



# SUPREME COURT HISTORICAL SOCIETY

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## ***My Father the Chief Justice***

### **CHARLES P. TAFT**

In 1930 William Howard Taft was succeeded as Chief Justice by Elizabeth Gossett's father, Charles Evans Hughes. She did [the first piece in the Year](#) book about Chief Justices, and I am honored to be asked to follow her example with a memorial piece on my father. Perhaps I can add a few sidelights on history . . .

I AM RESPONSIBLE for William Howard Taft's principal direct violation of the regulations of the Supreme Court of the United States, in November 1924. In January 1922, having passed the Bar examination, I was sworn in as a member of the Bar of the Supreme Court of Ohio. In November 1924, I was in Washington on business, having arrived at my father and mother's house the night before. At breakfast my father asked, "Would you like to be admitted to the Supreme Court Bar?" I said, "Sure!" He said, "All right, I'll call Jim Beck [then Solicitor General] and ask him to present you." We went down and I was set in the front row with the other applicants. When the clerk asked for us, Mr. Beck got up and said, "I am very happy to present for admission to the Bar of this Court, Mr. Charles P. Taft of Cincinnati, who for the three years past has been a member of the Bar of the highest court of the State of Ohio." If you can add and subtract, it was not three years, but two years and ten months for me. Should I say, Stop! This is illegal! Or should I keep my mouth shut? I kept my mouth shut! I was then sworn in and told to go to the clerk's office and sign the roll. I did! I don't believe St. Peter held that against the Chief Justice--or me.

I'm not sure of the correctness of a child's appraisal of his father or even his grandfather. My son Seth, lawyer and County Commissioner in Cleveland, a few months back gave a speech on W.H.T. at the Roosevelt Masonic Lodge in Cleveland. A few mistakes appear:

My grandfather was said to have come out to Cincinnati in 1838 through Cleveland and a canal. No, it was New York, Philadelphia and Harrisburg by train, canal, stage and railroad to Pittsburgh, Columbus and Cincinnati by stage coach, because the Ohio River was low that year.

W.H.T. was not interested in politics, said my son. He may well have disliked some of it, but he was in the middle of it in Ohio, as Collector of the Internal Revenue here, as Solicitor General in Washington, where he met and was charmed by T.R. as Civil Service Commissioner. And continuously until he died, he was really in the middle of political life.

Seth's account left out eight years as Circuit Judge, centering in Cincinnati. His cases then on labor matters had great importance, in an area that affected his life. His experience 1918-1919 in the War Labor Board modified his earlier views very greatly.

W.H.T. had long political inheritances. The original Robert Taft turned up in Braintree and Mendon, Massachusetts, in 1675. He and most of his five sons were Mendon Selectmen at one time or another. They had properties to the west, across the Blackstone River, and made a deal with the town to build a bridge if they were let out of road work required of all citizens. In a couple of years with the bridge built, the Tafts had no interest in beginning road work again! They finally had to be sued. My great grandfather Peter was a probate judge (no law needed) and a member of the Vermont Legislature. Alphonso was a Whig city councilman, an elected judge and ran for Governor.

When W.H.T. became President, I remember his telling Congress members that federal judges were his patronage.

We never had much talk about ancestors or early family around the table. Any references were to people and their characters, like Alphonso's. I learned what they had done long after events. The offices held evidently impressed me because I remember very well standing in front of my mother's pier glass, striking a pose and saying, I am the Governor of the Philippine Islands! *But* Alphonso was interested in ancestors and was the moving force in the first big

family reunion in Mendon, Massachusetts, in 1874. I was fascinated when I found and looked over the printed account of that event and the speeches. Alphonso's, giving the history of the Tafts, was long, and clearly would have taken three hours to deliver, at least. He spared them and left it to the printed volume. I remember a long one by W.H.T. in 1908 at some Virginia or West Virginia County Seat. I listened, but at age 10, without much enthusiasm. In all cases the subject was thoroughly covered. But I inherited the ancestor concern and have the whole Taft-Herron-Chase-Kellogg book. I hasten to add, don't ask me about collaterals, please.

As Governor of the Philippines, W.H.T. treated the Filipinos as persons, while the Army, shot at, with many killed, didn't like any Filipino. The Order of the Carabao later sang, "He may be a brother of William H. Taft, but he ain't no brother of mine." But Mr. Dooley did not write it!

In those presidential years while Bob was in Yale and Harvard Law perhaps doing what he should, I was at Taft School (Uncle Horace's), closely scrutinized by Uncle Horace, and, by deputy, by W.H.T. I was greatly amused the other day to read that Alphonso with W.H.T. at Yale was equally worried that W.H.T. was not devoting his time to academic pursuits. He came out only second in his class. Well, I was first in my class at Taft, which kind of stopped them, partially, and doing besides football, baseball, basketball, hockey, debating, drama and mandolin club. Finally, when I got to Yale (1914 fall) and onto the varsity basketball team, with my good friend and classmate Newell Garfield, grandson of the President, we got lots of national publicity. Uncle Horace wryly complained that he had always been known as son of his father and brother of his brother, but he was damned if he'd be known as uncle of his nephew.

W.H.T. was always kind of snooty about our camping and fishing and so on, although he always went along on H.H.T.'s tea picnics, and enjoyed them. I'm really annoyed that it was only long after he died that I discovered the camp record book at Gravelle Lake Club, seven or eight miles from Murray Bay. It was pretty rough camping, though in a cabin, even in those days. W.H.T. was a club officer and attended frequently. The trips were all spelled out with the numbers of trout, quite considerable, and more than today, along with number of rods. All of this around 1895-1896 before I was born, and W.H.T. was under 40, rejoicing in what he later kidded us about.

In 1909, John Hays Hammond gave me a sailing dory at Beverly, Massachusetts, to my ignorant *delight*. The Sylph was a presidential yacht run that summer by Lt. Jg Train, now a retired Admiral, and father of Russel, now head of EPA. W.H.T. wired to my mamma not to let me in it until he got there, knowing even less about it than I did. That restraint did not work, and an early day found me sailing sideways to leeward because I did not know what a centerboard was for. Fortunately, Lt. Train's sharp-eyed boys spied me and sent a launch after me; disaster was avoided and I learned about centerboards. The President never entered the dory or provided instruction.

There was golf at Murray Bay before that, but not from me. W.H.T. had played in the footsteps of Justice Harlan, whose family were long-time visitors at Murray Bay. After the White House we went back in 1913 and the golf course was the center of attraction. The John Harlans were regulars from Chicago and John, Jr. was brought up there, too, with his sister, now Mrs. Derby. When my wife and I were engaged as the First War began, she came up to visit and was overwhelmed by the conversation. W.H.T., Uncle Horace, Aunt Maria Herron, and Bob's wife Martha were great talkers, and most amusing, but as a combination absolutely nonstop. We should have had tape recorders in those days, for it should have been preserved. Much of the talk was around the daily golf matches; Eleanor was tennis, not golf.

Grandchildren of W.H.T. came along beginning in 1915, and as each new one arrived an additional room was added at Murray Bay. We ended up sleeping 26, including servants, with seven bathrooms. Helen had her own house, and Bob and I divided time so that I came in July and Bob and his family in August. There was too much noise, so that a big playroom was added at the end of the house by the tennis court. On W.H.T.'s 70th birthday (September 15, 1927), we had a real bash. That was late in the summer for most, but that year they stayed, and 105 sat

down to lunch. Not only that, my mamma and Maggie McNamara, the cook, picked enough lobsters (from Maine, of course) to feed the whole crowd. Sir Lomar Gouin, Premier of Quebec, made the speech and Miss Sally Tibbitts presented a most delightful painting by T.S. Coburn of a Canadian snow scene. It's in the Auburn Avenue house. I did a movie of the whole affair which shows all the ones we should remember, from Aunt Jennie Anderson and Aunt Agnes Exton to Sir Charles Fitzpatrick, Chief Justice of Canada.

There was no law clerk at Murray Bay, and W.H.T. did the work on the law himself with the help of Misch. Wendell W. Mischler had been with him since the War Department (1904-1908). His court objective was to reduce the burden of cases by the certiorari process, and he did it. It was only granted if the petitioner got three judges (now increased, I believe), but the Chief did them all first. The other objective was to induce agreement and avoid 5-4 decisions if possible.

He succeeded in both. When Justice Sanford was ill and had to give up the complicated patent cases, W.H.T. took them on, and it was a burden he felt he could not trust to any other Justice.

By this time he had to stop golf, because blood pressure was sure mounting on him. He kept his weight down, but still had to diet; he stayed around 255. In spite of various accounts to the contrary, he was 5'10 1/2", compared to Bob who was 5'11 1/2", 175-185, and Charles P. Taft (me) who is 6'1" and 195. That 255 was heavy enough. I remember well as a boy at Murray Bay watching him walk across the floor over my head, before he had to move downstairs to avoid the climb.

He was fascinated by the idea of a Supreme Court Building. He insisted on Cass Gilbert (whose son was a classmate of mine at Yale). That enterprise took longer than the basic change in the volume of Supreme Court business reduced by limiting appeals (passed 1925), and the administrative reorganization of the federal courts, almost equally necessary, took until 1939, long after W.H.T. was gone. The old-time "Progressives" retained their enmity all the way from 1912 to 1930+, quite irrespective of the merits of the W.H.T. program, about which no one would even argue today.

For the Court itself, McReynolds was a headache. He would not speak to Brandeis, was clearly anti-Semitic, and was a disruptive force. McKenna was old and wholly incompetent at the end, 30 years after McKinley appointed him.

W.H.T. was criticized for his conservative opinions. My own first contact with that was when I represented the Amalgamated Clothing Workers (Sidney Hillman's union) in a strike case and found one of *W.H.T.'s first opinions*, *American Steel Foundries* (1921), which sustained picketing by other than the company's employees, and overruled an extremely anti-labor opinion by Justice Pitney in 1917. W.H.T. dissented vigorously in the famous women's minimum wage case, sustained child labor regulations under the Commerce Clause, and laid down in the *Stockyards* case and the *Grain Exchange* case the whole theory of the stream of interstate commerce on which the Wagner Act and those like it were upheld. So I'm not worried about the modern charge of conservatism that I see snidely referred to on occasion. That is just ignorance. *Bill Severn's* book, *William Howard Taft* (1970), does the defense very effectively.

When William Howard Taft was ill at Ashville in his last sickness, he was greatly worried that President Hoover would appoint Stone instead of Hughes as Chief Justice. My brother Bob was willing to be the messenger, and was able to get from Mr. Hoover a commitment to appoint Hughes. W.H.T. was greatly relieved before he came back to Washington to die--and very pleased. W.H.T.'s satisfaction was wholly sound, as Hughes' service for eleven years and more clearly established, before he resigned for health reasons in June 1941. He achieved a colorful Supreme Court image of real importance *even if gently* joshed in *Of Thee I Sing*.

I will close this slight memorial with the letter W.H.T. wrote me when the 12th F.A. and its 2d battalion sergeant major (me) was ready for France and the 2d Division AEF:

"Whatever happens, we know you will do your duty with a pure heart and a clear conscience and a spirit that either in you or in others will win the war for the right. . . . It is a solemn and sacrificial moment, and I am glad you are there, much as it presses my heart to think of the possibilities. We are all proud of you."

## ***The Justice and the Lady***

**ROBERT KRONINGER**

San Franciscans during the gilded era of the 1880's were entertained by a spectacular and mystifying divorce suit against one of the city's richest men. William Sharon, Comstock mining multimillionaire, owner of the Palace and Grand Hotels, entertainer of royalty, and former United States Senator from Nevada, was generally thought to be a widower, who avoided loneliness with a succession of young companions. Suddenly there appeared the beautiful Sarah Althea Hill, claiming rights as his wife. She had a purported contract bearing what appeared to be his signature. Charging him with adultery, she sought a divorce.

This action was to spawn a great tangle of state and federal legal complications throughout the decade. As one segment of the larger story, Sarah's concern for her honor as a lady was to precipitate a constitutional teapot tempest. But she was little more than the final catalyst. The explosive brew had been simmering for three decades in the malevolently intertwining lives and passions of two brilliant but irascible men of the West, Supreme Court Justice Stephen J. Field and former state judge David S. Terry.

Both men had been trained in the law but were drawn to California by the gold fever of 1849, Field from New England, and Terry from the South. Stephen J. Field, on his arrival in California, was almost immediately elected *alcalde*, or judge, of the town of Marysville, which he helped to found at the foot of the Sierras. By his own account, he amassed over \$100,000 in less than six months in that office. With the state's admission to the Union in 1850 another man was made judge of the Marysville district, to Field's chagrin. Field soon found himself in contempt of court and disbarred by his successor. He quickly got the rulings set aside on appeal but, not satisfied, he sought election to the state's legislature and there attempted to have the new judge removed from office. In the process, Field became embroiled in a challenge to a duel and a few days later was the object of an attempted saloon ambush. David Broderick, a fellow member of the legislature, consented to be his second in the contemplated but never-consummated duel and was his protector in foiling the ambush. Thus Field was doubly indebted to Broderick.

Terry, seven years Field's junior, was elected to the state Supreme Court in 1855 and became its Chief Justice two years later at the age of 34. Field joined him on the Court in that year, Terry as Chief Justice swearing him into office.

Field, Terry and Broderick were all Democrats. But the tensions leading to the Civil War were keenly felt in California, whose people had come from widely disparate backgrounds. The party developed a bitter schism, out of which arose strong personal animosity between the Terry and Broderick factions. Determined to settle the matter according to the code by which he had been raised, Terry resigned his position as the state's highest judicial officer and two days later challenged Broderick, then United States Senator from California, to a duel. At dawn on September 13, 1859, amid sand dunes and cypresses, the two met beside a small lake on the outskirts of San Francisco. They faced each other, each gripping a pistol, and both fired. Broderick fell, mortally wounded.

Terry had avenged his honor according to his code, but had permanently damaged his reputation and career. He had also gained the enduring enmity of Stephen Field. Some years later Field was to write, "I could never forget his [Broderick's] generous conduct to me; and for his sad death there was no more sincere mourner in the state." Three decades later Field was to prove how truly he meant it.

Ironically, Field reaped a substantial windfall from Terry's quarrel with Broderick. Upon Terry's resignation, Field was made Chief Justice of the California Supreme Court. And, four years later in 1863 when the United States Supreme Court was expanded from nine to ten members, Field, as Chief Justice of the burgeoning West's largest state, was President Lincoln's

natural choice to fill the post. He ultimately served longer than any other man before or since (until the recent conclusion of William O. Douglas' tenure) and was therefore still on the United States Supreme Court twenty-five years after his appointment when in 1888 one convoluted of Sarah's litigation with Senator Sharon came before the federal Circuit Court in San Francisco.

Terry had conducted a lucrative law practice since resigning his high judicial office, and as Sarah Althea Hill's divorce case beat its tortuous path through state and federal courts he became one of her attorneys. Senator Sharon, Sarah's alleged husband, had died meanwhile, and Terry, as captivated by Sarah's charms as were most men, married her. Thereafter as her attorney and as her husband he championed Sarah's cause and defended her honor against the claim that she had merely been another in the Senator's long succession of mistresses.

By one of the many quirks of fate in the long litigation, Field, riding circuit as a member of the United States Supreme Court, was to preside at one of the most important hearings in the case. Before that date came, however, the lives of Terry and Field were to undergo several more rasping crossings.

The Civil War had settled the free soil-slavery issue. But the completion of the transcontinental railroad provided an issue which perpetuated the split in the Democratic party in California. Rate manipulation and land speculation by rail monopolists brought quick disillusionment to Western farmers and merchants. Terry became one of the most vocal of those who felt that the West's survival required regulation of the railroads.

Field, on the other hand, announced early in his judicial career his subsequently unswerving belief that "property is as sacred as the laws of God." He was rarely known to render a decision against the railroads. When the federal government undertook to regulate them he argued for states' rights. When states attempted to tax or regulate railroads he argued that, being engaged in interstate commerce, they were amenable only to the federal government. His close association with railroad magnates and their attorneys was much criticized. Reporting one of his decisions, *the San Francisco Chronicle* said, "Justice Field has peculiar opinions regarding the Constitution, which, if they cannot be said to be his own, are certainly those of certain interests in whose cause he is engaged." The Senator's attorneys in the Sharon divorce litigation were almost all prominent railroad lawyers, while Terry, Sarah's advocate and husband, was an outspoken opponent of the railroads.

Presidential aspirations helped define the battle lines. In 1880, Field, most political of Supreme Court Justices, unsuccessfully sought the Democratic presidential nomination. In 1884, as the Sharon divorce litigation was getting under full steam, he again sought the nomination, attempting first to gain the endorsement of his own California delegation. But despite determined efforts by a number of wealthy friends, including several of Senator Sharon's attorneys, he was repudiated by a vote of 453 to 19. Prominent among his opponents were Terry and his law associates. Reportedly, Field thereafter carried in his hat a list of the several hundred California "communists," as he characterized them, who had frustrated his ambitions, tirelessly seeking revenge even to the extent of importuning President Cleveland to deny petty post masterships to their friends and relatives.

With this background, the Circuit Court room in San Francisco's old Appraiser's Building was crowded on the morning of September 3, 1888, to hear the court's decision on an important federal aspect of the by-then notorious Sharon divorce case. Justice Field, in California on circuit, read the decision. It involved exhaustive legal argument, but Sarah Althea Terry, seated at the counsel table with her husband and attorney, understood all too well the effect of Field's words: She was being ordered to turn over to the court, for cancellation, the marriage contract.

She interrupted Field's reading of his decision to ask, "Are you going to take it upon yourself to order me to give up that contract?"

Field, momentarily disconcerted, finally said, "Sit down, madam."

"I will . . .," she began, apparently intending to get in one last word, but Field interrupted.

"Marshal, put that woman out!" he directed U. S. Marshal J. C. Franks.

"Judge Field, how much have you been paid for that decision? I know it was bought," Sarah cried as the marshal strode toward her.

"Marshal, put that woman out," Field repeated evenly.

No one but Sarah seemed perturbed. Some spectators in the back of the courtroom stood up to gain a better view. Terry, still seated at the counsel table, told the marshal to stand back. "Don't put a finger on my wife," he warned, adding that he would take her out himself, some witnesses later said.

The marshal hesitated, then attempted to push past. Terry jumped to his feet and struck him in the face. As the marshal fell to the floor, deputies, assisted by several attorneys and spectators, leaped on Terry, threw him to the floor, and pinned his arms down when he appeared to be trying to get his hand inside his coat. Sarah tried to rescue Terry, asking a bystander to hold her reticule. After being buffeted to the floor she was drawn to her feet and led away.

"Let me go," said Terry, ceasing his struggle as Sarah left. "I only want to accompany my wife and I'll go quietly." Released, he turned and walked out of the courtroom, straightening his clothing. The deputy marshals fell back. Half of those in attendance pushed out after Terry.

During the entire brief affair neither Field nor his associates had visibly reacted. After a sip of water, Field finished reading his decision without change of tone or demeanor.

Sarah was taken to the marshal's anteroom off the corridor adjacent to the courtroom. Terry followed and, finding the door barred by a deputy, drew a bowie knife. The fighting resumed and a bystander named David Neagle wrenched the knife from Terry while he was held by several deputies. An order came from the courtroom to place both Sarah and Terry under arrest, and marshals easily executed the order by permitting Terry to join Sarah, after which the door was placed under guard.

They were held in the anteroom for several hours. Terry was heard to ask, "My Dear, why did you bring on all this trouble?" She replied that her case and the corruption of the court "must at all cost be kept before the public." Transcontinental newswires were soon humming as they had not been since the days of the divorce trial itself, four years earlier.

Field ordered court reconvened that afternoon to consider what should be done about the morning's altercation. Sarah and Terry were not brought into court, only learning of the proceeding at its conclusion, when reporters were admitted to the anteroom to interview them. They told Terry that Sarah had been sentenced to thirty days in the Alameda County jail, across the bay in Oakland. "I'll go with you," said Terry, gently stroking her cheek. He would indeed, as he was then told he had been sentenced to six months.

Later that afternoon Sarah and Terry were ferried across the bay to jail in Oakland. Permitted to share a cell, they often received friends and gifts of flowers and fruit, and both seemed to be in good spirits throughout the month of Sarah's stay. At the completion of her term she hired a room nearby. She continued to spend long hours with Terry, for whom time now began to drag.

Friends suggested that Terry petition Field for remission of the sentence. They probably remembered that Field himself as an attorney had avoided punishment under similar circumstances in 1850 when he had successfully urged that a judge should not use a contempt order to vindicate his own character. Terry loathed the role of supplicant and doubted its success, in view of their longstanding mutual antipathy. Nevertheless, he did prepare an affidavit disclaiming any intention of disrespect. As he had feared, Field saw no analogy with his

own 1850 experience. Terry's penance was used to scourge him further. Field ordered that Terry serve the entire six months, for the conduct was too offensive to be purged by mere apology.

Terry occupied himself in reading, legal research and writing on various pending aspects of the cases, meanwhile brooding on the injustices of which he felt Field guilty. He continued to joke with visitors, but also uttered threats toward Field. Many of these found their way to Washington. The Justice remarked that Terry was "under great excitement and unless he cools down before his term of imprisonment is finished, he may attempt to wreak bodily vengeance upon the judges and officers of the court." He said he would not be deterred by Terry from doing his duty.

Both federal and state criminal law provided for time off for good behavior, amounting to cancellation of five days per month of one's sentence. Terry was a federal prisoner but he was in a state jail, and Federal Judge Lorenzo Sawyer, Field's protege (toady, some said), decreed that Terry was therefore ineligible for credit under either law. He served the complete term to the last hour. The full six months, Field predicted, would give Terry time to "cool down." If Field actually believed it would achieve that purpose, he did not know Terry.

Field returned to California that summer to sit on federal cases in the Ninth Circuit, with a bodyguard ordered by U.S. Attorney General William H. Miller as a result of Terry's various threats. U.S. Marshal Franks in San Francisco gave David Neagle the assignment.

Neagle had tried his hand at a number of occupations with indifferent success. He had been a migratory mine worker, a saloon operator and police chief in Tombstone, Arizona Territory, where he ran unsuccessfully for sheriff. He then drifted on to Montana Territory, before returning to San Francisco in 1883. There he became active in politics and was soon appointed deputy sheriff. While on city business, September 3, 1888, he had chanced to enter the Appraiser's Building just in time to disarm Terry in the melee of that day. His valor in that encounter earned him the role as Field's bodyguard.

Field held court in Los Angeles in early August, and on the evening of the 13th entrained, with Neagle at his side, to return to San Francisco. Always apprised of Terry's whereabouts, Neagle knew that he and Sarah had been at their home near Fresno. Consequently he stayed up to see the train through its Fresno stop. As he stood talking with the train conductor in the shadow of Field's sleeping-car, he noticed Sarah and Terry boarding a day coach a few cars away. They were required to appear in Federal Court in San Francisco the next morning on pending criminal charges arising out of the court incident the previous year. Neagle reported the new passengers to the judge. Field instructed him not to be rash, but said that if any incident took place he wanted to be protected at all hazards.

Early the next morning the train stopped for breakfast at Lathrop, near Stockton, as Field completed his morning toilet. Neagle suggested that he eat at the buffet on board the train but Field insisted that he had had good breakfasts in the station dining room and preferred to eat there. Neagle shrugged and followed him into the dining room, where the two men took a table near the middle of the room and seated themselves facing the door.

In a few minutes they saw David Terry enter with Sarah. She wheeled in the doorway and returned to the train. The dining room operator, who knew Terry, escorted him to a table near one corner of the room, and asked if he thought his wife planned anything desperate.

"Why?" asked Terry. "Who is here?" Seeing Field, he said, "Well, you had better go and watch her." He sat for a moment, then rose and with deliberation walked to Field's table. The restaurateur, at the door to intercept Sarah on her return, watched helplessly as Terry stopped and paused behind Field's chair while Neagle eyed him warily. Standing in back of Field at one side, Terry leaned over him and struck him twice--lightly, the restaurateur said later--on the cheek with the back of his hand, or with a clenched fist, depending on the observer.

Neagle immediately jumped up, wheeled, and drew a revolver. Thrusting its barrel against Terry's chest at the heart, he fired. Terry stood motionless for a moment; then his legs began to give way. As he fell, Neagle fired again, at his head.

Most of the restaurant's guests were unaware of the identity of the participants in silence, the room erupted in great confusion. the violence. After a moment's shocked Some tried to leave while others began to crowd around Terry's body. A bystander mechanically straightened a leg which was bent under it. Terry was obviously dead.

Some of the dining room guests tentatively moved toward Neagle to restrain him. He backed against a wall and, fanning his gun at the hundred-odd people still in the room, declared that he was an officer of the United States and no one should touch him.

Sarah arrived at that moment, tore her way through the cluster of people standing around Terry and dropped to the floor at his side. Ignoring the great mass of blood she cradled his head in her lap. Alternately she caressed and kissed his face, moaning, "Oh, my darling! Oh, my sweetheart!" Then she noticed those who stood silently about. "Why don't they hang the man? The cowardly murderer! He was too cowardly to be given a trial, but hired an assassin. They shot him down like a dog in the road. He was the soul of honor."

Sarah was drawn away from Terry's body long enough to permit several men to carry it to a barber shop next door. Her clothing was covered with blood. Running from train to dining room to barber shop, she imploringly accosted first one person, then another. At one moment concerned with Terry, at the next she demanded revenge on his "murderers."

Field and Neagle had withdrawn to their railway carriage and locked the door. Sarah approached it a time or two and Neagle warned that if she was not kept out he would kill her, too. The town constable boarded the train and, pledging impartiality, was permitted to talk with Field and Neagle in their carriage. Lengthy negotiations ensued, the trainmaster acting as arbitrator. They finally agreed that Neagle would submit to detention pending the coroner's inquest. In Lathrop sentiment was already hardening against Neagle, so as a precaution against possible mob violence the train would first proceed to Tracy, the next stop on the way to San Francisco. There Neagle would be removed for delivery to the San Joaquin County sheriff in Stockton, the county seat.

Many who had witnessed the incident felt that Terry had intended the slaps as the first step toward a challenge to a duel. He had several times hinted at such an intention when he was in jail that spring. He had said he would slap Field or twist his nose the next time he saw him. Many assumed that he would have been satisfied merely to humiliate Field. To a man who lived by Terry's code it made no difference whether the challenge resulted in a duel. Exposing a man as a coward was quite as good as killing him.

Others among Terry's acquaintances remembered his background and violent temper. Such a man, goaded by the events of the past year and importuned by Sarah, could easily become desperate enough to kill a man in cold blood, they thought.

Most people felt that Neagle had acted more precipitately than necessary. This impression was reinforced when a search of Terry's clothing revealed that he had been unarmed. And when it was learned that Field had not been scheduled to travel to California on circuit that year, but had intended to spend the summer in Europe, changing his plans only after a delegation of well-intentioned friends told him of Terry's grumbling and cautioned him against coming to California, some even charged that Field had deliberately created the incident.

The Lathrop constable took Neagle from the train at Tracy and delivered him to the sheriff in Stockton, while Field proceeded to San Francisco. The Stockton district attorney was incensed upon learning that Field had not been arrested, asserting that every person, "no matter how exalted his position and not excluding the President of the United States," must be amenable to the criminal laws. He vowed to go personally to San Francisco, if necessary, to arrest Field.

Every daily newspaper in the country carried accounts of the killing. It provided grist for editorials *describing a wide variety of moral truths*. The New York Herald interviewed a number of "Washington lawyers" and reported their general feeling to be that Neagle's conduct had been unjustified. They thought it beyond the necessary and reasonable bounds of his authority. "Here

in the East," one was quoted as saying, "we look on matters of this sort in a different light from that in which they are seen by people west of the Rocky Mountains. Out there they kill a man and explain or apologize afterward."

Most papers, particularly in the Midwest, emphasized Terry's life of violence and arrogance toward law. However questionable the particular circumstances under which he met his death, such a man *could expect to die* as he had lived, they felt. The New York Star saw in his death "a useful lesson," that even in the West a man may *not go through* life lawlessly with impunity. The New York Sun declared that David Broderick was after thirty years avenged. The paper did not intimate, if it knew, how appropriate was Field's role as avenger.

Sarah signed complaints in Stockton the day after the killing, charging Neagle with murder and Field as an accomplice. With Neagle already in custody, the San Joaquin county sheriff immediately took the train from Stockton to San Francisco to serve the warrant of arrest on Field. Field received the diffident sheriff in his rooms in the Palace Hotel by appointment, urged him to be at his ease, and agreed to accompany him back to Stockton the following afternoon, asking the sheriff to call for him in his court chambers at the Appraiser's Building.

A great crowd had collected in the courtroom and outside the chambers as the hour for Field's surrender arrived the following day. Eyeing the press, Field said to the sheriff, "I am glad to see you, sir, and wish you to perform your duty." The sheriff hesitated, intimidated as much by the large audience as by Field. "Because I may be a judge," Field encouraged him, "I am not excused from the proper processes of law. Judges should be all the more amenable to the laws which they are selected to maintain."

The sheriff mumbled that it was an unpleasant duty he had to perform.

"I am in your custody," prompted Field. Satisfied that form had been honored, Field immediately called Circuit Judge Lorenzo Sawyer's waiting clerk, and *handed him a previously prepared* petition for a writ of habeas corpus. Judge Sawyer, waiting a few steps away, promptly signed an order, also previously prepared, requiring the sheriff to produce Field before Sawyer forthwith and prohibiting him from taking Field to Stockton. The United States District Attorney offered to prepare a written response for the sheriff so that the matter could proceed quickly yet legally. Everyone waited briefly while he prepared a return consisting simply of an admission that Field had been placed under arrest. The trustful sheriff signed it, assuming that someone present must know what was taking place.

Judge Sawyer then set the following Thursday for the hearing of Field's petition. This meant, as was explained to him a few minutes later, that in the meantime the sheriff could not hold Field nor take him to Stockton for the preliminary hearing which was scheduled to take place in Stockton on Wednesday. The Stockton district attorney was angry when the empty-handed sheriff returned that evening. He was still more incensed upon learning that the *sheriff was accompanied* by an attorney carrying a writ of habeas corpus to remove Neagle to the jurisdiction of the federal court in San Francisco.

A subscription was well under way in Stockton to provide funds for Neagle's prosecution. Great feeling was immediately aroused at the prospect of having to surrender him without a trial. The subscription committee, attorneys, and citizen groups conferred to discuss the legality and necessity of relinquishing the prisoner. Many simply were disappointed at losing the spectacle of having Neagle prosecuted and punished in their presence. Others saw it as a much larger question of the division of powers between state and federal authorities. What right, asked they, had the federal government to take a man from the custody of state officers while a charge of violating state law was pending against him?

The arguments continued throughout the night, but the disputants might have saved their energy. A special train had been quietly chartered by Neagle's protectors to take him to San Francisco without delay, and in the dead of night it pulled out of the deserted Stockton station. A

reporter happened to be at the station while the special train was being made up. He was invited aboard, perhaps to keep him from spreading an untimely alarm, and accompanied the small party to San Francisco. Later he reported that Neagle was in fine spirits and not at all reticent about the killing, relating it as though it had been a bear hunt.

