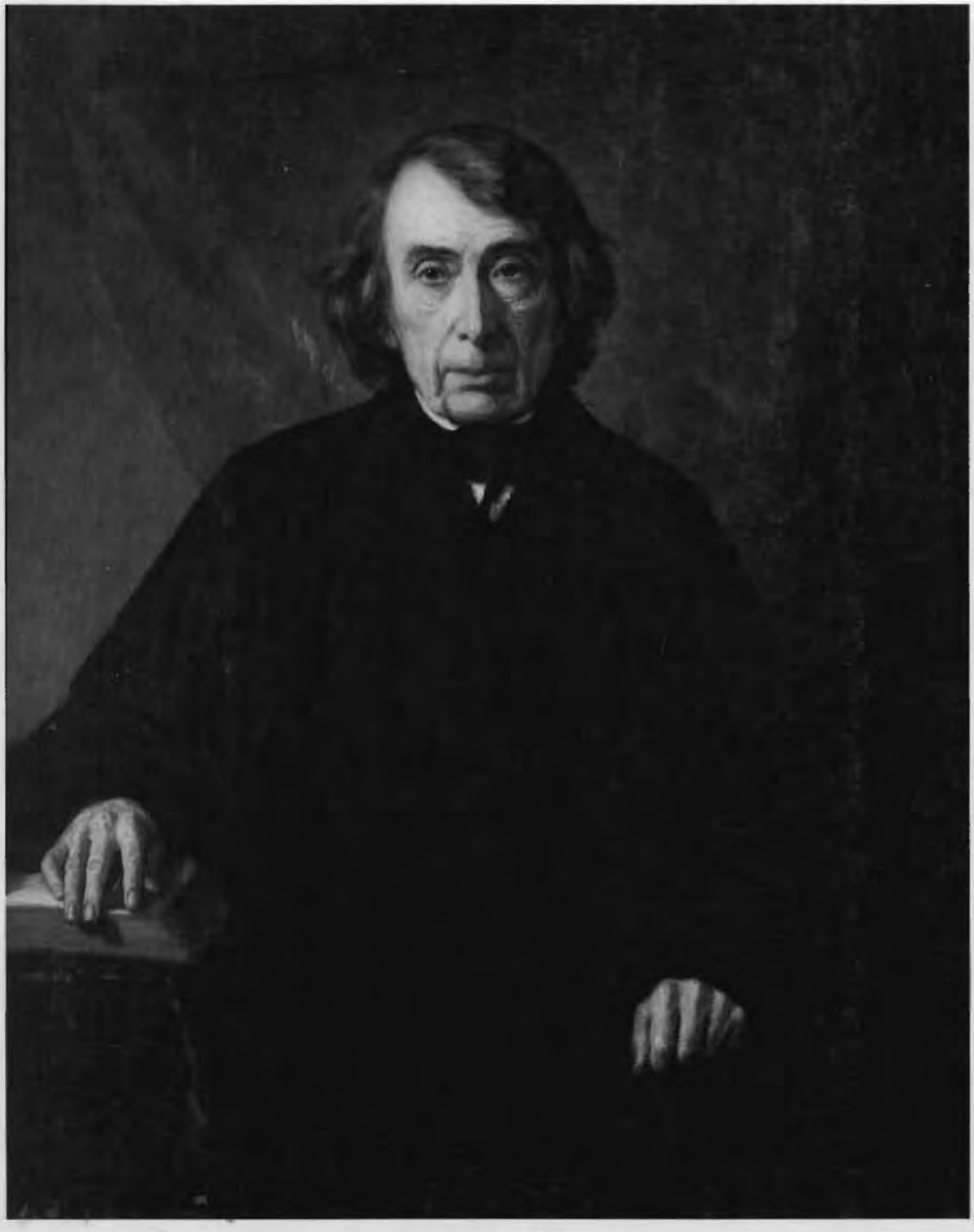
YEARBOOK 1978

SUPREME COURT HISTORICAL SOCIETY



ROGER B. TANEY
Fifth Chief Justice, 1835–1864

YEARBOOK 1978

SUPREME COURT HISTORICAL SOCIETY

The Supreme Court Historical Society

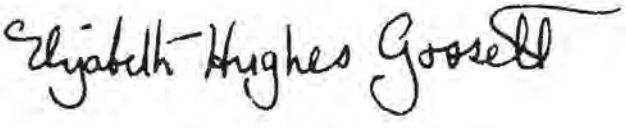
INTRODUCTION

This, our second year, has proven to be one of substantial progress and I greet all our members, with the hope that we can double and perhaps triple your number by the spring of 1978.

We had our second annual meeting and dinner, May 19, and then about three weeks later our beloved Chairman, Tom C. Clark, suddenly died.

Not only have I lost a personal family friend of many years standing, but during the past two years of sharing the endeavor of launching this fledgling Society, he has given me and us all wise counsel, guidance, leadership and support, from which we benefited greatly.

As we mourn his loss, I can think of no better way in which to adequately express our own feelings than to have published in *Yearbook 1978* for your perusal the magnificent tributes made to him by the Chief Justice and his son, Ramsey Clark, at the memorial service held on June 22 at the National Presbyterian Church in Washington, D. C. It was probably one of the most tender and therefore touching services of its kind I have ever attended and thus so appropriate for "Justice Tom."

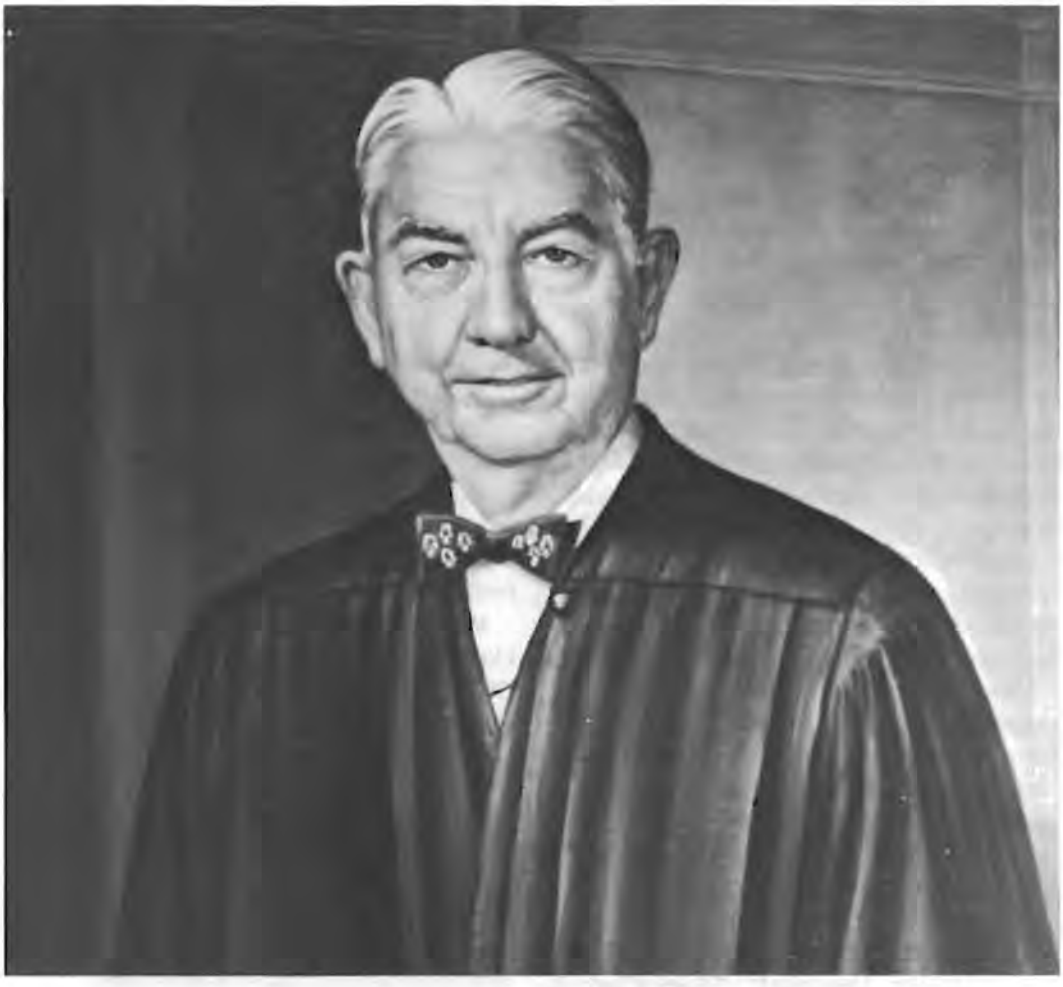


Elizabeth Hughes Gossett
President

YEARBOOK 1978
Supreme Court Historical Society

Tom C. Clark

1899–1977



Through the ages men have dreamed of and struggled toward the concept that nothing on earth is more sacred than human personality—that there is in the human soul a place which is inviolate, where no government or man may enter. But not until it became a part of our Declaration of Independence did this great concept of inalienable rights take on reality. Here for 171 years it has thundered forth its message to freedom-loving peoples everywhere.

The recognition and declaration that there are God-given rights—so inalienable—instill in man constant faith and hope, provide him with a Court of Appeals that is never closed—a law beyond the law—beyond the jurists—beyond the law makers. There is a higher law than mere man-made law.

Tom C. Clark
February 14, 1948

As the Court Remembers Him

At the time of his death, Tom Clark's colleagues on the Supreme Court each issued a statement, the excerpts from which fittingly complement the eulogies of the Chief Justice and the former Attorney General which follow on the next pages.

THE CHIEF JUSTICE: "He was unique in the annals of this Court and the judiciary, in that he took all problems of the judicial process as his personal burden . . . His work to improve the system will be his personal monument."

MR. JUSTICE BRENNAN: "His great distinction as a judge is the reflection of his conviction that it is wrong to live life without some deep deep and abiding social commitment."

MR. JUSTICE STEWART: "The lawyers and judges of our country will long remember Tom Clark for his tireless devotion to the fair administration of federal justice."

MR. JUSTICE WHITE: "This Texan, a remarkable mixture of practicality and idealism, with a talent for getting things done but getting them done better, was unfailingly cheerful, optimistic and generous."

MR. JUSTICE MARSHALL: "Tom Clark is also to be remembered as the first Attorney General of the United States to file a brief *amicus curiae* in a civil rights case. . . . This act was doubly important because it was the first brief by an Attorney General in support of civil rights, and it was ordered by a man from Texas."

MR. JUSTICE BLACKMUN: "Mr. Justice Clark . . . was a superb ambassador, in the literal meaning of that term, from the Court to lawyers everywhere . . ."

MR. JUSTICE POWELL: "It is likely that Mr. Justice Clark was known personally and admired by more lawyers, law professors and judges than any other Justice in the history of the Supreme Court of the United States."

MR. JUSTICE REHNQUIST: "I, along with the rest of the bench and bar of this country, can attest to the fact that if ever a man's career embodied the counsel of Theodore Roosevelt's that 'every man owes some time to the improvement of his profession,' it was Tom Clark's."

MR. JUSTICE STEVENS: "He earned the respect, admiration and affection of the entire federal judiciary by his evenhanded, perceptive and tireless participation in our day to day work."

MR. JUSTICE DOUGLAS (*Ret.*): "Mrs. Douglas and I . . . greatly admired Tom Clark for the stand he always took on the independence of the judiciary and his willingness to face every issue in turbulent times as well as in peaceful days no matter how difficult and bothersome they were."

Characteristic informal picture of Mr. Justice Clark, complete with smile and bow tie.

Tom Clark Eulogies

Chief Justice Warren E. Burger

Tom Clark is at once a very easy and very difficult man to talk about—difficult in the sense that the facets and ranges of his judicial activity were so broad that no brief ceremony would permit appropriate treatment. In the traditional Court announcement made from the bench on the Monday following his death, we alluded to his long career in the law beginning in Texas as a practitioner, then as a career lawyer in the Department of Justice, and the only one who had ever moved from the career service to the high post of attorney general of the United States. He served with great distinction in the office of attorney general, and after that was appointed a Justice of the Supreme Court of the United States.

He retired from the Court at age sixty-seven, still at the peak of his powers, in order to permit the appointment of his son Ramsey as attorney general of the United States. He took great pride in Ramsey in two respects: first, in the fact that his son succeeded to the office he had once held, and second, in Ramsey's exemplary performance in that high office.

When he retired in 1967, Tom Clark was then at a point most men or women would regard as the time for true retirement. But far from being the end of the career for him, it was the beginning of a new career—perhaps more accurately, the beginning of several new careers. He began to sit immediately on the courts of appeals all over the country and occasionally on the district courts; and in 1968, when the Federal Judicial Center began operations, having been created by Congress to act as the research and development arm for the improvement of justice, it was entirely logical that Tom Clark should be appointed as the first director of that important institution.

He brought to it a vast experience in the practice of law and in the administration of justice. But perhaps even more important than the experience was the standing and respect he had with the federal judges of this country. That enabled him to secure the acceptance of this new institution from federal judges, and he gave it standing and credibility in something less than the two years in which he served as its director and until he was required at age seventy, under the law, to retire from that position. No other person in America—lawyer, judge, or professor—could have given that center its standing and credibility as Tom Clark was able to do in two short years.

Then he returned to sitting on the courts of appeals and sometimes the district courts by assignment, and sat on the courts of all eleven circuits, something no other judge has done in the history of this country.

To all his work—as a lawyer, as attorney general, and on the bench—he brought a wonderful blend of common sense and compassion. He had a firm belief that law was not an end, but only a tool and that principles alone, however noble or great, were empty abstractions unless they were provided with the wheels for delivery of the meaning of those principles to the people.

We know—those of us who were close to him, and his family, know—that in recent years his health has not been sturdy. But as close as I was to him—going back and forth to his chambers and he coming to mine, our lunching together when I called on him for counsel and advice on the problems of the courts—I never heard a word of complaint leave his lips.

His life was unusual in many respects and in one that is especially worth noting: he did not need to wait until the end of his life for the recognition and acknowledgment of the great contributions that he made. He has

received, I think, every award, every commendation that is available in this country for improving the administration of justice. He took these with great modesty and often said that he didn't deserve them, that they were not terribly important, except as it was important to the people who were giving the award and thereby elevating and calling attention to the problems.

Even while he was on the Court, up to 1967, he was a roving missionary for the improvement of the administration of justice. If he was not the founder, he was one of the prime movers in creating the National College of the State Judiciary in Reno, Nevada, which has helped more than six thousand state court judges to become better judges. He chaired the very significant Williamsburg Conference on Justice in 1971. He was one of the key figures in the monumental project on Minimum Standards of Criminal Justice sponsored by the American Bar Association. He chaired the American Bar Association Committee on Evaluation of Disciplinary Enforcement. He was constantly traveling, attending seminars and conferences, all aimed at improving justice.

On the personal side, there are some things that perhaps deserve mention. I have said that, at least in my hearing, he never uttered a word of complaint about the health problems he encountered, nor did it seem to in any way impair or interfere with the dynamic activity in programs and work he loved so much. He was a man who seemed unhurried, and yet, with the fabulous activity that we saw during his lifetime—but see in better perspective now—it is astonishing that he could be an unhurried man.

Judges from all over this country, in the state and federal courts, called on him either in Washington or when he visited their cities to discuss their problems. His callers were not limited to judges or people in high places. The clerks in the Supreme Court building, the elevator operators, the messengers—any person having a problem—knew that he could go to Tom Clark. And in many offices and homes in this country, of high-ranking judges and bar leaders, there are framed on their walls the small card bearing "Chambers of Mr. Justice Clark," with a longhand message signed "T.C.C." That is why he was perhaps such an effective missionary; he had not only the technical qualifications and the vast experience, but he had a great goodness and humanity. People sensed he was interested in their problems.

He lived a rich and full life that was marked by dedication to duty and love of justice, and long before his death he had won a place in the memories of thousands of judges and lawyers of this country and a respect and affection in a way that few public men have experienced during their lifetimes.

Ramsey Clark was Attorney General, 1966–69, as his father had been, 1945–49.

Ramsey Clark

We come together to celebrate the life of a good man. In these troublesome times, too many find consolation in Shakespeare's observations that the death of fathers is the law of nature or that the good men do, is oft interred with their bones. I would suggest that the life of Tom Clark shows that neither need be so. He understood the wisdom of Solomon when the preacher told us "whatsoever thy hand findeth to do, do it with thy might." He knew what Holmes meant when he said, "energy is genius" and "functioning is happiness."

He had a prodigious energy and he functioned joyously all the days of his life. He knew that the true joy of life is being exhausted in a cause you yourself deem mighty. As a child I can recall him struggling for thirty minutes to untie a knot in my shoestring. No task was too small. He labored for a decade seeking to make the difficult and cumbersome machinery of our institutions of justice work well, knowing that many doubt we can cope in our time of great numbers and incoherence.

He labored because he believed an individual can make a difference. He saw in the collective energies of all of our people the chance for freedom and equality and justice. He believed we could overcome. And he might tell us today with the poet, "Mourn not the dead, but rather mourn the apathetic throng, the frightened and the weak who see the world's great anguish and its wrong yet dare not speak."

What guided his hand through these years? He shared the view expressed by Paul in his epistle to the Romans, "Love worketh no ill to his neighbor, therefore in love is the fulfillment of the law." He saw justice as Aristotle saw it—the practice of virtue toward others. And as Disraeli saw it—truth in action. He never had so high a commitment to any ideology that he ever permitted it to detract from his love for people. He was people oriented, to use an unhappy contemporary phrase. He wanted to do things that are good for humanity. He found them to do, and he did them with his might. He never asked anything for himself. He was concerned for others. He wanted to give. It can be said of him, as Auden said of Yeats,

> "In the deserts of the heart
> Let the nourishing fountains start.
> In the prison of our days,
> Teach the free man how to praise."

A constructive human being, he was a man of giant and gentle strength. He worked from morning to night—not as an end in itself, but as a means to an end. How often I've felt badly that I sat with him in the evening and read the paper while he scribbled out a dozen notes of counsel or consolation to friends.

Here was a man—we can see in his lesson how to meet the needs of our common humanity. Dostoevski recalls an incident in prison when a general visited and in the midst of all that misery he performed a simple single act of kindness. Dostoevski speculated that the handful of people among those who witnessed that act would in turn emulate it. Through them scores of others would see it and the good would radiate out for generations to come.

Tom Clark was a giver. He gave what once seemed to me too much: career, power, prestige—the work of a lifetime—cut off prematurely as he retired from the Supreme

Court. He never discussed it. He never even mentioned it. Instead, he turned to things like traffic courts and for three years he labored that the good people of this land brought before municipal courts would see principle processed there, truth found and applied in their cases.

He knew that in humility, as in darkness, "were revealed the heavenly lights." And he walked humbly but firmly. As was said of another, so was it with him. "Not often in the story of mankind does a man arrive on earth who is both steel and velvet, who is as hard as rock and soft as drifting fog, who holds in his heart and mind the paradox of terrible storm and peace unspeakable and perfect."

And these are some of the reasons that I believe Tom Clark is the best man I've ever known.

Looking over the first issue of the YEARBOOK *as the Society marked its first year were Justice Clark, first Chairman of the Board; Elizabeth H. Gossett, President, and Chief Justice Warren E. Burger, Honorary Chairman.*

The Supreme Court in 1941, when Associate Justice Harlan Stone was elevated to Chief Justice, included (front row) Stanley A. Reed, Wiley B. Rutledge, Stone, Hugo L. Black and Felix Frankfurter. The back row consisted of James F. Byrnes, William O. Douglas, Frank Murphy and Robert H. Jackson.

HARLAN F. STONE

My Father the Chief Justice

LAUSON H. STONE

My Father, Harlan F. Stone, served as Chief Justice of the United States from June, 1941 until his death in April, 1946. As Chief Justice he succeeded Chief Justice Hughes who had resigned after a most distinguished career. Father had served as an Associate Justice of the Court for nearly 16 years before his appointment as Chief Justice.

Our family lived from 1905 to 1919 in Englewood, New Jersey, a suburb of New York City. During those years Father was pursuing two careers—an academic career as a teacher and as Dean at the Law School of Columbia University from which he had graduated in 1898, and his professional career as a practicing lawyer. Both Mother and Father were New Englanders. Father was born on a farm in Chesterfield, New Hampshire and, when he was still a boy, my grandfather, concerned about education for his four children, moved to a farm near Amherst, Massachusetts. Amherst offered educational opportunities in the form of the State Agricultural College and Amherst College.

Father first attended the Agricultural College but was dismissed from that institution because of alleged disciplinary infractions. A year later he entered Amherst College where he "buckled down to business" (that's his New England expression) and graduated in 1894. His career at Amherst was a distinguished one: a top student, Class President, football player and voted "most likely to succeed". The following year, in order to earn money for law school, he taught science at the high school in Newburyport, Massachusetts. In order to make ends meet while attending Columbia Law School he tutored others and taught history at Adelphi Academy in Brooklyn.

In Englewood we lived in a large three story and attic house. In those days the house, as well as the streets, were illuminated by gaslight. Father believed that my brother, Marshall, and I should be brought up in the New England traditions of hard work and thrift which were so much a part of his own makeup. Accordingly we were assigned various chores such as keeping the sidewalks clean, winter and summer, tending the vegetable garden, feeding the chickens and stoking the coal furnace. We received modest compensation for these efforts which we were encouraged to deposit in the local savings bank.

In later years while I was in college and law school, summer work was decreed. As a result I had the experience of working in several different areas; and I have long since recognized the wisdom of Father's views on this subject. Mother told me that in those years she and Father had always saved at least one-third of Father's income despite the fact that they had ample household help, took trips to Europe and the like. That, of course, was in the days when income taxes were either non-existent or minimal.

In Englewood we did not see a great deal of Father because he left early in the morning for the City and returned only in the early evening, frequently after our bedtime. Saturday was much the same, since in those days it too was a working day. Sunday Father spent in various activities such as working in his flower garden, taking hikes and doing the usual chores that were needed around a house and, on occasion, working on briefs or articles.

One of my earliest memories is Father wakening me in the middle of the night, wrapping me in a blanket and carrying me out onto the lawn to see Haley's Comet. From time to time he performed for us simple experiments in physics and chemistry remembered from his year in Newburyport. He took us to New York City one day to ride in a horse-drawn trolley—the last day before the horses gave way to electricity. In this way he fostered in us an interest in science and unusual events.

Father was strict with us boys but always fair. On one occasion we became involved with some other boys in a prank at school. After the culprits were identified the principal of the school called the parents together to discuss the proper disciplinary measures. The other parents pleaded for leniency, particularly one parent who happened to be the Mayor. Father said nothing. Finally the principal asked Father for his views. Father replied "If the boys have done something wrong they should be punished."

Father's energy seemed endless. He surely needed it to teach his classes, which he evidently did with great success, carry out all the administrative duties as Dean of a growing law school and represent his clients at Wilmer & Canfield (later Satterlee, Canfield & Stone), the firm founded by Professor Canfield of the Columbia Law School. While Father's ability to successfully carry on these two careers was evidence of his affinity for and belief in hard work, I think part of the story was his ability to take a long vacation—two months or so—in each year after the law school term ended and the courts closed for the summer.

Shortly after their marriage in 1899, Mother and Father became fond of a small island in the Penobscot Bay, Maine, Isle au Haut by name, which later became the family's summer retreat for many years. Father was also interested in visiting foreign countries, so he planned to alternate his summers

between Isle au Haut and travel abroad. This led to trips to Europe for the whole family in 1909, 1911 and 1913. Both Father and Mother enjoyed the ten day sea voyage, necessary in those days, which provided a period of rest after the winter's activities.

In Europe Marshall and I were sometimes settled down in the care of our English nurse while Mother and Father took sightseeing trips. Other times we accompanied them while sightseeing with the result that both my brother and I have been confirmed travelers ever since. On one trip Father had some business with an English barrister who made his office in Lincoln's Inn.

I accompanied Father on one of his visits to this barrister and I can still visualize the deeply worn stone steps leading to his office and the walls of the office which were piled to the ceiling with briefs tied in small bundles with red tape. On another trip Father left us in Switzerland for about two weeks while he went to Russia in connection with an estate he was settling.

World War I put an end to the European trips for quite some time. After the War father's developing career as well as postwar conditions kept him from visiting Europe again until 1923 when the whole family went again. He was unable to go abroad again until 1930. Further trips in 1932 and 1934 were his last to Europe. During other years there were short trips to our West, Canada and Mexico. Otherwise vacations were principally spent at Isle au Haut. I feel certain that his interest in foreign travel was never fully satisfied.

With more summers being spent at Isle au Haut, Mother and Father decided in 1916 to build a summer home there which they occupied for all or part of almost every summer until the 1940s. Isle au Haut was a rustic and unspoiled spot. There were only about 100 year-round inhabitants, mostly lobster fishermen and their families, whose homes were scattered along the single road, about 14 miles in length, which went around the Island.

There was no telephone, no electricity, no paved road, only a few early Model T Fords, and no inside plumbing except in some of the summer homes. Meals were taken with one of the year round residents who operated a small boarding house for summer visitors. Old clothes and informality were the order of the day. The local citizens, many of whom were friends, could truly be described as "the salt of the earth"—industrious, honest and entirely unspoiled by the civilizing influences of urban life. Time was spent in hiking, boating, fishing, clambakes, evening rarebit parties and the like; simply enjoying the quiet and beauty of the Island was enough.

About the time Marshall and I went to college Mother decided to indulge in her long interest in art and during the summers took up watercolors with considerable success. After Father went on the Court, the applications for writs of certiorari came to the Island by the bagful. Many a day Mother and Father would take a picnic lunch and repair to some quiet cove or nearby island where Mother would paint while Father worked on the "certs". It was always a little sad when summer ended and it was time to return to "civilization" and the greater tasks of life; but, somehow, Father always returned with greater enthusiasm and renewed vigor.

In 1919 Father decided to move into New York City. His two careers seeemd to require even more time and the task of commuting was becoming more burdensome—from Englewood to Fort Lee by trolley, across the river by ferry to 125th Street, then to Columbia by trolley or on foot, downtown by subway in the middle of the day to the Wall Street law office and then, at the end of the day, by ferry to Hoboken, back to Englewood on the Erie Railroad and a walk home from the station.

I have always believed that the original move from the City to Englewood was prompted in part by the thought that it would be better for us boys to grow up outside the City. By 1919 that reason for living in Englewood no longer applied since Marshall was off to college and I was due to follow in two more years. Accordingly, we moved to an apartment at 116th Street

and Riverside Drive, just two blocks from the Law School and one block from the subway. While Father's life was made much easier, I'm sure that the move had its drawbacks. It deprived Father of his beloved flower garden to which he devoted much time when we were in Englewood. No longer could we take the frequent Sunday morning hikes to the Palisades or other nearby destinations. A circle of good friends was left behind and local clubs and activities had to be discontinued.

During the years in Englewood Father's many interests outside the law were developing. I have already mentioned his interest in travel. He developed a liking for music, both for opera and the symphony. I remember his enthusiasm after hearing Caruso sing. He had a "victrola"—wound up by hand—and a large collection of records—mostly classical music and opera—which were frequently played when he was home. He became interested in table wines due, perhaps, to the influence of a client in the hotel business, and he established a wine cellar, somewhat unusual in those early days.

Mother was an excellent cook with many recipes of her own; thus fostered, father's interest in food grew. Each Fall he and three other friends clubbed together to buy a barrel (literally) of some special cheese from New England. The barrel contained four 40 lb. "wheels" and was kept in our cellar. Periodically each "wheel" was divided into quarters which were distributed among the owners. One time Father bought some special cheese to take to Isle au Haut. In those days one had a wait of several hours between boats in Rockland, Maine and, as was customary, he left his suitcase with the local hotel clerk. When the time came to embark, he looked for his suitcase, but it could not be found. The hotel clerk had gone off duty, but was finally tracked down by telephone. "I put the suitcase in the back yard" he explained "because of the smell".

In 1924 we all went to Amherst so Father could attend his college class 20th reunion and visit relatives. Father's popularity among his classmates was most obvious. The gaiety and hilarity of such events was something new to me and I began to see a new side to his character—his fondness for people. I remember how surprised I was to hear everyone calling him "Doc", his college nickname, which I hadn't heard before, and which wasn't used in later years.

The big event of the reunion was the appearance of the statue of "Sabrina". At Amherst there was a traditional rivalry between the odd year classes and even year classes for the possession of this statue of a nymph, which had once graced the campus. The object was to gain possession of and keep the statue hidden while exhibiting it publicly at least once a year. There was great excitement at the reunion when a car appeared with "Sabrina" ensconced in the back seat. The car drove around one of the playing fields and then "Sabrina" was whisked away into hiding again. During Father's time in college he was deeply involved in the struggle for the possession of "Sabrina", and for a time "Sabrina" was hidden under the floor of the barn at Mother's home in Brattleboro, Vermont.

In 1923 after considerable thought, Father decided to terminate his academic career and become a full-time practicing lawyer. He had been offered the opportunity to head the litigation department of Sullivan & Cromwell, one of the top New York law firms where, incidentally, he had clerked his first year out of law school before embarking on his first teaching assignment. His decision was prompted in part by the increasing administrative burdens at the Law School and by differences with the University administration. As he phrased it, when talking with his friends, "there were too many dead cats to bury". He left Columbia at the end of the 1922-3 academic year, spent the summer in Europe and joined Sullivan & Cromwell in the Fall.

In August 1923 President Harding died and Calvin Coolidge, then Vice-President, became President. Coolidge and his family had lived in Northampton, not far from Amherst, and the Coolidge and Stone families were friends. Coolidge had attended

Two cabinet officers of the Coolidge administration who later went onto the high bench: Attorney General Harlan F. Stone and Secretary of State Charles Evans Hughes.

Amherst College, graduating in 1895, one year after Father. President Coolidge decided, some months after assuming the Presidency, to remove Attorney General Harry Dougherty around whom the scandals of the Harding Administration centered. Father's name did not figure in the speculation as to a successor. Coolidge called Father to Washington, but apparently only to discuss the names of several other candidates Coolidge was considering.

There was no indication that Coolidge might have had Father in mind. However, one Congressman prominent at the time, "Bert" Snell from upper New York State, who had been a classmate of Father's at Amherst, had been urging Coolidge to appoint Father. In April 1924 Coolidge again asked Father to come to Washington, this time for a breakfast meeting. There were several Congressmen present at the breakfast and after a short discussion Coolidge announced that he was appointing Father. This brought to an end Father's six months career as a partner in Sullivan & Cromwell. Under the then circumstances, Coolidge obviously needed a man of ability, integrity and no political entanglements. This was a bill which Father could well fill.

Coolidge's appointment of Father with little preliminary discussion was typical of that reticent New Englander. Father had many Coolidge stories which he delighted to tell. On one occasion, according to Father, he and grandfather were having breakfast at the Parker House in Boston when Coolidge, then Lieutenant Governor of Massachusetts, happened along. They asked him to join them. He ate in silence and all attempts at conversation brought little more than grunts from the Lieutenant Governor. Finally Coolidge finished, stood up to leave, shook hands and left saying: "Nice to have had the chat with you". Father from the beginning interpreted Coolidge's famous "I do not choose to run" to mean that he would not accept nomination for another term. When Father asked Coolidge why he reached that decision Coolidge replied "It's best to quit when they still want you".

Father had served slightly less than a year as Attorney General when Coolidge nominated him to replace Justice McKenna who was retiring from the Supreme Court. Some people thought at the time that Father was being "kicked upstairs" as a result of his carrying out his duties as Attorney General without regard to the political conse-

quences of the actions he took and without yielding to personal considerations or political pressures. I don't think that Father ever believed this. I do remember, however, his telling me of the difficulty he experienced in securing the appointment of a competent United States attorney in New York. At that time New York had one Democratic and one Republican Senator, and the system of "senatorial courtesy" required that the appointee be approved by both.

The difficulty was to find someone who met Father's high standards who could also secure approval from both political camps. Agreement seemed impossible. Father told me that he finally suggested that each Senator prepare a list of ten acceptable names, that he would do the same and that the first name appearing on all three lists would receive the appointment. The lists were prepared but no name appeared on more than one list. Finally he "took the bull by the horns" and submitted from his list the name of Emory R. Buckner, a lawyer so eminent that neither senator could publicly object and the appointment finally went through.

Whatever the reason for Father's appointment to the Court, it was generally well received. However, opposition to his confirmation developed in the Senate based largely on the fact that he had refused to drop a previously obtained indictment of Senator Wheeler without conducting a further investigation of his own. That investigation developed additional evidence unfavorable to the Senator, so Father determined to let matters take their normal course. Another objection to Father's confirmation was the fact that as a lawyer he had represented J. P. Morgan & Co. and other "Wall Street interests". After a great deal of rhetoric and two appearances before the Senate Judiciary Committee, the appointment was confirmed with only six voting against it. Senator Norris, the leader of the opposition, was still in the Senate sixteen years later when Father was appointed Chief Justice. On that occasion the Senator not only supported Father but publicly acknowledged that he had done Father an injustice in opposing him in 1925.

Father's appointment to the Court made it evident that he would spend the rest of his life in Washington. Just before coming to Washington he had committed himself to buy a cooperative apartment in New York City. As things turned out he never spent a night in that apartment which was not ready for occupancy until the Fall of 1924.

While he was still Attorney General the household belongings were moved from Riverside Drive into the apartment with the expectation that he would eventually return to New York Law practice. Mother and I spent a few nights in the apartment early in 1925 but the appointment to the Court shortly thereafter ended any possibility of his ever using the apartment. Consequently it was sold. Mother and Father lived in an apartment hotel in Washington until they were able to build their own home on Wyoming Avenue in Washington which they occupied in 1927.

These moves had one amusing aspect. Before we left Englewood, prohibition had descended on the land. Although Father recognized the validity and binding effect of the 18th Amendment and the laws passed pursuant thereto and enforced them vigorously as Attorney General, he thought they were bad laws and were an undue infringement of individual freedom. He thought the prohibitionists were "do-gooders" and referred to the WCTU as the "We-see-to-you-ers". He did not care for "hard liquor" and rarely took any, but he did enjoy and saw no harm in table wines, sherry and the like.

When we moved from Englewood to New York he obtained the government permit needed to move his wine cellar. When the move from Riverside Drive to the cooperative apartment was made the necessary permit was again obtained. However, when he was appointed to the Court he could not move the wines to Washington because transportation of alcoholic beverages into the District of Columbia was denied to all except representatives of foreign governments. Thus there was no legal way for him to enjoy any of the wines he had accumulated. Before selling the apartment he informed his

When a model for a judicial figure was sought for the mural, "The Triumph of Justice," in the Department of Justice building, muralist Leon Kroll selected Stone himself (third from left, in black judicial robes).

Chief Justice Hughes' administration was charged with being dominated by "nine old men." In this cartoon in the Washington Evening Star, the retired Chief Justice asks Chief Justice Stone if life on the Court is any easier now.

New York friends that any who were willing to do so might come to the apartment and take away any wines they would like to have. Many of them did so. I doubt whether many of them obtained a proper permit even though they had been warned that such a permit was needed. A major portion of the wines, however, had to be left in the apartment. I was told some years later by a mutual friend that the purchaser not only consumed the wines but found them delicious.

When I was in Law School one of Father's New York friends gave me a bottle of wine he had taken from the apartment and suggested that some time I might wish to take it down to Washington. This I did, not being quite sure how this action would be received. I was somewhat surprised by the vehemence with which I was reprimanded, especially by Mother, for not only violating the law, but for thereby jeopardizing Father's reputation should the facts become known. I noticed, however, that a few days later the bottle of wine appeared on the dinner table and was enjoyed by all.

Father and Mother made many friends in Washington and they frequently entertained in the home they had built. They limited their social engagements to some two or three a week, primarily because of the priority Father accorded to his work on the Court. Father was especially interested in making the acquaintance of many of the representatives of foreign governments, and he became friends with many of them. He was intrigued by the wife of the Ambassador to India, who, following Indian custom, wore a sari and a ruby in one side of her nose. The Finnish minister gave Father a recording of Sibelius' first symphony which became our introduction to that musical master.

When the Norwegian minister was recalled, after prohibition ended, Father acquired part of his wine cellar. Mother and Father and the Swiss minister and his wife were members of a small group that met periodically to savor the delights of spare ribs, pigs knuckles and sauerkraut. Mother followed the custom, which was then observed by wives of the Supreme Court Justices of Monday afternoon "at homes". Occasionally Father would feel free to join the visitors for a few moments, usually surprising the guests by appearing through a concealed door leading from his office directly into the living room.

Father followed the practice of taking a new clerk each year from the Columbia Law School, always one of the top students selected by the Dean. At that time a number of Justices kept their clerks for several years running. I think Father's practice helped to set the pattern of annual clerkships which has become so common today in many courts, including the lower courts. Father took a special delight in working with these brilliant young men; it served as sort of an extension of his teaching career. Without exception the former clerks have had successful careers and always seemed to have felt great affection and respect for Father. For many years they organized an annual dinner for him, and I am the proud possessor of a handsome desk set which they presented to him as a memento at such a dinner in 1940.

Many people remarked upon father's vigorous good health. He was large boned with a broad frame and a tendency to being overweight. It was easy to imagine that, as had been the case, he was an effective football player in college. He was careful to keep his weight under control and followed a practice of taking a brisk walk for one-half to three-quarters of an hour every morning before breakfast and again in the evening before dinner whenever possible. From time to time he was joined on these walks by various friends. Frequently the pace he set was a little too much for others; there was no dawdling. I was in Washington a good part of World War II and stayed part of the time with Mother and Father. During that period I joined Father on his walks whenever I could.

Father was generally too busy to become involved in sports. He loved fishing, principally fly-fishing, but did not have much opportunity to enjoy it. One summer we were

at Badeck, Nova Scotia and I remember sitting in the boat with him while he fished. On one of our trips to Europe he fished for salmon in the Wye River in Great Britain. Later he joined a small fishing club on Long Island where he fished occasionally. During his early days in Washington one of his friends persuaded him to try golf. Once or twice I caddied for him and I remember that Chief Justice Taft was a member of the foursome on one occasion. However, golf took too much time and he soon gave it up.

One of father's friends in Englewood was an early automobile enthusiast. He persuaded Father to learn to drive with a view to buying a car. For some reason Father was not an apt pupil. When the time came for him to take his driving license examination, Marshall and I accompanied him and his enthusiastic neighbor. Everything went smoothly until the Examiner asked him to park and then resume driving. He remembered to put on the emergency brake but neglected to take it off, and so couldn't get the car started again. He failed to pass the test. I fear that we boys took a somewhat perverse delight in witnessing this rare failure on Father's part. We moved into town soon after that and the idea of owning a car never came up again except that some years later Mother and Father did acquire a Ford which was used solely at Isle au Haut. Due to the limited distance one could drive there, it was never used very much.

Father was quite skillful in handling boats which were a necessity at Isle au Haut. He had a motorboat which he had built on one of the nearby islands which he named "Sabrina" after the nymph of Amherst. He also had a rowboat which was necessary for landings and there was a small sailboat for us boys. The "Sabrina" took us on many pleasant trips and picnics.

Father enjoyed keeping up his connections with the Columbia Law School. He was frequently visited in Washington by former students, former law clerks and members of the faculty. He carried on an extensive correspondence with many of the latter. Many times when I was with Father people would greet him as "Dean Stone" indicating that they were former colleagues or students. He attended Columbia functions whenever his schedule permitted.

When Chief Justice Taft died there was considerable speculation that President Hoover might appoint Father as Chief Justice. This was fostered no doubt by the fact that the Hoovers had become close friends going back to the time Father was Attorney General and Mr. Hoover was Secretary of Commerce in the Coolidge cabinet which also included Charles Evans Hughes as Secretary of State. Father had joined the Hoovers on short fishing trips to Florida and elsewhere. On one of these, as he was proud to relate, Mother caught the largest sailfish of the season and received a gold button commemorating the event.

Father was also an active member of Hoover's "Medicine Ball Cabinet". As a memento Father had a medicine ball autographed by all the players. There was also talk of the possibility of a cabinet post for Father, but Father would never have seriously considered leaving the Court absent some national emergency. I never knew how seriously Father took this speculation concerning appointment as Chief Justice and I never heard Father express any disappointment when the President appointed Mr. Hughes. The Hughes' also were close personal friends of Mother's and Father's.

Much later when Mr. Hughes resigned as Chief Justice there was again speculation that President Roosevelt might appoint Father. However, Father had never been particularly friendly with Roosevelt and, in fact, had felt obliged to rebuff him on one or two occasions. One such occasion arose when the President asked Father to chair an investigation into wartime problems with the supply of synethic rubber. This Father refused to do on the ground that a judge should not also be involved in problems of the executive branch. Another occasion was when the President sought Father's views as to certain proposed legislation. When the appointment as Chief Justice came Mother

and Father had already left Washington for the summer and were spending a few days at my home in Brooklyn. I have the impression that Father did not know in advance who the President would appoint.

Father's rejection of the proposal that he investigate the synthetic rubber matter was evidence of his strong feeling that any Supreme Court Justice should not become involved in other activities either involving the Government or taking substantial time from the work of the Court unless he first resigned from the Court. Thus he did not approve of Mr. Justice Jackson's becoming involved in the Nuremburg trials. He felt that the work of the court was too important to have a Justice be absent for substantial periods or be involved in other major endeavors especially should the latter have any political involvements.

On the other hand he did not feel that all outside involvement was taboo. The Chief Justice is by law ex officio Chairman of the National Gallery and because of his interest in art Father took great interest in that endeavor. I believe he was instrumental in bringing about one important acquisition by the Gallery. He also was happy to serve as a Trustee of Amherst College and took great interest in the Folger Shakespeare Library in Washington which was under Amherst direction. Service in these capacities did not, of course, run counter to Father's basic principle.

Father was also concerned about sitting on cases where he might have some possible conflicting interest. For example, he declined to sit on cases involving corporations in which he owned securities or else he sold the securities and did not repurchase them. He also declined to sit in cases where the litigant was represented by his former law firm or by my firm. He did make an exception in the so-called "saboteur" case in which habeas corpus proceedings were brought on behalf of the eight Germans who were secretly landed here during the War for the purpose of sabotaging war plants.

