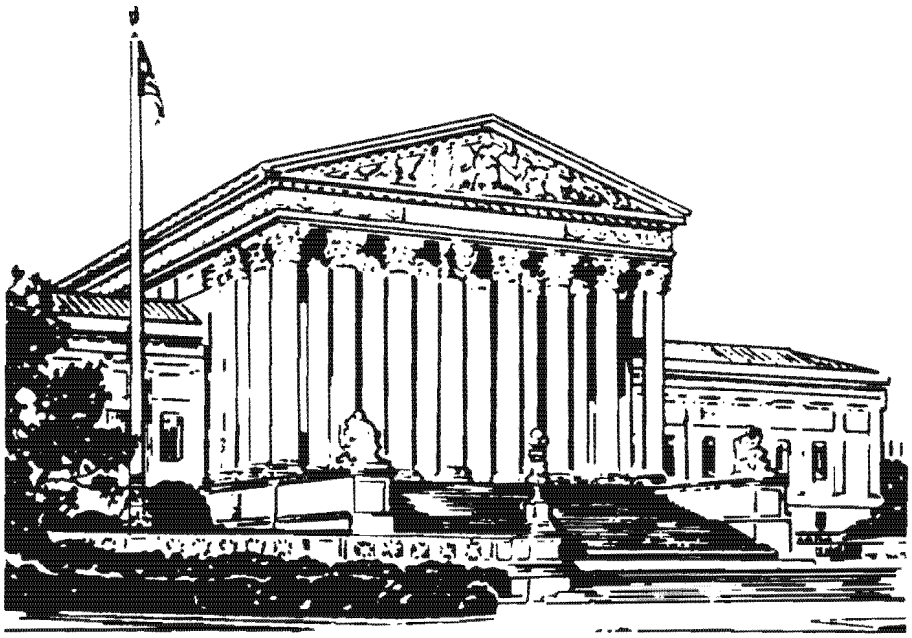
Journal of Supreme Court History

1990 YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY

JOSEPH STORY
Associate Justice (1811-1845)



The Supreme Court Historical Society

General Statement

The **Supreme Court Historical Society** is a private, nonprofit organization, incorporated in the District of Columbia on November 20, 1974; its purpose is to promote greater public understanding and appreciation of the history and heritage of the Supreme Court of the United States.

Since its inception, the Society has sought to preserve through acquisition items that have been associated with the Court over the past two centuries. The personal memorabilia of former Justices and period furnishings already acquired through the efforts of the Society enrich the physical and educational environment of the Court.

The Society seeks to further public awareness of the Court through the publication of a quarterly newsletter and an annual yearbook, and through the support of continuing research. The Society jointly sponsors with the Court the *Documentary History Project: 1789-1800*, which is engaged in collecting, editing and preparing for publication the records and papers of the Court's first decade. This past year the Society also sponsored the Opinions Index Project, which became the first complete citation index of the opinions of the Supreme Court organized by author ever published.

Although supported through public grants and private donations, the Society is primarily a membership organization, dependent upon its members for its principal support and general maintenance. As the work of the Society is made possible by its members, so are its achievements and accomplishments. Membership is available to any individual interested in helping to preserve the past to enrich the future. Currently, some 3,600 members nationwide are working together to meet this rewarding challenge.

The Society has been determined eligible to receive tax deductible gifts under Section 501 (c) (3) under the Internal Revenue Code.

ACKNOWLEDGEMENT

The Officers and Trustees of the Supreme Court Historical Society would like to thank the Charles Evans Hughes Foundation for its generous support of the publication of this *Journal.*

Introduction

This year, as we celebrated the bicentennial of the Supreme Court and reflected upon those first sessions at the Royal Exchange Building in New York City, the editors of this publication decided it was time for a title change. To better convey the content of the *Yearbook*, and to index it more easily, with this issue the *Yearbook of the Supreme Court Historical Society* officially sports a new title: *Journal of Supreme Court History*.

1990 witnessed the retirement of William Brennan and his career become history instead of active service on the Court. Fitting tributes to Justice Brennan's place in the history of the Court will appear in the 1991 issue. For this edition, the editors can only say a few words of fond farewell and express a wish for many years of contentment in retirement.

Most of the history of the Court during the past three decades reflects the influence of Justice Brennan's philosophy of the meaning of the Constitution. Under the umbrella of that philosophy, individuals in the United States have a fuller measure of freedom to speak, to worship, and to defend themselves than ever before.

Justice Brennan's views about the freedom and rights of individuals were expressed in many majority and dissenting opinions. Like the reputation of Justice Holmes, however, three quarters of a century before, the measure of the quality of a career on the Court is not how often a Justice speaks for the whole Court. The opinions of Justice Brennan, for the Court and in dissent, are a treasury of constitutional exposition that will enlighten students, scholars and jurists far into the future. His great contributions to the history of the Supreme Court will enrich and color the pages of future *Journals* of this Society.

This year also saw the death of another major contributor to Supreme Court history, Arthur Goldberg. This issue of the *Journal* appropriately contains tributes to Justice Goldberg's remarkable career in many government and private roles, as well as his service to the Court.

Readers will note that our cover this year is a picture of Associate Justice Joseph Story and that a brief biography of the Massachusetts Justice appears on page 17. Having featured eleven Chief Justices in prior years, we are now starting to reproduce portraits of Associate Justices whose careers are touched upon in articles in the accompanying issue.

The Editors

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In Memoriam

Arthur J. Goldberg, The Practitioner

Abner Mikva

I first laid eyes on Arthur Goldberg in May 1952, when the U.S. Supreme Court heard oral arguments in what has become the landmark Steel Seizure case.[1] As a law clerk for Justice Sherman Minton, I had a ringside seat to the oral argument, and it was exciting.

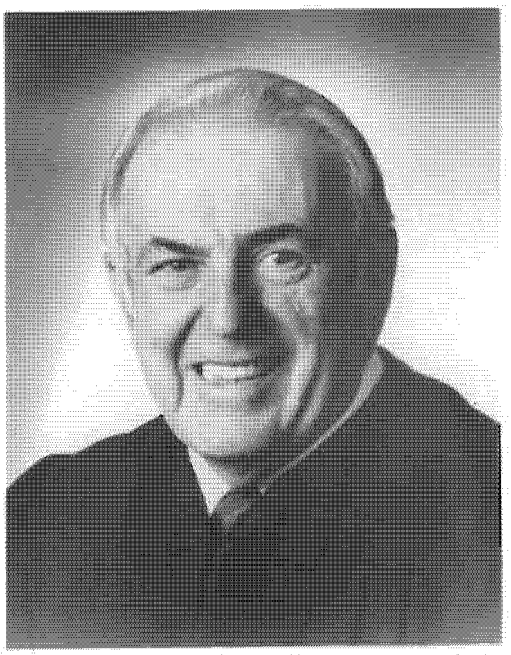
Arthur was then general counsel for the United Steel Workers of America, the union intervenor in the case. Although the union was very much a real party in interest, it was consigned to intervenor status because the thrust of the dispute was between the steel companies--which had been seized--and President Truman--who had seized them. As counsel for the intervenor union, Arthur was assigned a relatively short period of time to argue. John W.

In the late 1930s, Goldberg began representing a group which would become the United Steel Workers union. He is pictured here leaving the White House on Sunday, June 8, 1952 after participating in a bargaining session to resolve a week-long strike. The representatives from both sides of the talks are: *(from left)* Arthur J. Goldberg, General Counsel, United Steel Workers (USW): Philip Murray, President, USW; John Stephens, Vice President U.S. Steel; Ben Morrell, Jones & Laughlin; David J. McDonald, Secretary-Treasurer, USW; Charles White, President, Republic Steel.

Davis, representing the steel industry, and Philip Perlman, the Solicitor General, had been assigned five hours between them. Davis was probably past his prime (he was then 79 years of age and arguing his 138th case before the Supreme Court). Solicitor General Perlman had many items on his agenda, including trying to explain away President Truman's failure to use the Taft-Hartley Act (which had become law over Truman's veto) to accomplish the President's purpose. Arthur Goldberg had no such disabilities. It was the overwhelming consensus of the law clerks that he was the best oral advocate not only of the day but of the entire year. Since I wanted to practice labor law anyway, I determined that I wanted to work for this man.

