Maryland Law Review

Volume 47 | Issue 3 Article 3

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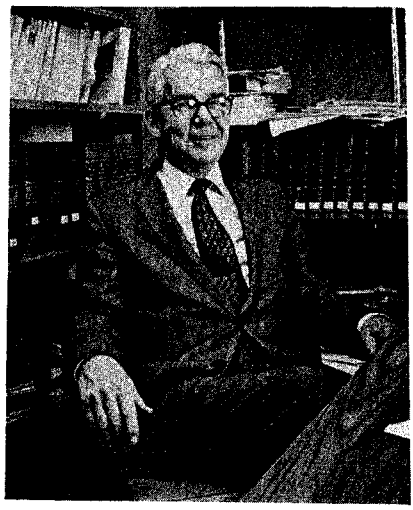

John F. Davis

TRIBUTES TO PROFESSOR JOHN F. DAVIS

OSCAR H. DAVIS*

I first met John Davis in 1938 or 1939, when he was an assistant general counsel at the Securities and Exchange Commission, interviewing job applicants, and I was seeking a position with the federal agencies of the New Deal. As I remember it, the Commission offered me a position but I went elsewhere—to the Department of Justice. I did not really come to know John until 1950, when he joined the Office of the Solicitor General, where I had been since 1949. Since then we have been close friends, first during his tenure in the Solicitor General's Office, later when he became Clerk of the Supreme Court of the United States in October 1961, and during the succeeding years when he taught at the Law Schools of Georgetown and the University of Maryland. A sign of our friendship is that we have had lunch together once a week since he became Clerk in 1961. Even more significant for me is that John has been enormously helpful during my repeated periods of illness in recent times. He is an intelligent, sharp, caring, humorous and interested

* Since 1982, United States Circuit Judge, United States Court of Appeals for the Federal Circuit; from 1962 to 1982, Judge of the United States Court of Claims.

companion with whom it is a delight to associate and to whom I will always be grateful.

I worked with John in the Solicitor General's Office for over ten years. He personally argued some fifty-seven cases in the Supreme Court, and he wrote and revised many more briefs (and other papers) for the Court. Although there were, of course, types of cases he did not relish, he never refused to argue a case—no matter how difficult or unpleasant. And he presented all kinds of cases, criminal and civil, not specializing in SEC cases simply because he had served there. Perhaps his best known and most important argument (a successful one) was in the big antitrust case of *United States v. E.I. Du-Pont de Nemours & Co.*[1]

As an advocate, John's principal hallmarks were candor and clarity. He always made his position clear to the Court, and he never tried to fool or befuddle the Justices—as so many advocates seem to do. He stood on his case whatever its own merits, and presented the most persuasive arguments he could. In a word he did the very best he properly could with the position he was supposed to proffer. When John retired as Clerk, Chief Justice Burger publicly recalled from the bench that for many years before he was appointed Clerk, "Mr. Davis was one of the able advocates who appeared regularly before the Court."[2]

With his extensive experience as a Supreme Court advocate (1950-1961) and Clerk of the Court (1961-1970), John was especially equipped to teach the seminar on Supreme Court litigation he conducted for so many years at the law school of the University of Maryland. He made very good use of that experience, threading it into the fiber of the seminar and thrusting advocacy-before-the-Court into the professional lives of his students. In that sense he has been concerned mainly with our highest tribunal for almost forty years—since he came to the Solicitor General's Office in 1950. His career has been distinguished not only by the subject matter of his interest but also by the high quality of his performance and contribution.

I rejoice that I have this formal opportunity to salute John F. Davis on his retirement from teaching. I pay tribute to him both as a good friend and as a sterling Supreme Court buff, in the twin roles of a participant in the litigation before that tribunal and an extremely knowledgeable and perceptive observer.

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1. 353 U.S. 586 (1957).
2. 398 U.S. vii (1978).