I had been ordered to assist one of the officers who had been appointed to defend these eight Germans who were to be tried in secret before a military commission appointed by the President. It was soon evident that questions concerning this procedure might end up in the Supreme Court. Defense counsel sought a writ of habeas corpus and Father convened the Court during its summer recess to consider the questions raised. He cross-examined me as to my exact involvement and he decided to disqualify himself. However, counsel on both sides waited on him prior to the argument of the case and urged that he nevertheless sit. At the opening of Court he stated that he was participating in the case only at the urging of counsel on both sides. The court was unanimous in its decision in favor of the Government which was announced promtly. Father wrote the opinion which was not published until the Court convened again in the Fall.

Father loved stories about the Court and the Justices. Two come to mind. On one occasion a lawyer was waxing eloquent in his argument before the Court when Chief Justice Taft tested him with a question, whereupon the lawyer replied "That is answered in your Honor's article in the *Yale Law Journal* where you said . . .". Shortly thereafter another Justice raised another point. Quick as a shot came the reply "That is answered in your Honor's opinion in the . . . case." The argument then continued without further interruption for some time. Finally, Mr. Justice Holmes leaned forward and said "I'd like to ask you this question" —a pause followed—"Well, on second thought, I'd better not."

Another story, allegedly true, involved the gold clause cases during the early years of the Depression. During the argument the word "specie" frequently came up. One of the lawyers who was arguing with particular vehemence came to this word when suddenly his false teeth shot out of his mouth in the middle of a sentence. According to Father, the lawyer caught his teeth in mid-air, popped them back into his mouth, and, with the greatest aplomb, went on to finish his sentence and the argument.

Father was a great admirer of Mr. Justice Holmes. I was priviliged to go with Father on two or three occasions when he went to see Holmes and my Father's admiration for him was easy to understand. There were many Holmes stories. Once he remarked to his colleagues that it was just sixty years earlier that he had been left for dead on the battlefield in the Civil War. Another time Holmes, in drafting an opinion, used a word in an unusual sense. His law clerk questioned whether the word meant what the Justice intended. Holmes got out the dictionary which gave the meaning Holmes intended as an archaic or secondary meaning. "But Mr. Justice" the clerk protested "Not one man in a hundred would know that meaning." "Well," Holmes replied, "he's just the man for whom I'm writing."

As I have mentioned Mother took up watercolors when Marshall and I left home. She had considerable talent and as her skill developed she was invited to put on a "one man show" at the Corcoran Gallery in Washington. The exhibit was well reecived and Mother was delighted when she sold her first painting. Father took great interest and pride in her accomplishments and encouraged her greatly. She had other successful exhibitions and derived much enjoyment from her work. Father was an admirer of the works of Joseph Pennell, the great etcher, and he arranged for Mother to stay for a few days in the Brooklyn Heights apartment in which Pennell once lived, thus giving her the opportunity of painting some of the scenes near the Brooklyn Bridge which appeared in many of Pennell's works.

Father also took pride in Marshall's accomplishments in his chosen field of higher mathematics. I remember well that Marshall, having completed his doctoral thesis when he was just 21, presented Father with a copy which was printed in a book about two inches thick. Father opened the book, looked at some of the pages which were cluttered with hieroglyphic-like mathematical formulae and then said "Marshall, I can't make head or tail out of it."—"Dad, you have it upside down".

Despite Father's robust good health he had two serious illnesses. One was in the early days when we lived in Englewood and he contracted a severe case of typhoid. He was unconscious for weeks. I can still remember the first time I was allowed in his room and my astonishment in seeing that he had acquired a beard several inches long. Again, after he went to Washington, he came down with amoebic dysentery. That was before sulfa drugs and antibiotics, so he had a long, hard illness of some months. After each of these illnesses he recovered fully and once against was restored to all his former vigor and strength.

We all thought that he would live long, perhaps into his 90's, as his father had. However, on April 22, 1946, after I had accompanied him on his morning walk and after he left home in apparent good health and spirits he suffered a massive cerebral hemorrhage while reading an opinion in open court. He died later that day at the age of 74.

I won't attempt to comment on Father's career on the Court—a subject better left to those who are closer students of such matters and who may be more detached than I. I can, however, safely affirm that his was a rich and rewarding life, filled with many varied interests; that he derived a great satisfaction from performing the tasks undertaken; and that he richly merited the great affection and esteem which all his family felt for him.

The twisting trail of Aaron Burr led from the duel site at Weehauken, N.J. where Alexander Hamilton was slain (1) to Blennerhasset's Island in the Ohio River (2), down the Mississippi to Natchez where he was warned of the plan to seize him in New Orleans (3), to his capture near present-day Biloxi (4) and his return to stand trial in Richmond (5). Five years later, somewhere off the Carolina coasts, his beloved Theodosia was lost at sea. (6)

VICTIM OR VILLAIN?

The Trials of Aaron Burr

WILLIAM F. SWINDLER

One dark night in the summer of 1804 a brooding figure, swathed in a cloak to avoid recognition, boarded a small boat on the Hudson above New York City and made his way to the New Jersey side. After a hurried visit with friends, the traveler was off again, keeping to back roads where he was less likely to encounter patrols, until he reached Philadelphia. In due course, after learning a warrant had issued for his arrest and fearing that extradition papers were en route from New York, the fugitive took to sea, on a vessel which slipped down the Chesapeake and into the Atlantic, where it made its way to St. Simon's Island off the Georgia coast. There he remained, with wealthy friends, until late in the fall. Finally he returned to the mainland, traveling through South Carolina for a visit with his daughter, the wife of the governor, and on to the nation's capital to preside over the United States Senate during the final session of the Seventh Congress.

Thus did Aaron Burr, who came within a single vote of winning the Presidency itself in 1801, begin a saga unequalled in romance, mystery and tragedy in American political history. Under indictment in New York and New Jersey for the slaying of Alexander Hamilton in a duel the previous July, there was no hope of returning to his successful law practice. As for a continuing career in national politics, that possibility seemed to be closed as well; Thomas Jefferson had chosen his own running mate for the second term, taking advantage of the Twelfth

Amendment to the Constitution which had been adopted after the deadlock of 1800, and which got rid of the anomalous procedure in the original Constitution which permitted the new President's strongest rival automatically to become his Vice-President.

By March 4, 1805 Burr would be a 49-year-old political outcast—virtually a man without a country. Yet he would end his term in a characteristically spectacular fashion, presiding for the last month over the impeachment trial of Justice Samuel Chase. Indeed, Jefferson had been confident that Burr's presence would insure the conviction and removal of the cantankerous Federalist from the Supreme Court and thus open a breach in the solid ranks of his political opponents in the judiciary. Certainly the theatrics of the trial were readymade for Burr; his colleagues of the Senate flanked him on either side of a semi-circle, and there were temporary galleries, draped in blue cloth, for the swarms of spectators. A part of these galleries, wrote a biographer, "the vice-president, with his usual gallantry, reserved for the ladies." But as to the trial itself, Burr—one of the nation's leading lawyers—was reported to have presided "with the dignity and impartiality of an angel, but with the rigor of a devil."

Burr earned no debt of gratitude from Jefferson; Chase was acquitted, in this penultimate act of the third Vice-President. The final act—fully as theatrical—came on March 2, when Burr delivered his farewell address to the Senate. The speech was all that the most lurid melodrama could have called for; a reporter declared that all the Senators "were in tears, and so unmanned that it was half an hour before they could recover themselves sufficiently to come to order and choose a vice-president pro tem." With this ultimate flamboyance, Aaron Burr moved out of history into legend.

He came, as the saying used to have it, of good stock. His father, the first Aaron Burr, was a scholar, theologian, and the second president of the College of New Jersey (later Princeton); his mother was the daughter of Jonathon Edwards, the great New England religious leader. The Edwards family reared young Aaron and his sister Sally after the death of their parents, and the children were later tutored by Tapping Reeve, founder of one of the early American law schools, who prepared Aaron to read for the bar and married Sally.

Burr's rivalry with Hamilton began during the Revolution, when both served in the headquarters of General Washington. Hamilton rose in Washington's favor, while Burr was transferred to another command. Although he apparently proved himself a good officer, Burr resigned after two years of service, began reading for the bar under New Jersey and New York jurists, and in 1782 was admitted to practice and—in a typically unconventional act—married the widow of a former British officer, a woman ten years older than he. The following year the one supremely joyful event of his life occurred, with the birth of a daughter, the precocious and beautiful Theodosia.

The Burr-Hamilton rivalry continued in the eighties, with both men dividing the leadership of the New York bar and then the struggle for control of New York politics. In the next decade, Burr seemed to gain the advantage, serving as United States Senator from 1791 to 1797. With a growing following of young zealots, Burr maneuvered the united anti-Hamilton factions in New York and thus threw the state, in the elections of 1800, to the anti-Federalists. In the process he adroitly arranged for his own endorsement as Vice-President; and then, in the deadlocked election results, found himself tied with Jefferson for the Presidency itself. So close did his abilities and ambitions take him. It was too much to expect that in the prime of life, despite the disasters which then began crowding in on him, Aaron Burr was prepared to retire to a lesser role than that to which, he was convinced, destiny would eventually call him.

The duel was provoked by Hamilton's lifelong suspicion of Burr's motives, and his imprudent comments on them which in the code of the day could not be permitted to pass unchallenged. When the former Treas-

Aaron Burr (left) and his daughter Theodosia (right) were among the "beautiful people" of the early Republic. Both had a high degree of charisma, and they were devoted to each other. Theodosia married John Alston, later governor of South Carolina, and had one son, Aaron Burr Alston, named for his grandfather.

ury Secretary was reported to have said in public that his rival was "a dangerous man and one who ought not to be trusted with the reins of government," the Vice-President sent a peremptory demand for an apology. The ritual required rejection of the demand, and thus led inexorably to the field of honor—in the improbable vicinity of Weehawken, New Jersey.

From the summer of 1804 until March 1805, the plot began to thicken. The Hamilton-Burr rivalry had extended even to the interests of both men in the Spanish borderlands to the south and southwest, and imperialist adventures to conquer them. Burr's first stop on his flight from New York had been at the home of a naval officer, Commodore Thomas Truxton, with whom he made big talk about a seaborne attack upon Florida or Mexico; and for some time previously Burr had also been meeting with General James Wilkinson, a career army man with whom the Vice-President had a long acquaintance. In his stop in Philadelphia, Burr had also approached the British minister, Anthony Merry, with a suggestion that Great Britain finance a project to separate the western states and territories from the rest of the Union.

Neither Burr nor Merry made any serious effort of record to pursue this subject, but when he returned to Washington in December, Burr and Wilkinson began frequent meetings over maps of Florida, Louisiana and Mexico, and shortly after his valedictory speech in the Senate, the former Vice-President set out for the west. Wilkinson had been posted to St. Louis, from where Jefferson would soon send him to take command of American forces in New Orleans. Burr's itinerary took him first to Pittsburgh and thence down the Ohio and Mississippi, calling at all the river towns and traveling the wilderness trails overland.

The conversations with Merry came quickly to the attention of the Spanish minister, Casa Yrujo, who found it to his country's advantage to leak the information to other government circles, foreign and domestic. For the ensuing year, however, nothing seemed to come of Burr's various plans; he returned to Philadelphia after his tour of the West, and even broached with Jefferson the subject of a possible diplomatic appointment. There were rumors that Burr might become the civil governor of Louisiana, although these seem to have been started by Burr's own followers. Always a charismatic personality, he was understood to be assured

of a new seat in the United States Senate from any of the western states, whose leaders had fallen under his spell. During this period there was even an approach to Yrujo by Burr and a new associate, ex-Senator Jonathon Dayton of New Jersey; since their proposals for Spanish financing of some hypothetical adventures in the West could hardly have included a threat to Spain's own colonies, it seems likely that instead the men held out the prospect of separation of the trans-Appalachian region from the rest of the Union.

Such talk was common enough, and Spain was well aware that it alternated with plans for attacks on her own territories. Andrew Jackson had more than once indicated his readiness to liberate Florida for the United States, while Wilkinson, as later evidence would prove, had been talking a Spanish pension for years to insure his relative loyalty. The "Citizen Genet" excitement of the French Revolutionary era, which had prompted passage of the Alien and Sedition Acts, had seen a number of French agents fanning out through the west to test the interest of the frontier in breaking away from the older states. Senator John Brown of Kentucky had conversed sporadically with French, English and Spanish representatives; and although the opening of the port of New Orleans by the Louisiana Purchase had presumably disposed of much of the western discontent over means of shipping their produce abroad, the fact remained that there were large numbers of persons who felt that a government in Washington would always be too remote to accommodate their interests.

By the summer of 1806, Burr's prospects for bringing all of these discontents to a head suddenly began to assume alarming proportions. In his first trip to the Ohio Valley, Burr had made the acquaintance of a wealthy Irish immigrant, Harman Blennerhasset, whose elaborate feudal estate on an island in the river near Marietta, Ohio comported with Burr's own grandiose ideas. (There was also Blennerhasset's accomplished and attractive wife, whom the chronically philandering ex-Vice President doubtless did not fail to notice.) In any event, Burr now arranged to have the island become a staging area for boats, men and supplies which were intended for an expedition downriver. He had spent the previous months raising modest sums from friends in New York, his son-in-law, Governor Joseph Alston, in South Carolina, and supporters in Kentucky. All had been for the announced purpose of developing a large tract of land on the Washita River on the western border of Louisiana, known as the Bastrop grant. This area was to be settled by a group of adventurous young men capable of serving as troops in any military uprising.

The communications with Wilkinson now grew more portentous. For a number of years, the two men had occasionally corresponded in a cipher code which Wilkinson had devised, and in this code Burr wrote to his longtime associate when he was ready to leave for New Orleans. The two men were alike in many respects, the former Vice-President brilliant and quite possibly mentally unbalanced at times, the career general pompous and impatient for public recognition of his own greatness. All of the bits and pieces were now being put together by Burr's enemies: the conversations with Truxton, Merry and Yrujo; the raising of funds for an assembling of men, boats and materiel at Blennerhasset's Island; and the availability of the entire military resources of the nation under Wilkinson at New Orleans. Given the circumstances, and the knowledge of the chronic proposals for separatism in the West, the Jefferson administration was now aroused, and in late November 1806 the President issued a public proclamation warning against giving aid and comfort to Burr and his activities.

Burr, Dayton, and probably Wilkinson, all had anticipated that growing British bellicosity toward Spain would distract Madrid's colonial administrators from New World affairs sufficiently to permit American adventures along the entire Gulf Coast. But the death of William Pitt the Younger that spring, and the decision of Congress to seek to buy Florida as it had recently bought

Harman Blennerhasset, a British immigrant, created a baronial estate on an island in the Ohio River which became the "staging area" for the cryptic adventure which Burr subsequently led downstream toward New Orleans.

Louisiana, left it to the tyro empire builders to provoke their own incidents. Meantime, Blennerhasset took it upon himself to publish a series of local newspaper articles renewing the proposals to separate the Western states from the rest of the nation. The situation smelled sufficiently of treason to prompt United States attorneys in Kentucky to seek, in two separate instances, grand jury indictments of Burr. By appearing personally before both grand juries, the former Vice-President cleared himself without difficulty.

Meantime, after Burr had proceeded to Nashville, Andrew Jackson's stronghold, federal authorities led a raid on Blennerhasset's Island to break up the grand conspiracy. They netted a few boats, fewer men, and scarcely any weapons; these, along with such trophies as Blennerhasset's violin—the lord of the manor having fled—constituted the meager evidence on which government prosecutors, at the later trial in Richmond, would have to attempt their proof of treason. By late autumn the remaining flotilla had made its way to a rendevous with Burr at the mouth of the Cumberland, and Burr had dispatched to Wilkinson a summons to glory and great deeds.

But the Presidential proclamation had reached the general ahead of the letter from Burr, and frightened him off any plans he might have had to join in Burr's quixotic schemes. Jeffersonian newspapers throughout the West were busy denouncing the former Vice-President, and such surviving sentiment as there was for separatism was now prudently hushed. The time had come to cut losses; Wilkinson elected to play the loyal soldier, and arrested the two youthful supporters of Burr when they reached New Orleans bearing the cipher letter. The two—Samuel Swartwout and Dr. J. Erich Bollman—were roughly handled, and thrown on board a ship for a stormy passage to Washington to stand trial for treason. Meantime, the letter—with Wilkinson's own version of the translation of the code—was sent by faster overland courier to the President.

By January 1807 the Burr flotilla had reached the settlements on the Mississippi above Natchez, where the ex-Vice President learned of Wilkinson's treachery and the trap now prepared for him in New Orleans. Burr at once "put himself on the country"—appearing before a third grand jury and being absolved of criminal actions for a third time. But the judge—Thomas Rodney, father of Jefferson's Attorney General Caesar Rodney—refused to release him from his bond; and Burr suspected that there was a conspiracy with Wilkinson to get him into the general's clutches. Accordingly, he fled into the wilds of the Mississippi Territory, disguished as a rough frontiersman; but he was recognized and captured near Mobile, and marched under guard to Richmond, Virginia where the United States Circuit Court had jurisdiction over Blennerhasset's Island.

The great treason trial under Chief Justice John Marshall, sitting as Circuit Justice with District Judge Cyrus Griffin, is portrayed in the two films and described in the article on the films which follows. It sufficeth here to note that on March 30 a preliminary investigation began which satisfied Marshall that

there was sufficient evidence to hold Burr on a charge of misdemeanor—planning an expedition against Mexico—while the question of treason was left for a fourth grand jury. After much maneuvering by an array of distinguished counsel for the defendant, and Burr's own bold motion for a subpoena *duces tecum* to issue to Jefferson himself, the grand jury of fourteen Jeffersonians and two Federalists indicted Burr for treason.

The government's case was exceedingly tenuous; aside from the sparse evidence from the raid on Blennerhasset's Island, there was the personal appearance, for the prosecution, of General Wilkinson himself, in full dress uniform, and his own narrow escape from indictment when the jurors grew suspicious of his apparently intimate knowledge of Burr's plans. Another witness, General William Eaton, was shown to have been paid off by the government, as to some long-standing claims, before his own testimony. Finally, the government was unable to deny that Burr was nowhere near Blennerhasset's Island at the time of the raid, and thus it was impossible to prove an overt act of levying war against the United States as required by the constitutional definition of treason. By early September, Burr was found not guilty "on the evidence submitted," both as to the treason and misdemeanor charges.

The saga of Aaron Burr was far from over, however. He and Blennerhasset were remanded for trial in the District of Ohio, but neither man ever appeared in that jurisdiction, and the Jeffersonians at length abandoned their efforts to convict them. Burr, together with Swartwout, whose petition for *habeas corpus* had freed Bollman and himself, skirted Baltimore—where pro-administration mobs hanged him in effigy as in Richmond they hanged both Burr and Marshall—and proceeded to Philadelphia. But throughout the winter Burr was hounded by creditors, besieging him for satisfaction on their advances to finance his great projects which had come to naught.

In June 1808 Burr sailed for England, still pursuing the will-o'-the-wisp of a Mexican military project. The American ministers prevailed upon the British not to lend him official encouragement, and the Spanish *junta,* which had come to power in Madrid and made peace with England, eventually persuaded London to expel him. But in February 1810, having wandered through northern Europe in the interim, Burr showed up in France, convinced that Napoleon Bonaparte would be interested in his final and most fantastic project. This called for a revolt in Louisiana and Mexico and the simultaneous provoking of a war between

General James Wilkinson, commander of American military forces in New Orleans and a paid Spanish agent, sought to turn state's evidence against Burr when a treasonable conspiracy was alleged.

Britain and the United States, during which the French could regain Canada. The real hope of the West, wrote Burr in one of his many memoranda to the Ministry of Foreign Affairs, depended upon a leader "superior in talent and energy"—which Burr obviously assumed was a readily recognizable description of himself—who could provide the American people with "something grand and stable"—the latter a quality which few friends or foes would attribute to him.

Again, all of this came to naught. While the correspondence in the French archives is far better evidence of treason than Jefferson had ever been able to find for the trial in Richmond, the simple fact was that by now no one was taking Burr seriously. By the winter of 1811 he himself saw the end of the dream of empire, and began to think of returning to the United States, and particularly to Theodosia.

Theodosia, after all, had been the one constant point of reference for him. Since the age of eleven, she had been his pupil and confidante, the belle of New York society at sixteen, the bride, at seventeen, of a rising South Carolina political and social leader, the mother, at nineteen, of Aaron Burr Alston. In 1806 she and her son had been guests at Blennerhasset's Island; in 1807 she and her family had taken up residence in Richmond for the duration of the trial; in 1808 she was with her father when—once more in disguise—he set off for his exile.

The blows of fate rained down remorselessly. Burr returned to New York in May 1812—the murder indictments for the Hamilton duel having been quashed. But in July came word that Theodosia's son had died. By December there was hope of a reunion, and Governor Alston put his wife, in the company of an attending physician whom Burr had sent from New York, aboard the clipper *Patriot* out of Charleston harbor. The ship was never heard from; it probably went down with all aboard in a terrible January storm off the Outer Banks of North Carolina, or—as legend suggests—it may have been overtaken by pirates and crew and passengers murdered. To the end, the real love affair was between father and daughter; at the height (or depth) of his exile, Theodosia had written him with characteristic adulation: "I had rather not live than not be the daughter of such a man."

For another quarter of a century, Burr himself lived on, his talents as a lawyer as undimmed as his personal magnetism for both men and women—and particularly women. At the age of seventy-seven (1833) he married for the second time—a wealthy widow, Eliza (or Betsy) Jumel, twenty years his junior. Within a year, his new wife brought suit for divorce, as Burr threatened to run through all her property. The divorce decree was granted September 14, 1836—the date of Aaron Burr's death.

EQUAL JUSTICE UNDER LAW

Documentary Films on the Supreme Court

"Equal Justice Under Law"—the motto on the front of the Supreme Court building as well as the title for a long-established and popular booklet produced by the Federal Bar Association—is now also the series title for five documentary films on the American constitutional heritage as exemplified in epochal constitutional cases under Chief Justice John Marshall. The films began showing over Public Broadcasting Service stations throughout the country this fall, as well as to schools and colleges. A "premier" showing of the first film, on *Marbury v. Madison,* was held at the second annual banquet of the Supreme Court Historical Society last May.

Originally commissioned by the Bicentennial Committee of the Judicial Conference of the United States as part of the federal judiciary's observance of the national bicentennial in 1976, the concept of the film series was soon broadened to achieve a more lasting public interest. In the first place, it was recog-

nized at the outset that there was no two hundredth anniversary for the court system to be marked in 1976 (see "Of Revolution, Law and Order," in YEARBOOK 1976). The judicial article (Article III) of the Constitution was not framed until 1787. Thus the releasing of the films in 1977 was an appropriate commemoration of the 190th anniversary of the work of the Convention at Philadelphia which drafted the Constitution.

In the second place, it was recognized that the best means of recognizing the function of the judiciary in the American constitutional system would be to dramatize the first principles of American constitutionalism for which the War of Independence was fought and for which Marshall's Court became the most articulate spokesman.

Prepared by WQED/Pittsburgh, the film series deals with a central idea in each of four cases—the renowned judicial review argument in *Marbury v. Madison* in 1803; the Burr treason trial (see accompanying article on "The Trials of Aaron Burr") in Richmond in 1807, which illustrated two fundamental principles, of executive accountability and of an unpopular defendant's right to a fair trial; the "bank case" of 1819 (*McCulloch v. Maryland*) defining the "necessary and proper" powers of Congress under the Constitution; and the "steamboat case" (*Gibbons v. Ogden*) of 1824, defining commerce clause powers.

Film actor E. G. Marshall was selected to narrate the opening and closing commentary on each of the films. His judicial role in the popular television series, "The Defenders," fortuitously complements the dramatized litigation of the Marshall Court portrayed in the present series. The drama department of Carnegie-Mellon University in Pittsburgh worked closely with WQED in preparation of the films, with several professors at Carnegie-Mellon and the Law School at the University of Pittsburgh serving as advisers. Chief liaison between the film makers and the Bicentennial Committee was Dr. William F. Swindler, consultant to the committee on its several anniversary projects and chairman of the publications committee of the Supreme Court Historical Society.

An independent project, but related to the documentary series, is Dr. Swindler's forthcoming book, *The Constitution and Chief Justice Marshall*, to be published this fall by Dodd, Mead & Co. of New York. The volume provides a narrative account of these cases, as well as containing a complementary chapter on the development of constitutional doctrine on federal-state powers exemplified in the Dartmouth College case (see also "Backstage at Dartmouth College" in YEARBOOK 1977). In addition, the volume reproduces the essential documents on which the litigation in these cases was based. Thus the book will serve as an optional background reading reference for the film series, particularly as it is used in classroom situations.

Already praised for authenticity and dramatic value, the film series is expected to have a long run.

NOW SHOWING

Equal Justice Under Law, a series of five documentary films sponsored by the Judicial Conference of the United States and produced for Public Broadcasting Service by WQED, Pittsburgh.

Host and Commentator	E. G. Marshall
Chief Justice John Marshall	Edward Holmes
President Thomas Jefferson	James Noble
Bushrod Washington, Associate Justice	Reid Shelton
George Hay, United States Attorney	Frank Latimore
Aaron Burr, ex-Vice-President	Nicholas Repros

Chief Justice John Marshall, as portrayed in the documentary film series, and William Marbury, petitioner in the Supreme Court for a commission as justice of the peace for the District of Columbia, set the stage for the famous doctrine of judicial review.

Commissions—Signed, Sealed and Mysteriously Lost

Did William Marbury really want to be a justice of the peace in the new District of Columbia—or was he put up to demanding his commission by Federalists seeking to test the new Jeffersonian administration? Didn't John Marshall know what had become of the undelivered commissions which outgoing President John Adams signed and Secretary of State Marshall sealed—since Marshall had stayed in office for some ten days after Jefferson's inauguration? Was there any similarity between the disappearance of the commissions and the erasing of a famed 18½ minutes of tape in the byzantine litigation over Watergate? Should Marshall as Chief Justice have disqualified himself in Marbury's suit? Couldn't the famous Section 13 of the Judiciary Act have been construed to confer original jurisdiction on the Supreme Court? And wasn't the jurisdictional issue the threshold question, making irrelevant all the rest of the famous opinion?

If the answer to any or all of these questions is affirmative, the famous case of *Marbury v. Madison* appears more clearly for what it really was—a titanic contest between Chief Justice Marshall and President Jefferson over the role of the judiciary in the evolving constitutional system. Jefferson forcefully advocated a separation of powers in government that assumed that each branch of government would determine for itself the extent of its constitutional powers. Marshall was equally convinced that such a theory would not work in the practical context of a written constitution which required interpretation by the single branch of government logically qualified for that function—the judicial branch.

A brilliant combination of statecraft and politics enabled the Chief Justice to avoid an impasse in which the Jeffersonian branches would have been able to ignore him. With the anti-Federalists prepared to refuse to enforce any interpretation of the statute, Marshall simply held the statute itself unconstitutional.

Aaron Burr, portrayed here in the two-part film series on the famous treason trial, challenged President Thomas Jefferson (lower right) to produce the evidence on which the treason charges were based.

Burr? Jefferson? Marshall? Who Was Guilty of What?

The treason of Aaron Burr, said the President of the United States of his former Vice President, was "beyond question." This indiscrete prejudging of an accused man was made in a special message to Congress in February 1807. Did this fatally prejudice the government's case—at least to the extent that John Marshall would demand the complete and literal proof of treason under the terms of the Constitution? For that matter, did Jefferson really believe that Burr was guilty of treason —or was Burr the only available scapegoat for national frustration as the young Republic was buffeted by great powers? If Burr was prepared to foment war against the United States—as his correspondence with Napoleon Bonaparte three years later unequivocally declares—was he bent on the same thing in his mysterious expedition into the Western wilderness in 1806? If the famous cipher letter was prima facie evidence of Burr's treasonable activity, why was Jefferson so adamant about refusing to deliver it to the Court?

The case of *United States v. Burr* was, of course, a criminal case, never reviewed in the Supreme Court because Burr was acquitted on both the charges of treason (levying war against the United States) and high misdemeanor (planning a military campaign against the possessions of a foreign country with which the United States was at peace). By the terms of the Jeffersonians' own judiciary act of 1802, restoring circuit riding duties to Supreme Court Justices, John Marshall sat on the case in the Circuit Court in Richmond, Virginia along with United States District Judge Cyrus Griffin. It was all intensely personal: Griffin, Marshall, Jefferson, United States Attorney George Hay, Congressman (and later Senator) William Branch Giles, William Wirt, John Wickham—all were Virginians and most had known each other from early Williamsburg days of the pre-Revolutionary and post-Revolutionary legislature and the law program of the College of William and Mary.

Even treason, which has a quaint and archaic sound to modern Americans, and impeachment, which carried less of the opprobrium then than it has now, were essentially devices at hand for vigorous personal combat in the courts or the halls of Congress. Amid all of this welter of legal stratagems, Chief Justice Marshall used the Burr case to lay down two fundamental principles: where evidence is deemed essential to the just administration of a criminal prosecution and defense, all persons, up to and including the

Thomas Jefferson, aware of Burr's unstable personality and the chronic separatism of the trans-Alleghany West, and bedeviled by great power harassment of the new nation, may or may not have over-reacted to Burr's mysterious undertakings.

James W. McCulloch, as acted in the documentary film series, was cashier of the Maryland branch of the Bank of the United States who was made defendant of record in the famous "Bank case."

John James, not otherwise remembered in legal history, is portrayed as the agent of the state of Maryland who brought the famous suit against McCulloch and the Bank of the United States.

highest officials of government, are amenable to judicial process; and however unpopular a defendant, particularly if the "hand of malignity," is suspected, he must be assured a fair and impartial trial under our system of justice.

Was Aaron Burr guilty of a felony or misdemeanor? If so, which or what? Was Chief Justice Marshall, in the question posed by Associate Justice Bushrod Washington, likely to have demanded the same strict accountability in the Chief Executive if that person had been his lifelong hero, George Washington, as when that person was his lifelong antagonist, Thomas Jefferson?

The "Supreme Law of the Land" Defines "Necessary and Proper"

What was the purpose of the chartering of the Bank of the United States? If that purpose was manifestly related to the expressed powers of the federal government under the Constitution, did the authority to charter a bank have to be mentioned in the Constitution itself? And if the power to charter a bank by Congress was accepted as analogous to the state legislatures' power to charter state banks, why could not the state taxing authorities levy taxes on the federal bank as Congress levied taxes on the state banks?

The case of *McCulloch v. Maryland,* like most great constitutional cases, treated the problems of the Maryland branch of the Bank of the United States as incidental to the broader issues. (Whether Marbury was or was not personally entitled to his justice of the peace commission, for example, was decidedly secondary to the doctrine of judicial review for which his case was the springboard.) Hence, the incompetence of the management of the Bank of the United States in its first three years (1816-19) which made it something less than a heroic agent for establishing a great constitutional principle, was both immaterial and unimportant in the "bank case." The basic point was that, in the view of the Marshall Court in 1819, the necessity of having such a bank was a matter for Congress to determine. That disposed of the first question; in Marshall's words, whatever was a legitimate end, and not directly prohibited by the Constitution, was "necessary and proper." The second question was logically answered by the disposition of the first: if the Constitution and the laws enacted under it were the supreme law of the land, no state law could impede the nation in the execution of its Congressionally determined policy. Was this, in the final analysis, a quasi-Jeffersonian doctrine, that Congress should be the effective judge of its powers and their scope under the Constitution?

State Burdens on Commerce Between States vs. Free Trade

If no state may burden interstate commerce, does this mean that no state activity in the field of interstate commerce can ever be permitted? And what is interstate commerce—the act of transporting goods from the last point inside one state border to the first point inside the other state border? What of goods being shipped from New York through Pennsylvania, Maryland and Virginia to North Carolina—how does federal authority operate within the borders of the states between the beginning and end of the commerce? And what is subject to the federal power—the act of transporting the goods, the medium by which they are transported, the nature and quality of goods, or the conditions under which they were manufactured? And can Congress forbid the use of interstate commerce to effectuate national policy, as in prohibiting shipments of lottery tickets, firearms, prostitutes, or racially discriminatory activities?

These questions were, for the most part, unknown to the Court in 1824 which handed down the basic decision in *Gibbons v. Ogden.* But in that case Chief Justice Marshall defined the commerce power of Congress, as Justice Felix Frankfurter later observed, "with a breadth never exceeded." The famous "steamboat case" was one of the most popular ever handed down by the Marshall Court, because of its immediate effect of insuring that the federal union would be a common market without internal trade barriers except as these would be developed by the federal government itself over the years to come. The contemporary significance of the Gibbons case lay in its equipping the national government with an effective instrument for the application of the supreme power with which the Court had invested it in the "bank case" of 1819.

The Supreme Court in the early days of Marshall, is represented by actors taking the parts, from left to right, of Justices Gabriel Duvall, Joseph Story, Marshall, William Johnson, Bushrod Washington and Brockholst Livingston.

YANKEE FROM GEORGIA

A Search For Justice Woods

THOMAS E. BAYNES, Jr.

They also serve who only stand and wait—wait for history to do them justice. (A bad combination of Milton and a pun.) With this article, the YEARBOOK undertakes to focus from time to time on the lesser known members of the Court, particularly in the first century of its history. Justice William B. Woods is a good prototype to begin this series.—ED.

* * *

The history of Southern Justices on the Supreme Court suggests some unique twists of fate. Three of the Justices were cousins, the two Lamars, Joseph Rucker Lamar[1] and L. Q. C. Lamar[2] were related to Justice John A. Campbell. Each was appointed from a different Southern State. However, L. Q. C. Lamar is remembered more for his Senatorial career than his tenure on the Court.[3]

But who was Woods? A search of the better known texts on the Court mentions almost nothing. Biographical data is scant.[7] The whereabouts of his personal papers are unknown. There is no written biography of his tenure on the Court. These factors alone should deter anyone from trying to write on this obscure Justice. Historians of the Court barely recognized his existence,[8] but those who did characterized him as mediocre.[9] Yet, more than their opinions was the 1970 poll [11] on Supreme Court Justices by a group of law professors. Woods was rated below average.

How could that be? There isn't sufficient evidence to support anthing except his appointment, a few cases, and his death. Further, how could all those Southerners, like Campbell, and later L.Q.C. Lamar support someone like Woods who appeared to be so patently unpalatable to men of the Confederacy? My Southern intuition said that if the South was behind Wood's nomination, then the historians and law professors must have been mistaken.

Woods was an Ohioian.[11] Born in a small central Ohio town, he went to Western Reserve finishing at Yale with honors in 1845. Returning to his hometown he studied law with his future law partner and was admitted to the Bar in 1847.

In the latter part of the 1850's, Woods took an active part in politics, an interest he would avoid after the war. While there is some evidence he first chartered his political fortunes as a Whig, later activities were as a Democrat. First as mayor of his town, then as a member of the Ohio legislature, he was elected speaker of the assembly during his second term. In 1859, the Republicans became the majority party. Woods, reelected, was known for his vigorous opposition to the Lincoln Administration. An often told anecdote concerned his adamant resistance to a loan bill which was to finance Ohio's home defense in the event of war with the South. However, when the secession was definite Woods was the one that convinced the opponents that the bill must be passed.

With the outbreak of the war, Woods joined the Seventy Six Ohio Regiment as a lieutenant colonel. Involved in numerous actions, he quickly rose to the rank of brigadier general. Later, Generals Grant, Logan and Sherman joined in recommending him for breveted major general. From Shiloh to Vicksburg, then through Georgia with Sherman, his participation concluded with the Grand Review of the Union Troops in Washington after the surrender of the Southern forces. Ordered to Mobile, Woods was mustered out of the Army in 1866, Woods

remained in Alabama becoming involved in cotton production and an iron foundry. In 1868, he was elected Chancellor in a south Alabama Circuit, resigning that position within two years to accept the appointment of United States Circuit Judge.

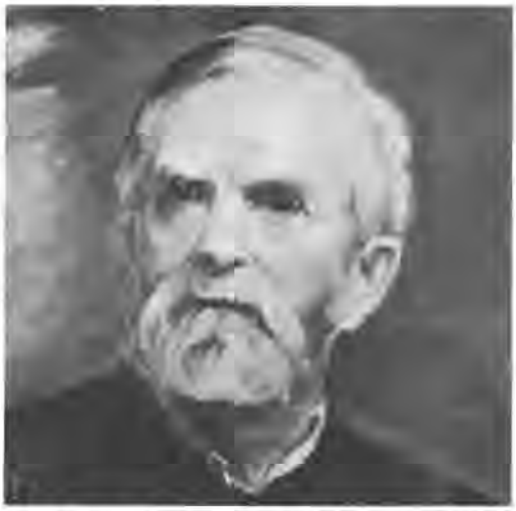
The 1869 Appointment

In 1866, Congress succeeded in finally thwarting any possibility of President Johnson making an appointment to the Supreme Court. Between Chief Justice Chase's willingness to trade Court seats for judicial salaries [12] and the possibility that an intermediate appellate court would be established, Congress voted to reduce Court membership to seven.[13] During Chief Justice Taney's twilight term, there were ten sitting justices. In 1867, Justice Catron died and then Justice Wayne. President Johnson, unable to fill the vacancies saw the court dwindle to eight.

With the election of President Grant, Congress was once again willing to consider judicial reorganization. While numerous ideas circulated, the final result was an increase in the Court membership to nine and the creation of nine circuit judgeships.[14]

The bill creating the circuit courts was enacted in April, 1869 but the Senate delayed implementation until December. Justice Miller suggests the delay was strategic. ". . . . the provision in that bill postponing its operation until next December was inserted by the Senate, because it was believed that the various Congressional delegations in the House had the circuit judges all arranged; and it was to break up this arrangement, and to give the President an opportunity to make his selection for the offices in the absence of the members of Congress, that it was done." [15]

Although Grant is not renowned for his ability to make able judicial appointments, in the case of the new circuit judges, he was saved by his Attorney General, Ebenezer Hoar,[16] who might have been one of the original proponents of merit judicial selection. Hoar's idea of judicial temperment was to bring to the federal judiciary men of the highest talent and rectitude.[17] "Nearly every Senator had a candidate of his own choice for the Circuit Court but in almost every instance the President took the Attorney General's advice." [18] In the instances where Grant balked he was later forced to withdraw his candidate's name.



William B. Woods, an Ohioan who followed the "carpetbag" Reconstruction governments to Georgia, attracted consistent Southern backing when he was nominated to the Supreme Court.

There is unfortunately little information on why Woods was chosen. At the time of his selection, Woods had some judicial experience as a chancery judge. Having joined the Republican Party, he now had no political handicaps and his service with Grant during the war was definitely an asset. Lastly, and probably most significant was Woods' connection with Senator Willard Warner, a Republican Carpetbagger from Alabama. He also had served with Grant and was a strong supporter of the administration. Woods had married Warner's sister.

But virtue in judicial selection was not to be entirely rewarded. On the same day the Senate Judiciary Committee approved Hoar's package of circuit judgeships (Woods included) the Senate rejected Grant's nomination of Hoar for a seat on the Supreme Court.[19] Democrats and Southerners (except Warner) voted against Hoar rejecting him by a vote of 33 to 24. Later, writing to Justice Bradley, Hoar said, "There is no

service which I have been able to render to the country which I look back upon with such entire satisfaction as upon the share which I have had in filling judicial positions."[20]

Woods served as the Fifth Circuit Judge for eleven years while also reporting the Circuit Court cases. Living first in Alabama, he finally settled in Atlanta. His two most important cases while sitting in the Fifth Circuit were the *Slaughter House Cases* and *United States* v. *Cruikshank*. In both he sat with Justice Bradley, disagreeing with his judgment in the latter. In the *Slaughter House Cases,* Ex-Justice Campbell argued for Louisiana—probably one of the few times, that a Justice, a former Justice and a future Justice were involved in the same litigation.

Woods understood his position within the Southern environment. His philosophy was clear. He was going "to administer the law as to encourage the sentiment that the courts of the United States were not courts of a foreign jurisdiction, but courts which belonged to the people of the district in which they were held, in common with all the people of the United States, not organized to oppress but to protect them in their rights and mete out even-handed justice to all classes."

1877 and The Supreme Court

In 1877, there was a new President. After a traumatic election dispute climaxed by an election commission decision and substantial concessions being made to the South and its Congressmen, Rutherford B. Hayes was declared the winner almost on the eve of the inauguration.[21] Immediately, he was faced with filling the vacancy on the Supreme Court. Justice David Davis had won a seat in the United States Senate and resigned his position the day after Hayes took office (so calculated by Davis to prevent Grant from making a last-minute appointment).[22]

While there is incomplete evidence as to Hayes' actual commitment to the South as regards filling Supreme Court vacancies, it appears a person acceptable to the South was anticipated. "The result was that in 1877 there was for the first time since the Civil War an actual contest between a Southern and a border state for a Supreme Court seat. In the course of Hayes' administration both sides won." [23]

At leaset 24 names (only one Northerner) were presented for the position vacated by Davis. John Marshall Harlan of Kentucky, soon became the front runner and ultimately received the nod.[24] Yet, Judge Woods' loss of this first opportunity was the prologue to his future appointment. Justice Miller gives us some initial commentary on Woods' position in this first vacancy test. Justice Miller was continually promoting his brother-in-law, William Ballinger, for a position on the Court. Ballinger was rather reluctant to have his name advanced, but he did have his favorites. In a letter just prior to Davis' resignation Ballinger suggested that Ex-Justice John Campbell might be someone to reappoint to the Court. Woods was mentioned as a second choice. "Told him (Miller) if a Republican from the Southern Bench was to be appointed Woods would meet with strong approval here."[25]

Miller thought Campbell was too old and since he, Waite and Field, all in their sixties, were the only members of the court who weren't aged and infirm there did not appear to be any advantage in adding another antiquarian to the Court. Campbell was 75. However, the gravaman of Miller's complaint was that he could not forgive Campbell for leaving the Court at the outbreak of the War. "I could forgive him sooner if like Toombs and that class of men the Confederate cause had commanded his convictions. But they did not."[26]

Campbell was not interested in going back on the Court. Having renewed an extensive practise after the war, he had become a leading member of the Southern bar. He practised before Woods quite often, the most notable being the *Slaughter House Cases* [27] in the Circuit Court. Along with Federal District Judge Billings, Campbell became one of Woods' campaign managers. He enlisted

for Woods the support the most notable son of the Confederacy then serving in Congress, Lucius Quintus Cincinnatus Lamar. Writing to Billings, Campbell quotes from a letter from Senator Lamar "it will give me pleasure to do what I can to promote your views in regard to the appointment of Judge Woods to the Supreme Court Bench. I will state to the President your favorable estimate of his qualifications and express the opinion that his appointment would be more acceptable to our people than any of those most likely to get the position." [28]

If one were to count written endorsements, Campbell and Billings were able to muster more support for Woods than there was for Harlan. There were 81 petitions of endorsement filed with the Attorney General.[29] Woods had the backing of all the District Judges, the local Republican parties and some members of the National Republican party. Southern politicians, carpetbaggers and Confederate veterans were his supporters. Even organizations which one would have assumed held the greatest antipathy for Woods for his participation in the destruction of the South sought his appointment.[30]

Besides Senator Lamar and Senator Eustis of Louisiana there was John A. Morgan, the new Democratic Senator from Alabama. "I would prefer a man of my own political views", wrote Morgan to the Attorney General, "if such an appointment could be properly made, but I am quite content to assist as far as I may in confiding this important power to Judge Woods, feeling satisfied that he should be appointed he will use it only in accordance with a strict sense of duty." [31] Two days later, Morgan forwarded a letter from the Mobile Bar Association to the Secretary of the Treasury, John Sherman (the General's brother). Morgan mentioned Sherman as a friend of Woods who was in the best position to get Hayes' attention on the affirmative letter to Woods' appointment.