My hiring interview was quintessential Goldberg. I told him that I wanted to practice with his Washington firm; he persuaded me that I really wanted to go back to Chicago and practice with his firm there. (The firm in Chicago did some labor law, but was primarily a general practice; although Arthur Goldberg was the only partner named in both firms, the financial arrangements were those of a single firm.) When the interview turned to discussion of compensation, Arthur assured me that the firm would improve somewhat on my law clerk's salary. He turned pale, however, when I told him that I was getting $5,200 per year as a law clerk. "That's more than I made the first five years I was in practice," he told me, "and more than all the other associates are making in Chicago or in Washington." I did avoid a pay cut, the other associates received a raise, and I started practicing law with the best lawyer of his time.

Arthur did not spend very much time in Chicago. He had already moved his family to Washington, and had commenced the familiar lifestyle of a Washingtonian who would be in Washington "temporarily" for the rest of his life. His visits to Chicago were always very exciting for the people he saw. His voice was booming, his stride was purposeful, his humor was sharp, and he was on top of every situation he confronted. Each of us in the Chicago office would trot out his most perplexing legal (or personal) problem, and Arthur would cut to the quick of it. He knew so much--cases, people, trends, judges, politicians, bishops, rabbis. I think that if he had told the switchboard operator to call the Pope for him, it would not have fazed her in the least.



Judge Mikva clerked for Justice Sherman Minton during the 1951 Term, served several terms in the U.S. House of Representatives, and was appointed United States Circuit Judge for the District of Columbia Circuit in 1979.

Even more fun were my occasional trips to Washington. As the junior associate, I was considered the most portable; if there was a need for an extra pair of hands in Washington, I would get called in. (I always suspected that those assignments came in part because Arthur knew I wanted to be in Washington.) The shop was small in Washington--only four lawyers at its height--and it meant working with Arthur side-by-side. Writing a brief for him was an exhilarating experience. He did not do law review edits (although David Feller and Elliot Bredhoff, the two other Washington seniors, did), but he would insist that we boil the brief down to our best shot. He could not abide the notion that we should use the brief to try to flim-flam the court. He was not naive about judges and justice (remember, he started his practice in Cook County, Illinois). Rather, he believed that justice was more likely to triumph, with the aid of a short, to-the-point brief than by means of attempts to confuse or overwhelm the court.

Arthur carried his zeal for brevity and pithiness to all forms of communication. Phone

conversations with him were always brief. His speeches were short. His memos were always to the point. He had been appointed special counsel to the AFL-CIO ethics committee, and I worked with him on the reports which summarized the hearings to expel some of the constituent unions because of corruption. He emphasized repeatedly that we had two audiences to satisfy: the AFL-CIO Executive Board, and any court that would be asked to review the process by which the unions had been expelled. I recall Arthur sending one report back to me with the comment that it probably was too long for even a court to read, but that it certainly was too long for the Executive Board to read.

I suspect that some readers will find my description of Arthur Goldberg's zeal for brevity hard to believe in light of the length of some of his speeches during his ill-fated gubernatorial race in New York. I can say only that all kinds of changes occurred in Arthur's style during that political effort, and none of them are worth reminiscing about.

There was a constant in Arthur's behavior that is worth remembering, and that was his warmth to people. He knew the names of the elevator operators in the building (even in the building in Chicago which he seldom visited.) Of course he knew the names of all the waiters in Duke Zeibert's restaurant in Washington. (I remember that on one occasion we ended up with two waiters serving three people because neither waiter would yield the privilege to the other.) It is hard to find a lawyer of my age or older in Chicago who fails to talk about his personal relationship with Arthur Goldberg. No matter how brief the encounter, Arthur generated an enthusiasm and charisma that made a lasting impression.

Early in my career, I defended a tenant against eviction by his landlord. I came to the Municipal Court of Chicago seeking an extra 30 days tenancy for my client. Before I could open my mouth, the judge looked at the pleadings with the name of the Goldberg law firm on them, and began to lecture the landlord's attorney. The judge didn't know me from a bale of hay, but told my opponent, "This young man is with one of the finest law firms in the city. Arthur Goldberg is a brilliant lawyer, and his name wouldn't be on a pleading if it wasn't accurate." The judge proceeded to stay the eviction for 60 days (twice as long as I had asked for) and my opponent undoubtedly assumed that I had put the "fix" in with the judge. When I told Arthur about the incident some time later, he laughed and recalled that the judge who had spoken so highly of him had been an early adversary.

Arthur Goldberg held many titles in his lifetime. He will be remembered as a Supreme Court Justice, a United Nations Ambassador, a Secretary of Labor, a counselor and adviser to Presidents. I had the privilege to know him in two other capacities: as a brilliant practicing lawyer and as a warm human being.

Before being appointed to fill Felix Frankfurter's seat on the Court in 1962, Goldberg had played a major role in the 1955 merger of the Congress of Industrial Organizations with the American Federation of Labor. He worked as special counsel to the AFL-CIO until 1961.

Endnote

[1] *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

In Memoriam

Clerking for Justice Goldberg

Stephen Breyer

Sometime after his retirement Justice Goldberg, at home in the midst of a blizzard, heard a television reporter talk about a hospital in Northeast Washington that needed special, emergency equipment. Within the next half hour he had remembered once being at a nearby Army base that should have the equipment, he had telephoned the Secretary of the Army, and he had made certain the equipment was on its way to the hospital. That is what he was like -- imaginative, intelligent, practical, and immediately ready to put his talents, connections, and resources to work in the service of a good cause.

No one could doubt Justice Goldberg's intelligence. (President Kennedy told a friend that he was "the smartest man I ever met.") Nor could anyone doubt his strong social conscience. He devoted his career as a labor lawyer to working men and women, whom he understood and never forgot. It is equally correct to call him an "activist." Within a few months of his becoming Secretary of Labor, he had started "equal opportunity" and "minority hiring" programs, secured job retraining and minimum wage laws from Congress, and intervened successfully in several labor disputes, including the Metropolitan Opera strike. ("How could any Secretary of Labor have turned down a personal request from Mrs. Kennedy?" he asked.) Indeed, his successor in office, Willard Wirtz, suggested that it was as Secretary of Labor, not as Supreme Court Justice, that he was "in his natural element of constant social and political and economic ferment and controversy, playing more than at any other time in his life his natural role of dynamic activist."

What was it like clerking for this active, practical, humane man during one of the three years he served as an Associate Justice of the United States Supreme Court?

For one thing, we saw a strong and imaginative legal mind at work. Justice Goldberg had an uncanny ability to grasp immediately the practical heart of a legal problem, shaping the legal material at hand so that it would better serve the law's basic human purposes. Consider a good example from his first Term: The New York Stock Exchange had suspended Mr. Silver without a hearing. Mr. Silver sued the Exchange under the antitrust laws. The Court was asked to examine two different sets of statutes -- securities statutes and antitrust statutes -- and to decide the extent to which they exempted the Exchange from the antitrust laws. Justice Goldberg noticed that the statutes were silent about the exemption's scope. He recognized that Mr. Silver's problem really was not "antitrust," but, in fact, was "fair procedure." And, he read the exemption as freeing the Exchange from antitrust liability but only if it used fair procedures -- a reading that effectively reconciled the statutes, not simply with each other, but also with basic principles of procedural fairness that underlie much of law.

For another thing, we learned a highly practical view of the Constitution. He saw the Constitution as protecting basic liberties in a practical way, a way that permitted achieving the ideal without unduly interfering with the workings of government. Thus, he wrote, in his second Term, that the police have a duty to tell an arrested person about his rights, to remain silent, to consult a lawyer. He knew from his own experience that, without such warnings, the Constitution's promises would have proved meaningless, practically speaking, to many of

In 1965 President Johnson asked Goldberg to resign from the Court in order to replace Adlai Stevenson as U.S. ambassador to the United Nations. The President emphasized that his negotiating skills would enable him to play an important role in seeking a peaceful end to the war in Vietnam.

those he had once represented. Soon after, he would also write, upholding the constitutionality of a search warrant, that the "Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract.... [A]ffidavits for search warrants... must be tested and interpreted... in a common-sense and realistic fashion."