Friends, associates, and federal officials hastened to visit and encourage Neagle in jail in San Francisco, but the general feeling in California was *of shock and* impotent rage. As far away as New York, the Mercury Sunday in a lengthy editorial demanded that United States Attorney General Miller be immediately arrested and indicted as an accessory to murder.

The hearing in Stockton, with no defendants present, was put off from day to day, awaiting their return. The Governor of California had meanwhile been subjected to much pressure on Field's behalf. He in turn requested the state attorney general to do what he could to halt the prosecution of Field. The Stockton district attorney remained adamant for several days, but finally yielded to the charge that his county and state were being made to appear ridiculous throughout the country and *consented to dismiss* the case against Field.

When Neagle's habeas corpus hearings finally convened in San Francisco, it was announced that proceedings against Field had been dropped. One of Neagle's six lawyers immediately arose and said they were prepared to waive irregularities and submit directly to a trial of the facts by the federal court. The Stockton district attorney protested that it was the people of Stockton and not Neagle who were complaining of irregularities. He said the state objected to the jurisdiction of the federal court, which he charged had no power to act and no purpose in hearing evidence while the state prosecution was pending.

Judge Sawyer said he wanted to know the facts and would later consider whether he had jurisdiction. The state attorneys thereupon withdrew from the case, declaring that they had never heard of a court considering a case without first determining whether it had power to do so.

Newspapers around the country were now regularly editorializing on the affair. A majority still sided with Field and Neagle but the *federal government's* intervention caused a great many to join the New York Mercury in expressions of alarm and disapproval. While the general view was still that in meeting his death Terry "married his tragic fate," it was also felt that this cavalier rejection of the state's right to *pursue its regular* procedure set a baleful precedent.

Neagle's habeas corpus hearing finally began several days later and, though no state attorneys were present to oppose it, the amicable hearing lasted two full weeks. Justice Field, the case against him dismissed, sat in the unused jury box, making of it a sort of reserved spectator's gallery, and sauntered into chambers with Judge Sawyer at each recess. A parade of witnesses testified to Sarah's and Terry's antagonism and threats against Field. The spectators had heard all this many times before, and for a time public interest flagged.

When it was time for Field's testimony, the courtroom was again crowded in anticipation. He walked briskly from the jury box when called and, after a few introductory questions, was permitted to give his testimony in narrative form. He first reviewed his judicial career, recalling that Terry as Chief Justice had sworn him in as associate on the state Supreme Court. He said that by reason of their early association, "No one knew better than Judge Terry that I would resent any personal indignity." Apparently aware of the charge that he had deliberately brought on the confrontation, Field detailed the important cases which had brought him to California that summer. The suspicion was not allayed when he admitted that he had gone to the dining room at Lathrop in the face of Neagle's efforts to dissuade him from leaving the train, adding, "I did not think what he was driving at."

He said he saw Terry rise from his table in the dining room but did not bother to watch him further, being busy eating. The next thing he was aware of was two violent blows to his head. Remaining seated, he looked around to see Terry looming over him with his fist crashing down for a third blow. He said Neagle cried, "Stop! Stop! I am an officer! Stop!"

Two shots followed instantly, Field testified, and Terry fell. "I am firmly convinced that had the marshal delayed two seconds, both he and myself would have been the victim of Terry. It was only a question of seconds whether my life or Judge Terry's life should be taken."

The next day, Neagle testified to a packed courtroom. Reviewing his childhood and early career, he recalled that Terry's exploits of the late 1850's were a common topic of his youthful conversations. He then related the events at Lathrop much as Field had, but curiously their testimony diverged at the most crucial point. Field had said that Terry was in the act of launching another blow at him, his fist crashing down, averted only by Neagle's shots. Neagle now said that he had *jumped* between the men as Terry was reaching for a knife to attack him. Unfortunately, with no opposing attorneys present to raise embarrassing questions, the spectators were given no explanation of the conflict in the testimony or of the absence of a knife. Both Judge Sawyer and defense counsel were too circumspect to allude to it.

Field and several other witnesses had explained the necessity for Neagle's second shot by saying that Terry appeared to be unaffected by the first. Neagle's attorney, leading him toward the same explanation, asked what had happened after the first shot. Terry started to sink, said Neagle. Though his attorney hastily dropped the subject, Neagle volunteered a few minutes later that he had been shooting to kill.

At the conclusion of testimony, the Stockton district attorney reappeared to argue the federal court's lack of jurisdiction. Pondering the matter for several days, Judge Sawyer then rendered a lengthy decision in which he first declared that the federal court had jurisdiction of the matter and the state had no right to prosecute Neagle. Then, reviewing the testimony, he concluded that, aside from questions of jurisdiction, Neagle's killing of Terry was not merely justified, it was commendable. "Let him be discharged."

Field sprang from the jury box to shake hands with Neagle and, having foreseen the outcome, presented him with a gold watch bearing an engraved inscription reading in part, "With appreciation in great peril."

Neagle was free. Terry was no more. Broderick was avenged. Sarah Althea Terry soon thereafter was committed to the state asylum for the insane, in Stockton, where she spent the remaining forty-five years of her life.

## ***Three Cheers for Father Cummings***

**DONALD RAU**

*I, John Cummings, do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri, adopted in the year eighteen hundred and sixty-five, and have carefully considered the same; that I have never, directly or indirectly done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and will support the Constitution and laws thereof as the supreme law of the land, any law or ordinance of any state to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I make this oath without any mental reservation or evasion, and hold it to be binding on me.*

This is the oath that Father John Cummings, young pastor of St. Joseph's Catholic Church in Louisiana, Missouri, refused to take. When he nonetheless offered Mass and preached to the people of his parish on Sunday, September 3, 1865, he was arrested and subsequently sentenced to pay a fine of five hundred dollars and to be committed to jail until said fine and costs of suit were paid.

According to section three of the second article of the Constitution, disloyalty to the United States included giving "aid, comfort, countenance, or support to persons engaged in any such hostility" or manifesting, "by act or word . . . his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States."

Those branded as disloyal included a person who had "ever been a member of, or connected with, any order, society, or organization inimical to the government of the United States, or to the government of this state," or who had ever "come into or has left the state for the purpose of avoiding enrollment for or draft into the military service of the United States. . . ." It included anyone who had ever, for any purpose whatsoever, "enrolled himself or authorized himself to be enrolled by or before any officer, as disloyal or as a Southern sympathizer, or in any other terms indicating his disaffection to the Government of the United States in its contest with rebellion, or his sympathy with those engaged in such rebellion."

John Cummings was not unique in his refusal to take the test oath. Priests and ministers throughout the state refused to do so. Neither was he unique in his arrest. Priests and ministers throughout the state were arrested for preaching and solemnizing marriages without having first taken the oath. Cummings was unique only in his refusal to accept bail, and in his insistence on being jailed instead.

Father Cummings was an obscure priest, but two years ordained, when he was arrested. When he died, some eight years later, he had returned to oblivion. For a brief time, however, he was a person of importance, and his struggle with the Radical establishment typified the problems and divisions which beset Missouri in the years immediately following the Civil War.

The test oath and the registry act were the key provisions of the program, designed to take control of the state and to keep control of it in the hands of the Radicals. These measures were designed to disenfranchise their opponents and once they made sure that their men sat on the registry boards, passing on the qualifications of all voters, their control of the state was assured.

Although the machinery for the registration of voters was not provided by the legislature until December of 1865, the test oath enacted by the new Constitution was put into effect immediately, and was applied even in the election to ratify the new Constitution itself. Even so, the new Constitution of 1865 was enacted by only a narrow margin, a majority of 1,835 in a total vote of 85,769. The Constitution was actually rejected by the civilian voters by nearly 1,000 votes. The military vote provided the margin of victory.

This requiring of an oath was not just the act of an individual military commander, as was the suspension of Rev. William M. Rush of Chillicothe from his duties as a minister by Colonel Walter King. Neither was it the action of an individual aberrant group of Union soldiers, such as the murder of Rev. John L. Wood, a preacher of the Methodist Episcopal Church, South, in 1864. It was not an act done under the excuse of martial law, as was the arrest of Revs. D. J. Marquis and J. B. H. Wooldridge of the Methodist Episcopal Church and the Rev. George Johnson of the Baptist Church. Quite the contrary, it was a carefully considered ordinance, enacted by the ruling convention of the state, a part of the organic law of Missouri. Even so, it was not as yet retroactive for ministers and other professional men and women. It demanded only a promise by the minister and others that they would be loyal to the Union from that time on, if they wished to continue to function in the state.

Even the McPheeters controversy, despite the fact that there was a dispute within the church itself, seems to be an abuse of military authority, an interference in the internal affairs of a church, and, in that sense at least, a step toward the oath of 1865. In 1860 Dr. McPheeters, although on temporary leave of absence as a military chaplain, was pastor of the Pine Street Presbyterian Church. His troubles began when, as a member of the General Assembly of the Presbyterian Church meeting in Columbus, Ohio, in May of 1862, he opposed a paper on the state of the country. His reasoning was that the church should not meddle in the affairs of the "civil commonwealth." Bernard Farrar, then the provost-marshal of St. Louis, had threatened to arrest him upon his return, and a small minority of the members of the Church demanded a statement from him of his views on the current Rebellion. When Dr. McPheeters refused to answer, denying the right of the members of the church to require such a statement from their pastor, Major General Curtis deposed him as pastor and exiled him from Missouri.

Dr. McPheeters went to Washington to appeal to President Lincoln. The President surprised General Curtis by suspending the order, but he ultimately agreed in his letters of January second and third, 1863, to leave the final decision with General Curtis. He concluded his letter of January second with the following admonition.

"But I must add that the U.S. government must not, as by this order, undertake to run the churches. When an individual, in a church or out of it, becomes dangerous to the public interest, he must be checked; but let the churches, as such take care of themselves. It will not do for the U.S. to appoint Trustees, Supervisors, or other agents for the churches."

When Dr. McPheeters was quietly allowed to resume control of the Pine Street Church about a year later, George Strong brought the case into Presbytery, "that was so controlled by the military that most of its members could not conscientiously attend, because they would not stultify themselves by subscribing to an oath of loyalty...." Two of the members of the board, "Rev. W. H. Parks and Rev. A. D. Madeira, were actually put in a military prison, to prevent them from being present at a meeting [of] the Presbytery at which Dr. McP's case was to be issued. These and other brethren, being thus kept away, the pastoral relation between Dr. McP and the Pine Street Church was dissolved `at the point of the bayonet.'" President Lincoln was again appealed to, but this time refused to help, since the action had been taken by the church itself and he was unwilling to interfere, on either side, in church affairs.

The McPheeters affair did not reach its final conclusion until after the end of the war, in September of 1865.

The reaction to the test oath, among the clergy in Missouri, ran the gamut from enthusiastic approval to cries of persecution. Most religious leaders, even most of those who had

taken the oath themselves, condemned it for one reason or another. Some were content to poke fun at it, others merely fulminated against it, while still others attempted to subject it to a logical analysis so that its iniquity would stand out in even sharper relief.

Archbishop Kenrick, on the contrary, saw the oath as an infringement of religious liberty and determined that it must be resisted at the outset. He did not believe that the oath was constitutional, and he instructed the priests of the state not to take the oath. "The next thing we know," said the venerable Archbishops in sending out these notices, "they will be dictating what we shall preach."

William Seward, the Secretary of State, considered the loyalty of the Archbishop to be sufficiently suspect that he asked Archbishop Hughes, one of the most vocal of the Union Bishops, to have Archbishop Kenrick transferred to a less critical See. Archbishop Hughes forwarded the letter to the Archbishop of Baltimore, Francis Patrick Kenrick, who assured Mr. Seward that Peter Richard, his brother, constituted no danger to the Union cause in Missouri. If Archbishop Kenrick was not an enthusiastic supporter of the Union, neither was he a supporter of the rebel cause. He refrained from preaching for two years at this time, lest his words would seem to favor one side or the other. Perhaps it is closest to the truth to say that his sympathy lay with neither the North or the South, but with peace.

In actual fact, the test oath was not enforced in St. Louis County (which then included the city of St. Louis) or any area in which public feeling ran strongly against the Radical oath.

Governor Fletcher tried to make his position on the matter as clear as possible. The test oath was the law of the state, and it would be enforced, until the courts struck it down.

"State of Missouri, Executive Department,

"City of Jefferson, August 25, 1865

"DEAR SIR: In reply to your note of 21st inst., I can only say that the provisions of the Constitution requiring an oath of ministers and teachers, are to be construed by the courts.

"Any question as to the right of the people of the State to make such provisions in their fundamental law, will be for the higher judicial tribunals of the country to determine. Pending their decision, the law must be regarded as valid and of binding force.

"My action in enforcing these and all other laws will be strictly within the scope of the legal powers conferred on me and I shall require, on the part of all citizens, that their acts in giving force to this law be done in a legal manner.

"Law-abiding men will, I presume, cause warrants to be issued for persons who violate the law by preaching or teaching without first taking the oath, or who may take it falsely; and will cause them to be bound over to appear at the next Circuit Court of the county to answer indictments for their offenses. The whole military force of the State will be at the command of the officers of the law, to enforce legal process in this as in all other cases. The Constitution, in all its provisions, is the highest law of the State, and so far as my official action is concerned, I need not repeat to you, what I have so *often publicly said, that all the duties devolved upon the Executive by law for enforcing it, will be in due time and in a proper manner, fully performed.*

"Very respectfully,

"your obedient servant,

THO. C. FLETCHER"

As Governor Fletcher indicates, this is but what he had been saying at appearances throughout the state, since the enactment of the new Constitution. "He reinforced his arguments by the discomfiting suggestion that arrangements would be made for enlarging the penitentiary to accommodate all clergymen and teachers who refused to take the oath while continuing the functions of their offices."

As *late as* September 11, 1895, the Republican still thought that the test oath would not be enforced.

"A week has elapsed and we have not yet heard of arrests of ministers or teachers for not taking the iron-clad oath of the new Constitution. Quite a number of clergymen in this city and throughout the State preached to their congregations last Sabbath without having done the swearing provided for by the instrument mentioned; showing that there are those in Missouri who cannot be frightened into a recognition of the right of a set of Radical politicians to regulate or interfere with the dissemination of the Gospel.... If there has been a single arrest in the State for preaching or teaching without taking the oath, we have not heard of it. It appears doubtful whether any Grand Jury in Missouri can be found to bring in an indictment against a minister for expounding the word of God and omitting to declare under oath that he has always been truly loyal to the Government. Several of the Grand Jurors empaneled last week in this county, though they took the oath themselves, protested that they could not conscientiously indite [sic] a preacher for not doing likewise. The Governor blusters a good deal about enforcing the law, but even his partisan friends, some of whom we must believe, go to church on a Sunday and know that clergymen have preached without reference to the restrictions of the new Constitution, put themselves no trouble to have the recusants arrested and placed in course of fine and imprisonment. The whole thing, indeed, turns out to be a dead letter."

On Sunday, September 3, 1865, Father Cummings, "a very modest gentlemanly little fellow, of about twenty-two or twenty-three years of age," offered Mass and preached as usual to his small congregation. On September 4, the Pike county authorities packed a Grand Jury with Radicals, which proceeded to indict him for preaching without taking the test oath. He was arrested and on the "Friday following he was arraigned [sic] before his Honor, Judge Fagg, as a criminal. The indictment was read to him by the Circuit Attorney, and he was asked to plead to it, and did so by saying that he was 'guilty.'" The Court seems to have been taken taken by surprise at Father Cummings's refusal to give bail and ask for a postponement. It was to be a day of surprises for them, since they were equally unprepared for his plea of guilty.

Judge Fagg then indicated that nothing remained but for sentence to be passed against him, and, after a further embarrassed pause, asked the accused if "he had anything to say why the sentence should not be passed against him." Father Cummings then made what even those favorably inclined called a "religious stump speech--directed to the audience rather than the Court, entirely proper in itself, but not entirely pertinent to the occasion." The main thrust of his argument seems to have been that the test oath was a persecution of Catholics and, after defending the patriotism of Catholics, concluded with the claim that he had violated no rightful law.

Senator Henderson happened to be in court in his connection with his practice of law. Even though a Radical, he rose to Father Cummings' defense, at least insofar as he pointed out to the Court that Father Cummings' statement really amounted to a plea of not guilty, since he had claimed, in effect, that the law imposing the test oath was invalid. Even though Senator Henderson castigated Father Cummings for his claim that the oath was an infringement of religious liberty, he offered to defend him in Court.

As a result of Senator Henderson's intervention, Judge Fagg eventually permitted Father Cummings to change his plea to "not guilty." After Senator Henderson's offer of assistance was twice refused, "the priest placed his case in the hands of Robt. A. Campbell, esq., ... and the trial set for next morning." The trial the next day was a mere formality. All agreed that the Court should sit as a Jury and since all the facts in the indictment were admitted, the Court found "the defendant guilty in the manner and form charged in the indictment" and assessed his fine at the sum of \$500. He was returned to jail until the fine was paid.

It was to be another day of surprises for the Radicals. Much to their chagrin, Father Cummings refused to pay his fine or to post bond for an appeal, and refused to permit anyone else to pay his fine for him. The reaction of Father Cummings' parishioners at Louisiana must have added considerably to the discomfort of the Radicals. They refused to accept the imprisonment of their pastor without protest. "Father Cummins' [sic] parishioners came up from Louisiana, and camping about the dungeon of their beloved shepherd, were in much the same frame of mind as the children of Israel when they set down and wept by the rivers of Babylon."

If Father Cummings wished to generate publicity for the plight of clergymen in Missouri under the new Constitution, he succeeded admirably. Even before the test oath went into effect, it had attracted attention in newspapers in various parts of the country. Now that the non-juring clergy had a martyr, the publicity was much increased. The local conservative papers made much of his arrest and the type of people with whom he was thus forced to associate. Newspapers in various cities made his name known around the country, and many of these reports were critical of the Missouri Radicals.

As far as can be determined from the rather confused state of Father Cummings' original defense, his plea was that he was the victim of a religious persecution, and that the test oath was invalid, either as unconstitutional under the First Amendment to the Constitution, or invalid under some principle of the natural law, guaranteeing freedom from state interference to the Church of Christ. This, at least, seems to be the general point of his somewhat rambling defense of the patriotism of Catholics in general, and Phil Sheridan in particular, and his references to the sufferings of Christ.

The defense presented in the appeal to the Supreme Court of Missouri was somewhat more elaborate and better reasoned. R. A. Campbell listed eight points for the consideration of the Court. First, "That there is no evidence in this cause of any offense against the laws of the State of Missouri, and the defendant ought to have been acquitted by the Court below." Second, the third section of Article two of the new Constitution, dealing with the test oath, is a bill of attainder, and is accordingly unconstitutional. Third, this same section is in violation of the Constitution, since it is an *ex post facto* law. The fourth, fifth and sixth points, which he makes, are based on conflicts between Article 2, sections 3, 6, 9 and 10 and sections 9, 27 and 28 of the bill of rights of the new Constitution, which provide that freedom of worship and freedom of *speech shall not* be abridged, and that no *ex post facto* law shall be enacted. The final argument, made in points 7 and 8, alleges that this section of the new Constitution *is invalid*, "because it is an attempt by the State to *legislate in regard* to offenses against the United States, and to *create and punish* offenses against the United States."

Charles C. Whittelsey was the other attorney for Father Cummings in his appeal of his conviction to the Supreme Court of the State of Missouri. His first argument relies on the Bill of Rights of the new Missouri Constitution. He argues that the test oath for the clergy is in conflict with various provisions of the Missouri Bill of Rights, and alleges a conflict not only with the 9th and 27th clauses of the Bill of Rights, but also with Sections 1, 2, 3, and 18. According to his theory, these provisions of the Bill of Rights, as an expression of the fundamental principles of government, are as much a limitation of the other provisions of the Constitution, as they are of subsequent legislative enactments. Furthermore, insofar as any of these rights are proclaimed as inalienable rights, they are rights which belong to a man, as a man, rather than as a citizen of the

state. In other words, these are rights which are not given by the state, and accordingly cannot be taken away by the state.

Mr. Whittelsey amplifies the claim that the test oath is a violation of religious liberty, by explaining that religious liberty means more than freedom to pray privately, or even freedom to pray publicly in a group. It demands also the freedom to receive instruction by the preaching of a minister. If citizens may listen only to a minister who is licensed by the state, "they are not free to worship according to the dictates of their own consciences, but they are directed by the consciences of those who happened to have the majority of votes, and who therefore controlled the administration by adopting the Constitution." Furthermore, preference is given to one Church over another under the Constitution; preference to the so-called loyal Church over the so-called disloyal one.

It was said that the Radical party had decided to abandon the test oath for the clergy, and felt that the least embarrassing way to do so would be for the Radical Supreme Court to declare it unconstitutional, on appeal of the verdict. However, the state high court sustained the trial court.

The Cummings case was immediately appealed to the Supreme Court of the United States. Archbishop Kenrick had lost hope that the Missouri legislature would repeal the test oath for the clergy and felt that the best hope lay in an appeal to the highest federal court. Several of the most eminent lawyers in the country were engaged for the appeal. In addition to Montgomery Blair, the brother of Frank Blair, a prominent conservative politician in Missouri, the Archbishop secured the services of David Dudley Field, well known as the author of the Field code and brother of Stephen Field, one of the Justices of the Supreme Court, and Reverdy Johnson, another well-known constitutional lawyer.

Justice Field gave the opinion of the Court. After a brief summary of the case and of the pertinent provision of the Constitution of 1865, he begins with a denunciation of the oath.

"The oath thus required is, for its severity, without any precedent that we can discover. In the first place, it is retrospective; it embraces all the past from this day; and, if taken years hence, it will also cover all the intervening period. In its retrospective feature we believe it is peculiar to this country. In England and France there have been test oaths, but they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct. In the second place, the oath is directed not merely against overt and visible acts of hostility to the government, but is intended to reach words, desires, and sympathies, also. And, in the third place, it allows no distinction between acts springing from malignant enmity and acts which may have been prompted by charity, or affection, or relationship....

"But, as it was observed by the learned counsel who appeared on behalf of the State of Missouri, this court cannot decide the case upon the justice or hardship of these provisions. Its duty is to determine whether they are in conflict with the Constitution of the United States."

Justice Field next determines that the test oath is indeed a bill of attainder, and therefore unconstitutional. He defines such a bill as "a legislative act which inflicts punishment without a judicial trial." He continues:

"In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether

conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

He notes particularly that Mr. Justice Story says that history shows us that these bills have usually been enacted either in times of servile subserviency to the crown, or in times of violent political excitement, "periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."

The Court, having held the test oath *unconstitutional* both as a bill of attainder and as an ex post facto law, concludes with a discussion of the iniquities of test oaths. It quotes Alexander Hamilton at some length regarding a New York statute enacted shortly after the peace treaty of 1783, ending the Revolutionary War. This statute required a similar expurgatory oath. Hamilton held that such oaths effectively overturned the presumption of innocence until proven guilty. "This was to invert the order of things; and, instead of obliging the State to prove the guilt, in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty." Finally, such oaths, in a certain sense, destroy the right to trial by jury, "substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one recognized by the laws and constitutions of the State."

## ***Backstage at Dartmouth College***

### **WALKER LEWIS**

For most of us, mention of the Dartmouth College case brings to mind Daniel Webster's emotional peroration, and especially the line: "It is, Sir, a small college, yet there are those who love it."

The popular folklore is that Webster's eloquence swept the Justices off their feet and saved the day for his alma mater. Pretty as is the story, the truth is otherwise. Webster's peroration had no more than a passing effect on the Court. It was like the strawberry embosomed in whipped cream at the center of a shortcake. It added immeasurably to the lusciousness of the image, but it had nothing to do with the cookery.

The result was the product of hard work, skillful maneuvering and persistent pressure, some of which probably would be considered unethical by present-day standards. In addition, without realizing it at the time, Webster had the good fortune to offer Chief Justice Marshall an opportunity that he coveted. Indeed, Webster had misjudged his own case and thought he might lose on the very point that brought victory.

Dartmouth College had its origin in Moor's Indian Charity School in Lebanon, Connecticut, organized and conducted by the Rev. Eleazar Wheelock. One of his pupils, a Mohegan Indian named Samson Occum, developed into such an excellent scholar and preacher that Wheelock sent him to England on a fund-raising expedition. It was a shrewd move. Britishers donated some eleven thousand pounds sterling, which was turned over to the Earl of Dartmouth as President of the Board of Trade and Foreign Plantations. The Earl's personal contribution was fifty pounds, a bargain price for immortalization. Not even John Harvard did so well; his glorification as a college progenitor cost 375 pounds and a 400-volume library.

On December 13, 1768, John Wentworth, Royal Governor of New Hampshire, granted a charter to Dartmouth College. This vested corporate power in a self-perpetuating board of twelve trustees, and named Wheelock as president with the right of designating his successor by will. In addition, the Province of New Hampshire donated 25,247 acres of land. Later, according to John M. Shirley's history of the case, the state gave further land to the College, including an eight square mile township in 1789 and a six square mile township in 1807. Vermont also made a substantial gift.

In 1807 Eleazar died, appointing his son John Wheelock in his place. The son was a difficult person, and friction developed with the trustees. The differences were primarily personal, but by 1815 they had intensified into a feud. In that year Wheelock published an anonymous attack against the trustees, which he circulated among the Republican members of the New Hampshire legislature. This converted the dispute into a political issue. The trustees thereupon dismissed Wheelock, as was their right under the charter. In his place they appointed the Rev. Francis Brown.

Next year the Republicans swept the state, electing the Governor and gaining control of the legislature. They then amended the Dartmouth charter so as to increase the number of trustees from twelve to twenty-one and to superimpose a board of overseers with veto power. They also changed the name to "Dartmouth University." The Governor was empowered to fill vacancies, and his selections converted Dartmouth into a Republican-dominated state institution.

Eight of the old trustees, who came to be known collectively as the "Octagon," resolved to fight.<sup>1</sup> On February 8, 1817, they brought suit to recover the corporate seal and other property from William H. Woodward, the former secretary and treasurer, who had sided with Wheelock.<sup>2</sup>

As Woodward was chief judge of the local court, the case was taken directly to the Superior Court of New Hampshire, then the state's highest. It too had just been reorganized, and

all three of its judges were now Republicans: William Merchant Richardson, Samuel Bell, and Levi Woodbury. They were men of ability, and the last was later a Justice of the U.S. Supreme Court. But party lines were sharply drawn, and Republican doctrine strongly supported the right of the legislature to exercise control. On July 21, 1816, Thomas Jefferson had written Governor Plumer to express his approval of the take-over, saying:

"The idea that institutions established for the use of the nation cannot be touched or modified . . . is most absurd. . . . Yet our lawyers and priests generally inculcate this doctrine, and suppose . . . that the earth belongs to the dead and not the living."<sup>3</sup>

The College retained able and zealous counsel: Jeremiah Smith, who until the 1816 reorganization had been Chief Judge of the New Hampshire court; Jeremiah Mason, one of the outstanding lawyers of his day; and Daniel Webster. In their suit against Woodward they relied principally upon the New Hampshire Constitution, which prohibited the taking of property except pursuant to "the law of the land." This necessarily meant, they said, that vested rights could not arbitrarily be destroyed, and that the charter rights of the trustees could not be taken away except by a judicial proceeding based upon adequate justification. To give themselves a ground for possible appeal to the U.S. Supreme Court, they also claimed that the legislative action violated the Contract Clause of the U.S. Constitution.

On November 6, 1817, the New Hampshire court brushed these points aside. In a powerful opinion Chief Judge Richardson held that "A corporation, all of whose franchises are exercised for publick purposes, is a publick corporation." This definition necessarily made Dartmouth "publick," as it was chartered expressly to provide public education. In addition, he pointed out that the trustees possessed no private interest in the property of the institution:

"If its property were destroyed, the loss would be exclusively publick.... The office of trustee of Dartmouth College is a publick trust, as much as the office of governor, or of a judge of this court."<sup>4</sup>

It necessarily followed, added Richardson, that the Contract Clause of the federal Constitution could have no application. This was intended to protect private rights, not to limit the power of States to control their own civil institutions; otherwise, divorce laws would be void.

The College appealed to the U.S. Supreme Court, by writ of error. But even Webster was impressed by Richardson's opinion, and the University authorities were confident that it could not be overturned. Governor Plumer, himself a lawyer, said: "The College can have no rational grounds to hope for success in the National Court."<sup>5</sup>

The New Hampshire court's opinion had been based upon the pleadings. To obtain finality, a determination of facts was required, and counsel for each side drafted proposed "special verdicts" for this purpose. That of Ichabod Bartlett, youngest and ablest of the University's attorneys, included a statement that

". . . the greater part of said moneys and lands received and acquired by said corporation at the time of its creation and since, were received and acquired by donation and grant from the Province and now State of New Hampshire."<sup>6</sup>

Jeremiah Smith objected to this and George Sullivan, senior counsel for the University, agreed to delete it. Apparently, he did not think the point worth fighting over; and, as he was Attorney General of New Hampshire, his view prevailed. Consequently, the record that went to the U.S. Supreme Court said nothing about the substantial gifts with which New Hampshire had endowed the College. So far as the record showed, Dartmouth had been financed by British donations of money and local gifts of land designed to attract it to the vicinity of Hanover.

Damaging as this appears in hindsight, it is easy to understand the thinking behind it. In holding that the College was a public institution, the New Hampshire court had *adopted* the test of function. The College had been formed to provide public education, therefore it was a public corporation. And so confident were counsel for the University that they had the case won, that they did not concern themselves with the possibility that the Supreme Court might adopt a different test. This, of course, is precisely what happened. Chief Justice Marshall held that the determinative factor was not function but the funds and the intention of the donors. And on the basis of the record he was able to say: "The funds of the College consisted entirely of private donations."<sup>7</sup>

Overconfidence led the University into another error. It recoiled from the expense of sending to Washington the attorneys who had handled the case in New Hampshire; especially as the College was not sending its senior counsel, Judge Smith and Jeremiah Mason. Instead, the University retained William Wirt and John Holmes, who had the advantage of already being there.

Wirt was a first-rate lawyer, but had recently become U.S. Attorney General (see "*The Many-Sided Attorney General*" in (Yearbook 1976-ADD LINK), and was so overwhelmed by the backlog of pressing matters that he had no time to prepare adequately for the argument. He came into Court knowing only what appeared on the surface, relying upon oratory to compensate for lack of depth. Holmes, a Massachusetts Congressman, was not even an experienced advocate. According to Claude M. Fuess, he was "a good `stump speaker,' but lacked dignity and poise."<sup>8</sup> Before the Supreme Court he was lost. On March 14, 1818, Webster wrote Judge Smith:

"Holmes did not make much of a figure. I had a malicious joy in seeing Bell [one of the N. H. judges] sit by to hear him, while everybody was grinning at the folly he uttered. Bell could not stand it. He seized his hat and went off."<sup>9</sup>

Webster, then in his mid-thirties, agreed to go to Washington to argue the case if the College would pay him \$1,000 to cover expenses. Out of this he was to retain cocounsel. He selected Joseph Hopkinson, then a Congressman from Philadelphia, and a leading lawyer of great erudition and urbanity. He had been one of those to defend Justice Chase against impeachment, which lost him no love in the eyes of the Court. He had also demonstrated his versatility by writing the vastly popular war song, "Hail Columbia," stimulated by XYZ Mission, of which Marshall had been a member.

