SUPREME COURT PRACTICE 1900

A STUDY OF TURN-OF-THE-CENTURY APPELLATE PROCEDURE

Ross E. Davies[†]

Nowadays, "[a]n application addressed to an individual Justice [of the Supreme Court of the United States] shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief."[1] It hasn't always worked that way. Indeed, for most of the Supreme Court's history, litigants (or their counsel) who had business with individual Justices generally felt free to deal directly with those Justices, and the Justices generally reciprocated. This was partly a matter of law and partly a matter of practicality.

First, law's role. Action by individual Justices used to be required or permitted on many occasions, in response to litigants' applications of various sorts. For example, at the turn from the 19th century to the 20th (and for many years before and after),

> An appeal or a writ of error from a circuit court or a district court direct to [the Supreme Court], in the cases provided for in sections five and six of the [Evarts Act of 1891], may be allowed, in term time or in vacation, by any justice of this court, . . . and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.[2]

As Daniel Gonen has explained, "[t]he practice of allowing a single Justice to act [under Rule 36] rather than the full court was based on the point-

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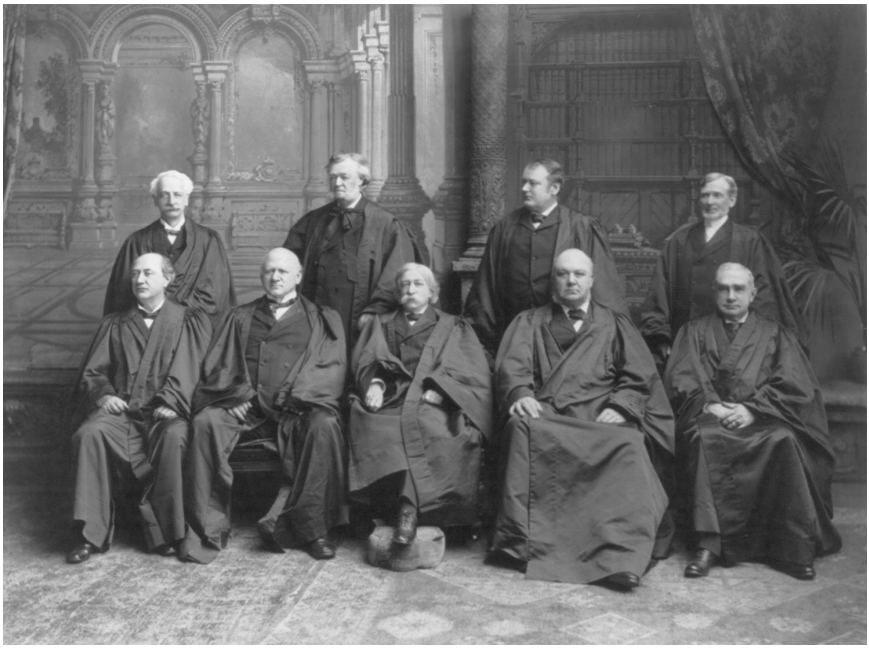
[†] Professor of law, Antonin Scalia Law School at George Mason University, and editor-in-chief, the *Green Bag*. A version of this article will be published, with more pictures and fewer words, by the *Green Bag* as a "Single Sheet Classic."

[1] S. Ct. R. 22 (2017).

[2] S. Ct. R. 36.1 (1893).



The Supreme Court of the United States. Front row, left to right: Justices David J. Brewer and John Marshall Harlan, Chief Justice Melville W. Fuller, and Justices Horace Gray and Henry Billings Brown. Back row, left to right: Justices Rufus W. Peckham, George Shiras, Jr., Edward Douglass White, and Joseph McKenna. Image source: Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56711 (1899).

lessness of burdening the full Court with these applications since there was little or no benefit from having more than one person process them."[3] (Sounds a bit like the rationale for the modern cert. pool, doesn't it?)