Neither should it surprise anyone that he was fully convinced the Constitution protected more "fundamental liberties" than those listed in the Bill of Rights. After all, the Ninth Amendment to the Constitution specifically said that the "enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." More important, how could a document survive the ages, he wondered, if it were limited to the protection of the specifically enumerated rights? Suppose, he asked us, that the government forced husbands and wives to live apart. Would the Constitution offer the family no protection? In the Connecticut birth control case, he wrote:

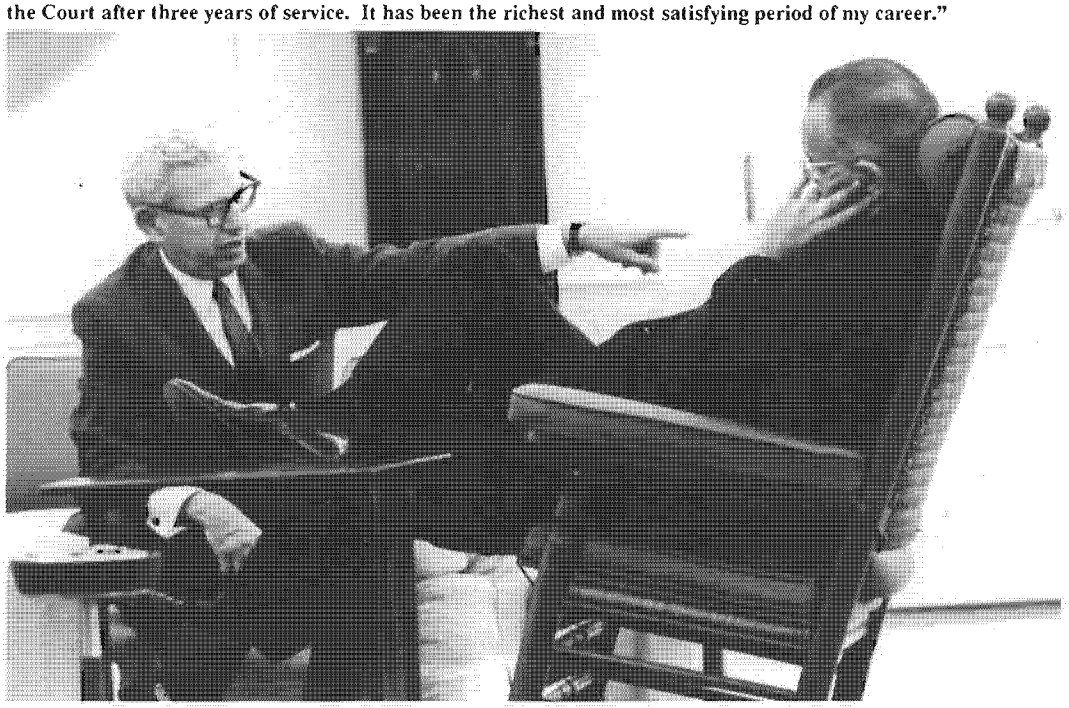
> *While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.*[1]

In addition, we learned about how

government works, for Justice Goldberg had endless experience of government and its institutions, toward which he was respectful, but not necessarily reverential. He loved to repeat (later on) how he once was sitting down to lunch with CIA Chief Alan Dulles, at a Washington club, when an intelligence officer rushed into the room with a sealed envelope. Dulles found another envelope inside, and, after opening yet a third, he turned to Justice Goldberg and asked, "Do you know what this says?" "Yes," replied the Justice, "I do. It says that De Gaulle has just died." "How ever did you know?" asked Dulles. "I heard it on the radio on the way over to lunch." Working for this energetic, enthusiastic, highly principled man (who would not let a lawyer buy him coffee) was also great fun. He was happy on the Court; indeed, he was in his element. He talked to us about cases, about law, and about decisions. Over lunch on Saturdays, he talked about politics and the civil rights movement and foreign policy. He invited us to his annual, totally ecumenical, Passover Seder, where Justices and labor leaders, and his family, and old friends would sing more than they would pray. ("I'm not certain George Meany should be singing so many Irish ballads at a Jewish Seder," Mrs. Meany apparently said "Why not?" would have been the Justice's reply.) He then, and later, set us the example, as Secretary Wirtz described it, of "perpetual energy in constant motion leading to endless achievement."

Finally, and perhaps most important, he made us his friends. The year was but the beginning of a lifelong commitment. We stayed in touch with him when he went on to the United Nations, when he ran for Governor of New York ("Please don't tell me I look pompous on television," he told us, "how can I change what I look like?"), when he went to the Belgrade Conference on Human Rights. We knew he would never stop working for the causes in which he believed. We were not surprised to learn, for example, that he had helped Cardinal O' Connor convince the Army to help create standards of "human rights" for enlisted men, or that he was chairman of a committee to right the wrongs done to Japanese citizens of America during World War II, or that he was about to send a letter explaining to the press how the Helsinki accords were truly important and could form the basis for a more stable, humane Europe. He followed our lives and those of our families with interest; he called us with help and advice, just as he would call,

In accepting the U.N. post, Goldberg told Johnson: "I shall not, Mr. President, conceal the pain with which I leave the Court after three years of service. It has been the richest and most satisfying period of my career."



advise, or help, so many others. One of Justice Goldberg's closest friends, Monsignor George Higgins, described how a few weeks ago the Justice, when the Monsignor's apartment heating system broke down, "ordered" him to move into his own house. He said that the Goldbergs proved that there are no limits, quantitative or otherwise, on friendship. Similarly, all his clerks quickly and permanently became convinced that there were no limits on the respect in which we held the Justice nor upon the devotion for him that we shall continue to feel.

Endnote

1. *Griswold v. Connecticut*, 381 U.S. 479 (1965)

Remarks on the Bicentennial of the Supreme Court

Warren E. Burger, Rex E. Lee, Kenneth W. Starr, William H. Rehnquist

Editor's Note: *The following remarks were made on January 16, 1990 at a commemoration marking the bicentennial of the first sitting of the Supreme Court.*

Chief Justice Burger (Ret.), Chairman, Commission on the Bicentennial of the Constitution of the United States:

In a matter of days it will be 200 years since this Court first undertook to meet. On the day set, only three of the six Justices who had been confirmed were present. There being no quorum they met the following day when the fourth Justice arrived. The fifth did not make it at all and the sixth, Justice Harrison, declined the appointment on the grounds of poor health. He was probably influenced by the reality that riding circuit, with the primitive conditions of travel in that day, was a burden that only a Justice in robust health could undertake.

As we know, this first session was held in a small room on the second floor of a commercial building in New York City across the street from the Fulton Fish Market near the waterfront. A bronze plaque was placed at this site by the American Bar Association in 1976.

Although the subject of Article III was extensively discussed at Philadelphia and in the ratification conventions, it did not receive the close attention, in some respects, that the other parts of the Constitution were given by the Committee on Style, where it might well have noticed that there was no reference to "Justices" in Article III but simply "judges." That was not consistent with the reference to the Office of Chief Justice in Article I assigning the duty to preside over impeachment trials. In the Judiciary Act of 1789, largely drafted by Senator Oliver Ellsworth, who would become the third Chief Justice, the office is described as "Chief Justice of the United States."

The structure of the federal system included a court of appeals to review the district courts, but it provided no judgeships for that court. It provided that those courts for each of the three circuits be made up of two Supreme Court Justices and one District Judge. Within a few years, the requirement of two Justices was reduced to one, but this required Justices to ride circuit under great hardships of primitive travel and housing. In 1791, Chief Justice Jay urged that judgeships be provided for the courts of appeals and the Congress did so in 1800 but then reversed itself after the election of Thomas Jefferson and the new Congress repealed the Act in 1801. In that day there seemed to be an attitude in the Congress that if the Justices of the Supreme Court were kept busy riding circuit they would be less troublesome to the other branches of government. The history of that early period shows that in a good many instances judges of the state courts declined appointments to the Supreme Court largely because of the circuit riding burden. John Marshall had declined appointment several years before becoming Chief Justice.

