Memorandum Accompanying Letter
to Miss Susie Hershberg

As to the childhood and history of Pierce Butler, there are ample references in the memorial presentations to the Supreme Court after his death. This includes the basic summary of his practice which was extraordinarily broad, with a great deal of litigation and with great success.

Inquiry is made as to other interests such as teaching or other education or religious activity, etc. In these matters he had the customary civic experiences such as member of the St. Paul Charter Commission, St. Paul Library Board, Regent of the University of Minnesota, a trustee of Carlston College, President of the Ramsay County Bar Association and of the Minnesota State Bar Association, activities in legislation for the first Workmen's Compensation Law in Minnesota, the establishment of the Mayo Foundation, etc.

As to religious matters he took little if any active part in religious organizations, though he was a friend of the Archbishops of St. Paul during their tenure while he was here, and also of the pastor of the church he attended in Washington.

He had no government activity other than judicial, nor diplomatic nor military service, nor commercial activity, and did not engage in farming after he left the farm to come to St. Paul in 1887 and prior to the year before his death when he acquired a farm in Maryland essentially as a summer place.

As to the military it is curious that when he was ready for college – having taught a country school for a year at the age of sixteen – he applied for West Point in a competitive examination. The prevailing candidate had a score of 86.4 and his score was 86.3, so he lost the appointment. The successor was killed in the Philippine War in 1901 or 1902.

He was not interested in any business other than as counsel for a great many businesses and including a contracting and mining business of his five brothers in which he inherited a small interest from one of his brothers in 1926, several years after he was on the bench.

When he went on the bench he owned 100 shares of Great Northern Railway stock and 100 shares of Northern Pacific Railway stock which he sold before being sworn in. He also owned 100 shares of the Merchants National Bank of St. Paul which he retained. The balance of his securities were municipal bonds. He owned no real estate other than his dwellings and subsequently his farm in Maryland.

As to general philosophy of the law, his views are very well presented by various members of the Bar, by the Solicitor General Jackson, whose views varied from his, and by the Chief Justice's comments, all of which are found in the memorial as well as in the general resolution of the Bar commencing on page 11. Perhaps the summary of his general thought is set forth on page 14 which for convenience I quote:

> "Fearful of the rule of man in place of the rule of law, he appealed to the accumulated body of the law as a continuous social expression and not as to what might appear at a particular time to be enlightened social self-interest. He did not believe that the law is merely what the judges may from time to time say it is. He believed that there is a law that is greater than the judges and he was zealous to avoid its misapplication merely because the end in view appeared at the moment to be desirable.
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> "He had faith in the power of objective reasoning and in the intellectual integrity of man, with correlative responsibility of the individual to develop himself and pursue the course that to him seemed right. This faith in the individual man was expressed by resistance to any attempted infringement of the bill of rights, and, in the absence of constitutional amendment, to centralization of government and to extension of its powers over the individual. He felt that greater material welfare under a paternal government – if possible of achievement – rather than ennobling the citizen would

> debase him by destroying his integrity and denying his will to exercise his moral and intellectual forces. He refused to concede that the individual is a helpless creature of an environment built by others, and opposed the kind of humanitarianism that would relegate him to that position."

The various opinions also set forth in the various presentations indicate clearly why he dissented in the Olmstead case, and also, although no reference is made to it, in Buck v. Bell, the sterilization case.

His early experience was as Assistant County Attorney and then for four years as County Attorney while he was still under the age of thirty-two. This together with other matters imbued him with the definite thought that those arrested for crime should be given all of the safeguards. He knew the advantage that could be taken by police or by prosecutors who sought to win cases rather than to win them with due regard to the rights of the individuals. Thus the long line of dissents or participation in majority opinions which protected the accused. In view of his early life as a vigorous prosecutor it is an example of his devotion to individual liberty and also of his compassion and warmth for individual people of all walks of life.

The memorial resolution shows general conception of the law and I would add further that he believed there was a natural law and that departure from it would lead to trouble. This led him to careful examination of each case so that there would be no application of the familiar rule that "Harsh cases make bad law." He felt that whenever the Court went beyond what was required in language, that the specter of such language would rise to plague the Court in the future.

This is sharply shown by examination of his opinions. There are practically no readily quotable sentences in them. All practicing lawyers know that one can always find generalized statements in some opinion or another which will apparently suit the purpose of the

advocate in the particular case although in fact inapplicable to the facts on which the case was decided.