Webster and Hopkinson went into the case as underdogs. Webster himself believed their case weak. Their strongest arguments had been under the New Hampshire Constitution. The Contract Clause point had been added primarily as kind of makeweight, to afford a possibility of appeal in the event of an adverse state decision. Now because of the way in which the case had reached the Supreme Court, it was the only point they were entitled to argue.

Under the Federal *Judiciary* Act, appeals from a state court were limited to issues arising under the Constitution, laws, or treaties of the United States. This excluded matters of state law, and in the present instance left only the Contract Clause. On the other hand, if the case had come from a subordinate federal court, acting under its diversity of citizenship jurisdiction, the appeal would have brought with it the issues that were before the lower court, including the points under the state Constitution.

On December 8, 1817, Webster wrote Judge Smith:

"It is our misfortune that our case goes to Washington on a single point. I wish we had it in such shape as to raise all the other objections, as well as the repugnancy of these acts to the Constitution of the United States. I have been thinking whether it would not be advisable to bring suit, if we can get such parties as will give jurisdiction in the circuit

court of New Hampshire. I have thought of this more, from hearing the sundry sayings of a great personage.<sup>10</sup>

"Suppose the corporation of Dartmouth College should lease to some man of Vermont (e.g. C. Marsh) one of their New Hampshire farms, and that the lessee should bring an ejectment for it. Or suppose the trustees of Dartmouth College should bring ejectment in Vermont in the circuit court for some of the Wheelock lands. In either of these modes the whole question might get before the court at Washington."<sup>11</sup>

Webster's recommendation was adopted. Three separate ejectment proceedings were instituted in the U.S. Circuit Court for New Hampshire (Justice Story's circuit) on the basis of diversity of citizenship. They were so contrived as to raise all the issues, but were much too late to become part of the proceeding pending in the Supreme Court. In those days the judicial system was capable of great expedition. The New Hampshire decision had been handed down on November 6, 1817; the record in the appeal was sent off to Washington on Christmas Day; and the case was argued before the Supreme Court on March 10-12, 1818.

For the time being, Webster had to make do with what he had. He did so with extraordinary power and consummate skill. So adroitly did he weave the state points into his Contract Clause argument that neither opposing counsel nor any of the justices raised an objection.

So far as we know, Webster was not aware that he was venturing into an area of intense interest to *Chief Justice Marshall*. In his *Life of Washington*, Marshall had laid great stress on the sanctity of contract rights. He regarded their protection as essential to the protection of private property, and he saw the Contract Clause as the best available means of preventing State intrusion. *Eight years* earlier, in *Fletcher v. Peck*,<sup>12</sup> he had stretched the Clause to cover a state land grant, holding it to be a contract. Justice Johnson had objected, and it was Marshall's strategy to move forward by stages, all the while working for a consensus. Hindsight makes it clear that he was determined to expand the coverage of the Clause and was biding his time for an appropriate opportunity. The Dartmouth College case must have brought a gleam to his eye. (See accompanying column, "An Earlier College Charter Case.")

Before the Due Process Clause of the Fourteenth Amendment, which in practical effect has superseded the Contract Clause, the Constitution afforded contract rights no other specific protection against state action. As a matter of judicial policy, Marshall strove to enlarge that protection. Professor Benjamin F. *Wright*, in his 1938 treatise on The Contract Clause, puts it this way:

"By employing a far broader conception of contract than had been prevalent in 1787, and by combining this conception with the principles of eighteenth century natural law, Marshall was able to make the Contract Clause a mighty instrument for the protection of the rights of private property."<sup>13</sup>

The arguments of counsel ended March 12, 1818. The next day Marshall announced that the Court had conferred; that there were different opinions, and some of the judges had not formed opinions; consequently that the case must be continued until the next term. In a letter of March 14, conveying this news to Judge Smith, Webster said,

"I have no accurate knowledge of the manner in which the judges are divided. The Chief and Washington, I have no doubt are with us. Duval and Todd perhaps against us; the other three holding up. I cannot doubt that Story will be with us in the end, and I think we have much more than an even chance for some of the others. I think we shall finally succeed."<sup>14</sup>

Notwithstanding this ray of optimism, Webster urged expedition in getting the federal circuit court cases to the Supreme Court. On March 22 he wrote Jeremiah Mason:

"I believe it is fully expected that a case, raising the question in amplest form, will be presented at the circuit court. I have given some reason to expect this, and, unless for good cause, should be mortified if it were not so."<sup>15</sup>

Although the letter mentions no names, it is obvious that Webster had canvassed the situation with Justice Story, who would be the one to preside over the circuit court. Later correspondence confirms this. On April 23 Webster, in Boston, wrote to Mason in Portsmouth, New Hampshire:

"Judge Story has been recently in town. I have no doubt he will incline to send up the new cause in the most convenient manner, without giving any opinion, and probably without an argument. . . ."<sup>16</sup>

On April 28 he wrote Mason from Ipswich:

"I saw Judge Story as I came along. He is evidently expecting a case which shall present all the questions. . . . Judge Story goes down in the stagecoach on Friday morning."<sup>17</sup>

It is apparent that by now Webster knew how Story felt and that he could count on his support. On September 9 Webster wrote him:

"I send you five copies of our argument. If you send one of them to each of such of the judges as you think proper, you will of course do it in the manner least likely to lead to a feeling that any indecorum has been committed by the plaintiffs. The truth is that the New Hampshire opinion is able, ingenious, and plausible. It has been widely circulated, and something was necessary to exhibit the other side of the question."<sup>18</sup>

Activity had blossomed elsewhere even before the Supreme Court arguments.<sup>19</sup> The Rev. Francis Brown, president of the College, had written to other presidents to emphasize their potential stake in the litigation. The other institutions did not, as hoped, contribute to the expenses, but they sent observers to the arguments in Washington. Webster's peroration was preserved for posterity, not by the Court reporter, who ignored it, but by Professor Chauncey A. Goodrich of Yale.<sup>20</sup> They also demonstrated their solidarity of interest by arranging a "College Congress" attended by presidents or representatives of Harvard, Yale, Bowdoin, Vermont, Middlebury, Williams, and Andover Theological Seminary, as well as by the Rev. Mr. Brown.

Following the arguments in Washington, Princeton took occasion to award honorary degrees to its two alumni on the Supreme Court, Justices Johnson and Livingston. Harvard followed suit, with degrees to the same two Justices, and in addition added Story to its Board of Overseers. Justice Johnson was led to remark that "diploma had become as cheap as dog meat."<sup>21</sup>

Nor were these the only ploys. Chancellor James Kent of New York, generally considered the most prestigious of the state judges, had taken a trip north that summer and had visited Hanover, New Hampshire. There he was entertained by the officers of the University and shown a copy of Judge Richardson's opinion. Word got round that he had expressed admiration. Charles Marsh, a trustee of the College, quickly saw to it that Kent was also exposed to Webster's brief. Isaac Parker, who was not only Chief Judge of the Massachusetts Supreme Judicial Court

but also Royall Professor of Law at Harvard, gave additional assistance in seeing that the brief reached appropriate spots of sensitivity.

Later, President Brown called upon Chancellor Kent in Albany. It was a fruitful visit. Kent expressed himself converted, and confided that Justice Johnson had requested a written expression of his views. Kent gladly complied, and in addition is said to have discussed the case with Justice Livingston, who had served with him on the New York court before going to the Supreme Court.

But there was a new cloud on the horizon. The University authorities, realizing that they had been badly served before the Supreme Court, retained William Pinkney of Baltimore to pull their chestnuts out of the fire. Marshall and Story both considered Pinkney the best appellate lawyer ever to appear before them. He was at the height of his powers and the acknowledged leader of the Supreme Court bar. He spent an entire week going over the case with Dr. Cyrus Perkins, secretary of the University, and proposed not only to seek a reargument but also to insert into the record facts demonstrating the substantial extent to which the Province and state of New Hampshire had endowed the College.

The Court opened its new term on February 2, 1819. For the first time since being honored by the wartime attentions of the British, it was back in its old room beneath the Senate Chamber, palatial quarters after shifting about among cramped rooms and taverns. As the Justices donned their robes and moved to their mahogany desks on the raised dais, Pinkney stationed himself where he could best command attention and was poised to present his motion for reargument. But, according to Shirley's history of the litigation:

"The instant the judges had taken their seats, the Chief Justice turned his `blind ear' towards Pinkney and shut off his motion by announcing that the judges had formed opinions during the vacation, and immediately commenced reading his, which was in manuscript. . . on eighteen folio pages."22

"Blind ear" or no, there can be little doubt that Marshall knew precisely what he was doing. Although he had polled the other Justices on their conclusions, he had not shown them the opinion that he was now delivering "for the Court." Indeed, he later revised it to meet suggestions. Without a compelling reason, Marshall would not have brushed aside the customary procedure of clearing majority opinions in advance of delivery. But none of the Justices objected, and Pinkney was in no position to do so. The only Justice to dissent was Duvall, who wrote no opinion and offered no criticism. Todd was absent.

How did Marshall know what Pinkney had in mind? Presumably from Story, who got it from Webster. Marshall and Story had been corresponding about the case. Both had drafted opinions in advance of the Court term, but had not had an opportunity to show them to each other. Plainly, Marshall had *grasped the opportunity* to make a desired point. In *Fletcher v. Peck* he had raised the bulwark of the Contract Clause a notch higher by extending it to cover grants of land. Here he broadened it to include a college charter.

Marshall's *Dartmouth College opinion* cited no legal precedents, not even *Fletcher v. Peck*. Instead, he proceeded as he liked to do in constitutional cases, as if the problem were one of logic. He adopted premises which he said were incontrovertible, and then reasoned from them to the conclusions he wished to prove.

He first demolished the New Hampshire court's conclusion that an institution dedicated to public education was necessarily subject to public management. The true test, he said, was not the function of the institution but the source of its funds and the intentions of the donors. He then turned to the effect of incorporation. Did this of itself make the institution public? Admittedly, the corporation owed its existence to a legislative act, but did this give the legislature control? Marshall's answer was a resounding "No." In the process he delivered himself of a definition that has become one of his most frequently quoted statements:

"A corporation," he said, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it. . . . By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."<sup>23</sup>

Then, returning to the point at hand, Marshall went on to say:

"A corporation is no more a State instrument than a natural person exercising the same powers would be. . . . It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. . . ."<sup>24</sup>

Marshall's was the only opinion read in open court. Johnson concurred in a separate opinion, as did Story. The latter's, twenty thousand words long, extended the protection of the Contract Clause to business corporations as well as charitable corporations. He pointed out, however, that the legislature could always reserve the right to amend, and cited examples where it had done so. In later practice, this was to become the almost universal rule.

Washington also wrote a concurring opinion, in part to take issue with Story's extension of the decision to types of corporations not actually before the Court, and in part to discuss in detail the proposition that a corporate charter was a contract, something that Marshall had merely treated as incontrovertible. Livingston stated that he agreed with the others.

The three federal circuit cases that Webster had been at such pains to initiate and to rush on their way to the Supreme Court now became Frankensteins. Pinkney, blocked out of the main play, seized upon these pending appeals as a means of gaining a rehearing and of showing how heavily the public authorities had contributed to the College. But he was too late. Webster successfully opposed any enlargement of the stipulated facts in the Supreme Court. Instead, it remanded the cases to the circuit court for further proceedings.

This did not, of course, end the matter. The University now sought to get the additional facts into the proceedings before Justice Story in the circuit court. Governor Plumer was optimistic. On April 8, 1819, he wrote: "I am confident the fact of the State's being the principal donor can be proved so as to remove the doubts of even an unwilling judge."<sup>25</sup> But Pinkney did not participate further, and the others representing the University seemed to have lost their fire. Instead of jumping in with both feet, they asked for five months to assemble further facts. Story was predictably unreceptive. He gave them a month. Then he held that what they produced was insufficient to vary the rulings.

Thus ended one of the greatest lawyers' battles in our history. But to allay concern at the weight that professional skill and persistence exerted in the scales of justice, an additional fact may be comforting. According to knowledgeable observers, the battle already had been won. Mounting criticism and expense had brought shudders to both Governor and legislature. And so many of the College students had refused to transfer allegiance to the University that it never became more than a shell. In all likelihood, it would **have** collapsed even had the Court's decision been otherwise.

## **Endnotes**

General note: The background *facts are admirably detailed and documented in Francis S. Stites, Private Interest and Public Gain: The Dartmouth College Case, 1819* (Univ. of Mass. Press, 1972). For a contemporary feeling of the case and of the antagonisms *that enveloped it, the best source is still John M. Shirley, The Dartmouth College Causes and the Supreme Court of the U.S. (St. Louis, 1879)*, which initially appeared in installments in *The Southern Law Review*, Vols. 1-III (St. Louis, 1875-77). This exhibits strong bias against Marshall and *the Court and was sharply criticized by Senator Beveridge in his Life of John Marshall (Boston, 1919), IV, 258 n2, also by John Phillip Reid, Chief Justice: The Judicial World of Charles Doe* (Harv. Univ. Press, 1967), 186-87; and by Stites, 165. Nevertheless, we are indebted to Shirley for interesting facts and documentary materials that might otherwise have escaped notice. Shirley (1831-1887) was State Reporter for the N. H. Supreme Court, a post traditionally held by highly qualified lawyers; he was also a Vice President of the N. H. Historical Society.

1 The "Octagon" included Thomas W. Thompson, under whom Webster had studied law and with whom he was on terms of intimacy.

2 *Woodward is said to have been a nephew of Wheelock. Stites, 29.*

3 *Writings of Thomas Jefferson, H. A. Worthington, ed. (N. Y., 1853-55), VII, 18-19.*

4 N.H. 111, at 119 (1817).

5 *Plumer Papers, Lib. Cong.*; quoted in Maurice G. Baxter, *Daniel Webster & The Supreme Court (Univ. of Mass. Press, 1966)*, 78.

6 Shirley, *op. cit.*, 106.

7 *Dartmouth College v. Woodward*, 4 Wheat. 518, at 632 (1819).

8 *Claude M. Fuess, Daniel Webster* (Boston, 1930), I, 225 n3.

9 *Writings and Speeches of Daniel Webster* (Boston, 1903), XVII, 276.

10 Justice Joseph Story.

11 *Webster*, XVII, 267-68.

12 6 Cranch 87 (1810).

13 Benjamin F. Wright, *The Contract Clause and the Constitution* (Harv. Univ. Press, 1938), 26, 28.

14 *Webster*, XVII, 276.

15 *Ibid.*, 278.

16 *Ibid.*, 280.

17 *Ibid.*, 282.

18 *Ibid.*, 287.

19 For such activities, see: Gerald T. Dunne, *Justice Story* (N.Y., 1970), 170-76, 180-83; Baxter, 89-98; and Stites, 69-73.

20 Many years later Goodrich made this available to Rufus Choate, who *featured it in his July 27, 1853 "Eulogy to Webster"* at Dartmouth.

21 *Donald Morgan, Justice William Johnson* (Univ. of S. C. Press, 1954), 143.

22 Shirley, *op. cit.*, 203.

23 4 Wheat. 518, at 636 (1819).

24 *Ibid.*, 647.

25 Plumer Papers, N. H. State Library; quoted in Baxter, 33 *New England Q.* (1960), 28; also in Dunne, 180.

## A POSTSCRIPT

### Another Early College Charter Case

A singular coincidence in the professional life of John Marshall places his famous opinion in *the Dartmouth College* case in juxtaposition to a similar case nearly thirty years earlier. In 1790, Marshall stood in the shoes of Daniel Webster, speaking on behalf of "a small College" of whom it could also be said that "there are those who love her." *Bracken v. Board of Visitors of the College of William and Mary* differed in some material points from *Dartmouth College*, but essentially both cases turned upon the proposition that a charter grant, like a contract, is not to be unilaterally altered. As lawyer and judge, Marshall insisted upon this proposition; in the William and Mary case he sought to absolve the governing body by contending that its unilateral action did not fall in the forbidden zone, while in the *Dartmouth* case he ruled that the unilateral action did so fall.

Singularly, too, the earlier case brought into contact the cross-purposes of those chronic adversaries, Marshall and Thomas Jefferson. The litigation grew out of an initiative that Jefferson describes in *his Autobiography*:

"Being elected . . . one of the Visitors of Wm. & Mary college, a self-electing body, I effected, during my residence in Williamsburg that year, a change in the organization of that institution . . . substituting a professorship of Law & Police [for the chair of theology]."

This 1779 reorganization of the college curriculum had been brewing throughout the pre-Revolutionary period, as the agitators sought to rid the institution of its loyalist faculty. Following independence, Jefferson was zealous to convert the college into a training ground for civil servants and citizens better equipped to participate in a democracy. Several of the original chairs of learning, representing the traditional European style of curriculum, were eliminated in favor of "modern" subjects.

One of the positions stipulated in the original charter of King William and Queen Mary in 1693 had been that of master the "grammar school." The Rev. John Bracken, occupant of the chair in 1779, apparently was disposed to let events take their own course, and it was not until eight years later, in 1787, that he was persuaded to challenge the governing board's power to eliminate his position. Late in that year he sought a petition in the local district court for mandamus to compel the college's Board of Visitors to restore him to his "place and office of grammar master and professor of humanity." (There is some suggestion that as a clergyman, Bracken was chosen by the Anglican party to test the legality of the disestablishmentarianism of the Jeffersonians.)

In any event, all parties recognized the importance of the issue now joined for litigation. The case was transferred from the district court to the Virginia general court of appeals, and the college retained as its counsel one of the leading members of the bar--John Marshall. There is no evidence that, in 1819, Chief Justice Marshall considered that anything he had argued in 1790 provided precedent for *the Dartmouth College* case. The earlier state case had turned upon common law interpretation of charter/contract powers, while the later case turned upon the constitutional matter of the inviolability of contract provisions. Moreover, Marshall in the earlier case was defending the power of the institution's governing body to make changes "provided they did not depart from the great outlines marked in the charter," while Webster in the later case was arguing that the New Hampshire authorities had done just that.

But a fundamental similarity exists between the two college charter cases in John Marshall's professional career. As William and Mary's counsel, he declared: "It is an established

principle, that all annexed foundations follow, and are governed by the rules of the old foundation to which they are annexed." As Chief Justice, Marshall said in the Dartmouth case: "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created." The William and Mary Board of Visitors succeeded to the British Crown, as a party to the charter/contract. The legislature of New Hampshire succeeded to a peer of the realm as a party to the charter/contract. In neither case could one of the parties to the charter/contract "depart from the great outlines."

Marshall won, in 1790. Webster won, in 1819. As for the Rev. Dr. Bracken, he also won, after a fashion. In 1812, after the furor of 1779 and 1790 had passed, he became for two years president of the College of William and Mary.

## ***"Robin Hood," Congress and the Court***

**WILLIAM F. SWINDLER**

Presidents nominate persons for positions on the Supreme Court for a variety of reasons--and in about one case in four, the Senate rejects the nomination for a variety of reasons, mostly political. Altogether, thirty-four persons have been proposed for the Court who did not sit. Seven were confirmed but declined the appointment; one died after confirmation but before he could take his seat; twelve were rejected by recorded vote; the rest were killed off by various types of delaying action, or simply no action.

Eight Presidents have had one of their nominations defeated by one senatorial tactic or another; Grover Cleveland and Richard Nixon had two rejections apiece; Millard Fillmore and Ulysses S. Grant, three each. But the record is held, in rather dubious honor, by John Tyler, the unhappy President without a party, who had the distinction of experiencing five rejections of four of his nominees in thirteen months.

Tyler's selections for the Court were all of high professional quality. It was Tyler, not the individual nominees, who was the target of the Senate vendetta. Only once in six attempts did the President succeed in getting his man confirmed--Chief Justice Samuel Nelson of New York. Nelson was so conspicuously competent that, in the interval of an uneasy truce between White House and Capitol, his name was approved and he went onto the bench.

Tyler, a Democrat, had come to the presidency by accident. William Henry Harrison had been chosen by the Whigs as their candidate for the White House in 1840 and Tyler had been his running mate. The fact that the vice-presidential candidate came from the opposite party and had almost completely opposite political views seemed to the strategists of the day to be a masterstroke. In the Number Two position, Tyler's views would be neutralized while the combination of a Whig and a Democrat would offer a bipartisan appearance calculated to split the opposition. To the familiar campaign song of "Tippecanoe and Tyler Too," the Whigs contented themselves with vilifying their opponent, Martin Van Buren of New York, and evading a discussion of issues which would bring their own candidates into conflict with each other.

The whole thing blew up when the elderly Harrison was struck by pneumonia on the day of his inauguration and died a month later. Tyler became the first vice president thus to succeed to the White House because of the death of the incumbent President. He immediately served notice that his administration would follow a strong states' rights line; with the Whigs in control of the Senate, this overshadowed a solid opposition to Tyler nominees, e.g., for the Supreme Court, as events were to prove. The Whigs, chagrined at having lost the fruits of the election, turned for leadership to Henry Clay of Kentucky, an old Tyler foe; as for the Democrats, they not only resented Tyler's trafficking with the Whigs in the 1840 campaign, but they were for the most part followers of Van Buren, whose defeat in 1840 was ascribed in large part to the vitriolic attacks of the Harrison-Tyler partisans.

The confrontation began in January 1844, when the President sent up a nomination of a successor to Justice Smith Thompson, who had died the previous month. Tyler's first impulse was to play the same political game that had proved effective--at least up to a point--in 1840: he would propose Van Buren himself, thus appealing to the Democrats for restored party harmony while putting his strongest rival for the 1844 Presidential nomination out of contention. Van Buren's friends saw through the maneuver and persuaded Tyler that Van Buren would reject the nomination and make Tyler himself a laughing stock. The President thereupon substituted another New Yorker, John C. Spencer--and leapt from the frying pan into the fire.

Spencer was a Whig, but this did nothing to further his nomination. First, was the fact that he was an anti-Clay Whig; second, he had accepted appointment to Tyler's Cabinet as Secretary of War and subsequently Secretary of the Treasury. Finally, his narrow, technical

views on the national banking laws had added to the current enmities, since it had been a bitter debate over a banking bill that had caused mass resignations from the Cabinet in 1842. Despite acknowledged legal competence, "I have no confidence in the political integrity of Mr. Spencer," wrote a New York political leader to Clay's henchman, Senator John J. Crittenden of Kentucky, while another New York Whig stalwart, Francis Granger, declared in the *New York Herald* that ninety Whigs out of every hundred would oppose the nomination.

Within three weeks, the Spencer nomination had been rejected by the Senate, 21-26. For the next six weeks, Tyler sounded out a number of prospects including--or so it was rumored--the leading Philadelphia lawyer Horace Binney and the longtime reporter to the Supreme Court, Henry Wheaton. Finally, on March 13, 1844, the President made his second formal selection, the chancellor of New York, Reuben H. Walworth. The Senate showed no disposition to act on the nomination, and while matters thus drifted along a second Court vacancy occurred with the death of Justice Henry Baldwin. On June 5 Tyler sent up a second name for the second opening--Judge Edward King of Philadelphia.

Tyler was in an impossible situation, not only with respect to his Supreme Court nominees but with reference to his entire administrative program. A courtly Virginian of the old Jeffersonian tradition, it had been his misfortune to come to national office at a time when the party of Jefferson was torn between the Van Buren faction of the North and the Clay faction of the West. Indeed, most of the political career of this gentle and gentlemanly Southerner was to be a history of being left behind by changing times. Elected to the Senate as an anti-Jackson Democrat, he had felt obliged to support Jackson against Clay, in the deadlock of 1828, as "a choice of evils." Yet in 1832 when the Jacksonian Democrats won control of the Virginia legislature and returned Tyler to the Senate, it was with instructions to vote to expunge the resolution which had censured Jackson in the heated struggle over the Bank of the United States. Unable to find it in his conscience to do so, Tyler had resigned his seat.

Tragedy and near-tragedy had marked Tyler's presidential years. In 1842 his first wife had died. Two years later, making an official visit aboard *the warship* Princeton, he himself narrowly escaped death when there was an accidental explosion which killed several members of the presidential party, including a prominent New Yorker, David Gardiner. This event did prove to have a happy ending; Gardiner's daughter, Julia, married the widowed President in June 1844, providing the White House with a gracious First Lady in the closing months of the administration.

The couple then retired to the Tyler plantation on the James River in Virginia, which Tyler had named "Sherwood Forest," in wry acknowledgement of his own political destiny, which he described as the role of "Robin Hood" confronting the arrogance of power in his own time. The choice of the terms apparently was an admission of political predestination; by the spring of 1844, it was apparent that Tyler's chances of renomination for the presidency were as non-existent as his likelihood of getting his Supreme Court nominations through the Senate. In January 1845 the Senate formally tabled the Walworth and King nominations.

That November, the election of James K. Polk had settled several matters--the diehard efforts of Clay to get into the White House, and the prospects of both Tyler and Van Buren for future political office. Another matter which the Polk election settled was the ambition of Senator Crittenden to get onto the Supreme Court. He had first been nominated in the last days of John Quincy Adams' administration, with the Jacksonians in the Senate voting to "postpone" action until their own man took office a few weeks later. Clay, had he been successful in his final bid for the White House, presumably would have sent up the name of his fellow Kentuckian one more time.

Now, in the last days of the Tyler administration, the White House sought to accommodate the Senate in the wake of the presidential election; with political issues settled for the time, and with one Supreme Court position having been unfilled for a year, it could be hoped

that a policy of reasonableness might govern relations between President and Senate in these last few months. The optimists were to prove to be only half right.

"Better the bench shall be vacant *for a year*," *the National Intelligencer* had editorialized the previous spring, "than filled for half a century by . . . partisans committed in advance to particular beliefs." The charge was somewhat exaggerated; while Walworth was condemned in the Senate as "querulous, disagreeable [and] unpopular," he was in many professional respects the best qualified of Tyler's unsuccessful nominations. For the previous twenty years as chancellor of New York he had virtually written the law of equity pleading and rules of evidence, and a substantial majority of his opinions had been upheld on appeal. Both his predecessor, the renowned Chancellor James Kent, and Supreme Court Justice Joseph Story cited his cases as authoritative.

Yet there was no denying that he was cantankerous, to a point where members of the state bar openly declared that they supported his nomination for the Supreme Court as a means of getting him out of their own judiciary. The animus was apparently deep rooted; in the new constitution of 1846, New York would dispose of the problem by abolishing the office of chancellor. In January 1845, Tyler accepted the fact of the massive opposition to Walworth and withdrew his name.

There was no clear objection--other than the Senate's anti-Tyler fixation--for opposing Judge King, a highly reputed Pennsylvanian, and the President made one final attempt to override the opposition by resubmitting King's name. The signs in the Senate were so forbidding, however, that early in February he withdrew that nomination as well.

Time was now running out; obviously, the anti-Tyler forces were delaying action until a new administration could take over in March. But the outgoing President made one further effort, and for the two vacancies on the Court he finally, on the same day that he withdrew King's name, submitted two last nominations--Chief Justice Samuel Nelson of New York and former United States Attorney John Meredith Read of Philadelphia.

Nelson, one of the best known state judges in the land, was confirmed within a week, and took his seat on the Court the day after Tyler left office. It was to be Tyler's only successful nomination for the bench. Read, although popular with all faction among the Whigs, had antislavery views which were anathema to the Southern members of the Senate, and the term ended without action on his case.

The sound and fury over the Court vacancies actually attracted small attention in their day. The struggle between Tyler and the Congressional opposition involved other issues of more burning public concern, epitomized in the effort to annex the Republic of Texas. After the Whig-dominated Senate refused to ratify a treaty of annexation, Tyler proposed a joint resolution of both houses, which would require only a simple majority. This tactic finally worked, but only after the fall elections made certain a new Democratic majority in Congress. In a sense, the judicial nominations of the President without a party were innocent bystanders to the larger contest; in any case, several highly qualified candidates were the victims.

## ***The Case of the Mutinous Mariner***

**EDWARD DUMBAULD**

The case of the mutinous mariner, Gideon Olmstead, presents a striking illustration of the function of the Supreme Court as an instrumentality for enforcing the legal rights of individuals. That aspect of the Court's task is often overlooked, because of the prominence of its activities as "umpire of the federal system" in pronouncing upon the allocations of power between State and federal government, and between the three branches of the federal government *inter sese*.<sup>1</sup>

But the importance of a bill of rights, directly protecting individuals and excluding some aspects of liberty from the jurisdiction of any branch of government whatsoever, has been emphasized by many writers, from Thomas Jefferson to Attorney General Edward H. Levi.<sup>2</sup> In Olmstead's case, the Supreme Court's decree<sup>3</sup> enabled a veteran of the Revolutionary war to collect the pecuniary reward due him on account of his bravery in action.

Olmstead was a Connecticut seaman,<sup>4</sup> who was taken prisoner by the British in 1778.<sup>5</sup> While confined at Montego Bay in Jamaica, he and three other Americans were put on board the sloop *Active*, commanded by John Underwood, bound for New York, with a cargo of arms and supplies for the British army of occupation there.

