

OPENING REMARKS

RECOGNITION AND VOLITION

REMEMBERING THE RETIREMENT OF JUSTICE GABRIEL DUVALL

Ross E. Davies[†]

When Gabriel Duvall resigned from the U.S. Supreme Court in January 1835, he became its first conventional retiree – the first Justice to voluntarily leave the Court after making a career of it. Everyone before Duvall had either died in office or left after serving briefly (anywhere from four months to five years). Duvall served for more than 23 years. By leaving while still alive, after long service, and at an advanced age (he was 82), Duvall: (a) gave his fellow Justices their first occasion to publicly salute a departing colleague who had devoted himself to the Court, and (b) gave himself a dignified, respectable ending to a long and successful career in the law. But his colleagues did not rise to the occasion, and history has not granted him that ending. This little article is an attempt to partially offset those defects.

RECOGNITION, BELATED

On Monday, January 12, 1835, the Supreme Court opened its January Term. Duvall was absent that day, and thereafter. On January 15, Chief Justice John Marshall received Duvall's letter of resignation from the Court. It was no surprise (see page 4 below). The next day, Marshall replied – for himself and the other Justices – with a kind letter of his own.¹ It is reproduced and transcribed here:

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

¹ Letter from John Marshall to Gabriel Duvall (Jan. 16, 1835), Papers of Gabriel Duvall, Box 1, Library of Congress, Manuscript Division.

ROSS E. DAVIES

Washington Jan^y 16th 1835

My dear Sir

Your letter taking leave of the court was received yesterday and has been laid before the Judges. We are grateful for the sentiments you express towards us, sentiments which we sincerely reciprocate for yourself, and lament the cause which has separated you from us.

We cannot review the cordiality with which we have proceeded together in the performance of our official duties, and the fidelity with which you have discharged the part which has devolved on you, without feeling deep regret at the separation which has taken place, and a sincere wish that you may long enjoy in retirement that unalloyed happiness to which your private virtues, and the purity of your public life give you such just claims.

I beg you to believe that no man possesses these feelings more entirely than myself, and that I am with sincere and respectful esteem

Your obed^t

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Marshall's letter did not make its way into the *U.S. Reports* or any other publication at the time. Instead, it remained a private (though not secret²) communiqué until 2006, when it was printed in *The Papers of John Marshall*.³ This seems a bit unfair to Duvall, because the Court had published a salute to every other recently departed Justice: Henry Livingston (1823), Thomas Todd (1826), Robert Trimble (1828), Bushrod Washington (1829), and William Johnson (1834). Of course all of them had died in office. The Trimble and Washington tributes were even titled "Obituary."⁴ And the Court would publish an "Obituary" for Duvall, too, after his death in 1844.⁵ More strikingly odd was the failure to note his departure at all for several weeks. Even then he was not mentioned by name; rather, when circuit assignments were announced on February 4, the entry for the Fourth Circuit (formerly Duvall's territory) merely read, "none, there being a vacancy."⁶ The first post-retirement mention of Duvall's name in the Court seems to have come nearly two years after the fact: On January 9, 1837, Philip Barbour (Duvall's successor) submitted to the Court an order from President Andrew Jackson assigning Barbour to the Fourth Circuit, "in the place of Gabriel Duvall, resigned."⁷

At the next conventional retirement – Justice Samuel Nelson's in 1872 – the Court was more generous, promptly publishing its farewell.⁸ And in modern times, friendly and public acknowledgment by the Court of a Justice's retirement is a matter of routine.⁹

On the one hand, this neglect of Duvall – his colleagues could not even be bothered to give him a quick public wave goodbye – might be taken to support David Currie's suggestion that Duvall was the "Most Insignificant Justice."¹⁰ On the other hand, Marshall's letter – honoring "the fidelity with which you have discharged the part [of

² See, e.g., G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 327 (1988).

³ 12 *THE PAPERS OF JOHN MARSHALL* 432 (2006) (Charles F. Hobson, ed.).

⁴ *Obituary*, 27 U.S. v (1829) (Trimble); *Obituary*, 28 U.S. vii (1830) (Washington).