Pierce Butler invariably reviewed his opinions after he had written them and carefully excised generalized statements not necessary to the decision of the particular facts in front of him. Further he did not alter the facts to reach a conclusion. As a result, his opinions are perfectly clear as to what was decided.

The custom of the Court, as is well known, is for the Court to vote on the decision and then the opinion is assigned by the Chief Justice to one man to write. That man having written it then circulates it in proof form printed, for comment by the others. If there are broader expressions than he felt were necessary he might make a note to that effect but rarely insisted upon change unless there was a very serious ground for it. In other words, he felt it most desirable for the country to know what the law was without caviling over small pieces of language. Thus there are few concurring opinions where he agrees with the result but expresses some variation in the method of reaching it. In other words, he was strong in his opinions on the decision but tolerant of other methods of expressing that decision, to the end that there would not be a large group of opinions but that the Court would stand as a whole insofar as it could without violating the principles of the individual Justices. This came largely from his view that the Court's function was to decide the case before it and let that decision stand for the future on facts similar to that case. Personally, as is indicated in the memorial at various places, he had great wit and humor and also the power to use them in clarifying facts and in persuasively expressing his own views. As Attorney General Jackson expressed it (page 50), "He could use his ready wit, his humor, his sarcasm or his learning with equal case and skill. He was relentless in bringing the lawyer face to face with the issues as he saw them." Or, as Attorney General

Mitchell put it (page 40), "Despite his force and power, he was no grim person. He liked people. He was companionable, with a delightful sense of humor, and an inexhaustible fund of anecdote."

On the same question and also on his own religious feeling in which your notes indicate substantial interest, you might refer to page 20 of the comments of Mr. Rumble,

> "He was a charming companion, and his memory and wit and keen insight into human nature made him a famous story-teller."
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> "He was deeply religious, if by this is meant a genuine belief in a Divine Being and a sincere effort to live a Christian life. A member of the Roman Catholic Church, he was noticeably tolerant in his views upon religion. I never knew him to either favor or criticize one for his religious beliefs, and when he left his law firm to go upon the Bench most of his partners were not members of that church."

I do not recall his speaking at ecclesiastical congresses although he may very well have made one at the big Congress here in 1923 which would be of largely formal nature.

My sister's illness did not affect his attitudes basically.

There was in Time at the time of his death a quotation through Thomas G. Corcoran by Oliver Wendell Holmes which approximates the following:

> "Tommy, he is against us but there is no man I more greatly admire. He is a monolith. There are no cracks for the frost to get in."

As to his personal relationships on the Court, the other Justices, it is well known that his appointment was recommended by Chief Justice Taft and by Mr. Justice Willis Van Devanter. The Chief Justice had had association with him (on opposite sides) in the long condemnation proceedings of the Grand Trunk Pacific Railway by the Dominion of Canada. And as Senator Taft (page 27) states:

> "He was one of my father's dearest friends, and I speak from personal knowledge when I say that he was loved by all those who knew him, and universally admired and respected by the Bar of the United States."

He and Mr. Justice Van Devanter drove to Court together every day, for all practical purposes. One would pick up the other indiscriminately. A moderate number of times they would also pick up the Chief Justice, who usually went in his own car.

Subsequently Mr. Justice Sutherland was added to the "car pool" and to a more occasional extent Mr. Justice McReynolds.

As to the court-packing bill, he of course took no part. He was a judge and stuck to his judicial duties and did not vary his opinions under the political threat.

One incident in this connection might be amusing. I happened to be in Washington during the peak of the court-packing bill and I suppose it would be about May 1937, and as it was an opinion day I went down to the Court and listened to the opinions and subsequently drove back in my father's car with Mr. Justice McReynolds, Van Devanter, Sutherland and Butler. My father had long treasured Scotch anecdotes for the benefit of Mr. Sutherland, who had been born in Scotland and who would receive what were usually jibes with his gentle smile and with obvious pleasure. On this occasion Mr. Justice McReynolds, who was in the front seat, followed the same line and referred to the picnic that was to be held by an Englishman, an Irishman and a Scotchman. The Englishman said he would bring the food, the Irishman said he would bring the whiskey, and the Scotchman said he would bring his brother. The laughter was general and there was no evidence of strain over court-packing bills.

This was followed by an anecdote which Father told, also for the benefit of Mr. Justice Sutherland, but with an apt reference to a matter I adverted to above as to generalized

language in an opinion. Father had passed it without comment but was not much in favor of it and he gently kidded Mr. Justice Sutherland about it. It is a little too long to relate here.