That does not, however, mean that single-Justice decisions about whether to allow a case onto the Court's docket were mere insignificant routine, though the Court's records (and much of the scholarly commentary on them) tend to foster that impression. Rather, those old allowances have a rubber-stamp aroma because there were so darn many of them, and because a record was rarely made or kept of any argument made at that

[3] *Judging in Chambers*, 76 U. CINCINNATI L. REV. 1159, 1223 (2008).

stage of litigation or of any explanation (such as an opinion in-chambers) for a Justice's decision. But those rare Rule 36 proceedings for which we do have a record, or an opinion, can be telling. Consider, for example, Justice John Marshall Harlan's rather chilling in-chambers opinion explaining his refusal to allow an appeal in a jury-and-race case:[4]

> Washington, D.C., August 24th, 1896.
>
> Dear Mr. Barrett:
>
> I have your letter of the 21st, in which it is said that you were specially desirous that I should act on the application for the allowance of an appeal in the case of Aleck Richardson from the order of the Circuit Court of the United States denying his application for the writ of *habeas corpus*. The members of our court do not, in the first instance, unless in some cases requiring immediate action, pass upon applications for writs of error or appeals in cases beyond their respective circuits. In accordance with that custom, the papers you sent to me were transmitted to the Chief Justice, who, as I learn from your letter, has refused to allow an appeal.
>
> You have the technical legal right to apply for your client to each one of the Justices of the Supreme Court, and I therefore take your letter to be substantially an application to me. Before the papers were sent to the Chief Justice, I examined them, and reached the same conclusion that he did. The only ground assigned in the papers sent by you for granting the writ is that your client was tried by a jury composed entirely of white men. It is not claimed that this resulted from any statute of the State excluding blacks from serving on juries, because of their race. If, therefore, any black man was, because of his race, excluded from the jury in Richardson's case, it was error on the part of the court in the trial, which was to be remedied by writ of error, not by *habeas corpus*. The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded, because of his race, any citizen, otherwise qualified, of the same race as that of the accused. *Ex*

[4] *In re Richardson*, 4 Rapp 1600 (1896).

> *parte Royall, 117 U.S. 241, 252, 252; In re Wood* [Publisher's note: "*In re Wood*" should be "*Wood v. Brush*"]*, 140 U.S. 278, 289; Gibson v. Missippii* [Publisher's note: "*Missippii*" should be "*Mississippi,*"] 162 U.S. 565. If you will read these cases you will perceive that there was not the slightest reason for the interference by the Circuit Court of the United States upon *habeas corpus* with the final action of the State Court, and therefore the application for an appeal from the order of the Circuit Court denying the application made to it ought not to be granted. I should feel otherwise about this application if I could perceive that there was any possibility whatever that the Supreme Court would entertain jurisdiction of the case and consider it upon its merits. If the appeal were allowed, it would be dismissed on motion. The careless allowance of appeals in such cases has no other effect than to interfere with the ordinary administration of the criminal laws of the State. If the State court in the trial of the case has denied to the accused any right secured to him by the Constitution and laws of the United States, his remedy is not by *habeas corpus*. *Pepke vs Cronan, 155 U.S. 100; Andrews vs Swartz, 155* [Publisher's note: "*155*" should be "*156*"] *U.S. 272* [Publisher's note: There should be a period at the end of this sentence.]
>
> Yours truly,
> /s/ John M. Harlan
>
> Mr. C.P. Barrett,
> Spartanburgh, S.C.

The plain, counsel-to-Justice-to-counsel nature of this communication is reflected in the typescript (not printed) original opinion, formatted as a letter addressed to Richardson's counsel, with Harlan's signature in his own hand at the end.

Second, practicality's role: During the 18th and 19th centuries, the Justices were basically solo operators, except when they were together on the bench or in conference. They had no office space at the Court. They had little or nothing in the way of administrative support for correspondence or research or errand-running or opinion-writing or anything else. They held court in a stately but not very big room in the Capitol, with a bit of space nearby for the clerk, the marshal, a small library, and some files.