Congress finally did respond to the urgings of Chief Justice Jay and his successors

by providing judges for the Courts of Appeal and eliminating circuit riding burdens, but that was done, to borrow a phrase from the English equity law, "with all deliberate speed." It was done in 1891.

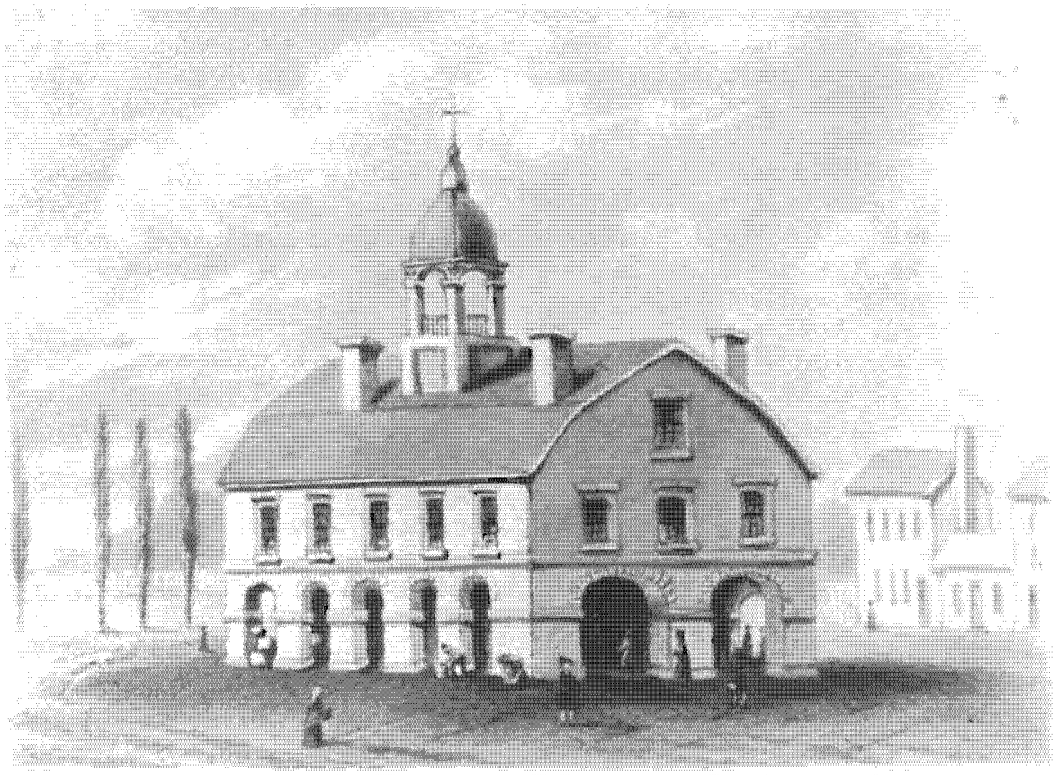
There being no business before the Court in the first few sessions, it undertook housekeeping matters; it appointed a "cryer," adopted a seal for the Court and later appointed a clerk. At its second session it admitted some lawyers, and over the next two years it mainly waited for the pipeline to bring some cases from the lower courts.

In the Court's first ten years there are fewer than 70 cases reported in the U.S. Reports of that day. I suspect that members of the Court would like the docket to move in that direction -- but without circuit riding.

The precise number of cases and opinions of the Court is not clear because apparently officers of Court and those compiling the Reports may have decided that a record of some cases was not worth preserving. The records of those early years were not carefully kept and, of those that were kept, some were lost as the Court moved from New York to Philadelphia and then to Washington, and also some were destroyed, probably by the British, when they occupied Washington in the War of 1812. About 15 years ago the Court and the Supreme Court Historical Society joined in a project to reconstitute those records.

But it would be a mistake to assume that no important cases were decided in that first decade of the Court's history. Often overlooked, but possibly one of the most important, was the case of *Ware v. Hylton* argued in 1796 while the Court was sitting in Philadelphia, the only case John Marshall ever argued in this Court. The records indicate that the argument lasted about six days. *Ware v. Hylton* is important because it can be read as foreshadowing the holding in *Marbury v. Madison* nine years later. The Court held, as we know, that a treaty

Only three of the six Justices were present at the Court's opening session on February 1, 1790 in the Royal Exchange Building *(pictured below)* in New York City. The Court's first home stood at the intersection of Broad and Water Streets, in what is now the financial district. An open-air market occupied the first floor of the building and the courtrooom was located on the second floor.



between the United States and England terminating the war and requiring the payment of debts owed by Americans to British creditors be paid not in state currency but in the equivalent of "gold."

John Marshall lost the case in a unanimous holding of the Court with Justice Samuel Chase writing the lead opinion and the other Justices writing separately, following the English custom.

As a judge I think Marshall would have decided *Ware v. Hylton* as the Court did. The best argument he could make was that the 1783 treaty did not apply and control the state legislative act because the debts were incurred before the Revolutionary War and before the Constitution. The holding that under Article VI, the treaty prevailed over a legislative act, surely gave some hint of *Marbury*, but the opinion in *Marbury v. Madison* does not cite *Ware v. Hylton*. Whether that was because he wanted to forget about losing the case, we have no way of knowing, but surely that great mind of his must have had in mind that if one clause of the Constitution controls over a legislative act the result in *Marbury v. Madison* was quite simple.

The young Supreme Court did not enjoy the prestige that it has today. It was not regarded as a co-equal branch, and some questioned whether it could survive. Even Chief Justice Jay, one of the greats among our founding fathers, did not see much of a future for the Court. He resigned after about six years to become governor of New York. After Adams was defeated in the election of 1800 and Chief Justice Ellsworth resigned on the basis of health, Adams then offered the appointment to Jay. In declining he wrote that he would rather be governor of New York and, in any event, the Supreme Court as a tribunal would never amount to very much.

It was then that John Adams, the lame duck President, turned to his Secretary of State, John Marshall, and invited him to take the appointment. Although Marshall had previously declined an appointment to this Court, he did accept and the year of 1801 began a great epoch in the history of this Court and of this country.

As we take note of this important anniversary of this Court--and of the country--it comes at the close of a decade when people all over the world are demanding the kinds of freedom this Court has been foremost in protecting for 200 years. Our history is their hope, and our hope for them must be that whatever systems they set up in place of the tyranny they have rejected will include a judiciary with authority and independence to enforce the basic guarantees of freedom, as this Court has done for these two hundred years.

Rex E. Lee, President
Brigham Young University:

Mr. Chief Justice, and may it please the Court, I am honored to participate in this bicentennial commemoration, and specifically to make some comments concerning the work of the Supreme Court bar over the 200 years of the Court's history.

The clerk's familiar incantation, swearing new members of the bar as "attorneys and counselors," is rooted in some interesting history. Originally, there was some distinction between the two. The first rules of the Court, adopted on Thursday, February 5, 1790, provided that "counsellors shall not practice as attornies, nor attornies as counsellors in this court." Historians tell us the difference was that attorneys could file motions and do other paperwork, but only counselors could "plead a case before the Court."[1] The distinction lasted for eleven and one-half years, until by rule adopted on August 12, 1801, the Court ordered "that Counsellors may be admitted as Attornies in this Court, on taking the usual Oath."[2]

Over the two centuries of this Court's existence, there have stood before the podium--or its equivalent in other parts of this town, in Philadelphia and New York--some very able and prominent "attorneys and counselors." It is not surprising that appearances before this Court during its early years were dominated by Attorneys General of the United States; until the creation of the office of Solicitor General in 1870, it was the Attorney General who was responsible for representing the United States before this Court. What is surprising is that the most notable and most frequent appearances of those early Attorneys General were not on behalf of the government but in representation of private clients. This was true of the first At-

Walter Jones, who holds the record for oral arguments before the Court, was commissioned by President Monroe in 1821 as brigadier-general of militia, and was elevated to major-general of the militia of the District of Columbia before his death in 1861.

torney General, Edmund Randolph, the second, William Bradford, the seventh, William Pinkney, and the ninth, William Wirt. Indeed, William Wirt, one of the greatest Supreme Court advocates of all time and the man who holds the record for years of service as Attorney General, confessed that "my single motive for accepting the office was my calculation of being able to [obtain] more money for less work."[3] Things were a little different then.

