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WILLIS VAN DEVANTER—A “RE-EXAMINATION”

Honorable Wallace H. Johnson

About a year ago, Al Simpson, our host and Honorary Chairman of this event, Jerry Parkinson, Dean of Wyoming’s College of Law, and I were discussing the Supreme Court of the United States, the Wyoming Bar, and “Frontier Justice.” Senator Simpson called our attention to the fact that Willis Van Devanter was the only Wyoming citizen who has served as an Associate Justice of the Court. He “wondered” to us aloud why more recognition was not afforded Justice Van Devanter within Wyoming’s Bench, Bar, and historical community.

The Senator stimulated my interest since the Justice began his national public career as Assistant Attorney General for Public Lands (AAG-Lands), appointed by President McKinley in 1897 and serving in that office six years until 1903. While responsible to the Attorney General of the United States, the position of AAG-Lands was then physically located in the Department of Interior, and the principal responsibility was to litigate on behalf of that Department concerning public lands and Native American issues.

I also served in the position of AAG-Lands,¹ although after the litigating responsibility for the national government was consolidated within the United States Department of Justice. My fellow panelist, Lois Schiffer, currently serves in this office, but now, and since the tenure of Van Devanter, the Division has substantially more expanded responsibilities and is named the Environmental and Natural Resources Division.²

1. Assistant Attorney General, 1972-1975, Lands and Natural Resources Division, U.S. Department of Justice.

2. All litigating responsibility for the United States is distributed within the U.S. Department of Justice. The Department has six litigating divisions that, generally, oversee the work of the U.S. Attorneys. These divisions are Tax, Civil, Criminal, Antitrust, Environment and Natural Resources, and Civil Rights. There is a U.S. Attorney in each judicial district with the office staffed by Assistant U.S. Attorneys. Each division is headed by an assistant attorney general who is appointed by the president and confirmed by the Senate Judiciary Committee—coincidentally the committee on which Senator Simpson served so ably during his senate career. Appointees to the Senate Judiciary

While at the Wyoming Bar and early in his private career, Justice Van Devanter represented the cattle industry and the Wyoming Stock-grower's Association. Our fellow panelist Chuck Schroeder is the CEO for the National Cattlemen's Beef Association (NCBA) and I had the honor of working as his General Counsel and for the beef industry.³ Of course, keynote speaker, Drew Lewis, served as Chairman of the Union Pacific Corporation and previously its railroad, a corporation that has had a major impact on the formation and development of Wyoming.

Thus, Senator Simpson stirred my interest in Willis Van Devanter, and I began to examine his background carefully. Another interesting coincidence is that Van Devanter was a visitor to Cody country and hunted here and close to Senator Simpson's own ranch, the "Bobcat," with Buffalo Bill. Senator Simpson's explanation of Wyoming history was correct: President William Howard Taft nominated Willis Van Devanter to the Court from the State of Wyoming in 1910.⁴

I. POLITICAL BIOGRAPHY

Van Devanter came to Cheyenne, Wyoming, from Cincinnati, Ohio. He came west, following his deceased father's former law partner John Lacey, who was also his brother-in-law.⁵ The Justice was born on April 17, 1859, in Marion, Indiana and came to Wyoming Territory in 1884 at the age of twenty-five.⁶ Van Devanter had a long national public career, first as an assistant attorney general and then as an appellate judge on the Eighth Circuit Court of Appeals. President Theodore Roosevelt appointed him to this post in 1903. He served on the Supreme Court of the United States from 1910 to 1937, so his national service spanned forty-four years.

This period when Van Devanter served on the Supreme Court has been referred to as the "golden era" for the Court. Distinguished justices the likes of Oliver Wendell Holmes, Jr., Louis Brandeis, Benjamin Cardozo, and the very distinguished Chief Justice Taft, who appointed Van Devanter to the high court as President, all served with him on the

Committee are usually senators who are also lawyers. This committee has, among its other duties, the responsibility of confirming senior Justice Department and Judicial Branch nominees.