Here is probably the place to speculate on Woods' support in Washington. Unlike the numerous letters written by Harlan to various members of the administration, there are none known from Woods. Woods had the backing of many Southern Congressmen, but his Ohio and Grant connections are also notable. James A. Garfield, then an Ohio Congressman, outwardly endorsed Woods. Garfield's own diary shows he spoke with Woods about federal appointments in June, 1877. Later, Garfield was to write Sherman of the support he found for Woods when visiting Alabama.[32]

Secretary Sherman (Ohio and brother of Woods' Commanding General) appears to have been another supporter. Garfield, Billings and Morgan all forwarded letters through the Secretary noting the friendship for Woods. Sherman was a cousin of Ebenezer and George Hoar, the former being the Attorney General who picked Woods for the Circuit Court. George Hoar was a United States Senator from Massachusetts. Hoar's senatorial colleague, H. L. Dawes, also supported Woods. William A. Evarts, cousin to both Sherman and Hoar, had been Attorney General under Grant and was now Hayes' Secretary of State. While there is no personal evidence of an endorsement by Evarts, his lifelong law partner, C. E. Butler, using the firm's name, endorsed Woods in a letter to the President.

The "Ohio connection" includes President Hayes, Chief Justice Waite, Secretary Sherman, Associate Justice Swayne, Senator Matthews (later appointed to the Court by Hayes) and Congressman Garfield (who was joined by four other Ohio Congressmen in his support for Woods). Only in the case of Matthews do we find no evidence of interest in the Woods appointment.

Harlan was appointed. He had been a staunch supporter of Hayes from the Convention through the Election.[33] Confirmation, a hard fight in the Senate, came after six weeks in debate.

1880—The Second Time Around

On December 8, 1880, the *Washington Evening Star* [34] carried the story that Associate Justice Strong had written his letter of resignation which would be forwarded to

the President shortly. Although the article suggested Attorney General Devens would most likely fill the vacancy, the more sophisticated Court watcher would have been more interested in the news that the Chief Justice was reassigning Justice Bradley from the southern Fifth Circuit to the northern Third Circuit. The vacancy thus took on more of a Southern flavor than one would anticipate could be filled by Devens of Massachusetts.

The next day, the Star made a more accurate prediction.[35] Justice Swayne would resign and Senator Stanley Matthews would be appointed his successor. This situation would later have relevance to the Woods appointment.

On the 14th of December, Strong tendered his resignation. The newspapers still had no idea who would be selected. While the papers might have been in the dark, the Justices may well have been parties to the behind the scene efforts in the nomination. Justice Bradley had sat with Woods on the Fifth Circuit for a number of years. They had formulated the Circuit Court's opinion in the *Slaughter House Cases*. When Justice Davis' successor was still in dispute, Bradley had told Justice Miller of his preference for Woods.[36] Secondary sources tell us that Chief Justice Waite was recommending Woods' appointment to the President.[37]

One could well assume that Justice Strong had some idea of the identity of his successor. Justice Miller wrote as early as two weeks before the news story on the Strong resignation that the President already favored Woods. Justice Swayne was reported as even going further. ". . . . Swayne who is for some reason fond of Woods is trying to make his resignation (desired by the President for Matthews' sake) dependent on the nomination of Woods. This is a nice little plan but complex and may fail of carrying out." [38]

While appointments to the Court were no longer required to be made from the Circuit where the departing Justice was assigned, there appeared to be some preference for the arrangement. The Chief Justice's transfer of

President Rutherford B. Hayes, a fellow Ohioan, appointed Justice Woods as a step toward conciliation with the South.

Justice Bradley facilitated the opening in the Fifth Circuit of a vacancy. Thus, the preference could be retained and Hayes was given the opportunity to appoint an acceptable "Southern." "Although Woods—whose appointment was recommended strongly by the Chief Justice—had lingering and fond attachments to the North his professional loyalities were to the South. Thus, he was precisely the kind of candidate Hayes sought as a conciliation, one who could help bind sectional wounds." [39]

The day after Strong resigned, Hayes sent Judge Woods' nomination to the Senate. It was immediately forwarded to the Judiciary Committee.[40] Within a few days of the nomination, the papers in Washington, New York and Atlanta reported the South's support for the nomination.[41] The same organizations that had backed Woods in 1877 were writing and telegraphing their Senators. In a poll conducted by the Atlanta *Daily Constitution*, the leading members of the Georgia Bar highly endorsed Woods for the Court seat.[42] The New York *Times* editorial called for confirmation.[43] All papers were predicting it.

Five days after the nomination went to the Senate, the five Democrats and four Republicans on the Judiciary Committee reported favorably on the nomination.[44] Although individual votes in Committee are

not known, the membership vote on the floor would show all yeas with two absent members. The Senate then took a day in Executive Session to debate the appointment.

When the nomination was first announced, the *Star* [45] had reported that Southern Senators felt a fierce indignation that Woods, an Ohio native, had been characterized as a Georgia appointee. The paper's conclusion was misplaced. In the main, the Southern Senators were with Woods. What argument there was had been diagnosed by Justice Miller even before the appointment. Justice Miller anticipated that Hayes might have to withdraw Woods' name because "Woods and Matthews will both be regarded as Ohio appointments and that Chase and Waite and Swayne and Woods and Matthews are too many Judges from Ohio in a few years with Harlan from the same circuit." [46]

This issue was raised during the debates. Although not a specious argument, it was only a reflection of the frustration of the Democrats, who had to watch a Lame Duck Republican President (from Ohio) appoint another Republican Justice with another appointment on the horizon. There had not been a Democratic Justice since Clifford's appointment in 1858, and Clifford was now ill, as was another Justice. The new Republican President-elect Garfield would be able to foreclose any chance of filling those vacancies with a Democrat.

The Ohio argument was overcome by the strong vote of confidence by the Southern Senators. The opposition realized that if the Senate took no action, Woods' friend Garfield might just resubmit his name. It was Christmas, and the Democrats decided to save their fight for Matthews. Woods was confirmed by a vote of 39 to 8.[47]

Interesting enough, the Senate's Democratic majority did not appear for the vote. Twenty-four Republicans and twenty-three Democratic Senators voted, with the eight negative votes being all Democrats. Earlier supporters like Lamar, in a rare appearance in the Senate, and Morgan voted yea. The Georgia Senators and most of the Southern Senators followed suit. Only the Senators from North Carolina voted against confirmation, with Florida and Louisiana splitting their votes. The Virginia Senators were absent. The Ohio Senators, both Democrats, did not appear either. Ex-Justice Davis and General Logan of Illinois were among the yeas as were the old supporters, Dawes and Hoar of Massachusetts.

On Christmas Day, Woods wrote the Chief Justice, "I thank you heartily for your telegram of congratulations and of welcome to the great tribunal over which you preside. . . . I have several cases, however, which have been argued before the circuit court, which I must dispose of before I leave. . . ." [48]

The Chief Justice's reaction to Woods' confirmation is unclear. Waite initially wrote the President of his enthusiasm on January 2. Two days later, in a letter to arrange for Woods to obtain his commission from Hayes, the Chief Justice wrote, "looking the ground all over, and judging him from such light as I have, there is little doubt that you have made the best possible selection under the circumstances." [49] Future information may suggest the implications of Waite's apparent commiseratory statement in light of his previous support for the appointment.

The Short Tenure: 1881-1887

In the January 2nd letter of glad tidings at Woods' confirmation, Waite wrote Hayes, "We shall give Woods a hearty welcome and he will find when he gets here that it will not be necessary for him to leave off any of his old inclinations to work. We are wonderfully overcrowded." [50]

When Woods took his seat, the October Term, 1880 was almost half completed. The workload of which the Chief Justice had spoken to the President was definitely awaiting Justice Woods. 795 cases from the previous term welcomed the Justices at the beginning of the 1880 term; 417 new cases were docketed during the term creating a total caseload of 1,212.

In addition, the Justices were shorthanded. Justice Hunt had not sat since the October term of 1878 and would not sit again. Jus-

Attorney General Ebenezer Hoar of Massachusetts was an enthusiastic supporter of Woods for appointment to the Supreme Court.

tice Clifford was also incapacitated.[51] Neither would vacate his seat for another two years. Justice Swayne retired the same month as Woods replaced Justice Strong. Thus Woods joined a five-man court with a backlog triple its annual disposition rate. Some relief would come with the appointment of Matthews in April. Yet, the Court would not be up to full strength until late in the 1883 Term with the appointment of Gray and Blatchford. The caseload problem would not disappear until the 1890's with the establishment of the Circuit Courts of Appeal.[52]

Although some have suggested that Justice Woods wrote over 200 opinions while on the Court,[53] a review of the United States Reports reveals 159 majority opinions. This total was more than any other Justice during Woods' tenure except that of Chief Justice Waite, who wrote over 400 opinions. Although this seems an impressive number many of the Chief Justice's opinions were only a paragraph long and today would be handled per curiam.

While the quantity of Justice Woods' opinions is significant, most of his opinions dealt with nothing more than general legal disputes which would have been found in any state or Circuit Court of the day. Twenty one percent of the opinions concerned matters related to real property and mortgages. Nineteen percent involved patents and the next thirteen percent associated with commercial matters. Seven percent were estates and trusts issues with the remainder, for the most part, pertaining to taxation, corporations and municipal law. The fact that these cases provoked little controversy on the court is illustrated in that only nine dissents were rendered against all of Woods' decisions, the lowest except for Blatchford.

While the majority of Woods' written opinions might be classified as mundane compared to present Supreme Court caseload, they were standard fare in the 1880's. At best, two of Woods 159 opinions remain of notable interest. In 1883, the Court, Woods, writing for a majority of eight, in *United States* v. *Harris*,[54] held the federal civil rights laws (so called the Ku Klux Klan Laws) unconstitutional. Woods found no constitutional provision which would support Congressional power "to enact a law which would punish a private citizen for an invasion of the rights of his fellow citizen, conferred by the state of which they were both residents, on all its citizens alike." Harlan's dissent was only to the issue of jurisdiction.

In the same year as *Harris*, the court had allowed laws on segregation of accommodations and miscegenation to withstand constitutional attack.[55] However, Woods joined Harlan's dissent in *Elk* v. *Wilkins*,[56] where the Court, speaking through Justice Gray, held Indians not to be citizens within the meaning of the Constitution and the Civil Rights laws.

Speaking for an unanimous court in *Presser* v. *Illinois*,[57] Woods held that a state law regulating military organizations did not violate the Constitution. Presser had participated with a private military company, marching and bearing arms, which had not been licensed according to state law. Found guilty, he was fined $10.00. Woods, citing *United States* v. *Cruikshank*,[58] held that the Second Amendment was only applicable to the national government. The state law did not concern the right to bear arms. Since the right to participate in military activities, independent of Congressional or state law,

"is not an attribute of national citizenship," Illinois' law did not fall due to the privileges and immunities clause of the Constitution.

Woods was almost always in the majority of the Court. He dissented only eight times.[59] Four of those dissents occurred in the eleven 5-4 decisions handed down between 1880-1887.[60] Although a small sample, the five-four decisions do represent some evidence of the Courts' voting pattern. On assumption that the Justices who dissent the least in these decisions comprised a majority, Table A would suggest that the majority of the Court might have been Harlan, Field, Bradley, Miller, and Woods. However, the data on dissents (tables B & C) might suggest another view—that the majority was Waite, Gray, Woods, Matthews, and Blatchford. Nonetheless, in either case the information reinforces the conclusion that Justice Woods was a majority member.

The significant division of opinion among the more notable members of the Waite Court is illustrated by Tables B and C. Field and Miller are the most often to join in a dissent, and then against Harlan. Harlan and Field also joined dissents, but usually against the Chief Justice. Just as often as not they would dissent from each others opinion. However, while Harlan and Bradley dissented against Justice Miller, they did not join in that endeavor. Thus, the second "Majority" membership appears more likely to have been the situation during Woods' tenure.

Wood's illness came on quite suddenly in Spring of 1886. After appearing to recuperate during a extended visit in California, his strength soon declined. In April, 1887 he executed his will (witnessed by friends, Attorney General Garland, a past Solicitor General and Assistant Attorney General). He died a month later.[61] Accompanied by his wife, the Chief Justice, and Justice Gray, Woods was returned to Ohio where he was buried in his hometown Newark.

As another commentator has noted, at the time of Woods' death, the news media was more concerned with his successor than in elaborating Woods' contributions to the

Senator John Sherman of Ohio, whose brother marched through Georgia, was another backer of the "Yankee from Georgia," as an appointee to the Supreme Court.

Court. Probably then as now, his contributions were little known.

In 1877, the South had all but given up hope that one of her own would be appointed to the Court. With Woods' appointment three years later, there was professional and personal approval. Yet, it was not the same thing. The Atlanta *Daily Constitution* summed up the Southerners' desires: "it is hoped that the appointment of Justice Woods will not interfere with the success of the movement which has as its purpose the appointment of a real representative of the South on the Supreme Court." The South got her wish. With the passing of Woods, one of his initial supporters and an acknowledged son of the South was appointed by President Cleveland. Lucius Quintus Cincinnatus Lamar came to the Court in January 1888. He, too, would be there only a short time.

Conclusion

The mediocrity label placed on Justice Woods is unfounded. Nevermore than sixth in seniority, he was judicially more productive than any other member of the Waite Court, except the Chief Justice. There is no doubt that his status on the Court has been obscured by the eminence and longevity of his colleagues, Harlan, Field, Miller, and

TABLE A

Voting Record of Justices on
5-4 decisions rendered 1881-1886

Case style	*Harlan*	*Field*	*Bradley*	*Miller*	*Woods*	*Waite*	*Gray*	*Blatch-ford*	*Mat-thews*
U.S. v. Lee	M	M	M	O	D	D	D	D	M
Kring v. Mo.	M	M	D	O	M	D	D	M	D
Boese v. King	O	M	M	D	M	M	D	D	D
Rector v. Gibbon	D	O	M	M	D	D	M	D	M
Virginia Coupon Cases	M	M	D	D	M	D	D	M	O
Wheeler v. New Brunswick RR	D	D	M	O	M	M	M	D	D
N. Pac. RR v. Herbert	M	O	D	M	M	M	D	D	D
Vicksburg, RR v. Dennis	M	D	D	D	M	D	O	M	M
Graffman v. Burgess	M	M	O	D	D	M	D	M	D
Patch v. White	M	M	O	M	D	M	D	D	D
Vicksburg & Meridan RR v. O'Brien	O	D	M	D	M	D	M	D	M
Total dissents	2	3	4	5	4	6	7	7	6

TABLE B

Dissents

Opinions by	*Field*	*Miller*	*Harlan*	*Waite*	*Bradley*	*Gray*	*Woods*	*Mat-thews*	*Blatch-ford*
Waite	7	3	7	—0—	1	—0—	4	1	—0—
Blatchford	3	1	—0—	—0—	1	—0—	1	—0—	—0—
Bradley	4	6	2	—0—	—0—	3	2	3	1
Field	—0—	3	6	3	1	1	1	1	2
Gray	3	2	2	2	2	—0—	1	—0—	—0—
Harlan	6	5	—0—	4	2	2	—0—	1	2
Matthews	—0—	3	3	4	2	2	1	—0—	0
Miller	4	—0—	6	3	6	3	1	2	1
Woods	1	3	2	—0—	2	1	—0—	—0—	—0—

TABLE C

Frequency of joining in Dissents

Dissents by	*Field*	*Miller*	*Waite*	*Bradley*	*Gray*	*Harlan*	*Mat-thews*	*Blatch-ford*	*Woods*
Field	—0—	9	5	5	3	10	1	2	1
Miller	9	—0—	7	6	4	3	3	2	1
Waite	5	7	—0—	6	6	4	1	2	2
Bradley	5	6	6	—0—	5	1	2	1	2
Gray	3	4	6	5	—0—	—0—	5	3	3
Harlan	10	3	4	1	—0—	—0—	2	2	3
Matthews	1	3	1	2	5	2	—0—	4	2
Blatchford	2	2	2	1	3	2	4	—0—	2
Woods	1	1	2	2	3	3	2	2	—0—

Bradley. The insignificance of the opinions he was assigned may be due to the jurisdiction of the Court at the time or possibly the Chief Justice's understanding that Woods could be called upon to do more than his share.

After making this inquiry, there is no doubt in my mind that commentators on Woods' performance and those participating in the 1970 Justices' Poll could not have had sufficient information on which to make a valid judgment of his qualifications or contributions. The information was then, and to a great degree now, unavailable. The obscurity of the Justice can be the only basis for his "below average" position in the poll. The absurdity of this characterization is apparent when comparing the pollsters place of Clifford and Hunt as "average".

So far the search for Justice Woods has born little fruit. His papers, except for a few minor notes, are still adrift. The basis and extent of the Justice's political and personal influence is for the most part conjecture. Other than his judicial opinions, mostly on commonplace legel issues, his thoughts, desires, values and goals have not been articulated. At times, one gets the feeling his personal obscurity was an intentional endeavor.

What has been gleaned from this inquiry is that the Justice was a very private person, a gentleman respected by his neighbors and professional colleagues. A diligent jurist, noted for his knowledge of the law, who took to the judicial harness quite willingly. Possibly the words of the Chief Justice of Georgia spoken at the time of Woods' elevation to the Supreme Court reflects Woods' commitment. "We are proud of him because he is identified with us, and while serving as a judge in our midst has known nothing but the law, and been loyal to nothing but the law."

[1] See, C. P. Lamar, The Life of Joseph Rucker Lamar (1926); L. Dinnerstein, Joseph Rucker Lamar, in 3 L. Friedman and F. Israel, The Justices of the United States Supreme Court 1973 (1969).

[2] W. Armistead, L. Q. C. Lamar, Secession and Reunion (1935); 2 Friedman and Israel 1431 (1969).

[3] J. Kennedy, Profiles in Courage 174 (1964).

[4] A. Lawrence, James Moore Wayne (1943).

[5] H. G. Connor, John Archibald Campbell (1920).

[6] See, F. O. Gatel, John Catron, 1 Friedman and Israel 737 (1969).

[7] See generally, William Burnham Woods, 20 Dict. Amer. Biog. 505 (1936); 8 Wash. L. Rpt 818 (1881); 15 Wash L. Rpt. 357 (1887); 1 Indexed Digest, U.S. Supreme Court Reports lxxxii (1897).

[8] e.g. Charles Warren's History of the Supreme Court only acknowledges Woods' appointment and death. 2 C. Warren, The Supreme Court in United States History, 566,624 (1926); In fact, the Justices photograph of the Waite Court shown in Warren's text has Woods' name misspelled at 622. See also, T. Campbell, Four Score Forgotten Men, 255 (1955); E. S. Bates, The Story of the Supreme Court 207 (1936).

[9] See, F. Rodell, Nine Men 164 (1955); H. Abraham, Justics and Presidents 124 (1974).

[10] Mersky and Blaustein, 58 A.B.A. J. 1183 (1972); See also, Abraham, supra note 10 at 289; Cf. Nagel, Characteristics of Supreme Court Greatness, 56 A.B.A. J. 957 (1970).

[11] See generally, note 7 supra and L. Fuller, William Burnham Woods, 2 Friedman and Israel 1327 (1969).

[12] C. Fairman, VI History of the Supreme Court, Reconstruction and Reunion, Part One 166, n119 (1971).

[13] Id. at 168,9; F. Frankfurter and J. Landis, The Business of the Supreme Court 73 (1928).

[14] 16 Stat. at Larg. 44, 45 (1869); Frankfurter and Landis, supra note 13 at 75, 76.

[15] C. Fairman, Mr. Justice Miller and the Supreme Court 340 (1939).

[16] M. Storey & E. Emerson, Ebenezer Rockwood Hoar (1911).

[17] Id. at 181; See also, Warren supra note 8 at 501; Fairman, supra note 12 at 487-88; 559,60, 731ff.

[18] Id. at 182; 1 G. Hoar, Autobiography of Seventy Years 306, 7 (1903).

[19] 17 J. Exec. Proc. Senate 329 (1869); See, D. McHargue, Appointments to the Supreme Court of the United States 203 (Unpublished Dissertation 1949).

[20] Storey & Emerson, supra note 16 at 182.

[21] See, C. Vann Woodward, Reunion and Reaction (1966); H. Barnard, Rutherford B. Hayes and His America (1954).

[22] McHargue, supra note 19 at 34.

[23] Frank, The Appointment of Supreme Court Justices; Prestige, Principles and Politics, 1941 Wisc. L. Rev 172, 204.

[24] Id. at 205-209; Fairman, supra note 15 at 360,361.

[25] Fairman, supra note 15 at 350.

[26] Id. at 352.

[27] 1 Woods 21 (C.C.D. La. 1870); Fuller, supra note 11 at 1331.

[28] This letter and others may be found in the National Archives, T.N.A. R.G. 60 (1877)

The problem of an overworked Supreme Court first reached an alarming stage in Justice Woods' time, as this cartoon from the English magazine PUCK *illustrates.*

quoted in McHargue, supra note 19 at 259; See, Frank, supra note 23 at 205.

[29] Id.

[30] Id.

[31] T.N.A. R.G. 60, 1877. National Archives.

[32] See, 3 H. Brown and F. Williams, The Diary of James A. Garfield 489 (1971); McHargue, supra note 19 at 258.

[33] Westin, John Marshall Harlan and the Constitutional Rights of Negroes, 66 Yale L. Rev 637, 668 (1957).

[34] Washington Evening Star, A1, December, 1881.

[35] Washington Evening Star, A1, December 9, 1880.

[36] Fairman, supra note 15 at 358, 362; Bradley appears to have gone to see the President about Woods. In that Bradley was the member of the Hayes–Tilden Election Commission which brought about Hayes confirmation as President. The President probably paid significant attention to the Justice's position. See, Friedman, Joseph P. Bradley, 2 Friedman and Israel 1181, 1191 (1969).

[37] Two commentators stress that Waite recommended Woods; B. Trimble, Chief Justice Waite 140 (1938); Abraham, supra note 9 at 20, 126. There is only marginal evidence to suggest such a strong position on the part of Waite.

[38] Fairman, supra note 15 at 381.

[39] Abraham, supra note 9 at 126; see also, R. Scigliano, The Supreme Court and the Presidency 100 (1970); Barnard, supra note 21 at 497,8.

[40] 22 J. Exec. Proc. Senate 415,6 (1880).

[41] See, New York Times, December 12, 1880; Washington Evening Star, December 20, 1880; Atlanta Daily Constitution, December 12, 1880.

[42] Atlanta Daily Constitution, December 12, 1880 at 2.

[43] New York Times, Editorial, December 12, 1880.

[44] J. Exec. Proc. supra note 40 at 421.

[45] Washington Evening Star, December 15, 1880.

[46] Fairman, supra note 15 at 381; Fairman, Retirement of Federal Judges, 51 Harv. L. Rev 396, 423 (1938).

[47] J. Exec. Proc. supra note 40 at 426-428.

[48] Woods to Waite, December 25, 1880, Waite Papers, Library of Congress.

[49] Waite to Hayes, January 4, 1881, Waite Papers, Library of Congress; see, C. P. Magrath, Morrison B. Waite; the Triumph of Character 269 (1963).

[50] Waite to Hayes, January 2, 1881, Waite Papers, Library of Congress; See, Trimble, supra note 37 at 272.

[51] Justice Ward Hunt suffered a stroke in January 1879. He refused to resign because of his pension ineligibility. Kutler, Ward Hunt, 2 Friedman and Israel 1221 (1969); "I write you a letter with my left hand. I cannot spell anything, nor can I aticulate (sic) any better. My portion shall not be in the Court Room during the rest of the court of the session, but I hope to see you at the consultation once more, once during the present session, good bye to

yourself, good bye to all my brethren upon all the bench." Hunt to Miller, April 13, 1880, quoted from 2 Leg. Hist. 85 (1959). Hunt did not resign until 1882. He died in 1886. Justice Nathan Clifford was eligible for retirement in 1873, but refused to resign until a democratic president could fill his vacancy. Clifford's mind failed him and he was a constant burden to the Court from the October term 1876. Gillette, Nathan Clifford, 2 Friedman and Israel 963 (1969); Fairman, Retirement of Federal Judges, 51 Harv. L. Rev. 397, 421 (1938); Magrath, supra note 49 at 260-262.

[52] Frankfurter and Landis, supra note 13 at 97, 295. Reports of the Attorney General, 1879 through 1895 setforth the early statistics on the Court and the circuits. Basis for the Supreme Court's heavy workload during this period may be traced to congressional enlargement of the Court's jurisdiction. See generally, Wiecek, The Reconstruction of Federal Judicial Power, 13 A. J. Leg. Hist. 333, 341 (1969); See also, Pirie v. Tvedt, 115 U.S. 41 (1885); Harper's weekly, June 17, 1882.

[53] Campbell, supra note 8 at 225. Justice Woods opinions appear in Volumes 113 through 117, United States Reports. Because of illness, he did not participate in any decisions, except one, after the October 1886 Term. See, Vicksberg & Meridian Railroad Co. v. O'Brien, 119 U.S. 99 (1886). This was a 5-4 decision with Woods in the majority.

[54] 106 U.S. 629 (1883).

[55] Civil Rights Cases, 109 U.S. 3 (1883); and Pace v. Alabama, 106 U.S. 583 (1883); Harlan and Field dissenting respectively.

[56] 112 U.S. 94 (1884).

[57] 116 U.S. 252 (1886).

[58] 92 U.S. 542 (1876); see also, 2 Friedman and Israel 1333.

[59] Woods' only dissenting opinion was in Patch v. White, 117 U.S. 210 (1885). This was a 5-4 decision with Gray, Blatchford and Matthews joining Woods. The issue was on whether parol testimony could be used to cure what the majority claimed to be a ambiguity in a land description setforth in a will. Other dissents were: Railroad Co. v. Ellerman, 105 U.S. 166 (1881); Flanders v. Seelye, 105 U.S. 718 (1881); United States v. Lee, 106 U.S. 196 (1882); Rector v. Gibbon, 111 U.S. 276 (1883); Elk v. Wilkins, 112 U.S. 94 (1884) joining Harlan; Pirie v. Tvedt, 115 U.S. 41 (1885) joining Harlan; Graffam v. Burgess, 117 U.S. 180 (1885).

[60] Five-four decisions of the Waite Court (1881-1886) United States v. Lee, 106 U.S. 196 (1882), Extension of citizens right to sue the Sovereign; Kring v. Missouri, 107 U.S. 221 (1883), Ex post Facto Law; Boese v. King, 108 U.S. 379 (1883), effect of Bankruptcy Act on State Statute allowing assignment to creditors; Rector v. Gibbon, 111 U.S. 276 (1884), land titles; Virginia Coupon Cases, 114 U.S. 269 (1885), impairment of obligation of contract; Wheeler v. New Brunswick & Canada RR Co., 115 U.S. 29 ((1885), intrepretation of contract for sale of Railroad ties; Northern Pacific RR Co. v. Herbert, 116 U.S. 642 (1886), limitation of Railroad Liability for employee's injury; Vicksburg, Shreveport & Pacific Railroad Co. v. Dennis, 116 U.S. 665 (1886), Railroad Tax Exemption; Graffam v. Burgess, 117 U.S. 180 (1886), Judicial sale of Real estate; Patch v. White, 117 U.S. 210 (1886), land description in devise; Vicksburg & Meridian Railroad Co. v. O'Brien, 119 U.S. 99 (1886), Admissibility of evidence.

[61] In Memoriam William Burnham Woods, 123 U.S. 761 (1887).

The Court Under Chief Justice Taney

DRED SCOTT, PLAINTIFF IN ERROR, *v.* JOHN F. A. SANDFORD.

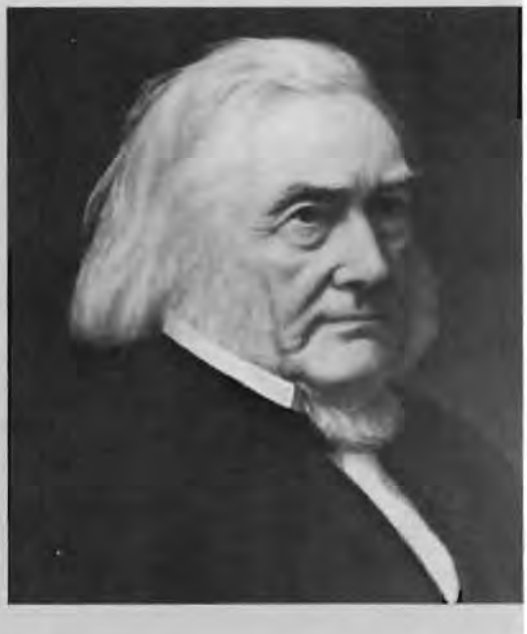
THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of Missouri.

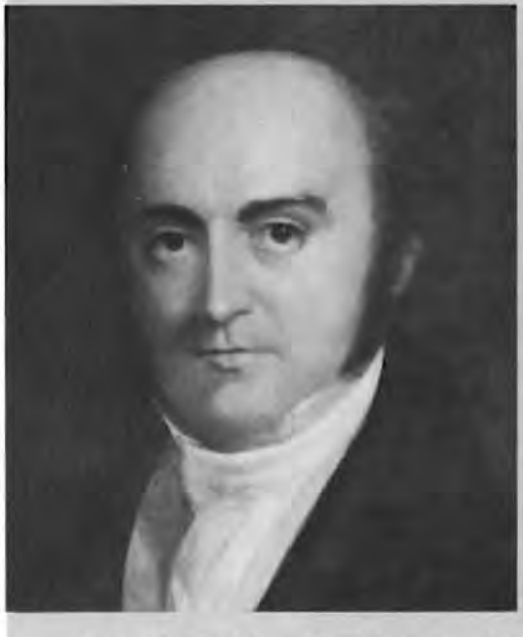
It was an action of trespass *ei et armis* instituted in the Circuit Court by Scott against Sandford.

Prior to the institution of the present suit, an action was brought by Scott for his freedom in the Circuit Court of St. Louis county, (State court,) where there was a verdict and judgment in his favor. On a writ of error to the Supreme Court of the State, the judgment below was reversed, and the case remanded to the Circuit Court, where it was continued to await the decision of the case now in question.

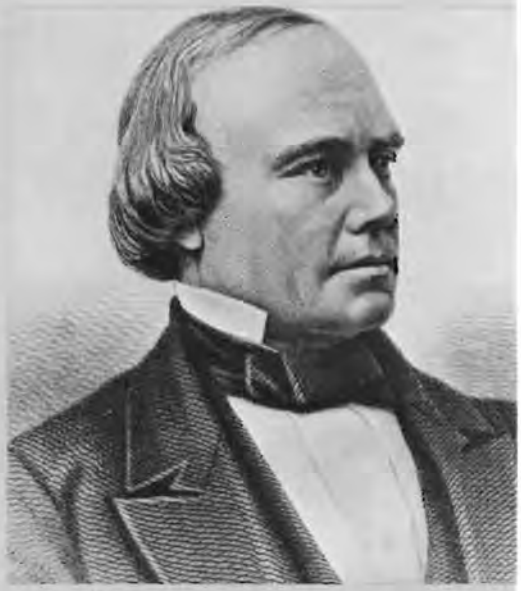
John Marshall's successor, Roger Brooke Taney of Maryland, has suffered from several historical stigmas which have concealed the real accomplishments of his long Chief Justiceship. As Andrew Jackson's field commander in the "war" on the Bank of the United States, 1833-35, he was first Attorney General and then Secretary of the Treasury, before Jackson nominated him on January 15, 1835 to be an Associate Justice. The Senate, still resentful of his role in the "Bank war," refused to take any action on his appointment. Meantime, Marshall died in July, and the President promptly submitted Taney's name again, this time to be Chief Justice. By a vote of 29-15, which was ruled a two-thirds majority, he was confirmed on March 15, 1836. Twenty years later, for a badly divided Court, Taney delivered the opinion in the Dred Scott case.

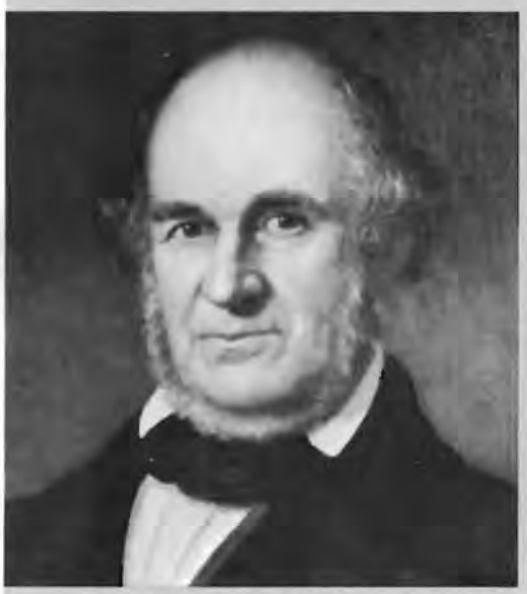
Senator Philip Pendleton Barbour of Virginia (upper left) was confirmed the same day as Taney, to fill the chair of Justice Duvall, who had resigned. An old-line Jeffersonian, he served only five years before his death. In 1837 Congress added two more positions to the Court, for a total of nine. William Smith of Alabama, onetime Senator from South Carolina (upper right) declined his appointment because he preferred active politics to "a very dignified office of light labors, and a permanent salary of $5,000." One of the new Justiceships was filled by John Catron, Chief Justice of Tennessee (lower left), who served until his death in 1865, when the seat was abolished (see YEARBOOK *1977, page 91). John McKinley, former United States Senator from Alabama (lower right), was appointed to the other new chair and served until his death in 1852.*



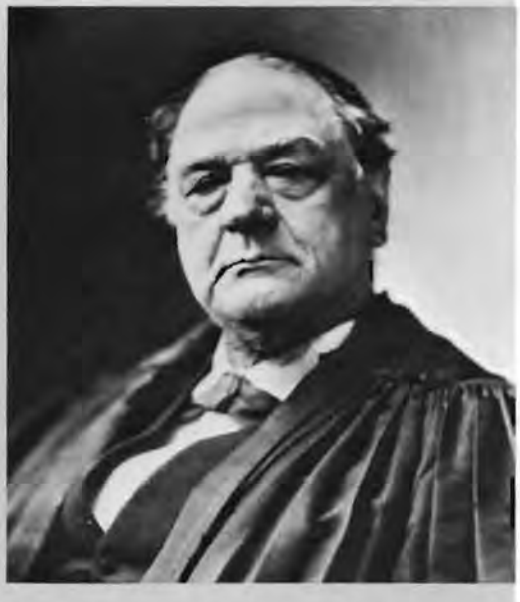


Peter V. Daniel of Virginia (upper left), a Federal District Judge, was nominated March 3, 1841 by outgoing President Martin Van Buren, to the outraged cries of the Whigs, who called him another "midnight judge" to be compared with John Adams' notorious appointments in the last hours of his administration. The Whigs boycotted the voting, and Daniel was confirmed (22-5) by a majority of the quorum only. The Whigs rejected President John Tyler's four nominees on five different occasions (see "'Robin Hood,' Congress and the Court, in YEARBOOK *1977), and only confirmed one—Samuel Nelson, chief justice of New York (upper right). Daniel served to 1852, Nelson from 1846 to 1872. The next appointee, Levi Woodbury of New Hampshire (lower left), judge, Senator and Cabinet member, served only from 1846 to 1851. George W. Woodward of Pennsylvania (lower right) was nominated by President James Polk in December 1845, but was rejected as "personally obnoxious" to Senator Simon Cameron, 20-29.*

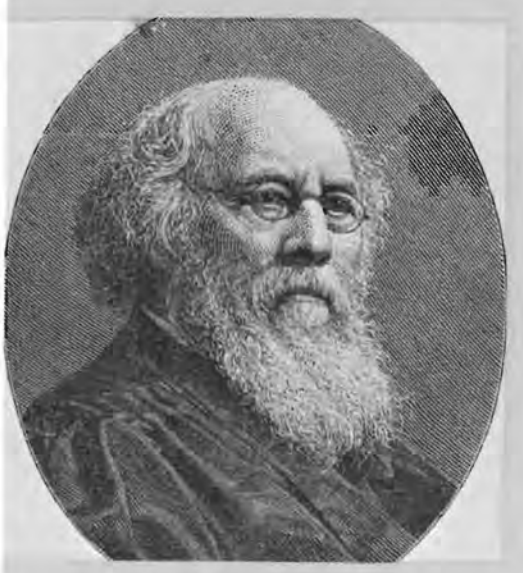


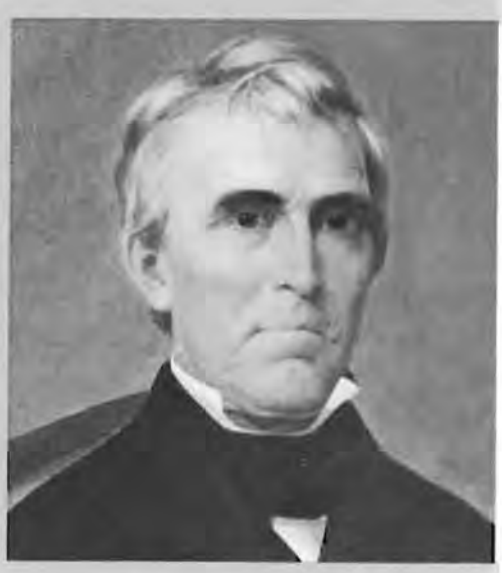


After Woodward's rejection, Polk nominated Robert Cooper Grier, another lower court judge from Pennsylvania (upper left), who served from 1846 to 1870. Benjamin Robbins Curtis of Massachusetts (upper right) was nominated by President Millard Fillmore in 1851, at the age of forty-one, one of the youngest Justices of the nineteenth century. Curtis, as a Circuit Court Judge, invoked the wrath of anti-slavery factions by upholding the constitutionality of the Fugitive Slave Act. His brother, George Ticknor Curtis, was one of the lawyers who argued the Dred Scott case before him and the other Justices in 1856 (in which Justice Curtis wrote a dissent). He resigned the following year. Other Fillmore nominations were simply tabled by the opposition Senate, including Edward A. Bradford of Louisiana (not shown) and George E. Badger of North Carolina (lower left). Fillmore's third unsuccessful nominee was William C. Micou of Louisiana (not shown). In March, 1853 Franklin Pierce became President and three weeks later nominated John Archibald Campbell of Alabama (lower right) who resigned in 1861 when his state seceeded from the Union.



In 1857 Pierce nominated Nathan Clifford of Maine (upper left) who had been Polk's Attorney General. The appointment was bitterly attacked by anti-slavery factions and was barely approved, 26-23. His service until his death in 1881 refuted the partisan charges that he was a political hack with little legal knowledge. Buchanan's single nomination to the Court—Jeremiah A. Black (not shown; see the article on Court reporters in YEARBOOK 1976), *his Secretary of State. He was rejected, 25-26, and a year later President Abraham Lincoln filled the position with Noah Swayne, a leading lawyer of Ohio (upper right). Swayne served until 1881. Lincoln's three other appointments included Samuel Freeman Miller of Iowa (lower left), David Davis of Illinois (lower right) and Stephen J. Field of California (page 48), who became the tenth member of the bench when the Senate created a "western seat" in 1863. Miller, a former physician who then became an outstanding lawyer, was recommended by signed petitions from one hundred and twenty-nine Congressmen and twenty-eight Senators. His distinguished career from 1862 to 1890 amply justified the testimonial. Davis was a state judge and personal friend of Lincoln's, but obsessed with Presidential ambitions (see cartoon,* YEARBOOK 1977, *page 99), and served only from 1862 to 1877 when he resigned to become United States Senator.*





Stephen J. Field's (upper left) long tenure (1863-1898) enabled him to develop what became the dominant laissez-faire doctrine of unregulated free enterprise, which characterized constitutional thought for half a century.

John J. Crittenden of Kentucky (upper left) served two terms at Attorney-General—in 1841 in the short-lived Harrison administration, and in 1850-53 under Millard Fillmore. He was succeeded by Caleb Cushing of Massachusetts, 1853-57, under Franklin Pierce. Felix Grundy of Tennessee followed Benjamin Butler of New York (see YEARBOOK *1977) in the Van Buren administration, 1838-39. Edward Bates of Missouri, under Lincoln, 1861-64, completed the long list of Attorneys General in the Taney period. Cushing, Grundy and Bates are shown in bottom row, left to right.*

Top row, left to right: Henry D. Gilpin, Pennsylvania, was Attorney-General 1840-41, in the last years of the Van Buren Administration. After Crittenden's first term in the office, he was succeeded by Hugh S. Legaré of South Carolina under John Tyler, 1841-43, and John Nelson of New York in the remainder of Tyler's term, 1843-45.

Bottom row, left to right: John Mason of Virginia, 1845-46, was the first of President Polk's three Attorneys-General. Nathan Clifford of Maine (shown on page 47) succeeded him until he went onto the Supreme Court, and Polk's third appointee to the office was Isaac Toucey of Connecticut, 1848–49. Reverdy Johnson of Maryland served under Zachary Taylor, 1849-50 and was followed by Crittenden, Cushing, Jeremiah S. Black (see YEARBOOK *1976) and Edwin D. Stanton (not shown) before Bates completed the list.*

NILES'

WEEKLY REGISTER.

