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## A Secretary's Absence for a Law School Examination

Todd C. Peppers

*Washington and Lee University School of Law*, [pepperst@wlu.edu](mailto:pepperst@wlu.edu)

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1601 I Street  
Washington,  
D.C.

May 5/93.

Dear Chief Justice,

Have you written anything  
or come to any conclusion in  
the state of funds case? .

Excuse this inquiry, which I  
would not have made <sup>had</sup> <sub>it</sub> not  
been necessary, who has worked on this  
case in looking for authorities,  
cases are tomorrow to prepare  
for his law school examination.

Respectfully,  
H. Gray

Melville Weston Fuller

Horace Gray to Melville Weston Fuller, May 5, 1893.

# A SECRETARY'S ABSENCE FOR A LAW SCHOOL EXAMINATION

*Todd C. Peppers*<sup>†</sup>

The May 5, 1893 letter from Justice Horace Gray to Chief Justice Melville Weston Fuller touches upon several different strands of Supreme Court history. To place the letter in context, we need to briefly discuss the creation of the law clerk position as well as the different functions of this first generation of law clerks. And we need to talk about the untimely death of a young Harvard Law School graduate named Moses Day Kimball.

During the eight years that Horace Gray was the chief judge of the Massachusetts Supreme Judicial Court (1873 to 1881), he hired recent Harvard Law School graduates to serve as his legal secretaries (hereinafter “law clerks”). Gray relied on his half-brother, Harvard Law School Professor John Chipman Gray, to select the clerks. Professor Gray was skilled at spotting high-quality students, and the men tapped to clerk for Horace Gray included future Supreme Court Justice Louis Brandeis. Gray and Brandeis spent many mornings discussing the substantive merits of pending cases, an experience which Brandeis biographer Melvin Urofsky writes that the young man “treasured.”<sup>1</sup> Gray himself was impressed by Brandeis, later writing that his former clerk was “the most ingenious and most original lawyer I have ever met.”<sup>2</sup>

Gray never publicly discussed his motivation for hiring law clerks, but the most likely explanation for the decision turned on his work style. Simply put, Gray “delighted to go to the fountains of the law and trace its growth from the beginning,” for he “believed that an exhaustive collection of authorities should be the foundation of every judicial opinion on an important question.”<sup>3</sup> Gray’s devotion to legal research might well explain the necessity of hiring assistants to help him drink from these fountains of the law.

When Gray took the United States Supreme Court bench in 1882, he continued his practice of hiring law clerks and assigning them substantive

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<sup>†</sup> Professor and Henry H. & Trudye H. Fowler Professor in Public Affairs at Roanoke College, and visiting professor of law at the Washington and Lee School of Law. Portions of this article have previously appeared in Todd C. Peppers, “Birth of an Institution: Horace Gray and the Lost Law Clerks,” *Journal of Supreme Court History* Vol. 32, No. 3 (2007): 229-248.

<sup>1</sup> Melvin I. Urofsky, *Louis D. Brandeis: a Life* (New York: Pantheon Books, 2009): 47.

<sup>2</sup> *Ibid.*, 51.