⁵ *Obituary*, 43 U.S. v (1844) (Duvall).

⁶ Minutes, Supreme Court U.S., p. 3172 (Feb. 4, 1835) (National Archives microfilm).

⁷ *Id.* at p. 3437 (Jan. 9, 1837).

⁸ See Ross E. Davies, *Pioneer of Retirement*, 17 *GREEN BAG* 2D 209 (2014).

⁹ See, e.g., J. S. Ct. 1030 (June 28, 2010) (retirement of John Paul Stevens); J. S. Ct. 1020 (June 29, 2009) (David Souter); J. S. Ct. 806 (Mar. 27, 20006) (Sandra Day O'Connor).

¹⁰ David P. Currie, *The Most Insignificant Justice*, 50 *U. CHI. L. REV.* 466 (1983).

our official duties] which has devolved on you” – might be taken to rebut Currie. It is too bad the letter did not appear in print until 23 years after Currie wrote. How might he have dealt with it?

VOLITION, INFLATED

Why then did Duvall retire from the Court rather than expire on it? His resignation letter is nowhere to be found,¹¹ and so we cannot be certain what “cause” it was that prompted Marshall to “lament the cause which has separated you from us.”

It was probably declining health. Contemporary accounts have him first announcing his plans in the autumn of 1834. The November 7 *Farmers’ Cabinet* (a Massachusetts newspaper), for example, reported:

In our last we . . . stated that it was the intention of Judge Duvall to resign his seat upon the bench of the Supreme Court of the United States – This report is confirmed by a gentleman who has recently conversed with the judge upon the subject. The reasons assigned for this act are his advanced age and the infirmities consequent thereon – particularly a partial deafness, disqualifies him for a proper discharge of his judicial functions.¹²

It also seems clear that any infirmities were physical, not mental, and that Duvall had admirers who wished him to stay. For example, in a letter written shortly after the news of Duvall’s retirement plans broke, Richard Peters, the Court’s reporter of decisions, told him:

In common with your many friends I have seen the communication of your determination to leave the Supreme Court. . . . The last day our lamented friend Mr. [William] Wirt was in this Supreme Court the subject of your resignation was spoken off. “I trust” said that great and good man “Judge Duvall will not leave the bench as long as the Chief Justice remains upon it. Who desires him to resign – no one who knows him; no one who practices in the Circuit in which he presides.”¹³

And indeed, while Duvall’s hearing was surely failing, he was just as surely remaining an active judge in his later years.¹⁴

¹¹ See 12 THE PAPERS OF JOHN MARSHALL at 433 n.1.

¹² *Judge Duvall of the Supreme Court*, FARMERS’ CABINET, Nov. 7, 1834, at 3.

¹³ Letter from Rich[ard] Peters to Judge Duval[l] at 1, 4 (Nov. 10, 1834), Duvall Papers.

¹⁴ See, e.g., *U.S. v. Cunningham*, NILES’ REGISTER, June 11, 1831, at 257 (C.C.U.S.D. Md.); *U.S. v. Richmond*, SOUTHERN PATRIOT, Nov. 15, 1834, at 2 (C.C.U.S.D. Md.). And he remained sharp in retirement. See WHITE, THE MARSHALL COURT at 326.

The newspapers went back and forth on the subject. For example, on November 27, the *Baltimore Patriot* reported: “Judge Duvall, has withdrawn the resignation, which he had tendered, of his seat on the bench of the Supreme Court of the U.S.”¹⁵ A few days later the same paper said its earlier report was “wholly destitute of foundation.”¹⁶

Speculation ended with Duvall’s retirement in January 1835, and the nomination of Roger Taney to replace him. The Taney nomination failed, and Barbour took Duvall’s seat, while Taney’s turn on the Court came the next year, when he replaced Marshall as Chief Justice.