Edmund Randolph, our first Attorney General, was the most active of this Court's early practitioners. He appeared as counsel in the very first case (which came up during the February 1791 Term) *Vanstaphorst and Vanstaphorst v. Maryland.* He also argued the first landmark case, *Chisholm v. Georgia.* Indeed, he was the only person who argued in that case. The state of Georgia refused to appear, and at the conclusion of Randolph's argument, which lasted two and one-half hours, the Court's minutes reflect that

the Court, after remarking on the importance of the subject now before them...expressed a wish to hear any gentlemen of the Bar who might be disposed to take up the gauntlet in opposition to the Attorney General. As no gentlemen, however, were so disposed, the Court held the matter under advisement...[4]

It would appear that the rules governing oral argument by *amici* were a bit more liberal in those days.

The same is true of divided arguments, time limits, and questions from the Bench. Representing the two sides of the oral argument in *McCulloch v. Maryland* was perhaps the greatest collection of prominent advocates in the history of this Courts' bar. Arguing for the bank were William Pinkney, William Wirt and Daniel Webster. And representing Maryland were Luther Martin, Joseph Hopkinson, and Walter Jones. The entire argument, by all six counsel, lasted nine days; Thomas Edison's birth was still 28 years away, and there were no red nor white lights. Those were the days when there were no questions; both the commentators and the advocates themselves referred to their arguments as speeches, which they could rehearse for days. Charles Warren relates that "the social season of Washington began with the opening of the Supreme Court Term,"[5] and some of those early lawyers, particularly Webster and Pinkney, apparently responded by paying as much attention to the gallery as to the Justices.

Pinkney's argument alone in *McCulloch* lasted for three full days. It was a performance which Professor Warren has said "was to prove the greatest effort of his life...." Pinkney was described by Chief Justice Marshall as "the greatest man [he] had ever seen in a court of justice"; by Chief Justice Taney as one to whom there was "none equal"; by Justice Story as having "great superiority over every other man [he had] ever known"; and by Francis Wheaton as the "brightest and meanest of mankind."[6]

Pinkney had the distinction of serving as Attorney General of both the United States and also the State of Maryland, as a member of both Houses of Congress, and as minister to Great Britain and Russia. But whichever of these was paramount, it was in Pinkney's view a distant second to his one consuming passion: advocate before this Court. It was an endeavor to which he gave his life, both figuratively and literally. Following the completion of the last of his eighty-four arguments, *Ricard v. Williams*--the 1822 case with Daniel Webster on the

John W. Davis, who served as Solicitor General from 1913 to 1918, has argued more cases before the Court than anyone except Walter Jones and possibly Daniel Webster and William Wirt. Davis is pictured here in 1924, the year he ran against Calvin Coolidge for the Presidency of the United States.

opposing side--he suffered a collapse. He was carried to his home, where he died a few days later.[7] Incidentally, he lost *Ricard v. Williams*, an unpleasant experience for any lawyer, but one that is well-known to those who are seasoned.

Walter Jones holds the record number of oral arguments with 317.[8] It is a record which, given today's realities, is surely safe for all time. For Mr. Jones, there will be no Roger Maris or Hank Aaron. The rank order after Mr. Jones is somewhat unclear, but among the leaders are Daniel Webster, William Wirt, and John W. Davis. But the record number of landmarks, in my opinion, belongs to William Wirt, whose biographer has accurately observed that "he appeared in virtually all of the landmark cases of the first third of the nineteenth century."[9] These included *Dartmouth College v. Woodward, McCulloch v. Maryland, Cohens v. Virginia, Gibbons v. Ogden, Brown v. Maryland, Ogden v. Saunders, Worcester v. Georgia, Cherokee Nation v. Georgia,* and *Charles River Bridge v. Warren Bridge*. Wirt was described by Chief Justice Chase as "one of the purest and noblest of men" and by another contemporary as "the most beloved of American advocates."[10]

In four of these landmarks, *Dartmouth College, McCulloch, Cohens v. Virginia, and Gibbons v. Ogden,* Wirt appeared with Daniel Webster. They argued *Dartmouth College* and *McCulloch* just three weeks apart. He was Attorney General at that time, and though in *McCulloch* he was arguing to sustain the power of the federal government, he received a substantial fee from the Bank of the United States.[11]

Daniel Webster, though he won slightly less than half of his cases, probably had the greatest influence on the Court and its work of any nineteenth century advocate--perhaps the greatest influence of any advocate in the Court's history. S.W. Finley has observed that

Webster and Chief Justice Marshall shared the same basic constitutional philosophy, and together with Justice Joseph Story they constituted a fortuitous triumvirate in establishing the fundamentals of American federalism in the first four decades of the nineteenth century.[12]

The twentieth century, of course, is not yet complete, but it is already clear that during the Court's second hundred years, advocates to

William Wirt probably holds the record for arguing the most landmark cases before the Court. As U.S. Attorney General from 1817 to 1829, he initiated the practice of having his opinions published as precedents.

match the stature of Pinkney, Wirt, and Webster have stood at this podium. Comparisons are difficult because of changes in circumstances and rules, but quite clearly the Court's jurisprudence during this century has been influenced by people such as John W. Davis, Robert Jackson, Thurgood Marshall, and Erwin Griswold, just as it was during earlier times by Pinkney, Wirt, and Webster. And our century also has had its equivalent of *McCulloch*'s battle of the giants when, for example, *Briggs v. Elliot,* a companion case to *Brown v. Board of Education,* pitted John W. Davis against Thurgood Marshall.

Mr. Chief Justice, we the members of the bar of this Court are proud of the institution whose two hundredth birthday we celebrate, proud of what it has meant and what it has done for our country and its people, and proud of the contribution that the members of the bar have made to the Court and its accomplishments over its two-hundred-year history. We recognize that we are more than attorneys and counselors. As officers of the Court, we are charged not only with the responsibility of vigorously representing our clients but also assuring that our representation is objective, fair, evenhanded, and contributory to the performance of its duties. We are mindful of the institution before which we practice, and the role that it has played from 1790 to 1990 in securing individual rights and providing stable government. We are pleased to offer our continuing services as we enter the Court's third century.

Endnotes

1. 2 U.S. (2 Dall.) 399 (1790); 1 The Documentary History of the Supreme Court of the United States, 1789-1800 177, n. 18 (M. Marcus & J. Perry eds. 1985).
2. Documentary History, *supra* note 1, at 177, n. 18.
3. J. Robert, "The Hon. William Wirt: The Many-Sided Attorney General," *Yearbook*, 1976, at 55.
4. 1 C. Warren, The Supreme Court in United States History 95 (1924) (quoting Dunlap's *American Daily Advertiser*, Feb. 21, 1793).
5. 1 C. Warren, The Supreme Court in United States History, 471 (1924).
6. S. Shapiro, "William Pinkney: The Supreme Court's Greatest Advocate," *Yearbook*, 1988, at 40, 44.
7. *Id.* at 45.
8. William H. Harbaugh, Lawyer's Lawyer: The Life of John W. Davis, New York, Oxford University Press, 531 1973; Maurice G. Baxter, Daniel Webster & the Supreme Court, The University of Massachusetts Press, 30 1966; and Russell L. Caldwell, "The Influence of the Federal Bar upon the Interpretation of the Constitution by the Supreme Court under John Marshall," Ph.D. Dissertation (University of Southern California, 1948), 198, 255.
9. J. Robert, *supra* note 3, at 52.
10. *Id.*
11. *Id.* at 56.
12. S.W. Finley, "Daniel Webster Packed 'Em In," *Yearbook*, 1979, at 70.