3. General Counsel, NCBA, 1995-98.

4. I must note another interesting coincidence: My successor as Assistant Attorney General was Peter Taft, President Taft's grandson and the nephew of Senator Bob Taft (whose political base was Cincinnati).

5. John Lacey came to Wyoming when he was appointed chief justice of the Wyoming Territorial Supreme Court.

6. THE SUPREME COURT JUSTICES 312 (Claire Cushman ed., 1993).

bench. But, Van Devanter has come under critical attack for his service on the court and is, generally, not held in the same regard as many of these distinguished brethren. He was charged with being “out of times” with his country. This reputation may be unfair but can be accounted for by the Roosevelt “constitutional revolution” during Van Devanter’s time on the Bench.

He was also by far the least prolific writer on the court, having written a total of 346 majority opinions during his twenty-seven year tenure on the Court.⁷ In a job where productivity often is measured by written opinions, he produced very little of note,⁸ certainly when compared with Justice Holmes.⁹

Drew Pearson, noted Washington columnist, while showing his political biases, described Van Devanter as having three claims to fame: “He is a fanatical reactionary. He is a fanatical dry. And he is afflicted with what psychiatrists call ‘neurotic pen,’ described in the vernacular as ‘literary constipation.’”¹⁰

Pearson went on to note that, during the first six years of the 1930s, Van Devanter handed down only twenty two opinions—a time when the court produced 963 opinions, and Brandeis, Hughes, Roberts, Stone, and Cardozo were averaging twenty per year!¹¹ In 1935, Van Devanter wrote no opinions at all and the previous year only three. In his defense and to his credit, this was a time when he was in bad health, and it should be noted that his lack of opinions may be accounted for as a function of seniority and the way opinions were assigned.

7. *Id.* at 314.

8. Current Executive Director of the Supreme Court Historical Society, David Pride, observed in an essay on the Justice, that during his tenure on the court, “Probably his most noteworthy majority opinion was in *McGrain v. Daugherty* (1927), in which he affirmed Congress’s right to subpoena witnesses.” *Id.* at 314. It is interesting to note that Attorney General Harry Daugherty’s brother refused to testify concerning the historic scandal involving Teapot Dome, a matter then within the jurisdiction of the Lands Division, and Van Devanter supported Congressional power on a matter where he may have had historic background from his time as Assistant Attorney General or because it was located in Wyoming!

9. This is a view expressed principally by those philosophically aligned with Roosevelt. History and the passage of time may prove that Van Devanter’s approach to the role of the national government versus the states has more judicial support than that of the Court in the so-called “golden era.” A good example is Holmes “clear and present danger” test that is now outmoded whereas Van Devanter’s pro-property/states rights philosophy has made a comeback.

10. DREW PEARSON, *THE NINE OLD MEN* 186 (1936).

11. *Id.* at 187.

Van Devanter came to be known as one of the "nine old men" on the court and was attacked by President Franklin D. Roosevelt and his followers for resisting progress in a "knee jerk," reactionary fashion. Roosevelt's frustration resulted in the now-famous attempt to "pack the court" by expanding the number of Justices, thus reducing the power of the President's conservative opponents. Justice Van Devanter was regarded as "the philosophical leader of the so-called Four Horsemen (including Justices Pierce Butler, James McReynolds, and George Sutherland) who made up the Court's consistently conservative wing."¹² Van Devanter retired in 1937, thus helping to avert the constitutional crisis, but only after the pension to which he would be entitled was increased.¹³

So the picture presented of Wyoming's only Justice is of a person who "resisted progress," was a "reactionary" (as distinguished from a political conservative), who was not a "prolific" or "brilliant" opinion writer, and who only retired when President Roosevelt "paid him off" by increasing his pension.

But that is not who Willis Van Devanter really was, and that is not the snapshot picture of Wyoming's Justice that history should retain. The persona of Willis Van Devanter only emerges when he is considered in the context of the historic and turbulent times during territorial Wyoming and its early statehood before the turn of the last century.