During the voyage (after midnight on September 6, 1778) the four American seamen mutinied. By raising the ladder and closing the hatch they confined the British officers below deck. After intermittent gunfire, and negotiations with their captives, they had gained full control of the ship, and were in sight of Little Egg Harbor, near Cape May, New Jersey, when on September 8, 1778, *the Active* fell in with, and was recaptured by, the brig *Convention*, belonging to the Commonwealth of Pennsylvania, commanded by Thomas Houston.<sup>6</sup> When Houston boarded *the Active*, Olmstead informed him that no help was wanted; but Houston thought it incredible that *the* four mutineers could have subdued the fourteen British seamen on board. Accordingly he took charge of *the Active*, conveyed it to Philadelphia, and filed a libel against it in the Pennsylvania court of admiralty, claiming it as prize.<sup>7</sup>

The facts are succinctly summarized in the report of the case in the Supreme Court:

"Gideon Olmstead, Artimus White, Aquilla Rumsdale and David Clark, citizens and inhabitants of the state of Connecticut, were, during the revolutionary war, captured by the British, and carried to Jamaica, where they were put on board the sloop *Active*, to assist as mariners in navigating the sloop to New York, then in possession of the British, with a cargo of supplies for the fleets and armies of Great Britain. During which voyage, about the 6th of September 1778, they rose upon the master and crew of the sloop, confined them to the cabin, took the command of the vessel and steered for Egg Harbor, in the state of New Jersey. On the 8th of September, when in sight of that harbor, they were pursued, and forcibly taken possession of, by Captain Thomas Houston, commander of the armed brig *Convention*, belonging to the state of Pennsylvania, and on the 15th of September, brought into the port of Philadelphia; when Houston libelled the vessel as prize to the convention. A claim was interposed by Captain James Josiah, master of the American privateer *Le Gerard*, who claimed a share of the capture, as having been in sight, and by agreement cruising in concert with *the Convention*. A claim was also interposed by Olmstead and others, for the whole vessel and cargo, as being their exclusive prize. The state court of admiralty, however, adjudged them only one-fourth part, and decreed the residue to be divided between the state and the owners of the privateer, and the officers and crews of *the Convention* and *the Le Gerard*. From this sentence, Olmstead and others appealed to the court of commissioners of appeals in

prize causes for the United States of America, where, on the 15th of December 1778, the sentence of the state court was reversed, and it was ordered and adjudged, that the vessel and cargo should be condemned as lawful prize for the use of the appellants, Olmstead and others, and that the marshal should sell the same, and pay the net proceeds to them, or their agent or attorney."<sup>8</sup>

The "commissioners of appeals in prize causes" was a standing committee created by the Continental Congress to exercise appellate jurisdiction in prize cases. The tribunal was set up in response to a suggestion from General George Washington. To encourage depredations on British commerce by enterprising American privateers. and to determine the propriety of condemning as prize the ships and cargoes seized in the course of belligerent operations at sea, there was need for admiralty or prize courts established under American authority.<sup>9</sup> (See "Of Revolution, Law and Order" in YEARBOOK 1976.)

Accordingly, on November 25, 1775, Congress adopted resolutions, the fourth of which provided: "That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible, to erect courts of Justice, or give jurisdiction to the courts now in being for the purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legislatures shall seem expedient." Simultaneously, in the sixth resolution, it was provided "That in all cases an appeal shall be allowed to the Congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, . . . and provided the party appealing shall give security to prosecute the said appeal . . .".<sup>10</sup>

The troublesome legal question presented by the Olmstead case was whether this resolution of Congress *permitted* de novo review of facts on appeal, or whether appellate review was limited to questions of law. The Pennsylvania act of September 9, 1778, creating a court of admiralty, provided for jury trial and declared that "the finding of the said jury shall establish the facts without re-examination or appeal."<sup>11</sup> It was Pennsylvania's position that the State had power by statute to change the English admiralty practice by granting trial by jury;<sup>12</sup> and that accordingly the resolution of Congress authorizing appeal should be interpreted as contemplating only review of questions of law. Facts found by a jury were regarded as sacrosanct, under this interpretation.

At the trial presided over by Judge George Ross the jury apparently decided against Olmstead and his men the question of fact whether they had completely subdued the British and gained undisputed *control* of the Active without any help from Houston's ship.

According to Chief Justice Thomas McKean of Pennsylvania "the question was, whether the four American mariners had subdued the rest of the crew, before these *vessels* [*the Convention* and Gerard] came in sight; that is, whether hostilities had then ceased? The jury were of opinion, they had not, and gave the verdict accordingly."<sup>13</sup>

In any event the jury on November 4, 1778, awarded Olmstead and his men only one-fourth of the net proceeds of the sloop Active and her cargo, giving three-fourths to be divided among claimants representing the *Convention* and the Gerard.<sup>14</sup>

The federal court of appeals, as previously stated, on December 15, 1778, reversed the Pennsylvania court's decision and awarded the entire proceeds to Olmstead and his men.<sup>15</sup>

However, Judge Ross refused to accept the decision of the court of appeals in favor of Olmstead, because he believed that he could not proceed in any manner contrary to the jury's verdict. On December 28, 1778, he ordered the marshal of the Pennsylvania admiralty court to sell the vessel and cargo, and pay the net proceeds into court.<sup>16</sup>

On the same day the court of appeals heard argument on a motion by Olmstead that the marshal be directed to execute the decree of the court of appeals. The case was continued for further argument until January 4, 1779, at 5 p.m. At 8 a.m. on that day the court of appeals met

at the urgent request of Olmstead and learned that Judge Ross had directed that the money be paid into his court at 9 a.m. by the marshal.

Accordingly an injunction was issued by the court of appeals ordering the marshal to retain the funds in his hands until further order of the court of appeals. This injunction was served upon the marshal before payment by him into court, but he disregarded it. With knowledge of the injunction, he paid the money over to Judge Ross, who gave a receipt for it.

Thereupon the court of appeals noted of record that the judge and marshal of the Pennsylvania court of admiralty had refused obedience to the decree and writ of the court of appeals, but that the court of appeals was "unwilling to enter upon any proceedings for contempt, lest consequences might ensue . . . dangerous to the public peace of the United States." However, the court of appeals refused to "proceed further in this affair" or to "hear any appeal" until "the authority of this court be so settled as to give full efficacy to their decrees and process." To that end the court of appeals ordered that a report of the proceedings *in the case of the Active* be laid before Congress.<sup>17</sup>

Judge Ross received from the marshal the sum of £47,981-2s.-Sd. in Pennsylvania currency. Of this £11,496-9s.-6d. was the share of Pennsylvania as *owner of the brig Convention*. He turned that amount over to David Rittenhouse, the State Treasurer, from whom he took a bond to indemnify him if "the said George Ross shall hereafter, by due course of law, be compelled to pay the same, according to the decree of the court of appeals" in the *case of the sloop Active*.<sup>18</sup>

Judge Ross died in 1790.<sup>19</sup> Suit in assumpsit against his executors for money had and received was brought by Olmstead in the Court of Common Pleas of Lancaster County, and judgment of £3248-4s.-7l/4d. obtained by default, the defendants having received no notice of the proceedings until after entry of final judgment. Ross's executors then sued Rittenhouse on his bond. The Pennsylvania Supreme Court held that the Lancaster County court, being a court of common law, had no jurisdiction of what was really an admiralty case, and that Rittenhouse was thus not liable on his bond.<sup>20</sup>

In this case Chief Justice McKean pointed out that he had been president of the court of appeals in 1778 when Olmstead's case was heard by that tribunal, but had declined to sit, because of conflict of interest, as he was also Chief Justice of Pennsylvania.<sup>21</sup> He had hoped that in some way the case could have been decided by the United States Supreme court, but this expectation had been disappointed. Being thus obliged to express an opinion, McKean concluded that reexamination of facts found by a jury was repugnant to "the genius and spirit of the common law" and that "the decree of the committee of appeals was contrary to the provisions of the act of congress and of the general assembly, extra-judicial, erroneous and void." <sup>22</sup>

Then on June 27, 1796, Rittenhouse died.<sup>23</sup> On May 27, 1802, Olmstead brought suit in the United States District Court for Pennsylvania against his daughters, Elizabeth Sergeant and Esther Waters, executrices of his estate.<sup>24</sup> This action sought enforcement of the 1778 decree of the court of appeals. On January 4, 1803, the celebrated Judge Richard Peters decided in favor of Olmstead.<sup>25</sup> Nothing further occurred until May 18, 1807, when counsel for Olmstead sought a rule to show cause why the decree of Judge Peters should not be carried into execution.<sup>26</sup> In response the defendants called attention to a Pennsylvania statute of April 2, 1803, asserting the commonwealth's interest in the money, and advancing the Eleventh Amendment as a bar to suit against Pennsylvania.<sup>27</sup>

Again there was no action taken until March 5, 1808, when Olmstead sought a mandamus against Judge Peters to secure execution of his 1803 decree.<sup>28</sup> With commendable prudence, Judge Peters had denied the relief requested by Olmstead, not desiring to incite armed conflict between State and federal government on the strength of his own opinion alone, without confirmation by the Supreme Court. His refusal to act cleared the way to consideration of the case by the Supreme Court.

On February 20, 1809, Chief Justice John Marshall pronounced the decision of that tribunal, granting the writ of peremptory mandamus and directing execution of the decree in favor of Olmstead. In impressive language he declared:

"If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals."

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act [of April 2, 1803] concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, . . . the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.<sup>30</sup>

But Marshall's decision did not end the matter. What had been a lawsuit between an old sailor and two women <sup>31</sup> became an armed confrontation between Pennsylvania and the federal government. Governor Simon Snyder, a week after the Supreme Court decision,<sup>32</sup> ordered General Michael Bright of the Pennsylvania militia, to protect the ladies <sup>33</sup> against unwelcome attentions of the United States marshal who was attempting to serve the execution process issued by Judge Peters on March 24, 1809, pursuant to the Supreme Court's mandate.<sup>34</sup>

When the marshal found the residence of the ladies guarded by militia (hence known colloquially as "Fort Rittenhouse") he set a date three weeks ahead as the time when he would return with a posse. After this diversion, the wily marshal succeeded in climbing a back fence and entering the house from the rear. He served his process and seized the ladies. Chief Justice Tilghman of the Pennsylvania Supreme Court, after a hearing on an application for habeas corpus remanded them to the custody of the marshal.<sup>35</sup> They were released upon payment by the Governor of money made available under an ambiguously worded act of April 4, 1809, appropriating \$18,000 for use in connection with the Olmstead matter.<sup>36</sup>

Governor Snyder wrote to President James Madison on April 6, 1809, urging that the federal government desist from enforcement of the court's decision. Madison replied firmly, on April 13, 1809, that "the Executive of the United States is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States but is expressly enjoined, by statute, to carry into effect any such decree where opposition may be made to it."<sup>37</sup>

Moreover, General Bright was indicted by a federal grand jury for obstructing justice. At his trial before Justice Bushrod Washington, the jury, in a special verdict, found that he had resisted the marshal, and had done so under the orders of the constituted authorities of the Commonwealth of Pennsylvania, leaving to the court to decide whether such action under the circumstances constituted the crime charged.

Justice Washington entered judgment of conviction and sentenced General Bright to three months' imprisonment and a fine of \$300, and the other defendants to one month's imprisonment and a fine of \$50 each. President Madison promptly pardoned all defendants,<sup>38</sup> and gratefully regarded it as "a blessing" that "The affair of Olmstead has passed off without the threatened collision of force." <sup>39</sup>

So the case of the mutinous mariner resulted in the judicial vindication of his property in the prize money earned by his bravery thirty years earlier during the American Revolution.<sup>40</sup> The Supreme Court had played its part as an instrumentality for enforcing the legal rights of individuals (as well as functioning as umpire of the federal system).

## Endnotes

1 Sometimes, says Attorney General Edward H. Levi, with respect to the Court's function as umpire, "this may be the inevitable consequence of the courts' performance of their proper duties." Levi, "Some Aspects of Separation of Powers," *Columbia Law Review* Vol. LXXVI No. 3 (April, 1976) 371, 387. In other instances the propriety of judicial intervention is less clear, and may reflect the tendency of an "imperial judiciary" to augment its own powers. *Ibid.*, 371, 382.

2 "Some powers have been confided to no branch," says the Attorney General. *Ibid.*, 385. For Jefferson's view, see Dumbauld, *The Political Writings of Thomas Jefferson* (New York, 1955) xxvi-xxvii; and Dumbauld, "Thomas Jefferson and American Constitutional Law," *Journal of Public Law*, Vol. H No. 2 (Fall, 1953), 370, 384. Since "the purposes of society do not require a surrender of all our rights to our ordinary governors, Jefferson declared, it follows that "a bill of rights is what the people are entitled to against every government on earth."

3 The crucial decision was *U.S. v. Peters*, 5 Cranch 115 (1809). An earlier effort in the courts of Pennsylvania to collect was unsuccessful. *Ross v. Rittenhouse*, 2 Dall. 160 (Pa. 1792). So was an appeal to the Pennsylvania General Assembly. See *Sundry Documents, Relative to the Claim of Gideon Olmstead, against the Commonwealth of Pennsylvania. Respectfully submitted to the Consideration of the Members of the Legislature of Said Commonwealth*. Philadelphia, 1808. The Supreme Court's decision evoked a "Protest of Pennsylvania against the Decision of the Supreme Court in the Case of Gideon Olmstead," forwarded by President Madison to the Senate on June 4, 1809, printed in Walter Lowrie and Walter S. Franklin (eds.), *American State Papers, Miscellaneous*, II, 2-12 (Washington 18~4). For discussions of the case see Hampton L. Carson, "The Case of the Sloop 'Active' " *The Pennsylvania Magazine of History and Biography*, Vol. XVI, No. 4 (January, 1893) 385-98; Kenneth W. Treacy, "The Olmstead case 1778-1809," *The Western Political Quarterly*, Vol. X, No. 3 (September, 1957), 675-91; and the biography by Louis F. Middlebrook, *Captain Gideon Olmstead* (Salem Mass., 1933). Good accounts are also found in Charles G. Haines, *The Role of the Supreme Court in American Government and Politics 1789-1835*, 270-78 (Berkeley, Calif., 1944); and in Charles Warren, *The Supreme Court in United States History*, 1, 374-86 (Boston, 1992) I have seen references to but have not have an opportunity to examine Richard Peters, *The Whole Proceedings in the Case of Olmstead and Others versus Rittenhouse Executrices* (Philadelphia, 1809).

4 Olmstead was born on February 12, 1749/ 50. Middlebrook, note 3 supra, viii. He died on February 8, 1845, at the age of 96. *Ibid.*, 170.

5 The Polly, upon which Olmstead was serving, was captured by the Ostrich. *Ibid.*, 39.

6 The Gerard, commanded by Captain James Josiah, was cruising with the Convention and was within sight when Houston boarded the Active. Middlebrook, 61.

7 *Sundry Documents*, note 3 supra, 3; Carson, note 3 supra, 386-87.

8 5 Cr. at 118. This report sets forth most of the pertinent documents in the case. The graphic testimony of the occupants of the ship is given in full detail in *Sundry Documents*, note 3 supra, 8-13.

9 131 U.S. App. xix-xxvi. For Washington's letter to the president of Congress, of November 8, 1775, see John C. Fitzpatrick, ea., *The Writings of George Washington*, IV, 73 (Washington,

1931). On the same day he wrote to Richard Henry Lee: "I should be very glad if the Congress would, without delay, appoint some mode by which an examination into the captures made by our armed vessels may be had, as we are rather *groping* in the dark till this happens." *Ibid.*, 75.

10 *Worthington C. Ford and others*, eds., *Journals of the Continental Congress* [34 vols. Washington, 1904-1937, cited hereinafter as J.C.C.], III, 373-74. See also 5 Cr. 127, and 3 Dall. 55-56. Perhaps jury trial was recommended because it was a widely-felt grievance later listed in the Declaration of Independence that British legislation had extended "the powers of the admiralty courts beyond their ancient limits" thus "depriving us in many Cases, *of the Benefits of Trial by Jury.*" *Dumbauld, The Declaration of Independence and What It Means Today*, 132-33 (Norman Okla., 1950). Congress at first referred several appeals to special committees, but on January 30, 1777, resolved that a standing committee of five members be appointed to hear and determine appeals. J.C.C., VII, 75. The membership of the committee changed from time to time. It was this standing committee which heard the *Olmstead* case. Not until January 15, 1780, was a permanent court of appeals created, consisting of three judges. J.C.C., XVI 61. For convenience we shall speak of the standing committee as the court of appeals, as Chief Justice Marshall does. 5 Cr. at 137.

11 *James T. Mitchell, et al.* (eds.), *The Statutes at Large of Pennsylvania*, 18 vols. [except vol. I] (Harrisburgh 1896-1915), IX 279. The act of March 8, 1880, repealing the act of 1778, provided for trial of prize cases "by the law of nations and the acts and ordinances of . . . Congress . . . by witnesses according to the course of the civil law." *Ibid.* x, 97-98. On January 15, 1780, Congress expressly provided, when creating a permanent court of appeals, that "the trials therein be according to the law of nations, and not by jury." J.C.C., XVI, 61. See also 5 Cr. 128.

12 Just as it has power by statute to change the common law. Chief Justice McKean cited the example of an act of Parliament (28 Hen. VIII, c. 15) providing trial by jury in cases of piracy, previously *triable in the admiralty* under the civil law. *Ross v. Rittenhouse*, 2 Dall. 160, 163 (1792). Likewise a Virginia statute (drafted by Thomas Jefferson) introduced *jury trial in equity cases*. *Julian P. Boyd, et al.*, *The Papers of Thomas Jefferson*, I, 615 (*Princeton 1950*); William Waller Hening, *The Statutes at Large [of Virginia]*, IX, 394 (Richmond 1821). "But this being found inconvenient, the act was repealed, *October, 1783, c. 26.*" St. George Tucker, *Blackstone's Commentaries*, III (App.) 56 (Philadelphia, 1803). Similarly, Congress has sometimes *provided for jury trial* in admiralty cases [*The Genessee Chief*, 12 How. 443, 459-60 (1852)] and for review of admiralty and equity decrees *by bill of exceptions* rather than by appeal [*Wiscart v. Dauchy*, 3 Dall. 321, 327-29 (1796)]. The Seventh Amendment to the United States Constitution (effective December 15, 1791) provided that "In suits at common law . . . [but not in equity or admiralty] the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in any Court of the United States, than according to the rules of the common law."

13 *Ross v. Rittenhouse*, 2 Dall. 160, 161 (Pa. 1792). McKean may have been aware of the controversy over review of jury verdicts (in 1763-66) between the New York courts and colonial governor *Cadwallader Colden* in connection with the case of *Forsey v. Cunningham*. See *Joseph H. Smith, Appeals to the Privy Council from the American Plantations*, 390-412 (New York, 1950).

14 5 Cr. 121.

15 5 Cr. 119. For the text of the decree of *the court of appeals*, see *Middlebrook*, 68-69; and *Sundry Documents*, 16-17. Benedict Arnold was surety for *Olmstead* on the appeal and it was he

who warned the court of appeals that Judge Ross planned to receive the money from the marshal before the court of appeals could act. *Carson*, 388.

16 5 Cr. 120-21.

17 5 Cr. 122-23; Sundry Documents, 20-22. Congress upheld the *court's authority*. J.C.C. XIII, 281-86. See also Sundry Documents 25; and 3 Dall. at 82-85.

18 5 Cr. 123-24. It is not clear whether Rittenhouse received only proceeds of the cargo, or also of the ship. *The latter had not* yet been sold on January 4, 1779. Sundry Documents, 21. It is also not clear what was done with respect to the shares of other claimants than the State. See *Treacy*, 683; and *Middlebrook*, 150.

19 *Carson*, 393

20 *Ross v. Rittenhouse*, 2 *Dall.* 160, 164, 165-66, 169 (1792).

21 *Ibid.*, 162. 1

22 *Ibid.*, 163. See note 12 *supra*. Justices Shippen and Yeates did not agree with McKean on this point, but joined in the holding that the *Lancaster County* court had no jurisdiction of the case. *ibid.*, 165, 169.

23 *Middlebrook*, 131.

24 5*Cr.* 131.

25 *Ibid.*, 124-26. The case is also reported as *Olmstead v. The Active*, Fed. Cas. No. 10503a, 18 Fed. Cas. 680. *It had by then* been decided by the Supreme Court in *Penhallow v. Doane*, 3 *Dall.* 54, 86 (1795), a similar case arising in New Hampshire, that decrees of admiralty courts set up by the Continental Congress could be enforced in *federal courts under the Constitution*.

26 5 *Cr.* 126.

27 *Ibid.*, 127-35; Statutes at Large of Pennsylvania, note 11 *supra*, XVII, 472-80. The act had been passed through the instrumentality of I Thomas McKean, who had become governor! of Pennsylvania. *Carson*, 394. Chief Justice Marshall disposed easily of the Eleventh Amendment issue. 5 *Cr.* 139-41. *It is interesting* to note that Justice Washington, in *U.S. v. Bright*, Fed. Case. No. 14647, 24 Fed. Cas. 1232, 1236 (D. Pa. 1809), drew attention to an additional reason why the Eleventh Amendment was of no avail to the State. That Amendment refers only to suits "in *law or equity*" and does not mention admiralty. But later in *Ex parte State of New York*, 256 U.S. 490, 1497-98 (1921), the Supreme Court *applied* the Amendment in an admiralty case.

28 5*Cr.* 116.

29 *Ibid.*, 117.

30 *Ibid.*, 136. This passage *antedates the better-known expressions* of the same principle in *McCulloch v. Maryland*, 4 *Wheat.* 316, 4361 (1819), and *Cohens v. Virginia*, 6 *Wheat.* 265, 1377, 385, 388 (1821). 1

31 Carson, 394. 1

32 Middlebrook, 151.

33 Pursuant to §2 of the *Act of April 21 1803*. 5 Cr. 132. 1

34 Middlebrook, 150: U.S. v. Bright, Fed Cas. No. 14647, 24 Fed. Cas. 1232, 12345 (1809).

35 Carson, 394-97; Treacy, 686.

36 The sum was "made subject to the orders of the governor" to enable him to carry into effect every engagement of the Commonwealth touching the premises in such manner as may appear to him to be advisable, just and proper, and to meet all contingent expenses which *may arise* in the execution of previous directions of the legislature. *Statutes at Large of Pennsylvania note 11 supra, XVIII, 1164*. See also *Protest of Pennsylvania, note 3 supra, 12*.

37 Debates (11 Cong., 1 and 2 sess.), 2269.

38 U.S. v. Bright, Fed. Cas. No. 14647, 24 1 Cas. 1232, 1238 (D. Pa. 1809). Justice Washington rejected the "Nuremberg defense" of obedience to the orders of a superior officer. *Ibid.*, 1237-38.

39 *Madison to Attorney General Caesar A. Rodney* quoted in Warren, *The Supreme Court in United States History*, 1, 385.

40 Olmsted was said to be 84 years old when collected his claim. Treacy, 690.

## ***Women and Other Strangers Before the Bar***

**ALICE L. O'DONNELL**

"It is impossible to close one's eyes to the fact that she [woman] still looks to her brother and depends upon him. Even [if] all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection."

The above quotation is from an opinion of the Supreme Court of the United States announced in 1907, over a quarter of a century after this august body first agreed to admit a woman to the bar of the Supreme Court. Women have since then come a long way--in the law and in other professions--but until recently progress was slow and surely must have been discouraging to the pioneers in this area.

From the time the Judiciary Act of 1789 was passed and the Supreme Court of the United States was established, it was ninety years before the first woman was admitted to the bar of that Court, and it took a special Act of Congress to bring this about.

It took a total of 131 years of the Court's existence to admit the first 100 females. Starting with Mrs. Belva Lockwood's admission in 1879 and covering a period of 41 years (or until 1929), the first 100 women were admitted from 26 states and the District of Columbia. Understandably, Washington, D.C., leads, with the number of women admitted from the District totalling 26 during that period. Undoubtedly propinquity and the operation in the District of a law school which admitted women had a lot to do with this relatively large number. The State of New York has the next highest, with a total of 13. What is amazing is that many distant states competed for representation with states in the East.

For example, the rolls show that seven were admitted from California by 1920; one came from Oregon in 1918; two came from the state of Washington, between 1913 and 1918; Nevada had two between 1913 and 1916 (a surprising fact since Nevada to this day does not have a law school); and Arizona was represented through Sarah Herring Sorin in 1906, six years before this state was formally admitted to the Union. And it surely must be gratifying to the distaff side of the bar in Louisiana that at least one woman in their state was included in the first 100 by being admitted to practice before the Supreme Court in 1919. This is the State which until January 1975 excluded women from jury panels unless they filed a written declaration of willingness to serve. And some message must be found in the fact that during this period two states contiguous to the District of Columbia, Maryland and Virginia, were represented by only one each on the Supreme Court rolls.

It is easy to imagine the consternation of some of those Justices entertaining a suggestion that women be admitted to the Supreme Court bar, especially since stories about the first days in the new Supreme Court building in 1935 include one relating how one Justice was opposed to *having* any women employees at the Court. One Clerk of Court finally dared pioneer the course and hired a woman to work in his office. But so violently opposed was the Justice that (tales recount) the woman had to hide every time he was heard to be approaching the office.

Women continued for some time to face stumbling blocks in all areas of endeavor. But it was in their early attempts to enter the legal profession that the most insurmountable stumbling blocks showed up. There appeared on all scenes an increasing number of women agitating for women's rights--from rights to enter all professions as well as the suffragette movement. And all of this had much to do with the ultimate acceptance of the fact by the courts that women were here to stay. It undoubtedly made it a little easier for three women in particular who deserve special credit for having pioneered the cause in the legal profession.

Myra Bradwell was the wife of Judge James B. Bradwell, of Chicago, and daughter of Eban and Abigail Willey Colby. Upon the maternal side a descendant of the Willeys, a family well represented in the Revolution, and two members of whom were in the Battle of Bunker Hill. She was born in Vermont, but in infancy was taken to western New York, where she remained until about twelve years old. She then came to Chicago, where she continued to live for the greater part of her life.

She was educated in Kenosha and at the ladies' seminary in Elgin, where she afterward became a teacher. Still later she taught school in Memphis, Tennessee. In 1852 she was married to Bradwell, whose father was one of the pioneer settlers in Illinois. Though Mrs. Bradwell began the study of law under the tutelage of her husband, it was apparently only a side interest and she had no serious plan to become a practicing lawyer, perhaps because she realized that, being a married woman, she would be denied admission to the bar. She continued to work with her husband, however, and later did file an application for admission to practice before the Supreme Court of Illinois--the first such application from a woman ever to be filed in this country.

Mrs. Bradwell's petition was supported with a certificate from an inferior court which attested to her good character and asserted that she possessed the necessary qualifications. Apparently foreseeing a hazardous path she also filed a paper stating she was entitled to the license applied for by virtue of Section 2, Article IV and the Fourteenth Amendment to the Constitution of the United States. She was denied the license, based on decisions of the Illinois Supreme Court and with that court giving as one of its reasons that Mrs. Bradwell, "as a married woman, would be bound neither by her express contracts nor by those implied contracts which it is the policy of the law to create between attorney and client." The court summarily denied the petition until Mrs. Bradwell pursued the matter further with a printed brief. There followed a confirmation of that court's previous action, in a written opinion.

Discouraged, but determined to exhaust all her legal remedies, she filed a writ of error to the Supreme Court of Illinois in the Supreme Court of the United States. The Court, in an opinion delivered by Mr. Justice Miller and announced in December of 1872, affirmed the action of the Illinois Supreme Court.

But it was the concurring opinion of Mr. Justice Bradley that was the greatest affront. With a lead-in reciting the fact that to license Mrs. Bradwell would be contrary to the rules of our common law inherited from England, "and the usages of Westminster Hall from time immemorial," this 19th-century Justice concluded with:

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the diviner ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was tiers sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from that of her husband, who was regarded as her head and representative in the social state; and, not withstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husbands consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in

rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor

"It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."

Reflection on the years that spanned the terms of the Justices who *participated* in the Bradwell case, as well as their backgrounds, belie the words of the majority opinion. Mr. Justice Miller, for example, was appointed from the state of Iowa, and served from 1862 to 1890. Surely he must have observed some of the things women were called upon to do during the harsh winters in Iowa, and some the struggles women faced during the Civil War days. Their activities would disabuse any contention that women were fragile and totally incapable of doing a man's job.

To his great credit, Chief Justice Chase, though no doubt having his share of detractors, at least earned some points with the ladies. He dissented from the judgment of Court and from both opinions filed in the case.

Mrs. Bradwell's cause ultimately prevailed and she was finally admitted to the bar of the Supreme Court of the United States on March 28, 1892, on motion of Attorney General W. H. H. Miller.

But it was Mrs. Belva A. Lockwood who was first admitted to the Supreme Court bar, her name being inscribed on the rolls March 3, 1879. Her path was equally rocky. After being licensed to practice in the highest court in the District of Columbia, she petitioned the United States Court of Claims in the December 1873 Term for admission to practice before that court. The opinion of this court denying the application is amazing in both language and reasoning. The opinion refers frequently to common law and the fact that except where it might have been altered by local statute, it prevailed in the District of Columbia.

The judge authorizing the opinion also made the observation that were Mrs. Lockwood to be admitted it would open the door to unheard-of situations. The opinion states that the effect of such a result could be "to have the law declared to be that the wife of a judge of a United States court may appear at its bar . . . and admitted to the practice of the law before her husband." The reasoning following is as amazing as the conclusion. The judge concludes that the law which protected a husband and wife from testifying against each other, and laws which "scrupulously assured to every suitor an impartial tribunal, never contemplated as a possibility that the rights of third persons might be confided to judges liable to be swayed by the most powerful influence known to the law or to humanity." And so there was only one conclusion this jingoistic judge could come up with:

"The fact that there has been no express provision by statute and that there was no exceptional rule at common law to prevent any such dangerous and scandalous practice, certainly indicates that the law has never been considered to authorize the admission of women to the bar." Dicta goes on for pages citing *dangerous* situations which could arise, including the scandalous possibility that a woman lawyer, the wife of a judge or even the Attorney General, could conceivably make more money than her husband, leading to all kinds of questions in the minds of the public and raising all kinds of suspicions when the affluence became evident (supposedly through a better life style generally).

And so Mrs. Lockwood's application was denied on these amazing grounds. But she was determined and she had personal convictions as to her rights as well as to the legality of her arguments. Ultimately she prevailed.

It must have been gratifying indeed for her to be able to move the admission of other women who followed in her steps to appear before the Justices.

Miss Katy Kane of Chicago was a Virginian by birth, but the Supreme Court records show that she was admitted to the Supreme Court of the United States, May 19, 1890, from the state of Illinois. She was educated in the Midwest, her parents having moved to Wisconsin in her early childhood. She practiced law in Chicago and did much to show that women as well as men could excel in the legal profession.

Miss Kane uttered some prophetic words early in her career which, read today, reflect her awareness that because of stumbling blocks women had to work harder, but that with perseverance and by acting professionally at all times they could become a very vital part of their chosen profession. She said in the late 19th-century: "I soon learned after my admission to the bar, that the only way to demonstrate a woman's ability to practice law, was for her to drop all collateral lines of work and side agitations and devote herself wholly and entirely to her profession. Having arrived at this conclusion, I lost no time in acting accordingly, and that with only one little word for motto--`Work.' And I can assure you that no soil ever responded more fruitfully to work of the toiler than has the profession yielded to my work. It first demonstrated to me what was once an inane and feeble expression in my own mind, that I was capable of practicing law; it soon convinced the public of the same fact; and it finally proved to be the talisman that charmed away those ever recurring prejudices which so frequently find lodgment in the minds of judges and jurors.

"The law is not a pedestal upon which to pose and display one's charms. It is a profession that ruthlessly buries all who trifle with it, and yields supremacy only to its devotees; and I am prouder of its mastery than as if I were Czar of all the Russias or President of the United States."