MILTON V. FREEMAN*

John Davis has done it all. He has been active in every aspect of law: extensive government service in all three branches of the federal government, teaching, even private practice in New York and Washington. His portrait hangs in the Supreme Court of the United States, where he served for ten years as the chief administrative officer of the judicial branch of the United States government. It is good that the University of Maryland recognizes John's talents in this issue. Because of his modesty and reserve, most unusual in members of our profession, no other written record of his career exists to my knowledge, although of course his accomplishments are well and widely known in Washington.

I first met John Davis at the Securities and Exchange Commission (SEC) in the mid-1930s. I had been there since I left law school in 1934. John joined the Commission a few years later after a stint on Wall Street and service with the Interior Department Petroleum Administration and the staff of the Senate Committee on Railroad Reorganization.

When John came to work at the SEC he was placed in a supervisory position and was unfortunate enough to be required to supervise me. His title was Assistant General Counsel, and I was a supervisory attorney or some such thing. I immediately found that not only did he have a superior intellect and superior legal skills, but he was a very serious person who did not take himself too seriously. My respect and admiration for him dates from his very first day on the job, and we have remained good friends for over fifty years.

I can speak most about our time together at the SEC, and I have space for only a few examples. John was assigned to supervise administration of the law, which included responsibility for interpreting the statutes the Commission administered, particularly the Securities Act of 1933 and the Securities Exchange Act of 1934. The staff of the Commission was of the highest caliber, a fortunate circumstance due to the very Depression whose effects we were trying to alleviate. This high level of competence was necessary because we constantly dealt with the largest firms and most sophisticated lawyers in the field of finance, particularly those in New York.

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The young New Dealers aroused a great deal of resentment in many quarters by telling older and more experienced persons that their clients would be required to accede to new regulations. Nevertheless, there grew to be a substantial amount (I do not wish to push the point too hard) of acceptance of the rationality of the positions taken by the staff. This was in large part due to the carefully reasoned and logical approach taken by John Davis and his predecessors and the professional manner in which they conducted their business.

In those days, the staff always was available to discuss problems in person and to answer written inquiries. Under the circumstances, the quality of the personnel the public met was of prime importance.

One of the first major challenges the SEC faced after John came was a substantial effort to revise the securities laws to eliminate some of the burdens on issuing companies. The Chairman, William O. Douglas, agreed to hold meetings with the staff to discuss the complaints of Wall Street. John was designated to take a leading role in the legal aspects of these negotiations.

The meetings were peculiar in many ways. For example, they were held not on the premises of the Commission but at the Metropolitan Club a block away under the sponsorship of Colonel Milbank, counsel to the New York Stock Exchange. Another peculiarity, in light of present public excitement about the evils of insider trading, was that a major goal of Wall Street was the repeal of the insider trading section which forfeited to corporations the proceeds of short-term profits obtained by their officers, directors, and principal stockholders.

At first I joined John in these meetings and was impressed with the calmness, steadiness, and courtesy with which he listened to and responded to presentations, many of which could not be regarded as having any merit from the Commission's point of view. Fortunately, just before Chairman Douglas was appointed to the Supreme Court by President Roosevelt, he made a public statement to the effect that the Wall Street proposals undermined the effectiveness of investor protection.

When Douglas left the Commission, Jerome Frank was appointed Chairman, but not too long thereafter he also left to become a judge of the Second Circuit. We had an extraordinarily able staff at the SEC, but it was impossible to keep the staff at its high level because of world developments. Not only were our chairmen being promoted to the courts, but the imminent prospect of war and the preparations it made necessary resulted in a drain of some of

our best people, either directly into the military service or into war-related agencies.

A substantial recruiting effort followed to replace those departing with high caliber substitutes. The program became even more difficult after Pearl Harbor when the government decided the SEC was not essential to the war effort and would be moved to Philadelphia. That required a major effort to retain current staff and move their homes and to seek new people who were willing to come with the Commission and live in Philadelphia. The move was accomplished with diligence and skill, and the staff of the Commission picked up a number of first-rate talents.

John had been Assistant General Counsel while we were in Washington, but when the Commission moved to Philadelphia, John became the chief legal officer of the Commission and was given the title of Solicitor. I was one of the Assistant Solicitors. Soon, however, John himself defected to serve in the Coast Guard and our SEC partnership terminated.