Kenneth W. Starr
Solicitor General of the United States:

Almost half a century after this Court's opening session, Alexis de Tocqueville, the French observer of democracy in the new republic, turned his eye back to the founding and saw in that remarkable generation the finest minds and noblest characters ever to have graced the new world. And the wisest, ablest minds of that generation were well represented in the membership of this Court. As we have been reminded, the docket may not have been especially demanding, and the rigors of office may have been daunting, but the Court nonetheless boasted among its members not only its distinguished Chief Justice, John Jay, author along with Madison and Hamilton of The Federalist Papers, but also several delegates to the Constitutional Convention itself. Like the nation's first Attorney General, Edmund Randolph of Virginia (whose successor is here today), Justices Rutledge of South Carolina, Wilson of Pennsylvania, and Blair of Virginia, had served as members of the Convention. Other Justices of the 1790s, including Iredell of North Carolina and Cushing of Massachusetts, had played pivotal roles in their respective States in securing ratification.

To these individuals, along with their counterparts in the political branches, fell the task of forming a workable government. It was John Jay who articulated the basic structural insight:

Wise and virtuous men have thought and reasoned very differently respecting Government, but in this they have at length very unanimously agreed. That its powers should be divided into three, distinct, independent Departments -- the Executive legislative and judicial.

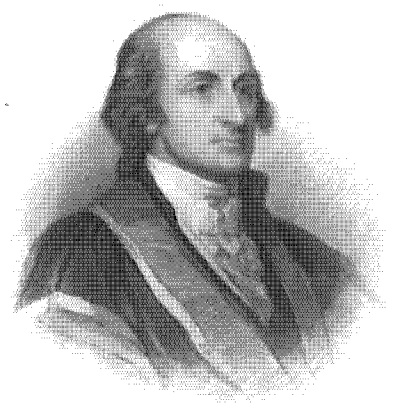
As Providence would have it, in our

system of separated powers, it fell in no small measure to the Court to serve as an instrument of achieving the Madisonian and Hamiltonian vision of a vast commercial republic. That was not without difficulty, since this was to be the branch where, as Hamilton put it, judgment, not will, was to be exercised.

The fundamental importance of the judgment of the judiciary was made manifest early on. That our constitutional democracy, by virtue of the status of the Constitution as supreme law, would include the power of judicial review was evidenced in the judicial literature as early as 1792 in *Hayburn's Case.* If not before, the decision of *Hylton v. United States* in 1796, upholding the constitutionality of the federal Carriage Tax, powerfully foreshadowed *Marbury v. Madison.* In short, although the judiciary was to be the least dangerous branch, it was nonetheless to be a truly co-equal, coordinate branch with the legislature and the executive.

In view of the Court's role, friction between the federal judiciary and the several States was inevitable, just as leading Anti-Federalists such as George Mason had pessimistically predicted. Quite apart from *Chisholm v. Georgia,* other decisions of that first decade, now dim in the national memory, made clear that the national power in its proper sphere extended to and ultimately controlled the States. This was important to be said, and the Court did not flinch from saying it.

As the first Chief Justice of the United States, John Jay voted to uphold *Chisholm v. Georgia,* the first landmark case dealing with the issue of state sovereignty.



These formative principles -- of the legitimacy as well as the limits of judicial power, and of the need to vindicate the primacy of the nation in its appropriate sphere over narrow, parochial interests -- provided important grist for the early judicial mill. Along with Washington's stewardship of the executive power, and the wisdom of the first Congress -- graced by Madison himself, who turned his hand to fashioning the Bill of Rights -- the leaders of the nation in all three branches brought to life in 1789 and 1790 what the Framers had envisioned -- a balanced government, destined to stand the test of time.

The nation has endured and prospered. The structure of government has endured. The Court has endured. And with the long-sought abolition of slavery, the promise of legal equality -- embodied in the 14th Amendment -- took root and grew so that the original vision of the Declaration of Independence and the Constitution's vision of a more perfect union, preserved out of bitter conflict, and a true constitutional democracy for all our citizens, came fully to life. It was in large measure these events -- so important for the work of this Court over the past century -- that brought the Department of Justice into being in the wake of the Civil War.

This was what Tocqueville had seen so clearly, peering as he did into the future, looking at us with prophetic vision. Social equality, as Tocqueville put it, was what America ultimately promised through the emergence of democratic institutions. This was, he felt, the will of God. From the American experience, purified by slavery's inevitable eradication, Tocqueville believed that Europe could learn and morally profit. This was a new order of the ages. Out of the mouths of babes in the new world, truths about what the twentieth century moral imagination of T.S. Eliot would call, simply, the permanent things, would emerge -- the moral vision of equal justice under the rule

of law. This was, as demonstrated by events now unfolding across the globe, a powerful vision destined to capture the moral imagination of the entire family of mankind.

For that vision brought to life in the judiciary's daily, steadfast service to the law, those of us privileged to serve in the Department of Justice, under the stewardship of the officer whose office was created by the Judiciary Act of 1789, salute the courts of justice and the tribunal ordained in Article III of our beloved Constitution as "one supreme Court." As Lincoln put it so simply at Gettysburg, only seven years before the birth of our own Department, it is entirely fitting and proper that we should do this.

Chief Justice William H. Rehnquist:

Chief Justice Burger, Solicitor General Starr, Mr. Lee: your felicitous remarks have shown how the Supreme Court of the United States got off to what was indeed a slow start in New York two hundred years ago, but eventually picked up the necessary speed to evolve into a truly co-equal branch of the federal government.

Half a century ago the Court held a ceremony similar to this one, commemorating the one-hundred and fiftieth anniversary of its first session. Attorney General Robert H. Jackson -- soon himself to become a member of this Court -- addressed the Court on that occasion saying:

[T]his age is one of founding fathers to those who follow. Of course, they will reexamine the work of this day, and some will be rejected. Time will no doubt disclose that sometimes when our generation thinks it is correcting a mistake of the past, it is really only substituting one of its own.... I see no reason to doubt that the problems of the next half-century will test the wisdom and courage of this Court as severely as any half-century of its existence.

None of us here today can doubt the accuracy of Robert Jackson's assessment of this Court's succeeding half-century. All of us realize how significantly -- indeed, how dramatically -- the interpretation of the United States Constitution has changed in the past fifty years. And yet we, too, must realize that our work has no more claim to infallibility than that of our predecessors. Daniel Webster said that "Justice is the great end of man on earth" -- a statement which attests his wisdom not only as a statesman but as a theologian -- and the motto inscribed on the front of this building -- "Equal Justice Under Law" -- describes a quest, not a destination.

But if we look at the temporal context of the ceremony here in this room fifty years ago, it was vastly different from the one today. The gathering storm of war had burst a few months earlier with the German invasion of Poland. A few months later the German breakthrough in the Ardennes would knock France out of the war, leaving Great Britain and her commonwealth allies fighting alone against the dictators. The fate of constitutional ideals such as self-government and the rule of law seemed to hang in the balance of war.

How different it is today. The allies won the Second World War, and the worth of western values was re-established. In February, 1940, when this Court celebrated its one hundred and fiftieth anniversary, it was virtually the only constitutional court -- a court whose existence was based on a written constitution which had the authority to invalidate legislative acts -- sitting anywhere in the world. But after the Second World War, the idea of such a court found favor with nation after nation.

The written Constitution drafted by the Framers in Philadelphia in 1787 incorporated two ideas which were new to the art of government. The first is the system of presidential government, in which the executive authority was separated from the legislative authority. This idea has found little favor outside of the United States, and countries just as committed to democratic self-government as we are have preferred the parliamentary system.

The second idea was that of a constitutional court which should have authority to enforce the provisions of a written constitution. It is this second idea which has commended itself to country after country following the Second World War. Today its momentum continues. Less than a decade ago Canada adopted a charter of rights to be enforced by its Supreme Court. In countries today which do not have a

full-scale constitutional court -- Great Britain, Sweden, Australia -- proponents of change are engendering lively debate. I do not think that I overstate the case when I say that the idea of a constitutional court such as this one is the most important single American contribution to the art of government.

As we look today toward eastern Europe, where a curtain which had been drawn for nearly half of a century has been lifted only within the past year -- it may not be too much to hope that these nations, too, will see fit to reshape their judiciaries on the American model.