CONTAINING

POLITICAL,
HISTORICAL,
GEOGRAPHICAL,
SCIENTIFICAL,

STATISTICAL,
ECONOMICAL,
AND
BIOGRAPHICAL

DOCUMENTS, ESSAYS, AND FACTS;

TOGETHER WITH

NOTICES OF THE ARTS AND MANUFACTURES, AND A RECORD OF THE EVENTS OF THE TIMES.

H. NILES, EDITOR.

THE PAST—THE PRESENT—FOR THE FUTURE.

I wish no other herald,
No other speaker of *my living actions,*
To keep mine honor from corruption,
But such an honest chronicler.

Shakespeare, Henry VII, Act IV,
Scene II, Lines 69-72

Hezekiah Niles, who established the predecessor to the modern news magazine and edited it from 1811 to 1836, in a day of violently partisan political journalism, sought to maintain an accurate and objective commentary on public affairs, including activities of the Supreme Court. The selection from Shakespeare, epitomizing his own ideals, appeared in the masthead of his first issue, September 1, 1811.

"NO OTHER HERALD"

Niles Register *and the Supreme Court*

JEFFREY B. MORRIS

Day after day the short, stout man with the weatherbeaten, plain face and the keen, gray eyes stooped over his desk. Some of his ten-hour stints were spent reading through documents piled high around him. Others were devoted to scanning newspapers from all over the United States. Still other sources of information had to be examined—some of the 4,000 letters written to him each year. Then, after all this, the wheat had to be culled from the chaff so that news could be printed. Long editorial essays on political economy had to be written.

It was in this way, week after week, for twenty-five years, in a building on Water Street in Baltimore, that the man known simply as "H.Niles" to his readers published that news weekly which was the great journal of the early nineteenth century.[1] Henry Steele Commager has written of *Niles Register*:

> It had all the news, all the information, all the reports from the best journals, and it had all the documents too. . . .
> It was national, it was authoritative, it was indispensable.[2]

Niles Register provided the Supreme Court of the United States with its first sustained, accurate coverage. The newspaper's first great twenty-five years are almost coterminous with the greatest years of the Supreme Court under Marshall. By printing verbatim decisions of the high court, unbiased reportage of decisions in Washington and on circuit, a wide variety of stories and documents relating to the origins and effects of those decisions, debates in the Congress and the state legislatures relating to the judiciary and its decisions, and by paying attention to a variety of other matters—this weekly newspaper informed a nation about the work of the Supreme Court.

Historically, critics of press coverage of the Court have charged the fourth estate with oversimplification, shallowness, misinterpretation, distortion, bias and factual error.[3] There are, however, particular difficulties with reporting the work of the Court. The Supreme Court speaks once and then is silent. Its decisions are complex, encompass a variety of subject areas, and are handed down on relatively few days. The reporter must work only from the legal opinion. There are no backgrounders, handouts, or public relations puffery to help out.

The opinions often "mask the difficulties of a case rather than illuminate them".[4] Dissents and concurring opinions, offering a parade of potential "horribles", blur the meaning of the majority's opinion. And, of course, the Court's internal operations are secret, both protecting and obscuring the institution. The task of reporting about the Court calls for very different skills than those for the coverage of other news. It never has and never will be an easy task.

Hezekiah Niles

When an editor's most salient characteristics are accuracy, fairness, and integrity, one wonders if his publication has "personality". Yet, reading page after page, volume after volume of *Niles Register,* one get to know and to like "H.Niles". This is because Niles engaged in a continuing dialogue directly with his readers, talking to them "from the fireside," and responding to their letters in his columns. It is because he was self-consciously attempting to publish a work which would be useful in the future.

It is, as well, because—though he was a man of decided opinions, who made those opinions felt—he obstinately insisted upon providing his readers with the opinions of those with whom he disagreed and with the raw materials to attempt to find the truth out for themselves. And, it is because this Quaker and Mason was a man of marked tolerance, not only for the political views of others, but for outsiders such as Jews and Indians.

Hezekiah Niles began his *Register* before he was thirty-four years old.[5] Born October 10, 1777, Niles' early years were spent in Wilmington, Delaware. At seventeen he was apprenticed to a printer in Philadelphia, then the nation's capital, where he spent several years learning typesetting and bookbinding. Breathing the air of budding party rivalries, he became a Jeffersonian Republican, writing articles supporting Jefferson in the 1796 election.

Niles returned to Wilmington where he spent a decade as a printer.[6] Along with typical job printing, he produced a two-volume edition of the political writings of the prominent Delaware Republican, John Dickinson.[7] He also edited and published the state's first literary magazine, *Apollo,* or, *Delaware Weekly Magazine,* which survived eight months, about average for magazines of the time. Involved with the Democratic Republican Party, he was elected town clerk and Assistant Burgess of Wilmington, holding each office twice.

After his second publishing partnership and his literary magazine failed, Niles moved to Baltimore, then a major commercial center, the nation's third largest city (and soon to be its second), a city with genuine cultural aspirations. There, he operated a book and stationery store from 1805 to 1811 and became editor of the four-page daily (three pages were ads) *Evening Post,* Baltimore mouth of the Democratic Republican Party, a newspaper typical of the partisan press of its time.[8]

The *Evening Post* was sold in June 1811. Two weeks later, Niles issued a prospectus for a new newspaper. The first issue of *Niles Register* was published on September 7, 1811. For twenty-five years, his editorial responsibilities and relations with his readers were Niles' chief interest. He did, however, find the time to produce an anthology of primary source materials on the American Revolution,[9] to participate in two national tariff conventions, and in local, state and national politics.

He first served on the First Branch of the City Council of Baltimore and participated in such varied civic groups as the Abolition Society, Fire Company, and Typographical Society. He is reported to have loved good food, wine and tobacco. He must have loved home, hearth and family—he had twelve children by his first wife, Anne, and another eight by his second wife, Sally. He died in Wilmington at sixty-one, after suffering a stroke, on April 2, 1839. The *Baltimore Chronicle* wrote of him:

> . . . frank, honorable, independent and truly republican spirit, simple in his manners, and habits, affectionate to his family, liberal to those who he employed in the prosecution of his business, disinterested and public spirited.[10]

Two towns were named after him—in Michigan and in Ohio.

Niles Register

H. Niles published his fifty volumes on medium octavo, 6⅝″ by 9⅛″, two columns to a page. The weekly was normally sixteen pages in length. Each half-year, Niles bound and indexed the twenty-six issues, producing a library-size volume of at least 316 pages. The subscription price during Niles' editorship remained at $5 annually plus postage.

The *Register* "differed markedly from the weekly newspapers and weekly magazines of its day".[11] During the first third of the nineteenth century, there were few newspapers. They were limited in content—half of their usual four pages were advertising matter. Circulations were small, dailies averaging perhaps 1,000 with the largest 4,500 (*New York Courier and Enquirer,* 1833) and normally limited to the locality.[12] Newspapers were heavily partisan, weapons employed as artillery in the propaganda wars between parties.

Presidents literally hired poets to edit administration "mouthpieces." The typical newspaper was marked by contentiousness, personal virulence, sarcasm, untruthfulness, and scurrility.[13] While magazines were more diverse, they too had small local circulations (up to 2,500 in 1825), and when dwelling on politics were full of "bitter attack and savage reprisal."[14]

The *Register* was somewhere between a newspaper and a magazine. It took no advertising, avoided partisanship, aimed at a national rather than a local audience, and considered it a *first object* to "register" material for the future. The leading scholar of the publication, Norval Neil Luxon, describes it as

> . . . actually a weekly news magazine specializing in printing official documents, governmental reports, Congressional speeches on matters of great public moment and diplomatic correspondence, with a summary of the significant news of national interest.[15]

Niles differed from his fellow-editors in that he wished his readers to make up their own minds:

> all *public* papers and proceedings . . . needful to a correct understanding of the nature and character of public measures shall be given . . . without much, if any, comment, let them affect what party or persons they may—and both sides, and all sides, shall have the same opportunity of being heard before 'the bar of the public reason'. When this is the case, the people will not often fail to form a rightful judgment of everything that may interest them.[16]

Niles attempted to present a fair, accurate, impartial picture of the great issues that divided the nation—the elections, the War of 1812, the Missouri question, states rights, nullification, slavery.

The editing, furthermore, conceptualized the role of his publication to encompass that of a reference work. He printed such documents as the Articles of Confederation, state constitutions, lists of governors and college presidents, election and population statistics. Niles aimed at informing his readers, at achieving a work which was essential for a man's library,[17] and he considered the major function of his journal to preserve significant documents and facts for posterity. Indeed, the motto of the newspaper on its masthead was "The Past—The Present—For the Future."

Niles filled his *Register* primarily with news and primarily news relevant to government and politics. The great bulk of the pages of the weekly was made up of documentary material—abridged Congressional debates and unabridged Congressional speeches of particular interest, Presidential and gubernatorial messages, reports of cabinet officials, diplomatic corespondence, reports and letters relevant to controversy, treaties and the like. These were printed "in their raw state."[18] As one reader put it:

> in your usual manner, you have served up to your readers a little *meat* rather than "fed them milk".[19]

Often when Niles had more news and documents than would fit within the covers of an eight-page weekly, his conscientiousness about informing his readers and posterity was such that he printed and mailed free of charge eight and sixteen page supplements. Nine times he printed supplementary volumes, normally 192 pages long, which he sold for one dollar.

Niles was not lacking in political opinions of his own. He was a strong nationalist, who opposed states rights, nullification, and secessionist movements. He was a classic Jeffersonian with "a deep and abiding faith in democracy." He acceded to majority rule when it went against him.[20] He was against slavery but not an extreme abolitionist. Niles expressed these views in his *Register* but would not use the newspaper to advance party or person or to bias the presentation of ideas.

The *Register* was full of economic matters. H. Niles was a political economist of importance, "an outstanding member of that group of American nationalist economic writers," who opposed the classical school of English economic philosophers, such as Adam Smith, Malthus, Ricardo, and James Mill.[21]

Niles' interest in protection was not limited to essay-editorials in his journal. He was a prominent participant at the Harrisburg and New York national tariff conventions of 1827 and 1831 and compiled pamphlets from his essays and editorials in the *Register* on his economic philosophy which were very widely distributed.[22]

The Register and the Supreme Court

Browsing through Charles Warren's monumental works on the Supreme Court,[23] one find references to dozens of newspapers published during the first part of the nine-

teenth century. In the *Register* itself there are news stories and commentary relevant to the work of the court from all over the country.

What made coverage in *Niles Register* so important is that it was accurate and unbiased; that its reputation for integrity was such that its editorializing was paid serious attention; that for its time it was read by a large number of subscribers distributed over all parts of the nation; that its readership included a disproportionate number of "opinion-formers" and political elites; that through the *exchange system,* its news and views reached many times the number of its subscribers.

Niles took great pride in the reputation his *Register* had for accuracy. Indeed, the journal came to be cited in court for proof of facts, and as a source of reported decisions.[24] He was fastidious in attempting to warn his readers to distinguish between fact and rumor, careful in typesetting, and corrected errors expeditiously. While H. Niles' editorial commentary, particularly his campaign for protection, was controversial, his newspaper was a trusted reference work.

The circulation of the *Niles Register* ranked second in the United States among both newspapers and magazines prior to 1833. The *Register* started with 1,500 subscribers and generally maintained between 3,500 and 4.500. The circulation was national in character. There were subscribers in every state, in the territories, and abroad.[25] As Richard Gabriel Stone said:

> For twenty-five years people from every section of the country accepted his weekly contributions as connecting links in a national chain that bound them together.[26]

The constituency of the *Register* was, as Edward Stanwood said, "the best-informed part of the community in every part of the country." [27] John Adams, James Madison,

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decisions, opinions of the Court were then printed verbatim within relatively few weeks. *The Schooner Exchange, McCulloch* [sic] v. *Maryland, Cohens* v. *Virginia, Gibbons* v. *Ogden, Brown* v. *Maryland, Worcester* v. *Georgia* and the *Amistad*—all were selected. The choice of cases to which such space was alloted passes the test of history.

The most controversial questions involving the Court during the period Niles edited the *Register*—the Bank question, the supremacy of the Court over state court decisions and state laws when in conflict with the U.S. Constitution, and the Cherokee problem—are covered at length and fairly. Along with the publication of the opinion and a variety of other stories and documents, Niles offered his own editorial opinion on those questions.

For cases considered to be of importance but of somewhat less interest, there were news stories running one-half column or more and later follow-up stories. Typical of such coverage was that given to *Sturges* v. *Crownshield.* The decision was handed down on February 17, 1819. On February 27 there was a front page story taken from the *National Intelligencer* which covered over a column and summed up the holding. That story was followed by a column written by H. Niles, obliquely indicating his approval of the decision and noting that it "powerfully shews the necessity of a general bankruptcy law." [34]

On March 6, a column was given over to two articles from the *New York Evening Post* and the *Baltimore American* discussing the substance of the opinion and its effects.[35] On March 20, there was a 2½ column article from the *National Intelligencer* carefully and dispassionately analyzing the decision and that in an indistinguishable case, *M'Millan* v. *M'Neill.* The same day there was a half-column from the *New York Evening Post* indicating the application of *Sturges* to a jury trial in a New York state court.[36] On May 22, there was still another column, this time from the *New York Daily Advertiser,* reporting an analysis of the effects of *Sturges* in pending New York cases by Chief Justice Spencer of the New York State Supreme Court.[37]

Coverage of other cases, generally taken from other newspapers or from correspondence to Niles, one to three paragraphs in length (including cases from *Green's Heirs* v. *Biddle* to more run-of-the-mill admiralty, piracy, customs, and negotiable instruments cases, now lost in obscurity) is somewhat less satisfying due to brevity, which often blurred the legal significance and obscured other implication.[38]

If Niles was scrupulous in segregating news and commentary, and in giving "equal time" to positions contrary to his own, he was not lacking in a point of view regarding the Supreme Court of the United States. Those views were expressed most vigorously during that era of controversy over Supreme Court review of state laws—the time of *McCulloch* (1819) and *Cohens* (1821). His concerns, about the role the court was assuming in the constitutional system as well as the direction of some of its decisional law, were modified a decade later as a result of worry about the union breaking apart and, one suspects, growing respect for John Marshall and his brethren.

Basically, Niles' attitude towards the Court might be labeled a moderate, Jeffersonian Republican position. He saw the need for a judiciary which was not subject to the ebb and flow of public opinion, but did not wish it immune from all checks.

Niles believed that there was a need for some final arbiter of state constitutional issues, but believed that it would be better placed in an institution responsible to the people. He did not believe in life tenure for judges and suggested various devices for re-confirmation of Justices by the Senate after a term of years. Niles was particularly concerned about excessive public veneration of the Court. These views are encompassed in reactions he expressed after a visit to the court in 1821:

> I could not look at the bench without something like veneration—but, recollecting some of its decisions or 'oracles', the reflection that the judges were only *men,* immediately crossed my mind, and checked the

NILES' WEEKLY REGISTER.

THE BANK QUESTION. It is ascertained by the vote on Thursday last—see "congress," that the house of representatives will neither agree to repeal the charter of the bank of the United States, nor order a *scire facias*. These are results that were to be expected, and in conformity with *our* wishes on the subject—reformation, and not destruction, is the thing that we continually aimed at. What will be done—what *can* be done, to effect the former, is doubtful. It is probable that no act will be passed at present, except the bill to regulate voting, &c.

It is stated that upwards of 100 shares of stock were *really* sold in Baltimore, at $115, "for money," a few days ago; but since then, we believe, other sales have been made at 107 or 108,—which probably, is the *full* worth of the stock, under the most favorable circumstances that can be anticipated, to persons desiring to possess it as an investment of capital; but the spirit of speculation in which the institution has been so much managed from the beginning, may keep its price fluctuating, until the stock passes into the hands of those who intend to hold it, for the sake of its interest or dividends.

We learn from Charleston, that Mr. *Cheves* has been invited to Philadelphia, to assume the duties of the president of this bank; and it is understood that his arrival in that city may be speedily expected.

The bank is calling in from 5 to 10 per cent. every sixty days, on the notes discounted on stock; and we see that the office at Washington city is demanding 25 per cent. every 60 days, on the discounts made there upon the stock of the *district* banks. This severe pressure upon the latter class of borrowers, seems to have occasioned some agitation in the district, and we observe that a meeting of the cashiers of the district banks is invited.

The case of *McCulloh* versus *the state of Maryland*—that is, on the right of a state to tax the bank of the United States, has been in argument before the supreme court since Monday last. Messrs. Pinkney, Webster and Wirt (the latter as the attorney general, representing the interest of the government in the institution) for the bank; Messrs. Martin, Hopkinson and Jones against it. The discussion has been very able and eloquent—it involves some of the most important principles of constitutional law, and the decision is anxiously expected. *Much will depend upon it.*

Supreme Court of the United States.

On Wednesday, the 17th inst. Mr. chief justice Marshall delivered the opinion of the court in the case of Sturges against Crowninshield.

Sovereignty of the States.—No. 1.

An insidious delapidation or violent dismemberment of the American union, together with a consolidation of the reserved rights and powers of the states, is the darling hope that the enemies of liberty, at home and abroad, have hugged to their heart with demoniac fervor and constancy. They have hated and still hate, the freedom of the people of the United States, on the principles with which Satan regarded the happy condition of our first parents in the garden of Eden—their own preverse dispositions not being fitted to participate in an equality of rights, or their inordinate pride rejecting every measure calculated to do away distinctions among men, save in virtue and usefulness. No part of our editorial duty has been performed with more alacrity than to combat with such, and to encourage a confidence in the perpetuity of the confederacy, in its present super-excellent form—to descant upon the inestimable advantages that must flow from a well-balanced system, with an honest administration of its principles for the common good; shewing how every part transmitted intelligence and strength to a general point, from whence the collected wisdom of the nation, with collected force, was re-transmitted to benefit every part of the common family. But, we always contended that the *living principle* was in the virtue of the people, and the sovereignty of the states—and that these were so closely united in giving order to the system, that neither could be dispensed with. The *individuals* of this country having, by the favor of Providence, and patience and perseverance, worked out their emancipation, from British despotism, gave up to their state governments certain of their rights for the better preservation of those that they thought proper to retain; and the states, in like manner and for like purposes, agreed to establish a national head, to direct the *general* affairs of the confederation, in peace and in war. Here was a system that we confidently trusted was to confer happiness on many millions of freemen, to the thousandth generation. We discovered nothing which had happened to jeopardize this most splendid inheritance—and never suffered the idea to prevail that the RESERVED rights of the people, or of the states, could be *seriously* compromitted by any act of the national administration, trusting in the virtue of the *ballot* to reform abuses and punish those guilty of them. It was that thus influenced, we have labored so faithfully to build up a NATIONAL CHARACTER, to inspire a *home feeling*, a proud and jealous regard of our rights as men—rights which the people, in obedience to the will of GOD who created them free, cannot legally transfer to the keeping of others. We were aware, nevertheless, of the intrigues of the ambitious and

Niles Register *sought to distinguish factual reporting from editorial comment, particularly with reference to Supreme Court cases, as illustrated in the material taken from succeeding issues of the news weekly in the 1819 term. In the left-hand column, the editor gives a factual background discussion of the issues in the Bank of the United State case, followed by the opening summary of the New York bankruptcy case of Sturges v. Crowninshield. In the right-hand column the editor begins a vigorous editorial attack upon the Bank opinion which had subsequently come out.*

homage (though it did not lessen the respect) which the senses of seeing and hearing had predisposed to me to render it.[39]

Niles' vehement criticism of the decision in *McCulloch*, set out at length in Beveridge's *Marshall*,[40] was essentially based upon the concern that the decision would sanction the establishment of monopolies by the Congress and tend towards the destruction of state power. He admitted to writing with hesitation in the issue of March 13th, one week after the decision was rendered, because he had not yet read the decision (which was to be printed in the following issue). He was of the view that the opinion was a great wound:

> We are awfully impressed with a conviction that the welfare of the union had received a more dangerous wound than fifty *Hartford* conventions, hateful as that assemblage could inflict—reaching so close to the *vitals* as seemingly to draw the heart's blood of liberty and safety, which may be wielded to destroy the *whole revenues*, and so do away the sovereignties of the states.[41]

Nor, once he head the opinion, did Niles think very highly of Marshall's craftsmanship.

> We frankly confess *our* opinion, that the writer of the *opinion*, in question, has not added anything to his stock of reputation by writing it—it is excessively labored.[42]

As Niles' criticism of *McCulloch* was copied by papers throughout the country, public opinion rapidly crystallized against the decision, "the sleeping spirit of Virginia" [43] was aroused, and Spencer Roane took up the cudgels to speak to the lawyers and judges of the country, as Niles had spoken to the "plain people." [44]

Niles both expected the decision in *Cohens* v. *Virginia* and regretted it:

> The decision was exactly such as we expected. . . . We had no manner of doubt as to the result that the State sovereignty would be taught to bow to the Judiciary of the United States. So we go. It seems as if almost everything that occurs had for its tendency that which every reflecting man deprecates.[45]

Niles nonetheless drew a sharp line between disagreement with the Court and defiance of its decisions. After the State of Ohio ignored a circuit court injunction and seized money in payment of its tax (unconstitutional under *McCulloch*) from the Bank of the United States, Niles wrote:

> Much as we are opposed to the principle at operation of the bank of the United States, —decided as we are in the opinion, that congress transcended its authority by incorporating it—and convinced also that the decision of the supreme court in the case of McCulloh vs. the State of Maryland was wrong, yet believing that the states have a right to tax this institution and its branches —Still we regret this act of Ohio. It is not for any of the states, much less individuals, to oppose force of the law, as settled by the authorities of the United States, however zealous we may be to bring about a different construction of it, through persons legally vested with power according to the constitution to act in our name and in our behalf.[46]

During the controversy over the Cherokee Indian case, he distinguished between his belief in "lessening the power and altering the jurisdiction" of the Supreme Court and "resistance of its authority." Niles was, after all, a staunch Unionist:

> There must be some tribunal of last resort . . . else it is impossible that the union should continue.[47]

Although Niles always retained reservations as to the power and jurisdiction of the Court, his respect for it increased over time. In 1828 he wrote of it:

> Though the constitutional construction of this lofty tribunal, is not wholly comformable to our humble opinions of right,—we have often thought that no person could behold this venerable body without profound respect for the virtue and talents concentrated on its bench; and with a great degree of confidence that, as there must be some power in every government having *final* effect, it could hardly be vested any where more safely than in the supreme court, as at present filled.[48]

Niles paid tribute to Marshall during the nullification crisis:

> I trust I may be pardoned for directing your attention for a moment to the eminent man, who has now for thirty years presided over its highest tribunal, and to whose lot it has fallen, more than to that of any other man, to interpret authoritatively the provisions of the federal constitution. Questions most momentous and most embarrassing, have been solved by his gifted intellect, as by intuition; and the arguments by which his decisions have been sustained, while they are intelligible to the meanest capacity, are such as to reflect honor on the highest intellect. Though contending politicians may not always acquiesce in his conclusions, yet none can doubt the strength and depth and clear-

> ness of his mind, or the uprightedness, integrity, and purity of the judge.[49]

Although Niles normally limited his reportage of deaths to a sentence or two, Marshall's was accompanied by pages of memorial resolutions, reports of the burial, and of editorial coverage. Niles' initial reaction was uncharacteristically emotional:

> It may truly said that 'a great man has fallen in Israel' . . . next to WASHINGTON, only did he possess the reverence and homage of the heart of the American people—not forced by any sudden burst of party zeal, but gently and kindly, yet ardently, flowing from a deep conviction of his long public service, and private practice of whatever embellishes and adorns human nature. No man that lived more nearly 'filled up the measure of his country's glory' than he.
>
> Some other will attempt a sketch of his character—the task will be performed, but we are incapable of it. . . .[50]

Still—one must always remember that Niles was *invariably* fair. The week after he reported John Marshall's death, while noting that "happy to say that it is the only 'thing of the sort' that we have seen," Niles republished an editorial from the *New York Evening Post* critical of Marshall's career.[51]

Niles Register gave extensive reportage to the work of the Justices on circuit. In forty cases from 1818 to 1831, the *Register* covered trials, charges to juries, and questions of law occurring customs, admiralty, piracy, banking, negotiable instruments, and riparian rights cases.

What else did *Niles Register* print about the work of the federal judiciary? Some items which are *de rigeur* in major newspapers these days are found in very different form. The opening of the annual four to six week term was not the subject of a story anticipating and describing the major cases on the docket. Normally, cognizance was taken of a new term in one sentence. For example, the 1821 term, which had *Cohens* to decide, began with this story (in its entirety):

> The Supreme Court is now in session at Washington city and employed in the decision of many important questions.[52]

Nor does one find in the *Register* the kind of "end-of-the-term wrap-up" with which we have become familiar—discussing major decisions of the term, alignments of the Justices and so forth. If account was taken of adjournment, it was either perfunctory, or in the context of the court's ability to keep up with its case load. The Justices were praised at the end of the 1827 term:

> The Supreme Court of the United States concluded an arduous and important session of ten weeks, on Friday the 16th inst[ant]. Nearly eighty cases, some of them of deep and delicate interest, and of high consequence, have been decided—on some of which the court was not unanimous, which also caused much extra labour to the judges, and loss of time to business in general. The most gratifying testimony is borne of their sedulous attention to the great matters submitted to them.[53]

There were only seven Justices appointed to the Court in the twenty-five years Niles edited the *Register*. There was comparatively little speculation as to how these vacancies might be filled. After Livingston's death in 1823 the *Register* simply reported:

> It is strongly reported that the present secretary of the navy, Smith Thompson, will be appointed a judge of the Supreme Court in place of Mr. Livingston, dec[eased].[54]

When John McLean was appointed in 1829, he is spoken of having "transferred" from Postmaster General. The brief story does not meditate upon the effect of the appointment upon the Supreme Court but rather shows alarm about the possibility of a partisan appointment of the new Postmaster General on the delivery of the mails.[55]

The penchant of the twentieth century press for printing rumors of the resignation of Justices is anticipated in Niles' columns with respect to only one member of the Court, John Marshall. Several times there were rumors or concern expressed about his leaving the bench.

With the exception of Marshall's death, the *Register* did not print obituaries of Justices as we know them today, with lengthy biographies and/or critical analyses of their career. Justice Tod[d] was disposed of with one sentence:

> He was one of the most excellent men who ever lived.[56]

There was a four paragraph story at the time of the almost simultaneous deaths of Justice and Mrs. Bushrod Washington[57] and later coverage of memorial services for the

Justice. Of course, there was coverage of John Jay's death.[58]

Relatively little was printed about the Justices which did not come out of their judicial duties. News accounts of Presidential inaugurations would note the attendance of the Justices and the participation of the Chief Justice;[59] brief miscellaneous items about one or another Justice might occur several times each year.

We read of Marshall as a delegate to the Virginia Constitutional Convention, of Justice William Johnson's correspondence attacking nullification,[60] and of a controversy over Bushrod Washington's sale of his slaves.[61] On the lighter side, Niles reports a feud between Justice Smith Thompson and District Judge Van Ness over the location of the Circuit Court in New York City,[62] of Story's views on women,[63] and of a dinner given in honor of Justice McLean in Nashville.[64] (For the first story, see *Judicial Potpourri*, page). At a dinner in honor of Justice Baldwin, a toast was given:

> The Supreme Court of the United States—Although it sits in the darkest room of the capitol, the hall is illuminated with the purest moral light.[65]

The *Register's* coverage encompassed, of course, Congressional proceedings including those affecting the judiciary: the great constitutional debates, proposals to expand the circuit system and so on. The *Register* also included in its pages resolutions of state legislatures, gubernatorial messages, and correspondence of notables such as Jefferson. It was and is a unique repository of information pertinent to the judicial branch in the early nineteenth century.

With "penetrating editorial judgment," "fidelity to principle, industry and truthfulness," and a deep sense of responsibility to his readers, Hezekiah Niles produced "the great American news magazine of the early nineteenth century," a reference work "whose columns mirror the most nearly complete and most nearly accurate picture of the American political scene from 1811 to 1849" found in any one contemporary publication.[66]

Treating each of his readers as if he had the intellectual vigor and breadth of interest of a Jefferson, Niles provided for his nation extensive and accurate news coverage of the Supreme Court as well as thoughtful criticism during the "Golden Age of Marshall." The press of later generations, of our own time, and of posterity should be measured by the standard set by *Niles Register*.

NOTES

The author gratefully acknowledges the research assistance of Randy L. Sturman and William L. Saunders, Jr., the bibliographic assistance of Vincent A. Burke and Sara J. Sonet of the library of the Supreme Court of the United States, the editorial work of Dr. Dona Baron Morris, and the stimulating suggestions of Professor William F. Swindler. Needless to say, the views of the author do not represent the views of the Supreme Court of the United States.

The journal has customarily been referred to as *Niles Register*. Actually, for its first 2½ years, it was titled *Weekly Register;* for the next 23½ years, it was *Niles' Weekly Register;* for the last 12 years, it was *Niles' National Register*.

This article is limited to consideration of the *Register* during the years it was edited by Hezekiah Niles, 1811-1836. He was succeeded by his son, William Ogden Niles, who proved more interested in politics than journalism. The journal was sold by Niles' second wife to Niles' friend, Jeremiah Hughes who returned it to a high level for nine years (1839-1848). Age and adverse financial conditions forced a sale to George Beatty of Philadelphia, who simply lacked the editorial expertise to keep the financially-troubled journal going.

[1] The description of Niles at work is taken with minimal poetic license from the authoritative work on Niles and his *Register*, Norval Neil Luxon, *Niles Weekly Register; News Magazine of the Nineteenth Century* (Baton Rouge, 1947) and from various references in the columns of *Niles Register* [hereafter designated "N.R."], e.g. 49 *N.R.*, Dec 18, 1830, p. 274.

[2] Henry Steele Commager, Preface to Alden T. Vaughan (ed.), *Chronicles of the American Revolution* (N.Y., 1965) vii, viii.

[3] The major contemporary works on the relations between press and Court are: Donald L. Grey, *The Supreme Court and the News Media* (Evanston, Ill., 1968) and Chester A. Newland, "Press Coverage of the United States Supreme Court", 17 *Western P.Q.* 15-36 (1964). See also John P. McKenzie, "The Supreme Court and the Press", 67 *Mich. L.R.* 303 (1968), excerpted in Kenneth S. Devol, *Mass Media and the Supreme Court. The Legacy of the Warren Years* (N.Y., 2nd ed. 1976), pp. 353-359.

[4] MacKenzie, "The Supreme Court and the Press", in Devol, *op. cit.*, 354.

[5] The major works on Niles are Luxon, *op. cit.*; Richard Gabriel Stone, *Hezekiah Niles as an Economist*, The Johns Hopkins Studies in Historical and Political Sciences, Series LI Number 5 (Baltimore, 1933. See also *Dictionary of American Biography*, vol. XIII, p. 521-522).

[6] Niles' Wilmington career is discussed in John Thomas Guerther, "Hezekiah Niles, Wilmington Printer and Editor", *Delaware History*, XVII (Spring-Summer 1976) No. 1, pp. 37-53.

[7] John Dickinson, *The Political Writings of John Dickinson* (Wilmington, 1801).

[8] In 1809 Niles' partisan commentaries in the *Evening Post* on Federalist speeches and statements were published in book form as *Things as they Are; or Federalism Turned Inside Out! Being a Collection of Extracts From Federal Papers, &c and Remarks upon Them Originally Written for, and Published in the Evening Post* (Baltimore, 1809).

[9] *Principles and Acts of the Revolution in America* (Baltimore, 1822), republished by Samuel V. Niles (New York: 1876), republished and edited by Alden T. Vaughan, *supra* n. 2.

[10] Quoted in Luxon, *op. cit.*, p. 64.

[11] Luxon, *op. cit.*, p. 1.

[12] The standard histories of American Journalism are Frank Luther Mott, *American Journalism, A History 1690-1960* (New York, 3rd ed. 1957); Frank Luther Mott, *A History of American Magazines 1741-1850* (Cambridge, Mass., 1939); Frank Luther Mott, *A History of American Magazines 1850-1865* (Cambridge, Mass., 1938). See also John [William] Tebbel, *The Compact History of the American Newspaper* (N.Y., rev. ed. 1969).

[13] Tebbel, *op. cit.*, 72-73.

[14] Mott, *A History of American Magazines 1741-1850*, 161.

[15] Luxon, *op. cit.*, 75.

[16] 28 *N.R.* June 18, 1825, p. 241.

[17] *N.R.* August 23, 1817, p. 403. See also Stone, *op. cit.*, 8.

[18] Luxon, *op. cit.*, 91.

[19] 19 *N.R.* Jan. 20, 1821, p. 337-338.

[20] Luxon, *op. cit.*, 31.

[21] Stone, *op. cit.*, 7.

[22] *Agriculture of the United States* (Baltimore, 1827); *Politics for Farmers* (Baltimore, 1830); *Politics for Working Men* (Baltimore, 1831).

[23] Warren, *The Supreme Court in United States History* (Boston, 40, 1922, rev. 1926).

[24] 30 *N.R.* April 22, 1826 p. 151-152; 18 *N.R.* June 24, 1820 p. 299.

[25] Luxon, *op. cit.*, 6.

[26] Stone, *op. cit.*, 13.

[27] Quoted in Luxon, *op. cit.*, 301.

[28] 30 *N.R.* April 22, 1826 p. 151-152.

[29] Luxon, *op. cit.*, 298.

[30] Thomas Jefferson to H. Niles, Aug. 22, 1817, quoted in Luxon, *op. cit.*, 12.

[31] Stone, *op. cit.*, 31.

[32] Albert J. Beveridge, *The Life of John Marshall*, IV: *The Building of a Nation* (Boston & N.Y., 1919), p. 310, 445.

[33] Noted in Warren, *op. cit.*, I, 488. There is a story in *Niles Register* about the interpretation of the case by the Mayor of New York without naming it. 16 *N.R.* June 12, 1819 p. 209.

[34] 16 *N.R.* Feb. 27, 1819 pp. 1-2.

[35] 16 *N.R.* Mar. 6, 1819, p. 27.

[36] 16 *N.R.* Mar. 20, 1819, p. 76-77.

[37] 16 *N.R.* May 22, 1819, p. 214.

[38] Perhaps the best short treatment of a case was an analysis prepared by Thos. P. Jones for the journal of the Franklin Institute of *Pennock and Sellers* v. *Dialogue*, a patent case. 37 *N.R.* Sept. 12, 1829 p. 47-48.

[39] 20 *N.R.* April 17, 1821 p 82-83.

[40] Beveridge, *op. cit.*, IV, 309-313.

[41] 16 *N.R.* March 13, 1819, p. 43.

[42] 16 *N.R.* April 3, 1819 p. 103.

[43] Beveridge, *op. cit.*, IV, 312-313 quoting John Marshall's letter to Joseph Story, March 24, 1819.

[44] Beveridge, *op. cit.*, IV, 313. Marshall took to the press to answer Roane and others with essays signed "A Friend of the Union" published in the *Philadelphia Union* April 24-28, 1819, and "A Friend of the Constitution", *Alexandria Gazette*, June 30-July 15, 1819. See the modern revelations in Gerald Gunther, *John Marshall's Defense of McCulloch v. Maryland* (Stanford, 1969).

[45] *N.R.* Mar. 17, 1821 p. 36.

[46] 17 *N.R.* Oct. 2, 1819 p. 65.

[47] 39 *N.R.* Sept. 18, 1830 p. 58.

[48] 33 *N.R.* Jan. 19, 1828 p. 329.

[49] 39 *N.R.* Aug. 28, 1830 p. 11-12.

[50] 48 *N.R.* July 11, 1835 p. 321.

[51] 48 *N.R.* July 18, 1835 p. 341.

[52] 19 *N.R.* Feb. 17, 1821 p. 415.

[53] 32 *N.R.* Mar. 24, 1827 p. 80.

[54] 24 *N.R.* Mar. 29, 1823 p. 49.

[55] 36 *N.R.* July 11, 1829 p. 313.

[56] 29 *N.R.* Feb. 26, 1826 p. 418.

[57] e.g. 37 *N.R.* Dec. 5, 1829 p. 228-229.

[58] 36 *N.R.* May 23, 1829 p. 199; 36 *N.R.* May 30, 1829 p. 217-218.

[59] e.g. 28 *N.R.* Mar. 5, 1825 p. 8, 19.

[60] 39 *N.R.* Oct. 2, 9, 16, 1830, pp. 98, 116, 132.

[61] 21 *N.R.* Sept. 1, 15, 29, 1821, pp. 1, 39, 70-72.

[62] 27 *N.R.* Sept. 11, 18, Nov. 6, 1824, pp. 28-29, 43-48, 158-160.

[63] 36 *N.R.* July 25, 1829 p. 351.

[64] 39 *N.R.* Oct. 30, 1830 p. 154.

[65] 37 *N.R.* Feb. 6, 1830 p. 397.

[66] Luxon, *op. cit.*, p. 307, 163; Stone, *op. cit.*, 43; Louis L. Snyder and Richard B. Morris, *A Treasury of Great Reporting* (New York, rev. ed. 1962), xxvii. See also Frank Luther Mott, *American Journalism*, *op. cit.*, 188.


The Daily Picayune.

NEW ORLEANS THURSDAY, JULY 7, 1898—SIX TWO PARTS.

A FRIGHTFUL DISASTER AT SEA.

IN THE TRENCHES AT SAN JUAN.

D. H. HOLMES,

Remnant Sale for 1898

D. H. HOLMES.

The presumed death of a mother and daughter in the ocean disaster described in the headlines of the New Orleans newspaper shown above, led to a bizarre struggle in state and federal courts, as well as those in England and France, as well as a cryptic cenotaph in a New Orleans cemetery.

ANGELE MARIE LANGLES

The Case of the Missing Bodies

EBERHARD P. DEUTSCH

(Part of the story of Supreme Court litigation is the story behind the story—the sometimes bizarre circumstances which led to the case. While the following story only reached the Supreme Court on collateral issues, it was considered too interesting to pass by; so the author was asked to rewrite his original article, which appeared in the *American Bar Association Journal* in March, 1962, for the benefit of YEARBOOK readers.—Ed.)

New Orleans' Metairie Cemetery was once the sight of the exclusive Jockey Club. This gave rise to its sardonic characterization as a haven for the quick and the dead. In years long past, when outlying areas of New Orleans were still marshy soil, there were no underground interments and cemeteries consisted of vaults built above the ground.

Apparently, some kind of social status, measured by the magnificence of Mrs. Moriarity's tomb was accorded to persons deceased. For instance, one such tomb adorned by figures of four ladies, bears an inscription referring to the saints portrayed, as follows: "Faith, Hope and Charity and Mrs. Moriarity".

A cenotaph, rising above the surrounding tombs, contains on its base, the remarkable inscription:

Angele Marie Langles, 105 La. 39

The bizarre history of the latter inscription is the subject of the present article, and is to be found in one of the decisions arising out of legal proceedings in New York and Washington, and in London, Paris and New Orleans. Angele Marie Langles was lost on the early morning of July 4, 1898 with 550 others aboard the French steamer *La Bourgogne*, sunk in collision with the British iron sailing ship, *Cromartyshire*, in a dense fog in the North Atlantic off the Newfoundland banks some 650 miles south of Sable Island. The collision gave rise, as already indicated, to extensive litigation in France and in England and in several traditional controversies in the United States.

The case richest in common interest, as well as perhaps in legal interest, arose in Louisiana, where the opinion of the Supreme Court of that state remains a colorful link in the chain of fabulous New Orleans anthology.[1]

Pauline Costa Langles and her daughter, and only child, Angele Marie, had divided their time between their native New Orleans and a residence in Pau, France, and in Paris. Pauline was a comely, robust widow of 52. Her daughter, 35, was slight, frail and delicate. Both owned extensive real property in New Orleans.

On the 25th and 27th of June, 1898, mother and daughter executed at New Orleans, simple reciprocal wills, olographic and valid in form. By her testament the Mother declared

> "I give and bequeath to my daughter, Angele M. Langles, all the property of which I may die possessed, hereby constituting her my universal legatee. In case of the death of my said daughter prior to my death, I give [various personal and charitable legacies]. Two thousand dollars to be expenses for my tomb. After all debts are paid, the remainder of my fortune I give to build a memorial hospital for women and children . . ."

The daughter's will contained the following provisions:

> ". . . by this, my last olographic will and testament, entirely written, dated and signed by me, I give and bequeath to my mother, Mrs. J. Langles, all the property of which I may die possessed, hereby constituting her my universal legatee. In case of the death of my mother prior to my death, I give [various personal and charitable legacies]. After all my debts are paid, the remainder of my fortune I give for the support of the memorial hospital built by my mother. Three thousand dollars to be appropriated for my tomb. . .".

The wills were apparently prepared for each of them by a lawyer, apparently not noted for his astuteness. Shortly after the wills were written, both mother and daughter left for Paris, stopping *en route* in New York, whence Angele wrote to her cousin, Alex Costa in New Orleans, "we sail tomorrow morning at 10:00 on *La Bourgogne*" —and that was the last word ever heard from them.

La Bourgogne was a steel and iron steamer built in 1896, thus only two years old at this time and operated by La Compagnie Generale Transatlantique. She was 494.5 feet in length, displaced 7,395 tons, and was described as "the big French floating palace" in her cruise literature.

On Sunday morning, July 2, 1898, *La Bourgogne* sailed from the Port of New York bound for Le Havre, France. Just two days later, while *La Bourgogne* was proceeding at what was later found to be a moderate speed, in a dense fog some sixty miles south of Sable Island, she was struck almost broadside by the British iron threemaster *Cromartyshire* bound for Dunkirk from Philadelphia. In less than 40 minutes *La Bourgogne* foundered and sank to the bottom of the North Atlantic.

The *Cromartyshire* remained afloat, laid to, and assisted in the rescue of, and took aboard, the 163 persons (out of 715 who had been on board *La Bourgogne*). Subsequently, the *Cromartyshire* was taken in tow by the British Steamer Grecian which brought her to Halifax, whence the Associated Press issued the first news of the catastrophe.

This and later dispatches, as they appeared in *The Daily Picayune* of New Orleans for July 7 of that year carried headlines which fairly summarized the ten columns of text.[2]

The French Steamer *La Bourgogne*
Collided with an English Vessel,
And soon Afterwards Sank with over
500 Passengers and Crew.