For me it was a pleasure to deal with John in all the various aspects of our work. He had not only a keen legal mind, but an openness to new ideas and suggestions. His quiet and reserved personality served well to diffuse many situations that could have been confrontational in a time when the New Deal was not generally accepted by the business community or their counsel.

Unlike today, the Commission was under constant attack instead of having the support of Wall Street. Substantial courage was required to stand up to the attacks constantly directed at the Commission and its staff. John Davis had this quality in abundance. His absolute integrity and insistence on high standards assured that no unjustified pressures from the business community would meet with anything other than polite but determined resistance—which is not to say that John was not open to suggestions reasonably presented, whether or not they were ultimately accepted.

John served the SEC supervising a substantial portion of its work in a most able and conscientious way. For this service in addition to his other services it certainly can be said that he has deserved well of the Republic.

DANIEL M. FRIEDMAN*

Other contributors to this issue have dealt with John Davis as a lawyer with the Securities and Exchange Commission, as an advocate before the Supreme Court, and as a law teacher. I shall touch briefly on an aspect of his career that is perhaps not as well known but is nonetheless equally important and impressive: his service as Clerk of the Supreme Court from 1961 to 1970.

To most people, the Clerk of the Supreme Court is a little-known and mysterious figure. Impressively dressed in formal attire with a cutaway coat, striped trousers, and a morning tie, he sits at the Clerk's desk at the side of the bench during most oral arguments. The public knows him primarily as the person who administers the oath to lawyers who have been admitted to practice before the Supreme Court. In fact, like the tip of an iceberg, this visible part of the Clerk's activities is but a minuscule portion of the important duties he performs at the Court.

When John Davis was called to the Clerk's post, he already had served for many years in the Office of Solicitor General and had argued more than fifty cases before the Supreme Court with great distinction. He was "called" not in the figurative sense that barristers are called to the bar in England, but quite literally. While traveling in England he received a telephone call from then Chief Justice Earl Warren, asking him to take the position because the former Clerk, James R. Browning, was leaving to accept appointment to the Court of Appeals for the Ninth Circuit. John accepted, and the resulting loss to the Office of the Solicitor General (where I then was working) was a great gain for the Supreme Court.

In my work in the Solicitor General's Office I had frequent contact with John as the Clerk. He was a pleasure to deal with. He, of course, brought to his work at the Court great knowledge of and experience with the Court's operations and procedures and was able to put these skills to immediate and profitable use. As Clerk he was knowledgeable, helpful, friendly, reasonable, and firm when necessary.

At an earlier stage in the Supreme Court's history the Clerk of the Court had an exceptionally high income. In those days, instead of receiving a salary, the Clerk was permitted to retain the portion of

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all the fees he had received that remained after he had paid the expenses of his office. The income was so substantial that in 1883 a judge of the United States Court of Claims, J.C. Bancroft Davis, resigned his judicial position to accept appointment as Clerk. Unfortunately, by the time John Davis became Clerk, his compensation was only a set salary.

The Clerk's Office is the point of contact between lawyers who have matters before the Court and the Court itself. Lawyers who are uncertain about how to proceed and who seek advice from the Court call the Clerk's Office. When lawyers wish to communicate information to the Court or to a particular Justice, they write to the Clerk. In many ways, the Clerk serves as the intermediary between the Court and the bar. John Davis performed that function superbly.

