

## Two Kentuckians on the United States Supreme Court

During the 1920s and 1930s the United States Supreme Court numbered among its members to individuals born in Kentucky. Both men had distinguished legal careers before being elevated to the CDC position. But their backgrounds could not have been more different and their demeanor and character more just similar. In this paper I will compare and contrast the careers of Louis the Brandeis and JAMES McReynolds.

James Clark McReynolds was born in Elkton on February 3, 1860 to the son of a prominent surgeon and plantation owner. He graduated from Vanderbilt University in 1882 and then attended the University of Virginia law school graduating in 1884. He established a law practice in Nashville which was extremely successful and in 1900 became a professor of law at Vanderbilt. McReynolds dabbled in local Tennessee politics and unsuccessfully sought a seat in Congress. In spite of his lack of success he caught the eye of Republican president Theodore Roosevelt who appointed him as assistant United States attorney general in 1903 where he remained in the justice department until 1907. He focused on trust busting policies and litigation. He moved from Washington to New York and joined a large law firm and practiced in the city until 1913 when President Woodrow Wilson appointed McReynolds attorney general of the United States. He served only a short time, in part due to what has been described as his violent temper and abrasive personality. He caused headaches for president Wilson and that fact alone is the most plausible reason why President Wilson decided to appoint McReynolds to the United States Supreme Court in 1914. he served on the court until 1941 when he retired.

McReynolds is remembered for his inflexibility, his narrow constructionist views, his bigotry, anti-Semitism and his utter failure to get along with his colleagues on the court. McReynolds loathed justice Benjamin Cardozo and the other subject of this paper Justice Brandeis. The idea that a Jew would be appointed to the United States Supreme Court appalled McReynolds and he went to extreme lengths to express his dissatisfaction with sharing the bench with Jews. He barely spoke to them and he refused to join in opinions with them. At a time when justices routinely conducted business from their homes neither Cardozo or Brandeis was welcome in the McReynolds household. Brandeis had been on the court for several years when Cardozo was appointed which led to a remark attributed to Justice McReynolds "another Jew".. He spared no one he believed unfit to participate in court related business. When the first woman appeared before the court for oral argument he turned his chair away from the audience in protest. He behaved in similar fashion when black lawyers appeared before the Court ..He refused to sit beside Brandeis, and would not be photographed with him, either.

His racist views were well known and frequently influenced his court opinions. He saw nothing wrong with use of disgusting racial terms in conversation with black barbers or custodians in the Supreme Court building.

Justice McReynolds is most often remembered as one of the Four Horsemen of the Court, so called as the four members who consistently struck down Franklin Roosevelt's New Deal legislation. He despise Roosevelt and swore that he would never leave the bench so long as that "cripple" was in the White House.

But leave he did in 1941, the last of the Horsemen. He died four years later and was buried in Elkton. Not one present or former member of the Court attended his funeral. But to the surprise of many, it was

disclosed after his death that he had supported numerous war orphans and charitable institutions during World War Two.

Justice Brandeis was born in Louisville on November 13, 1856. The scion of a wealthy family, he demonstrated superior academic ability in childhood. At age 21 he graduated first in his class from Harvard Law School in 1877. Brandeis based his law practice from a Boston office but his reputation and courtroom activity was national in scope..He focused primarily on public interest cases, taking on government entities and agencies in litigation that ultimately vindicated working class citizens who were victims of governmental abuses, monopolistic trade practices and business abuses. His support of Woodrow Wilson led to a major role in formulating government economic policy and,ultimately, a nomination to the Supreme Court. His confirmation process was arduous and long..Over four months of hearings and anti Semitic currents barely beneath the surface made for a tough fight. Big business weighed in against Brandeis, stung by his many courtroom victories at their expense. He prevailed in the end but remarked disappointedly that his biggest regret was the failure of his friends and supporters to be more outspoken.

Brandeis' judicial reputation is remarkable. He is remembered as one of the best jurists among all members of the Supreme Court. In addition to maintaining a heavy judicial workload, he found time to actively participate in the American Zionist movement which culminated in the establishment of the state of Israel.

He retired in 1939 and died in 1941. He is buried under the front portico of the school of law at the University of Louisville, now known as the Brandeis School of Law.

What a study in contrasts. These two Kentucky born contemporaries, exceptional students and lawyers, members of the same Court for decades, two men who couldn't possibly be less alike in their temperament,attitudes and racial outlooks. Brandeis was typically tight lipped about the court's affairs behind closed doors. That tendency holds true regarding his relationship or lack of one with McReynolds..

McReynolds' comments about Brandeis, Cardozo and, later, Felix Frankfurter weren't shared with the public or media..But the courtroom situations described were public and the other behavior has been mentioned by more than one witness in each case. McReynolds' obituary in the New York Times says nothing about his conduct.

Writing in the American Spectator, Jeffrey Lord asks how an attorney general who stood by and watched as president Wilson re-segregated the federal government, then allowed racism to influence jurisprudence for over two decades gets a free pass from the media? He suggests the media of the day was controlled by the Democratic Party and that the party tolerated racist behavior in the interest of maintaining power. After all, he notes,McReynolds views on race were congruent with Wilson's. No need to rock that boat.

When I began writing this paper I could not have imagined that within days of my original date of presentation yet another battle royale would be emerging in the United States Senate over a vacant US Supreme Court seat. With the death of Ruth Bader Ginsberg we found ourselves once again in a situation where the news media might play a pivotal role in the dispensation of information about a prospective nominee. For better or worse the news media of today will go to great lengths to provide adequate information for public consumption. I for one am quite pleased to know that information that comes from any investigation of a prospective nominee will be public record and not information left to be whispered about behind closed doors or drawn drapes in the halls of the most powerful people in the

world. In another historic coincidence related to confirmation proceedings, the last time the Senate considered a nominee in an election year was 1916 when Brandeis was nominated.

In closing I would like to relate a personal situation that I find interesting and hope that you do as well. When I was a law student at the University of Louisville in 1975 we were visited by Associate Justice Byron White of the United States Supreme Court. Justice White was very surprised when a group of us students told him not only was Justice Brandeis buried on the front porch of our law school but that his 250,000 page collection of papers was housed in our library he seemed genuinely amazed that that was the case particularly since justice Brandeis had graduated from Harvard and he assumed that that's where his papers were located.