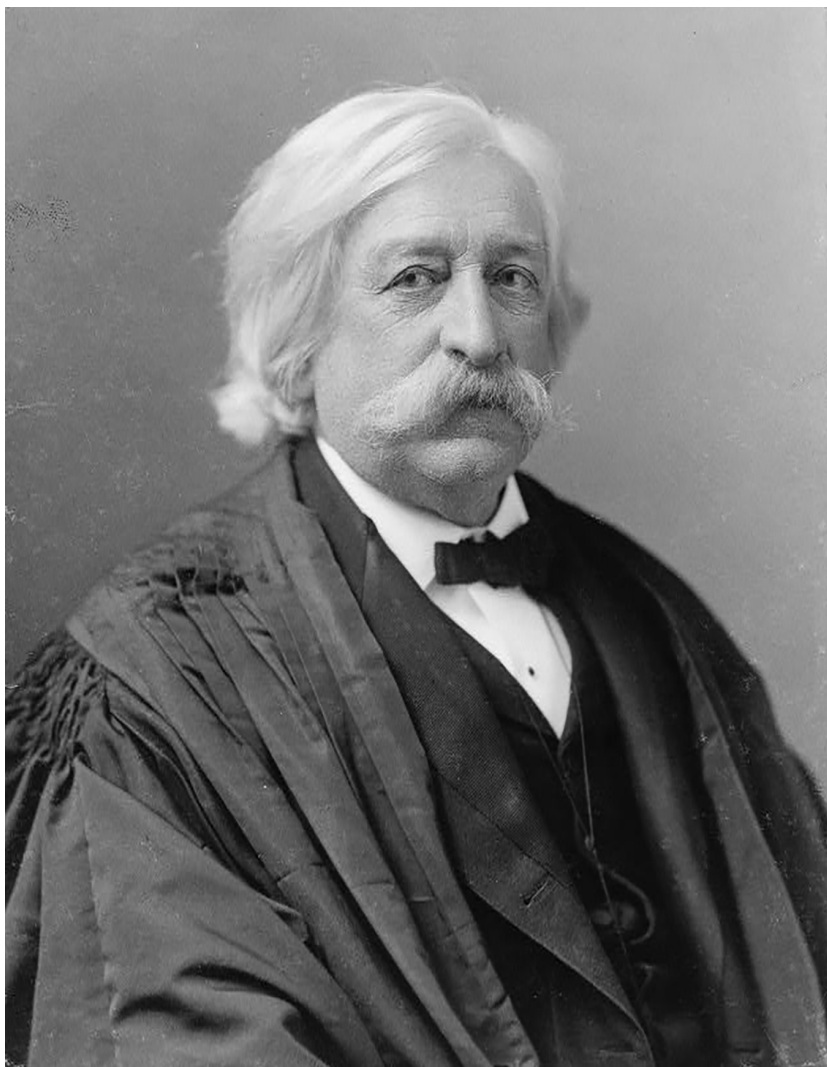
<sup>3</sup> Elbridge B. Davis and Harold A. Davis, “Mr. Justice Horace Gray: Some Aspects of His Judicial Career,” *American Bar Association Journal* 41 (May 1955): II.

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Horace Gray.





Melville Weston Fuller.

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duties. Former law clerk Samuel Williston (October Term 1888), who went on to fame as a contracts professor at Harvard Law School, writes that “[t]he secretary was asked to do the highest work demanded of a member of the legal profession — that is the same work which a judge of the Supreme Court is called upon to perform.”

After oral argument, Gray would give his young clerk the applicable briefs and legal pleadings, and ask them to review the “novelettes” and report back to the Justice with their independent thoughts. Gray did not initially share his own opinion of the case with his clerk, but “[i]t was then the duty of the secretary to study the papers submitted to him and to form such opinion as he could.” Gray and his clerk would also sit down before the Court’s Saturday conference and discuss pending cases — first Gray would ask his clerk to “state the points of the case as best he could,” with Gray closely examining and challenging the clerk’s “conclusions.”<sup>4</sup> “When I made them [the reports],” Williston writes, “the Judge would question me to bring out the essential points, and I rarely learned what he thought of a case until I had been thoroughly cross-examined.”<sup>5</sup>

Former law clerk Langdon Parker Marvin (October Term 1901) also recalled Gray’s oral examinations:

After he had settled himself in front of the fire with his black skullcap on his head and a five-cent Virginia cherooot in his mouth, he would say to me, “Well, Mr. Marvin, what have you got for me today?” So then I would tell him, having fortified myself with a little bluebook in which I had made notes of the various cases. Of course, I couldn’t read all of the records, or even all of the briefs, but I made an analysis of the cases and I would tell him what the facts in each case were, where it started, how it had been decided in the lower courts, how it got to the Supreme Court of the United States, and what the arguments on either side were.<sup>6</sup>

Through his tenure on the Supreme Court, Gray permitted his clerks to offer opinions as well as case recitations. Williston writes that Gray “invited the frankest expression of any fresh idea of his secretary . . . and welcomed any doubt or criticism of his own views,”<sup>7</sup> while Marvin confesses that “he rather astonished me early in the year by saying ‘How do you think it ought to be decided.’”