The Justices did most of their work at home, where they also main-

tained their own libraries. So, if counsel wanted to correspond or meet with a Justice, the best place to write to or visit would often be the Justice's home address in Washington when the Court was in Term, or the Justice's address on circuit (or on vacation) when it was not. So, that is what counsel did, especially when time was of the essence. Consider, for example, John L. Semple, counsel to Theodore Lambert of New Jersey. Semple traveled from Philadelphia to Washington on January 2, 1895 — the day before Lambert was set to be executed for murder — to visit Justice George Shiras and apply for relief. The next day, Shiras explained his decision in the case:

> "I did not interfere with the State court in granting Lambert's counsel the provisional writ of error, which has operated as a stay of execution. In the haste with which the original application for writ of habeas corpus was urged no record was made in Judge Dallas's court. Without this record I could not interfere, although in criminal cases the defendant is entitled to the writ of error, which is merely a formal proceeding. When Lambert's counsel called upon me last night there was no time to send him back to Judge Dallas's court. His client would meanwhile have been hanged. Therefore I issued to him a writ of error contingent upon completion of the record in the court. I did not take into account the merits of Lambert's case, which was not before me. I merely made it possible for the condemned man to avail himself of such advantages as, had the proceedings been regular, he would have been clearly entitled to."[5]

Lambert eventually had his day — two days, actually — in the Supreme Court.[6] He had no success there, and his sentence was carried out on December 19, 1895.[7] But the combination of Semple's exertions on the road and Shiras's decision at home, in chambers, did extend Lambert's life by almost a year.

The Marshal of the Supreme Court made counsel-Justice contact of this sort easier by providing a useful card for counsel (which was also handy for social callers), titled "Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States." The edition for 1900

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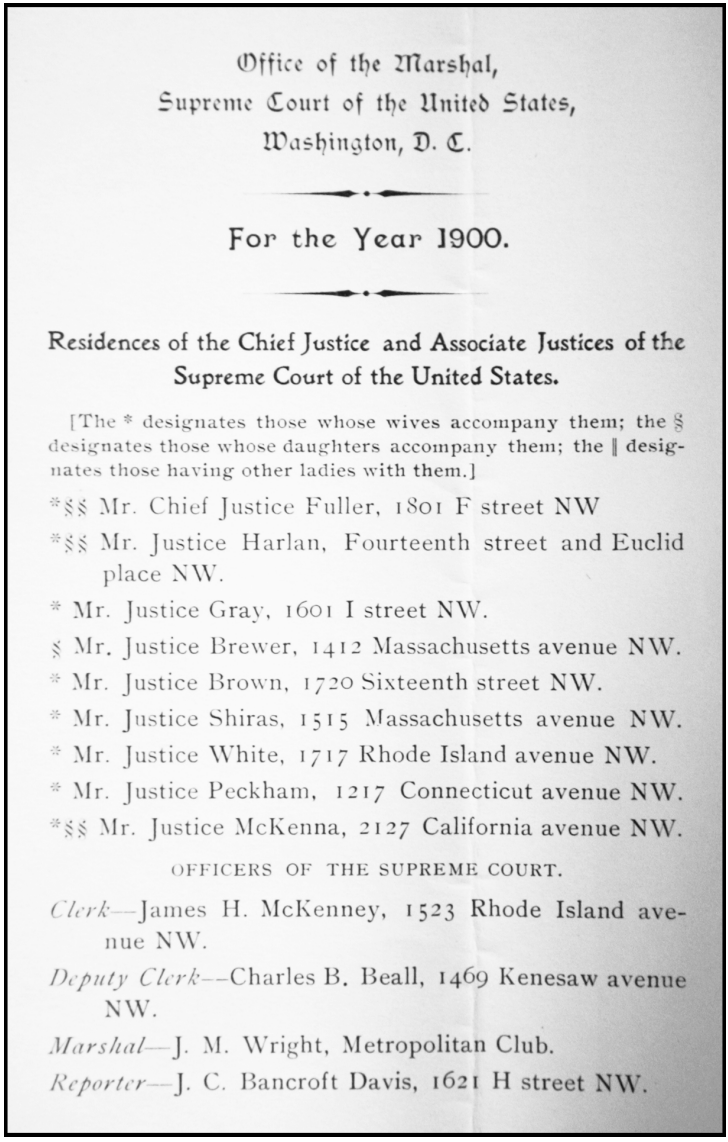
[5] *Reprieve at the Last Hour*, BALTIMORE SUN, Jan. 5, 1895, at 7.
[6] *Lambert v. Barrett*, 157 U.S. 697 & 159 U.S. 660 (1895).
[7] *Lambert Hanged at Last*, WASHINGTON EVENING TIMES, Dec. 19, 1895, at 1.

