

CHIEF JUDGE CUTHBERT POUND

*Judge Robert S. Smith**

Hello, thank you for having us here.

Thank you, Professor Bonventre, for organizing this wonderful event.

I'm going to talk to you about a Judge named Cuthbert Pound, going back even further in time than Judge Read did, because Judge Pound was leaving the Court, more or less, as Judge Loughran was arriving. And they, I guess, served together very briefly.

It was a whim of mine that made me something of the in-house expert on Judge Pound. When Judge Rosenblatt asked me to write a chapter for the book that you've all heard so much about, I picked Judge Pound because I'd sort of heard of him and was trying to figure out who he was. I knew that he was a colleague of Judge Cardozo's and didn't know much more. I realize now that there are serious gaps in my knowledge even now.

When I heard Judge Pigott a few minutes ago, I asked him who he was talking about and he said Matt Jasen, and I said, my God, what did Cuthbert Pound's friends call him? It seems unimaginable that they called him Cuthbert. But I have absolutely—I have no idea what the answer to that question is, and that's just a gap in my research that I didn't realize until today.

I do have a general idea of who he was. He was an upstate Republican politician, he came from Lockport in Niagara County, he had been a town attorney and a State Senator, and he was a Judge of real distinction. After serving as a professor at Cornell Law School, he went on the Supreme Court and, after a number of years, came to the Court of Appeals in 1914.

He had enough national reputation that he was mentioned in the early 1920s as a possible candidate for the United States Supreme Court. We know that because of a scathing letter from Chief Justice Taft to President Harding saying, "Please, don't appoint Pound, the

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man's a dissenter. You can't have that on the United States Supreme Court." He said, "We have enough trouble as it is with Holmes and Brandeis, I mean, this is getting out of hand. He's as bad as that fellow Learned Hand on the Second Circuit, we can't have any of these." I rather suspect that maybe it was perhaps not that Judge Pound tended to be a dissenter, but perhaps also that his dissents were not always in agreement with the views of Chief Justice Taft that may have had something to do with that opinion.

Judge Pound never did make it to the United States Supreme Court, but he did acquire some reputation, and, as you might be able to guess if you know the politics at the time, from Taft's antipathy, Judge Pound was always given the label liberal, or progressive. You see, people did that even then. They classified judges as liberal and conservative, and even then, judges hated it, I'm sure. And even then, there was some truth to it, as there is today. Yes, and so this is, unquestionably, if anyone was, a liberal progressive judge, so why am I, of all people, standing up here talking about him? I cannot imagine.

His relationship with Judge Cardozo was, of course, a very important part of his career. They came to the Court the same year in 1914. They remained together until Judge Cardozo—then Chief Judge Cardozo—went to the Supreme Court in 1932. They were close friends, and they were allies. They were the, you know, of course there are no liberal and conservative judges, but, nevertheless, they were on the liberal wing, and what everyone called the liberal wing of the Court; in fact, they more or less constituted the liberal wing of the Court in those days. Although it was true then as it is now that you can't find a really consistent pattern. You'll find, in any particular case, you'll find people all over the place.

Nevertheless, on the most high profile, the most intensely fought over and the burning issues of the day and the ones that are best remembered now, you would definitely find Judge Pound, with Judge Cardozo, on the liberal side. Despite their friendship and their ideological alliance, there was a rivalry, at one point, because in 1926, the Chief Judge, Hiscock, reached the mandatory retirement age, which bedeviled us even then, and both Cardozo and Pound wanted to succeed him. They'd come to the Court, as I told you, the same year, so that you could even debate which was more senior, because I think Pound had got there first, or maybe Cardozo had got there first, but he had only got there on a temporary appointment and had not become a permanent Judge until a few months later. So that and other burning issues were debated furiously by the partisans of both

people. The deciding vote really was that of Governor Al Smith, who, eventually, went for Cardozo after it had looked like Pound had the job sewed up, and I'm sure it was a disappointment to him, and I'm sure he thought, since he was older, I think, than Cardozo, that he would never become Chief Judge.

As it happened, however, Judge Cardozo went to the United States Supreme Court in 1932. Judge Pound did become Chief Judge. I have a feeling it meant a lot to him. The reason I have that feeling is when 70 years after Judge Pound's death, when I got on the internet and, with the wonders of the internet, was able in about three minutes to track down Judge Pound's granddaughter, then in her 80s, picked up the phone and called her and said, I believe your grandfather was a Judge of the Court of Appeals, and she said, "Chief Judge."

On the issues of the day, the highest profile, most closely watched issues of the day were economic regulation, and Judge Pound was ahead of his time in adhering the view, which is now a cliché, that the economic regulation by the government is not something that courts will second guess or invalidate on due process or other constitutional grounds very readily.