Former Gray clerk Ezra Thayer (October Term 1891) echoes Williston and Marvin’s comments about the intellectual give-and-take between Gray and his young charges. Thayer writes that Gray “liked best to do his thinking aloud, and develop his own views by discussion.” During these discussions

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<sup>4</sup> Samuel Williston, “Horace Gray,” ed., William Draper Lewis, *Great American Lawyers: A History of the Legal Profession in America* (Philadelphia: J.C. Vinson, 1909): 158-59.

<sup>5</sup> Samuel Williston, *Life and Law: An Autobiography* (Boston: Little, Brown and Company, 1940): 92.

<sup>6</sup> “Oral History Project: The Reminiscences of Mary V. and Langdon P. Marvin,” Columbia University.

<sup>7</sup> Williston, *Life and Law*, 93.

Gray “would patiently and courteously listen to the crudest deliverances of youth fresh from the Law School.”<sup>8</sup>

Gray then adjourned to the Saturday conference. Williston writes:

When . . . the Judge returned, he would tell the conclusions reached and what cases had been assigned to him for opinions. *Often he would ask his secretary to write opinions in these cases*, and though the ultimate destiny of such opinions was the waste-paper basket, the chance that some suggestion in them might be approved by the master and adopted by him, was sufficient to incite the secretary to his best endeavor.<sup>9</sup>

Marvin also recalls assisting with the drafting of opinions, but only to a limited extent. “When the Court went into recess, Mr. Justice Gray would begin his work on the opinions allotted to him. I would help him on that, looking up law, and sometimes preparing statements of fact which appeared in the Court records — but, of course, he wrote the opinions himself — in long-hand, with a stub pencil.”<sup>10</sup>

Gray and his clerk worked in the library of Gray’s home at 1601 I Street in Washington, the one-year clerkship beginning in the summer before the next term of Court. Williston describes the second-floor library as composed of two rooms.

The walls of the library rooms were entirely covered with law books, except the spaces for windows and those over the mantel pieces. In the larger room, a portrait of [Chief Justice John] Marshall by Jarvis had the place of honor, surrounded by quite small portraits of all the other chief-justices of the United States. In [the] connecting room, the portrait over the mantel was a replica of Stuart’s well-known representation of [George] Washington.<sup>11</sup>

A desk for the law clerk was placed in the larger of the two library rooms, a spot from which the clerk observed social calls by the other Supreme Court justices. Williston adds that Gray’s bedroom was on the third floor of the home. He wryly observes that Gray “was unmarried at the time, and the house seemed designed for a bachelor. He had some antipathy to closets.”<sup>12</sup>

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<sup>8</sup> *Proceedings of the Bar and of the Supreme Judicial Court of Massachusetts in Memory of Horace Gray* (Jan. 17, 1903): 36, 38.

<sup>9</sup> Williston, “Horace Gray,” 159 (emphasis added).

<sup>10</sup> “Reminiscences of Mary V. and Langdon P. Marvin.”

<sup>11</sup> Williston, *Life and Law*, 91.

<sup>12</sup> *Ibid.*



Gray's home at 1601 I Street.

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As for Gray's personal relationships with his law clerks, Williston remarked that Gray "was of most genial disposition" and "a patient man" who "invited the frankest expression of any fresh idea of his secretary."<sup>13</sup> Marvin commented that Gray was a "delightful person" who regaled his law clerks with stories of hunting buffalo in his youth. Marvin would often have lunch or coffee with Gray, and in the afternoon he took drives with Gray in his brougham ("I had to huddle in the corner, as he took up most of the seat") to the local zoo.<sup>14</sup>

During his first three years at the Court, Gray personally paid his law clerks' salary. This changed in 1886, when Congress authorized funds for the hiring of a "stenographic clerk for the Chief Justice and for each associate justice of the Supreme Court, at not exceeding one thousand six hundred

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<sup>13</sup> *Ibid.*, 93.

<sup>14</sup> *Reminiscences of Mary V. and Langdon P. Marvin.*

dollars each.”<sup>15</sup> While the justices differed in who they hired to serve as their stenographic clerk — some justices hired lawyers or law students, while a few hired professionally trained stenographers — within 50 years the position had evolved into what we recognize as the modern law clerk.

