

One characteristic so marks most judicial biography—good, bad, and indifferent—as to raise a question about its meaning. This is the let-down that occurs when the biographer has brought his subject to the Bench. While he explores birth, family, education, practice, and politics, the author usually seems to be enjoying himself. But in the chapters that deal with the judicial years, a grim tone enters the treatment; the author seems to feel that he has had his fun, and now he must pay for it. And so with conscientious plodding, he gives us the usual generalities about separation of powers, due process, equal protection, and the rest.

So many judicial biographies bear this stamp that we may interpret the fact as reflecting a remarkable lack of definition of the problems posed by "judicial" biography. Few books written about judicial years show much effort to define what questions are worth asking about a man's

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