Even his vigorous political critic, Drew Pearson, said of him:

No matter what Van Devanter's views may be, no matter how radically they may differ from those of other justices, whatever he says commands their respect and attention. Brandeis, despite differences of opinion, constantly pays tribute to his usefulness. He is one of the ablest members of the court and one of its hardest workers. He has an active and analytical mind. He knows every case thoroughly. The entire court defers to him on questions of jurisdiction. He is an excellent trial judge, keeps every detail of oral argument in mind, so that when a lawyer gets his case badly twisted Van Devanter has been known to lean forward and straighten him out.

However, Van Devanter, despite his ability, despite his usefulness, seldom has deviated from a viewpoint as outmoded as the law of

12. Claire Cushman ed., *supra* note 6, at 315.

13. *Id.* at 315.

the six-shooter which governed Wyoming in the days when Van Devanter practiced law there.¹⁴

II. TERRITORIAL WYOMING

So, how did practicing law in territorial Wyoming, albeit briefly,¹⁵ more than a century ago shape Van Devanter's philosophy and earn him his reputation on the Supreme Court?

Wyoming was organized as a territory in 1868 under the auspices of the Union Pacific Railroad. The territory was heavily dependent on the boom-to-bust cattle market, the economic fluctuations of mineral extraction, and the competition for immigration. One might observe that our economic situation is not that much different today! Some suggest, not without some support, that the railroad and the cattle interests "ran" the state a century ago. The lawyer for those powerful interests was Willis Van Devanter, and Van Devanter was very much at the center of cultural, political, and economic Wyoming.

I suspect that he was a very capable lawyer. Some proof of this is that the economic interests in Wyoming all turned to Van Devanter to represent them. He represented the Union Pacific and the Burlington railroads. He represented the Wyoming Stockgrowers and most of the powerful and sizable stock ranches in the state.

Van Devanter even represented the notorious cattle detective, Tom Horn, who was ultimately indicted, convicted, and then hanged for murder! It should also come as no surprise that he represented the purported Texan "thugs," hired by the cattleman's association to intimidate the small ranchers in Johnson County in what has come to be known as the Johnson County War (the President of the Wyoming Stockgrowers, a commission man and native-born Scotsman, John Clay, was conveniently out of the country during the "invasion").

It was not without justification that Van Devanter had such a comprehensive practice. He was by reputation thorough, well organized, and meticulous. He was second in his law school class so he was probably competent in the "law." He was certainly politically connected and, upon arriving in Cheyenne, got involved almost immediately in the political life of the territory. His first elected position was as Cheyenne City Attorney, and a year later, in 1888, he became a member of the ter-

14. PEARSON, *supra* note 10, at 188.

15. I calculate the time from his arrival in Wyoming to his appointment as Assistant Attorney General as thirteen years.

ritorial legislature.¹⁶ He served in many key Republican Party positions including state chairman and national GOP committeeman.¹⁷ He connected immediately with the political machine of Governor Francis Warren.

But the interesting question for me is what was unique about this lawyer that allowed him to emerge as a member of the high court? There were certainly many outstanding, capable, and politically "wired" lawyers then, just as there are today. There were many lawyers who represented the dominant economic interests then, as there are now. There were many who ranked high in their law school class, as Van Devanter did, who do not rise to such prominence at the bench and bar.

William Jennings Bryan criticized Van Devanter's appointment to the high court in a speech made in Lincoln, Nebraska, on November 5, 1911. He said,

And in spite of the fact that the President knew that Van Devanter was biased in favor of the great interests, he appointed him to the Supreme Bench. Upon whose recommendation was the appointment made? Will President Taft make that information public?¹⁸

This is a most interesting question about Van Devanter.

What commended him to President Taft? How did he get from being city attorney in Cheyenne to one of the most sought after judicial positions in the country when he was so clearly aligned with the "special interests," particularly when he was a frontier lawyer as opposed to a big city lawyer from New York or New England, educated in the eastern law schools?