At some point in 1892, Professor Gray tapped Harvard Law School student Moses Day Kimball for the clerkship position. A native of Massachusetts and the son of a wealthy merchant, Kimball graduated first in his class at Harvard College in 1889.<sup>16</sup> Kimball himself was unimpressed with his undergraduate achievements, writing at the time of his graduation that “[m]y life has been uneventful so far.” While Kimball considered becoming a minister, he subsequently enrolled in Harvard Law School in the fall of 1889. Kimball proved to be a top student, became a member of the *Harvard Law Review*, and was awarded the honor of speaking at the law school commencement in June of 1892. Kimball chose to address his classmates on the topic of “Employer’s Liabilities to Their Servants.”<sup>17</sup>

We know nothing about Kimball’s clerkship with Gray. He would have started the clerkship by the fall of 1892, and throughout his time in Washington Kimball roomed with his brother, Marcus Morton Kimball. In late March of 1893, Kimball developed a cold that rapidly turned into pneumonia. By April 1, the 25-year-old Kimball was dead.<sup>18</sup> Prior to his burial, a small memorial service was held at his brother’s home.

Regarding Kimball’s early demise, former law school classmate Prescott F. Hall offers some insight. After summarizing Kimball’s studies at Harvard Law School as “a splendid example of what can be one by one who adds to a good mind the untiring and conscientious will to achieve the best,” and describing him as a friendly and helpful classmate who was willing to assist his fellow students with their academic difficulties, Hall writes that Kimball’s “love for the law” may have been his undoing. “This devotion to his profession blinded him . . . to the proper measure of his physical strength, and deprived the State of his most promising life and service.”<sup>19</sup>

We can only speculate as to the emotional impact that Kimball’s death had on Gray, but there was a clear work-related impact: Gray needed a new law clerk. In his letter of May 5, written approximately one month after

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<sup>15</sup> 24 Stat. 254 (1886).

<sup>16</sup> “Obituary: Moses Day Kimball.” *The Harvard Crimson*, April 4, 1893.

<sup>17</sup> “Very Last Act: Scenes at the Harvard Commencement.” *The Boston Globe*, June 29, 1892.

<sup>18</sup> “Death of M. Day Kimball: Was Private Secretary to Judge Gray of Supreme Court.” *Boston Daily Globe*, April 2, 1893. There is some confusion as to whether Kimball died on March 31 or April 1. The latter seems to be the most accurate date.

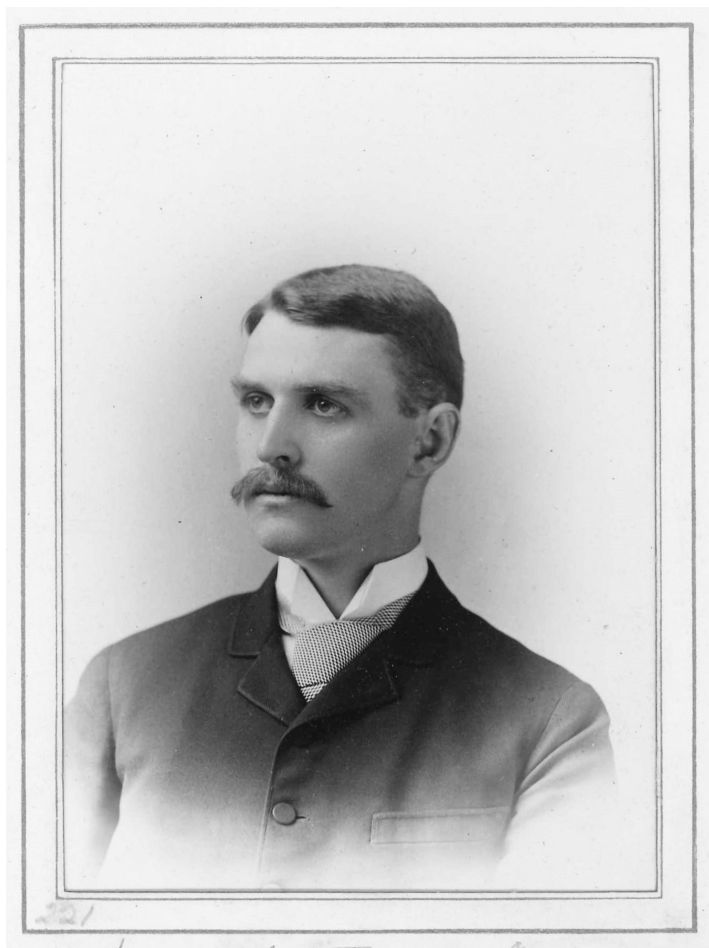
<sup>19</sup> *Harvard College Secretary Report No. III, Class of 1889* (Cambridge: E.W. Wheeler, 1898): 48.