When he was still a trial judge, he upheld the, what was then called The Workman's Compensation Law, against a constitutional attack.¹ He was reversed by the Court of Appeals in that case. He had the satisfaction of seeing the Court of Appeals then reversed by a constitutional amendment. He had the greater satisfaction of seeing the case, the *Ives* case, in which he had been reversed, turned into one of those chestnuts that everyone abuses, as a wrongly decided case; even had the pleasure many years later of indulging in that himself, saying the *Ives* case is clearly no longer good law, in an opinion that he wrote for the Court of Appeals.² But he was, undoubtedly, on the prevailing side in that case.

Of less interest then, but of at least equal interest today, were the free speech cases, what we would think of as free speech cases, although they weren't always fought out as constitutional issues then, but if you've taken, those of you who are students or used to be law students, which I guess is a lot of you, have taken con law, you may have heard of a case called *Gitlow v. New York*,³ one of Justice

¹ *Ives v. S. Buffalo Ry. Co.*, 124 N.Y.S. 920 (Sup. Ct. 1910), *aff'd*, 125 N.Y.S. 1125 (App. Div. 1910), *rev'd*, 94 N.E. 431 (N.Y. 1911).

² *Evans v. Berry*, 186 N.E. 203, 205 (N.Y. 1933).

³ 268 U.S. 652 (1925).

Holmes's most famous dissents on the free speech issue. Before it was called *Gitlow v. New York*, it was called *People v. Gitlow*,⁴ and was decided by the New York Court of Appeals.

Mr. Gitlow was a left-wing socialist who had circulated a paper advocating communist revolution in no uncertain terms. He had been convicted and sent to jail for criminal anarchy. His conviction was affirmed by the New York Court of Appeals; Judge Pound dissented.

Judge Pound, unlike Cardozo, was not someone who usually strove for eloquence. Most of his opinions, while they are well-written, able opinions, are perfectly prosaic, nothing eye-catching. He made an exception here. He wrote: "Although the defendant may be the worst of men, although Left Wing socialism is a menace to organized government, the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."⁵

He was so committed to free speech that in a 1921 case, where I think we're maybe before *Gitlow* now, it's called *People ex rel. Doyle v. Atwell*,⁶ that was a case where some socialists had been prosecuted and convicted for holding a meeting without a permit. It was clearly an outrage, and there's a separate opinion by Judge Cardozo pointing out that it's an outrage, but, nevertheless, Judge Cardozo concurred in affirmance of the conviction on the ground that they, you know, if they were denied the permit because they were socialists, they had to sue to get the permit. You can't just meet without the permit because it's against the law to meet without a permit, no matter how bad the reason is, the permit was denied. Even Cardozo said that, and he may have been right. Pound was not going for it. Pound was the sole dissenter in that case, and he said the discriminatory enforcement of the permit law renders the permit law invalid. He was not inclined to kid around with free speech.

In many ways, he was much more a representative of his time in the obscenity cases of the day. You'll find him more in the middle of the Court in finding things obscene that we would, that we would find so unobscene as to be boring. But, in his day, he certainly earned the title of a liberal Judge. Did it mean then what it means now? To some degree, of course. All the causes I've identified for you that he was identified with would be thought of as liberal causes today, but there were differences.

⁴ 136 N.E. 317 (N.Y. 1922).

⁵ *Id.* at 327.

⁶ 133 N.E. 364, 367 (N.Y. 1921) (Pound, J., dissenting).

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In an article written shortly after Pound's death by Henry Edgerton, then a law professor, and after that, a very liberal judge himself for many years, a federal judge, he had wrote an article called, *A Liberal Judge, Cuthbert W. Pound*, in which he tried to define what it meant to be a liberal judge.⁷ You'll be interested to know that one of the things it meant to be a liberal judge at that time was to follow the law and not let your personal preferences interfere with—it really, you know, it sounds a little bit like a Republican candidate for president describing the kind of judges he's going to appoint. That's Judge Edgerton's appreciation of Judge Pound's liberalism. It says very proudly, this is Edgerton:

“It is as unusual for a liberal judge to feel authorized to invalidate a statute which he dislikes as to feel obliged to invalidate one which he likes.”⁸

So those liberals, they just stick to the law. They don't indulge their personal preferences.

What was Judge Pound like personally? Everything, of course, of course everything you read says he was wonderful. I have to take that, of course, everything about every judge says that, so you never quite know. I have had the pleasure of talking to his granddaughter, who lived with him when she was a child and who said, with great warmth, that he was a wonderful man, and I'm inclined to think he was.

Thank you.

⁷ See Henry White Edgerton, *A Liberal Judge—Cuthbert W. Pound*, 21 CORNELL L.Q. 7 (1935).

⁸ *Id.* at 11.