is reproduced here. And we've done the Marshal one better by providing a pair of illustrated and annotated maps that might have been useful to counsel in 1900. They might also be useful to law-tourists in 2017.



Office of the Marshal,
Supreme Court of the United States,
Washington, D. C.

For the Year 1900.

Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States.

[The * designates those whose wives accompany them; the § designates those whose daughters accompany them; the ‖ designates those having other ladies with them.]

*§§ Mr. Chief Justice Fuller, 1801 F street NW

*§§ Mr. Justice Harlan, Fourteenth street and Euclid place NW.

* Mr. Justice Gray, 1601 I street NW.

§ Mr. Justice Brewer, 1412 Massachusetts avenue NW.

* Mr. Justice Brown, 1720 Sixteenth street NW.

* Mr. Justice Shiras, 1515 Massachusetts avenue NW.

* Mr. Justice White, 1717 Rhode Island avenue NW.

* Mr. Justice Peckham, 1217 Connecticut avenue NW.

*§§ Mr. Justice McKenna, 2127 California avenue NW.

OFFICERS OF THE SUPREME COURT.

Clerk—James H. McKenney, 1523 Rhode Island avenue NW.

Deputy Clerk—Charles B. Beall, 1469 Kenesaw avenue NW.

Marshal—J. M. Wright, Metropolitan Club.

Reporter—J. C. Bancroft Davis, 1621 H street NW.

Image source: National Archives, RG 267, Entry 72, box 3 (1900).

Today, lawyers — indeed, all people — have it much easier. No matter the time of year or the nature of our business, when we want to communicate with a Justice we simply address our filings or other papers to the Supreme Court's house at 1 First Street NE, Washington, DC 20543 (and also file briefs electronically[8]). But while we have been freed from much complicated and costly rigmarole, we never come to a Justice's home, or chambers.[9]

NOTES ON RESIDENTIAL WORKPLACES OF MEMBERS OF THE U.S. SUPREME COURT IN WASHINGTON, DC

Chief Justice Melville W. Fuller, 1801 F Street NW.

The Chief Justice and his family were the latest in a long line of formidable occupants — Tobias Lear, Tench Ringgold, John Marshall, Joseph Story, William Johnson, Gabriel Duvall, Smith Thompson, John McLean, Henry Baldwin, Sally and William Carroll — of the building now known as the Ringgold-Carroll House.[10]

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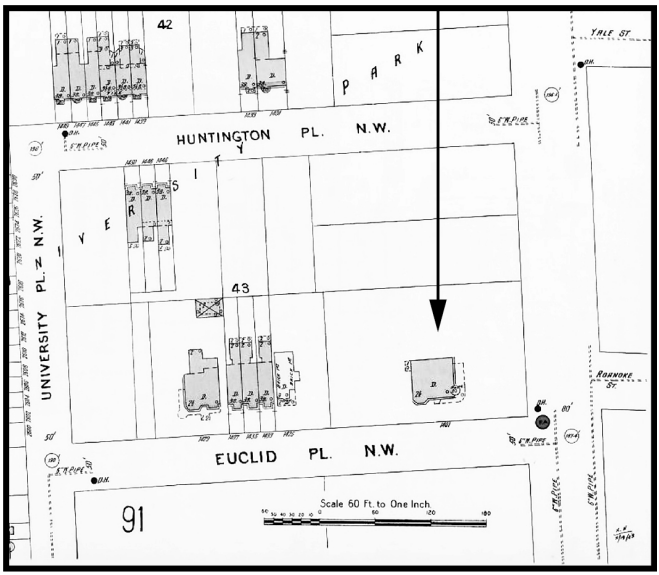
[8] *See* S. Ct. R. 29.7 (2017).