Moses Day Kimball.

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Kimball's death, Gray references the fact that his clerk had to discontinue his legal research on a statute of frauds case in order to return to law school for his examinations. Although Gray doesn't mention the law clerk by name, it is undoubtedly James Montgomery Newell — a Phi Beta Kappa graduate of Harvard College who would graduate from Harvard Law School in June of 1893 and clerk for Gray until the spring of 1894. Given the fact that Kimball died late in his clerkship, it's likely that Newell had already been tapped as his successor.



James Montgomery Newell.

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The statute of frauds case mentioned by Gray is *Dalzell v. Dueber Watch-Case Manufacturing Company*, which was argued before the Court on April 18 and 19, 1893 and decided on May 10, 1893.<sup>20</sup> The case involved the applicability of the statute of frauds doctrine to an oral contract in which a watchmaker allegedly agreed to assign his patent rights to his employer. Gray would write the majority opinion for the Court, holding that the employer had no right to the patent held by an employee because there was not an express

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<sup>20</sup> 149 U.S. 315 (1893).

agreement assigning such rights. The lone dissenter in the case was Justice David Brewer, who did not write a dissenting opinion.

Unfortunately, we don't know exactly what Gray wanted from the Chief Justice. If one considers only the first sentence of the letter, a logical guess would be that Gray was inquiring whether Fuller was going to write a concurring or dissenting opinion. The second sentence of the letter, in which Gray explains that his law clerk's research had been interrupted because the clerk needed to prepare for his law school exams, suggests that Gray himself was unsettled — either as to the outcome of the case or the relevant legal authority — and wanted to know what Fuller thought of the merits of the case.

Any written response from Fuller has been lost to history. If, however, the Chief Justice had his own legal research to share, it was likely gathered by his long-term law clerk, Clarence Melville York. A graduate of National University Law School, York worked for the Fuller for 16 years and was highly regarded for his legal research skills. Like Kimball, York's life would end prematurely. He either jumped or fell to his death from a hospital window.<sup>21</sup>

James Montgomery Newell would complete his year-long clerkship with Gray before entering private practice in Boston. Fifty years after graduating from Harvard College, Newell looked back on his life and career with a cool detachment. "There is no outstanding accomplishment in my life which I can recite," he wrote. "Along the cool, sequestered vale of life I have kept the noiseless tenor of my way, to my own satisfaction for the most part, and, I trust, without disturbance to others." As for his legal career, Newell was equally taciturn. "[A] recital of it in detail would bore any reader to tears."<sup>22</sup> He died in his hometown of Boston, Massachusetts on December 1, 1939.

As for Moses Day Kimball, his name remains familiar to residents of Putnam, Connecticut. After his death, Kimball's mother, Susan Tillinghast Morton Kimball, donated 9,000 dollars to build a new hospital in Putnam and name it in honor of her late son. Today the Day Kimball Hospital is part of the sprawling Day Kimball Health Care System. And Moses himself has not been forgotten by the staff at the hospital. Every year, per the conditions of his mother's original gift, the staff gather to celebrate the birthday of the young man who once worked at Justice Horace Gray's side.<sup>23</sup>

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<sup>21</sup> Todd C. Peppers. "The Supreme Court and the Curse of the Gypsy: The Tragic Tale of Clarence Melville York." *The Green Bag* 2d. Vol. 13, No. 2 (Winter 2010): 173-186.

<sup>22</sup> *Harvard College Class of 1889: Fiftieth Anniversary Report*: 296.

<sup>23</sup> "Day Kimball Hospital Marks 150th Anniversary of Namesake." *Norwich Bulletin*, February 13, 2018. As with the date of death, there is additional confusion as to the actual date of Kimball's birthday. The hospital has traditionally celebrated it on February 14, although birth records show that Kimball was actually born on February 13, 1868.