Less Than 200 were Saved, and the
Survivors Tell a Terrible Story of the
Battle for Life aboard the Ship, in the
Boats and on Rafts.
The Crew Threw Women and Children
into the Sea to Save Themselves.

PROMINENT ORLEANIANS AMONG THE LOST

In a reversal of traditional French gallantry, never satisfactorily explained, 120 of the steamer's crew of 164 were saved while women and children among the passengers were sacrificed first.[3]

One of the many proceedings in the extensive litigation to which the sinking of *La Bourgogne* gave rise was decided by the Civil Tribunal of the Seine, and affirmed by the Court of Appeal of Paris and ultimately by the French Court of Cassation. In the latter decision it was held the speed of the French vessel "was not excessive at the time of the collision" and "no inference is to be drawn from the fact that the number of mariners saved greatly exceeded that of the passengers who survived the disaster . . . the members of the crew, accustomed to perils of the sea, and in better physical condition than the passengers, fought for their lives; and any isolated infractions which may have occurred among them . . . are primarily imputable to foreign sailors, on board the steamer as passengers . . ." [4]

Despite the holdings of the French courts to the contrary, the Supreme Court of the United States held that on the facts found by both courts below, "it is too clear for anything but statement" that "La Bourgogne (was) at fault, because she was moving at a rate of speed prohibited by the international rule as interpreted by the decisions of this court".[5]

One of the questions involved was as to the right, under the maritime law of the United States, to assert claims in admiralty for death on the high seas without having theretofore been settled; [6] that in the absence of statute—the death on the high seas act had not yet been passed—there could be no such recovery. But it had also been held [7] that if such a right of action is given by the law of the vessel's flag, that law will be enforced in an admiralty court of the United States. Justice Edward Douglass White (later Chief Justice) who wrote the opinion of the Supreme Court of the United States, was a native Louisianian. He noted that Article 1382 of the Code Napoleon provides that "every act whatever of man that causes damage to another, obliges him, by whose fault it happened, to repair it"—a provision, as the learned Justice pointed out, to be found, in *haec verba*, in the corresponding article of the Civil Code of Louisiana.[8]

"It may not be doubted", said Justice White, "that under the cited codal provision, a right of action for wrongful death has been constantly recognized and enforced from the date of the enactment of the code Napoleon."

"Indeed . . . in controversies in the French courts concerning injuries asserted to have been suffered by loss of life caused by the sinking of *La Bourgogne*, the right to recover for loss by death was impliedly conceded to exist, although relief was denied in the particular cases on the ground that the steamer was not, under the proof, at fault for the collision."

"Such being the law of France", Justice White's opinion concludes on this point, "it follows [that] . . . the Circuit Court of Appeals rightly held the claims for loss of life to be provable against the fund created in the limited liability proceeding", even though, "under the facts found as to the speed of *La Bourgogne*, the vessel would not have been held by the French courts to have been negligent, and therefore no re-

covery could have been had in France."

In the English courts, the case involved an action instituted by Messrs. Thomas Law and Son, owners of the *Cromartyshire,* for the damages which that vessel sustained in her collision with *La Bourgogne.*

In its first series of decisions in that case ultimately decided in the House of Lords, it was held that the courts of England had jurisdiction over the action against Compagnie Generale Transatlantique, owner of *La Bourgogne.*[9] In the second series, Mr. Justice Gorell Barnes, sitting with the Trinity Masters in the Probate, Divorce and Admiralty Division, reached a conclusion of fact that *La Bourgogne* was in fact "going at too great a rate of speed" since "the vessel was kept at what may be termed reduced full speed".[10] On appeal to the Court of Appeal, Lord Justice A. L. Smith, with whom Lords Justices Vaughan Williams and Romer concurred, sitting with Admiral Moresby and Captain J. S. Castle as assessors, held that "there could not be a doubt that *La Bourgogne* was doing at an utterly unjustifiable speed considering the density of the fog".[11]

Mentioned above, and as will be noted hereunder, the opinion of the Supreme Court of Louisiana, arising out of the deaths of two of *La Bourgogne's* passengers who were lost with the vessel, dealing with a fine point of Louisiana's law of descent and distribution, also turned on provisions of the Code Napoleon—as brought over verbatim into the Civil Code of Louisiana.

Two of the "Prominent Orleanians Among the Lost" were Angele Marie Langles and her mother. Actually, they were merely presumed to have been lost, for no one could ever be found who had seen them on board *La Bourgogne.*

Named in each of the long wills as executor of the testator's estate, was Harry H. Hall, a prominent New Orleans lawyer. Not long after news of the sinking of *La Bourgogne* reached New Orleans, and no word having been received from Angele or her mother, so that there no longer seemed any doubt that they had been lost with the vessel, Hall filed the wills for probate in the Civil District Court for the Parish of Orleans, Louisiana, and as is so often the case when substantial estates are involved, there was a plethora of applicants presenting claims for recognition of hereditary rights in the "Successions of Langles".

The two proceedings were consolidated and, there being no debts except expenses of administration, for payment of which ample funds were available, and accordingly no need for any administration, the executor filed a petition seeking approval of a proposed tableu of distribution. "This" he said he was doing "in order to avoid a multiplicity of suits" growing out of "a contest which had arisen among the heirs and legatees over the testamentary dispositions" and to "bring the questions thus raised to a speedy issue and prompt determination" and also "to obtain for his guidance the interpretation of the court of the wills probated" in the proceedings.[12]

The principal question at issue in the litigation, was as to whether mother or daughter died first or whether they died simultaneously, and the subordinate questions turned on the legal consequences flowing from the facts established by the answer to be given to the principal question.

Article 936 *et seq.* of the Civil Code of Louisiana is in identical terms to the corresponding articles of the Code Napoleon of France. It provides certain presumptions of survivorship among persons "entitled to inherit from one another" and who "perish in the same event" . . . by the probabilities resulting from the strength, age and difference of sex, according to" the rules set forth in Article 939 of the Code, provided that "those who perished together are above the age of 15 and below 60 and the same sex the question of survivorship by which the succession becomes open in the order of nature must be admitted, thus the younger must be presumed to have survived the elder."

The heirs at law of the mother sought to show that her robust constitution, as opposed to her daughter's delicate health, con-

stituted "circumstances of the fact", which should give rise to a presumption of the mother's probable survival. In the alternative, they insisted that the Louisiana codal articles, like those of France from which they had been transplanted, apply to presumptions of survivorship only in intestate successions, when the right of inheritance by law—not by will—is at issue.

In support of the latter position these heirs quoted the leading French commentators on the cited provisions of the Code Napoleon, to the effect that "there is one kind of succession in France, and that is the intestate succession. Parties who take under 'testaments' are not heirs but legatees"; and not the presumptions of the survivorship as to successions. The heirs at large of the mother accordingly contended that she survived and inherited from her daughter, or, in the alternative, that neither survived the other, and all of the legacies in both wills lapsed; that the two estates must be administered independently; and that these heirs would then be entitled to participate in the estate of the mother.

The heirs of the mother, feeling that all of the legacies had lapsed, were as to those payable "for the erection of monuments or tombs to the memory of decedents", which these heirs favored "from consideration of humanity or propriety, and not of law".

The French and Louisiana heirs at law of Angele Marie Langles submitted that under the letter and spirit of Articles 936 and 939 of the Civil Code of Louisiana, she must be presumed to have survived and to have inherited the estate of her mother; that, for various reasons, the particular legacies under Angele's will must be declared invalid; and that therefore her estate must be held to devolve upon her heirs at law. Angele's heirs expressly opposed the disposition, "in the last will of the said Angele Langles . . . of the sum of $3,000 to build a tomb or monument for decedent, because the intention of the said testatrix was clearly that she should be buried in such a tomb, which cannot be done, as her body has not been recovered from the sea".

The particular legatees of both mother and daughter—substantially the same under both wills—contended as did the heirs at law of the mother, that the codal articles, fixing presumptions of survivorship as between heirs who have died in the same catastrophe, do not apply in testate successions; that there must therefore be an assumption of simultaneous death; that both wills must consequently be carried out as written (except as to the dispositions of both mother and daughter in each other's favor); and that accordingly these particular legatees must be held entitled to receive their legacies under both wills.

The City of New Orleans, claiming the residuary legacies under both testaments (of the will to build a memorial hospital for women and children), and that of the daughter's will to support the memorial hospital built by her mother, based its contention on the assumption of simultaneous death and the effectuation of both wills, as urged by the particular legatees.

The position of the executor, in support of his proposed tableau of distribution, was substantially the same as that of the particular legatees and the City of New Orleans as claimed universal legatee. He submitted that the presumptions of survivorship of "commorientes", set up by the Civil Code of Louisiana, like those of the Code Napoleon of France, as construed by the French commentators, do not apply to restate successions, in which "the vulgar substitution made in each will in favor of a memorial hospital . . . is made precisely to take effect in default of the instituted heir", so that "the entire property of decedents is covered by testamentary dispositions"; and the commorientes must accordingly be assumed to have died simultaneously.

"The plain intent of the wills is to give the property to the mother or daughter, if the one or the other survived; otherwise to give it to pious uses. . . . Under the civil law, it is no objection to the validity of a legacy to pious uses that it is for the benefit of the poor, even without a designation of locality. . . . And the bequests under consideration

Reluctant legatees under the will of Angele Marie Langles, judicially determined to have briefly survived her mother in the drownings at sea, eventually erected the cenotaph at left, and on its base, shown at right, cited the Louisiana supreme court opinion which ordered them to do so.

are not void for uncertainty. They are made not to the memorial hospital, but to the women and children, and the city is authorized to receive and regulate this charity."

A jury in the district court found that it was impossible to determine from the facts whether mother or daughter died first, or whether they died simultaneously; and the Supreme Court of Louisiana held that the deaths occurred "under circumstances such as to make it impossible to say from evidence which of the two died first".

"The court has to act", it stated, "either upon an assumption of simultaneous death, or upon a presumption of survivorship. For the latter there is none."

"It is claimed by some of the parties", said the court, "that the presumptions referred to are confined to intestate, and have no application whatever to testate, successions, and they quote a number of French commentators in support of that proposition."

"It is, no doubt, true", the court continued, "that a majority of the French writers are of the opinion that article 720 et seq. of the Code Napoleon, which corresponds with article 936 et seq. of our Code, do not apply to cases where the persons who perish together are entitled to inherit from each other only by reason of reciprocal testaments, and not otherwise."

"But", said the court, "where the fact is at all recognized that the commorientes may be the heirs ab intestato as well as the testamentary heirs of each other, so far as we have been able to discover, the further fact is also recognized that such a case constitutes an exception to the rule of the inapplicability of the presumption of survivorship to testamentary successions. . . ."

So the court concluded that for the reasons outlined the law of Louisiana said in effect to Mme. Langles and her daughter Angele: "If you perish in the same wreck, without any possibility of ascertaining which died first, that question will be determined by a presumption which is established in the interest of the natural order of succession, and agreeably to which, in your case, it will be held that the daughter survived the mother." It having been determined then that Angele Langles must be presumed to have survived and accordingly to have been the universal legatee of her mother, it became necessary to adjudicate the validity of the particular and universal legacies of Angele's will.

It had been stipulated toward the end of the trial in the District Court that whichever will was to be held effective, all of the personal and charitable legacies in such will or wills, except that or those of the residuum, were to be recognized as valid and

were to be paid.

Angele's residuary bequest of the remainder of her fortune was to be devoted "to the support of the memorial hospital built by my mother". That legacy was held by the court to have fallen for want of an object to which it could apply since the "untimely death of her mother prevented her from carrying out this plan, and therefor, when the daughter dlied, there was no hospital built by the mother, in existence, to whose support the residuum of the daughters' fortune could be devoted".

The court took occasion to castigate the principal heirs of Mme. Langles who had opposed the effectiveness of the latter's will, by confessing its inability "to follow the learned counsel in the attempt to show that we shall be conforming to the wishes of the two testatrices by decreeing, according to the prayer of the opposition, that none of those wishes, as expressed in the testaments before us, shall be carried into effect, but that the opponent, who, by the terms of both testaments, is entirely excluded from both successions, shall nevertheless participate in the distribution of one or both".

The court dealt no more kindly with the heirs at law of Angele Langles than it did with those of her mother. It will be recalled that Angele's heirs, whom the court had held entitled to recover the residuum of her estate because of the caducity of the residuary legacy of her will, had sought to increase their inheritance by asserting the invalidity of the testatrix's direction for the appropriation of $3,000 "for my tomb".

"We are surprised", said the court, "that the heirs of the deceased, inheriting her property under the circumstances they have, should have opposed, as they have, the carrying out of Angele Langles' wishes on this subject. They should have been willing to perpetuate her memory even in this slight way."

The court concluded, "we do not think that the direction of the testatrix that $3,000 should be expended by her executor for a tomb, should fall from the fact that the body of the testatrix has not been recovered and cannot be deposited in it. The word 'tomb' has been defined, among other meanings, to signify 'a monument or tombstone erected in memory of the dead,' We think this is a proper occasion to give the word its broadest meaning—a monument in memory of the dead."

And so the executor of the estate of Angele Marie Langles was required by mandate of the Supreme Court of Louisiana, entered April 23, 1900, to erect a monument in her memory, at a cost of $3,000.

The centotaph, an imposing granite obelisk, was erected in Metairie Cemetery at New Orleans. But the executor was puzzled as to an appropriate inscription. Any conventional legend, even if it gave only the decedent's name with the dates of her birth, and death, would imply clearly that the monument marked her last resting place, and would not tell the real story.

So after careful consideration, the executor determined that the inscription on the base of the obelisk should suggest to all who passed, that to learn the circumstances under which this towering monument was erected they should read the opinion of the Supreme Court of Louisiana commanding its construction.

And that is how it came about that, carved upon the base of this stately cenotaph which dominates all of the other tombs in Metairie Cemetary in New Orleans, is

ANGELE MARIE LANGLES
105 La. 39.

[1] Succession of Langles, 105 La. 39; 29 So. 739 (1900).

[2] The account of *The New York Times* for the same date, with its headlines, is substantially the same.

[3] "That the officers of the Bourgogne lost their lives does not prevent the horrible scene of savagery that followed the collision from being a national disgrace. . . . We say a national disgrace advisedly, because we do not believe that in the annals of the British or the American mercantile marine any parallel can be found to that spectable of unchecked cruel and brutal selfishness that was shown when the Bourgogne went down." Editorial, *The New York Times*, July 8, 1898, page 6.

(Continued on page 76)

FIKES v. ALABAMA

The Unconstitutional Conviction of "Baby"

E. BARRETT PRETTYMAN, JR.

(The following article is adapted from a chapter in the author's *Death and the Supreme Court* (New York, 1961), copyright by Harcourt, Brace & World, Inc. and reprinted with permission.—Ed.)

Latinists used to quarrel over the variant philosophical constructions of a sententious admonition—*fiat justitia* [*ne*] *ruat coelum,* translated either as, "let justice be done though the heavens fall," or (with the bracketed qualification), "let justice be done *lest* the heavens fall." A hard choice, in either sense—and one which, in the case of *Fikes* v. *Alabama,* led to a rare circumstance when an order of the Supreme Court, or the logical consequences flowing from such an order, could not be obeyed.

It all started on a black night in September 1948, but no one in Selma realized it at the time. The real terror, the almost hysterical fear that gripped the city, was to come later. Selma sat beside the Alabama River in the center of the state, and Broad Street, the main thoroughfare, shot like an arrow over the river and through the town to flat country westward. It was a clean and prosperous street, but the dirt roads of the Negro community were only a block away, just as the grand, rambling, proud houses of the elite were street-to-street with Negro shacks and shanties.

It was 3:30 in the morning. Mrs. Thelma Manning had dropped off to sleep while reading, her light still on. She was suddenly jolted awake by the sound of a man sitting on her bed. She uttered a paralyzing scream, and he scrambled from the bed and ran downstairs and out the front door. Mrs. Manning called the police. They found the prowler's shoes still neatly placed on the front porch, Mohammedan style.

While the police were investigating Mrs. Manning's complaint, they received a second alarm from only a few blocks away. Mrs. J. M. McLaughlin told them she had just been awakened by a light-skinned Negro trying to pull the sheet off her. In the brief struggle that followed, he bit her on the left arm, and then ran from the house.

The police were satisfied that both women had been attacked by the same man. Despite the descriptions they gave and the clue of the abandoned shoes, no subsequent leads developed, and in a few months the manhunt slackened.

Five years passed. In early March 1953, several families reported to the police that their homes had been broken into. Then, on the night of March 18, Mrs. Delores Stenson, the eighteen-year-old pregnant wife of a sergeant at nearby Craig Air Force Base, had fallen asleep awaiting her husband's return from regular duty at the base. At 10.45 P.M., Mrs. Stenson was wrenched into wakefulness by the weight of a body on top of her. She could see only the eyes of a Negro—the rest of the face was hidden by a mask and a rag wrapped about his head. He held a knife at her throat. She began sobbing uncontrollably, and the man raped her.

When he had gone, Mrs. Stenson's screams roused the tenants in the adjoining apartment, and the police were called. The Chief, E. W. Mullen, immediately brought every one of his twenty men into active duty, and most of them worked through the night. Bloodhounds were also brought to town, but to no avail.

It was not until April 24, over a month later, that near hysteria gripped the town. That night, the mayor's daughter, Mrs. Jean Rockwell, was attacked.

Shortly after Mrs. Rockwell had drifted off to sleep, a man slipped around the side of the house and climbed several brick steps which led, inexplicably, to the bedroom window of the Rockwell's sixteen-month-old son. The man cut a hole in the window screen, unhooked the latch, opened the window, and climbed over the sill. Seeing the sleeping child he moved softly out of the room and into the kitchen. He unlocked and opened the kitchen door, guaranteeing himself an exit route. Picking up a butcher knife that lay on the kitchen table, he walked to the bathroom, put a towel around his head, and passed on to the parents' bedroom.

Mrs. Rockwell woke suddenly and in horror to find a man sitting on top of her. He was slight of build and appeared to be in his twenties. He wore no shirt at all, only an undershirt and a pair of blue jeans, and he held a knife in his left hand, with the edge of the blade at her throat. He told her he was going to kill her if she made a sound.

He had picked on the wrong lady.

Mrs. Rockwell immediately began struggling, and a wild fight began which carried itself down forty feet of hallway and into the living room, where the Negro fell over a stool, carrying her down with him. With a single, nimble movement, she twisted the knife out of his hand. He galloped the length of the living room and out the kitchen door. Mrs. Rockwell ran to the door, locked it, and called the police. The entire battle had laseted about eight minutes.

By now the City of Selma was in a complete state of hysteria. Women did not walk alone after dark; they were locked in at home like members of an ancient harem, while their menfolk roamed the streets as self-appointed commandos, armed with pistols, knives, pipes, sticks. The slightest disturbance caused a covey of men to come circling in for the kill. The night cries of children brought parents convulsively to their feet.

False alarms sometimes poured into the police station too fast to be checked, as nervous men and women were terrorized by shadows shifting in the darkness. Selma's supply of window bars, used to seal windows so that they could not be raised, was quickly exhausted; orders were placed in Montgomery and as far away as Mobile, until finally every available window bar in the southern half of the State had been purchased by the nineteen thousand residents of the Selma area.

This was the mood of the people—overwrought, apprehensive, explosive—when, at eleven thirty on Saturday night, May 16, Mr. and Mrs. Jake Youngblood, returning from a movie, were driving up an alley in back of their house and Mrs. Youngblood noticed a Negro dart across the alley behind the car. Her husband turned the car around and drove back.

Mr. Youngblood got out and questioned the man. His answers were evasive. Youngblood ordered him to walk ahead of the car, and the Negro meekly complied. The strange parade—Negro in front and bright-eyed car trailing slowly behind—passed out of the alley to Deason's Service Station on Broad Street. At eight minutes past twelve, the police were called again.

They arrived to find a slender black seated in the back of Youngblood's car beside the gas pumps. A number of white men milled about the car, some of them peering in occasionally at the prisoner. The police quickly took the man into custody and booked him on an open charge of "investigation." The man was William Earl Fikes.

By next morning, the police had gained considerable information about Fikes.

He was not a resident of Selma at all. He lived with his wife and four children in Marion, Alabama, thirty miles away, where he worked at a service station. In fact, he had been born only five miles from Marion, the youngest of three boys, and during his early years he had helped his father farm a plot of land and direct funerals. Books were not William's forte; he entered school at age eight and left eight years later while still in the third grade. On one of his forays from home, while working at a paper mill

in Mobile, he met and married a local girl and moved her north to Marion.

There had been strains of insanity in the family. The uncle and the mother of the elder Fikes had both been declared insane, and both had died in mental institutions. In November 1949, about a year after the first, seemingly unrelated, attacks on Mrs. Manning and Mrs. McLaughlin, Fikes had been sentenced to six years in prison in connection with the theft of some tires. After serving less than two of the six years, he was released on parole by Governor James E. Folsom in January 1951, during the last days of Folsom's first term in office.

At eleven o'clock on the morning after his arrest, Fikes was brought into the office of the Captain of Police, I. Wilson Baker.

Captain Baker questioned Fikes for two hours about the various housebreakings and attempted rapes that had terrorized Selma. During the questioning, Fikes asked to talk to the county sheriff, who lived in Marion. The sheriff arrived after lunch and conferred with the prisoner. Reluctantly, and yet perhaps with a certain degree of relief, Fikes began to intimate that he had been involved in the housebreakings. The sheriff, Captain Baker, and Chief of Police Mullen placed Fikes in a car and drove him around Selma to several of the houses which had been burglarized. At one of them, Fikes pointed out how he had obtained entry. On their return to the police station, the captain again talked to Fikes for several hours at the end of the day.

Beginning at 9 A.M., Captain Baker talked with Fikes for about two hours. Fikes now was openly admitting some part in the housebreakings, but his statements were far from conclusive. He mentioned, for example, the two attacks on a single night in 1948, involving Mrs. Manning and Mrs. McLaughlin, but he denied any part in the rape of Mrs. Stenson, the Air Force sergeant's wife. The police dusted off the shoes that had been found on Mrs. Manning's porch, and, sure enough, they fitted Fikes. He was given a blood test and found to be type "B." He was taken to a lineup, where he was identified by Mrs. Binford as the man she had seen in the bathroom of her home several weeks before.

The strange world of William Fikes was becoming clear to the officers now. On the surface, Fikes seemed to have lived out his humdrum days and evenings in Marion. But according to what he allegedly told the police, some inexplicable tension kept building up in Fikes to a point he could not endure, and so on many evenings, he would climb into his truck and drive past the big white courthouse, past the car cemetery on the edge of town, down the hill to the highway, and along the flat, open, lonely country towards Selma, thirty miles away, where he would begin his search, prowling alleys and peeping in windows.

After two days of questioning, Fikes had hinted at most of this, and now, on Tuesday, he rested in prison without visitors. On Wednesday, Captain Baker, the sheriff, and a doctor met at the prison shortly before noon and interrogated Fikes for a short while before lunch and for most of the afternoon and into the early evening. Each man asked questions, but Captain Baker asked the most. The next day was Thursday, May 21. During the day, William's father arrived at the prison, was denied admittance, and drove away. Captain Baker also arrived, carrying a tape recorder belonging to the City of Selma. He and a police lieutenant set up the machine in the chaplain's office and had Fikes brought in.

The captain asked Fikes specifically about the night the mayor's daughter was attacked. Fikes said he had broken into the house, found a butcher knife, and entered Mrs. Rockwell's room. He admitted he was attempting intercourse with "a white lady." With the addition of more details, the recorded interview ended.

Friday was another day of rest, but on Saturday the 23rd, a full week after he had been arrested, Fikes was again confronted by questioners. This time they were Captain Baker and Mr. James Hare, the circuit solicitor, who both arrived at the prison shortly after 11:30 A.M., with Mrs. Stenson and

her husband. Fikes was brought in, and Mrs. Stenson, after looking closely at his eyes and listening to his voice, identified him as the man who had raped her. An attorney came to the prison to see Fikes during the morning but was turned away, allegedly because he had no authorization to represent the prisoner. Fikes had lunch about 12:30 and dinner about 4:30 P.M., with two officials interrogating him in between, and then a second tape recording was made.

That Sunday was the first time since his arrest that Fikes saw any member of his family. His father once again drove to the prison and this time was admitted for a talk with his son. No one came to see Fikes on Monday, but on Tuesday the warden, two county solicitors, a police lieutenant, and Captain Baker gathered in the warden's office at the front of the prison and questioned the prisoner for about an hour. The warden's secretary took down two confessions in shorthand and typed them up for Fike's signature—one dealing with the attack on the mayor's daughter, and the other with the rape of Mrs. Stenson.

The confession as to Mrs. Rockwell closely paralleled the tape recording which Fikes had made five days before. This was the first time, however, that Fikes had admitted either by recording or in writing that he had raped Mrs. Stenson.

The police and prosecutors now had what they wanted. Their cases against Fikes were airtight. The ten-day interrogation period ended, and on June 2, 1953, an Alabama grand jury returned seven separate indictments against Fikes—one for rape, and six for first degree burglary. All seven carried possible death sentences, since capital punishment could at that time be meted out in Alabama for any entry after dark of an ocupied dwelling for the purpose of committing a felony—in this case, an entry with the felonious intent of ravishing a woman. No one thought more than one trial would be necessary; the Stenson rape case would be tried first, and with Fike's confession in hand, the prosecution considered a verdict short of death unthinkable.

Two local white attorneys, Hugh (later judge) Mallory, Jr., and Sam Earle Hobbs, were appointed by the court to defend Fikes against the rape charge. When they looked into their client's background and found such a low degree of intelligence, they arranged to have three Negro psychiatrists from the Veterans Administration Hospital at Tuskegee go to Kilby Prison on June 19. The psychiatrists interviewed Fikes for two hours, and the attorneys were heartened by their report. Fikes pleaded not guilty, and not guilty by reason of insanity.

A near-capacity crowd—one-third Negro and two-thirds white—turned out for the trial of *Alabama* v. *Fikes* in the Selma courthouse on June 22. His attorneys requested the judge to change the venue of the trial, to put the case over to a later date, and to be relieved as Fike's attorneys—this last request on the ground that they had not had sufficient time to prepare his defense. All three requests were denied, and the trial proceeded.

The star witness at the trial, of course, was Mrs. Stenson. The prosecutors, County Solicitor Henry F. Reese and Circuit Solicitor Hare, very much wanted her to make a positive identification of Fikes. Obviously, this was impossible, since her attacker had worn a mask and a rag about his head. Mrs. Stenson, however, was as positive as she could be under the circumstances. She testified that "to the best of my knowledge," she had identified a man at the prison "by his eyes and voice" as her attacker, and she pointed to Fikes as the man whom she had previously identified. She admitted under very careful and gentle handling on cross-examination that Fikes had been the only man brought before her for identification and that her attacker's face had been largely covered, but she nevertheless insisted that Fikes was the culprit.

There was other evidence, but the real battle developed over the written confession that Fikes had signed on May 26, admitting the rape. Twice, Judge Callen refused its admission on the ground that the police had

Opinion of the Court.

FIKES *v.* ALABAMA.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 53. Argued December 6, 1956.—Decided January 14, 1957.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Petitioner is under sentence of death for the crime of burglary with intent to commit rape. He seeks reversal of the judgment through a writ of certiorari to the Supreme Court of Alabama, which sustained the conviction. 263 Ala. 89, 81 So. 2d 303. Petitioner raised

In the case of Fikes v. Alabama, the Supreme Court held invalid a conviction in a capital offense based in part on a confession obtained after prolonged questioning. Due to a peculiar set of circumstances, Fikes only belatedly received the benefit of this ruling.

failed to take Fikes before a committing magistrate promptly after his arrest, so that he could be warned of his rights. Finally, however, over vigorous defense objections, the judge allowed the jury to read the confession after all of the officials involved in obtaining it testified that the police themselves had warned Fikes of his right not to speak and that the confession had been given voluntarily and not as the result of threats, coercion, or force.

The case went to the jurors—all residents of Selma—at 11:40 P.M. on June 23, the day after the trial began. Every one in town expected a quick decision. But at half past twelve, the jurors returned to ask Judge Callen whether there was a fixed sentence they could impose which the defendant would have to serve. Judge Callen told them that minimum sentence for rape was ten years, but that he could give no assurance that a defendant would serve any specified period of time. The jurors retired again.

At 1:10 in the morning, still deadlocked, they were shepherded by a sheriff to various offices and corridors in one wing of the courthouse, where they spent the night. By the middle of the next morning, the entire town knew that something had gone wrong in the jury room. What could possibly be holding things up? Finally, at 5:45 P.M. on June 24, a full eighteen hours after they had begun their deliberations, the jurors, looking utterly exhausted, filed back into the courtroom. The crowd had grown to two hundred, about half of them Negroes.

The foreman announced that the jury found William Earl Fikes guilty of rape. But, he added, ". . . [we] sentence him to ninety-nine years in the state penitentiary." There was shocked silence. The foreman said the jury had a further recommendation: that Fikes never be granted a parole. Judge Callen allowed the recommendation but pointed out that "it in no way has any bearing in this case nor in the future disposition of the prisoner."

It did not take long for the enterprising reporters of the Selma *Times-Journal* to discover what had occurred in the jury room. From the outset, the jurors had voted unanimously in favor of a conviction, and eleven to one in favor of the death penalty. The one dissenter said he simply did not believe in capital punishment. His fellow jurors pointed out that he had been questioned on that score when they were being impaneled, and he had failed to reveal his belief. The

juror remained adamant. He would not agree to the death penalty, and that was that. The eleven other jurors had no choice but to give in and consent to a life sentence. The recommendation to the court that Fikes not be paroled was an added concession by the single dissenter.

When one of Fike's attorneys was asked whether there would be an appeal, he replied, "No comment. The case has too many angles to discuss it at the present time." The most important angle he had in mind was that Fikes had been lucky to escape the death penalty, and if the Alabama Supreme Court were to reverse the case, Fikes might not be so fortunate at a second trial. This tentative conclusion was discussed with the defendant and a definite decision reached: Fikes would not appeal.

The concern of the community that he might some day be released was allayed by an announcement from the circuit solicitor that he intended to prosecute Fikes on the next of the seven indictments. This time, Fikes would be tried for entering the home of the mayor's daughter with an intent to ravish her, also a capital offense.

By now, the plight of the twenty-seven-year-old Negro had reached the attention of the National Association for the Advancement of Colored People. Envelopes were passed out in Negro churches, soliciting money to aid in Fike's defense. Apparently the drive was successful, because two prominent Negro attorneys, Peter A. Hall and Orzell Billingsley, Jr., soon arrived from Birmingham. After various motions, the Rockwell case proceeded to trial on December 7, 1953. It lasted three days.

The courtroom was again filled almost to capacity, with some two hundred Negroes on one side of the room. Judge Callen again presided. Hare and Reese were joined by a special prosecutor for the state, Thomas G. Gayle.

Mrs. Rockwell, the first witness, told of the attack on her during the rainy night of April 24. She said her assailant had a towel draped over his head so that she saw only "one of his eyes." He was "real thin . . . real slender." She could not positively identify Fikes as the culprit.

Hall sought to put Fikes on the stand, but he wanted it understood that Fikes could be cross-examined *only* about the confessions. The prosecutor objected; if Fikes took the stand, he would open himself up to questioning on the entire case. It was a ticklish point, but Judge Callen ruled with the prosecutor, and Hall, rather than allow Fikes to be subjected to a full-dress cross-examination, advised his client to keep away from the stand altogether. And so Fikes did not testify, and the confessions were duly admitted into evidence against him.

For a second time a jury deliberated the fate of William Fikes. But no member of this jury was squeamish about the death penalty. After only forty minutes of consultation, the foreman announced: "We, the jury, find the defendant guilty of burglary in the first degree as charged in the indictment, and fix his punishment at death." For the first time in over ten years, a Dallas County jury had given the death penalty.

The problem which had bothered Fike's attorneys after his first trial did not confront Hall and Billingsly; they had nothing to lose by an appeal. And appeal they did, to the Alabama Supreme Court.

By the time the record had been certified, the briefs prepared and printed, the case argued, and the opinions written, a year and a half had passed. The Alabama Supreme Court rendered its decision affirming the conviction on May 12, 1955.

As to the confessions introduced against Fikes, the court concluded that all the evidence showed them to have been given voluntarily. Four justices joined in this opinion. Two other concurred in the result, stating that they thought it was error not to have allowed Fikes to testify only about the confessions, but under all the circumstances, they saw no reason for reversing the conviction. The seventh justice simply concurred in the result without comment.

Since questions under the United States Constitution were involved, the case was now ripe for appeal to the United States

Supreme Court.

Feeling that Hall and Billingsley were primarily trial attorneys and that this case demanded the services of a more experienced appellate lawyer, the NAACP called in Jack Greenberg, the assistant counsel to the NAACP's Legal Defense and Educational Fund, to make the argument before the Supreme Court.

Greenberg had three arguments, all based on the Fourteenth Amendment. First, the confessions used against Fikes had been obtained from him involuntarily. Second, Fikes was unconstitutionally denied an opportunity to testify for the limited purpose of attacking the confessions. And third, Negroes had been systematically excluded from the grand jury which indicted him.

Greenberg's job was to make the circumstances surrounding the confessions as suspicious as possible. The Supreme Court had held many times that it is a violation of the Due Process Clause of the Fourteenth Amendment to convict a man on the basis of a confession which is coerced from him. But what constituted coercion? The clear case, of course, is one in which a man is beaten until he agrees to write what he is told to write. But there are other methods equally effective, of making a man perform. Trickery, threats, promises, and a myriad of ruses and pressures can produce startling results.

Greenberg had no direct evidence of improper conduct by the police, but he tried to make up for the holes in his case by ticking off the suspicious circumstances surrounding Fiske's capture, extended interrogation, and trial, all of which Greenberg claimed spelled out a case of systematic coercion. He admitted that the Court's decision should not hinge on any arbitrary counting of the hours and days during which the prisoner was held for questioning; there was no magic cut-off point in time, after which the interrogation became unconstitutional. But all of the circumstances here, he said, showed a deliberate attempt to seal off the prisoner from any outside help until his will had been broken.

When Greenberg sat down, he was replaced at the lectern by Robert Straub, representing the State of Alabama. Straub had hardly begun speaking before he was bombarded with questions, and he was so persistently interrogated thereafter that the Chief Justice graciously allowed him extra time to complete his argument.

The Justices wanted to know why the police had failed to take Fikes before a committing magistrate. An Alabama statute specifically required the police to take a prisoner "forthwith" before a magistrate, and one of the purposes of the statute is to assure that each prisoner be informed of his constitutional rights, including his right to remain silent, prior to the time he is interrogated at length by the police. Fikes, however, had been questioned for more than a week before he ever saw a committing magistrate.

Straub had three answers when the justices asked him about this. First, the police had testified that they themselves had warned Fikes of his right not to speak. Second, it was not at all unusual in Alabama for a man to be questioned at length before he saw a magistrate, particularly when the police were not sure they had the right man; the police had not singled out Fikes for special or unusual treatment. Third, the Alabama Supreme Court had held several times that even though the statute be violated, the prisoner's confession was not thereby automatically rendered inadmissible.

By the very nature of the case and through no fault of the attorneys, the oral arguments were not completely enlightening, and the Court must have felt a certain degree of frustration in attempting to deal with it. No one really knew for sure—certainly not the lawyers arguing the case—exactly what had occurred during Fikes's incarceration. It was true that the police officers had all testified that no coercion had been used, but police officers are never prone to admit they have violated someone's constitutional rights, and the Justices, from long experience in reviewing criminal cases, were not so naive as to believe that the officers' testimony was

totally free from doubt. On the other hand, since Fikes had not been allowed to testify about the confessions, the officers' testimony stood unchallenged and unrefuted in the record.

Five weeks after the Fikes argument—a relatively brief period, considering the intervention of the Christmas recess—the Court rendered its decision. *Fikes* v. *Alabama*, 352 U.S. 191 (1957). Chief Justice Warren wrote the majority opinion and was able to garner the supporting votes of five other Justices—Black, Frankfurter, Douglas, Clark, and Brennan—although Justices Frankfurter and Brennan deemed it necessary to ad a few words of their own to what the Chief Justice wrote.

Warren discussed only the legality of the confessions, because the conviction was reversed on that ground and it thus became unnecessary to cover Greenberg's other arguments. For Warren and the Justices he carried with him, the question of due process rested not only on the events that had occurred, but on the type of person they had involved. The Chief Justice emphasized Fike's character, limited mentality, and background, with particular emphasis on the evidence of his insanity.

The reversal of Fikes's conviction for first degree burglary presented the Alabama authorities with a difficult decision. If the Supreme Court had reversed on either of the two other points raised by Greenberg—the failure to allow Fikes to testify about his confessions, or the discriminatory selection of the grand jury—Alabama undoubtedly would have tried Fikes again for the same offense, or proceeded against him on the next indictment. The grand jury would then have been more carefully selected, and Fikes would have been allowed to testify. But the Supreme Court had ruled that Fikes's confessions were invalid, which meant that those confessions could not be used at any future trial. Reviewing the record, the circuit solicitor concluded that Fikes could not be convicted of the attack on Mrs. Rockwell without the confessions. The only evidence linking Fikes to this particular attack was his blood type, which Judge Callen had not even allowed to be introduced in evidence, and Mrs. Rockwell's identification.

But the identification simply would not stand up, absent other proof. Fikes had worn a towel over his head, and even if a jury were to believe that Mrs. Rockwell could positively identify her assailant by a glimpse of one eye, a reviewing court would not. She had not been sufficiently definite at the trial. The circuit solicitor reluctantly decided that he would have to be content with the life sentence which Fikes was serving for the rape of Mrs. Stenson.

But if the decision reached by the circuit solicitor was difficult, the one confronting Fike's attorney was downright appalling.

One of the confessions in the Rockwell case which the Supreme Court had held unconstitutional had been obtained on the same day and by the same methods as the confession used against Fikes in the Stenson case. All of the legal infirmities of the Rockwell confession were applicable to the Stenson confession; and it was clear that Fikes had been convicted in the Stenson case as unconstitutionally as the Supreme Court had now held he had been convicted in the Rockwell case. Thus, assuming that the point could be raised properly in the Alabama courts, Fikes's attorneys were certain that they could obtain a reversal of the Stenson conviction.

But did they want to? Did they dare? Mrs. Stenson, unlike Mrs. Rockwell, had been quite certain that Fikes was the man who attacked her, and she had remained unshaken on cross-examination. If the Stenson conviction were reversed, the state almost certainly would try Fikes again, ignoring his confession and relying instead on Mrs. Stenson's identification, with evidence of other crimes as a type of corroboration. Everyone knew that Fikes had escaped the death penalty at his first trial solely because one juror had not believed in the death penalty. Would Fikes be as fortunate a second time? His attorneys thought not. They simply could not gamble his life on such odds.

And so the decision was made to do noth-

ing at all about Fikes's conviction for the rape of Mrs. Stenson, even though a reversal would have been virtually assured. In effect, Fikes would go to jail, presumably for life, under an unconstitutional conviction.

The town of Selma was soon back to normal. The housebreakings stopped on the night of Fikes's arrest, the bars were taken off windows, and the police returned to their regular schedule.

William's father and mother and the brother who had never gotten into trouble lived on in Marion. Every other Sunday, Mr. and Mrs. Fikes packed their car and drove one hundred and forty miles to Atmore Prison, north of Mobile, where William was moved from Kilby. When they arrived at the prison, they stayed as long as they could with William, telling him the news they had stored up for two weeks, and when they went, they left him a large basket of food.

Every other Sunday, it was the same story. As soon as they reached the outside of the prison, Mr. Fikes asked his wife, "How do you think Baby looks?"

And Mrs. Fikes replied, "I think Baby looks just fine."

* * *

That would have been the end of the Fikes story, except that in late 1974, over 21 years after William Fikes's arrest, his son visited the author of this article and asked if anything could be done to obtain his father's release. The son pointed out that his father had been transferred to the Mount Meig Diagnostic Center, a prison facility, and was being treated for tuberculosis. The son felt that due to the passage of time, there was little chance that witnesses would still be available for a retrial, and therefore a reversal of his father's conviction would probably mean freedom and a return to his family.

The author assigned a young attorney, Edward F. Glynn, Jr., Esq., to look into the matter. Glynn filed a petition for a writ of habeas corpus with the United States District Court for the Middle District of Alabama in December 1974, and traveled to Alabama to argue the petition. The State argued that the confessions in the Rockwell and Stenson cases were sufficiently distinguishable, and that in any event Fikes had waived his rights by not appealing the Stenson conviction.

On January 21, Judge Robert E. Varner, Jr., granted the writ. He held that the two confessions were obtained in so similar a fashion that they must suffer the same fate; the Supreme Court's opinion in the Rockwell case controlled. As to waiver, the Court held that Fikes had not appealed his Stenson conviction for fear of receiving the death penalty in a retrial, and therefore, under *Fay* v. *Noia*, 372 U.S. 391 (1963), he could not be denied habeas corpus because he had by-passed a state court remedy.

Alabama decided not to appeal this decision and not to re-try Fikes. Therefore, on March 24, 1975, Judge Varner ordered Fikes released from prison. Just 22 years after his unconstitutional conviction, "Baby" returned to his family.

(Continued from page 67)

[4] XV Revue Internationale Du Droit Maritime 67, 76 (Tribunal Civil de la Seine, June 28, 1899); *Ibid.*, 598 (Cour d'Appel de Paris, January 18, 1900); XVI *id.*, 630 (Cour de *cassation*, March 26, 1901). Translations by the author of this article.

[5] 210 U.S. at page 114.

[6] The *Harrisburg*, 119 U.S. 199.

[7] *The Hamilton*, 205 U.S. 398.

[8] 210 U.S. at page 95. The foregoing quotation and the quotations from Mr. Justice White's opinion which follow are found at pages 138-139.

[9] *La Bourgogne* (1899) P. 1 (C.A.); (1899) A. C. 431 (H. L.).

[10] *The Bourgogne*, The Times, London, January 13, 1899, page 6.

[11] *The Burgogne*, The Times, London, May 12, 1899, page 14. This opinion and that under footnote 10 *supra* do not seem to appear in any of the published official reports of English cases.