[9] *Cf.* J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING, book one, ch. XI (2d ed. 1965).

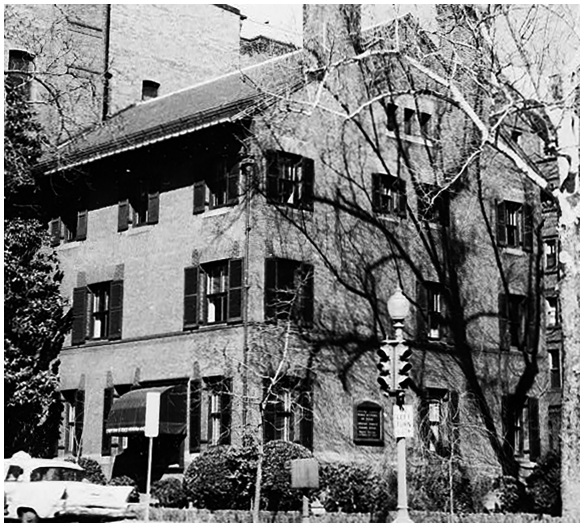
[10] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,34--6 (n.d.); see also History of 1801 F Street, dacorbacon.org.



Justice John Marshall Harlan, 1401 Euclid Place.

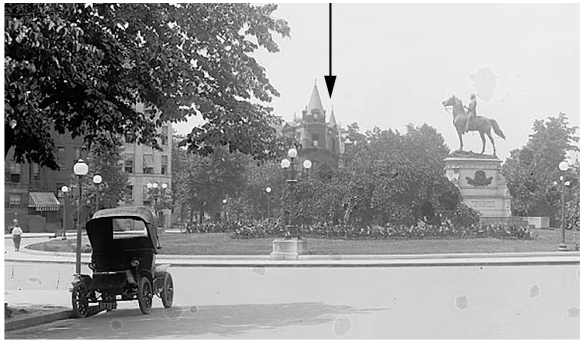
As this detail from a contemporary street plan shows, the Harlans did not have many neighbors out in the boondocks, just off what was then called "Fourteenth Street, Extended" (see the downward-pointing arrow). Harlan's commute to the Supreme Court's chamber in the Capitol was longer than any other Justice's, but what was then a barely suburban home suited his lifestyle well. It was conveniently located between the three central Cs of his life: Church (the New York Avenue Presbyterian at 1313 New York Avenue NW, for faith), Course (the Chevy Chase Club in Bethesda, Maryland, for golf), and Court (the Supreme, at the U.S. Capitol, for law).[11]

[11] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903); *see also* MALVINA SHANKLIN HARLAN, SOME MEMORIES OF A LONG LIFE, 1854-1911 at 117-18 (2002); James W. Gordon, *Religion and the First Justice Harlan*, 85 MARQ. L. REV. 317, 333-36 (2001); Ross E. Davies, *The Judicial and Ancient Game*, 35 J. SUPREME COURT HISTORY 122, 124-25, 131, 137-39 (2010).



Justice Horace Gray, 1601 I Street NW.

Gray's residence on the northwest corner at the intersection of Sixteenth Street and I Street NW would be, if it were still standing today, next door to the offices of O'Melveny & Myers LLP, the bobbleheadquarters of the Green Bag. Alas, the Gray residence is long gone.[12]



Justice David J. Brewer, 1412 Massachusetts Avenue NW.

From his home on the west side of Thomas Circle (with its equestrian statue of General George Henry Thomas), Brewer had a lovely view of the

[12] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,154--1 (n.d.).

