



THE HARLAN FUND

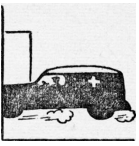
Ira Brad Matetsky

AS THIS JOURNAL HAS REPORTED, after Chief Justice Roger Taney died in 1864, members of the Supreme Court bar met to establish a fund – the “Taney Fund” – for the financial relief of his two surviving dependent daughters.¹ But the embarrassing case of the Taney family did not result in any long-term legislative solution to the problem of survivors’ benefits at the Supreme Court. During the 19th and early 20th centuries, Congress routinely passed private bills for the benefit of a deceased Justice’s widow – a “gratuity” equal to one year’s salary – as was often done for the widows of Members of Congress and some other high-ranking officeholders. But this was an uncertain and limited way of providing financial security for Justices’ survivors. Nevertheless, Congress would not enact general legislation providing survivors’ benefits for widows of Justices until 1954.² And it was not

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¹ *Proceedings of the Bar of the Supreme Court of the United States, February 1871* (pamphlet), reprinted in 11 Green Bag 2d 373 (2008) (transcript of proceedings of a special meeting of the Supreme Court Bar convened “to take some action in reference to a provision for the family of the late Chief Justice of the United States”). See Ross E. Davies, *The Judiciary Fund: A Modest Proposal that the Bar Give to Judges What Congress Will Not Let Them Earn*, 11 Green Bag 2d 357 (2008) (discussing the efforts for the benefit of Taney’s daughters); Ross E. Davies, *The Judiciary Funded: The Generosity of David Dudley Field*, 14 Green Bag 2d 435 (2011) (discussing substantial contributions by one prominent lawyer to that fund).

² Act of Aug. 28, 1954, ch. 1053, Pub. L. 83-702, 68 Stat. 98 (1954), formerly codified at 28 U.S.C. § 375.



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until 1972 that the Justices were authorized to join the general pension system for federal judges, assuring their surviving spouses of retirement benefits.³ In the interim, evidence to support such legislation piled up, as other judicial families suffered through circumstances like the Taney's.

For example, some 40 years after the Supreme Court bar met to raise money for the Taney Fund, their successors found themselves leading a similar project. Justice John Marshall Harlan served on the Court from 1877 until his death on October 14, 1911. At the time of his death, Harlan was a popular public figure and his work on the Court was esteemed. But he was not rich. To the contrary, Harlan's biographers report that the Justice was in debt throughout his tenure on the Court.⁴ Although he lived in comfortable style, "[d]ebt made Harlan think of himself as impoverished."⁵ And, when he died in 1911, he left an estate worth only \$13,000 to his widow (Malvina Shanklin Harlan) and two unmarried daughters (Laura Cleveland Harlan and Ruth Harlan).⁶ By the next year, the bar was discussing what it might do in light of "the unfortunate financial condition in which Mr. Justice Harlan left his family."⁷ It was clear that the customary one-time appropriation of one year of the late Justice's salary would be far from sufficient to address the family's needs.⁸

³ Act of Aug. 22, 1972, Pub. L. 92-397, 86 Stat. 579, codified as amended at 28 U.S.C. § 376.

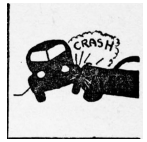
⁴ See generally Linda Przybyszewski, *The Republic According to John Marshall Harlan 187-91* (1999); Tinsley E. Yarbrough, *Judicial Enigma: The First Justice Harlan* 164-69 (1995); Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* 143-45, 188 (1992).

⁵ Przybyszewski, at 188.

⁶ The Harlans had six children, three sons and three daughters. Their eldest daughter died before Justice Harlan did.

⁷ *Id.*, citing a newspaper clipping from the *New York Age*, Jan. 6, 1912 (copy located in the Harlan Papers at the University of Kentucky).

⁸ See *In Aid of Mrs. Harlan*, *New York Times*, Jan. 17, 1912, p. 1, col. 1; Act of Aug. 26, 1912, ch. 408, Pub. L. 62-340, 37 Stat. 595, 611 (1912) (appropriating "[t]o pay the widow of John Marshall Harlan, late a Justice of the Supreme Court of the United States, \$12,500").



Malvina Shanklin Harlan, married to John Marshall Harlan from 1856 until his death in 1911, was left by her husband without the financial resources to carry on with the stately lifestyle the couple had enjoyed in Washington, DC during the Justice's long tenure on the Supreme Court.