The story of Duvall’s unusual but easily understandable retirement remained unchanged for decades. His 1844 “Obituary” in the *U.S. Reports* simply referred to his long service and retirement. Newspaper obits said he “retired to private life only when warned of the necessity of doing so by a growing deafness, which disqualified him from longer discharging the judicial function with satisfaction to himself.”¹⁷ Books on the Court did the same. A Joseph Story biography (1851): “In consequence of the infirmities of age, Mr. Justice Duvall also resigned his position on the Bench in the early part of the succeeding January, and Mr. Taney was nominated to supply the vacancy.”¹⁸ A volume about the Chief Justices (1856): Duvall “continued in the discharge of the duties of this place for a period of nearly a quarter of a century, when, resigning his seat on account of the infirmities of age, he was succeeded by Philip P. Barbour”¹⁹ And so on.

Then, in 1872 – 37 years after Duvall’s retirement and after all the principal actors in it were dead – came the *Memoir of Roger Brooke Taney*, by Taney’s worshipful semi-official biographer, Samuel Tyler. Here is Tyler’s version of Duvall’s retirement:

He was violently opposed to General Jackson and his policy. He was now advanced in age, and wished to resign his seat on the bench. But he feared that General Jackson would appoint a gentleman of great abilities as a lawyer, but of too much political ambition, as he thought, to

¹⁵ BALTIMORE PATRIOT & MERCHANT ADVERTISER, Nov. 27, 1834, at 2.

¹⁶ *Judge Duvall*, BALTIMORE PATRIOT & MERCHANT ADVERTISER, Dec. 6, 1834, at 2.

¹⁷ See, e.g., *Death of Judge Duvall*, SOUTHERN PATRIOT, Mar. 11, 1844, at 2.

¹⁸ 2 LIFE AND LETTERS OF JOSEPH STORY 182-83 (1851) (William W. Story, ed.).

¹⁹ GEORGE VAN SANTVOORD, SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF-JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 488 (1856).

be elevated to the Supreme Court. He expressed this opinion to a particular friend, Thomas William Carroll, the Clerk of the Supreme Court of the United States. Mr. Carroll, who was opposed in politics to Mr. Taney, knew that Judge Duvall, like himself, had the greatest admiration of his abilities and his character. He, in some way, found out that General Jackson would appoint Mr. Taney in case Judge Duvall resigned, and communicated this information to the Judge. Judge Duvall thereupon resigned his seat upon the bench in January, 1835.²⁰

It is a juicy story, one that scholars have found hard to resist.²¹ Which is a more intriguing cause of judicial change, bad health or back-room politicking? But no evidence supports Tyler, at least none I can find. His story has the odor of another fable: Mason Weems's disreputable tale of George Washington and the cherry tree. Both stories – of Washington's personal integrity, of Taney's judicial character – are appealing to admirers, and practically impossible to disprove. They are, however, equally impossible to prove, being free of support in the historical record or pre-existing literature.²² And Tyler's story is even weaker than Weems's. It is not only unsupported, but also implausible. First, telling a Justice (Duvall) his or her seat will be filled by the chief operative (Taney) of a President whose policies that Justice “violently oppose[s]” would be, if anything, a deterrent to retirement. Second, the real Washington had the integrity of the tree-chopping boy. The real Taney's judicial character was not so pure.²³

The plainer, more plausible story – based on the available record – is that Duvall remained a Justice until he felt he was no longer up to the job, and then he retired. Perhaps he even believed so deeply in his country's Constitution that he trusted its mechanisms to fill his seat with someone worthy, though maybe not to his tastes. It was a dignified, respectable ending to a long and successful career. Duvall deserves that legacy, not Tyler's Taney-serving fantasy.

²⁰ SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY, LL.D. 239-40 (1872).

²¹ See, e.g., CARL BRENT SWISHER, ROGER B. TANEY 311-12 (1935); CARL B. SWISHER, THE TANEY PERIOD 22-23 (1974) (same story, extra guilt); Irving Dilliard, *Gabriel Duvall*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT 250 (1997) (relying on Swisher); Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 406 (1938).

²² See generally Marcus Cunliffe, *Introduction*, in MASON L. WEEMS, THE LIFE OF WASHINGTON ix-xlix (1809; 1962; 2001 prtg.); see also *id.* at 12.

²³ See, e.g., *Scott v. Sandford*, 60 U.S. 393 (1857).