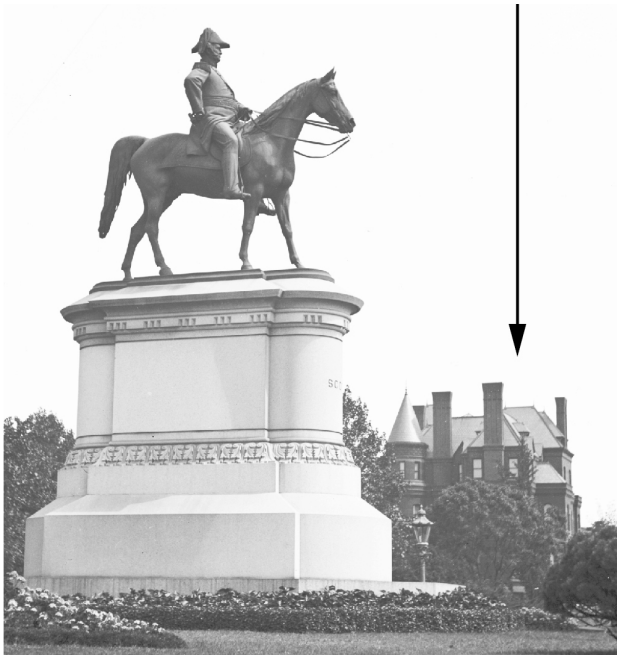
park-like circle and the Luther Place Memorial Church beyond. (The church still stands, where Vermont Avenue and Fourteenth Street meet at the circle.) The Brewers' home is in the background of this photograph (see the downward-pointing arrow), which was snapped from the east side of the circle, on Massachusetts Avenue.[13]

Justice Henry Billings Brown, 1720 Sixteenth Street NW.

After he was elevated to the Supreme Court in 1890, Brown bought a lot and commissioned an enormous (and enormously expensive) new house to fill it — now known as the Toutorsky Mansion — for himself and his spouse, Caroline. There they lived until their deaths in 1913 and 1901, respectively. Brown did not, however, insist on moving about the city in comparable splendor. He frequently rode the buses (aka "herdics") that rolled up and down Sixteenth Street.[14]

[13] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-31843 (ca. 1910-1925).

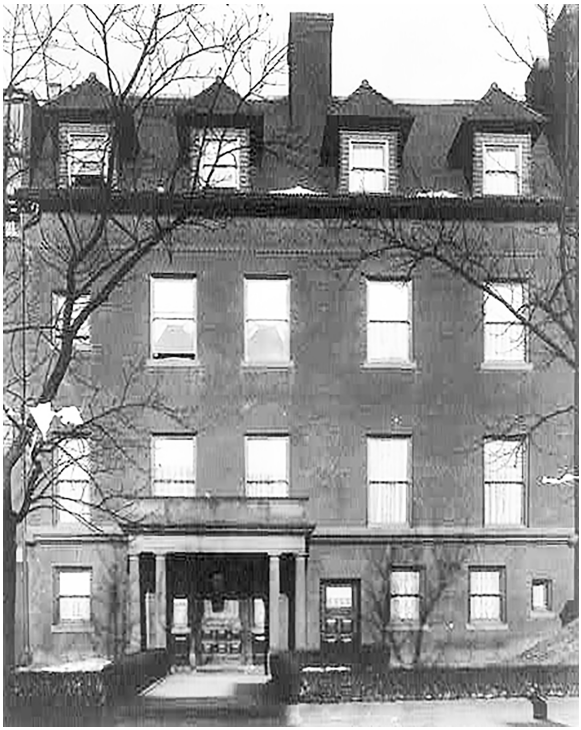
[14] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56822 (1895); *see also Justice Brown in the Lists to Solve Herdics Problem*, WASHINGTON TIMES, May 27, 1911, at 3.



Justice George Shiras, Jr., 1515 Massachusetts Avenue NW.

"The large house at the junction of N Street and Massachusetts Avenue" — visible in this photograph, to the right of the south-facing equestrian statue of General Winfield Scott (see the downward-pointing arrow) — "is the residence of Supreme Justice Shiras," according to the 1901 edition of Rand, McNally & Co.'s Pictorial Guide to Washington and Its Environs. Shiras lived across the street from the famous "Louise Home," which occupied the entire block on the south side of Massachusetts Avenue between Fifteenth Street and Sixteenth Street.[15]

[15] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-00115 (ca. 1918-1920); *see also* Historical Sketches of the Charities and Reformatory Institutions in the District of Columbia, House Report No. 1092, 55th Congress, 2d Session 144-48 (1898).