In April 1912, a letter went out, soliciting donations for a fund of at least \$40,000 for the benefit of Mrs. Harlan and her daughters.⁹ It reported the unfortunate circumstances in which Justice Harlan's survivors found themselves, and requested that each recipient contribute \$500 to a fund that would be placed in trust in the hands of the Supreme Court's Reporter (Charles Henry Butler) and Marshal (John M. Wright).¹⁰ The letter was signed by ten of the most prominent and successful eastern (mostly New York) lawyers of the day, including politically and socially active Republicans and Democrats: Joseph H. Choate, Lewis Cass Ledyard, Elbridge T. Gerry, William D. Guthrie, Victor Morawetz, Francis L. Stetson, John L. Cadwalader, William Nelson Cromwell, John G. Johnson, and Elihu Root. A letter signed by all of these eminences would certainly have received respectful attention from its recipients.¹¹

⁹ The letter is reproduced below.

¹⁰ Butler served as the Court's Reporter (the position that today is known as Reporter of Decisions) from 1902 to 1916. See generally Charles Henry Butler, *A Century at the Bar of the Supreme Court of the United States* (1942). In addition to being an officer of the Court on which Harlan served, Butler was also related to Harlan: Harlan's son, John Maynard Harlan, was married to Butler's wife's sister. *Id.* at 172. Harlan and Butler also wrote a law treatise together. John Marshall Harlan & Charles Henry Butler, *Treatise of the Law of Marriage* (1907).

¹¹ Brief biographies of the ten signatories are provided below.



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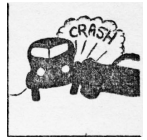


Chauncey M. Depew, donor to the Harlan Fund.

One of those recipients was Chauncey Depew, the Chairman of the Board of the New York Central Railroad. Depew had represented New York for two terms in the U.S. Senate, where for two years his service overlapped with Root's. There is a handwritten note in the margin of Depew's copy of the letter: "Check for \$500. mailed Sept 16, 1912."¹² It is Depew's copy of the letter, located in his papers at George Washington University, that is reprinted below.

¹² Chauncey Depew Papers, Gelman Library, George Washington University, Washington, D.C., box 1, folder 10.

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Although the letter soliciting donations for the Harlan Fund is headed “(CONFIDENTIAL),” word that funds for the Harlan family were being raised soon became a matter of public knowledge. In August 1912, the *New York Times* reported:

AID FOR HARLAN FAMILY
Leading Lawyers Start \$40,000 Fund
For Justice’s Widow and Daughters.

WASHINGTON, Aug. 9. Prominent members of the bar of the Supreme Court of the United States have started a movement to raise \$40,000 for the relief of the widow and two daughters of the late Associate Justice John M. Harlan. They have sent a letter to members of the bar, asking for \$500 contributions. The signers of the letter are Joseph H. Choate, Lewis Cass Ledyard, Elbridge T. [Gerry], William D. Guthrie, Victor Morawetz, Francis L. Stetson, John L. Cadwalader, William Nelson Cromwell, John G. Johnson and Elihu Root.

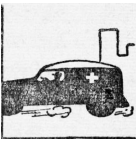
Justice Harlan, after a long and distinguished career, died leaving his family unprovided for. The letter states that the writers are informed that the Harlan home in Washington has been mortgaged to its full value.¹³

Malvina Shanklin Harlan lived until 1916,¹⁴ Laura Harlan until 1949,¹⁵ and Ruth Harlan until 1971, the same year that her nephew, the second Justice Harlan, retired from the Supreme Court. Although the records of the Harlan Fund have not yet been located, one hopes from the vantage point of one hundred years later that the fund succeeded in its mission and provided the assistance to Justice Harlan’s survivors that its creators had envisioned.

¹³ The New York Times, Aug. 10, 1912, p. 6, col. 6.

¹⁴ Malvina Harlan wrote an autobiography, which was published several years ago and received wide attention. Malvina Shanklin Harlan, *Some Memories of a Long Life* (2002) (originally written ca. 1915).

¹⁵ During the 1920s, Laura Harlan served as White House Social Secretary to Florence Harding and Grace Coolidge. She later became “a successful real estate broker in Washington.” Amelia Newcomb, Epilogue to *Some Memories of a Long Life* 205, 207.



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SIXTY WALL STREET

New York, April 29, 1912.