III. VAN DEVANTER'S RISE TO PROMINENCE

There was a time in our political history when the fast track to prominence on the Federal Bench was being the law partner of a United States Senator. While it may not hurt to fall in that category, it is certainly no longer a guarantee! Today, Bar Association Judicial Nomina-

16. Claire Cushman ed., *supra* note 6, at 313.

17. He was first appointed as a commissioner to revise the territorial statutes. Then, after his service as City Attorney and in the territorial legislature, he was appointed as Chief Justice of the Territorial Supreme Court by President Harrison. He won this post by popular election at the age of thirty and after the territory achieved statehood in 1890.

18. William Jennings Bryan, Address in Lincoln, Neb. (Nov. 5, 1911).

tion Committees make recommendations. Special interest groups voice articulate opinions on the philosophy and personal habits of nominees. A prospective candidate, even for the lower bench, must be well known and acceptable to the attorney general, her deputies, and White House legal and political officials. And nominees to the high court face even more hurdles! Appointments for that court now seem to be ethnically and sexually balanced and even geographical considerations may be taken into account.

This selection, nomination, and confirmation process has, in recent years, discouraged and, indeed, disqualified many otherwise qualified candidates from reaching judicial prominence. Obtaining a judicial nomination has, in many ways, become a deliberative process standing alone, sometimes even more complicated than being confirmed by the Senate. Such a case is absolutely true today for the nominees to the Supreme Court.

Such was not the case at the turn of the last century. Van Devanter had some very loyal friends, and his loyalty to one of those friends is why, in my view, he ended up on the Supreme Court. That friend was a senator from the state of Wyoming, Francis Warren. And, the simple reason Van Devanter ended up on the U. S. Supreme Court was because of Senator Warren's tenacity.¹⁹ To Senator Warren's credit, he seemed to really care what happened to Willis Van Devanter. As much as anything, Willis Van Devanter's history is the story of Governor, and then Senator, Warren's loyalty and the good fortune that befell Willis Van Devanter by aligning with Warren when he moved to Wyoming. The pivotal event in this relationship was when Senators were still selected by the state legislature.

Warren was voted out of office by the Democratic-Populist controlled legislature in 1893. Two years later, after a crushing Republican victory at the polls, organized and made possible in large measure by the planning of state chairman Van Devanter, the Senator was re-elected. From that time on his support for his friend was undiminished.²⁰

19. I do not suggest that all members of the Wyoming delegation were not involved. They most certainly were. A prominent Van Devanter client was Union Pacific, and Senator Clarence Clark's brother-in-law was vice president of the Union Pacific Coal Company. But, Warren's correspondence has survived while Clark's has not. So historians are able to demonstrate Warren's effort and they are unable to demonstrate Clark's. Clark also served as Chairman of the powerful Senate Judiciary Committee, which, of course, reviewed Van Devanter's nomination for the Supreme Court.

20. M. Holsinger, *The Appointment of Supreme Court Justice Van Devanter: A Study of Political Preferment*, AM. J. LEGAL HIST. 324-335 (1968).

The Wyoming U. S. Senate delegation was powerful. Warren was Chairman of the Senate Appropriations Committee and Clarence Clark was Chairman of the Senate Judiciary Committee: One committee controlled the President's purse and the other his access to the Judicial Branch. It is no wonder that, after a fifteen year effort to elevate Van Devanter to high position, his confirmation was routine, and passed through the Senate in a matter of a few days! Nonetheless, getting the nomination was through consistent and persistent, political hard work demonstrably on the part of Senator Warren. Fortunately for both the Senator and his nominee, in 1910, the Senate confirmation process was not as divisive as it has become today.

No complete biography has been published on Willis Van Devanter. That work is yet to be done. However, several articles and post-graduate dissertations have been written. Several of these presentations address the issue of Warren's effort, beginning in 1891 and only successfully concluding in 1910, to reward his friend with the Supreme Court appointment. Other historians and legal scholars have concentrated on the Justice's early career and his judicial philosophy as extracted from the twenty-seven years he served on the high court. This review can be interpreted as concluding that he was not socially progressive, as we would interpret that term today. While a review of Holmes jurisprudence during their time together on the Court will reflect a maturity of view, no such picture emerges from a similar study of Van Devanter.