The high esteem in which the Court held John Davis is reflected in Chief Justice Burger's statement from the bench on June 8, 1970, when he announced John's retirement as Clerk. The Chief Justice said:

> On behalf of the Court I announce with regret the retirement of one of its able and trusted officers, Mr. John F. Davis, Clerk of the Court since 1961. For many years before he was appointed senior officer of the Court, Mr. Davis was one of the able advocates who appeared regularly before the Court.
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> Your departure is an occasion for regret on our part, Mr. Davis, but we wish you happiness and continued success in the years ahead.[1]

During John's term as Clerk, a group of his friends commissioned his portrait and presented it to the Court, where it now hangs. At the formal presentation ceremony Justice Harlan spoke about John Davis. He commented that during the period when John was in the Office of the Solicitor General and regularly arguing cases before the Court, the members of the Court would review the calendar of cases to be argued at the next session. Justice Harlan said that whenever the Court saw that John Davis was assigned to argue a case, they knew it was probably a difficult one that required his special skills as an advocate. He was no less skilled in the legal and administrative tasks of the Clerk. His tenure in that office will long be remembered as a most important contribution to the efficient and effective functioning of the Court.

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1. 398 U.S. vii (1970).

WILLIAM L. REYNOLDS*

John Davis came to Maryland to teach in 1971. John, Mike Kelly (soon to become Dean), and I were the most junior faculty (although John could have been called the most senior as well—he was sixty-three). As a result we shared a suite of offices in a remote corner of the school. We became close friends.

John did not rest on the many laurels he had earned before coming into teaching, but instead immersed himself enthusiastically in the new job. For many years John taught a course on injunctions, with an occasional foray into administrative law. But John's true love in teaching was the seminar he developed on Supreme Court litigation.

The seminar introduces students to the workings of the Court and the manner in which constitutional law is made. It culminates with each student writing a brief on a case pending in the Court and then arguing before a "Court" composed of other students.[1] The seminar has been a great success, greatly enjoyed by the many students who have participated.

John and I had lunch together almost every Tuesday for sixteen years. During that time I have moved from youth to middle age but John has not changed at all. He remains keenly interested in all that happens in the wide world. Most of all he is interested in the workings of that mysterious body, the Supreme Court. But John's interests are not limited to the law, of course—another passion is his beloved Orioles. We have spent many a happy hour discussing their prospects and, in recent years, their problems. One memorable experience we shared was being at Memorial Stadium for the first playoff game in 1979 and reveling in John Lowenstein's tenth inning, game-winning home run.

John Davis has never been one to talk much about the past except to the extent that it bears on the present. I have found this an unfortunate trait because it has limited my ability to experience vicariously his endlessly fascinating career. Nevertheless, over the years I have heard many wonderful vignettes of that career: travelling from Maine to Paris as a young man in the late 1920s; attending the Harvard Law School at its height; practicing law in New York

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1. John occasionally would argue one side of a case; those who know him realize that was a responsibility he took very seriously.

City in the depths of the Depression; going to Washington with all the other young geniuses to start the New Deal; toting a gun in Texas to enforce federal law there; representing Alger Hiss. I shall recount one little-known story because it deserves to be on the public record.

In 1957 John argued the case of *United States v. E.I. DuPont de Nemours & Co.*,[2] in which the Supreme Court adopted a novel idea of antitrust law and required Dupont to divest itself of its twenty percent ownership of General Motors stock. Naturally, the defendants had the best counsel in the country and every one of them was present at oral argument. Assistant Solicitor General Davis, however, walked in by himself, carrying only his briefcase, with no one to assist him. It was a classic scenario: the lone government lawyer against the posse of well-paid attorneys representing the defendants. One of the lead defense counsel appreciated this immediately; he leaned over to John, shook his hand, and said, "Congratulations, you've won."

From John I have learned much. I have witnessed the excitement of Washington in the early New Deal when the bright, young lawyers set out to save the country, and I have experienced the thrill of hearing about the argument in *Brown v. Board of Education*.[3] John has taught me much about oral argument and brief writing, especially the need for professionalism and integrity in everything an advocate does. I was fortunate enough to have John help me overcome the young professor's "first article" problem—we wrote together about plurality opinions in the Supreme Court.[4] That process led to my deep interest in judicial administration and decisionmaking, an interest John has shared and stimulated.

John is excellent company, intelligent and knowledgeable, kind and yet with a bit of a bite in his conversation. He is involved with the people in his life, sharing both good times and bad. Together, John and Jane Davis—along with their melange of family, friends, and animals—have wonderful, rambling parties.