(CONFIDENTIAL)

Dear Sir.-

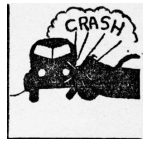
We are credibly informed that Mr. Justice Harlan, after his long, laborious and distinguished career of thirty years and more upon the Bench, died leaving his family wholly unprovided for, the house in Washington which formed their home being mortgaged up to its full value, and, outside of that equity, there is, as we are told, less than \$2500, to which Congress will probably add, as it did in the case of Mrs. Brewer, a year's salary of \$12,500., but that will only yield about \$600 or \$700.

We do not think that the Bar of the Supreme Court should allow such a state of things to continue, or that the wife and two daughters of the late Justice should be permitted to remain in this really destitute condition. Although we did not always agree with Justice Harlan's decisions, there is no doubt of his earnest and patriotic desire to discharge the great duties of his office according to his best lights.

Under these circumstances, we propose each to contribute, for the relief of his family, that is to say, of his wife and two daughters, the sum of \$500., in the hope of raising for their benefit not less than \$40,000., the same to be placed in the hands of the Honorable Charles Henry Butler, the Reporter of the Court, and of the Marshal of the Court jointly, in trust to apply the same in their discretion to the use and benefit of Mrs. Harlan and her daughters, either principal or interest, or both.

Mrs. Harlan is an aged lady, not much younger, we believe, than her husband, and the two daughters are of middle age, but have not been

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qualified for any profession or business by which they could earn their livings, although they are now struggling to do so.

If you are disposed to join in this plan and make a contribution for the same object, we shall be glad to have you do so, and to send your check, for any amount that you may deem suitable, to Hon. Charles Henry Butler, 1535 I Street, Washington, D. C.

Yours very truly,

Joseph H. Choate
Chauncey M. Depew
White Terry
William D. Johnson
John D. ...
John D. ...
John D. ...
John D. ...
John D. ...
John D. ...
John D. ...
John D. ...

Letter from Joseph H. Choate et al. to [Chauncey Depew], Apr. 29, 1912, Chauncey M. Depew papers, Special Collections Research Center, The George Washington University.



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SIGNERS OF THE HARLAN FUND LETTER

Joseph H. Choate (1832-1917), a New York attorney regarded as one of the leading trial lawyers of his day, as well as a successful practitioner at the Supreme Court bar. He successfully argued against the constitutionality of the 1894 federal income tax law in *Pollack v. Farmers' Loan & Trust Co.* (1895), and defended the claims of Stanford University as the beneficiary of Leland Stanford's will in *United States v. Stanford* (1896). Choate served as U.S. Ambassador to the United Kingdom under Presidents William McKinley and Theodore Roosevelt (1897-1905), and as a President of the Association of the Bar of the City of New York.

Lewis Cass Ledyard (1851-1932), a grandson of Lewis Cass (governor of and a U.S. Senator from Michigan and the Democratic Presidential nominee in 1848). Ledyard was an antitrust law expert in the early days of that field, during which he oversaw the restructuring of the American Tobacco Company following the Supreme Court's decision in *United States v. American Tobacco Company* (1911). Ledyard also served as corporate counsel to the United States Steel Corporation and the New York Stock Exchange, and as personal counsel to J.P. Morgan. A prominent figure in New York society, Ledyard was a founder of the New York Public Library, a trustee of the Metropolitan Museum of Art and the Pierpont Morgan Library, Vice President of the Frick Collection of Art, and President of the Association of the Bar of the City of New York. He is best remembered today as a name partner of the New York firm of Carter, Ledyard & Milburn.

Elbridge T. Gerry (1837-1927) was named after his grandfather, a signer of the Declaration of Independence and a Vice President of the United States. As a New York attorney, the younger Gerry served as counsel for the American Society for the Prevention of Cruelty to Animals (ASPCA) and founded the New York Society for the Prevention of Cruelty to Children, the world's first child protective agency, which for many years was referred to as the "Gerry Society" in recognition of his contributions.

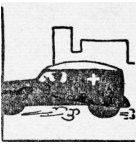
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William D. Guthrie (1859-1935) started his legal career as a messenger with the New York firm of Blatchford, Seward, Griswold & Da Costa (a predecessor of Cravath, Swaine & Moore), working his way up through the ranks until he became a name partner. His clients included E.H. Harriman, Bethlehem Steel, International Harvester, the Pinkerton Detective Agency, and “Buffalo Bill” Cody. An expert in constitutional law and for ten years a professor at Columbia University, he was influential in propounding the doctrine of “dual federalism.” In *Pollock v. Farmers’ Loan & Trust Co.* (1895), he successfully argued (along with Choate) that the federal income tax law of 1894 was unconstitutional. But he later was unsuccessful in arguing the unconstitutionality of progressive state income taxes and the federal corporation tax. In *Pierce v. Society of Sisters* (1925), he successfully argued the unconstitutionality of state laws requiring that all children attend public schools.