The three Justices who gathered in New York City on February 1, 1790, could not possibly have foreseen the future importance of the court upon which they accepted the call to serve. I am confident that even those who gathered here fifty years ago could not have foreseen the changes and developments in the law which would come in the next half-century, nor the influence that this institution would have outside its borders during that time. And surely the same is true of those of us who have gathered here today to commemorate the bicentennial of the Court's first sitting.

We have no way of knowing with certainty where the quest for equal justice under law will lead our successors in the next half-century. If at times our labors seem commonplace or even unavailing, let us hark to the words of Arthur Hugh Clough:

And not by eastern windows only,
When daylight comes, comes in the light;
In front the sun climbs slow, how slowly!
But westward, look, the land is bright!

Joseph Story: A Man For All Seasons

Ronald D. Rotunda and John E. Nowak

Editor's Note: *Professor Rotunda adapted this article from the introduction to the authors' book, Joseph Story's Commentaries on the Constitution of the United States (Carolina Academic Press, Durham, N.C. 1987).*

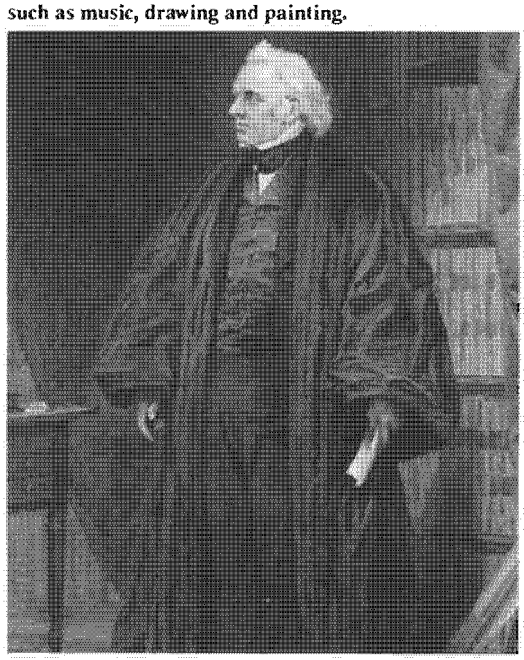
As we celebrate the bicentennial of our Bill of Rights -- ratified by the States from the period from November 20, 1789 (New Jersey) through 1790, and completed by December 15, 1791 (Virginia) -- it is appropriate also to celebrate Joseph Story, the Justice who wrote the opinions that first gave meaning to our unique federal system of government, a structure that protects the rights we cherish today.

Joseph Story lived at an ideal time and under ideal circumstances to reflect upon the nature of our constitutional system of government. Story's life spanned the period from 1779 to 1845. He spent 34 of his 66 years as a Justice of the United States Supreme Court. During most of that time he was also professor of law at Harvard University, and his accomplishments as a teacher and scholar were key elements in establishing the Harvard Law School's initial success and enduring reputation. Story is, in a very real sense, father to all American legal education, for his efforts demonstrated that professional academic training for lawyers was possible and desirable. What he created at Harvard became the model for all subsequent American law schools.

Joseph Story was also the intellectual grandfather of early American political theory. He provided scholars of the early nineteenth century, such as Francis Lieber and Simon Greenleaf, an understanding of our constitutional system of government. Alexis de Tocqueville relied heavily on Story's works when he wrote his renowned book, Democracy in America, analyzing the young American Republic and its workings in the early nineteenth century.

Joseph Story was born three years after the Declaration of Independence, but he must have felt as if he had lived through it all. His father, Elisha Story, was active in the War of Independence and, in fact, was one of the "Indians" at the Boston Tea Party.[1] Story became a close associate of men who had been both the intellectual and political leaders of the

Joseph Story was a great lover of poetry. In 1805 he published a long poem, written in heroic couplets, called "The Power of Solitude." He enjoyed other creative pursuits such as music, drawing and painting.



revolution. The Constitution was drafted when he was only eight years old; the first ten amendments to the Constitution, which form the Bill of Rights, were ratified only twenty years before Story took his oath of office as a Supreme Court Justice. For all practical purposes, he was present at the creation of our constitutional system of government.

Elisha Story's first wife, who gave her husband seven children, died two years before Joseph was born. Elisha remarried and Joseph was the eldest of eleven more children. Yet Story never got lost in the crowd. His mother told him: "Now Joe, I've sat up and tended you many a night when you were a child, and don't you dare not to be a great man."[2]

In January 1795, Story entered Harvard College where, in his own words, he "studied most intensely" and "reaped the fair rewards in collegiate honors."[3] He loved the college life, but he studied too much. Story's son later explained that in the dead of night young Joseph "would go down to the college yard, and pump cold water on his face and head in order to revive himself, and then would return with renewed energy to his studies." He entered college "robust and muscular," but left "pale and feeble."[4]

He was graduated in 1798, and began to read law at Marblehead, Massachusetts, in the offices of Samuel Sewall. A formal legal education would have been most unusual in Story's day. Less than a year later Sewall became a Justice of the Massachusetts Supreme Judicial Court, so Story moved to Salem and studied in the law offices of Samuel Putnam, who later also became a Justice of the Massachusetts Supreme Judicial Court. In July of 1801 Story was admitted to the bar and opened his own office in Essex.

In 1805 the town of Salem chose Story to be its representative in the Massachusetts legislature, where he served for three terms. Three years later he was elected without opposition to the U.S. House of Representatives. He served only one term in Congress but declined reelection because of his "disgust" at political chicanery, "domestic consideration," and his desire "to devote myself with singleness of heart to the study of the law."[5]

Story returned to his state, was reelected to the state legislature, and, in 1811, was elected Speaker of the House. Later in 1811, President Madison appointed Joseph Story, then age 32, to the United States Supreme Court. Story was Madison's third choice, after Levi Lincoln and John Quincy Adams had declined the position.

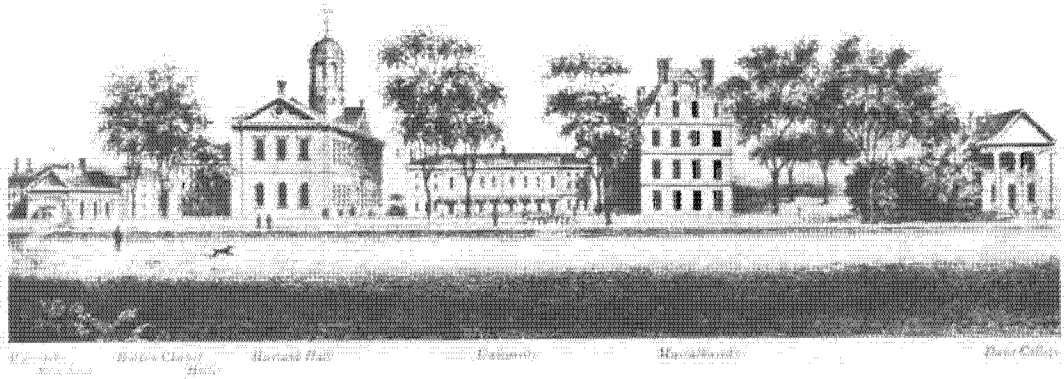
Story accepted the appointment to the Supreme Court although by so doing he took approximately a 50 percent cut in salary, to $3,500 a year. In a letter of November 30, 1811, Story explained why he had accepted:

Notwithstanding the emoluments of my present business exceed the salary, I have determined to accept the office. The high honor attached to it, the permanence of the tenure, the respectability, if I may so say, of the salary, and the opportunity it will allow me to pursue, what of all things I admire, juridical studies, have combined to urge me to this result. It is also no unpleasant thing to be able to look out upon the political world without being engaged in it....[6]

Story promptly resigned his legislative seat.