Until 1970 the Supreme Court Rules required a personal appearance for the motions for admission to the Supreme Court bar, but a growing list of applicants with an attendant increase in the amount of court time required to hear admissions brought a change in the Rules. Now applicants may be admitted by mail or in open court. The first Term that *admissions* were permitted in absentia the number hit an all-time high: 6,682, almost double the number admitted the previous Term. To date the list of enrollees totals 109,030. Since notice does not automatically come to the Court on deaths or disbarments, one can only speculate on how many are currently living and eligible to practice before the High Court. Formal applications in writing were required starting in 1925 and the form still includes reference to "attorney" and "counsellor." This is no doubt an influence from the British, who still distinguish between solicitors and barristers. From 1790 to 1801 those who appeared to sign the rolls after admission signed in a column designated for "attorney" or in a column designated "counsellor." The difference at that time was that counsellors argued cases in court, whereas attorneys did not, and generally played a rather junior role. For some reasons some signed in both columns.

While the Supreme Court Rules do not recite how an applicant must be attired when appearing before the Court, accepted practice calls for business suit, morning coat and striped trousers, uniform. For many years seasoned lawyers, especially those who specialized in Supreme Court practice, would never dream of appearing without their swallow-tailed or sack coats, a matter of self pride on their part as much as a show of respect for the High Court. They were encouraged to the point that the Marshal had emergency attire which could be loaned to counsel if for some reason appropriate personal attire was not immediately available. Even today a four-in-hand necktie is in the Marshal's office for emergencies. Such an occasion occurred recently when an

applicant appeared for admission in a business suit, but being a Westerner he wore a "bola" or string tie with a large turquoise stone affixed. Clerk's office personnel were of some doubt as to its acceptability, but recalling no precedent politely suggested he borrow their four-in-hand just in case the Clerk himself questioned it in the courtroom.

Women are not the only persons who have had problems with admission. Another incident involving proper dress arose when several uniformed members of the Texas National Guard appeared in the Clerk's Office to inquire how to proceed to be admitted, having previously been notified their applications had been received and were in order. Their uniforms are colorful, a bright blue with a fairly wide red stripe up the side of the trousers. An amazed and conservative Clerk, mistaking their uniforms for garb designed for the Inaugural Parade that day, advised them they could not appear in Court dressed in that manner. Having traveled some 1,500 miles for the ceremonies that day, including their admissions to the Supreme Court bar, they were not about to accept that ruling, especially when Mr. Justice Clark, the only Justice to be appointed to the U.S. Supreme Court from the Lone Star State, was right in the building. Their appeal to the Texas born Justice was quickly heard, the Clerk was promptly advised they were indeed in uniform, the Guardsmen's indignities were soothed and they admitted within the hour.

## *The Circuit Riding Justices*

### **LEONARD BAKER**

In the early decades of the Supreme Court's history, riding circuit for its justices meant bouncing thousands of miles over rutted, dirt roads in stagecoach, on horseback, and in stick gigs to bring the federal judiciary system to the American communities strewn along the Eastern seaboard. More so than the representatives of the federal postal system, the justices appeared despite rain, snow, sleet, and the hazards of traveling.

One of the more well-known anecdotes about John Marshall has him making the journey from his home in Richmond to Raleigh, North Carolina, where he held Circuit Court, by stick gig--a wooden chair supported on two wheels and two shafts and pulled by one horse. The Chief Justice of the United States, an elderly man at this time, often napped as the horse pulled him along. On one occasion the gig ran over a sapling and tilted. Marshall was awakened by the jolt and found himself sitting at a precarious angle, unable to move either to the left or right. He was rescued by an elderly black man who came along and suggested the obvious: that the Chief Justice stop trying to move either to the left or the right, but, instead, back up the gig. As the Chief Justice rode away, his rescuer is supposed to have described him as "a nice old gentleman who wasn't too bright."<sup>1</sup>

But not all adventures of the Supreme Court judges riding circuit ended so lightly. For Associate Justice Joseph Story riding circuit meant traveling close to 2,000 miles a year as he swung through New England twice a year, to Portsmouth, Boston, and Newport in the spring and to Exeter, Boston, and Providence in the fall. His biographer called it a "wretched system."<sup>2</sup>

Another Associate Justice, James Iredell of North Carolina, described himself as a "traveling post boy" and complained bitterly in the 1790s of traveling a circuit of almost 2,000 miles a year. "I will venture to say," he complained, "no Judge can conscientiously undertake to ride the Southern Circuit constantly, and perform the other parts of his duty."<sup>3</sup>

One Associate Justice, Thomas Johnson, accepted appointment from President George Washington only with the understanding that he would avoid riding circuit. Washington informed Johnson that, after a discussion with Chief Justice John Jay, "the arrangement had been made or would be so agreed upon that you might be wholly exempted from performing this tour of duty at that time." The President also advised Johnson that there was no cause for concern for the future. "I take the present occasion to observe," he wrote, "that an opinion prevails pretty generally among the judges, as well as others who have turned their minds to the subject, against the expediency of continuing the Circuit of the Associate Judges." Washington continued that he was sure that "these disagreeable tours" would be eliminated entirely.<sup>4</sup>

Washington, however, was wrong. The travel duty was not halted for another century. According to the original judiciary act of 1789, the states were divided into three circuits--the Eastern, the Middle, and the Southern, with a Circuit Court composed of two Supreme Court Justices and one district judge meeting twice a year in each area. The Justices also had to appear in Washington twice a year, at this time, for sessions of the Supreme Court there.

Partial relief came quickly, in 1793, with an act of Congress reducing the number of Supreme Court Justices on any Circuit Court bench from two to one, thus reducing the Circuit Court workload of Supreme Court Justices by one-half. The rationale for this Congressional action was the obvious displeasure of the Justices. Chief Justice John Jay, joined by Associate Justices William Cushing, James Wilson, John Blair, and Justices Iredell and Johnson, had complained in a letter of the circuit riding that "some of the present judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome journies through different climates and seasons." As insurance against a possible suggestion by either of the other two branches of government that the present Justices resign in favor of healthier men, Jay

added that no set of judges, "however robust," would be able to withstand the rigors of frequent travel over vast distances within the United States.

That letter also included another complaint, a faint cry, but one that was to become more loudly heard as the years progressed: The Supreme Court was an appellate court which heard appeals from the Circuit Courts. The Supreme Court Justices, while sitting on that court, heard appeals from cases they had helped decide while sitting on the Circuit Courts. "Appointing the same men finally to correct in one capacity," said the letter signed by Jay and the other Justices, "the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justices, and to that confidence in the Supreme Court, which it is so essential to the public interest should be reposed in it."<sup>5</sup>

A decade's experience with the Supreme Court Justices riding circuit, even with their duties halved by the act of 1793, resulted in that function being ended. This was a feature of the Judiciary Act of 1801. This act was the battleground for one of the great struggles between the Federalists, who were then going out of power, and the Jeffersonians, just coming in. Tucked in with the provision for appointing more federal judges (who would be Federalists, of course) and reducing the size of the Supreme Court from six to five (so as to deny an appointment to the next President, Jefferson) was a section to eliminate the circuit riding. John Marshall, then Secretary of State in President John Adams' administration, considered the separation of the two courts as "the principal feature" in the bill.<sup>6</sup>

Other politicians, however, were seriously concerned about other areas in the bill. As a result, the Jeffersonian-controlled Congress of 1802 repealed the Judiciary Act. Marshall, by then the Chief Justice, had a much more personal interest in the outcome. To him, the primary issue continued to be the separation of the two courts. "There are some essential defects in the system which will I presume be remedied as they involve no part of political questions," he said to a friend, "but relate only to the mode of carrying causes from the circuit to the supreme court. They had been attended to in the bill lately repealed and I make no doubt will be again."<sup>7</sup>

Marshall was, of course, wrong. Rather than "attending to" the separation of the two courts, the Congress resurrected the circuit riding duties of the Supreme Court Justices with one change: the Justices were assigned specific circuits and did not rotate. That arrangement persisted through most of the nineteenth century.

The Justices continued to be bothered by the rigors of the lengthy travelling, and proposals to eliminate the circuit riding were staples of presidential messages for many years. Congress, however, was not receptive. "I fear," said Senator Abner Lacock of Pennsylvania, when faced with such a proposal, "that gentlemen have consulted more the ease and convenience of the judges than the benefit of the nation, and that this will suit the judge better than the people." In the same debate, Senator William Smith of South Carolina turned one of John Marshall's own achievements against the notion that the justices should be relieved of their circuit duties.

"There was one evidence," Smith said, that there was no great pressure of business, given by the judges themselves. One of them had turned historian, and had written the history of his country in five large volumes, which would redound to his imperishable honor, and the unspeakable advantage of his countrymen. It now adorned the library of every man of science. . . ." This was a reference to the biography of George Washington, which Marshall had written in the early part of the century and which had irritated the Jeffersonians ever since for its Federalist view of America's development. Smith continued: "Surely, then, the honorable judge could not have been oppressed by the duties of his office, or he could never have found time to have written so elegant and voluminous a work."<sup>8</sup>

Actually the debate over circuit riding began to shift from the infirmities of the Justices and the rigors of travelling to the question of Supreme Court Justices sitting in dual role. At first John Marshall was convinced that he could not preside over both the Supreme Court and a Circuit Court, "but I presume a contrary opinion is held by the court," he continued in a letter to his fellow Justices, "and, if so, I shall conform to it." He acknowledged in a second letter,

however, that he opposed the procedure of requiring Supreme Court Justices to ride circuit, regardless of the fact the requirement had been the practice for more than a decade. He explained that "the late discussion [in the judiciary acts of 1801 and 1802] had produced an investigation of the subject which from me it would not otherwise have received." Despite his personal feelings, Marshall indicated he would be bound by the "opinion of the majority of the judges."

Perhaps because he was new to the bench and unsure of his strength there, or perhaps because his "investigation" was not very deep, maybe because he wished to be diplomatic or did not wish to impose his personal thoughts on the other Justices, Marshall began to shift his opinion. Only two weeks later when confronted with support for the circuit riding by Associate Justice Bushrod Washington, Marshall responded that he would be "privately gratified" if the majority took that opinion of Bushrod Washington's "and I shall with much pleasure acquiesce in it."

In contrast to this shifting by John Marshall, Associate Justice Samuel Chase made a strong stand against the judges holding two positions. Although his famous letter to John Marshall is known for its opposition to the Justices riding circuit, it should also be read as the cry of an independent man--"my conscience must be satisfied," declared Chase--and also as a plea for an independent judiciary--he argued against the right of the 1802 Congress to abolish judgeships created by the one which passed the Judiciary Act of 1801, saying that "the inferior Courts . . . ought to be as independent of Congress as the Supreme Court; *but* the Judges of both Courts will not be independent of but dependent on the Legislature, if they be not entitled to hold their offices during good behavior."<sup>9</sup>

Chase wanted the Justices to rendezvous in Washington to plot a strategy of resistance to the circuit riding requirement, but the other Justices would not go along with him. He, too, finally acquiesced.

The issue was settled the *next year in the* case *Stuart v. Laird*, which placed squarely before the Supreme Court the issue of whether its members could sit as Circuit Court judges without specific commissions to do so. Associate Justice William Paterson dealt with that question in his decision. "To this objection, which is of recent date," he said, "it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction." He summed up: "Of course, the question is at rest, and ought not now to be disturbed."<sup>10</sup>

Actually support for the circuit riding of the Supreme Court justices developed over the years for just the reason that the Justices would have an opportunity to mix their Washington actions with the regional experiences of the American people they gained while out on the circuits. Daniel Webster, for example, wrote to his friend Joseph Story, in 1824, that as far as separating the Supreme Court responsibilities from the Circuit Court ones "would be convenient to the members of the court, it would be most desirable to me to follow it." However, Webster had to add that his "convictions of the public interest are the other way, and are very strong."<sup>11</sup>

Webster's opinion, that the Justices did well to keep in touch with local law and local customs, was the prevailing one for almost everyone outside the members of the Supreme Court. "Adopt the system now before you," said one Senator of a proposal for change, "and your supreme judges will be completely cloistered within the city of Washington, and their decisions, instead of emanating from enlarged and liberalized minds, will assume a severe and local character." The critic quickly added that his fears did not apply "to the honorable gentlemen who now fill your bench with so much ability, but it will result from the system, and from human nature."<sup>12</sup>

Another point was that the nation was well served because persons at the local levels were able to glimpse the members of the Supreme Court at work. And that they did. There developed between the Supreme Court Justice when he sat on the Circuit Court and the local

members of the bar a relationship of camaraderie and respect. There is a description by Gustavus Schmidt, a lawyer, of Chief Justice Marshall presiding at the Circuit Court in Richmond during the closing years of his life. The picture is of a friendly man sauntering into the courtroom a few moments before the court was called to order, stopping to chat with his friends; "no attempt was ever made to claim superiority, either on account of his age or his great acquirements; neither was there any effort to acquire popularity." Rather, in those few minutes before he took on the role of presiding Justice, his conduct was "evidently dictated by a benevolent interest in the ordinary affairs of life, and a relish for social intercourse."

But the moment John Marshall took his seat on the bench, the Schmidt account continued, "his character assumed a striking change. He still continued the same kind and benevolent being as before; but instead of the gay and cheerful expression which distinguished the features while engaged in social conversation, his brow assumed a thoughtfulness and an air of gravity and reflection, which invested his whole appearance with a certain indefinable sternness. . . ."

Marshall's appearance in the Richmond court supported the riding circuit rationale; the local people did receive a positive impression of the Supreme Court Justice at work. Marshall always acted, said Schmidt, "on the principle, that a Court of Justice was a sanctuary, where parties had a right to be heard . . . [that] the law had wisely interposed a special class of agents, called lawyers, to protect the interest of suitors . . . they acted in behalf of the citizens of the community, for those whose benefit the administration of justice was created, and because the highest and lowest member of society was entitled to equal favor in a Court of Justice."<sup>13</sup>

Sometimes, however, the local people impressed the Justices unduly. Joseph Story's biographer, Gerald T. Dunne, reported, for example, that a Circuit Court decision in 1809 of Story's (against a ban on imports from Great Britain) was "ruled" by the "New England antiwar sentiment."<sup>14</sup>

But that was unusual, and the Circuit Court rulings often were scenes in which the disputes of history were acted out. The most famous was the Burr treason trial in Richmond in 1807, with John Marshall presiding. But there were others.

The John Marshall-Thomas Jefferson dispute is one. Jefferson and Marshall had been at odds for decades--the origins of their dispute is attributed by legends to many causes--when in 1811 a case came before John Marshall which specifically involved Jefferson's financial security. Jefferson was being sued for a seizure of property in New Orleans that had taken place by his order when he had been President. The case was tried before the Circuit Court in Richmond, which is how Marshall entered the dispute.

Thomas Jefferson assumed that the case had been parlayed to come before Marshall in the belief that the Chief Justice would rule against his old enemy--probably a reasonable assumption on Jefferson's part. John Marshall was not one to allow his better instincts to overrule his human nature when it came to making critical remarks about Thomas Jefferson, and he did not allow this case to go by without taking a few snide remarks at the ex-President. But on the point of law, nothing could overrule Marshall's integrity as a judge. He upheld the basic point made by Jefferson's lawyers that Marshall's court lacked jurisdiction because the act which led to the suit (an alleged trespass of property in New Orleans) had taken place outside of Virginia. Common law, Marshall said, dictated that the case be tried where the alleged trespass had taken place. He then described common law as "really human reason applied by the courts, not capriciously, but in a regular train of decisions, to human affairs, for the promotion of the ends of justice." Marshall insisted that Virginia had adopted the common law, and "Had it not been adopted," he said, "I should have thought it in force."<sup>15</sup>

Another question which the Circuit Courts dealt with before it came before the Supreme Court was *that of judicial review*. The *Marbury v. Madison* decision by the Supreme Court in 1803 is the one which cemented that power of judicial review to the Court. Sitting on the Circuit Court three months earlier in Raleigh, North Carolina, Marshall took a similar position that the

courts have the power to determine the constitutionality of legislation. It was a complicated matter involving a series of state acts having to do with estates and creditors' claims upon those estates. In 1799 the legislature passed a law which interpreted the intent of two earlier laws in that area (one of 1715 and one of 1789), apparently replacing the earlier one. The law of 1799 was challenged before the Circuit Court at which Marshall presided. He ruled against it, explaining that the 1799 law was in violation of the state constitution because it assumed a role of statutory interpretation for the legislature that had been reserved for the judiciary.

"The bill of rights of this state," Marshall wrote, "which is declared to be part of the constitution, says in the fourth section, `That the legislative, executive and supreme judicial powers of government, ought to be forever separate and distinct from each other.['] The separation of these powers has been deemed by the people of almost all of the states, as essential to liberty. And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them or to the legislature?" Marshall continued that if the judiciary did indeed hold that power, then the act of the legislature was an action "made by a branch of government, not authorized by the constitution to make it; and is therefore in my judgment, void."<sup>16</sup>

And so the circuit riding offered the justices opportunity for conviviality, learning from the local lawyers, thrashing out political arguments, and testing legal theories. There were two other points that emerged during the discussions in those years which were placed on the plus side for maintaining the Supreme Court Justices on the circuits. Senator Lacock listed them both. To separate the Supreme Court justices from their circuit riding responsibilities, he said, "subjected the judges of that court, by locating them in the City of Washington, to dangerous influences and strong temptations, that might bias their minds and pollute the streams of national justice."

In going on to define the "dangerous influences," Lacock said: "The judges are to be old men when appointed, and the infirmities of old age will every day increase, and as the useful and vigorous faculties of their minds diminish, in the same proportion will their obstinacy and vanity increase. Old men are often impatient of contradiction, frequently vain and susceptible of flattery. These weaknesses incident to old age will be discovered and practiced upon by the lawyers located in the same city, holding daily and familiar intercourse with the judge. And this, your court may become subservient to the Washington bar. The judges, bowed down by the weight of years, will be willing find a staff to lean upon; and the opinion of the Washington bar is made the law of the land. A knot of attorneys at or near the seat of Government having gained the ear, and secured the confidence of the court, will banish all competition from abroad."<sup>17</sup>

Experience attests that those "dangerous influences" as described by Senator Lacock never had their way with the Supreme Court Justices. Lacock, however, did not define what he meant by "strong temptations." Since the Senator had eight years of experience in Washington when he spoke those words, one can assume he spoke with some knowledge of the temptations the city of Washington had to offer and one can regret that he did not describe them and that the justices did not detail in their personal papers **how they countered or succumbed.**

## ***Endnotes***

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- 4 *John C. Fitzpatrick* (ed.) *The Writings of George Washington*, Washington, D.C., 1939, v. 31, pp. 332-3.
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- 10 1 *Cranch* 299.
- 11 *Fletcher Webster* (ed.), *The Writings and Speeches of Daniel Webster-Private Correspondence*, Boston, 1903, v. 1, pp. 338-9.
- 12 *U.S.*, *Annals*, v. 33, p. 126.
- 13 *Louisiana Law Journal*, *May, 1841*, pp. 85-90.
- 14 *Dunne*, p. 97.
- 15 2 *Brockenbrough* 206-11.
- 16 *Ogden v. Witherspoon*, 2 *Haywood* (North Carolina) 227.
- 17 *U.S.*, *Annals*, v. 33, p. 130, 131-2.

## ***Presidents versus the Court***

**ROBERT W. LANGRAN**

Under the American constitutional doctrine of separation of powers, the executive, legislative and judicial branches of government are independent of each other in their assigned areas of authority. However, since the Supreme Court is the final interpreter of the Constitution, enactments of Congress periodically are tested for validity under the process of judicial review. As for acts of Presidents, these have been rarely but spectacularly dealt with when the Court has had occasion to review them. Andrew Jackson's aphorism, "John Marshall has made his decision; now let him enforce it," turned out to be little more than presidential bravado. In the few confrontations between the judiciary and the Chief Executive, the latter has usually come off second best. The following nineteenth-century instances will illustrate the point.

### **Marshall v. Jefferson:**

### **Marbury v. Madison**

The first time the Supreme Court dealt with the President was in the famous case of *Marbury v. Madison* in 1803. The Federalist party had been defeated in the 1800 elections by the Jeffersonian Republicans, losing control of the [residency and the Congress. In order to insure keeping control of the judicial branch, the Federalists passed two laws before they left office. One was the Circuit Court Act of February 13, 1801 (repealed thirteen months later by the Republicans), which created six new circuit courts with a total of sixteen judges (one of whom was James Marshall, John's brother), several new district courts, and personnel to staff the courts such as marshals and clerks. (See also "The Numbers Game") The other law, passed on February 27, 1801, let the President appoint as many justices of the peace as he deemed necessary for the District of Columbia. These people were the famous "Midnight Judges," to hold office for five years. John Adams named forty-two of them.

One of the appointed justices of the peace was William Marbury, forty-one years of age and an aide to the Secretary of the Navy Benjamin Stoddert. The commissions of office were delivered to most of the forty-two while John Marshall was the Secretary of State, but at midnight on March 3 the Administration changed hands and the new President, Thomas Jefferson, told his acting Secretary of State, Attorney General Levi Lincoln, to cease delivery of the remaining commissions. Jefferson perceived the entire matter to be grossly partisan in nature, and after examining the matter decided on a list of thirty people to be justices of the peace, of whom twenty-three were from the original list of forty-two. Among those who did not get the jobs were Marbury, Dennis Ramsay, William Harper, and Robert Hooe (persons who might have gone unnoticed in history save for this omission).

These four men brought suit in the Supreme Court against the then-Secretary of State James Madison to get the commissions of office delivered to them. The action they took was a request for a writ of mandamus, a court order compelling someone to do something. Under the 1789 Judiciary Act this was a remedy available to them. Congress, as mentioned previously, did repeal the Circuit Court Act, and since federal judges do hold office for life there was a constitutional question as to what to do with the sixteen circuit judges. In order to let the matter sit for awhile in the hope that the controversy would subside, Congress in the same bill told the Supreme Court it would not meet in June for its regular session and could not meet again until February of 1803, some eleven months from the date of the bill. As fate would have it, nobody

did challenge the repeal bill and thus the matter would have been put to rest except for the suit by Marbury and friends.

John Marshall was now the Chief Justice, having been placed there by the outgoing President John Adams. Even though Jefferson's name does not appear in the case, it still was a showdown between the President and the Court. If Marshall and his Court issued the writ, the President would tell Secretary of State Madison to ignore it and the Court would lose face, as it had no way of enforcing its order. In fact, even today the Court must rely on the Executive branch in the matter of enforcement. If, on the other hand, the Court did not issue the writ, it would be a clear victory for Jefferson. The fact that Marshall and Jefferson were political and personal enemies made the forthcoming decision even more momentous.

Despite the seeming dilemma, Marshall and his Court came out of the case with a decision which has to rank as a landmark. The Court met on February 9, 1803, in the office of the Clerk of the Senate. Present, besides Marshall, were Justices Washington and Chase. The lawyer for the plaintiffs was Charles Lee, former Attorney General under Washington and Adams and, ironically, one of the sixteen circuit judges whose jobs had been taken from them by the repeal bill. Marshall called upon two clerks from the State Department--Jacob Wagner and Daniel Brent--to testify, but all they said was that they were unsure as to the particular commissions which had been signed and sealed but had not been delivered. Mr. Lincoln was then called, but his testimony was the same as that of the clerks. However, James Marshall, John's brother, said in an affidavit that the commissions for the plaintiffs had been properly sealed and signed (he had actually been delivering the commissions that fateful midnight and had those for Harper and Hooe in his possession but just had not been able to get them to the appointees). This seemed to all to be the evidence Marshall needed to issue the writ, and on February 24 the Court rendered its verdict.

Marshall, to the surprise of most, denied the writ, even though he said that Marbury and the others were entitled to the office. He denied it because he said that that part of the 1789 Judiciary Act which gave the Supreme Court the power to issue writs of mandamus in cases of original jurisdiction (meaning one can start the case at the Supreme Court) was unconstitutional (an interesting sidelight is that one of the Justices, Paterson, had helped write that 1789 law). Marshall's reasoning was that the original jurisdiction of the Supreme Court is given in the Constitution, and therefore it cannot be enlarged, as in this case, or diminished, except by constitutional amendment. Thus, he gave up a power which Congress had conferred upon the Court, but at the same time he gave the Court its greatest power, that of judicial review over federal laws; i.e., the power to look at their constitutionality. At the same time, also, he made it appear that Jefferson was morally wrong in denying the commissions.

The Jeffersonians, of course, only tried to emphasize that part of the decision denying the writ, but nevertheless it was a great victory for John Marshall and the Supreme Court. And what happened to Marbury? He went on to become president of a bank in the Georgetown section of Washington in 1814 and he died in 1835, the same year as John Marshall. The Court, meanwhile, showed that it was impartial as to which President it rebuffed in that the following year, 1804, in the little-known *case of Little v. Barreme*, it held a naval commander liable in damages for injury to property he inflicted in carrying out provisions of a proclamation of President John Adams which the Court held was in excess of presidential power.

## **Marshall v. Jefferson:**

### **United States v. Burr**

The battle between Marshall and Jefferson reached its peak in the famous Aaron Burr treason trial in 1807, which was held at John Marshall's Circuit Court for Virginia in Richmond. The story began when Jefferson sent a message to Congress in late 1806 in which he accused Burr of planning to attack Mexico and to form his own empire there and with the states west of the Alleghenies, which he would detach from the Union. Two of Burr's conspirators, Erich Bollmann and Samuel Swartwout, were in New Orleans and General Wilkinson declared martial law there and arrested them. Fearful that the Federalist-dominated judiciary would release them, the Senate actually pushed through a bill suspending the writ of habeas corpus but the House of Representatives refused to go along with it. Accordingly, the argument for issuance of the writ was presented to the Court on February 10, 1807, ironically by the same Charles Lee who had represented Marbury and the others, and on February 14 Marshall and his Court issued it. The men were brought to the Court on February 18, and on February 21 Marshall ordered both men released from custody, holding that there was not enough evidence to convict them of treason and furthermore they had committed nothing in Washington, D.C., the site of the Court.

On March 30, 1807, Burr himself was brought before Marshall's Circuit Court and he was bound over to the grand jury on the misdemeanor charge of violating the neutrality law. On June 24, however, the grand jury indicted him not only for that but also for treason. Meanwhile, Marshall had allowed bail to Burr over Jefferson's opposition. The trial lasted from August 17 to September 3, with the prosecuting United States Attorney being George Hay. Burr moved that Marshall subpoena President Jefferson to appear with certain important papers both in June and in September, and both times Marshall did so, as he felt he had that power. Jefferson, naturally, refused to honor them on the grounds that it would jeopardize the independence of the executive. He also added that he, the President, had duties which were superior to his duties as a citizen.

Marshall proceeded to exclude most of the government's testimony as not bearing on treason, whereupon the jury came in with a verdict of not guilty because of the evidence submitted. Marshall, relying heavily upon the arguments of Burr and defense counsel Luther Martin, drew the distinction between actually levying war against the United States and merely advising or procuring. He felt that advising or procuring was conspiracy, not treason. He did admit that procuring might be treason, but that would have to be charged in the indictment and proved by two witnesses. The defense, of course, said that it would be most difficult find two witnesses to such a secret act as procuring an armed force, and Marshall said that that still would not justify a conviction without proof.

After the verdict, the government dropped similar charges against other conspirators, although Jefferson insisted that Burr be charged with the misdemeanor of planning an attack against Mexico, for which he was also adjudged not guilty. The reaction by Jefferson to all this was outrage, and it seems clear that he thought for awhile about impeaching Marshall. In Congress, meanwhile, two months after the verdict, an attempt was made to amend the Constitution to impose a limited term of office upon federal judges and also to enable the President to remove a federal judge by a two-thirds vote in each house of Congress. In addition, in 1808 a special Senate committee headed by John Quincy Adams issued a report which assailed Marshall's rulings and also hinted at the possibility of impeachment. Finally, a bill was introduced to amend the law of treason; it was defeated. Attention of the country then shifted from domestic to foreign affairs and the controversy surrounding the Burr trial subsided.

The Burr controversy did not involve the entire Supreme Court, only the Justice in whose circuit the trial actually took place, and Justices no longer have to hold court in their assigned circuits, but nevertheless it was important in that while it allowed the President to create the

precedent of immunity from subpoenas, it also showed that presidential enemies could not be jailed on treason charges without actual proof as required by the Constitution. Furthermore, the Supreme Court and not just one Justice did take part in the *Ex parte Bollmann* and *Swartwout* decisions which effectively said same thing as did the *Burr* decision by Marshall.

### **The Court v. Jackson:**

#### **Kendall v. United States**

Andrew Jackson was no great enthusiast of the Supreme Court, as that oft-quoted remark of his alluded to at the beginning of the article will attest. His one skirmish with the Court, however, came in a case involving his Postmaster General, Amos Kendall, and the decision was rendered after Jackson left the presidency. It also involved the now-famous writ of mandamus.

Kendall had revoked the settlement of certain claims of postal contractors which had been made by his predecessors in that office. When Mr. Stokes was not credited with the entire amount of money due him he went to court. He had a good case, because Congress had turned the matter over to the Solicitor of the Treasury and he had allowed all the claims, and Congress in turn provided redress by private bill. As usual in a case of this import the lawyers on each side were impressive. Richard S. Coxe and Reverdy Johnson represented Kendall and Francis Scott Key and Attorney General Butler represented the government in its effort to force Kendall to pay the claims. The Circuit Court of the District of Columbia issued the writ of mandamus against Kendall, and in 1838 the Supreme Court affirmed it.

All seven Justices joined in the opinion by Justice Thompson, which stated that there are some duties performed by government officers such as cabinet members which are political in nature and consequently fall under the direction of the President. However, Congress may also impose duties upon these people that they think proper and which are not unconstitutional and in these cases the law is controlling, not the President. Since the case in question was the latter type mandamus was the appropriate common law remedy to enforce that ministerial duty which Kendall had violated. In addition, four of the Justices said that the District of Columbia court did have jurisdiction to so issue that writ, since it was a general jurisdiction court. Other federal courts did not gain that power until 1962.

When Justice Thompson read the decision he implied in it that President Jackson had believed that he could forbid the execution of laws. Attorney General Butler objected to this, and Thompson agreed to delete it from the printed Court opinion even though he said that he felt Butler had intimated it in his argument before the Court and that Justices Baldwin, McKinley, and Wayne agreed that Thompson had heard correctly.

As would be expected, President Van Buren criticized the decision in his annual message that December 3rd, but Congress apparently saw nothing wrong in the decision as it did not act on Van Buren's criticism. Although the case did not involve the President as such, it did involve an official of the United States appointed by him, and the decision did create a precedent for asserting claims against federal officials, still a continuing problem.

### **Taney v. Lincoln: The Civil War Cases**

The Civil War era brought President Abraham Lincoln and Chief Justice Roger Taney into conflict with each other. It was an almost-inevitable clash because both were strong-willed persons thrust into the uniqueness of a Civil War situation where crucial decisions had to be made, sometimes without the luxury of a time period in which to think them through and to get opinions from others.