[12] This, and the quotations given hereunder from the Louisiana proceedings, as well as from the opinions of the Supreme Court of Louisiana, are taken (unless otherwise noted) from the report of those opinions in *Successions of Langles*, 105 La. 39-77, *passim*.

For laymen, and often for practicing lawyers, opinions by the Supreme Court often seem frustrating or unfathomable. In the heyday of the so-called "Fifth Amendment" cases of the 1950s, this sentiment by cartoonist Harold Maples of the Fort Worth Star-Telegram was frequently echoed.

DECISION OF THE YEAR

Amadee, cartoonist for the St. Louis Post-Dispatch, voiced approval for a Supreme Court decision in 1953—a relatively rare reaction to judicial opinions—for an anti-trust decision against professional baseball.

Scene in the Supreme Court chamber in the Capitol, about 1910, as it appeared to Charles Henry Butler, the longtime Reporter of the Court.

RETROSPECTIVE VIEW

Customs, Courtesies and Ceremonies

CHARLES HENRY BUTLER

(Behind-the-scenes perspectives of the Supreme Court are somewhat rare—cf. Garland's "The Court a Century Ago," in YEARBOOK 1976. One of the most refreshing is that of the Court Reporter, Charles Henry Butler, whose book, *A Century at the Bar of the Supreme Court of the United States,* was published by G. P. Putnam in 1942. Three short chapters from that work are reprinted here by permission of the publisher.)

Rules and Customs of the Court

Rules and customs of the Supreme Court have been greatly modified since my appointment as the Reporter of its decisions in 1902.

For many years Mr. Justice Gray was the sartorial dictator of the Court. According to my friend, Marshal Wright, he insisted on strict formal dress for everyone connected with the Court, or appearing before it. Major Wright told me that in order to help out unfortunate counsel, who had come unprepared to meet the strict dress requirements insisted upon by Mr. Justice Gray, he had acquired, somehow or other, several old frock coats of various sizes, and kept them in a closet in his office so they might be donned by counsel otherwise unprepared.

Until the Court moved into its new building, the Marshal of the Court always conducted them from the Robing Room across the north to the south corridor of the Capitol into the Court Room. The Marshal was always attired in his frock coat for this ceremony. One Monday morning, however, the

cleaner disappointed him and did not return his frock coat until after twelve o'clock. This obliged the Marshal to lead the procession wearing a short, but fortunately, dark coat.

The Marshal told me that Mr. Justice Gray summoned him, and notwithstanding the Marshal's explanation, demanded an apology, with an intimation that if is ever happened again, the Court would ask for his resignation. Happily it never did happen again. Even if such a thing had happened again before the death of Mr. Justice Gray it is doubtful whether the dire punishment threatened would have been inflicted on anyone who was so much loved and respected by all connected with the Court as was Marshal John Montgomery Wright.

My court attire was the regulation Prince Albert coat until the last few years of my term when it was changed to a black cutaway. My last frock coat, as had its predecessors when they were discarded, became the property of a colored clergyman, who not so long ago informed me that he was still wearing it every Sunday morning when he delivered his sermon.

For some time after the decease of Justice Gray, counsel continued to appear either in frock coats or cutaways. The Attorney General's office still adheres to the latter dress. Other cousel generally wear dark clothes, though very often of much shorter length than the old-time frock coat or the present cutaway.

In late years, however, counsel have appeared in much lighter garb than ever was known in the olden days. In one case, counsel appeared in an olive-yellow tweed suit; tan shoes, pink shirt and no vest. He was permitted to address the Court, however, because he came from Kansas and had an important message to deliver. In another case, by the direction of Chief Justice Taft, the Clerk, during the luncheon hour, requested an Asisstant State Attorney General, either to put on a vest or else button up his coat so as not to expose quite so much of his shirt to view.

In respect to time allowed for argument, there has also been a great modification of the rules. Based on their own remarks, made in my hearing, Chief Justice Fuller and Justices Harlan and Brewer considered that counsel should have ample time to present the cases of their clients and constantly opposed any effort to limit them.

Mr. Justice Holmes was all for cutting the time down, and more than once told me that he was never influenced by oral arguments, but considered the cases wholly on the briefs. In nearly every case counsel were allowed two hours a side, which, if availed of, would take a full day for each case. Frequently extra time was given. In some of the anti-trust cases, such as those involving the United States Steel Company, the Standard Oil Company, and the International Harvester Company, each case was allowed six hours. Thus a single case occupied three entire days.

The two-hours a side Court rule applied to cases that came up on writ of error or appeal based on a Federal question being involved. To these cases the full time was permitted, even if the writs or the appeals were founded on very doubtful grounds. So long as the cases could not be affirmed or dismissed on motion for lack of Federal question, no matter how ephemeral the basis might be, full time had to be granted if counsel so desired, as counsel generally did.

When Mr. Justice White became Chief Justice, he instituted a new rule under which, if an appeal could not be dismissed, or the writ denied as frivolous, it was placed on the "Summary Docket." Only thirty minutes a side was allowed for cases on this docket. After a few cases placed on it had been dismissed with ten per cent damages, writs of errors and appeals of that nature were greatly discouraged. All this was done away with by the rules Chief Justice Taft promulgated after the Act of 1925, under which nearly all those cases come up by writs of certiorari.

The Court saved time often by announcing, after the petitioner or appellant had made his opening argument, which failed to support his contention, that it would not hear the respondent. This was equivalent to saying that the moving party had so completely failed to sustain his case that it would be a waste of

Charles Henry Butler, Reporter of the opinions of the Court, 1902–1932.

time to hear arguments by counsel representing the other side. This was a great relief to the respondent, although it was often a disappointment not to be able to address the Supreme Court of the United States.

Mr. William B. Hornblower, of New York, told me that on his second wedding tour he arranged that a case in which he represented the respondent be argued before the Supreme Court while he was in Washington. This was, he said, for the double purpose of having his new bride hear him argue a case before the Supreme Court; and incidentally to be able to charge with propriety at least part of his expenses as disbursements. Thus he followed the example of *Mrs. John Gilpin,* who, although on pleasure bent, still had a frugal mind.

The plaintiff in error, having demonstrated in the opening argument the lack of merit in his case, the Chief Justice said:

"The Court does not care to hear the respondent."

My friend Hornblower had just stood up to address the Court; and so far as he was concerned this statement by the Chief Justice was a relief. He informed me, however, that Mrs. Hornblower, who was all agog to hear him make his argument, never forgave the Court.

On another occasion Matthew Carpenter, a well known practitioner of the law, presented his case with similar ineffectiveness, and the Court made an announcement like the one just quoted. The opposing attorney, who was very deaf, could not hear what the Chief Justice said. So he whispered to Carpenter as he sat down:

"Matt, what did the Chief Justice say?"

Matt, who naturally was not at all pleased with the Court's action, replied in a voice resounding through the Court Room:

"He said he would rather give you the damn case than hear you talk."

A traditional story of Marshal Wright's was that when Jeremiah—otherwise 'Jerry'—Wilson began an elaborate opening by citing many of the fundamental authorities, he was interrupted by an Associate Justice who said that Mr. Wilson ought to take it for granted that the Court knew some elementary law. To this 'Jerry' Wilson replied:

"Your Honors, that was the mistake I made in the Court below."

Another of Marshal Wright's stories told how counsel spread out a large map. One of the Justices asked what it was, and counsel answered that it was a bird's-eye view of the scene where the cause of action arose. Another Justice interposed:

"Well, as we are not birds, you can take it away."

Mr. Justice Shiras, who at times was inclined to be a wag, was credited with saying to counsel, during the argument of the Benedict Collar Button Case in which a hump in the middle of the shank was relied on to justify the patent, that if a certain question were answered affirmatively, he might be in favor of sustaining the patent. When counsel asked what the question was, the Justice answered:

"Will this hump prevent the collar button from rolling under the bureau when you drop it?"

It took some time to get the Court back to listen seriously to the argument.

A still older story sometimes told about the Court and pinned on some particular attorney, on some particular occasion, before some particular Justice, is that when counsel

stated a conclusion of law, one of the Justices said:

"That is not the law."

"It was until your Honor spoke," counsel replied.

It is my belief that record of a similar conversation can be found in a little volume on one of the shelves of the New York Bar Association library, entitled, "Annals of Westminster Hall," which was published about 150 years ago. Nevertheless it's a good story whoever the judge and counsel may have been and whenever and wherever it originated.

In a book published about the Justices of the Supreme Court there is a story of long ago. In a little cabinet in the Robing Room was kept some material by which the Justices might be refreshed after an arduous session on the Bench. It seems, however, that a rule had been made that the contents of the cabinet should be opened only in case it was raining.

On one occasion, the story continues, upon retiring from the Bench, a certain Justice remarked that as it had been a hard day it might be well to resort to the cabinet.

"But it is not raining," said another Justice.

Thereupon Chief Justice Marshall looked out the window and then observed:

"No, it is not raining here, but it is probably raining somewhere in the jurisdiction."

This justified opening the cabinet.

That is a good and oft-told story; but there is an addition thereto possibly not so widely known to other as to myself. One evening when several Justices were present at a gathering at 1535 Eye Street, in answer to my inquiry as to the authenticity of the story Mr. Justice Brewer said:

"Why, Mr. Reporter, the story is not only true, but you ought to know that the Court sustained the constitutionality of the acquisition of the Philippines so as to be sure of having plenty of rainy seasons."

Whether or not the historic cabinet of the Robing Room in the Capitol was transported to the new building now occupied by the august tribunal has never been disclosed to my knowledge.

The temperature of the Court Room in the Capitol was very difficult to regulate. This difficulty was increased by the various views of the different Justices as to what its proper temperature should be. The regulation of the heat had always been under the control of the Marshal.

There is a traditional story anent this particular matter, which is generally ascribed to Justices Gray and Bradley. Justice Gray, who weighed more than 250 pounds, it is said, always wanted the thermometer kept below 70 degrees, while Justice Bradley, who was a very thin man, and of much lower weight, always wanted it kept up to nearly 80 degrees.

One day as Justice Bradley was going behind the screen back of the Bench, with his gown wrapped round him and apparently shivering with the cold, he pointed to an open window and said to the Marshal:

"What d——d fool opened that window?"

"That window," answered Major Wright, "was opened, Your Honor, by the order of Mr. Justice Gray."

"I thought so—I thought so. Shut it up and keep it shut," snapped the irate Justice Bradley and went to his seat on the Bench.

Social Etiquette

On account of the death of Mrs. Fuller in July, 1907, Chief Justice Fuller asked to be excused from attending the next annual dinner given by the President to the Chief Justice and members of the Supreme Court. The regular list of guests for this function up to that time not only included, as it still does, the Attorney General of the United States, but also until then, the Speaker of the House of Representatives. The officers of the Court were not invited, although on several occasions Mrs. Butler and I were among the guests bidden to the musicale which usually followed the dinner.

On the afternoon of the day following the dinner of 1908, I was horseback riding in Potomac Park with Attorney General Moody, later Associate Justice Moody, who said to me:

"Butler, let me tell you something that

happened at the White House dinner last night."

It seems that at about the middle of the dinner, President Theodore Roosevelt called the attention of Justice Brewer to the fact that Joseph G. Cannon, the Speaker of the House of Representatives, was not present. The President explained the Speaker's absence as follows:

At three o'clock that afternoon, William Loeb, the President's Secretary, told the President that Speaker Cannon was awaiting an answer on the telephone to the Speaker's inquiry as to who was to escort Mrs. Roosevelt to the dinner table. The President instructed Mr. Loeb to say that as this dinner was in honor of the Supreme Court, Mr. Justice Harlan, the senior Justice, in the unavoidable absence of the Chief Justice, would escort Mrs. Roosevelt.

Loeb returned to the President with the further message from the Speaker to the effect that, while he was always ready to yield to the Chief Justice, he did not think that the Speaker of the House of Representatives should yield to an Associate Justice and, therefore, asked to be excused. As Attorney General Moody related the incident to me, the President's reply was:

"All right, Loeb, tell Uncle Joe I appreciate his feelings and, while sorry to miss him, he can be excused and I'll give him another dinner all for himself."

And that is the reason the Speaker's Dinner has been one of the official White House functions ever since that night.

Joseph G. Cannon was a remarkable man individually and as Speaker of the House. Numerous interesting stories could be collected and told about him. He was called "Chief of the Clan of the Plain People," and many were surprised at his attitude in the incident just narrated. He would sit anywhere at anybody's table, if it was a private affair, but if his location involved the relative rank of himself and others in officialdom, he insisted that, as head of the Legislative Branch of the Government, he out-ranked everybody except the President, Vice President and Chief Justice—the heads of the other two

Justice Horace Gray, characterized as the arbiter of professional etiquette for the Court and its bar.

great departments of our National Government. In my opinion Speaker Cannon was absolutely right in this feeling.

Uncle Joe, as he was affectionately called, was a very loyal supporter of Theodore Roosevelt, although he did not always agree with him; and he had a real affection for the President. Once while dining at our house, he expressed his admiration for the President and then went on to say:

"Teddy was not always right—in fact, he made a good many mistakes—but he had the remarkable faculty of finding out himself when he made a mistake before anyone else did, and immediately 'lighting a new fire,' thus distracting the attention of the public and effacing or neutralizing the results of his previous error of judgment."

Uncle Joe was indeed a picturesque character and his departure from public life left a great gap in all the various Washington circles in which he moved. We all owe him a debt of gratitude for his work as Chairman of the Lincoln Memorial Committee and for standing by his guns in confining the Memorial to Lincoln and to Lincoln alone. As he said more than once, there was nobody else and nothing else big enough to go with, or in, a monument erected to Abraham Lincoln.

Probably the most remarkable event connected with what might be called the "right of way," rather than individual precedence,

of different groups at official functions, happened at the White House Judiciary Reception of 1907. Theodore Roosevelt was President; Elihu Root was Secretary of State; Melville W. Fuller was Chief Justice; Mr. Justice Harlan was Senior Justice; Captain, later Major General, Charles L. MacCawley, of the Marine Corps of the United States Navy, was Chief Aide at the White House. All figured in the episode about to be related.

To my everlasting regret, my unavoidable absence in New York prevented me from attending the reception. However, Mrs. Butler was present—Justice and Mrs. Harlan had taken her under their protective wing—and from her came my knowledge of the details of this occurrence.

Resident diplomats attending receptions at the White House *in a body* are always (and properly so) accorded the right of way over other bodies of visitors. The same custom still obtains at the Diplomatic Reception, which is the first of the annual series of White House receptions, and generally opens the official social season.

At these functions the Diplomatic Corps come attired in full court regalia, assemble in a designated room, and then pass by the President and the receiving line in the order prescribed by the Vienna Protocol of 1815. At other White House receptions the diplomats do not come in a body, or in diplomatic dress, but arrive whenever convenient and are ushered to "the front of the line." The Judiciary Reception of 1907, so far as my knowledge is concerned, was the only exception to this very sensible course of procedure.

According to the story as told to me, Secretary Root, on some occasion when they met casually after the Diplomatic and before the Judiciary Reception of 1907, asked the Dean of the Diplomatic Corps if it would not be a pleasant change to have the members of the corps attend the other receptions, as well as the Diplomatic, in their official regalia. The Dean responded that if it were so desired, so it would be done,—a sort of "we strive to please" answer and a diplomatic one.

Nothing more seems to have been said or done until the night of the next reception, which happened to be the "Judiciary Reception." To the great surprise—or rather to the horror—of all officialdom, the entire Diplomatic Corps arrived in full regalia and, assembling as usual in true Vienna Protocol order, the Dean of the Corps informed one of the aides that they were ready to enter. There they were, not as private guests as heretofore had been the case, but as the Diplomatic Corps at the invitation of the Secretary of State, and they expected to lead the procession.

Here indeed was a pretty how-to-do. At the Judiciary Receptions, the Chief Justice of the Supreme Court of the United States always had led the way. This time, however, after the fanfare had announced the presence of President and Mrs. Theodore Roosevelt, and the Chief Justice had offered his arm to Mrs. Fuller and was about to proceed, suddenly Captain MacCawley appeared before them and said:

"Mr. Chief Justice, the Secretary of State asks me to tell you that the Diplomatic Corps will precede you tonight."

It was too late for anybody to say anything. The Diplomatic Corps was already passing the group assembled around the Chief Justice. According to Mrs. Butler's account, the Chief Justice protested to the aides. Mrs. Fuller wanted everybody to go downstairs, call for their carriages and go home. Justice Harlan wanted to do something more or less desperate—to judge from what he told me. To hang, draw and quarter the aide, he said, would have been too moderate a punishment. Justice Harlan insisted that the aide had actually "assaulted" the Chief Justice, because he touched the lapel of his coat as he delivered the message from Secretary Root. Subsequently Justice Harlan added the adverb "violently" to his description of the "assault."

For all that, the Court went "through the line" though most of its members left the White House at an early hour. Next morning the Chief Justice and Senior Associate Justice Harlan called on the President. The whole matter was explained in as satisfactory a

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·1790 1890·

Centennial Celebration

OF THE ORGANIZATION OF THE

Federal Judiciary

Commemorative Literary Exercises

Metropolitan Opera House

New York City

Tuesday morning, February 4th, 1890

The centennial of the Supreme Court was observed with full Victorian ceremony, as the reproduction of the Tiffany invitation above indicates.

manner as possible. Secretary Root assured the Chief Justice and the Senior Justice that such an incident could not happen again. Members of the Diplomatic Corps, he said, much preferred attending all receptions, except the Diplomatic Reception, in ordinary evening dress, at their convenience, and would be glad to be relieved of the necessity of donning court dress and assembling at a set hour, which they were obliged to do at the New Year's and the Diplomatic Receptions. And so the storm blew over.

It afforded Mr. Justice Harlan, however, a great deal of joy to tell how "that little whippersnapper of a lieutenant dashed into the room and actually and violently assaulted the Chief Justice of the United States in order to prevent him from leading the line to greet the President and Mrs. Roosevelt at the Judiciary Reception."

At about this time cards for the White House receptions were changed. As told to me, the Dean of the Diplomatic Corps advised the Secretary of State that because the members of his corps represented sovereigns, they could not be invited to meet anyone beneath the rank of a sovereign. Therefore, as there were no sovereigns to meet, the invitations to White House receptions were changed to read that, The President of the United States and Mrs. (as the name might be) invite you to a reception (at a certain time) " honor of the Chief Justice,"—instead of "to meet the Chief Justice," as had been the custom previously.

The Centennial Celebration

It was surely an unintentional oversight on the part of President Franklin D. Roosevelt when, in his address at the opening of the New York World's Fair, April 30, 1939, the sesquicentennial anniversary of the inauguration of President Washington, Mr. Roosevelt said that all sesquicentennials of the initial events in the establishment of our National Government were past and had been celebrated.

He enumerated the Ratification of the Federal Constitution, the First Meeting of Congress, and the event then being celebrated. He omitted, however, to mention the sesquicentennial of the first meeting of the Supreme Court of the United States in the Royal Exchange Building in New York City on February 1, 1790. The centennial anniversary of this occasion was celebrated in New York on February 4, 1890; and the sequicentennial was celebrated on February 1, 1940 by very simple ceremonies in the Court Room at Washington, and elsewhere, as is told hereafter.

During the year 1889, at the annual meetings of the New York State, City, and American Bar Associations, committees were appointed to arrange for a centennial celebration of the most historic event in the history of the Judiciary of our country. The American Bar Association met that year in Chicago. David Dudley Field, one of the most prominent members of the New York Bar, was its President. He was then eighty-seven years of age. Notwithstanding the disparity of our years, a warm friendship existed between Mr. Field and myself. He had taken me to the Chicago meeting not only as his guest, but also as his personal secretary, to help him in the discharge of his presidential duties.

During the session, and on my motion, a resolution was adopted for the appointment of a committee of the Association to cooperate with the other Associations in the celebration of the Judiciary Centennial. Mr. Field was chairman of this committee and the nine other members were: Lyman Trumbull, Illinois; Thomas J. Semmes, Louisiana; William C. Endicott, Massachusetts; Edward J. Phelps, Vermont; J. Randolph Tucker, Virginia; Henry Hitchcock, Missouri; Cortlandt Parker, New Jersey; Francis Rawle, Pennsylvania; Henry Wise Garnett, District of Columbia, and Charles Henry Butler, New York, who was appointed Secretary of the Committee.

At the meeting of the American Bar Association in 1890, the report of this committee showed that it was merged into one large committee, which consisted of members of the three different Bar Associations, cooperating in this respect.

As David Dudley Field's brother, Stephen J. Field, was then Senior Associate Justice of the Supreme Court, the former was, of course, greatly interested in the celebration, and took an active part in the arrangements for it. One result of his activities was that at the morning session, three of the orators, Messrs. Hitchcock, Semmes and Phelps, had not only been Presidents of the American Bar Association, but also were members of the committee of which David Dudley Field was chairman. The fourth orator, William Allen Butler, was not a member of that committee, but was an ex-President of the Association. Also he had been chairman of the "Plan and Scope" subcommittee whose adopted recommendations were that the celebration "should be characterized by simplicity and dignity, and so arranged as to bring into prominence before the nation the distinctive character and functions of the Court as a co-ordinate branch of the Government, and to exhibit its influence in our national history: and also to give an opportunity, as far as practicable, for a manifestation of the respect and esteem in which the members of the Court, as now constituted, are held by our citizens."

The report also made a recommendation for a suitable memorial volume of all that transpired during the celebration. The various committees were consolidated into the Centennial Judiciary Committee, and increased to 112 members. Mr.—later Judge—William H. Arnoux, President of the New York State Bar Association, became chair-

The official portrait of the Supreme Court in 1889 under Chief Justice Melville Fuller shows the following members, left to right: Joseph P. Bradley, Samuel Blatchford, Samuel F. Miller, Stanley Matthews, Morrison R. Waite, Stephen J. Field, Lucuis Q. C. Lamar and John Marshall Harlan.

After more than twenty years, the Fuller Court changed to the Court under Chief Justice Edward D. White, shown above in 1911. Left to right are: Oliver Wendell Holmes, Willis Van Devanter, John Marshall Harlan, Horace H. Lurton, Edward D. White, Charles E. Hughes, Joseph McKenna, William R. Day.

man of the General Committee. Former President Grover Cleveland was chairman of the Executive Committee; and various subcommittees were established to attend to the different phases of the celebration.

In fact some of the diners, who had lately attended the Centennial Dinner of the Washington Inaugural Celebration—a $20.00 one—at the Metropolitan Opera House, under the chairmanship of Mr. Ward McAllister, declared that our $10.00 dinner was the better of the two. Not having had thirty dollars at the time to pay for two dinners, it is not possible for me to pass judgment on the relative merits of the two repasts; but there is no reason for me to contradict the favorable verdict of those who did have the wherewithal to attend both dinners and were thus enabled to express their opinion.

In respect to the cloakroom accommodations—a most important feature of any such function—the palm of victory must be awarded to the Lenox Lyceum. That cloakroom was my own idea. It was on the first floor with an opening of about 75 feet. The shelf was formed of a series of wide laundry tables. Behind these tables twenty men and women handled the outer garments of more than 1500 diners and gallery guests. Generally less than one or two minutes were required to deposit or recover a garment.

Almost directly in front of the Chief Justice, at Seat 18, Table G, was Judge Horace H. Lurton, then a Justice of the Supreme Court of Tennessee, who was soon to become a Circuit Judge of the United States for the Fifth Circuit, and was later to be appointed an Associate Justice of the Supreme Court of the United States by President Taft in 1909. Near Judge Lurton, in Seat 1 at Table D, was William B. Hornblower, a prominent member of the Bar, who was to be nominated by President Cleveland as a Justice of the Supreme Court of the United States, to succeed Mr. Justice Blatchford, on this occasion sitting with the Chief Justice at the main table. The confirmation of the appointment of Mr. Hornblower, however, was bitterly and successfully fought by President Cleveland's political enemy, David B. Hill, who had been Governor of the State of New York and was Senator from that State.

A little farther away, at Seat 5, Table B, was Wheeler H. Peckham, whose name was substituted for that of Mr. Hornblower as nominee for the same Associate Justiceship which had been denied Mr. Hornblower. The like hostility defeated the nomination of Mr. Peckham. It made way for the nomination and confirmation of Mr. Justice White, as the result of which New York State was for a while unrepresented on the Supreme Court Bench.

Immediately in front of the Chief Justice, at Seat 7, Table G, was Rufus W. Peckham, of Albany, then a Judge of the New York Court of Appeals. His nomination to succeed Mr. Justice Jackson of the Supreme Court of the United States, met the approval of David B. Hill and was confirmed. Justice Peckham became Chief Justice Fuller's colleague on the Supreme Court Bench in 1895.

At the far end of Table G, directly in front of him, the Chief Justice had he strained his eyes, could have seen the writer, who, about twelve years later was to become the Reporter of the Decisions of the Court and to continue to function as such for fourteen years thereafter.

Had the eye of the Chief Justice wandered as far to the left as possible, he would have seen at Seat 17, Table A, which might well fit the Gospel description of the "lowest room," a young man of twenty-seven years, who was to have a most eventful legal and political history; and who was to be told constantly not only—"Friend, go up higher," but to go higher and higher, and indeed have worship in the presence of those who sat at meat with him.

For this young man went on to his State's Governorship, then for a time to an Associate Justiceship of the Supreme Court of the United States, and almost to the White House itself, which he failed to enter only because of a campaign blunder for which he himself was blameless. Then, after a brilliant period of private practice, during which he was chosen by his fellow members of the

Reporter Butler began work in a third Chief Justice's administration when William Howard Taft succeeded Chief Justice White in 1921. The official portrait of the Court the next year shows the following: (left to right) William R. Day, Louis D. Brandeis, Joseph McKenna, Mahlon Pitney, Chief Justice Taft, James C. McReynolds, Oliver Wendell Holmes, John H. Clarke and Willis Van Devanter.

Bar to fill at one time or another the high offices of President of the American Bar Association, the New York State, the New York County and the New York City Bar Associations and of the American Society of International Law, he was selected for the highest appointive executive office in the country, as Secretary of State. Finally he was exalted to the post of Chief Justice of the United States, which he now [1940] so efficiently and gracefully administers. The young man in Seat 17, Table A was Charles Evans Hughes of New York.

After the celebration was over, and all the bills had been paid, there was a substantial surplus in the hands of the treasurer, which invoked considerable discussion in the Executive Committee as to its proper disposition. It is not unusual after such events for the Committee on Ways and Means to be obliged to devise methods for meeting deficiencies; but in this instance the Committee had been so generously supplied with funds that there was a surplus of more than $8,000 after the payment of all expenses. These expenses included transportation of all the members of the Court and its officers from Washington to New York and back, entertainment of them in New York; the engraving by Tiffany of the banquet menus, rental of the Opera House, and many other items of apparent extravagance, but which were authorized by the Committee only with the knowledge that sufficient funds were on hand to meet all expenditures. Mr. Francis Lynde Stetson, the treasurer, was not only very efficient but also very meticulous, and carefully scrutinized and audited every item of outlay.

The disposition of the surplus funds was solved by two resolutions offered by my father. One of these, according to the preface of Carson's "History of the Supreme Court," appropriated $6,000 to procure the publication of that work. Remarkable both from an artistic and an historical standpoint, it was to be known as the "Official Report" of the celebration, and also as the enduring artistic memorial, as suggested in the report of the Committee on Plan and Scope. The second resolution offered by my father was that the treasurer should transmit the net balance of the surplus to the widow of Mr. Justice Miller, who had died in the meantime. This was done and Mrs. Miller was very grateful for the $2,500 she unexpectedly received.

During the preparations for this celebration many episodes occurred, some of a hu-

morous character, some tragic. The most serious was the tragedy of the fire in the residence of the Secretary of the Navy, Benjamin F. Tracy, on Farragut Square in Washington. It resulted in the death of Mrs. Tracy and in severe injuries to other members of the family. President Harrison, Vice-President Levi P. Morton, and Secretary Tracy, all of whom were to take part in the ceremonies, had to cancel their acceptances immediately.

The program of the morning exercises had to be altered by the omission of the President's address, but that was a simple matter as compared to rearranging the seating of the guests at the banquet. The seating list and diagram of tables were in type, and the changes necessitated by the absence of the highest ranking guests required the relocation of more than one hundred names on the diagram. Printing the list of names and the diagram was part of my duty as Secretary of the Dinner Committee; but the delicate task of seating in their proper places nearly two hundred invited guests, including Federal and State officials, from the President of the United States to municipal judges was under the control of the Executive Committee.

My father and Mr. Stetson, of that Committee, worked with me until late that evening in order to re-seat the guests. Meanwhile a special staff of the Bank Note Company was kept on hand so that the list and diagram could go to press the following day. Thus fortunately the task was duly accomplished.

Always there are people who want to get something for their own advantage out of an event of this nature. Some of these seemed to think their desires could be attained either through me directly or through my influence with other members of the Committee. It was rather a mystery, for instance, why a prominent member of the Bar, who was almost twice my age of thirty, should invite me to luncheon at Delmonico's. The mystery was solved, however, over the coffee, when my host told me he had been overlooked by those who had selected the speakers for the banquet, and he intimated that it was more or less my duty to have this error corrected.

Fortunately the Committee on Toasts had complete charge of that feature of the banquet, so that then, even as now, the favorite indoor sport of "passing the buck" could be resorted to. My anxious host soon found that he had wasted his hospitality, so to speak, on "the desert air." Notwithstanding any further efforts he may have made, his name did not appear on the list of those responding to toasts at the banquet.

A couple of days before the event, a man well known as a "pusher" for a noted champagne distributor, expressed great concern over the fact that his pet brand of that delectable beverage was not listed on the menu. He declared that he was acting for the Chief Justice, who, he said, never drank any other kind of champagne.

When it was explained to him that a special committee of experts had selected the wines and that the menus had already been printed, he offered to pay all expenses for reprinting them. And when he was told that the menus were copperplate engravings by Tiffany & Company, that they had cost more than $2,000, and that it was too late to alter, reprint or amend them, he became almost lachrymose over the fact that the Chief Justice should be deprived of his one and only favorite beverage. Also he refused to be consoled by my assurance that if the Chief Justice expressed a preference for this particular wine, there would be some of it within easy reach to satisfy his thirst. The champagne agent left me with the sad warning that under the circumstances the banquet would be a complete failure. According to my recollection neither the Chief Justice, nor any other guest at the dinner, in any way regretted the Committee's choice of Mumm's Extra Dry and of Irroy Brut to be served with the appropriate courses of the dinner.

Congress vs. the Court

ROBERT W. LANGRAN

(In YEARBOOK 1977, Dr. Langran wrote "President vs. the Court," a description of the challenging positions often assumed by the Chief Executive and the high tribunal. He complements that study with the present article on the continuing challenges between the legislative and judicial branches.)

The Constitution of the United States created three separate branches of government and made them equal with each other. Theoretically that is good, as power shared makes those in power less able to be dictatorial, and it also enables those in power to specialize in their particular area, thus making for a more efficient government. In practice, however, it has not always worked out that way, as each branch has, at times, encroached upon another branch's area or else has felt that another branch was starting to meddle in its area of competence. The purpose of this article, therefore, is to focus on the relationship between Congress and the Supreme Court, not just where they have clashed but where they have cooperated.

As far as the Constitution is concerned, little is said about the relationship between Congress and the Court. Article II, Section 2, does stipulate that the President ". . . by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court . . ." Article III, Section 2, after defining the Supreme Court's original jurisdiction, goes on to state that ". . . the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Aside from these the Constitution is silent about the relationship between these two branches, but areas of cooperation and disagreement have sprung up as to the use and extent of powers conferred either explicitly or impliedly upon one or the other branch. Of these the biggest bone of contention has been the lawmaking power.

Lawmaking

Article I, Section 1 of the Constitution says clearly that "All legislative Powers herein granted shall be vested in a Congress of the United States . . ." However, what happens if the Congress should pass a law at odds with the Constitution? Although the Constitution is silent on this point, the Supreme Court has stepped in and has said that the Constitution impliedly has given it the power to declare unconstitutional that law—the power known as judicial review.

Although not used until 1803, the Court inferred that it had that power in 1796, in *Hylton v. United States* (3 Dallas 171). In that case the Court sustained a carriage tax enacted by Congress by declaring it to be an indirect tax and thus, since it was uniform throughout the country, levied as required by the Constitution. The implication was there, however, that the Court could have declared the statute unconstitutional had it found that it had not been enacted as prescribed by the Constitution.

The celebrated case of *Marbury v. Madison* (1 Cranch 137) grew out of an attempt by the outgoing Federalists (John Adams and his Congress) to see to it that Federalists at least dominated the judicial branch, rather than to see that branch also in the hands of the incoming Jeffersonian-Republicans. Accordingly, in February, 1801, two laws were passed. One created six new circuit courts with their own judges—sixteen in all, which in addition to giving the Federalists these sixteen positions also relieved the Supreme Court Justices from the burdensome task of riding the circuit to hear cases at the circuit court level. The act also created more district courts. The second law created forty-two judgeships for the District of Columbia. It was this one that precipitated the *Marbury* case. (See article, "Equal Justice Under Law," page 00.)

The decision in *Marbury* got Marshall out of a dilemma, since he held that although Marbury was entitled to the commission of office, as it was a rightful appointment (thus upholding the Federalist actions and placing moral blame upon the Jeffersonian Republicans), the Court had no power to issue writs of mandamus in cases of original jurisdiction such as this one. Since Section 13 of the 1789 Judiciary Act had given the Court that power, that section was unconstitutional. The reason is was unconstitutional, according to Marshall, was that the Court's original jurisdiction was defined in the Constitution, and could only be enlarged or diminished by constitutional amendment.

Thus the Supreme Court, for the first time, invalidated an act or part of an act of Congress. Marshall got out of the dilemma of Congressional confrontation, although the Jeffersonian Republicans claimed that the only decision rendered by the Court was that Marbury and the others were not entitled to their commissions of office. Everything else, including the part about judicial review, was *obiter dicta* (extra words which do not affect the decision).

A few days later the Court, in *Stuart v. Laird*, (1 Cranch 299) upheld the Jeffersonian law which repealed the Circuit Court Act and thus required the Justices to ride circuit once more. Although Marshall abstained from this case, and although later critics have said the Court evaded a more fundamental issue than was offered in *Marbury*, the holding mollified Congress.

The Supreme Court did not utilize judicial review over a federal act once again until the famous 1857 decision in *Dred Scott v. Sandford* (19 Howard 393). In that case the 1820 Missouri Compromise was declared unconstitutional by Chief Justice Roger B. Taney. That statute had stipulated that there would be no slavery north of the southern boundary of Missouri (Missouri expected) in the territory of the Louisiana Purchase. Taney felt that slaves were property, and therefore Congress, by the Missouri Compromise, was denying citizens property without due process of law, which was a violation of the Fifth Amendment.

After that decision, and commencing with the Court under Taney's successor Salmon P. Chase, the Court has invalidated more than 100 federal acts, with the high watermark coming under the Earl Warren Supreme Court when some 21 federal laws were declared unconstitutional mostly because of civil liberties infringements.

Of these statutes which have fallen, one deserves special notice because, as with *Marbury*, it concerned the constitutional limits to Supreme Court jurisdiction. The case is *Muskrat v. United States* (219 U.S. 346), in 1911. It involved the federal government's policy of giving land to American Indians under the condition that they could not sell or dispose of the land for twenty-five years. Since that condition was of uncertain legality, Congress passed an act in 1907 authorizing class action suits challenging the condition, said suits to be heard in the Court of Claims and in the Supreme Court with special priority over other cases and with the government paying the legal expenses in case the judgment went against the Indians.

Accordingly, Muskrat and other Cherokee Indians brought suit. The unanimous decision of the Court, written by Justice Day, declared the 1907 statute unconstitutional because it was not a legitimate case or controversy which was being brought before it, but rather an attempt by Congress to have the Court act in a non-judicial question. Thus once again the Court rebuffed Congress in an attempt to give the Court more jurisdiction than it constitutionally possessed.

Broadening the Lawmaking Power

Just as John Marshall went against Congress in *Marbury*, he and his Court gave Congress' lawmaking power a vastly broadened scope in the 1819 case of *McCulloch v. Maryland* (4 Wheaton 316). That case, and the 1824 case of *Gibbons v. Ogden*, are both discussed in another part of this issue (pages 29-30).

A further area of lawmaking which deserves note, is the occasional attempt by

The presidential bug bit Chief Justice Salmon P. Chase in 1868 shown in this cartoon from Frank Leslie's "Illustrated Weekly" from July 18. The Democratic Party managers were pushing Chase as a successor to his predecessors of dubious renown, Polk, Pierce and Buchanan.

Franklin D. Roosevelt's court-packing plan is caricatured in this 1937 cartoon by Berryman in the Washington STAR showing New Deal appointees reflecting the New Deal President's program.

Congress to delegate its lawmaking power to the executive branch. The Court has had to decide on occasion if this delegation is proper. The first case in which the question arose was in 1892 in *Field v. Clark* (143 U.S. 649). In the 1890 Tariff Act Congress allowed the President to take an import off the free list and to impose a prescribed duty upon it if he felt that the nation concerned was being unfair in its imports from this country. To the objection that Congress was delegating its power to the President the Court, speaking through Justice Harlan, said that although outright delegation was unconstitutional, in this case the President was merely ascertaining a fact and then acting accordingly—he was not engaging in actual law making.

In 1904, in *Butterfield v. Stranahan,* (192 U.S. 470) the Court even allowed minor executive policy making by upholding the 1897 Tea Inspection Act which allowed the Secretary of the Treasury to appoint a Board of Tea Inspectors who would set standards for tea and then inspect and grade all imported tea, with that which was below standard denied entry. The Court, through Justice White, ruled that Congress had fixed the primary standard and policy for the tea board to follow.

In the 1911 case of *United States v. Grimaud* (200 U.S. 506) the Court even allowed Congress to permit an administrative agency, in this case the Department of Agriculture, to issue regulations on grazing in forest reservations and to impose penalties should those regulations be violated. Justice Lamar, speaking for the Court, upheld this 1905 law and drew a distinction between administrative rules and legislative power.

The Court will not permit an outright delegation of legislative power; in the 1935 case of *Panama Refining Company v. Ryan* (293 U.S. 388) it struck down section 9(c) of the National Industrial Recovery Act which allowed the President to prohibit the interstate commerce shipments of oil produced or stored in excess of limitations imposed by states. Chief Justice Hughes felt that there were no adequate standards set by Congress for the President.

A short time later, in *Schechter v. United States* (295 U.S. 495), the entire N.I.R.A. was invalidated, one of the main reasons given by Hughes being that the delegation of legislative power was invalid. The law provided for codes of fair competition to be drawn up by private business groups and promulgated by the President. The codes were first done by private individuals rather than by the President, and there was a further problem in that there were no limits put upon the President outside of the vague preamble of the statute. The President was thus free to regulate our whole economy. Even as liberal a Justice as Cardozo called it "delegation run riot" in a concurring opinion.

Jurisdiction

Congress is empowered by the Constitution to determine the extent of the Supreme Court's appellate jurisdiction. The Court rebuffed Congress in this regard in the *Muskrat* case, but in another, very famous case, the Court deferred to Congress in the matter of jurisdiction. That case was *Ex parte McCardle* (7 Wallace 506) in 1869, *habeas corpus* proceeding brought by McCardle, contending that he was being detained contrary to due process of law. McCardle was a newspaper editor in Mississippi and at that time the military was in control of the Mississippi government. He was detained by the army on charges that his paper published articles that were incendiary and libelous. Since he was a civilian he felt that his restraint was unlawful, and the Supreme Court heard arguments in the case.

Meanwhile, the Radical Republicans in control of Congress were afraid that the Supreme Court might strike down as unconstitutional much of the harsh Reconstruction legislation. Since this case might be a good opportunity for the Court to do just that, Congress rushed through a statute denying the Court jurisdiction in the case. Congress did this by simply repealing an 1867 statute which had allowed appeals to the

Court in cases similar to McCardle's. The Court, although it had already heard the arguments in the case, apparently decided that discretion was the better part of valor, and acknowledged that the Constitution gives Congress complete control over the Court's appellate jurisdiction and dismissed McCardle's petition.

Just three years later the Court did not back down. *United States v. Klein* (13 Wallace 128) involved a party seeking indemnification for property seized during the Civil War. Earlier decisions had stated that such party would receive the compensation if pardoned by the President. Klein got the pardon, was awarded the property in the Court of Claims, and while the case was in the process of appeal to the Supreme Court, Congress passed a statute directing the judiciary to dismiss all these claims for want of jurisdiction. The Supreme Court, however, unlike in *McCardle,* proceeded to hear the appeal, in the process holding the act of Congress an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case, and also an unconstitutional attempt to impair the pardoning power of the President.

Investigations by Congress

One of the areas which has given rise to much interplay between Congress and the Supreme Court has been the extent of the power of Congress to conduct investigations. The earliest case of importance was the 1881 case of *Kilbourn v. Thompson* (103 U.S. 168) in which the Court set aside the contempt citation of Hallett Kilbourn for refusing to answer questions or producing documents requests by a House of Representatives select committee looking into the collapse of Jay Cooke's banking firm. Justice Miller, speaking for the Court, felt that the House was looking into the personal affairs of individuals and that no valid legislation could result from it. If anyone conducted an investigation in this area, asserted Miller, it should be a court since the matter was judicial in nature.

In 1927, in *McGrain v. Daugherty* (273 U.S. 135) however, Congress fared better. A Senate committee was investigating Attorney General Harry Daugherty's conduct and on two occasions subpoenaed his brother Mally to appear before it. He refused each time and the Senate took him into custody. The Court, in an opinion written by Justice Van Devanter, upheld the action of the Senate because the investgation was held to be conducted with legislative intent in mind.

Two years later, in *Sinclair v. United States* (279 U.S. 263), the Court again upheld a Senate investigating committee, this time to elicit testimony concerning fraudulent leases of government property. Sinclair felt the matters were private and also involved matters pending in the courts, but the Supreme Court ruled that there was legislative intent involved and thus the witness would have to answer. However, the Court did say that the witness could refuse to answer questions which exceeded the committee's power or where they were not pertinent to the matter under inquiry.

In 1957 came the famous *Watkins v. United States* case (354 U.S. 178). Watkins was a labor leader testifying before the House Committee on Un-American Activities. He refused to answer questions, however, about other individuals no longer involved in the Communist movement and was cited for contempt. The Supreme Court, under Chief Justice Warren, reversed the conviction, holding that the congressional investigative power was not unlimited, that it cannot expose the private affairs of individuals without a legislative function in mind, and it was not a law enforcement or trial agency.