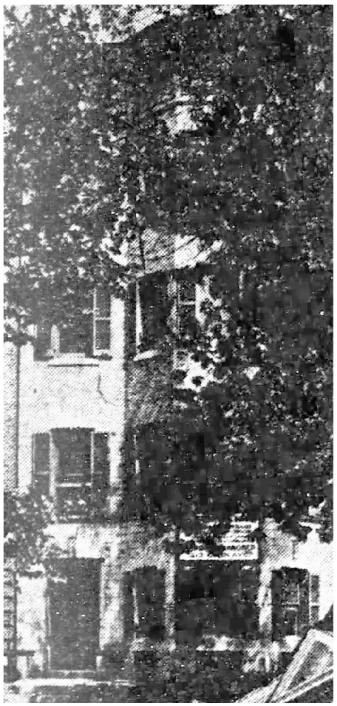


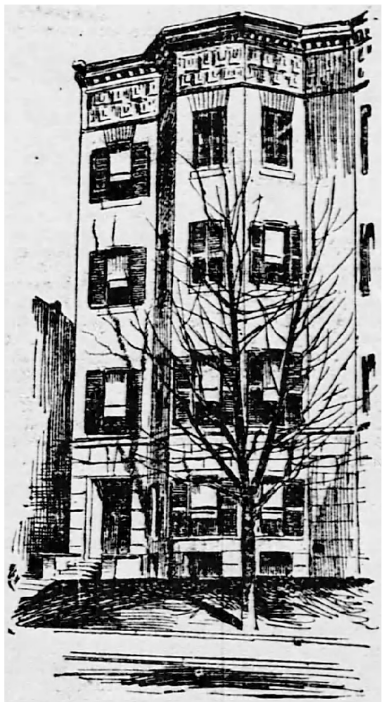
Justice Edward Douglass White, 1717 Rhode Island Avenue NW.

White was reputedly an extraordinarily congenial colleague on the Supreme Court and generally a very nice person, as this effusive profile, published when he became Chief Justice in 1910, suggests:

> An invitation to the home of the Justice is a chance to get acquainted with real hospitality. The Justice enjoys good company and he always has the latch string out for his friends. Furthermore, he is accessible to those persons who might want to talk to him on public business out of hours.
>
> A caller at the White House, whether he is a belated messenger boy hunting a number or a dignified Senator, is received with equal consideration. If the Justice himself answers the door, as he often does, the graciousness of the greeting to the caller is habitual and not measured by the social stature of the person he greets.[16]

[16] ST. LOUIS POST-DISPATCH, Dec. 18, 1910, at 10; *see also* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62- 86851 (1910).

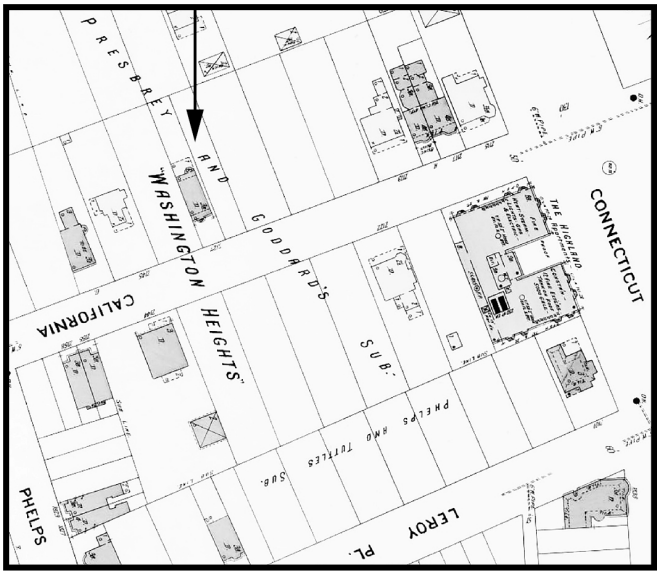




Justice Rufus W. Peckham, 1217 Connecticut Avenue NW.