The initial conflict began in April 1861, when Lincoln told his military commanders that they might suspend the writ of habeas corpus in the area between Philadelphia and Washington, as in that area he feared much sabotage. One of the persons apparently engaging in such activities was John Merryman, the president of the Maryland Agricultural Society and an officer in that state's militia. He was suspected of destroying bridges on the Northern Central Railway and, in May, was arrested by the military and confined to Fort McHenry under General Cadwalader on a treason charge. Merryman applied to the Circuit Court in Baltimore, which was run by Chief Justice Taney, for a writ of habeas corpus. On May 27 Taney issued the writ, but Cadwalader sent an aide to say that he would not produce Merryman because his superior, Commanding General of the Army Winfield Scott, had suspended habeas corpus the month before on Lincoln's order. Taney ordered Cadwalader to show cause the next day as to why he should not be held in contempt, but when the general still would not produce Merryman Taney rendered his *momentous opinion* in the case of *Ex parte Merryman*.

The Court ruled in favor of Merryman, stating that only Congress could suspend habeas corpus. After delivering this opinion verbally, Taney proceeded to put it in writing on June 1 for President Lincoln.

Meanwhile, the marshal who went to the fort to get Merryman was not allowed in. However, on July 4th Secretary of War Cameron interviewed Merryman and on July 12th he ordered him delivered to the marshal. During this time Merryman was indicted for treason but he was released on bond and never brought to trial. Altogether he spent some forty-nine days in jail. President Lincoln responded with a message to Congress in which he said that he had inherent power to suspend habeas corpus, and in August and September 1862, he did just that for all rebels, all those engaging in disloyal practices, and all those who interfered with enlistments and conscription. Lincoln's action was fully supported by Attorney General Edward Bates, who in a formal opinion in July 1861 had stated that the President and the judiciary were equal branches of government and as such might interpret the Constitution differently. Lincoln, of course, believed that he was defending the Constitution with his actions. Congress supported Lincoln in March 1863, by allowing him to suspend habeas corpus everywhere in the country. In September 1863, the cabinet approved an order by the War Department which told all military officers that they might cite presidential authority whenever they refused a habeas corpus writ. Taney, for his part, simply refused to let any treason trials take place in his Circuit Court without his presence, and he was too ill for over a year to hear any cases.

Taney opposed something else the government was doing during this period. In order to help finance the war, the government resorted to an income tax of 3% on personal income. However, since the Constitution states that a federal judge's salary may not be diminished while he holds office Taney wrote a letter to Secretary of the Treasury Chase (soon to succeed Taney as Chief Justice) saying that it was illegal to deduct the income from federal judges' salaries. The letter was written on February 16, 1863, and on March 10th Taney had it entered into the Supreme Court's records. In 1872 Secretary of the Treasury Boutwell ordered all the tax refunded, agreeing completely with the then-departed Taney's opinion.

Also on March 10th, 1863, the entire Supreme Court had its first chance to adjudicate one of Lincoln's Civil War actions. At issue was the April 19, 1861, blockade of southern ports ordered by Lincoln and agreed to by Congress on July 13, 1861. He had ordered the blockade to halt the ships from carrying goods to the Confederate States, and any ships seized by Union ships were considered prizes. Since a number had been seized *the cases* are called simply the Prize Cases and the main question before the Court was whether the President had the right to order the blockade. Justice Robert Grier, speaking also for Justices Wayne, Swayne, Miller, and Davis, said that Lincoln's action was proper. He said that although a President does not have the power to initiate war, once one has begun through an insurrection the President was to act as he saw best for the country without waiting for Congress. He has this power as Commander-in-

Chief. In fact, the reasoning went on, the proclamation of the blockade showed that a state of war existed which demanded such action.

The four dissenters (Nelson, Catron, Clifford, and Taney) joined together in an opinion written by Nelson in which they insisted that the basic war power belonged to Congress, and only after it had declared a war could something such as a blockade be done. Therefore, the President was wrong in his action, and even congressional ratification of the seizures *did not save* him because it was an ex post facto law and thus unconstitutional. According to them, all ships seized between the presidential proclamation and the act of Congress were seized illegally. Of course, this was the minority opinion, but it took courage to say this in the face of the Civil War events occurring at the time. Perhaps that courage also permeated to other courts, because on June 3, 1863, a circuit court ordered a federal Provost-Marshal to return seized merchandise or its value and to pay damage and costs, and on June 19, 1863, a court ruled illegal the government confiscation of a box of dry goods on a ship. Some extreme Republicans reacted to all this by attempting to legislate the Supreme Court out of existence or to substitute judges they liked for those they did not, but Lincoln's reaction was merely to add the tenth Justice to the Supreme Court as Congress had increased the number of seats on the Court to that figure.

In February 1864, the Court would not review the sentence of a military commission which had ordered Clement Vallandigham, a civilian and in fact a former Democratic congressman from Ohio, to close confinement during the war. He had made a speech on May 1, 1863, critical of Lincoln for what he said was needlessly prolonging the war. Under an order issued the previous month by General Burnside, who had Ohio as his command, persons who made speeches such as that were subject to military arrest and procedure. A Circuit Court refused to issue the writ of *habeas corpus* and the Supreme Court, in *Ex parte Vallandigham*, in a decision written by Justice Wayne, felt that it could not hear cases from military commissions since those commissions were not courts. Thus, the Supreme Court was consistent in its refusal to upset actions of the President taken while the war was in progress. Such was not to be the case, however, once the war was over and Lincoln had left the scene.

### **Chase v. Johnson: Reconstruction Cases**

In December 1866, the Court rendered its decision in the highly celebrated case of *Ex parte Milligan*. Milligan had been arrested on October 5, 1864, by the military commander in Indiana, tried before a military commission and convicted of conspiracy to release and arm rebel prisoners and to then go with them into Kentucky and Missouri in order to plan an invasion of Indiana. The sentence was hanging, pronounced on May 18, 1865, but President Andrew Johnson commuted it to life imprisonment and Milligan petitioned for *habeas corpus*.

A unanimous Court ruled that President Lincoln had had no right to authorize the military commission to try civilians in areas which are remote from the war where the civil courts are open. Justice Davis, speaking this time for himself and four others, also felt that even Congress did not have the right to authorize this type of procedure. He agreed that martial law might be used in an invasion, but not in a threatened invasion. Chief Justice Chase, speaking for himself and three others, did feel that Congress could have authorized these military tribunals in nonwar areas, even though in this case it had not done so.

As for Milligan, the Court held that since he had not been indicted by a grand jury the next time it met, under the 1863 Habeas Corpus Act the government had to release him. The decision was a clear victory for civil liberties under the Constitution, and the fact that it was unanimous attested to the courage and integrity of the Court.

*Also in 1866* the Court heard the case of *Ex parte Garland*, dealing with the President's power to grant reprieves and pardons. President Johnson's philosophy of Reconstruction was much milder than the Radical Republicans' in Congress. Among other acts, they had passed the

Federal Test Act in 1865 requiring all federal attorneys to take an oath that they had never engaged in rebellion against the United States, or given aid to rebels, or even expressed any sympathy for their cause. In a five to four decision, the Court held the act unconstitutional, holding it both a bill of attainder (a legislative enactment declaring guilt before the *judicial process* can take place) and an ex post facto law. At the same time, the Court held the President's pardoning power to be unlimited except in cases of impeachment. It applies to all offenses known to the law, and the President may utilize it at any time, either before the legal proceedings are taken, when they are pending, or after conviction and judgment. Congress has no control over this presidential power.

In March 1867, Congress passed a series of Reconstruction statutes over Johnson's veto, and on April 5 an equity suit was brought by attorneys for the Johnson government in Mississippi which was about to be replaced by a federal military administration. The attorneys were Robert J. Walker, Alexander H. Garland, and William L. Sharkey, and they sought to enjoin President Johnson from enforcing those acts in Mississippi on the grounds that *the acts were unconstitutional*. The case, *Mississippi v. Johnson*, marked the first time the Supreme Court had ever been asked to stop a President from enforcing the law as enacted by Congress, and even though he opposed the laws, Johnson, through his Attorney General Stanbery, said he would not comply with a decision enjoining him from enforcing the laws. Stanbery also formally objected to the filing of the suit.

The case was argued on April 12, and on April 15 Chief Justice Chase, speaking for a unanimous Court, held that the Court had no jurisdiction to enjoin the President when the President was engaging in major executive actions such as carrying into effect a Congressional statute. His reasoning was that those actions involve political discretion and therefore an injunction would be interfering with the political acts of the other two branches, and defying it would create an absurd situation. If the President obeyed it, then the legislative branch might wish to take action against the President, such as impeachment. Chase did feel that presidential actions of a ministerial nature might be enjoined since they involved no discretion, and he also felt that the decision applied to Congress as well; i.e., the Court could not enjoin it either when political discretion was involved. The decision did not deter attorney Walker very long, as he then joined in a suit one Charles O'Conor on behalf of Mississippi and Georgia to try to enjoin Secretary of War Stanton and General Grant from enforcing *the acts in those two states*. The case, *Georgia v. Stanton*, was argued April 26, May 1, 3, and 6, and ten days later the Court rendered the same decision as in the previous case in that it dismissed the suit for lack of jurisdiction, holding that the rights being adjudicated were not of persons or property, which is within the purview of the Court, but were political in that they involved sovereignty, and the Court does not deal in political questions. The Mississippi counsel then tried to amend the suit to show that the state had a property interest in the case, but the Court denied it in a split four-four vote (Justice Wayne, Clifford, Nelson, and Field would have allowed the amended suit, but Chief Justice Chase and Justices Swayne, Miller, and Davis were opposed, and Justice Grier was absent).

The following year the Court again became quite controversial when a Mississippi editor by the name of McCardle was arrested and held for trial by a military commission under an early Reconstruction act. On January 17, 1868, the Court accepted a habeas corpus petition and set the case for March 2. However, on March 5 Chief Justice Chase had to leave the Court to preside over President Johnson's impeachment trial in the Senate, so on the 9th the Court merely said that it would take the case under advisement. Congress became fearful that the Court would use this case to invalidate the Reconstruction Acts and so just three days later rushed through a bill withdrawing from the appellate jurisdiction of the Court all cases arising under the 1867 Habeas Corpus Act, even those which the Court had already taken, as in the matter of McCardle. As expected, Johnson vetoed it on the 25th, and the next day the Senate overrode him 33-9, and the day after that the House overrode him 115-57, thus making the bill into law. Johnson was

acquitted in May, but the Court did not get around to rendering a decision as to whether Congress could take away its appellate jurisdiction even on cases already *taken until April 12, 1869*. At that time, in *Ex parte McCardle*, Chief Justice Chase for a unanimous Court held that Congress did have the right and therefore McCardle *was denied his* hearing. On the same day, in *Texas v. White*, Chase gave the famous decision saying that no state may secede from the Union.

In these Reconstruction cases the Court started out strongly by striking down the military commissions in the non-war areas and by striking down the Federal Test Act, but then, probably very slowly, refused to halt enforcement of Reconstruction Acts and allowed Congress to take away some of its jurisdiction. More than likely the Court would have been hurt had it done otherwise, as the temper of the country was clearly in favor of the Court's actions, or more properly inactions, in these cases. Using discretion as the better part of valor, the Court lived to fight another day.

### **Harlan v. the Presidency: Field v. Clark**

The final important nineteenth-century *case involving* the Court and the presidency was *Field v. Clark* in 1892. It was important in that the Court had to face an upcoming national issue. The issue was the delegation of Congressional power to the President and his branch, and the reason it was becoming an issue was because Congress was delegating more and more. This particular case concerned the Tariff Act of 1890, in which the United States worked out reciprocal trade agreements with other nations, included in which were free imports of some of those nations' products. The delegation of power came with a section which authorized the President to suspend the free entry and impose prescribed duties if the nation in question was imposing reciprocally unequal or unreasonable duties on our imports. Justice John Harlan spoke for the Court in sustaining the act. He did admit that outright delegation of legislative power was unconstitutional, but this law did not do that because the President had nothing to do with the expediency or the just operation of the law. He had to suspend existing duties when he ascertained the existence of a particular fact. Thus, he was obeying the legislative will rather than making laws himself, and he was not policy making but rather ascertaining facts.

The standard set by the Court in this case, accepting reasonable delegation of power, was used as precedent in most of the subsequent delegation of power cases. The Court struck a middle position which enabled the other two branches, particularly the executive, to more effectively perform their tasks.

Looking back upon these nineteenth-century cases, one can see that the relationship between the President and the Supreme Court was a fluctuating one due to the lack of detail surrounding their relationship in the Constitution.

This balance shown by the Supreme Court in these cases is good because otherwise our separation of powers principle would not function effectively. Giving in to the President on every occasion would mean the Court not performing its function as it should, but rather being an unequal partner in government. Conversely, always ruling against the President would have been the demise of the Court, because Presidents, especially in wartime situations, would simply have ignored the Court and the latter would have been helpless to do anything about it. Thus the Court has acted wisely and that serves the purpose of enabling the President and the Supreme Court to coexist as integral components of the political system of the United States of America.

## Judicial Appointments: Controversy and Accomplishment

JOHN P. FRANK

*Address to May 1976 annual banquet of The Supreme Court Historical Society*

More than 125 times, the Senate of the United States has been called upon to advise and consent to a presidential appointment of a Supreme Court Justice. One hundred of the appointees were confirmed; the others were denied consent. (See article, "Robin Hood, Congress and the Court.")

This confirmation process is an American institution of infinite variety. For illustration of the short and the long of it, in 1869, President Grant appointed Lincoln's Secretary of War, Edwin M. Stanton, to the Court. Confirmation was immediate; four days later, Stanton died, before he ever took his oath. At the opposite pole, the fight over the appointment of Justice Louis D. Brandeis in 1916 lasted six months. Happily, the Justice made it worthwhile by serving twenty-three years.

Confirmation controversies have been of every complexion. They have been petty, as when in 1893 Senator David B. Hill of New York successfully blocked two Cleveland appointees from New York State because they were not politically satisfactory to the Senator; each of the two had been involved in uncovering corruption among the Senator's followers. When the second New York name went in and faced the same opposition, President Cleveland made very clear that if the New York Senators held their ground, there would be no appointment from New York. They did hold their ground and Cleveland appointed Senator Edward Douglass White, of Louisiana, who was confirmed within an hour.

Sometimes, opposition is wildly eccentric. Justice Frankfurter was a grand target for the lunatic fringe. Mrs. Elizabeth Dilling, author of a work popular in the 30's called *The Red Network*, opposed Justice Frankfurter as a communist. The following exchange took place:

SENATOR NEELY: Is it not a fact that in your *book*, *The Red Network*, you criticized Chief Justice Hughes, Justice Brandeis, Justice Cardozo, Justice Roberts, and Justice Stone as vigorously as you have criticized Dr. Frankfurter?

MRS. DILLING: I didn't know Hughes was in it. I knew the rest of them were. I don't keep all these radicals in my mind.

It was no wonder that when one of the witnesses informed the committee that he had facts which were "really surprising," Senator Neely replied: "The committee does not want you to restrain yourself because of any fear of its being startled. The committee became shock-proof long before you appeared."

Some of the disputes are party politics; neither President Tyler nor President Andrew Johnson could get anyone confirmed by a hostile Senate, and, indeed, the Senate reduced the size of the Supreme Court for the duration of Johnson's term to insure that he would have no appointments. Sometimes the controversies are peculiarly personal. When President Grant appointed his Attorney General, George H. Williams, for the Chief Justiceship, the appointment was shot down for a number of reasons. One of them was that Williams had used department funds to purchase a carriage with exceptionally handsome horses, handled by a driver with brass buttoned livery, although Mrs. Williams had purchased the buttons herself. Mrs. Williams had snooted a number of senatorial wives, a fact which did no good when the vote came.

When President Cleveland chose Lucius Quintus Cincinnatus Lamar, the first Confederate general to be proposed for the court after the Civil War, there was inevitably

opposition on many fronts. One of them was a charge of connection between Mr. Lamar, then Secretary of Interior, and a Miss Mary McBride, unfortunately under indictment for burning down her house to collect the insurance money. When sex and arson cropped up in what had been a routine political squabble, the newspapers gave their full attention to the controversy. *The New York Evening Telegram* regaled its readers with "serious charge against the Secretary of the Interior--a lady in the case--alleged relations with a woman accused of arson."

Miss McBride wrote the committee to defend her character. She told it that her fortitude rose from "the undismayed confidence of guiltless courage, sustained by the omnipotent power that gave force to the tiny pebble hurled from the feeble sling of Israel's youthful flock-tender and through which I am emboldened to ask your aid against those ambushed assailants who seek through my misfortunes to make me the Delilah of their evil conspiring against the political Samson whose unshorn strength they thus attempt to weaken through disgrace." With appropriate reference to the action of the English Parliament in a similar case and with a neat allusion to Roman history, Miss McBride concluded. I have always felt that her letter displayed more the style of a southern gentleman than of a clerk in the government printing office, the position she held.

A continental divide in the nature of appointment controversies was crossed when President Hayes appointed Stanley Matthews, a railroad lawyer, in 1881. Matthews had strong support from his party and from good lawyers. Nonetheless for the first time an appointment was opposed on strict economic grounds. The opposition was precisely that Matthews was a "railroad lawyer." The California Anti-Monopoly League, the Pennsylvania Grange, even the New York Board of Trade and Transportation protested. The charges were that Matthews would "sustain the usurpation of monopoly," would bring the Supreme Court "under corporate control." Matthews was confirmed by a vote of 24 to 23, and from that day to this, the economic outlook of the nominee has been considered fair game for confirmation controversy.

From this welter of miscellany can any general guiding principles or perceptions be found? I think so, and this evening I shall develop a proposition which I shall cheerfully name Frank's Law of Supreme Court Confirmations. This law, which is not quite as immutable as a principle of physics but which nonetheless is sturdy enough to stand, is that the greater the controversy over the appointment, the greater the accomplishments of the Justice.

Before I demonstrate factually that my maxim is true, and before I engage in some speculation as to why this is so, let me clear a little underbrush. Frank's Law does not say either of these two things:

1. It does not say that no one can be a great Justice unless his confirmation is controversial; it does not even hint in this direction. There was no controversy over the confirmation of John Marshall or of Holmes, or of Cardozo, to speak of only the vanished great.
2. The law does not embrace as a subsidiary even the smallest suggestion that every appointee whose confirmation is controversial becomes a great judge. For clear illustration, two appointees whose confirmation was intensely controversial were Peter V. Daniel in the nineteenth-century and James Clark McReynolds in the twentieth. Daniel, then a federal district judge in Virginia, was appointed by President Van Buren upon the extraordinarily fortuitous death of Justice Barbour, also of Virginia, which occurred only eight days before Van Buren's term expired. Since Democrat Van Buren was to be succeeded by Whig Harrison, the President had every impulse to put an appointment through quickly and on February 27, 1841, before Barbour's funeral, the President sent Daniel's name to the Senate. The Whigs stalled, but the full-scale filibuster was not yet in vogue. Finally, late on the night of March 2nd, just two days before Van Buren's term expired, Senator Henry Clay, the Whig leader, saw his chance to break the quorum. Ostentatiously picking up his hat, Clay said to the presiding officer, "I bid you good night." Almost all of his fellow Whigs marched out with him. The Sergeant at Arms went out to the bars

and the bedrooms rounding up Democrats and by 11:00 o'clock at night there were 27 senators on the floor. Twenty-six were Democrats, and one was a Whig. The Whig faced a terrible dilemma. If he withdrew, he would break the quorum, but there would be no one left on the floor to make the point of no quorum. If he stayed, he would himself make the quorum. He stayed, voted against the appointment, and just before midnight Daniel was confirmed.

McReynolds also had a good deal of trouble. As Wilson's Attorney General he had been a little lax in enforcing the Mann Act against the son of a prominent politician in California. This raised a fuss at confirmation time and required McReynolds to take vigorous steps. The result is *the famous case of Caminetti v. United States*, the decision holding that the Mann Act covers transportation of a sexual companion in interstate commerce, not merely for profit but also solely for pleasure.

The point of these illustrations is clear enough: even as Daniel's friendly biographer, I cannot put him in the galaxy of the great; the plain truth is that despite both his earnest if plodding career and my book, 99% of the persons within the sound of my voice have never heard of him. As for McReynolds, the whole thing was a mistake from the beginning.

So much for the underbrush. I am asserting that there is a correlation between controversy and accomplishment and that most Justices who were subject to serious confirmation battles made outstanding records on the bench.

We could illustrate from the nineteenth-century, in which one of the hardest fought confirmation battles concerned Chief Justice Taney; but in the interest of banquet brevity, I shall take the last 60 years. For the second decade of the century, 1910 to 1920, the major controversy was over the Brandeis appointment. For the third decade, the major fight was over Harlan Stone, though there was some rumpus about Pierce Butler as well. Between 1930 and 1940, there were three major disputes, Chief Justice Hughes and Justices Black and Frankfurter. It will be noticed that I am not speaking of the potentially great appointments which were in fact rejected, Judge Parker in the 1930's and Judge Haynsworth in more recent times. In the 1940's the main contest was over Justice Clark and in the 1950's over Justice Harlan. In the 1960's, the appointment of Abe Fortas as a Justice led to a confirmation controversy; the most recent moderately disputed appointment, that of Justice Rehnquist, came in 1971.

The names I have listed include some of the foremost figures of American law in the twentieth-century. The game of pick the ten greatest justices has never appealed to me much, but the names of Brandeis, Stone, Hughes, Black and Frankfurter are surely names of stature in American legal history. Justice Butler represents the absolute essence of the strong conservative Justice; there was both perception and generosity in then-Attorney General Jackson's memorial observation on Butler when he said, "Across that gulf, which always exists between two men who regard each other as representing ominous trends, I felt the strength, the warmth, and the sincerity of a great character--one of the most firm and steady men I have known...." Justice Clark served with great effect in this building, but outside it, in the entire national field of judicial administration, he was truly a sort of one-man gang, single-handedly accomplishing more than the entire Court of which he was a part. Justice Harlan brought sterling distinction to his work, and Justice Fortas was on his way to real greatness when he left his post here. Justice Rehnquist is already earning well-warranted acclaim.

Most of this audience is sophisticated in Supreme Court history or it would not be here. Is it not apparent that we are on to something? In the past 60 years there have been 36 appointments and confirmations. Ten of those appointments have engendered distinct controversy at the confirmation; I am aware that I am putting aside a few, as for example the matters of Justices Brennan and Stewart, where it seems to me that the controversies were too minor to deserve much talk. Justice Brennan could be pardoned if, in the light of his brush with Senator McCarthy, he took another view of this. Nonetheless, we have here a list of Justices, the least distinguished being first class and some of them the foremost figures ever to sit on this

court; all were subject to real confirmation disputes. Frank's Law, I submit, is clearly sustained on the evidence; indeed, the three most controversial appointments in this list of ten are those of Brandeis, Hughes and Black, and all three would be on any scholar's list of the ultimate immortals.

Is there some connection here? The corollary between confirmation controversy on the one hand and judicial accomplishment on the other is demonstrated. Why does the condition exist?

The answer emerges, I think, from a glance at the controversies in each case.

The very first, the Brandeis appointment, puts us on the track of understanding. Brandeis had richly earned both his appointment and his enemies. In 1910, as a kind of special counsel for conservation, Brandeis had done as much as any man in America to bring down the Taft administration. It is not hard to understand why six years later former President Taft and his former Attorney General, George Wickersham, fervently opposed the Brandeis appointment. Moreover, Brandeis had been the principle opponent in Massachusetts of the New Haven Railroad, an affiliate of J. P. Morgan & Company. *The publisher of both Barron's Weekly and the Wall Street Journal was directly in the pay of the New Haven.* There was no issue of competence in the Brandeis case--he was obviously one of the best lawyers in America--but charges as to how he had handled his business kept the Senate in a turmoil for months. I pass over the details--I have written a *lengthy article on them* in the Stanford Law Review ten years ago if anyone wishes to relive those passionate days, but the explanation seems clear enough. There is some suggestion that if Brandeis had simply been a little more amiable, a little more companionable, he might have escaped the fire, but I doubt it; his enemies would have sought to cut him to shreds whether or not he had been the gayest of the lads at the lawyers' club. The New Haven Railroad, the United Shoe Company, and President Taft had felt the full lethal force of Brandeis' power. They and those with them who hoped to regain political power at the election of 1916 fought a hard fight against the nomination.

With Butler, the pressures were of the exact opposite sort. Butler, as a Minnesotan, represented old line railroad power and conservatism in a state which had just elected a farm-labor senator. Butler had also been a dominant member of the Board of Regents, where he had served during World War I and immediately thereafter. Butler was not one to take wartime disagreement or postwar radicalism lightly, and he had a propensity for seeing these evils where more temperate souls might not have been alarmed. He came to his appointment an obvious mix of an able lawyer, a railroad tycoon, and a campus tyrant. His enemies made much of his failings. While the vote for Butler was heavy, the tussle was real.

In retrospect, it is hard to realize that the main opposition to the Stone appointment came from liberals who saw Stone as a reactionary tool of President Coolidge. There were three main charges, one that as Attorney General, he had harrassed Senator Burton K. Wheeler of Montana with a dilatory prosecution for alleged corruption to smear the Progressives; the second that while in private practice, he had been guilty of unethical conduct in a particular case; and the third that he had been a "Morgan attorney" and was therefore unfit to hold any office. With one cabinet member of Harding's administration on the way to the penitentiary, another forced out of the cabinet for almost-criminal stupidity, and a third under greatest suspicion, some senators found it easy to suspect the worst of Stone.

The obstructions were smoothed away because on examination there was no fair ethical criticism of the case in question and because Senators Walsh and Wheeler of Montana worked out with Stone a satisfactory venue for the Wheeler prosecution. In the course of it, the Senate recommitted the Stone appointment to the Judiciary Committee to allow a complete investigation of the Wheeler matter. As a result, for the first time in United States history a Supreme Court nominee came before the Judiciary Committee for examination, in the last forty

years, this practice has become routine. The chief examiner for the Committee was Wheeler's counsel, Senator Walsh, also of Montana. As the Stone hearing went on, Walsh and Stone dropped all pretense of being Senator and Court nominee; as two lawyers, in the very hearing record, they negotiated a date for the Montana trial. Confirmation then easily followed.

The Senate debated the nomination of Chief Justice Hughes for five days in February of 1930. This was in the midst of the Great Depression, and there emerged in complete form the economic interpretation of the Court. Senator Norris set the frame for the debate in his first remarks when he said, "Perhaps it is not far amiss to say that no man in public life so exemplifies the influence of powerful combinations in the political and financial world as does Mr. Hughes." The nomination was finally confirmed, but with a large dissent.

From the functional standpoint, the Black controversy was almost identical with the Brandeis dispute. Black, as Senator in the first Roosevelt administration, had been a strong and, indeed, extreme voice of liberalism. He was the sponsor of the 30-hour-bill which in due course became the Fair Labor Standard Act. He was the Senate's principal investigator of corporate misdeeds. The types of enemy Brandeis had, Black had too. The form of the opposition lit on what must be respectfully regarded as a pretext, just as with Brandeis. In Black's case it was the fact that he had in 1925 been a member of the Ku Klux Klan, an organization from which he had resigned before he ran for the Senate in 1926, and which he never rejoined. This was perfectly well known in Alabama, but at the time of the appointment it was "discovered" by the press. In Black's case the main public blowup came after confirmation, and there was much pressure for withdrawal. Black, speaking to the largest audience which had ever heard an American up to that time, quieted the storm with a radio address.

With Justice Frankfurter, the charge that he was a dangerous radical evoked very extensive hearings. With Justice Clark, it was the reverse, a contention that he was a dangerous conservative, and this also evoked extensive hearings. With Justice Harlan, the claim was that he believed in Union Now, a kind of alliance with England. If ever a strictly professional advocate was appointed to the Supreme Court, it was Justice Harlan, and his life had indeed been remote from the problems of international relations; but there was a very substantial storm of opposition all the same. Justice Fortas, it was charged, was too close to President Johnson, too radical, and later, when he was proposed for Chief Justice, unduly involved in advising the President. The latter charge was singularly weak on the historical facts, but it was effective rhetoric all the same.

With Justice Rehnquist, the charge was that he was a conservative extremist, and, indeed, that he was somehow linked to the John Birch Society. There was also a charge that somehow at some earlier time he had been racist. There were also charges of election corruption. All these charges were, to my own personal and certain knowledge as a resident of the same city as the appointee, utterly baseless but they were fervently made and extensively explored all the same.

I do not want this little recital to be taken as a criticism of the confirmation process. There have been some terrible errors in that process, but it is the only means the people have of taking hold, even for a moment, of an institution which powerfully affects their lives. While some of the attacks are appalling--one thinks here of the outright abuse of Justice Thurgood Marshall, especially when he was appointed to the Court of Appeals for the 2nd Circuit and the petty efforts to humiliate him when he came to this Court--there are some virtues too. Not only have we some reasons to be comforted by the operation of the system in connection with one rejection in recent years; we have substantial reason to believe that there is tight scrutiny of potential nominees because of the prospect of confirmation hearings.

Nonetheless there are controversies, and some of them have involved outstandingly fine Justices. I do not in the slightest degree attribute the excellence of the Justices in fact to the grueling confirmation ordeal. The notion that somehow it is good for them, I think, is pious pap.

What I suggest as the true explanation of Frank's Law is simple enough: Of the ten controversial appointments I have listed, only one came to this Court from the bench; that was Justice Harlan, who had served only briefly. The fact is that the men who have been movers and shakers of events after they came to this Court were functioning as movers or shakers of events before they came to this Court. The same vigor and power and effectiveness that have made them significant here also made them significant before they came here. To take three of the most conspicuous examples, Brandeis, Hughes and Black were prodigious giants on the national scene before they put on the judicial robe. Prodigious giants on the national scene make friends, but they also make enemies; they are admired, but they are also feared. I come back to my observation of a moment ago on Justice Brandeis; the great Justice had earned his appointment, but he had also earned his enemies.

If an appointee has been a figure of great accomplishment on the national, political or economic stage before he comes to this Court, that same track record makes it likely that he will be a person of accomplishment here. I am aware of course that some misfits turn up here who do not successfully bridge the gap even though they have been men of great power and stature in earlier public life. It would be petty treason in these halls to name names, and so I shall simply note the intriguing fact that in the main such instances of the past 35 years there were no confirmation controversies.

The true meaning of the confirmation process is that where a very strong figure is appointed from some form of non-judicial public life, if he has been strong enough and active enough and conspicuous enough and effective enough, he will have enemies. This will make a confirmation controversy. If the appointee survives that controversy, he will almost assuredly make a very fine Justice.

## ***The Numbers Game***

### **The Editor**

ON SEVEN different occasions--or eight, depending on how and what occasions are being counted--the number of Justices on the Supreme Court has been fixed by statute. The last time was in 1869, when the present lineup of a Chief Justice and eight Associate Justices was determined upon. In the eighty years back from that date to the First Judiciary Act of 1789 the number on the bench had gone from six to ten and back to seven--except that before vacancies reduced the Court to that number, Congress added two more seats.