However, two years later in *Barenblatt v. United States* (360 U. S. 109), the Court, speaking through Justice Harlan, upheld a contempt conviction for refusing to answer questions put to a witness by the same committee, the only difference being that this time the committee was investigating Communism in higher education. Harlan felt that the House charge to the committee was clear and made relevant the questions by the committee on the subject being investigated.

Harlan balanced the rights of the individual against the nation's right to self-preservation and ruled for the latter.

Next followed a series of cases in which the Court displayed a certain ambivalence concerning congressional investigative power. In 1961, in *Wilkinson v. United States* (365 U.S. 399), and *Braden v. United States* (365 U.S. 431), Justice Stewart upheld the right of the House Committee on Un-American Activities to cite for contempt two journalists who had followed its subcommittee to Atlanta where it was conducting hearings on Communism in southern industry and who had subsequently refused to testify when subpoenaed by the subcommittee. The court stated that the subcommittee investigation had been properly authorized, for a valid legislative purpose, and the questions were pertinent to the inquiry.

In 1962, in *Hutcheson v. United States* (365 U.S. 599), the Court speaking through Justice Harlan upheld a contempt conviction for refusing to answer questions put to a witness by a Senate committee investigating the labor-management field. Hutcheson was under indictment in Indiana, and contended that his answers might incriminate him while not serving any legislative purpose. The Court held that the self-incrimination argument had not been used at the committee level and that the questions were pertinent to the committee's charge and were within the authority of Congress.

That same year in *Russell v. United States* (369 U.S. 749), Justice Stewart reversed six convictions for refusal to testify (two before the House Committee on Un-American Activities and four before the Senate Internal Security Sub-Committee). The majority opinion held that in all instances there was failure to identify the subject being investigated, and therefore the witnesses did not really know the nature of the indictments against them.

In the 1963 case of *Yellin v. United States* (374 U.S. 109) Chief Justice Warren reversed the conviction of a witness who would not testify because the House Committee on Un-American Activities refused his request for a closed hearing despite their own rules providing for it.

Finally, in the 1966 case of *Gojack v. United States* (369 U.S. 749), Justice Fortas, speaking for a unanimous Court, reversed the conviction of one who had been freed four years previously, then reindicted, tried, and convicted. The Court reversed, claiming that the House had never given the subcommittee in question any clear authority. He based that decision on the fact that the main committee had no resolution authorizing the subcommittee nor defining its jurisdiction.

Congressional Districts

The Supreme Court has also gotten involved in the sizes of districts for the House of Representatives, despite the objections of Justice Harlan and others that this was a political area into which the Court should not venture. In the 1964 *Wesberry v. Sanders* case (376 U.S. 1), Justice Black held that House districts must be equal in population and accordingly made void a Georgia congressional apportionment law.

In 1969, in *Kirkpatrick v. Preisler* (394 U.S. 526), the Court through Justice Brennan held that equality meant absolute equality and therefore struck down Missouri's congressional apportionment law under which there was only a three percent variation from the ideal but where the state had conceded it could have come closer had it so desired. Finally, in the 1973 case of *White v. Weiser* (412 U.S. 783), the Court struck down the Texas apportionment scheme even though the maximum deviation was 4.1%, because the plaintiff's had submitted a plan with a .159% deviation and therefore the state's deviation was not unavoidable.

Continued on page 120

The painting by Howard Chandler Cristy as he conceived of the signing of the Constitution shows the Founding Fathers affixing their names to the document on September 17, 1787.

The Miracle of the Constitution

C. WALLER BARRETT

Address to May 1977 Annual Meeting, Supreme Court Historical Society

In 1966 an extremely talented writer, Catherine Drinker Bowen, published an exciting and absorbing book *Miracle at Philadelphia.* She had previously written biographical works on Justice Holmes, John Adams and Sir Edward Coke. She justly called the creation of the Constitution a miracle but as she, herself said, she was not the first to do so. In February of 1788, George Washington wrote to Lafayette "It appears to me, then little short of a miracle, that the delegates from so many different states (which states you know are also different from each other),—should unite in forming a system of National Government, so little liable to well founded objections."

James Madison, in writing to Thomas Jefferson, also called it a miracle. As one considers the matter, the realization comes that the miracle of the Constitution was only the last of a series. In fact, the whole circumstances of the founding of the new nation take on a miraculous aspect. The meeting at Philadelphia was the last act in a dramatic sequence of events that occurred from 1776 to 1787. The first impetus to national union had been given by the *Declaration of Independence.*

The first move toward a constitutional convention took root in the supple mind of Jefferson's neighbor, James Madison. He had no trouble in enlisting George Washington

in the cause. Although Madison had been brooding on the State of the Confederation for some time his ideas began to take definite form at a Commission held in Annapolis in 1786 to settle a controversy between Maryland and Virginia over the navigation of the Potomac River. There Madison met Alexander Hamilton. Hamilton was to become Madison's principal collaborator in *The Federalist Papers* published in 1788 which proved to be a powerful tool in securing ratification of the Constitution. This was a fateful meeting as Hamilton has been called—"the most potent single influence toward calling the convention of 1787."

In any event, Hamilton and Madison between them influenced the Annapolis Commission to recommend to Congress (the words are Hamilton's) "that all thirteen States appoint delegates to convene at Philadelphia on May 2nd next, to take into consideration the trade and commerce of the United States." This phrasing was a slightly deceptive description of what the Convention could attempt but the collaborators knew what they were about. They had no intention of exciting alarms from New England to Georgia.

But, let's get back to our series of miracles. Was it not extraordinary that a young, thirty-three year old backwoods lawyer from Albemarle should be chosen to draft that fateful *Declaration of Independence?* But, whoever else in that Continental Congress of 1776 could have composed the inspired flow of words that give the document its immortality? This was followed by another miraculous event when a lieutenant-colonel of the Virginia militia was appointed general of the Continental Army. Who could have foretold the development of that indomitable fortitude which in the face of almost insuperable obstacles and mortifying defeats would enable Washington to gain the victory? And, once again, what other member of that Continental Congress could have achieved that result? Another extraordinarily inspired event was the sending of Dr. Benjamin Franklin to Paris to seek French support for American arms. The success of that charismatic diplomat in convincing the French to send armies and fleets to aid the colonies was an indispensable ingredient in securing the victory.

To return to the Constitutional Convention one must recognize that in those days conventions were unusual, practically an innovation. One of the delegates, Oliver Ellsworth of Connecticut, said—"A new set of ideas seemed to have crept in since the Articles of Confederation had been established. Conventions of the people, or with power derived expressly from the people, were not then thought of." It had been the state legislatures which had addressed themselves to establishing or changing constitutions. But, now to many Americans, and in particular James Madison, it had become obvious that this should be done "by a power superior to that of the ordinary legislature, the people themselves."

Thus had ensued the recommendation of the Annapolis Commission to Congress which that body had adopted. However, Congress had authorized the Convention "for the sole purpose of revising the Articles of Confederation." It had said nothing about a new Constitution. Neither the country at large nor most of the delegates themselves fully understood that they were setting up what became known as a constitutional convention. However, Washington and Madison and Hamilton knew what was required. They knew their task was to educate and to lead the representatives of the people.

Seventy-four delegates were named to the Convention; only fifty-five attended. These included some of the most distinguished men in America. Aside from our redoubtable triumvirate of Washington and Madison and Hamilton, there were Benjamin Franklin, John Rutledge and the two Pinckneys, from South Carolina; Robert and Gouverneur Morris; John Dickinson of Delaware; George Wythe, George Mason and John Blair from Virginia; Roger Sherman of Connecticut; Rufus King and Elbridge Gerry of Massachusetts. Many were young men; Charles Pinckney was twenty-nine, Hamilton, thirty, Gouverneur Morris, thirty-five and Madison, thirty-six.

At eighty-one Franklin was the patriarch. Twelve states were represented. Rhode Island sent no delegates. Jefferson called it "an assembly of demi-gods." Jefferson, himself, in Paris, and John Adams, in London, were unavoidably absent. They were, however, intensely and patriotically concerned. Adams' now book on American constitutions circulated among the members. Madison sought advice from Jefferson and, characteristically, Jefferson sent him a small library on constitutions and confederacies.

In Philadelphia in May the weather was hot and sultry. Contemporaneous accounts called it the worst summer since 1750. Madison, arrived in Philadelphia eleven days early. He was a member of Congress and rode over from New York. He has been described as "a small man, slight of figure-no bigger than half a piece of soap. He had a quiet voice and delegates frequently called out, asking him to speak louder. Of the entire convention no one was better prepared intellectually."

The State House, now called Independence Hall, was the place where the Continental Congress had sat and had signed the Declaration of Independence. The east chamber was a large and handsome room, some forty by forty, with lofty windows on two sides. On a small platform against the east wall was the high-backed chair of the presiding officer. Delegates were seated in windsor chairs, state by state, at tables covered with green baize. Such was the scene on which the curtain was about to rise.

George Washington arrived on May 13th, a Sunday, and was received with military honors. The opening was set for the following day. The last act of the drama that forged the union of all the states was about to be played. There will be three stars, five supporting actors including a villain and thirty supernumeraries. In theatrical terms it was a disappointing opening. Only Virginia and Georgia were represented. Virginia was proud of her delegation of seven; she had been the first to appoint delegates. Although nominated, Patrick Henry, looking ancient at fifty-one, declined saying he "smelt a rat." He continued, "I stumble at the threshold. I meet with a National Government instead of a Union of Sovereign States." He was to become the most virulent opponent of ratification. Of Georgia's four delegates, two, like Madison, came over from Congress in New York. It was the twenty-fifth of May before a quorum was obtained. This presented an opportunity for the Virginians to draft the fifteen resolves which were to be the basis of the Constitution.

The last delegate, John Francis Mercer of Maryland, did not arrive until August 6th. In the meantime, members came and went as they pleased and no more than eleven states were represented at one time and scarcely more than thirty delegates at any meeting. As each delegate arrived he presented his credientials from his state legislature. The credentials consisted mostly of the various ideas the states had formed of the proper objectives of the Convention. Virginia's preamble, however, declared in ringing terms—"the necessity of extending the revision of the federal system to all its defects. The crisis is arrived at which the good people of America are to decide the solemn question whether they will by just and magnanimous Efforts reap the just fruits of that Independence which they have so gloriously acquired and of that Union which they have cemented with so much of their common blood."

On the twenty-fifth of May, when a quorum was present, Washington was unanimously elected President of the Convention and escorted to the chair. Characteristically, he made a little speech in deprecation of his own abilities. Washington proved an exemplary presiding officer. Courteous but firm and extremely sparing of speech. The universal respect accorded him caused the delegates to glance toward him whenever they made a point as though seeking his approval. He responded not with words but with a slight smile or occasionaly a frown. It has been said that for four months his "August presence kept the Federal convention together, kept it going, just as his presence had kept a straggling, ill-conditioned army together during the terrible years of war."

The Convention was soon ready to get down to business. Edmund Randolph, Governor of Virginia, thirty-three years old, was a handsome man of nearly six feet. In oratorical fashion he presented the Virginia resolves which envisaged an entirely new national government with a national executive, a national judiciary and a national legislature of two branches. Everyone understood the intention of the resolves and felt that here indeed were—that dread word to some—innovations. They also realized that here was something to work on. The Virginia plan provided a point of departure and, although many did not fully realize this, it would form the basis of the United States Constitution. It is sad and ironic that Randolph in the end found himself unable to sign the Constitution. He was followed by Charles Pinckney who generally supported the principles of the Virginia plan. "The house then resolved," wrote delegate Yates of New York, "that they would the next day form themselves into a Committee of the Whole, to take into consideration, the state of the Nation."

The next few weeks were given over to debate on the fifteen Virginia resolves. The content of these articles evoked great controversy. For discussion and voting Washington stepped down from his chair and took his place with the Virginia delegation. The first subject for consideration and the most vital was the establishment of a supreme national authority as against a federal compact among the States. This not unnaturally evoked a storm of debate for several days. New actors appeared on the scene. One-legged Gouverneur Morris, a brilliant and a compulsive talker left no doubt as to his position. "We had better take a supreme government now than a despot twenty years hence" and, he continued—"This generation will die away and give place to a race of Americans."

Elbridge Gerry, one of "the old patriots" and a signer of the Declaration was afraid of unchecked democracy, the rule of the people. George Mason, white-haired and dignified Virginia land-owner, answered Gerry, "We ought to attend to the rights of every class of people . . . provide no less carefully for the

James Madison, "father of the Constitution," kept an authoritative journal of the debates and later contributed to the famed Federalist papers.

. . . lowest than the highest orders of citizens." Unhappily, Mason was one of the three who refused to sign the Constitution. When the clause containing the words, "to call forth the forces of the Union against any member of the Union failing to fulfill its duties under the articles," Madison prudently called for postponement and the House adjourned.

Next came the thorny questions of a chief executive, the executive veto power, proportional representation, the naming of judges for the lower courts. During these lengthy discussions, three delegates made their appearances on the rostrum. The first of these, James Wilson, forty-four, born in Scotland and with a pronounced burr called for a single vigorous executive, who, in his words, would be the best safeguard against tyranny. Wilson has been called the unsung hero of the Convention and Lord Bryce in his *The American Commonwealth* described him as "one of the Convention's deepest thinkers and most exact reasoners." John Dickinson of Delaware, famous for his *Letters from a Farmer in Pennsylvania,* rose on June 2nd to declare for a single executive. He said he considered a limited monarchy "as one of the best governments in the world though in America it was out of the question."

On June 11th, the Convention seemed deadlocked on the question of a national legislature. A new star appeared on the floor, Roger Sherman of Connecticut. Sixty-six, tall and lean, his features projected honesty, sincerity and dignity. "That old Puritan, honest as an angel," said John Adams and Jefferson remarked, "Mr. Sherman of Connecticut . . . never said a foolish thing in his life." He tackled the question of proportional representation head-on and moved the three-fifths rule for slaves. In deference to the small states, he proposed that each state should have one vote in the Senate. It has been said that although this compromise was not fully accepted it was eventually to save the Convention.

On June 15th, the meeting was thrown into a turmoil by the introduction of *The New Jersey Plan.* This plan differed from the Virginia resolves in no less than eight vital conditions. On the following Monday, Hamilton was first on his feet. He began a long harangue that lasted six hours. Hamilton was a strange and complex character, young and slight with a countenance endlessly expressive. He was a friend of Washington and an enemy of Jefferson. Hamilton had an almost overblown idea of the structure of a national government. And yet he was one of the staunchest and earliest advocates of that concept. He had written voluminously about it and was to write more. In this particular speech he no doubt went too far in suggesting monarchy. There was no rebuttal. None was needed. Hamilton left town shortly thereafter but returned sporadically and was on hand to sign the Constitution, the only one of the New York delegation to do so.

On June 19th Madison was on his feet early and proceeded to blast the New Jersey plan point by point. On that day the delegates voted it down. However, the small states were by no means silenced. It was now that the real *bête-noir* of the Convention rose to make one of his intemperate and interminable speeches. As all dramas must have a villain he was appropriately cast in that rôle. Luther Martin of Maryland was a man of forty years with a consuming love for the

Alexander Hamilton, advocate of an independent tax power as the secret to success of a national government in 1787.

battle and political speechifying. He has been characterized as "impulsive, undisciplined, altogether the wild man of the Convention," talking stridently and profanely about "the rights of free men and free states."

Weariness now beset the delegates—the heat and humidity and long-winded speeches exhausted them—so much so that the venerable Franklin asked that prayers be instituted in the Assembly every morning before proceeding to business. Accordingly a chaplain was appointed. On July 10th Washington wrote to Hamilton, "I am sorry you went away. I wish you were back. The crisis is equally important and alarming . . . I almost despair of seeing a favorable issue to the proceedings of the Convention."

On July 16th, the heat wave broke at Philadelphia. It was now cool and comfortable. More importantly, the delegates had reached agreement on what has been called the great compromise—equal representation for all states in the Senate. Also there was laid to rest any lingering fancy about setting up a monarchy.

On July 26th the Convention appointed a Committee of Detail. On August 6th this Committee rendered its report, drawn up into articles and sections. Since any clause could be reargued and voted on again, five weeks were to ensue before delegates could agree

and give the document to a Committee on final drafting and polishing. Among other matters there was still undecided the question of the method of ratification, whether to be done by the State legislatures or the people at large. To Madison it was clear that the legislatures were incompetent to handle the problem. "I consider," he said, "the difference between a system founded on the legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty* and a *constitution.*

With some questions not settled, nevertheless the Convention was ready to attempt to revise the style and arrangement of the articles. Accordingly, a committee of five was chosen: William Samuel Johnson of Connecticut, Hamilton, Gouverneur Morris, Madison and Rufus King of Massachusetts. These were excellent choices. Johnson, named chairman, has been described as "the perfect man to preside over four masters of argument and political strategy." Rufus King, called the most eloquent man in the United States, had come to Philadelphia fearful and undecided. He became a strong constitutional supporter and lent his masterful oratory to the struggle for approval of the document. The committee produced a powerful preamble:

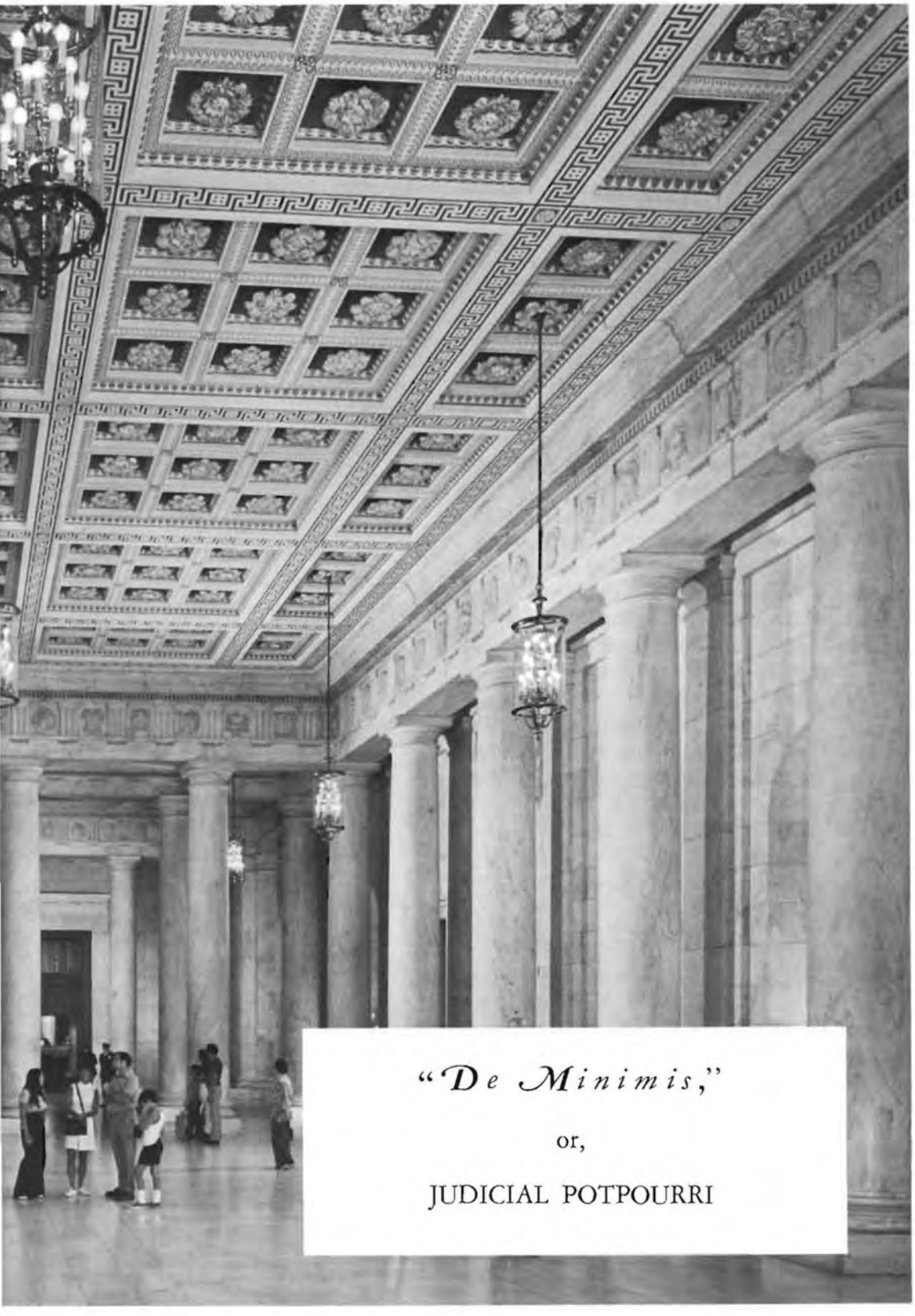
> "We the people of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.

In the book, *Miracle at Philadelphia,* Mrs. Bowen praised this preamble. She said—"The seven verbs rolled out: to form, establish, insure, provide, promote, secure, ordain. One might challenge the Centuries to better these verbs." In the phrasing Gouverneur Morris played an important rôle. The finish given to the style and arrangement," Madison wrote, "fairly belongs to the pen of Mr. Morris."

On September 15th the final arguments were heard. On the motion to approve the Constitution, as amended, all the States voted aye. The Constitution was then ordered to be engrossed for signing and the Convention adjourned. On September 17th, the sky was clear, the sun shown brightly as if to bless the labors of the delegates. A cool breeze sprang up. Thirty-eight gathered in the room where they had sweated and argued through a hot and steamy summer. The benign and universally respected Dr. Franklin, noting the reluctance of some of those present to sign made a motion, carefully phrased to beguile dissenters; it suggested that the Constitution be signed by all of the delegates as follows: *Done in Convention by the unanimous consent of all the States present September 17th.*

There were present six delegates who had attended faithfully all summer but who had not uttered one word on the floor. Blount of North Carolina now rose and declared he would not sign but added he was willing to accept the form proposed. Jared Ingersoll of Pennsylvania broke his silence with a similar statement. Whereupon, the four remaining speechless delegates joined in signing without comment. There were three non-signers: George Mason, Edmund Randloph from Virginia and Elbridge Gerry from Massachusetts. The Secretary received his instructions to carry the document tomorrow to Congress in New York.

And so the curtain descended on one of the most stirring dramas in our nation's history. The players departed from the room leaving the scene deserted. Washington's and Madison's miracle had been wrought.



"De Minimis,"

or,

JUDICIAL POTPOURRI

The Muse at the Bar

The Editor

Leaders of the bench and bar are not always prosaic professionals, their personalities frozen in unvarying postures of decorum. Justice Pierce Butler is said to have had a virtually inexhaustible supply of Scottish jokes. William Wirt, one of the early Attorneys General, was a widely known satirist, his *Letters of a British Spy* titillating Richmond, Virginia society at the turn of the nineteenth century. George Wharton Pepper, a leader of the Supreme Court bar, was a cartoonist of considerable skill. (For Wirt and Pepper, see items in YEARBOOK 1976.) As the attics of the judiciary are gradually inventoried, a number of other literary gems of lighter touch are expected to come to notice, with selections therefrom to appear occasionally in *Judicial Potpourri*.

No less a personnage than Chief Justice John Marshall was a writer of poetry—well, then, verse—on occasion. One such occasion was the droning discussions in 1788 at the Virginia convention called to ratify the new Constitution. The man who would, in the next half-century, do more than anyone in history to make that Constitution an instrument "to endure for ages to come," was sometimes hot and bored as the debates dragged on, competing for public attention with the opening of the racing season at the nearby Jockey Club. Amid the bombast of the convention, Marshall wrote some less than immortal lines:

The State's determined Resolution
Was to discuss the Constitution.
For this the members came together
Melting with zeal and sultry weather.
And here to their eternal praise
To find its history spared three days.
The next three days they nobly roam
Through every region far from home;
Call in the German, Swiss, Italian,
The Roman robber, Dutch Rapscallion,
Fellows who Freedom never knew
To tell us what we ought to do.
The next three days they kindli dip yea
Deep in the river Mississippi—

The passing of years, and the burden of judicial duties, did not extinguish the Chief Justice's inspiration from time to time. In 1824, during the Marquis de Lafayette's triumphal tour of the United States, a Richmond reception for the French hero was featured by singing by Miss Elizabeth Lambert. She was identified in *Tyler's Quarterly Historical and Genealogical Magazine* (in the July 1924 issue of which the following lines were reprinted) as a sister of the mayor and a friend of Edgar Allan Poe. Neither of these facts, presumably, influenced Marshall as he proceeded to dash off something entitled, "From the Chameleon to the Mocking Bird":

Where learnt you the notes of that soul
melting measure?
Sweet mimic, who taught you to carol that
song?
From Eliza 'twas caught whom e'en birds
hear with pleasure,
As lightly she tripped the green meadows
along.

O breathe them again, while with rapture I
listen;
Every beat of my heart is responsive to
thee,
And my eyes to behold thee with ecstacy
glisten,
With thy grey breast reclined on that high
poplar tree

Yet still with homage true I bow
At woman's sacred shrine,
And if she will a wish avow
That wish must still be mine.

After the verses, Marshall then wrote feelingly: "My old wife! My youth grown rich and tender with years!"

* * *

The usually sobersided *American Bar Association Journal* a few years ago stirred up a spirited literary debate over the perennial question of who (if not Shakespeare) wrote Shakespeare. It brought forth a freshet of erudite commentary from the legal fraternity. Allusions to the Bard are recurrent in Supreme Court arguments and opinions; *lexis*, a data storage and retrieval system which presently contains nearly half a century of recent judicial opinions in its memory banks, will list on demand no fewer than a dozen references to, or quotations from, Shakespeare for this time period alone. But the only known instance when the playwright was cited as authority in a legal brief before the Court was in the 1863 case of *Parker v. Phetteplace,* 68 U. S. 684, at 687.

This was an appeal from a decree of the District Court for Rhode Island, in litigation charging a fraudulent conveyance of property to thwart certain creditors. Unable to offer any evidence of fraud in writing, the creditors had lost at the trial level and retained counsel to carry an appeal to the Supreme Court. Appellants' counsel, unable to overcome the absence of written evidence, inserted into his oral argument the observation that some of the "greatest crimes that power ever has commanded have been done without a word," and proceeded to quote—"from memory" as he advised the bench—from Shakespeare's *King John:*

King John. I had a thing to say,—but let go.

If that thou couldst see me without eyes,
Hear me without thine ears, and make reply
Without a tongue, using *conceit* alone,—
Without eyes, ears, and *harmful sound of words,*—

I would into thy bosom pour my thoughts:
But ah! I will not. . . . .
He lies before me. Dost thou understand me?
Thou art his keeper.

Hubert. And I will keep him *so,*
That he shall not offend your majesty.

Taking a breath, the learned counsel then quoted another passage from the play which he considered relevant:

King John. It is the curse of kings to be attended.
By slaves, that take their humors for a warrant
To break within the bloody house of life;
And, on the winking of authority,
To understand a law. . . . .
Hadst thou but shook thy head, or made a pause,
When I spake *darkly* what I purposed,
As bid me tell my tale in *express* words,
Deep shame had struck me dumb.
But thou didst understand me by my *signs,*
And didst *in signs* again parley with sin;
Yea, without stop didst let thy heart consent,
And consequently thy rude hand *to act*
The deed which both our tongues held vile to name.

The Court was not impressed. Chief Justice Taney and his colleagues affirmed the decree of the trial court, with only one Justice dissenting. The moral of all that may be, if the case is weak to begin with, the greatest writer of the English language will be of little help.

Cf. also *Shakespeare et al. v. City of Pasadena,* 386 U. S. 39 (1965).

Small Fry and the Court's Mailbag

By Barrett McGurn

Mail pours in to number one First Street Northeast, Washington, D.C. all day every day, sometimes from prisoners hoping against hope, often from people of every type seeking help with problems and, infrequently, from children.

Generally the small fry correspondence concerns a class assignment though at other times it is inspired by a hobby (collecting photos or autographs) and occasionally it is merely an expression of good will and encouragement for the heavily burdened Justices. At times the tot mail accompanies a request with recognition that other matters may clamor for a priority ("I am in no hurry, and realize how busy you are"); other times a note of panic provoked by a teacher's deadline intrudes ("I will be in troube [sic] if I don't get this information").

Spelling is not always the forte of the child correspondents. (For that matter not all the adults or even school teachers are above an occasional orthographic error: Pamphlet is a bugbear for many of all ages, coming out variously as pamplet or even phamplet; some evade the shoals by using "booklet" or "brochure".)

Some letters are heartening, even flattering. Some are confidential ("my dad comes home late from work and . . . trys to help me with my autograph collecting since I broke my hand playing ball"). Some reflect the petulance and worries of adolescent years ("I have been asked . . . to wright [sic] a report on . . . Earl Warren. I can receive some information from encyclopedias, but I would like this information to be as complete as possible [sic]. That is why I am asking the government he served for so many years. Being seventeen I am loseing

[sic] faith in the government and this information would restore my faith in the govment [sic]").

Four misspellings in about as many lines in a 17-year-old's letter is more than average, but the children's mail make clear that any teacher pondering whether to give one more spelling drill is well advised to do so. Riffling through 100 or so letters from grade and high school children more than fifty words are found misspelled, some of them in a range of ways. Supreme as in Supreme Court comes out Sepreme, Surpreme, Surprime and Suprem. Government is often goverment and sometimes govorment. Judicial is judical and even jucial. Justices becomes Jusctices, and the gentlemen of the Bench gentelment.

Many students wish to express appreciation for the Court's efforts but the root word many times comes out as apeciate, apperciate, apriciate or apreciate. For some reason studying becomes studing or sudying. One high school student wrote from "Navada". More than one child thinks he is in the fith [sic] grade. Other bugbears seem to be weather (for whether), campiane (as in Presidential campaign), socail studies, scandle, greatful, budjet, responce, polotics, cooraporation (as in enjoying someone's cooperation), arcitecture, pitures, Amercian (as in American government), admier, prodject, constution, carrer (career), intrested, ammendment, sincerly and materil.

Beyond the spelling are the children's concern with getting answers to questions teachers have posed. Sometimes an imaginative child himself has thought up an inquiry or two. Sometimes the requests scoop in vast territories of data, e.g.:

"Could you send me information on the purpose of the Supreme Court?"

"I would like you to send me all the information on government you know. Maybe I can send you some information sometime. Thank you."

"Could you possibly send me some information about Judges, laws and their penalties, Lawyers and Juries".

"My Grandfather too . . ."

As staff members at the Court help the Justices respond to some of the stream of mail, there is wonderment sometimes about what lies behind some of the incoming letters. There was the occasion during the time of Chief Justice Harlan Fiske Stone (1941-1946) when the following arrived:

"Dear Chief Justice Stone,

Will you please send me your autograph? My grandfather was Chief Justice too.

Toni Gossett".

Back went the requested autograph plus a post script a staff officer included:

"Was your grandfather a Chief Justice of the Supreme Court or of some other court?"

(It was not indeed "some other court". Antoinette, to give her her official name, was the granddaughter of Chief Justice Stone's immediate predecessor, Charles Evans Hughes, and eldest child of William T. Gossett (later on a president of the American Bar Association) and of Elizabeth Hughes Gossett, president of the Supreme Court Historical Society).

B.McG.

"I would like to know who were the first men on the Supreme Court and if possible some information about them too—where they were born, who did they marry, and when did they die". (John Jay, New York, Sarah Livingston, 1829; John Rutledge, South Carolina, Elizabeth Grimke, 1800; Wililam Cushing, Massachusetts, Hannah Phillips, 1810; James Wilson, Scotland, Rachel Bird, 1798; John Blair, Virginia, Jean Balfour, 1800; James Iredell, England, Hannah Johnston, 1799.)

To a Justice: "I am 14 . . . and would like to know more about your job. . . . We were ask to write to a jude [sic]."

"I would like . . . some information . . . like the date (the Supreme Court) first opened and the hardest case. . . ." (1790 in lower Manhattan. The Dred Scott case?)

"I need the name of the only Justice to be impeached". "Do the Justices ever lose their job?" (Samuel Chase impeached in 1804 but not convicted by the Senate. Service is for the duration of good behavior or until voluntary retirement, resignation or death.)

"Do you like being a justice . . . . What do you do at each meeting". (Each year is crowded chockablock with more than 4,000 new cases.)

"What is your average day like?" (Busy, sometimes into the wee hours and deep into the weekends.)

". . . Some information about how the courts are runed [sic]."

"What happens to the chairs of the Supreme Court judge when he retires or dies? (The remaining Justices purchase the chair from the government, giving it to the family of the Justice.)

"I am doing a report on 'My Ideal Supreme Court'. I am 14. . . . Would you be kind enough to send me some information on the nine . . . I picked: Charles Evans Hughes, Louis D. Brandeis, William Howard Taft, Hugo L. Black, Earl Warren, William O. Douglas, Felix Frankfurter, Fred M. Vinson, Abe Fortas. . . . This will help me get an 'A' ".

The children's letters tell much about the young authors, sometimes intentionally so, sometimes not. Some trip over sentence construction. ("Please send me a Supreme Court." (Pamphlet?) "If I could . . . have some . . . information it would help me a great deal in doing the Supreme Court." (Pictures of them?) "Please give me [the justices'] names and what president they are appointed." "Would you include a map of Washington D.C. . . ., Sincerely, John Burke. P.S. You pronounce my name 'Berk' ".

Some report career plans. ("When I grow up I want to be a football player, then I might be a lawyer. Would you send me a panphlet [sic] on . . . what a judge does? Thank you." "Some day I'm going to become president and help our great country". "I am 14. . . . Even though I don't intend on going to Law School, I hold the highest respect for our country's Judicial System. . . . I am going to be an honest politican [sic] who is working for the country and not himself." "When I was really young I wanted to become a major league baseball player. . . . I'm 13. . . . I've noticed for sometime now that ever since I've decided to become a lawyer my studies have been noticeably better. As a matter of fact my last grade, grade 8, was my best ever. . . . I'm really not sure what prompted me to become a lawyer. It may have been my mother saying, 'you should become a lawyer, you're so technical' . . . . Since you're very, very successful at your profession I'd really like some advice on how to someday become . . . a very well established lawyer".

Some young writers are autograph collectors hoping to supplement their treasures. Some have heard good things about the Justices and wish to express that. Some use art to combine the two. ("You are one of the greatest leaders this country ever had . . . I would like . . . Autographed pictures." "I'm twelve years old and I can't wait to tell my friends that I wrote to you. I'm doing a report on you. . . . You are so interesting to work on. . . . I'm one of your fans. I hope you right [sic] back. . . . I hope you send a picture . . . if you have the time". "It must be very exciting to be involved in such important legal decisions. . . . I am writing to ask if you could send me your signature and a picture. Sincerely . . . . age 12". "You are doing a good job. I am 7. . . . May I have your autographed picture". "I believe you are a very honest, kind, erudite, hardworking and remarkable person. . . ." "You have done very much for this world and I am proud of you. . . ." "I believe you are a very loyal, honest and knowledgeable person. . . . May I ask . . .to have a signed picture". "You and your other justices are very good about keeping order in our government. . . ." "I was wondering if I could meet you personally [sic] sometimes."

"Our class would like . . . to have a picture of the Supreme Court. . . . In our textbook the picture was taken when Felix Frankfurter was in office. P.S. Have a nice day."

Several times daily a mail truck rolls into the Supreme Court basement with more correspondence, much of it to do with each year's flood of cases, but another stream of it from children. A dozen motives inspire the young writers, sometimes admiration, sometimes a determination to be another link in the chain now 101 Justices long. As one Pennsylvania boy wrote a Justice: "I would appreciate . . . information . . . so I could become a great judge like you". And as another scribbled chattily: "I plan to be one of the eight (!) lawyers in the supreme court. . . . I'm in the fifth grade. My mom and dad's names are. . . ." Somehow in its own way young America is making contact with the nation's nearly two-century old ultimate Court.

Extra-Judicial Commentary

J. B. M. and W. F. S.

In addition to the serious work of the Supreme Court reported by *Niles Register* (see article at page 50 of this issue), teapot tempests were also occasionally brewed—as witness the *Register's* series of reports of conflicting stories of the *New York American* and the *New York Evening Post* in the fall of 1824:

COLLISION AMONG THE JUDGES

From the New-York American

> We understand that judge Thompson, some time during the sitting of the circuit court in April last, noticed, in one of the public papers, a paragraph stating that thereafter the courts of the United States were to be held at Tammany Hall, at which he expressed some surprise, as he had never understood there was any objection to the courts being held as usual in the City Hall; and on inquiring of Mr. Morris, the marshal, respecting it, received for answer that he was authorized by the comptroller of the treasury, to hire a house for holding the courts of the United States, and that he had taken Tammany Hall, alleging that the clerk of the court could not be accommodated at the City Hall . . .
>
> During the vacation the marshal, acting, as it is understood, with the cooperation of judge Van Ness, proceeded in and concluded the arrangement for Tammany Hall, as the place for holding the courts. Judge Thompson finding that, by reason of bad weather, and the indisposition of one of his family, he would not be in New York at the opening of the court, on the first of the present month, wrote to the United States' district attorney, requesting him to inform the marshal he wished the court opened at the usual place, in the City Hall: and to adjourn it from day to day, until his arrival, if judge Van Ness did not attend, and to state again to Mr. Morris his decided objection to having the court removed from the City Hall, which, it is believed, was communicated to him. The court was, however, opened by judge Van Ness, at Tammany Hall, without having first met at the City Hall, the place where in judgment of law it was adjourned to meet. . . .
>
> Such, we believe to be a plain statement of the facts in this case: and cannot perceive any justifiable ground upon which this attempt to remove the court from the City Hall has been taken; as there was no objection to its being held at the usual place in the City Hall. The expenses, therefore, of $15000 a year to provide another place, was entirely unnecessary. Some object other than the accommodation of the court must have induced this extraordinary proceeding.

Beneath the surface of this incident was the chronic pulling and hauling of New York politics. District Judge William Peter Van Ness for years had been a rabid partisan of any faction opposed to the powerful Livingston family—and Justice Smith Thompson was a relative by marriage of the Livingstons. Van Ness idolized Aaron Burr (see article on Burr in this issue, page 18), and served as his second in the notorious duel with Hamilton. Van Ness, moreover, had been a federal judge since 1812, and obviously considered himself considerably senior to a mere Supreme Court Justice of less than one year's standing. Finally, it may be noted that Tammany Hall was the head-

quarters for the party of Martin Van Buren, which was also Van Ness' party.

Most of this was familiar enough to Editor Niles and many of his readers—as well as the fact that the several New York newspapers from which the *Register* quoted were committed partisans of one faction or the other. Thus, to keep the story before the readership, Niles the following week published the *New York Post's* pro-Van Ness version of the affair:

> *Circuit court*—The misrepresentations which have been published in one or more of the evening papers, apparently by authority, relative to what they are pleased to term "a collision among the judges," have rendered it proper and necessary to lay before the public a plain and concise statement of the facts connected with the subject to which they allude. It is to be lamented that an occurrence wholly unconnected with the controversies of the day, should be made a subject of perverse and angry discussion. . . .
>
> It will be proper to explain, first, the causes that produced the removal of the court, and then its legality.
>
> No room has ever been assigned in the City Hall, for the exclusive use of the courts of the U. States; and for several years past, these courts have been exposed, in that building, to every kind of inconvenience and interruption. The room was perpetually devoted to all the miscellaneous and incidental uses, for which the city authority and local magistrates might want it. . . .
>
> In the mean time, the room occupied as a clerk's office, was more than once demanded to be given up. But, after much correspondence and solicitation, the requisition was abandoned. Some time in October or November last, however, a peremptory order to that effect was made and served upon the clerk. He was required to relinquish the room he occupied, not on the 1st of May, when houses and appartments can conveniently be obtained, but on the first of January. No commodious place could then be procured for his use, and the very numerous important and valuable papers, records and securities in his office, were, from necessity, deposited in various places. Some were left in the public court room, in cases; some at another private house, and such only as were daily wanted, could be placed in the room he was finally enabled to obtain for an office. That in the Hall which was proposed to him, was found on examination to be wholly inadequate. . . .

U.S. District Judge Peter Van Ness, a strong Jacksonian, sought to challenge the Livingston faction in a judicial teapot tempest.

> The evils resulting from the state of things, which has been described, were for a long time endured, with much patience and forbearance. But, when the clerk was virtually expelled from the public building, they became so serious, that the district judge suggested to the marshal, the propriety of procuring other accommodations for the court, under the authority vested by law in all the marshals of the United States. . . .
>
> The room designed for the immediate use of the courts, has been prepared in a plain but appropriate manner. In point of size, appearance, comfort and convenience, it is superior to that occupied in the City Hall; and, if his honor, the justice of the supreme court, could have made it convenient to examine it, it is confidently and respectfully believed that he would have found nothing there repugnant to his feelings, nor derogatory to the dignity of his station. What his particular objections are to the apartment prepared for the reception of the court, remain, in a great measure, unknown. He has never condescended, in any manner or form, to express them to his associate upon the bench. He has never, in any way, asked, proposed or suggested, an interview or conference with him on the subject. By a rational and amicable examination and discussion of the matter, all objections to the existing arrangements would undoubtedly have been removed, for none that are substantial exist; if not, the honorable judge's partiality for the Hall would have been indulged. The district judge was permitted, however, to know nothing but that the judge of the supreme court censured the marshal for not consulting him, and alleged, that the place designed for holding the court, had been, or was, a tavern. . . .

Justice Smith Thompson tangled with District Judge Van Ness over where the federal Circuit Court in New York should hold its sessions.

When it was ascertained that judge Thompson neither intended to confer nor consult with judge Van Ness, the latter was bound, in duty to himself, to his office, and the public, to maintain his legal rights, and, with that view, he respectfully requested the marshal, in writing, to take no measures for the removal of the court, without his concurrence. When the marshal, in justification of his conduct, urged this request to judge Thompson, he indignantly refused to read it. What required or justified this total disregard to the feelings, the opinions, and the authority of the district judge? Was it proper, was it decorous to assume, without necessity, without any known cause or assignable reason, a manner so utterly offensive, and without precedent, as to preclude every thing like concession or conference?