John Davis has been a great friend. This law school and I are both very lucky that he came here to teach.

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2. 353 U.S. 586 (1957).

3. 347 U.S. 483 (1954).

4. Davis & Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59.

G. EDWARD WHITE*

When I asked John Davis to "cooperate" with this exercise in paying tribute to his career, he responded by providing me with a bare-bones summary of his professional life. The summary had been prepared in 1970 and virtually no effort had been made to update it. Nothing listed in the summary was inaccurate, but much was left out, and it seemed to minimize accomplishments and ignore contributions. I have been John's son-in-law for twenty-two years and thus appreciate that he has had a very distinguished career, but one certainly would not learn that from John. Indeed it is remarkable that he even consented to all this public appreciation.

John was the third of five children born to Marshall and Marguerite Gifford Davis of Portland, Maine. He grew up in a large frame house on Orland Street, spending parts of summers on a farm in Turner, about twenty-five miles north of Portland. He attended Bates College in Lewiston, graduating Phi Beta Kappa in 1928. After his senior year he traveled around the world with a Bates debating team, reaching places like Australia, South Africa, and England, and debating issues like the merit of the Kellogg-Briand treaty and the legitimacy of Prohibition. The trip took nearly a year, and the following fall he enrolled in Harvard Law School.

John was on the editorial board of the Harvard Law Review, but apparently was not enthusiastic about the Socratic teaching method then in use at Harvard. After his first year, whenever he was called upon in class he would respond, "unprepared," even when that was not the case. It strikes me as noteworthy that a man with international experience as a debater would choose not to demonstrate his ability in class, but John, almost from the beginning of his professional career, seems to have regarded his accomplishments as nobody else's business. He once told me that at Bates he took courses in subjects like foreign languages in which he had no native ability, apparently as a combination of an intellectual challenge and an exercise in self-control, two activities John likes to pursue.

After Harvard, John practiced briefly in New York with Robb, Clark, and Bennett, and in 1933 joined the Interior Department, assigned to the Petroleum Administrative Board. I asked him why he

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left private practice for the New Deal, as did many others of his generation, thinking this might perhaps elicit some discussion of the political climate of the 1930s, but John indicated it was simply because he needed to earn a living. While at the Petroleum Administrative Board he was sent for a time to east Texas, where he met Valre Talley, whom he was to marry in 1937. Among the many things John and Valre shared in common was a strong commitment to the New Deal and its liberal political assumptions; they always felt that Washington was a place where people had the opportunity to help others and to improve the world.

John left Interior in 1936 to work briefly for a Senate committee investigating railway finance and the next year joined the staff of the Securities and Exchange Commission (SEC), where he remained until 1943. The SEC was one of John's great loves—both the work and the colleagues. By the time he left the SEC his duties were equivalent to those of a general counsel; had the Second World War not begun he might have remained there indefinitely. Instead he joined the Coast Guard, was assigned to the office of Chief Counsel, and remained there until 1947, taking two additional years to wind down his responsibilities.

At that point John entered private practice in Washington, first forming his own firm and then joining three other partners in a slightly larger firm. John claims he was not good at private practice: he found some of the work tedious and did not particularly relish soliciting business. I suspect that some of John's frustration might have been due to his conscientiousness. He may have been that perhaps rare private practitioner whose diligence and amenability result in clients' taking undue advantage. At any rate, when a position with the Solicitor General's office opened in 1950, John readily accepted it, remaining there for the next eleven years.

One facet of John's career that he omitted from his resume was his representation of Alger Hiss. John assisted Hiss in three respects: accompanying Hiss in his August 25, 1948 appearance before the House Un-American Activities Committee, in which Hiss publicly revealed that he had known Whittaker Chambers; helping Hiss file a libel suit against Chambers in September, 1948 (which subsequently was dismissed with prejudice in 1951); and serving as a member of the legal defense team employed by Hiss during his perjury trials in 1948 and 1949. The facts of the Hiss case are sufficiently familiar not to bear repeating here. Suffice it to say that the critical issue at the trials was the authenticity of incriminating testimony and evidence produced by Chambers, which suggested that

Hiss had been engaged in espionage in the 1930s. Hiss' eventual conviction for perjury—he was never indicted for espionage—amounted to a jury finding that Chambers' evidence was authentic.