The reason? Sometimes it was a response to a not-always-logical relationship between the Court and the number of circuits, e.g., one Justice for each circuit. Sometimes it was a matter of politics, as in 1801 and 1802, and again in 1866 and 1869. This last date was the date of a "Court packing" maneuver; another attempt at "packing," in 1937, satirized in Herblock's renowned cartoon, did not succeed.

The First Judiciary Act established a six-member Supreme Court, and distributed the Justices among three circuits, called the Eastern, Middle and Southern Circuits. That made two Justices per circuit, which seemed both efficient and economical since there was not expected to be enough Supreme Court business to occupy those jurists full time, and two Justices and a District Court judge in the circuit could make up the Circuit Court. The idea was also to "keep the Supreme Court in touch with the country," as the phrase of the day had it.

Some purists--and all the Justices--objected to this arrangement from the outset. The purists pointed out that on cases appealed from the circuits, two members of the Supreme Court, or one-third of the reviewing panel, would already have sat on the case at the trial level. The Justices simply complained that riding circuit over uncertain roads (see Leonard Baker's article {ADD LINK}) was a hardship to which their dignity and time should not be subjected.

On the eve of Thomas Jefferson's incoming Anti-Federalist administration, the outgoing Congress enacted a second Judiciary Act in 1801. It was not without considerable merit, since it expanded the number of circuits to six and proposed to phase out circuit riding. But the law came a cropper on its political provision, reducing the size of the Supreme Court to five by stipulating that the first vacancy on the six-man bench was to be left unfilled.

The Jeffersonians promptly repealed the 1801 act and reviewed the 1789 law. No vacancy among the six Justices had materialized in the interim, so the number remained the same. Alas, however--circuit riding remained inviolate. In a new Judiciary Act in 1802, the Anti-Federalists continued the 1801 provision for six circuits, although it shuffled the states to be included in each.

In 1789 there had been three circuits for eleven states. Each state also had a District Court, and the Maine District of Massachusetts and the Kentucky District of Virginia were given District Courts with certain circuit jurisdiction. Almost at once, changes had to be made--Rhode Island and North Carolina, holdouts in the original ratification of the Constitution, belatedly joined the Union and Congress had to amend the statute to create new District Courts and merge these states into the existing circuits. Then three more states were admitted--Vermont (1791), which was incorporated into the Middle Circuit, and Kentucky (1792) and Tennessee (1795), which found themselves in limbo without any circuit affiliation.

The 1801 statute gave the circuits numerical, rather than geographical, identifications, which have been used ever since even though the states making up the circuits have changed rather wildly. The 1802 law continued the plan for six circuits, with one Justice per circuit. The number of states kept growing, however, and in 1807 a seventh circuit was created. By the logic of the circuit riding system, a seventh Justice was needed and the Court was enlarged accordingly. There was also an attempt to have one Justice from each geographic area

represented by each circuit, and thus Thomas Todd, chief justice of Kentucky, became the seventh man on the federal Supreme Court.

This balancing of circuits and Justices soon became artificial. When Justice Stephen J. Field of California was added to the Court (see Judge Kroninger's article), a tenth circuit was created for the West Coast. The number of circuits had gone from seven to nine in 1837, and the number of Justices had expanded accordingly, but with the addition of Field it appeared that the correlation had reached its ultimate limit. Congress had at last relieved the circuit system somewhat by creating Circuit Court judgeships in 1875, and the number of circuits remained at nine after 1869. When the Circuit Courts of Appeals were created in 1891 (with a separate circuit created for the District of Columbia in 1893), the number of circuits (ten) established at the time of Field's appointment in 1863 became permanent--at least until current proposals for revising the circuits are acted upon.

Since 1891, with nine Justices and eleven circuits, it is obvious that two members of the Court have had to be responsible for two circuits apiece. The 1891 statute creating intermediate appellate courts made circuit riding no longer necessary, so the increase in the assignment of circuits was less onerous than it would have been otherwise. The modern practice is for the Chief Justice to assign the circuits to the respective members of the Court at the beginning of each term. The old Circuit (trial) Courts were merged with the District Courts in 1911.

The legislation of 1801 and 1802 had been the product of political infighting. The same was true in 1866, when Congress sought to deny President Andrew Johnson an opportunity to submit nominations for Court openings by providing that no vacancies were to be filled until the number of seats on the bench had been reduced to seven. As it turned out, the number never fell below eight. Meantime, in 1869, President Grant found a need to "pack" the Court, and Congress obliged by building the number back up to nine.

The reason for the "packing" was the Court's unreconstructed attitude toward the constitutionality of the Civil War legal tender acts, which had dealt with a financial emergency by making paper money ("greenbacks") acceptable on a parity with gold and silver in payment of certain obligations. A seven-judge Court held the law unconstitutional by a margin of 4-3, on *February 4, 1870 (Hepburn v. Griswold, 8 Wall. 603)*. Grant, whose nominations for the two new positions authorized by Congress had been hanging fire, had his nominees (William Strong of Pennsylvania and Joseph Bradley of New Jersey) confirmed within a month following this first Legal Tender Case. Fifteen months later, on May 1, 1871, the two new jurists joined the former minority of three to form a 5-4 majority upholding the legislation in the *Second Legal Tender Case (Knox v. Lee, 12 Wall. 457)*.

In 1937, the confrontation between the conservative majority on the Court and the New Deal administration of President Franklin D. Roosevelt led to another "packing" proposal. The proposal failed (Leonard Baker, the author of an article in this issue, describes the confrontation in his *readable book, Back to Back: The Duel Between F.D.R. and the Supreme Court*).

Amid these changes and chances, the task of tracing the lines of succession of the various Justices becomes complicated; the accompanying table, adapted from a table originally made by the Marshal of the Court in 1972, may be of help--although some students of the Court do not agree on the numbers involved. Charles Evans Hughes, most of them will admit, should be counted twice, since he was appointed at two different times, as Associate Justice (1911-16) and as Chief Justice (1930-41). By the same reasoning, Justices Edward D. White and Harlan F. Stone are counted only once--upon their appointments to the bench, without special accounting for their advancement to Chief Justice.

This brings up, at last, the ultimate problem in the numbers game--how many Chief Justices have there been? Fourteen? Fifteen? Sixteen? Or seventeen? The game begins with a definition of the status of John Rutledge in 1795. The Constitution provides for nominations to the judiciary by the President and confirmation by the Senate; thereafter, as a final step, a commission issues. However, interim appointments may be made and commissions issued,

which are valid until the end of the session of Congress next ensuing. Rutledge's commission was for a recess appointment, and when the Senate failed to confirm at its next session, the commissions lapsed. Some contemporaries argued that this had the effect of invalidating the appointment altogether, in effect striking Rutledge from the records of sitting Justices. Either this reasoning, or faulty arithmetic, led to the labeling of the cast of Houdon's bas relief of John Marshall as "the third Chief Justice."

But there have definitely been fifteen--not fourteen--Chief Justices to date. Rutledge's recess appointment was completely in conformity with the Constitution (Article II, Section 2). Moreover, it vested him with authority which he affirmatively exercised, presiding at a session of the Court during the recess. But hold--in two other cases, men were nominated, confirmed by the Senate and commissions issued; what of them? Both of them entered the picture after the Rutledge brouhaha. Justice William Cushing was nominated January 26, 1796, and confirmed the next day, to succeed Rutledge; but Cushing concluded that an Associate's chores were as much as he wanted to discharge and within the week he declined the commission.

When the third (yes, third) Chief Justice, Oliver Ellsworth, resigned on September 30, 1800, President John Adams waited for Congress to assemble in December and nominated John Jay, who had already served as the first Chief Justice (1789-95). The November election results were in, and it was essential to secure the judiciary from the Jeffersonian, so the Senate confirmed on January 19, 1800. This time it took two weeks to get the message that Jay had declined his commission--due to the slowness of communications between Washington and New York.

No sixteenth. No seventeenth. Every first-year law student learns that a contract offer must be *accepted to be valid*. Res ipsa loquitur.

## ***Downstairs at the Court***

### **Barrett McGurn**

The Supreme Court consists of nine Justices. They weigh some 4,00 cases each year; and hand down 200 or 300 judgments. But inside the Court walls 260 other persons labor. None engaged in such momentous tasks as those which occupy the Nine, but each is a cog in the machine of high court justice. Here are some of these "cogs":

#### The Seamstress

Mrs. Bertha L. Glimps of Asheville, North Carolina started 31 years ago at the Court, tidying up around the building as a "housekeeper"; for nineteen years she has been the Court seamstress.

Mrs. Glimps' space is on the ground floor adjacent to the women's rest rooms. All day long women visitors knock on her door to ask the meaning of the "seamstress" sign. A kindly, gregarious person, Mrs. Glimps never tires explaining. The seamstress does what her title suggests: she keeps busy day after day sewing and mending a hundred items--the rent robe of a Justice, a flag shredded by gales out front of the building, uniforms of the sixty policemen in need of alterations, torn tablecloths and napkins, the draperies on many large windows--and on and on.

"The Supreme Court," Mrs. Glimps sums it up, "is just your home."

Every so often Mrs. Glimps can be seen going through the Courtroom when no case is being heard. The tall draperies wear out beside the tie ropes. As they are opened and closed other signs of use appear. Mrs. Glimps mends as the need arises. Visitors who have enjoyed the comfort of the cushions on Courtroom seats may be interested to know that it was Mrs. Glimps who covered them.

No policeman will make his rounds in an ill-fitting outfit so long as Mrs. Glimps is on hand; no Justice need lack a button on his robe. The piles of work awaiting her attention is evidence of the continuous opportunities Mrs. Glimps has for the plying of her needlework skills (Sometimes the challenges go far beyond the ordinary. Recently Chief Justice Burger commissioned Mrs. Glimps to produce a replica of the robe of Chief Justice John Jay--the first Chief Justice--for a bicentennial exhibit. Unlike the unrelieved black costumes of recent years, that of Chief Justice Jay had a brilliant scarlet facing and cuffs, piped with a half inch of silver silk.)

When she speaks of her "calling" Mrs. Glimps refers in part to girlhood days in the Carolinas. Her mother was a seamstress and Bertha was sewing by the time she was six.

"I won a prize when I was six--for a quilt made of patches of all kinds. Later at fairs I won prizes for dressing dolls. I sewed at church and I sewed at home--and I sewed for all the other girls. When we were 12 or 13 we formed a club and made uniforms for ourselves--very plain dresses. We bought cloth at ten cents a yard; thirty cents bought us a dress."

It was Bertha's talented fingers which produced most of the "uniforms."

At Steven Lee High School sewing was one of Bertha's favorite subjects. The local Presbyterian church offered a course in the art of the seamstress; Bertha took that. Here in the District of Columbia the Washington Vocational School granted diplomas for tailoring. Bertha won one and still wears the school gold ring though numerous years later the design has worn away leaving a smooth circlet.

Harlan Fiske Stone was Chief Justice when Mrs. Glimps entered the Court employ. Mrs. McPherson supervised the housekeepers.

"She admired my clothes--I made them myself," Mrs. Glimps remembers. When the previous seamstress, Mrs. Jackson, retired, the hob--at Mrs. McPherson's recommendation--was Mrs. Glimps, as it has been ever since.

### The Cabinet Maker

Wood too can wear down just like cloth so it is the job of Ed Douglas and his three assistants to help see to it that the handsome Supreme Court Building and its fine furniture--now in their 41st year--do not deteriorate.

Mario E. Campioli, the Deputy Architect of the Capitol, says that in his view the two finest buildings put up in this country in this century--in terms of materials used--are the National Gallery on the Mall in the District of Columbia and the Supreme Court. The Court structure is all marble and white oak. Mr. Campioli and his superior, George White, the Capitol Architect, supervise the upkeep of this building as well as that of the Capitol.

Ed Douglas' basement headquarters with its lathes, power saws, spray equipment and other tools is a handyman's dream but Ed insists it is no more than a "hobby shop." If budgets were no worry he can think of many thousands of dollars in additional equipment he would like to have to handle Court assignments, but budgets fret everyone and Ed makes do. How well he does is reflected in the testimonials from Justices which adorn his walls:

\* A portrait of Chief Justice Burger is inscribed "for Ed Douglas, whose high craftsmanship and dedication preserve this place for the future."

\* A picture of a red Honduran mahogany desk is signed: "For Edward F. Douglas, in appreciation and with the best wishes of Earl Warren."

\* Justice Lewis F. Powell's image is underscored: "To Ed Douglas with admiration for his great skill."

\* A framed letter from Justice Harry Blackmun mentions that "I am deeply grateful for the many things you have done to make my chambers comfortable and convenient."

When United Press International in the newsmen's area of the ground floor had need of an expanded work cubicle it was Ed Douglas' staff who ran out additional partitions and put in more bookshelves. When Curator Cathe Skefos designed an exhibit of two centuries of the Court in American public opinion, it was Ed who translated the curator's visions into tasteful varicolored exhibit standing ten feet tall. For another Skefos exhibit on the 140th anniversary of John Marshall's death, Ed created an early American law office on the building's ground floor, a

delight for Bicentennial crowds. Few corners of the Court building are without examples of Ed's skill with saws and brushes.

The inscription of thanks from the late Chief Justice Warren recalled one of Ed's greatest feats. When the Court building opened in 1935, nine identical mahogany desks were purchased for the Justices. Working for sixteen years at one of them, former Governor Warren grew accustomed to it--he mentioned that if it were possible he would like one identical to it for his retirement Chambers the Court had prepared for him. A call to the furniture company which had provided the nine brought the information that they were out of stock and that the cost of reproducing the design would be prohibitive. Ed Douglas studied the Justices' desks, picked up the Honduran and African mahoganies and other materials needed to reproduce them--and came up with a duplicate. Mr. Justice Stevens, who is temporarily assigned to the Chambers for Retired Chief Justices, works now at this tenth Justice desk.

When Mr. Justice Byron R. White came to the Court in 1962 he mentioned that he would like a tall chair with a good back support for his place at the Bench. Ed built one to the Justice's specifications. Before that the Marshal of the Court had been in the habit of picking chairs of various proportions as each new member joined the Court. (By tradition, the remaining Justices purchase a Justice's chair when he retires, giving it to him and his family.)

The chairs of various types gave a strange New York-skyline effect behind the high bench as backs rose and fell in a jagged line. When Chief Justice Burger was appointed in 1969 he so much liked the looks of the White chair that he told Ed Douglas to make his the same and Ed has continued to do that ever since. Now a smoother back-of-the-bench "skyline" can be noted. The White-Douglas chair rotates and rocks easily so that a Justice using one can talk to neighbors during hearings or lean backwards, relieving the fatigue of long sessions.

Along with the more glamorous jobs of building bench chairs and exhibits, Ed and his helpers tend to a variety of other chores--restoring and refinishing furniture, framing pictures, replacing moulding and performing a score of additional tasks to the advantage of the Court aesthetics and also to taxpayer savings. Done away from the Court, the work would be greatly more expensive.

A native of Washington, D.C., Ed had a year of high school and a year as an apprentice machinist before his fate beckoned. A friend quit work as a mill apprentice and Ed stepped into the vacant shoes. The future cabinet maker's education in wood working began with a vengeance: the mill made sashes, frames, doors and other objects. Ed joined the United Carpenters and Joiners of America as an apprentice and later, in the Navy, served two years as a cabinetmaker. Out of service Ed worked seven years on his own, building kitchen cabinets, cases for high-fi sets, bookshelves and a wide variety of other custom furnishings. Coming to the Court in 1961, Ed set up the building's first furniture finishing shop and, soon after that, took over all carpentry and cabinet making as well.

### The Microfilmmers

Tucked away in a remote corner of the Court's library floor is a small room where microfilmmers have been at work for fifteen years putting each page of the Court's thousands of volumes of briefs and case records on microfiche cards. The purpose is to make the Court's unique record of national litigation available to law libraries across the country.

With the help of two tall cameras the microfilmmers have been photographing at the rate of 8,000 pages--the equivalent of more than twenty books--each day, flipping pages almost as fast as they can be turned.

The work began with the Term of 1960. Using a single camera at the start, the microfilmmers managed that year to photograph all current cases, plus those of the 1959 Term as well. With the addition of the second camera the rhythm became more brisk, the cameramen kept current but dug further back into the collections which fill more than 15,000 volumes at the rear of the Court's third floor. At last, during the past year, the photographers caught up with the backlog thanks in part to purchase of films which others had done on the Court's early work. The result is that Information Handling Services of Denver, Colorado, the organizer of the work, say that they have microcards now on all cert-denied and per curiam cases back to 1946, and all full opinion cases back to 1832. How immense the task has been is reflected by the fact that lower court records in some cases fill an entire shelf by themselves. The microcards are postcard size--four inches by six--yet each reproduces 96 pages. Three cards are enough *for a book*. In the 1975 Term the Buckley v. Valeo cases on campaign financing generated 800 pages of material; nine cards took care of the lot.

Not every piece of paper nor the details of every issue in the Court's nearly two centuries are on the microcards now, though a very great share is. Some was lost when the British burned the Capitol and built a bonfire in the Supreme Court chambers during the War of 1812. Blazes at other times destroyed further materials. Meanwhile it was well into the 1800s before the Court demanded printed briefs in all cases. With these exceptions, however, the microcards will now enable lawyers distant from Washington to delve easily and deeply into the Supreme Court's cases past. Chief of the microfilmmers is Bill Bisgood; he is assisted by Janice Buchanan and Michael Cavanaugh.

### The Print Shop

In a secluded part of the Court building is the printing operation which was set up in 1946 to compose the Court Opinions.

Preserving the secrecy of Opinions while they are being drafted and passed back and forth among the Justices for amendments and rephrasings has always been a Court concern. Only after World War II however was it decided to confine the process to the Court's own building. Prior to that the typesetting was done in commercial shops in the District of Columbia, always with the requirement that total discretion be assured. With rarest exceptions the confidentiality of the Justices' work has been protected through the long history.

One of the trusted early printers was George S. Gideon who undertook the work in 1845. At that time each of the three branches of the government arranged for its own printing. By 1860 Congress held hearings on whether a Government Printing Office should be established to provide for the bulk of all such work for the federal bureaucracy. Mr. Gideon testified. He implied that government rates were so low that accepting any of the work was a labor of love. Mr. Gideon added that he would keep on with the Supreme Court material, "it being the only printing I do for the Government."

The GPO was set up a year later, taking on the larger share of the printing for the executive and legislative branches, plus some for the judiciary, but the Supreme Court stayed on with Mr.

Gideon and with Joseph L. Pearson who succeeded him. The Pearson plant had the Court work until 1946 when it went out of business, a three-quarter-century span.

From 1891 until his retirement in 1948, Clarence E. Bright handled the bulk of the Court work for Pearson's. Starting as one of the printers he became successively the manager and owner. Justices would drop into his plant in downtown Washington to look over the preparation of the Opinions just as they still do now occasionally in the Court cellar. Mr. Bright's system for guaranteeing secrecy was to split up each Opinion among several of his printers, keeping the concluding part for himself to set.

Chief Justice Vinson saluted Mr. Bright from the bench when his six-decade tenure ended; the printer's discretion and loyalty in protecting the Court's confidence exceeded a mere contractual relationship, the Chief Justice attested. The tribute went into volume 329 of the U.S. Reports at page ix, there for all future students of the Court to see if they wish.

The Government Printing Office observed its centenary in 1961, by publishing "100 GPO Years." The volume said that the Court weight several alternatives after Pearson's shut down, deciding at length to do its own printing in its own basement with the help of selected GPO personnel. That is the system to this day. Lou Cornio is foreman. Under him are five journeyman printers and a printing plant worker, There are linotype hot metal machines for setting type, equipment familiar in a country newspapers but rather dated now in the larger cities. There are also presses able to turn out 8,000 pages in an hour. On Decision Days the printers produce something over 100 copies of each Opinion, most of which go to dozens of waiting newsmen. The same type is used for the booklet-style "slip opinions," for the paperback Preliminary Prints, and for the "U.S. Reports"-the bound volumes of Court Decisions.

Lou Cornio grew up in Chicago. He too an early liking to his high school's print shop and made pocket money working after hours producing Christmas cards. He went to engineering college for a year and served in World War II. At war's end Lou's father, an electrician, saw a chance to get Lou into his union as an apprentice but the young Cornio decided he wanted to print instead. It is a job, he says, where "you see the results of your work." Almost any major law library now provides honored space to many volumes of the U.S. Reports which first came into type under Lou's supervision. After some time doing advertising layouts in the Windy City, Lou joined the GPO in Washington and then went on to the Court basement work which has occupied him since.

## THE SUPREME COURT IN CURRENT LITERATURE OVERVIEW, 1964-1974

ROY MERSKY and JENNI PARRISH

When Dr. Samuel Johnson observed that a dog's walking on his hinder legs may not be done well but one is surprised that it is done at all,<sup>1</sup> he might well have been contemplating the problem of preparing a roundup review of recent books <sup>2</sup> on the Supreme Court. Can it be done well is not the question; but rather, can it be done at all? Indeed, can any valid generalizations be made about so diverse a body of literature?

The editors of the Supreme Court Historical Society's *Yearbook* have determined that such a review covering the current year's crop of Supreme Court-related titles can be a useful tool, and can serve as a valid springboard for more focused discussion. Thus it will become a regular feature of the annual *Yearbook*. For this first year, a tripartite approach will be taken. Part One will consist of a statistical breakdown of some of the major, pertinent titles published in the last dozen years.<sup>3</sup> Part Two evaluates several of the multivolume sets produced during this period. Part Three concerns the major titles published from 1974 to the present.

### PART ONE

Considering the output on a purely statistical level, some 301 titles were published from 1964-1967. For manageability's sake, they were divided into eleven categories. This was not an easy task in itself. Authors of books on the Supreme Court do not always think in categories, thus, the classification was arbitrary at times. To take one example, in Harvie Wilkinson's *Serving Justice; a Supreme Court Clerk's View* (New York: Knopf, 1974), the author describes the day-to-day workings of the Supreme Court and also Justice Powell's personality and his work before and since joining the Supreme Court. Therefore, it could have found its niche under both the categories, "Mechanics" and "Specific Justices." The latter category was chosen as it seemed more appropriate for the book as a whole.

Some explanation of the categorization process is in order. The reader is referred to the three tables entitled: "Books on the Supreme Court," "Specific Justices," and "Fundamental Rights." In the first table, "Historical" was the label given to titles dealing either with the development of a theme or themes over time (an obvious example: *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan, 1971), or a specific personage and/or period (e.g., Alfred Cope's *Franklin D. Roosevelt and the Supreme Court* (Lexington, Massachusetts: Heath, 1969).

The category "Political" was employed when the work concerned the relationship between the Supreme Court and another branch of government. As the numbers in the first table indicate, this classification was used sparingly. An example is Samuel Krislov's *Supreme Court in the Political Process* (New York: Macmillan, 1965).

"Specific Justices" was one of the easier sub-topics to use, as the title alone usually made its appropriateness self-evident. Included here were books on one or more Justices (biographical and autobiographical works and critical analyses of their work on the Court) as well as books on specific nominees (e.g., two books on George H. Carswell<sup>4</sup>). Also included were collections of letters and papers of specific Justices. An example of a title fitting under this label is Hugo Black Jr.'s *My Father, A Remembrance* (New York: Random House, 1975).

"Minorities" was a difficult category to use. It was employed for titles like Arnold M. Paul's *Black Americans and the Supreme Court Since Emancipation: Betrayal or Protection?* (New York: Holt, 1972), which deals with the subject of segregation in a more general way than a book like Richard Kluger's *Simple Justice: the History of Brown v. Board of Education and*

*Black America's Struggle for Equality* (New York: Knopf, 1976) which was classified under "Specific Cases." Once again the arbitrariness of the whole process leaps out at the reader and the only justification which can be offered is that of necessity.

"Law Enforcement" looked like a promising term in the beginning but only two titles fell into that slot: Ronald Sokol's *Lawabiding Policeman: a Guide to Recent Supreme Court Decisions* (Charlottesville, Virginia: Michie, 1966) and Stanley Cohen's *Law Enforcement Guide to United States Supreme Court Decisions* (Springfield, Illinois: C. C. Thomas, 1971). As with all the titles, others might have fit this category but seemed better suited to other categories and so there they rest.

"Warren and His Court" is a category like "Specific Justices" which was very easy to fill. While there was a steady trickle of books on Warren and "his" Court from 1964-69, one finds a veritable flood in 1970, 1971, and 1972. This large volume of books following Chief Justice Warren's death is understandable, as is the relative dearth of titles in recent years as current attention shifts. This category took precedence in classifying the books over any other possibly suitable ones.

"Mechanics" seemed the best term to use for those books explaining the internal processes of the Supreme Court. This classification includes the appointing of Justices and the more or less day-to-day operations of the Supreme Court (e.g., Henry Abraham's *The Judiciary; the Supreme Court in the Governmental Process*, 3rd ed., (Boston: Allyn & Bacon, 1973).

"Constitution" was another fairly obvious heading under which could be grouped a steady stream of volumes over the years concerning what the Court has and has not done with that most important work, an obvious example being Wallace Mendelson's *The Constitution and the Supreme Court*, 2d ed. (New York: Dodd, Mead, 1965).

"Specific Cases" is fairly self-explanatory. Any book whose taking-off point was a specific case or a related group of cases was placed in this category regardless of where else it might fit. (For example, Stanley Kutler's *Privilege and Creative Destruction; the Charles River Bridge Case* (Philadelphia: Lippincott, 1971) was placed in this class though it could have fit under other categories).

"Social Science" was a fairly arbitrary category for what appeared to be a developing trend in legal scholarship. Titles like Abraham Davis' *United States Supreme Court and the Use of Social Science Data* (New York: MSS Information Corp., 1973) and Paul Rosen's *The Supreme Court and Social Science* (Urban: University of Illinois Press, 1972) are so bold about making the connection that they seem to call out for a category of their own.

Finally, "Fundamental Rights" was the label used for the fairly constant flow of books concerning the Constitutional guarantees which are the center of so much scholarly and emotional debate. Again the difficulty with overlapping appears: Michael Meltsner's *Cruel and Unusual; the Supreme Court and Capital Punishment* (New York: Random, 1973) could have fit other categories but was included here.

Once again Dr. Johnson's statement springs to mind and one wonders if the dog isn't trying the even more impossible feat of walking on its own two front legs.

## PART TWO

Having considered the categorization of the vast quantity of available literature, it is appropriate to turn to several sets which by their size and scholarly content merit individual analysis. One of these is *The Justices of the United States Supreme Court 1789-1969: Their Lives and Major Opinions*, edited by Leon Friedman and Fred L. Israel, 4 volumes, (New York: Chelsea House Publishers in association with R. R. Bowker Co., 1969). This multivolume work includes biographies of ninety-seven Justices by thirty-eight authors, among whom are found

historians, practicing lawyers, law professors, political scientists, and journalists. Each biographical sketch is followed by one to three major opinions of that particular Justice--a feature which has both been criticized by some as unnecessary padding<sup>5</sup> and justified by the editors as showing "the jurist in action . . ."<sup>6</sup> The uneven quality of the biographies has also come in for a good deal of criticism, as has the price (originally \$110, now \$130).<sup>7</sup>

With so many contributors and the great diversity in the amount of information available on individual Justices, a marked contrast in the quality of the individual essays is almost inevitable. As to price, the problem of inflation's effect on law book publishing is one that is interesting, but outside the scope of this article. One feature praised by a number of critics<sup>8</sup> is that portion of the appendix entitled "The Statistics of the Supreme Court." It is interesting in and of itself as a collection of data on ancestry, religion, education, occupational experience, and other areas of background information. At any rate, reviewers of this biographical dictionary almost unanimously agree that such a work was long overdue and that despite its deficiencies it is a valuable addition to the literature on this country's great jurists.<sup>9</sup>

Another work of monumental proportions *and aspirations is the Oliver Wendell Holmes Devise History of the Supreme Court of the United States* (New York: Macmillan).<sup>10</sup> The general editorship of the set has been undertaken by Professor Paul A. Freund of Harvard Law School. Of the proposed twelve volumes (eleven covering the period 1790-1941, and the twelfth containing charts, photographs, biographical data on the Justices, and other materials related to the history of the Court), three have been published. The project was launched by Congress in 1955 (P. L. 84-246) at which time the Oliver Wendell Holmes Devise Fund (consisting largely of Holmes' bequest to the nation of \$263,000 at his death in 1935) and the Permanent Committee of the Oliver Wendell Holmes Devise were established. The Committee consists of the Librarian of Congress *who serves* as chairman *ex officio* and four members appointed by the President. The Committee administers the Fund and the chief project has been the publication of this multivolume set, with each volume being written by a scholar recognized as an expert on the particular time period covered.<sup>11</sup>

*The first volume, Antecedents and Beginnings to 1801* (1971) by Julius Goebel portrays the Court from its beginnings in 1790 up to the time when John Marshall became Chief Justice. One of its major themes is the development of the concept of the judicial review for constitutionality. Leaping forward in time, the next volume *published was volume six, Reconstruction and Reunion 1864-88* (1971) by Charles Fairman. It deals with the struggle between the executive and legislative branches over the reconstruction of the southern states after the Civil War, and the Supreme Court's effect on this struggle. Published three years later, *the fifth volume, The Taney Period 1836-64* (1974) by Carl B. Swisher, covers the years between Marshall's death and the end of the Civil War.<sup>11a</sup>

The numerous reviews published on each volume make analysis here not only unnecessary but undesirable. The major concern of this review is with the place of this set in the literature on the Supreme Court. However, since it is only one-fourth finished, it would be ill advised to pass judgment on the work as a whole. The idea behind it, "to give a comprehensive and definitive survey of the development of the Court from the beginning of the nation to the present,"<sup>12</sup> is as valuable and worthwhile as *the concept behind the Justices of the Supreme Court of the United States*. Both are reference works in a sense, gathering a wealth of information into a fairly manageable form to provide starting points for future scholars whose research will delve more deeply into the obscure areas. Indeed those who have criticized the volumes published thus far because of their preponderance of detail but lack of analysis seem to overlook this underlying concept.

As John J. Gibbons points out<sup>13</sup> there are two possible deficiencies in such a large work: 1) a scholar so enmeshed in one era may lose sight of the influence of earlier Court decisions on those of the time period which he covers, unnecessarily breaking the continuity among the volumes; and 2) each volume may reflect too heavily its author's topical interests. As Gibbons

indicates, Swisher's book does suffer somewhat from both deficiencies.<sup>14</sup> It is hoped that the scholars working on the eight volumes to come will take note of their predecessor's weaknesses as well as their strengths. Whatever the ultimate vote on the complete set, its having been undertaken in the first place is laudable and along with the *Justices of the Supreme Court* of the United States, it will provide a major contribution to the scholarship on the Supreme Court.