Further, no one has written on his successes as a frontier lawyer, which includes running Johnson County financially "ragged" to the benefit of the large cattle interests who brought the "heavies" up from Texas to hassle the small ranchers. No one has credited him with being a stable influence on the Court. Not many acknowledge the continuity and experience he brought to consideration of public lands issues. And no one credits him with challenging Franklin D. Roosevelt's policies! There are still many living who considered Roosevelt a major threat to the American way of life. Without passing any judgment on the wisdom of the New Deal, policy should be formed in a cauldron of discussion, and Van Devanter helped provide the chemical elements for that discussion.

Yet most scholars do recognize Warren's significant commitment to Van Devanter and his contribution to getting Van Devanter on the high court. While the relationship between the Senator and the Justice is interesting to those of us fascinated with the history of the Supreme Court selection process, one might ask what this has to do with a

conference on history and its relationship to future western development?

CONCLUSION

Well, this conference is devoted to a study of our frontier heritage as a precursor to future political, economic, and cultural behavior. And, there is no easier example to offer for consideration than that of Wyoming's only appointee to the U.S. Supreme Court and the way his frontier experiences and heritage conditioned his behavior as a justice.

Certainly, Van Devanter was raised and educated in Indiana and Ohio. He was neither born in Wyoming, nor did he get his formal education here. He lived less time in Wyoming than almost anywhere else! Some argue that he was an Ohio appointee coming as he did from Taft's home turf in Cincinnati.

But Van Devanter was a product of his western heritage and is as a true son of Wyoming and the American West. He spoke the language of the West. He acknowledged the values of the West. And he represented the interests of the West throughout his tenure of public service. But, would his beliefs and values then be his values and beliefs today? Would his political bloc still control?

How would Van Devanter have faced the challenges of economic growth in competition with environmental protection? Could he have stood by, adhering to his non-interference jurisprudential philosophy, in the face of the diminishing markets for beef and the threat this poses for the cattle industry and the viability of ranching as a way of life? What about the agenda for multiple uses of public lands? Would the EPA have to ascribe to more stringent tests of proving federal interest in effective seizure of environmental easements? These are our problems today, but, in only a slightly different fashion, they were Van Devanter's problems too. These were the problems of his political mentor and patron, Francis Warren. And, these are the problems that my fellow panelists address daily in their professional lives and that we are discussing here today.

As we move to consider these contemporary problems, keep in mind Wyoming's adopted son and remember the stability and wisdom he brought to the judicial process. Remember the loyal character of Senator Warren.

These are values to be admired and emulated. Circumstances may never combine again to provide a nominee to the Supreme Court from our sparsely populated territory. The political landscape and demo-

graphics have changed during the last century to make it very difficult for that to happen again.

But, it could happen. And it is more likely to happen if the legal, judicial, and educational leadership in the American West makes a commitment to achieve the excellence that is demanded of nominees to the bench today. With that commitment, and if a qualified candidate emerges who is coupled with a political patron as persistent as Francis Warren, the West may once again have another associate justice of the U. S. Supreme Court.

But whether we are formally represented on the Court demographically, we must be represented on the Court philosophically. That does not mean a "knee jerk" reactionary view. The new philosophy must be one based on reason. It is one of understanding the needs of everyone. It encompasses the ability to create a vision for the future based on the reality of our contemporary economic situation. It means recognizing the current political landscape.

This is very much the power that was exercised by Willis Van Devanter. His judicial philosophy was driven by the reality of his political power and how it could best be used to advantage. It was based on the drive to develop and settle the west. It was based on investment by the government and private industry in the future. Many of his principles then, are our principles now. But, the landscape is different today.

So, recognizing the true interest of the West is what we must do as we continue our discussions here today. But as we do so, let us recognize the differences as well as the similarities that faced Van Devanter and face us today. That will serve all of us well as we each establish our own personal vision for the future.