Victor Morawetz (1859-1938) first became known as author of *The Law of Private Corporations* (1882), which was recognized as the first important book in its field. He became a leading corporation and railroad lawyer, serving as general counsel and chairman of the board of the J.P. Morgan-controlled Atchison, Topeka & Santa Fe Railway and taking part in the formation of the United States Steel Corporation. A speech he gave in November 1909 calling for the creation of several banking districts under the ultimate direction of one central control board, and his subsequent lobbying of President Woodrow Wilson on behalf of his proposal, led to the creation of the Federal Reserve Board. He also served as a leading consultant to the Federal Trade Commission.

Francis L. Stetson (1846-1920) first became prominent as a trial attorney, then eventually became a leading corporation and railroad attorney, serving as general counsel to the International Mercantile Marine Company, the Northern Pacific Railway, the Southern Railway, and the United States Rubber Company. He was a founding partner of the firm of Bangs & Stetson, a predecessor of today’s Davis, Polk & Wardwell. There, he organized J.P. Morgan’s United States Steel Corporation, which he also served as general counsel. Stetson represented Democratic candidate Samuel J. Tilden in the controversy



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over the 1876 presidential election and acted as an attorney for President Grover Cleveland. He also served as President of the Association of the Bar of the City of New York. His estate in Ringwood, New Jersey is now the New Jersey State Botanical Gardens.

John L. Cadwalader (1836-1914) co-founded the law firm now known as Cadwalader, Wickersham & Taft, after having served as Assistant Secretary of State from 1874 to 1877. He served as a President of the Association of the Bar of the City of New York and as President of the New York Public Library, where he played a key role in planning the library's main building at Forty-Second Street and Fifth Avenue in Manhattan. He served as a trustee of the Carnegie Endowment for International Peace, the Metropolitan Museum of Art, and the New York Zoological Society.

William Nelson Cromwell (1854-1948) was a founder of the law firm of Sullivan & Cromwell. As counsel for the New Panama Canal Company, he played a key role in lobbying the U.S. Congress to build a canal across Panama rather than Nicaragua, oversaw legal aspects of the transfer of the Canal Zone to the United States, and helped negotiate treaties with Colombia and Panama. As an attorney, he was known for his expertise in business reorganization; he was also active in charitable causes, particularly those involving aid to the blind.

John G. Johnson (1841-1917) was a Philadelphia practitioner who argued 168 cases before the Supreme Court on behalf of clients including the Sugar Trust, the American Tobacco Company, and the Northern Securities Company. His clients also included many large corporations, banks, and railroads, such as J.P. Morgan & Co., the Pennsylvania Railroad, the New York Central Railroad, and the United States Steel Corporation. Johnson reportedly declined offers from Presidents James Garfield and Grover Cleveland to appoint him to the Supreme Court, as well as President William McKinley's offer to name him Attorney General. Johnson's extensive art collection, which he left to the City of Philadelphia, forms the core of the early European works collection at the Philadelphia Museum of Art.

Elihu Root (1845-1937) began his career in private practice in New York City, where his clients included William "Boss" Tweed,

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Jay Gould, Chester A. Arthur, Charles Anderson Dana, and E.H. Harriman. From 1883 to 1885, he served as U.S. Attorney for the Southern District of New York. Later, he was Secretary of War under Presidents William McKinley and Theodore Roosevelt from 1899 to 1904. During a return to private practice, Root served as President of the Association of the Bar of the City of New York from 1904 to 1905. He returned to government service as Secretary of State from 1905 to 1909. From 1909 to 1915, Root served a term as a U.S. Senator from New York, one of the last senators to be chosen by a state legislature before the adoption of the Seventeenth Amendment. He was awarded the Nobel Peace Prize in 1912 for his efforts to foster international cooperation, and served as President of the Carnegie Endowment for International Peace from 1910 to 1925. Root's name was put forward for the Republican presidential nomination in 1916, although he declined to be considered due to his age. After World War I, he was actively involved with the formation of the League of Nations and was appointed by President Warren Harding as a delegate to the Washington Naval Conference of 1921-22. He was among the founders of the American Law Institute in 1923.

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