A third set worthy of note is the trilogy, *Court and Constitution* in the Twentieth Century, (Indianapolis and New York: Bobbs-Merrill) by William F. Swindler. *The first two volumes, The Old Legality, 1889-1932 (1969) and The New Legality, 1932-1968 (1970)* tell the history of constitutional law developed case by case in the Supreme Court from the laissez-faire-dominated late nineteenth century to the end of the civil liberties-oriented Warren era. Skillfully integrated with this legal history is the political, economic, and social background of the times, giving both books a larger focus than one might expect from a treatise on constitutional law. But there is more. Described by one reviewer as "a kind of world almanac of facts of constitutional history,"<sup>15</sup> the five appendices in each volume provide a tremendous reference source in their own right. One appendix in each provides biographical sketches of Justices and other Court personnel during the period covered including also Attorneys General and Solicitors General; another appendix includes proposed constitutional amendments; a third gives the statutes pertaining to the federal judiciary; a fourth includes selected acts of Congress; and a fifth provides annotations of all the major constitutional cases of the era in chronological order. In addition each volume includes an excellent bibliography.

Equally well written, but taking a somewhat different tack, the *third volume of the trilogy, A Modern Interpretation (1974)*, is intended as a general guide to the Constitution. It includes two separate commentaries on the Constitution, the first being a reprint of the text with background notes illustrating the changes in interpretation over more than 200 years; the second part comprises an analysis of each clause of the Constitution based on post-1937 Supreme Court decisions. Considered as a whole, this three-part work marks a very valuable and extremely readable contribution to the literature under consideration here.

A fourth multivolume set to be noted is *The Supreme Court of the United States Nominations 1916-1972* edited by Roy M. Mersky and J. Myron Jacobstein (Buffalo: Hein, 1975). These eleven volumes in twelve books include the Senate Judiciary Committee's hearings and reports on successful and unsuccessful nominees, beginning with Louis D. Brandeis in 1916 and ending with George H. Carswell in 1970. They contain materials which have not been available to the public before now. As one reviewer has noted: "Now Supreme Court scholars can have easier access to materials essential in delineating one of the significant nonjudicial processes relating to American constitutional law."<sup>16</sup> As with the other works considered, there are omissions here,<sup>17</sup> but without doubt, the set is a valuable addition to the needed reference materials of the Supreme Court scholar.<sup>18</sup>

Fifth in the line-up of major undertakings is *The Papers of John Marshall* edited by Herbert A. Johnson (University of North Carolina Press, for the Institute of Early American History, 1974). So far, only one volume of the proposed ten has been published. It spans the years 1775-1788 and covers Marshall's early career from his service in the Culpeper Minuteman Battalion to his part in the debates at the Virginia ratifying convention. As noted by the editors, a need for this collection has been felt since 1906 when the project was originally proposed. Over three-fourths of the first volume's papers have never before been published.

Supplementing the paucity of personal correspondence (Marshall did not keep letterbooks or draft copies of his letters) is a wide variety of other papers giving clues to his personal life including muster roles, student law notes, legislative petitions and bills, and letters sent by him to John Adams, James Monroe, and others. Perhaps the most important single document is his Account Book, which records his financial transactions, thus telling much about his private and professional life. With only one-tenth of the series published no final judgment

can be made, but if succeeding volumes follow their predecessor's excellent example, another great contribution to American legal and historical literature is to be anticipated.

A similar effort has been made in *The Correspondence and Public Papers of John Jay 1763-1826*, 4 volumes, edited by Henry P. Johnston (Lenox Hill Pub. & Dist. Co., 1970).<sup>19</sup> The first major biography of Jay, containing portions of his correspondence, was edited by John Jay's son, William Jay.<sup>20</sup> Because it has long been out of print and therefore generally inaccessible, the need for the present work is apparent. Fortunately, Jay, unlike Marshall, retained drafts of most of his personal correspondence and these have been carefully preserved by his descendants and in public and private collections. The same praise that was given to the effort to collect Marshall's papers must be bestowed upon this collection of Jay's papers. Both will be invaluable starting points to future historians and legal scholars concerned with the times and lives of our early Chief Justices.

### PART THREE

The final part of this review will concern itself primarily with some of the major titles published since 1974. Although a careful attempt has been made to include all major titles, oversights are inevitable. Apologies for any such omissions are extended here in advance. Besides reading these recent books there are other means of maintaining current awareness of the Court's activities. Those *deserving mention* range from *The Docket Sheet*, a bimonthly news bulletin reporting on the "insiders" at the Supreme Court to publications which group and analyze recent cases according to *legal topics*.<sup>21</sup> Published annually, *The Supreme Court Review*<sup>22</sup> contains scholarly articles which discuss recent cases and trends of the Supreme Court. The editor, Philip B. Kurland, has reprinted articles *which* originally appeared in the Review in book form according to topic (e.g., *The Supreme Court and the Judicial Function* (1975) includes seven Review articles on this subject dating from 1960 to 1971).<sup>23</sup> A somewhat similar effort was made in a series of books entitled *The Supreme Court in American Life* published by Free Press under the general editorship of Professor Samuel Krislov of the University of Minnesota. Of the nine books originally planned, six<sup>24</sup> have been published dealing with the political, economic, and human implications and effects of recent Supreme Court decisions. These types of projects are relatively rare and when they are bravely launched they often reach too small a portion of the potential audience to make them financially viable.

Monographs, then, are certainly not the only source, and often they are not even the best source, for serious analysis of the Court's work. However, those titles listed below are worthy of consideration from readers who are seriously interested in the Supreme Court. The major emphasis is on description rather than criticism and thus the form chosen as the most appropriate is that of the annotated bibliography.

A few preliminary comments are in order. There are a number of interesting biographical and autobiographical treatments of Supreme Court Justices in this group.<sup>25</sup> In addition, several books are written by non-lawyers. These make valuable contributions to the literature as they provide a varied perspective on problems which lawyers may tend to *view too narrowly*. Richard Kluger's *Simple Justice* is one of the most striking examples which can be used to illustrate this idea. Also found in this group are a number of authors with strong political viewpoints who are not at all shy about expressing them (e.g., Robert Macey's *Our American Leviathan Unbound* and Philippa Strum's *The Supreme Court and "Political Questions": A Study in Judicial Evasion*). A final observation is that although this collection of recent books is not lacking in volumes which attempt to explain the conceptual functioning of the Supreme Court (e.g., *David Rhode's and Harold Spaeth's Supreme Court Decision Making*), it does not include any book which really lays bare the internal working of the Supreme Court. Perhaps the one book which *comes closest* is Harvie Wilkinson's *Serving Justice* and yet even with this

volume there seems to be an invisible line beyond which the former clerk to Justice Powell will not go.<sup>26</sup> Those who do not know continue the search; those who do know maintain discretion. The mystery of the Supreme Court *remains intact*.

*Abraham, Henry J. Justices and Presidents: Political History of Appointments to the Supreme Court.* (New York: Oxford University Press, 1974).

As a history of the exercise of one presidential power, i.e., the power to appoint Supreme Court Justices, this book includes parallel accounts of the presidency and of the Supreme Court from the appointment of John Jay to Thurgood Marshall. Heavy use of statistical data without sufficient analysis, poor documentation, too little emphasis on the Senate's power to veto, and too much emphasis on the political aspects of the appointment process deny this title a place on the list of great scholarly contributions, although it does make *interesting reading*.

*Baker, Leonard. John Marshall: A Life in Law.* (New York: Macmillan, 1974).

This is a very thorough and somewhat idealized treatment of the life of the fourth Chief Justice of the Supreme Court. What it lacks in scholarly analysis is more than compensated for by its easy readability for both *lawyers and non-lawyers*.

*Ball, Howard. The Vision and the Dream of Justice Hugo L. Black.* (University, Alabama: University of Alabama Press, 1975).

This short work is, in the author's words, a "biography of . . . [the] . . . convictions" of Justice Hugo Black (Preface, p. v). Examining Black's views on substantive and procedural due process and on first amendment freedoms, it serves as a useful introduction to the views of this "judicial `giant.'" (Preface, p. vii).

*Barth, Alan. Prophets with Honor: Great Dissents and Great Dissenters in the Supreme Court.* (New York: Knopf, 1974).

Giving the facts of the cases, the characters of the litigants and the Justices who dissented, this book details six important dissenting opinions spanning half a century and traces the progress of these dissents until a majority on the Court was persuaded to the original dissenters' views. Such overrulings occurred during the Warren years for five of the six cases and the author certainly gives *that Court due credit*.

*Black, Hugo, Jr. My Father, a Remembrance.* (New York: Random House, 1975).

Perhaps wishing to be judged solely on the basis of his written opinions, Justice Black requested that, upon his death, all of his judicial notes and memoranda be destroyed. Hugo Black, Jr. fulfilled that request, but he has chosen to reveal much about his father in this largely affectionate memoir which may be used by future historians in passing judgment *on this great jurist*.

*Countryman, Vern. The Judicial Record of Justice William O. Douglas.* (Cambridge, Massachusetts: Harvard University Press, 1974).

Written by a former law clerk to Justice Douglas, this book covers Douglas' voting record in all major cases covering thirty constitutional issues and gives excerpts from the Justice's opinions.

The Epilogue, "On Judging a Judge," includes some interesting observations on evaluating the performance of a jurist; "Justice Douglas passes the test *with flying colors*" (p. 381).

Cox, Archibald. *The Role of the Supreme Court in American Government*. (New York: Oxford University Press, 1976).

Taken from lectures delivered at All Souls College at Oxford, this very short book makes some interesting and valid points about the Supreme Court and its treatment of the Constitution. Professor Cox does assume a general familiarity *with the topic in his* readers.

Douglas, William O. *Go East, Young Man*. (New York: Random House, 1974).

Covering Douglas' early life up to his appointment to the Supreme Court in 1939, this autobiographical collection of anecdotes has some surprising omissions (e.g., virtually nothing is said about his wives and children), some curious inconsistencies (e.g., after all the praising of egalitarianism, Douglas proposes a very elitist college system), and an amazing surfeit of camping stories. For a discussion of his years on the Supreme Court one must look forward to the second volume of *Douglas' autobiography*.

Elliott, Ward E. Y. *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969*. (Cambridge, Massachusetts: Harvard University Press, 1974).

Beginning with an overview of voting rights in this country from 1776 to the mid-nineteenth century, the author proceeds to analyze voting rights reforms since that time and the Supreme Court's role in effecting such reforms. Elliot sees the law professors, the deans of law schools, the editors of the national press, and others, all of whom he labels "Guardians," as having a profound influence on the Court starting in the mid-twentieth century, especially in the area of voting rights reforms, and he questions the advisability of allowing *this group to have so much sway*.

Funston, Richard. *Judicial Crises: The Supreme Court in a Changing America*. (New York: Wiley, 1974).

Taking six major problem areas in contemporary American society, from race to crime to obscenity, the author reprints one law review or periodical article or chapter from a book to introduce each section and follows with six to eleven opinions of *recent cases dealing with the topic*.

Goldberg, Dorothy. *A Private View of a Public Life*. (New York: Charterhouse, 1975).

Relating the private life story of a wife of a former Supreme Court Justice, Dorothy Goldberg provides an interesting perspective on Goldberg's career, both on and off the Court. She tells a very human tale, one which may never be told by the former Justice, who "has an *allergy to writing memoirs*" (*Preface, p. v*).

Graglia, Lino A. *Disaster by Decree: The Supreme Court Decisions on Race and the Schools*. (Ithaca and London: Cornell University Press, 1976).

Focusing on busing, this controversial book explores the *history of school desegregation since the landmark decision of Brown v. Board of Education of Topeka in 1954*. According to Graglia, the prohibition of racial discrimination in that case has developed into compulsory integration

which the Court seeks to accomplish by the use of racial discrimination to increase racial mixing. As a result of the Brown decision, the author believes that the Court has become a "seemingly omnipotent instrument for effecting fundamental social changes without obtaining the consent of the American people or *their elected representatives*" (p. 14).

*Kluger, Richard. Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality.* (New York: Knopf, 1976).

Written by a non-lawyer, this work is both a study of the key lawsuit in one of America's most troubling conflicts, and a history of the mistreatment of America's black population. This thorough and very human account provides an *important volume in American legal history*.

Lash, Joseph P. *From the Diaries of Felix Frankfurter.* (New York: Norton, 1975).

Following a brilliant biographical essay by Lash (another non-lawyer) on a Justice who has been too little written about, this book contains a number of excerpts from Frankfurter's diary, many of which are not flattering to him. (Perhaps one can now better understand Justice Black's command to his son.) Lash has done an *impressive job of annotating these fragments*.

*Levy, Leonard. Against the Law: the Nixon Court and Criminal Justice.* (New York: Harper & Row, 1974).

Analyzing some three dozen decisions on criminal justice handed down by the Burger Court, this book covers a number of problems relating to civil liberties guaranteed by the Bill of Rights. If the author's disclaimer that the book's title is neutral (p. xiv) seems questionable, it is not hard to accept his statement that this is not a book favorable to the "Nixon Court" (p. xiii). Despite some of Levy's controversial conclusions, the *book is a scholarly contribution to the literature*.

*Lushy, Louis. By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution.* (Charlottesville, Virginia.: Michie, 1975).

Focusing on the period 1937 to the present, this book interprets a number of Supreme Court decisions dealing with civil liberties guaranteed by the Bill of Rights, most notably in the area of racial equality. The author is especially critical of the Burger Court but is also quick to point out some of the major headaches with which the Court *must deal* (e.g., *an impossibly heavy caseload*).

*Macey, Robert L. Our American Leviathan Unbound: The Judicial Perversion of American Freedom.* (Brooklyn: Gaus, 1974).

Quoting liberally from the Bible at every turn, this very short book decries the passage by Congress and the upholding by the Supreme Court of the Social Security Act of 1935. According to the author *such evil doings have made America a welfare state*.

MacKenzie, John P. *Appearance of Justice.* (New York: Scribner's, 1974).

According to this author, a legal reporter for the Washington Post, appearing "just" is considered as important for a judge as actually being just. By this he means that they should not be involved in financial dealings which create conflicts of interest with the cases they judge. The author scrutinizes the behavior of a number of judges and Justices and sets out clear, if perhaps unrealistic, *criteria for judging the "appearance of justice."*

Meador, Daniel J. *Mr. Justice Black and His Books*. (Charlottesville: University Press of Virginia, 1974).

Starting with an excellent essay of Justice Black's tastes in literature, this book goes on to give an alphabetical listing *and a listing by subject of the titles in Black's personal collection*.

*The Supreme Court and the Religion Education Controversy: A Tightrope to Entanglement*. (Durham, North Carolina: Moore, 1974).

Spanning half a century of case law, this short book develops a historical overview of the major decisions of the Supreme Court involving religion and education. The authors emphasize and criticize the development of the "excessive government entanglement" test as it has been applied to *religion-education controversies*.

Rohde, David W., and Spaeth, Harold J. *Supreme Court Decision Making* (San Francisco: Freeman, 1976).

Having presented most of the material in this book in lecture form to large undergraduate classes studying the Supreme Court, the authors put together a good introduction to the United States judiciary in general and to the Supreme Court in particular. The path by which cases go to the Supreme Court and the factors which *play a part in judicial* decisions are thoroughly explored.

Schubert, Glendon. *Judicial Mind Revisited*. (New York: Oxford University Press, 1974).

Using computer science methods and certain psychological theories, this author, a political scientist, has attempted to analyze the political ideologies of the Justices on the Supreme Court under Chief Justices Vinson and Warren using their voting records as a base. *This book is a review of the conclusions reached in its predecessor volume, The Judicial Mind (1965), based on more recent data and more sophisticated techniques*.

*Strum, Philippa. The Supreme Court and Political Questions: A Study in Judicial Evasion*. (University, Alabama: University of Alabama Press, 1974).

Examining only domestic applications of the political questions doctrine, the author, a political scientist, exhibits great skepticism about the Supreme Court's method of constitutional adjudication and about its avoidance of difficult constitutional issues by labelling them "*political questions*" which are outside the scope of judicial review.

Thomas, William R. *The Burger Court and Civil Liberties*. (Brunswick, Ohio: King's Court Communications, 1976).

Following a brief look at the shaping of the Supreme Court, "Nixon style," the author explores the Court's handling in recent years of the rights of the accused, freedom of expression, and equal protection of the laws. His conclusion is that "*the days of looking to the Supreme Court for the protection of civil liberties are over*" (Preface).

Walker, Mary M. *The Evolution of the United States Supreme Court*. (*Morristown, New Jersey: General Learning Press, 1974*).

Supplementing the textbook *American Government: The Facts Reorganized* (1974), this short volume traces the development of the Supreme Court, *coordinating it to different periods of American history*.

Wasby, Stephen L. *Continuity and Change: From the Warren Court to the Burger Court*. (Pacific Palisades, California: Goodyear, 1976).

Focusing on the last years of the Warren Court and the early years of the Burger Court the author examines what policies have developed, especially in *regard to civil liberties during this period* of transition.

Wilkinson, J. Harvie, III. *Serving Justice; A Supreme Court Clerk's View*. (New York: Charterhouse, 1974).

Combining a section on the mechanical day-to-day workings of the Supreme Court, an affectionate memoir of Justice Powell, and an analysis of the work of the Burger Court, the author, a former clerk to Justice Powell, has *compiled a most perceptive, if not scholarly, work on the modern Court*.

*Wolfman, Bernard*. *Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases*. (Philadelphia: University of Pennsylvania Press, 1975).

Dividing the tax cases in which Justice Douglas participated into four periods, the author makes a statistical analysis of Douglas' voting record in the thirty-four years covered. The conclusion, a bit hastily reached, is that Justice Douglas, by his contradictory **voting record and his dissents without** opinions, has refused to judge in tax cases (p.138).

#### Endnotes

1 1 Boswell's *Life of Johnson* 463 (Powell's revision of Hill's ed. 1934). The use of the original chauvinistic quotation in full was deemed too inauspicious a way to begin this review.

2 For the sake of space, consideration here is limited to monographs. However, it should be noted that a large amount of material on the Supreme Court is to be found in periodical articles. Two quite different examples of many which could be mentioned *are the excellent* articles on varied aspects of the Supreme Court *irregularly published by American Heritage*, and the first number in each volume (November issue) of the *Harvard Law Review* which is devoted to analysis of the work of the preceding term. Another source of information not covered in this review are reprints of older classics. *Some worthy examples, all of which have been recently reprinted by Da Capo Press, include: The Miscellaneous Writings of Joseph Story (W. Story ed. 1852); The Constitutional Decisions of John Marshall (J. Cotton ed. 1905); Chief Justice John Marshall: A Reappraisal (W. Jones ed. 1956); F. Weisenburger, The Life of John McLean, A Politician on the United States Supreme Court (1937)*.

3 *Two other bibliographical sources for books written about the Supreme Court are: A Selected Bibliography on the History of the United States Supreme Court (R. Mersky comp., unpublished); Harvard Law Library. Elihu Root Room. Suggested Reading List (1955-1956)*.

4 These two books were: *R. Harris and G. Carswell, Decision (Nomination of G. Harrold Carswell) (New York: Dutton, 1971); United States. Congress. Senate Committee on the*

Judiciary., George Harrold Carswell. *Hearings, Ninety-First Congress, Second Session* (New York: *Da Capo*, 1973) .

5 *Ireland*, *Book Review* 15 *American Journal of Legal History* 224 ( 1971).

6 *The Justices of the Supreme Court of the United States 1789-1969: Their Lives and Major Opinions* (L. Friedman and F. Israel eds.) (New York: *Chelsea House Publishers* in association with R. R. *Bowker Company*, 1969) I:vi.

7 *Ireland*, *Book Review*, *supra* note 5, at 225; *Murphy*, *Book Review*, 37 *Missouri Law Review* 577-78 (1972).

8 *Kurland*, *Book Review*, 69 *Michigan Law Review* 778, 781 -82 (1971); *Levy*, *Book Review*, *New York Times*, Jan. 11, 1970, ¶ 7, at 30; *Wright*, *Book Review*, 64 *Law Library Journal* 265 (1971).

9 This set by Friedman and Israel is only the latest of a number of *compilations concerning the lives of Supreme Court Justices including the following: G. Van Santvoord. Sketches of the Lives and Judicial Services of the Chief Justices of the Supreme Court of the United States* (New York: *Scribner*, 1854); *Sketches of the Lives, Times and Judicial Services of the Chief Justices of the Supreme Court of the United States* (2d ed. W. Scott, Albany: *Weare C. Little and Company*, 1882); H. Flanders, *The Lives and Times of the Chief Justices of the Supreme Court of the United States* (Philadelphia: *Johnson and Company* 1881); F. Rodell, *Nine Men: A Political History of the Supreme Court of the United States from 1790 To 1955* (New York: *Random House*, 1955).

10 This collection too, has predecessors worthy of mention: H. Carson, *The Supreme Court of the United States: Its History* (Philadelphia: *John Y. Huber Company*, 1891); C. Warren, *The Supreme Court in United States History* (rev. ed.) Boston: *Little, Brown and Company*, 1926 .

11 In addition to the publication of this multivolume history, the Permanent Committee has established and continues to supervise the Oliver Wendell Holmes Devise Lectures, under which a distinguished legal scholar gives two or three lectures in one year at a college or university. This series is not to be confused with the *lecture series honoring Holmes sponsored by the Harvard Law School*. For a bibliographical listing of each, see *Two Lecture Series Honoring "The Great Dissenter,"* 10 *Notes From The Tarlton Law Library* no. 5-6, pp. 1-5 (1975). For a brief history of the *Oliver Wendell Holmes Devise*, see *Mersky*, *Book Review*, 8 *Criminal Law Bulletin* 67 (1972).

12 *J. Goebel*, *Antecedents and Beginnings to 1801* (New York: *Macmillan*, 1971), XI.

13 *Gibbons*, *Book Review*, 75 *Columbia Law Review* 222 (1975).

14 *Id.*

15 *Frank*, *Book Review*, 58 *American Bar Association Journal* 394 (1972).

16 *Powe*, *The Senate and the Court: Questioning a Nominee*, 54 *Texas Law Review* 891 (1976).

17 *Id.*, at 900-01.

18 The delineation of standards for potential Supreme Court Justices, as well as a determination of the boundaries of the Senate's "advice" role under the Constitution in regard to such nominees are points which *were considered in the Symposium on Advice and Consent on Supreme Court Nominations held on November 21, 1975 (Subcommittee on Separation of Power of Senate Committee on the Judiciary, 94th Cong., 2d Sess., Advice and Consent on Supreme Court Nominations (Comm. Print 1976) ).* It is to be hoped that this little-explored area of Supreme Court scholarship will be *pursued further.*

19 This title was also reprinted (four volumes in one) *in 1971 by Da Capo Press.*

20 W. Jay, *The Life of John Jay* (1833).

21 When the Court recesses for *the summer*, *The United States Law Week* (Washington, D.C.: Bureau of National Affairs) publishes articles entitled Review of Supreme Court's Work. Each week's installment covers a different field of law and briefly summarizes the opinions from the recent term *pertaining to that field.* *The Lawyer's Cooperative Publishing Company* publishes a bound volume each year entitled *Decisions of the United States Supreme Court* in which the decisions of the recent term are summarized.

22 This has been published since its beginning in 1960 *by the University of Chicago Press.*

23 *Two other titles published by the University of Chicago Press in 1975 are: Free Speech and Association: The Supreme Court and The First Amendment; and Church and State: The Supreme Court and The First Amendment.*

24 *The six titles are: S. Krislov, The Supreme Court and Political Freedom (1968); A. Miller, The Supreme Court and American Capitalism (1968); M. Shapiro, The Supreme Court and Administrative Agencies (1968), R. Scigliano, The Supreme Court and The Presidency (1971); J. Schmidhauser and L. Berg, The Supreme Court and Congress: Conflict and Interaction 1945-1968 (1972); R. Morgan, The Supreme Court and Religion (1974).*

25 Once again it should be noted that periodical and other non-monographic *literature greatly adds to this area, but unfortunately cannot be discussed fully* here. One notable example is: Gossett, My Father the Chief Justice, *Supreme Court Historical Society Yearbook, 1976, pp. 7-15.*

26 Some writers do not recognize the invisible line. See Totenberg, Behind the Marble, Beneath the Robes, *New York Times*, Mar. 16, 1975. ¶ 6 (Magazine), at l5.

27 There were 64 books on "Specific Justices" but two would not fit in this table because they *were on a number of Justices. These were: A. Dunham, Mr. Justice (Chicago: University of Chicago Press, 1964); J. Flynn, Famous Justices of The Supreme Court (New York: Dodd, Mead & Co., 1968).*

## ***Res Gestae 1976: The Supreme Court Historical Society***

### **WILLIAM H. PRESS**

This Society, an infant organization When *Yearbook 1976* was published, has matured rapidly during the last year and made significant accomplishments. Every indication now is that during 1977 activities will broaden and intensify and progress will be outstanding.

Members who attended the first annual meeting of the Supreme Court Historical Society on May 19, 1976 were impressed by the demonstration that we have become an efficacious agency for the achievement of our basic objectives.

The day began with a well-attended and spirited Executive Committee meeting. The General Membership meeting in the West Conference Room of the Supreme Court Building concluded with standing room only for the more than 150 attendees. This was followed by the first annual Board of Trustees meeting.

The First Annual Dinner in the Great Hall of the Supreme Court was sold out in advance to almost 250 diners. President Elizabeth Hughes Gossett presided; Chief Justice Warren E. Burger made interesting and humorous comments; John Paul Frank of Phoenix, Arizona--once law clerk to Justice Hugo L. Black--delivered the principal oration "Supreme Court Appointments--Controversy to Accomplishment."

Mrs. David Acheson and Mrs. Earl Warren were elected Trustees of SCHS, and the following were reelected for three-year terms: Ralph E. Becker, Herbert Brownell, G. Howland Chase, William T. Coleman, Jr., Newell W. Ellison, Erwin N. Griswold, Joseph H. Hennage, Nicholas deB. Katzenbach, Harvey T. Reid, Fred Schwengel, Whitney North Seymour and Hobart Taylor, Jr.

Appropriately the Society placed emphasis on Bicentennial activities during 1976 mainly by jointly sponsoring with the Supreme Court (1) completion of the first floor display of sculptures of former Chief Justices, (2) execution of twelve missing portraits of former Associate Justices for the ground floor, (3) an exhibit on "The Court and the American People," (4) the Hugo L. Black Exhibit and (5) preparation of continuous films from Archives newsreel footage for viewing by visitors to the Supreme Court. SCHS also provided the full cost of a portrait of retired Associate Justice Tom C. Clark.

*Publication of Magna Carta and the Tradition of Liberty*, a full-color, 64-page book written by Louis B. Wright, was completed in May. It was jointly sponsored by the U.S. Capitol Historical Society, the Supreme Court Historical Society and the American Revolution Bicentennial Administration. Both historical societies offer the books for sale at modest prices with discounts for members.

To mark the Bicentennial the U.S. Mint has, pursuant to strong urging, agreed to execute and strike fifteen medals of Chief Justices to be added to its list of about 300 historic three-inch bronze medallions. The first two medals are of John Jay, the First Chief Justice, and Warren E. Burger, current Chief Justice. These may be purchased from SCHS.

Speaking of portraits, the Society in December assumed the responsibility of providing portraits to be hung in the Supreme Court Building of all current and future Justices. Families, associates and clerks will have the opportunity of contributing to their cost by making contributions to SCHS. An Art Committee, chaired by Rowland F. Kirks, will oversee this activity.

During 1976 a number of historically significant objects and memorabilia were obtained as gifts according to Joseph H. Hennage, Acquisitions Committee Chairman. These include a dinner invitation to Justice and Mrs. Cushing from George Washington, a French carriage clock which belonged to Justice Oliver Wendell Holmes, a plat map of New York signed by John Jay, several group photos of former Supreme Court benches, an oil portrait and plaster bust relief of

Justice John Marshall Harlan (the first), a tortoise-shell box from the desk of Justice Oliver Wendell Holmes, the World Court robe and a number of academic hoods and medals of Chief Justice Charles Evans Hughes and an 1800 James Howell sterling teapot presented to SCHS in honor of Chief Justice Warren E. Burger by his former law clerks. SCHS also purchased a mahogany Sheraton sideboard c. 1800-1810, which has been placed in the Justices' Dining Room.

An understanding has been reached with the Federal Bar Foundation, the present operator, for SCHS to take over and enlarge the kiosk, inside the main entrance of the Supreme Court Building, where postal cards, publications and mementos are sold. Items stocked there will be made available through the Newsletter and circulars to members of SCHS throughout the country. A "taste" committee will be appointed to approve sale items and their prices.

The Society in August decided to embark on an oral history project as soon as it is feasible. A committee is being named to review a consultant's proposal and other recommendations concerning a program and then to draft the initial oral history project for adoption by the Board of Trustees.

Major steps toward a scholarly publishing program have been taken and are being developed by the Publications Committee chaired by Dr. William F. Swindler.

On September 13, 1976, the National Historical Publications and Records Commission approved our proposal to publish a documentary history of the Supreme Court 1789-1800 and a matching grant of \$25,000 per annum to meet forecast \$50,000 annual costs. Preparation time is estimated at four to five years. The history will primarily consist of hitherto unpublished materials of the unfamiliar pre-Marshall period when the Court considered questions central to creating a workable national government out of the Constitution's blueprint. This is a major step in implementing SCHS's encouragement of serious scholarship in the field of constitutional history.

Before year's end it is hoped that a *new publication Magna Carta Documents* will be published commercially with SCHS sponsorship. Additional titles in this arrangement have been projected annually for four years.

A compendium of opinions of all Justices in all decisions of the Supreme Court since its formation is under discussion now.

Organizationally and administratively, the Society, as was expected, grew larger, increased its income, moved to larger quarters and enlarged its staff.

On August 1, 1976, SCHS moved into Suite 333 in the Investment Building, 1511 K Street, N. W., Washington, D.C. 20005. This provided more and better space to accommodate an additional staff person as membership coordinator and also volunteer aides provided by D.C. Lawyer's Wives and other cooperating agencies.

A full audit of the Society's financial operations was made by a Washington CPA firm as of June 30, 1976, the end of the SCHS fiscal year. No exceptions were taken. Members wishing to examine the audit may do so by visiting the Society offices.

Overall figures for the year July 1, 1975-June 30, 1976 show receipts of \$185,153, expenses of \$108,782 and the fund balance of \$202,336 on June 30, 1976. Assets consisted of cash \$164,581 and acquisitions held for display \$88,830 for a total of \$253,411. Liabilities--all current--were \$51,075.

As Yearbook 1977 goes to press, membership totals approximately 1,350. A major membership campaign will be in full swing beginning in October 1976. Striking new brochures and invitations and expanded mailing lists will be used. Cooperation through personal support of leading lawyers in all states and major communities is being sought. Our second full-year objective is to at least triple our membership.

Standing Committee chairpersons

Annual Meeting Linwood Holton

Arts Rowland F. Kirks

Acquisitions Joseph H. Hennage

Budget and Finance Earl W. Kintner

Exhibits Robert T. Stevens

Membership Fred M. Vinson, Jr.

Nominating Elizabeth S. Black

Publications William F. Swindler

Yearbook Editorial Board Merlo J. Pusey