In 1979 Allen Weinstein's book *Perjury* attempted a reassessment of the Hiss case and concluded that Hiss was guilty of both perjury and espionage. Weinstein interviewed John in 1974, expressing particular interest in the famous Woodstock typewriter which Hiss once had owned and on which incriminating stolen documents allegedly had been typed. In *Perjury* Weinstein claimed that in December, 1948, shortly before his indictment for perjury, Hiss called John and asked him to look for an old typewriter that Hiss had given to the son of a woman who had done washing for the Hisses in the 1930s. John subsequently wrote Edward McLean, who was helping to coordinate Hiss' legal defense, alluding to the conversation and indicating that he felt the typewriter could readily be located, but adding that he would not pursue the matter unless so instructed. At Hiss' perjury trial, documents were produced that demonstrated that an application to a private school from one of the Hiss children had been typed on the same machine as the stolen documents produced by Chambers.

In September, 1949, according to Weinstein, John wrote another letter to McLean suggesting that the Hiss defense team hire an expert to build a typewriter identical to the Woodstock in order to establish that Chambers or someone else could have forged the incriminating documents. Eventually, after Hiss' conviction, such a typewriter was built. The process took nearly a year and did not produce an identical machine. Weinstein claimed in *Perjury* that the origins of the "forgery by typewriter" defense of Hiss, which Hiss himself employed in his 1957 book, *In The Court of Public Opinion*, and which several other commentators on the Hiss case have regarded as credible, emanated from John's 1949 letter to McLean. John continues to believe that Hiss was innocent of espionage and that commentary on the Hiss case has been largely misleading.

In contrast to the Hiss case, John's work at the Solicitor General's office was consistently fulfilling. He continues to regard working for the Solicitor General's office as the best law job in Washington. He found the experience of regularly arguing cases before the Supreme Court a consistent pleasure. John was a particular favorite of some of the Justices, including Felix Frankfurter, who outraged Valre Davis with his provocative questioning of John during oral arguments. On one occasion Valre was in Frankfurter's company and responded to the Justice with distinct coolness, where-

upon Frankfurter attempted to explain that he was particularly probing of advocates whose talents he admired. The explanation was not a conspicuous success.

In 1961 Earl Warren invited John to become Clerk of the Supreme Court. The position of Clerk had not traditionally been held by lawyers as talented and experienced as John, but Warren sought to professionalize the position. The Clerk who had preceded John, James Browning, had gone on to become a judge on the United States Court of Appeals for the Ninth Circuit. In my view a similar progression would have been most appropriate for John; he would have made an exceptional judge. He took no steps toward that end, however, and remained at the Court until 1970, staying one year after Warren's retirement. I attended John's retirement party the same day I interviewed with Warren for a clerkship, and I am certain that his subsequent decision to offer me the position was based on a supposition that some of John's qualities must have rubbed off on me. It was not too long before Warren implied to me that he must have been mistaken in that belief.

Part of the reason John retired from the Court was that he believes one should not hold any position too long; one gets stale and predictable and does the office no good. In that spirit, he began a new career teaching law at the age of sixty-three, and stayed at Maryland longer than any previous job he had held. I have seen John only once in the classroom, and that was long ago; I leave it to others to assess his performance. I will say, however, that I do not think he was a "natural" academic, either as a scholar or a teacher, in the way that he may have been a "natural" appellate advocate. Law teaching may have been for him, in other words, what foreign languages were in college: something he could take pride in learning to do well.

A sketch of John's career does not even begin to capture the measure of him. I have known him as well as nearly anyone and still find him unpredictable and sometimes unfathomable. About all I can say as a kind of summation is that he has been an inspiration to me, and that few people could be blessed with such a father-in-law. He is a person for whom the terms independence and strength of character seem designed. It has been a privilege to be in his company.