The habit of command, derived from long and arduous service, should have been somewhat moderated. The spirit of the camp, or the discipline of the deck, cannot always be transferred with propriety to the civil departments of the government. Was it not known to the judge of the supreme court, that the district judge was one of the judges of the circuit court, and that, in the administration of justice in that court, he possessed power and authority in every respect equal to his own, except in the instance of cases brought up from the district court? If it was known, upon what principle was it expected that all his legal rights, and all personal and official consideration, were to be surrendered to one possessing no superior rights or power?

One begins to suspect that City Hall was in Livingston hands and that Van Ness was the real author of the article in the *Post;* he was an inveterate pamphleteer, whose writings were generally described as "confused truth and fiction." One also can infer various political things from the exculpatory letter which the marshal, Thomas Morris, subsequently wrote to the New York common council that fall. Which side had the last word is not documented; but the *Register* wound up its coverage of the affair with another *New York American* blast at the district judge:

> *Circuit court.* The lucid *Post* contains, last evening, an explanation, purporting to be from authority, and which, therefore, we probably do not err in ascribing to the pen of Mr. Van Ness, of the circumstances connected with the misunderstanding, (the word *collision*, seems to offend the sensitive delicacy of the district judge), between the judges, as to the late term of the circuit court. The article is introduced by a few editorial lines, which, with the usual skill and accuracy of the *Post*, a paper that lives through countless present blunders, inconsistencies and absurdities, on the strength of its former reputation, commence by stating that the "term of the United States' *district court*, having adjourned without doing the business *prepared* for it," the public will expect some account of the circumstances, &c. and then immediately follows judge Van Ness's statement, headed *"circuit court,"* in the course of which it is distinctly asserted, that the court did not fall through, but transacted all the business moved by the bar, or submitted to its attention. Thus it will be seen that *in limine*, the *Post* blunders, and, in substance, contradicts an important asseveration of its *new* protege.
>
> But to nobler game than the *Post*. We are charged by indirection with "misrepresentations" in our statement of the circumstances connected with what we still call a collision between the judges, of which the result was, that the term appointed to be held, fell through, without doing the business prepared for it. It is a little remarkable, however, that no one fact stated by us is disproved, and some of the most important are directly, or by being passed over in silence, admitted. The facts, particularly, that Tammany Hall is still a tavern, and that political meetings are held in the very court room, are among those that are not attempted to be denied, while they were, as they ought to have been, very influential, with Mr. Justice Thompson, in refusing to hold his court there.

Indeed the labored and angry vindication of judge Van Ness, shows that he is a little nettled at the disapprobation with which his conduct is universally received. His misrepresentations of the conduct of the corporation, in relation to a court room, as we have reason to know and in other particulars as we have understood, will be noticed hereafter. In the mean time, we should be glad to have him point out to us, the law that authorizes the marshal to provide court houses, and gives him the discretion of dragging the court about wherever he pleases, within the bounds of the city of New York. . . .

The district judge seems so very tenacious of his official rights and dignity, as a member of the circuit court, that it would be well if he attended a little more to its duties; yet we understand he seldom makes his appearance in the court when the circuit judge is here, and why need he be so very officious in providing a place for holding that court? But judge Thompson refused to read the

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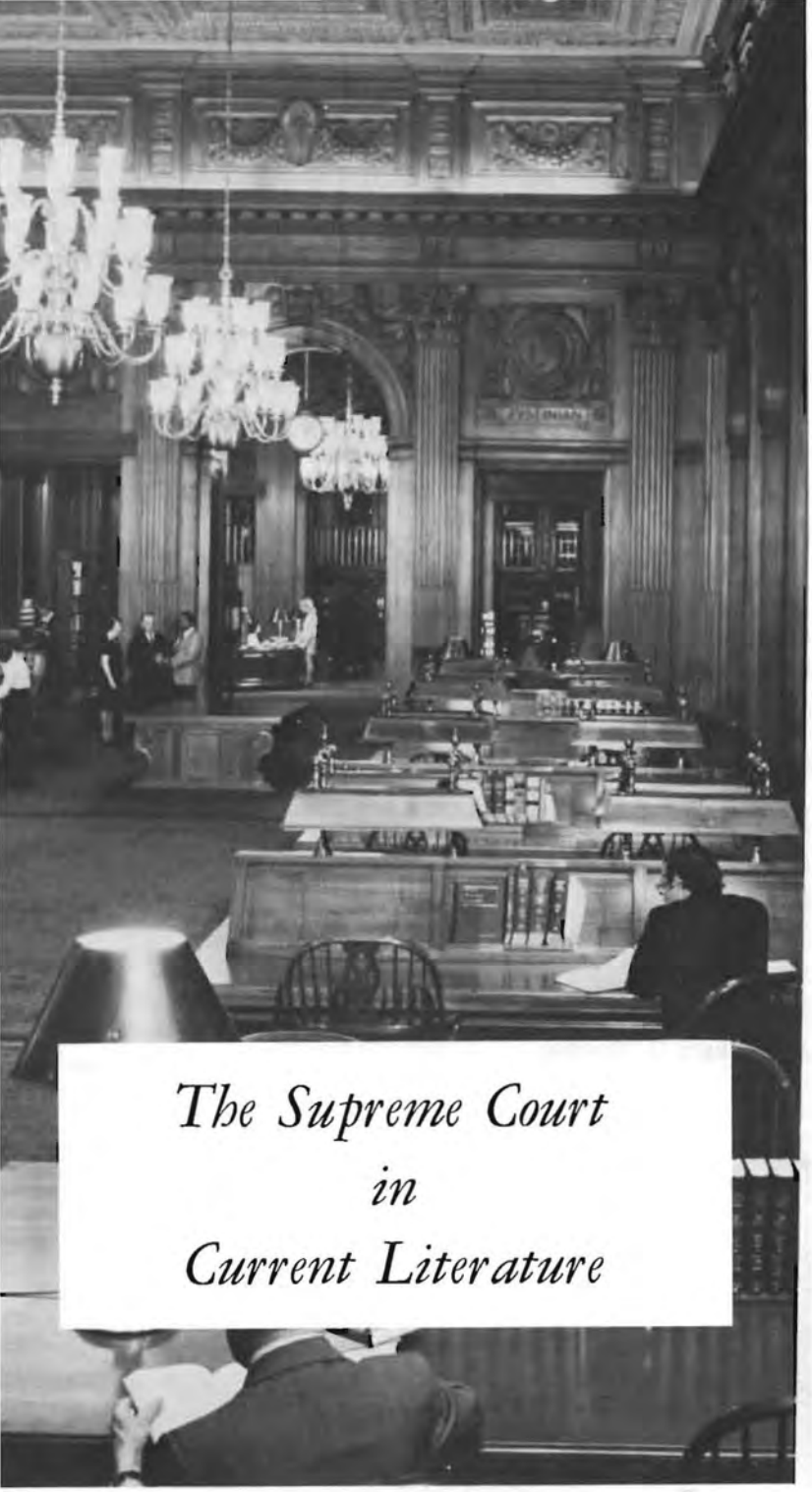
The district judge seems so very tenacious of his official rights and dignity, as a member of the circuit court, that it would be well if he attended a little more to its duties; yet we understand he seldom makes his appearance in the court when the circuit judge is here, and why need he be so very officious in providing a place for holding that court? But judge Thompson refused to read the order he had given the marshal on this subject. We would thank his honor or the marshal to publish that order. We have seen it, and cannot but think it a very extraordinary one. We understand, however, from a gentleman present at the time it was offered to judge Thompson, that the manner in which he refused to read it, is entirely misrepresented. . . .

Judge Thompson probably knowing the temper of the man, acted prudently and discreetly, is not putting himself in a situation where the dignity and respectability of the court might have been degarded by the rashness of his associate. But the district judge asserts, that the court did not *fall through*. And pray, why did he then break it up, or, if you please, adjourn without doing any business. He assumes equal powers with the circuit judge, and why did he not then transact the business of the court? Was it a want of confidence in himself as to the course he had adopted, or of the bar and suitors to him.



The Supreme Court in Current Literature

PUBLICATIONS July, 1976–June, 1977

J. MYRON JACOBSTEIN and JOAN S. HOWLAND

Last year in surveying the literature on the Supreme Court,[1] the authors presented an overview of the books published for the years 1964 through June, 1976. A total of three hundred and ninety-three titles were surveyed for that period. The year with the greatest number of titles was 1971, with forty-six; since then each year, except for 1974, has shown a decline: 1972:36; 1973:35; 1974:38; 1975:22, 1976:17. As nine titles were published during the first six months of 1977, it is apparent that despite the decline in the rate of publication, there is still great interest in the Supreme Court of the United States. We shall leave it to other commentators on the Court to reflect on the significance, if any, of the fewer titles published in recent years.

PART I, BOOKS

This survey covers the fourteen books published between July 1, 1976 and June 30, 1977.[2] Of these, five are concerned with the role of the Court within our constitutional framework, one with the operation of the Court, and five deal with its opinions and decisions. Three are biographical works, and include the memoirs of Chief Justice Earl Warren, a biography of Justice Hugo Black and a selection of the opinions of Justice William O. Douglas.

Supreme Court and the Constitution

Abraham, Henry J. The Judiciary; the Supreme Court in the Governmental Process. 4th Ed. Boston: Allyn and Bacon. 1977. 228 pages.

This fourth edition of Abraham's *The Judiciary* is a thorough analysis of the judicial function of the Supreme Court in the governmental process. Designed for laymen as well as students of political science, the volume is divided into three concise chapters. The first is an analysis of the organization and procedures of the U.S. court system while the second deals with the Supreme Court's role in protecting individual freedoms. The final and most provocative section of the book explains the Court's role as a maker of public policy and the power of judicial review. Though perhaps overly simplistic, Abraham's work is still a fine introduction to the mechanics and influences of the U.S. judiciary.

Funston, Richard T. Constitutional Counterrevolution? The Warren Court and the Burger Court: Judicial Policy Making in Modern America. Cambridge, Mass.: Schenkman Publishing Company. 1977. 399 pages.

Constitutional Counterrevolution by Richard Funston concentrates primarily upon Supreme Court activity in the areas of civil rights, legislative appointment, criminal procedure, and obscenity. Funston's approach has been to summarize the case law surrounding these issues while also critically discussing the law itself. A major portion of the volume is devoted to the relationship between the Warren and Burger Courts. The author thoroughly discusses the "continuities and discontinuities" in the decision-making of the courts. Funston emphasizes that the break between the two courts is not as great as it is usually claimed to be, nor perhaps as great as it should be. Constitutional Counterrevolution, though written for the educated layman rather than the constitution scholar, is extremely well-documented, including a comprehensive bibliography, case name table and subject index.

Kilgore, Carol D. Judicial Tyranny. Nashville: Thomas Nelson. 1977. 370 p.

In *Judicial Tyranny,* Carrol Kilgore presents an extremely critical analysis of the Supreme Court and its role as protector of the United States Constitution. Kilgore's central argument is that the Supreme Court, especially in the past two decades, has not adhered to the supremacy of the law or the Constitution, and has generally abused its position in the American governmental process. Using excerpts from an extensive selection of recent opinions, the author illustrates how the Supreme Court has twisted the meanings of many clauses of the Constitution, especially those dealing with individual freedoms. Much of Kilgore's discussion also centers on the Court's support of federal interference in many areas of business and local affairs not intended by the Constitution. Though this work is exceedingly biased and fails to offer any practical solutions to the problems discussed, *Judicial Tyranny* remains a sound history of recent Supreme Court action.

Selakovich, Daniel. The Supreme Court: Does It Protect or Limit Our Freedoms. Boston: Allyn and Bacon. 1976. 122 pages.

The Supreme Court: Does It Protect or Limit Our Freedoms, by Daniel Selakovich offers an extremely basic introduction to the federal judiciary. Directed toward college students with little background in American government, the volume covers such topics as the structure of the Court, appointment of judges, and important Constitutional issues which have faced the Court. The text is heavily supplemented with excerpts from important cases, interviews, and magazine articles. Also a variety of open-ended questions aimed at stimulating the reader's interest are interjected throughout the book. Though very simple in its approach, Selakovich's work is surprisingly thorough and presents an acceptable overview of a very complex subject.

The Supreme Court and How It Functions

Casper, Gerhard and Posner, Richard A. The Workload of the Supreme Court. Chicago: American Bar Foundation. 1976. 118 pages.

This follow-up to a 1974 American Bar Foundation study presents the statistical evidence surrounding the controversy of whether the Supreme Court is, or is soon to become, overly excessive. The new work attempts to statistically examine the growth pattern of the Supreme Court caseload. The authors offer a critical discussion of the past and probable future growth of the caseload in regard to the Court's actual workload, and present the argument that there is presently no statistical basis for assuming that this workload has reached crisis proportions. This comprehensive analysis is exceptionally well organized.

The Justices of the Supreme Court

Countryman, Vern. Ed. The Douglas Opinions. New York: Random House. 1977. 465 pages.

William O. Douglas participated in the issuing of over 1,200 opinions during his prolific 36-year career on the Supreme Court bench. Vern Countryman has selected excerpts from 93 of the opinions which best exemplify Douglas' position on various issues ranging from civil rights to due process to privacy. Countryman has grouped the excerpts by whatever issue is concerned and begins every chapter with a brief discussion of the question of law involved. The volume is extremely well-organized and could prove very useful when used in conjunction with other works on Douglas and the Supreme Court.

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Dunne, Gerald T. Hugo Black and the Judicial Revolution. New York: Simon and Schuster, 1976. 492 pages.

An intricate blend of biography and historical analysis, Mr. Dunne's work provides a very personal account of the life and times of Hugo Black. The major emphasis is directed towards Black's years on the Warren Court and his participation in several landmark decisions. The author does not neglect, however, the early years of Black's career and some of his less commendable exploits such as membership in the KKK. Well-indexed and documented, this biography is both comprehensive and entertaining.

Warren, Earl. The Memoirs of Earl Warren. Garden City, N.Y.: Doubleday. 1977. 394 pages.

The Memoirs of Earl Warren comprises an intriguing chronicle of the former Chief Justice's fifty years of public service. The volume describes intimately Warren's rise from Los Angeles District Attorney to U.S. Supreme Court Justice. The chapters on the early years of Warren's career are particularly valuable as they cover an era often neglected by other authors. The section on the Supreme Court years, incomplete at the time of Warren's death, obviously needs expansion and the analysis of the Warren Commission investigation of John Kennedy's assasination is very disappointing. The text does, however, adequately define the role Warren played in landmark decisions affecting racial desegregation of schools, voting rights and the protection of personal freedoms. Though far from objective, Warren's book is truly excellent for its insights into the personality and private thoughts of a man whose career was filled with such controversy and dissent. The writing style is extremely readable.

Opinions and Decisions

Abraham, Henry J. Freedom and the Court; Civil Rights and Liberties in the United States. 3rd ed. New York: Oxford University Press. 1977. 482 pages.

Abraham's third edition of *Freedom and the Court* is, like its predecessors, an analysis of the role the judicial branch of the federal government plays in protecting the rights of the American citizen. The first three chapters comprise a general evaluation of the powers of the Supreme Court and the part it has played historically in protecting individual liberty. The remaining chapters address themselves to specific issues such as due process of law, religion, freedom of expression and race. The author explores the Supreme Court's treatment of each issue, offering historical background, a synopsis of important related cases and an evaluation of constitutional significance. The analyses of various issues are extremely thorough, well organized, and up to date through 1976.

Anderman, Nancy. United States Supreme Court Decisions: An Index to Their Locations. Metuchen, N.J.: Scarecrow Press. 1976. 316 pages.

This reference tool provides an excellent index to secondary sources containing excerpts from or complete reprints of Supreme decisions. Two especially helpful aspects of this well-organized volume are a case name index and a subject index.

Devol, Kenneth. Mass Media and the Supreme Court: the Legacy of the Warren years. 2nd ed. New York: Hastings House. 1976. 400 pages.

This work edited by Kenneth Devol traces the relationship between the Supreme Court and the mass media from 1953 through 1969. The book is a collection of writings by various authors addressing problems such as obscenity, censorship, libel and freedom of speech.

The individual articles, though well-written, generally rely heavily on direct quotes from Supreme Court opinions, giving the volume an almost casebook approach. However, the coverage of the topic is extremely comprehensive and the amount of information concentrated into this one source quite impressive.

Goldman, Alvin L. The Supreme Court and Labor-Management Relations Law. Lexington, Mass.: Lexington Books. 1976. 191 pages.

This volume attempts to describe and analyze the decisional process the Supreme Court has followed in labor relations litigation. Nearly a quarter of the book is taken up by a section entitled, "Historic Perspective," which traces the Court's role in interpreting federal and state statutes as well as lower court decisions. The remaining chapters discuss the Supreme Court's relation to union activities, labor arbitration, the N.L.R.B., and other issues such as boycotting. Well-documented and indexed, this work's only major flaw lies in the author's failure to adequately compound the wealth of information presented into any clear conclusions as to what role the Court may take in labor relations in the future.

Wasby, Stephen L. Small Town Police and the Supreme Court: Hearing the Word. Lexington, Mass.: Lexington Books. 1976. 264 pages.

One of the most practical books on the Supreme Court published in the last year is Stephen Wasby's *Small Town Police and the Supreme Court*. This volume is the result of an in-depth study of the methods by which law enforcement officers learn about Supreme Court rulings concerning civil procedure. Interviews with police officers in small towns in Illinois and Massachusetts produced extensive information concerning the backgrounds and attitudes of policemen, their training as to proper criminal procedure, and their perception of how court decisions effect their profession. Special consideration is given to the average policeman's knowledge of opinions pertaining to search and seizure, and informing defendants of their rights. The author concludes that the recent criminal procedure decisions of the Supreme Court have not been adequately transmitted to the police officers and this lack of communication has hindered effective law enforcement. Despite the omission of tables and graphs, which could greatly assist the reader's comprehension of the material presented, the book is extremely well organized with indexes by both case name and subject.

PART II. PERIODICALS

Although there has been a reduction in the number of monographs, the number of periodical articles published during the past twelve months confirms the importance of the role of the Court in American society. Moreover, it is interesting to note that of the 53 articles covered in this survey, nearly one third were published in other than legal periodicals.

Periodical Literature on the Supreme Court

Supreme Court and the Constitution

American Liberals and Judicial Activism: Alexander Bickel's Appeal From New to the Old. M. J. Holland. Indiana Law Journal. 51:1025-50. Summer, 1976.

Failure of the Supreme Court As a Constitutional Institution. E. F. Kunin. Connecticut Bar Journal. 50:323-34. September, 1976.

Government by Judiciary. P. B. Kurland. Modern Age. 20:358-71.

Has the Supreme Court Abandoned the Constitution? Laughlin McDonald. Saturday Review. 10-14. May 28, 1977.

New Dimensions of Constitutional Adjudication. A. Cox. Washington Law Review. 51:791-829. October, 1976.

Sovereign Immunity in the Supreme Court: Using the Certiorari Process to Avoid Decision Making. Virginia Journal of International Law. 16:903-29. Summer, 1976.

Supreme Court and Constitutional Change: Lochner v. New York Revisited. D. G. Stephenson, Jr. Villanova Law Review. 62:533-601. April, 1976.

The Supreme Court's Public and the Public's Supreme Court. G. Edward White. Virginia Quarterly Review. 52:370-88. Summer, 1976.

There Shall Be "One Supreme Court." A. J. Goldberg. Hastings Constitutional Law Quarterly. 3:339-44. Spring, 1976.

Nixon-Burger Court

The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection. Tinsley E. Yarbrough. Duke Law Journal. 143-170. March, 1977.

Civil Rights in the Burger Court Era. Akron Law Review. 10:327-66. Fall, 1976.

The Nixon-Burger Court and What To Do About It. Ann Fagen Ginger. National Lawyer's Guild Practitioner. 33:143-151. Fall, 1976.

Rodriguez, the "Poor" and the Burger Court: A Prudent Prognosis. Mary Cornelia Porter. Baylor Law Review. 29:199-242. Spring, 1977.

Section 1983 and Federalism: the Burger Court's New Direction. University of Florida Law Review. 28:904-35. Summer, 1976.

State Courts and Constitutional Rights in the Day of the Burger Court. A. E. D. Howard. Virginia Law Review. 62:873-944. June, 1976.

Warren Court Critics: Where Are They Now That We Need Them? I. Silver. Hastings Constitutional Law Quarterly. 3:372-452. Spring, 1976.

Supreme Court and Its Operations

Address to the New Jersey Bar. W. J. Brennan, Jr. Guild Practitioner. 33: 152-68. Fall, 1976.

Inside the Supreme Court. Earl Warren. Atlantic Monthly. 239:35-40. April, 1977.

Judicial Policy-Making and Information Flow to the Supreme Court. C. M. Lamb. Vanderbilt Law Review. 29:45-124. January, 1976.

Justices Run "Nine Little Law Firms" at Supreme Court. Richard L. Williams. Smithsonian. 7:84-92. February, 1977.

Many Roles of the Supreme Court and the Constraints of Time and Caseload. A. L. Levin, A. D. Hellman. University of Toledo Law Review. 7:399-430. Winter, 1976.

Supreme Court of the United States: The Staff That Keeps It Operating. Richard L. Williams. Smithsonian. 7:38-49. January, 1977.

Workload of the Supreme Court: a Comment on the Freund Report. R. Hodder-Williams. Journal of American Studies. 10:215-39. August, 1976.

The Justices of the Supreme Court

Influence of Sitting and Retired Justices on Presidential Supreme Court Nominations. H. J. Abraham. Hastings Constitutional Law Quarterly. 3:37-63. Winter, 1976.

The Judicial Philosophy of Justice Cardozo. The Basis of a Definitive Jurisprudence. Rev. Walter T. Gouch. The University of Maryland Law Forum. 6:49-63. 1976.

Mr. Justice Douglas and Government by the Judiciary. Wallace Mendelson. Journal of Politics. November, 1976.

Justice Stewart and Fourth Amendment Probable Cause: "Swing Voter," A Participant in a "New Majority". P. W. Lewis. Loyola Law Review. 22:713-42. Summer, 1976.

Senate and the Court: Questioning a Nominee. L. A. Power, Jr. Texas Law Review. 54:891-901. May, 1976.

Supreme Court Appointments: Criteria and Consequences. T. Halper. New York Law Forum. 21:563-84. Spring, 1976.

What the Justices Are Saying. L. F. Powell, Jr., W. Rehnquist. American Bar Association Journal. 62:1454-6. November, 1976.

Supreme Court and Its History

Documentary Sources for the Study of U.S. Supreme Court Litigation. Part 1. Records and Briefs. E. C. Surrency. Part 2. Resources in the Supreme Court Library. P. Evans. Part 3. Materials in the National Archives. M. McReynolds, Law Library Journal. 69:440-52. November, 1976.

Franklin D. Roosevelt and the Supreme Court. Theresa A. Niedziela. Presidential Studies Quarterly. 6:51-56. Fall, 1976.

Franklin D. Roosevelt and the Supreme Court: An Example of the Use of Probability Theory in Political History. Rodney J. Morrison. History and Theory. 16:137-148. 1977.

History and Legal Interpretation: The Early Distortion of the Fourteenth Amendment by the Gilded Age Court. E. M. Gaffney, Jr. Catholic University Law Review. 25:207-49. Winter, 1976.

Partisan Press and the Rejection of a Chief Justice. K. R. Middleton. Journalism Quarterly. 53:106-10. Spring, 1976.

Retirement and Death in the United States Supreme Court: From Van Devanter to Douglas. D. N. Atkinson. University of Missouri at Kansas City Law Review. 45:1-27. Fall, 1976.

Schneiderman Case: An Inside View of the Roosevelt Court. J. F. Liss. Michigan Law Review. 74:500-23. January, 1976.

Supreme Court and Critical Elections. R. Funston. American Political Science Review. 69:795-811. September, 1975. Reply with rejoinder. P. A. Beck. 70:930-2. September, 1976.

The Supreme and Its Opinions

Commercial Speech Doctrine in the Supreme Court. R. D. Rotunda. University of Illinois Law Forum. 1976: 1080-1101. 1976.

Habeas Corpus and Due Process: From Warren to Burger. N. McFeeley. Baylor Law Review. 28:533-61. Summer, 1976.

Lost Court. J. P. MacKenzie. Civil Liberties Review. 3:36-53. October/November, 1976.

New Patterns in Judicial Control of the Presidency: 1950's to 1970's. P. A. Dionisopoulos. Akron Law Review. 10:1-38. Summer, 1976.

Of Myths, Motives, Motivations and Morality: Some Observations on the Burger Court's Record on Civil Rights and Liberties. H. J. Abraham. Notre Dame Law Review. 52:77-86. October, 1976.

Supreme Court and Antitrust Policy: A New Direction. R. A. Posner. American Bar Association. Antitrust Law Journal. 44:141-9. Spring, 1975.

Supreme Court and Its Impact on the Court of Military Appeals. S. L. Silliman. Air Force Law Review. 18:81-93. Summer, 1976.

The Supreme Court and Sexual Equality: A Case Study of Factors Affecting Judicial Policy-Making. Philippa Strum. Policy Studies Journal. Winter, 1976.

Supreme Court's Still Changing Attitude Toward Consumer Protection and Its Impact on Integrity of the Court. J. T. McDermott. Montana Law Review. 37:27-38. Winter, 1976.

Supreme Court's Three Tests of the Establishment Clause. R. B. Flowers. Religion in Life. 45:41-52. Spring, 1976.

Supreme Court 1974 Term: The Allocation of Power in Deciding Labor Law Policy. F. Bartosic. Virginia Law Review. 62:533-601. April, 1976.

Supreme Court 1975 Term—Foreword: In Defense of the Anti-Discrimination Principle. P. Brest. Harvard L. Review. 90:1-282. November, 1976.

Thomas Hill Green, Positive Freedom and the United States Supreme Court. M. J. Phillips. Emory Law Journal. 25:63-114. Winter, 1976.

U. S. Supreme Court and the Exclusionary Rule: Trimming the Branches of the "Fruit of the Poisonous Tree Doctrine." Laurence Greene. Journal of the Beverly Hills Bar Association. 10:10-29. November-December, 1975.

What the Supreme Court Is Really Telling Business. Walter Guzzardi, Jr. Fortune. 95:147-155. January, 1977.

[1] Mersky and Parrish. The Supreme Court in Current Literature: Overview, 1964-1974. pp. 101-113. *Supreme Court Historical Society Yearbook*, 1976.

[2] We have attempted to locate and annotate all books for this period, but bibliographic sources for current publications are not always accurate and we apologize to any authors we may have inadvertently omitted. We have included only those titles received at the Stanford Law Library for the twelve-month period covered.

[3] While we also attempted to do a thorough literature search, we are well aware that this list is perhaps not complete.

CONGRESS V. THE COURT

continued from p. 96

Conclusion

In summation, one can see that the relationship between Congress and the Supreme Court has been a balanced one with neither dominating the other. The Court has exercised judicial review over legislative enactments, but it has also broadened Congress' legislative powers by its interpretations of the implied powers, commerce clause, and delegation of powers. Congress has seldom curtailed the Court's jurisdiction, and the Court in turn has been balanced on Congress' investigative function.

The Court has seldom ruled directly on individual members of Congress and Congress in turn has only once attempted impeachment (the trial of Samuel Chase in 1805). Congressional districting is an area where the Court has been tough, but Congress in turn has been tough on recent Court appointments. All in all, the system of separation of powers and checks and balances envisioned by our Founding Fathers seems to be working for Congress and the Supreme Court.

Duncan Phyfe Table and Chairs, Sheraton Sideboard, Clock—Recent acquisitions

Res Gestae 1977
THE SOCIETY REPORT

The Supreme Court Historical Society

WILLIAM H. PRESS

As the year 1977 draws to a close, substantial Society development and accomplishment progress is noted. Of perhaps greater significance are several goals which will be reached during the next few months.

It is just about two and a half years since the Supreme Court Historical Society became operational. Its Second Annual Meeting was held at the Supreme Court on May 17, 1977. The dinner was again a sell-out.

There was one major and overwhelming misfortune early this summer when SCHS Chairman Justice Tom C. Clark died in New York. Tributes to him as a great national leader appear elsewhere in this Yearbook, but let it be recorded here that he was one of the key founders of the Supreme Court Historical Society, a dedicated officer who devoted countless hours to our development. He will be greatly missed and can not be fully replaced.

The Honorable Robert T. Stevens, Vice-President of SCHS since its organization has been elected Chairman for the remainder of Justice Clark's term. Trustee Fred M. Vinson, Jr. was selected as a Vice-President. Earlier this year Trustee Whitney North Seymour was also selected a Vice-President to succeed Sol M. Linowitz when he resigned after being named Ambassador to negotiate the new Panama Canal Treaty.

Membership in SCHS has not grown as much as the trustees had hoped. The total as we go to press numbers approximately 2000 and there are indications that the growth rate is increasing.

Financial records for the last fiscal year July 1, 1976–June 30, 1977 have been fully audited by a responsible Washington firm of CPA's. During the year, revenues totalled $150,684, expenses were $131,193 and the excess revenues of $19,491 increased the Society's fund balance to $221,827.

During calendar year 1977 three major highly consequential enterprises were begun.

1. On January 1, 1977 the Society inaugurated a five-year research project entitled "Documentary History of the Supreme Court of the United States, 1789-1800." Dr. Maeva Marcus is the editor and James R. Perry is the assistant editor. Approximately one half the cost of the project this year, or $25,000, is a grant from the National Historical Publications and Records Commission. The Documentary History will be published by the Columbia University Press.

2. On January 1 the Society also began operating the Kiosk inside the main entrance to the Supreme Court Building. The number of publications, mementos and souvenirs sold has been increased. It appears that our retail volume during this fiscal year will reach about $75,000. A new committee chaired by Dr. Melvin M. Payne has been formed to select items to be sold to the public and to members at a discount.

3. Students at the William and Mary Law School during the last year formed a student chapter of the Supreme Court Historical Society and spent most of a day at the Supreme Court last spring. Pursuant to their recommendations, the Board of Trustees has now authorized the formation of chapters in all law schools and has assigned the task to a new committee chaired by Chief Judge Edward D. Re of the U.S. Customs Court in New York City.

All of our committees have been active during the year. Three special ones have been given important assignments.

The Oral History Committee, Erwin N. Griswold, Chairman, submitted a report outlining the basis for beginning oral history projects.

The Yearbook Advisory Committee, Merlo J. Pusey, Chairman, recommended new techniques and some content selections for the 1978 Yearbook.

The Documentary History Advisory Committee, Patricia C. Acheson, Chairperson, has provided recommendations to Dr. Maeva Marcus, Editor.

The Society has a fundamental interst in acquiring memorabilia and historically important material for exhibit and now reports a number of additions to its collection. Gail Galloway, the Court's Curatorial Coordinator, with whom exhibit material is deposited, has prepared an article following this one which describes most of the items in our collection. Let it be noted here that President Elizabeth Hughes Gossett's goal of exhibiting a copy of the U.S. Constitution in the Supreme Court Building has been accomplished. An exact replica of the Constitution provided by the Archivist of the United States is now most attractively displayed on the ground floor.

Naturally, potential historic publications are and will be constantly under study by SCHS. Dr. Swindler continues to chair the Publications Committee which has responsibility for Yearbooks. A number of other publications such as "Magna Carta Documents" are in preparation. The publication of a "Calendar of Opinions of Supreme Court Justices" has been approved and will be compiled by Patricia Evans, research librarian of the Supreme Court Library. Work on this calendar has begun and it is hoped that final suitable arrangements will be completed without delay.

What is probably the major SCHS publication project to the general public is just getting started. "AN ILLUSTRATED HISTORY OF THE SUPREME COURT" will be written and marketed under contract with Monument Press. This 224-page book containing 54 pages of illustrations will be sold by the Society and also through commercial outlets. SCHS will outline and determine the book's contents and copyright the volume.

For the record we report that the *Smithsonian Associates* magazine carried excellent articles about the Supreme Court in the January and February 1977 issues. A most attractive informal picture of the Justices was featured on the cover of the January issue. This cover and both articles have been reprinted by SCHS and may be purchased at the Kiosk or through the mail.

On September 20 the Supreme Court Historical Society and the National Gallery of Art sponsored a reception and preview of EQUAL JUSTICE UNDER LAW—the film series produced by the Bicentennial Committee of the Judicial Conference of the United States in cooperation with WQED, Pittsburgh. These presentations of the Marbury, McCulloch, Gibbons and Burr cases will be shown on public television and are available for distribution to schools and colleges. They are significant elements of our current efforts to better inform the general public about the branch of government they understand the least.

During the year 1977 there was one meeting of the Board of Trustees and five meetings of the Executive Committee on January 13, March 9, May 19, September 20 and December 13.

CLASSES OF MEMBERSHIP

Individual Annual Membership

$5 STUDENT—for students only—non-voting membership

$25 INDIVIDUAL—minimum full voting membership

$50 ASSOCIATE—for individuals wishing to pay something more than the minimum

Annual Memberships for Individuals, Firms, Foundations and Organizations

$100 CONTRIBUTING

$1000 SUSTAINING

$2500 PATRON

Life Memberships for Individuals, Firms, Foundations and Organizations

Life membership may be paid at once, or over a period of not more than 10 years. Life status will be reached after full payment has been made.

$5,000 SPONSOR

$10,000 MAJOR SPONSOR

$50,000 BENEFACTOR

Non-member readers are invited to join the Supreme Court Historical Society in any of the above classes for which they qualify

by writing the Chairman, Membership Committee, Supreme Court Historical Society, 1511 K Street, N.W., Washington, DC 20005 designating the class of membership desired and enclosing a check for one year's dues. Dues year begins the first day of the month following receipt of payment. The Society's telephone number is (202) 347-9888.

A Tour of Society Acquisitions

Gail Galloway

A large oak-panelled, high-ceilinged room in the Supreme Court is a perfect setting for period pieces of antique furniture acquired by the Supreme Court Historical Society. A fifteen-foot mahogany dining table is prominent in the center of the room. The table, a gift of Mrs. Lita Annenberg Hazen, is attributed to Duncan Phyfe, circa 1790. In harmony with the table are 16 Sheraton chairs, 14 side and 2 arm. The mahogany chairs, attributed to Slover and Taylor of New York, circa 1795, are also a gift of Mrs. Hazen.

The inside wall of the dining room is enhanced by a Sheraton mahogany drop leaf dining table, circa 1800-1810, gift of Mr. and Mrs. Joseph Hennage, and a Sheraton mahogany carved sideboard with the original lion-head brasses, attributed to John and Thomas Seymour, circa 1800-1810.

The panelled walls to the right are embellished by two related Massachusetts Hepplewhite mahogany secretaries, circa 1780-1800. A Philadelphia mahogany musical grandfather clock, circa 1775-1790, chimes every quarter hour. The clock and secretaries are being acquired by the Historical Society.

Antique brass andirons, circa 1810, inscribed "O. W. Holmes" are in use in the dining room fireplace. The andirons descended to Justice Holmes from his father, the author of the *Autocrat of the Breakast Table*. The Justice later gave them to Justice Felix Frankfurter. Joel Barlow presented the andirons to the Historical Society.

A small period room in the Court is the setting for a Sheraton mahogany sofa, circa 1800. The sofa, with turned and reeded legs and solid mahogany panelled back, is a gift of Mr. and Mrs. Hennage.

Chief Justice Oliver Ellsworth's Connecticut maple corner chair with applied writing arm, circa 1770-1775, was donated to the Society by Theodore N. Harley of Pittsburgh. The corner chair was used by several generations of Ellsworths. The Chief Justice's son, William Wolcott Ellsworth, Governor of Connecticut, reportedly wrote state documents upon the arm of the chair. The chair and one of the Hepplewhite secretaries were pictured in the January 1977 issue of the Society's newsletter.

A pair of gilt framed mirrors were accepted by the Society from the Executor of the Estate of John M. Bennett of San Antonio, Texas.

With the assistance of the Society, the Court succeeded in acquiring a portrait of each former Justice. Gregory Stapko of McLean, Virginia was commissioned to paint an oil portrait of Justice Tom Clark and the "missing Justices" Horace Gray, James Iredell, Rufus Peckham, Noah Swayne, William Paterson, Horace Lurton, Stanley Matthews, John Catron, Robert Trimble, Benjamin Curtis, Alfred Moore and William Cushing. A second copy of the Gilbert Stuart portrait of Chief Justice John Jay was painted for exhibition on the ground floor of the Court. Portraits of Henry Brockholst Livingston and William Moody have recently been commissioned. These portraits are hanging in the exhibit halls in chronological order of appointment to the Court.

Justice Hugo Black's portrait by C. J. Fox dominates the reading room of the library. An oil portrait of Justice William O. Douglas by Elek Kanarek was accepted by Mrs. Gossett from Mr. Justice and Mrs. Douglas in a ceremony witnessed by many members of the Society and the Court.

Portraits of Chief Justice Warren Burger and Justice Harry A. Blackmun are other recent acquisitions of the Society.

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Hughes Court and one
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r; engraving of "The
amber" depicting the
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Frank Leslie's Illu-
ted 1868 portraying

and phrases dated 1637, was presented to the Society by Harvey T. Reid, a Trustee.

Acquisitions in use in offices of the Court include Walter Welch's gift of a French carriage clock, brass with porcelain face, circa 1890-1900, with "Oliver Wendell Holmes" engraved on the bottom; tortoise shell box from the desk of Oliver Wendell Holmes, gift of H. Graham Morison and identified by a former Holmes clerk, Thomas Corcoran, as having been used by the Justice.

A Philadelphia sterling silver tea pot, circa 1800, was presented to the Society in honor of Chief Justice Warren Burger by his law clerks. A three piece tea service of Chief Justice Charles Evans Hughes, gift of Mr. and Mrs. Charles Hieken and Mrs. Charles Snyder, is frequently used for serving tea to guests of the Chief Justice.

Mrs. Gossett has generously given the Society many items belonging to her father, Chief Justice Charles Evans Hughes. The gold framed marriage certificate of Chief Justice and Mrs. Hughes is hanging in the Curator's Office. The certificate is signed by the clergyman, the Chief Justice's father. In the Hughes collection are valuable photographs, diplomas, medals and correspondence.

The American Revolution Bicentennial Administration has donated four sets of Franklin Mint Series: set of Commemorative Stamps, set of Silver Medallions, set of Pewter Medallions and set of Pewter Plates.

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ACKNOWLEDGMENTS

American Bar Association for permission to reprint the article on the Langles cenotaph by Eberhard Deutsch which originally appeared, in part, in the ABA *Journal*.

Dialectic Literary Society Collection at the University of North Carolina, Chapel Hill, for the photograph of their portrait of George Edmund Badger.

Gibbs Art Gallery, Charleston, South Carolina, for the photograph of William Smith.

Elaine Kern, of the firm of Deutsch, Kerrigan and Stiles, New Orleans, for the photographs of the Langles cenotaph.

Library of Congress for the photographs of Rutherford B. Hayes, James Madison, Thomas Jefferson, Alexander Hamilton, John Sherman, George Woodward and the Signing of the Constitution.

Maryland Historical Society, for the photograph of Hezekiah Niles.

National Geographic Society for the photographs used to introduce the departments "De Minimis" and "The Supreme Court in Current Literature."

National Portrait Gallery, Smithsonian Institution for the photographs from their collection of Theodosia Burr Alston, William Peter Van Ness and General James Wilkinson.

New Jersey Historical Society for the photograph of Aaron Burr.

New Orleans Blueprint Company for the print of the front page of the "Daily Picayune" of July 7, 1898.

Ohio Historical Society for the photograph of Harman Blennerhasset.

G. Putnam and Sons for permission to reprint portions of *A Century at the Bar of the Supreme Court of the United States* by Charles Henry Butler, copyright 1942.

Supreme Court of the United States, Office of the Curator, for the cover portrait, formal individual and group photographs of past Supreme Court Justices and selections from their collection of cartoons.

H. Stewart Treviranus for photographs of portraits from the collection at the United States Department of Justice of the following Attorneys General: Felix Grundy, Henry D. Gilpin, John J. Crittenden, Hugh S. Legare, John Nelson, John Y. Mason, Isaac Toucey, Reverdy Johnson, Caleb Cushing, Edward Bates and Ebenezer Hoar.

WQED, Pittsburgh for pictures of the characters from the film series "Equal Justice Under Law."

PUBLICATIONS

of the

Supreme Court Historical Society

The primary objective of the Supreme Court Historical Society is to provide a broad selection of informative material to the public generally as well as to the professional and scholarly world. The Society has initiated or projected a number of publications programs to implement this process, which are described in the following prospectus:

I. Periodicals

Newsletter of the Supreme Court Historical Society, issued quarterly; primarily for members and others directly interested in the Society program

Yearbook, issued annually; intended for general readers, featuring articles and illustrations on persons and events in the history of the Court

II. Special Studies, primarily for professional and scholarly researchers

Collections of the Supreme Court Historical Society, issued occasionally; selected historical materials annotated and reprinted in more readily accessible form; the first number, expected to be published during the winter of 1977-78, is:

Magna Carta Documents, a collection of materials illustrating the development of the Great Charter as an element of the medieval English constitution and subsequently a frame of reference for modern English and American constitutional principles

Contributions of the Supreme Court Historical Society, issued occasionally as original research into selected areas of Supreme Court history is completed. The continuing research program on the *Documentary History of the Supreme Court, 1789-1800,* will be a prototype for such volumes.

Service Publications, issued occasionally as work is completed. These are intended as a service to scholars and researchers. In 1978 this series is expected to feature a *Calendar of Opinions of Supreme Court Justices, 1789-1900.*

III. General Publications, occasionally published in cooperation with another agency or distributed by the Society through arrangement with another agency.

Magna Carta and the Tradition of Liberty, an illustrated booklet prepared in cooperation with the U.S. Capitol Historical Society and supported by the American Revolution Bicentennial Administration

Equal Justice Under Law, an illustrated booklet published by the Federal Bar Association and distributed by the Association and the Society

The William and Mary Qua

A Magazine of Early American Histor

Published in January, April, July, and Oc
by the Institute of Early American History and

Yearly subscriptions, $10.00; student subscriptio
student verification; single copies, $3.00; some iss
able. Index to Vols. XVI-XXX (1959-1973),
orders payable to the Institute of Early American
Culture); Index to Vols. I-XV (1944-1958) a
Kraus Reprint Corp.

All communications should be addressed to the
William and Mary Quarterly, Box 220, Williamsb
23185.

THE SUPREME COURT
HISTORICAL SOCIETY