The four-story home of the Peckham family, two blocks south of Dupont Circle, had been adjacent to greatness. Alexander Graham Bell built his Volta Laboratory at 1221 Connecticut Avenue, but Bell moved the lab to 2020 F Street NW before the Peckhams moved in at 1217 Connecticut Avenue. Lacking a good photograph of the Peckham residence, what we have here is a bad photograph of it taken when some trees in front of the house were leafy (left) and a not-bad sketch drawn when the trees were bare (right).[17]

[17] *See* WASHINGTON TIMES, Sept. 9, 1911, at 4; WASHINGTON EVENING STAR, Feb. 13, 1897, at 13; *see also* Raymond R. Wile, *The Development of Sound Recording at the Volta Laboratory*, 21:2 ARSC J. 208 (1990).



Justice Joseph McKenna, 2127 California Avenue NW.

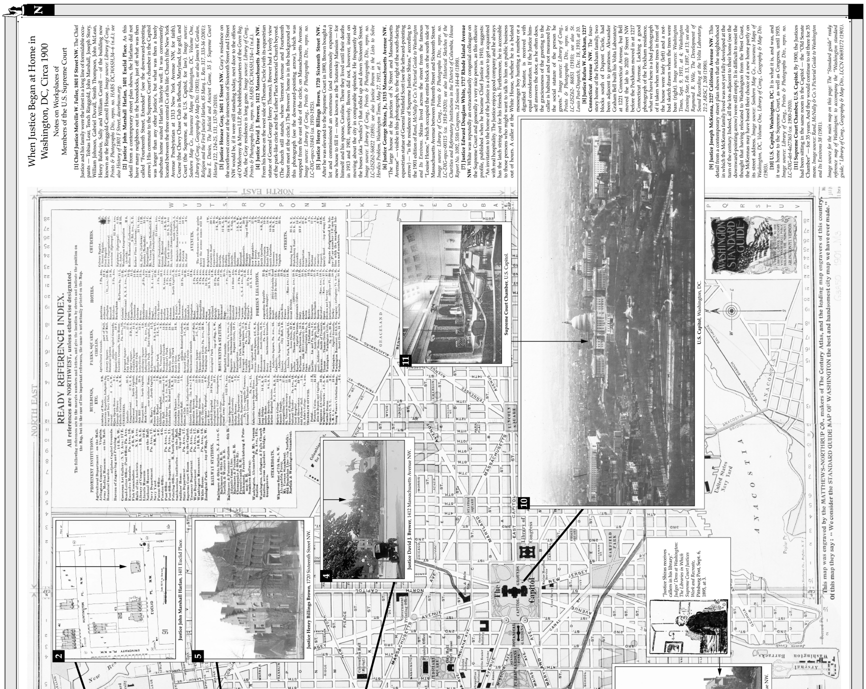
This detail from a contemporary street plan shows that the neighborhood in which the McKenna family lived was not yet fully developed at the turn of the century. Indeed, all the lots adjacent to their home (see the downward-pointing arrow) were still empty. It is difficult to resist the thought that having relocated to Washington from the West Coast, the McKennas may have based their choice of a new home partly on its street address.[18]

[18] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903). (Today, by the way, California Avenue is a Street.)

APPENDIX

THE "SINGLE-SHEET CLASSIC" VERSION OF THIS PAPER (REDUCED)


Joseph McKenna
Melville W. Fuller
Rufus W. Peckham
Edward Douglass White
Horace Gray
Henry Billings Brown
George Shiras, Jr.
David J. Brewer
John Marshall Harlan
When Justice Began at Home
For the Year 1900.
NOWADAYS,


When Justice Began at Home in Washington, DC, Circa 1900
Notes on Workplaces of Members of the U.S. Supreme Court
READY REFERENCE INDEX.
THE "STANDARD GUIDE" Ready Reference Map of WASHINGTON

"Justice Shiras receives callers in his library." *Judges' Dens at Washington: The Libraries in Which Supreme Court Justices Work and Recreate*, PITTSBURG POST, Sept. 6, 1895, at 3.