Why did Madison choose Story? Madison was a Democratic-Republican. His mentor, Thomas Jefferson, had defeated the last Federalist to hold the Presidency, John Adams. Joseph Story, like his father before him, and like President Madison, was a Democratic-Republican. Story's son said that his father "was an ardent republican, and believed in the policy of Mr. Jefferson."[7] Although Story was a successful politician, in Massachusetts his politics put him in a distinct minority status. As Story acknowledged: "At the time of my admission to the bar, I was the only lawyer within its pale, who was either openly or secretly a *democrat*. Essex was at that time almost exclusively federal, and party politics were inexpressibly violent."[8]

That Story and Madison were of the same party may have been a necessary condition for an appointment, but it was, by itself, not a sufficient condition. Perhaps it may have been that President Madison expected that Joseph Story, as a Justice of the Supreme Court, would vote to restrict the power of the federal government over the states and to increase state autonomy in economic matters. President Madison may even have thought that the strong-willed Story, a successful lawyer, politician, and legal scholar, would serve as an intellectual



Story championed the cause of education, including higher learning for women. A Harvard University alumnus, he was elected to that university's Board of Overseers in 1819 and became a fellow of the Harvard Corporation six years later. He moved to Cambridge to become a professor of law at his alma mater in 1829 and was instrumental in founding Harvard Law School. Above is an illustration of Harvard University between 1832 and 1840 when Story taught law at Dane Hall *(shown on the extreme right)*.

counterweight to the views of federalist Supreme Court Justices such as Chief Justice John Marshall. If Madison held those beliefs, his appointment of Story illustrates the truth to the commonly made statement that Presidents are poor predictors of the legal positions and judicial philosophies of persons whom they nominate to be members of the Supreme Court.[9]

Some people have concluded that Story fell under Marshall's spell, but that view sells Story short. While Story was a believer in many of the theories put forth by Jefferson, he also believed that the best hope for the country to flourish as a nation and as a place where republican principles could thrive was an effective central government. Story also believed that there were legal, rather than merely political, restrictions on the powers of both the states and federal government to interfere with the inherent freedoms of men and women. He saw these freedoms protected by a type of natural law embodied in the Constitution. These included freedom to contract for, and engage in, a variety of economic activities.

During his years on the Court, Story would be as controversial a figure as Chief Justice John Marshall. Justice Story wrote the Supreme Court's opinion in *Martin v. Hunter's Lessee*[10] holding that the Supreme Court of the United States could reverse the rulings of state courts in order to insure a uniform interpretation of federal law throughout the United States and to insure the supremacy of federal law over conflicting actions of state and local governments. He consistently voted for court rulings that found that state regulations of commerce violated limitations on state power established by the granting of power to the federal government to regulate commerce; he dissented when the Court, in his later years, upheld state regulations of commerce that he believed would interfere with the growth of the nation as a single economic unit.

Story understood that federal courts would be crucial to the enforcement of federal law. Indeed, Story suggested in his scholarly writings and in case dictum that Congress had a constitutional duty to extend the jurisdiction of lower federal courts in a way that would guarantee protection of the supremacy of the federal law.[11] Whenever possible, Story would vote to extend the jurisdiction of federal courts. As one commentator wrote at the turn of the century, after reviewing Story's positions on the jurisdic-

tion of the federal government to control admiralty matters, and the jurisdiction of federal courts to rule on such matters: "It was said of the late Justice Story, that if a bucket of water were brought into his court with a corncob floating in it, he would at once extend the admiralty jurisdiction of the United States over it."[12]

In perhaps the most controversial opinion that Joseph Story wrote during his years as Justice, he ruled in *Prigg v. Pennsylvania* [13] that state courts and state governments had no authority to interfere in the enforcement of the Fugitive Slave Act of 1793 passed by the federal government. Although Justice Story's opinion for the Court in *Prigg* created some procedural difficulties for slave owners seeking to recapture fugitive slaves, it represented in its own time a victory for slaveholders. Justice Story's opinion found that the states retained the power to legislate regarding fugitive slaves so long as the state laws did not interfere with or obstruct "the just rights of the owner to reclaim his slave, derived from the Constitution of the United States."[14]

Story had a long, public history of opposition to slavery, but--because of his understanding of the slavery compromise reached as a basis for the Constitution of 1787[15] --Story could not bring himself to disregard the rendition clause of the Constitution, which provided the basis for the pro-slavery ruling in *Prigg*.[16] Story viewed his analysis of the Constitution, and all other branches of law, as a science; he believed that he could explain the meaning of the Constitution in the same manner as a detached scientist would explain the meaning of scientific principles. He understood the original intent behind the rendition clause and its purpose in the governing structure of the new Republic. Indeed, in a speech to students at Harvard he later stated that those who wished that he and other Justices disregard the rendition clause of the Constitution were espousing a position that he believed in the long run would be to the detriment of constitutional government in America because the position was grounded on a belief that one could disregard part of the Constitution for political or other nonlegal reasons. Story's opinion in *Prigg* as well as his other judicial opinions and scholarly writings, show Joseph Story to have been a man of independent mind who would analyze the history and purposes of constitutional provisions and give his opinion regarding their meanings, regardless of the popularity or unpopularity of his opinion or decision.

One reason that Story's views of the Constitution remain important to us today is that he cannot be easily categorized as merely a Democratic-Republican believer in state autonomy or a Federalist champion of federal power at the expense of state autonomy and individual liberties. He wrote opinions that were both praised and attacked by persons whom we would today consider political liberals or conservatives. A tribute to his lasting influence is that many of those opinions continue to be cited today, while much more recent opinions by less influential Justices have been assigned to constitutional dustbins.

Story was not only a controversial Justice; he was an influential professor of law who made Harvard Law School a success. Harvard Law School is said to have been founded in 1817, but for over a decade it did not amount to much. Then Nathan Dane endowed a new professorship of law, and Harvard University, determined to make something of its new law school, sought to persuade Story to take the position. At first he refused. Story had already given much of his time to Harvard: he had become a Harvard Overseer in 1819, and a Fellow of the Harvard Corporation in 1825. However, with repeated entreaties it became hard to say no. After Dane himself approached Story at least twice, the young Justice finally accepted.

Story bargained carefully. As a respected jurist, he was able to "write his own ticket at the University."[17] It was agreed that Story would receive at least $1,000 a year from the Harvard Corporation, plus income from the Dane professorship, plus a house in Cambridge. He would not be a resident professor, but he would be willing to visit the law school, "examine the students occasionally, and to direct their studies, and to lecture to them orally on the topics connected with the Dane Professorship from time to time in a familiar way."[18] And he would write,...and write.

His scholarly output was amazing. Story was inaugurated Dane Professor on August 25, 1829, and almost immediately began work on

When Nathan Dane *(pictured above)* endowed a chair of law at Harvard, he had to persuade Story, who already had his hands full with his Supreme Court caseload, to accept a teaching position in Cambridge. Dane succeeded after being turned down at least once.

his Commentaries on the Constitution, while continuing to remain an Associate Justice. By late 1832 the three volumes were at press. Also that year he published his Commentaries on the Law of Bailments. His other Commentaries were published in rapid succession: in 1834 he published Commentaries on the Conflict of Laws; that same year he published a short book called Constitutional Class Book: being a brief exposition of the Constitution of the United States, designed for the "higher classes in the common school." In 1840 he published another slim volume, A Familiar Exposition of the Constitution of the United States: containing a Brief Commentary on Every Clause Explaining the True Nature, Reasons, and Objects Thereof; Designed for the Use of School Libraries and General Readers. (Long titles were common in those days.)

In 1835, in Edinburgh, he published A Discourse on the Past History, Present State, and Future Prospects of the Law. In 1836 he published his Commentaries on Equity Jurisprudence, As Administered in England and America. In 1838 came Commentaries on Equity Pleadings, and the Incidents Thereof, According to the Practice of the Courts of Equity of England and America. A year later saw: Commentaries on the Law of Agency as a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law. And so on. He did all this writing in an era long before the advent of word processors, before photocopy machines, before dictaphones, before even typewriters. His last commentary, Commentaries on the Laws of Promissory Notes and Guarantees of Notes, and Checks on Banks and Bankers; with Occasional Illustrations from the Commercial Law of the Nations of Europe was published in 1845, the year he died. At the time of his death, he had grand plans for more writings, for Commentaries on Admiralty and for Commentaries on the Law of Nations, and for a book of his reminiscences.

Story had a lot of thoughts that he wanted to publish, and his readership agreed. By the time he turned 65, on September 18, 1844, he was earning $10,000 a year from his book royalties. At this point his salary as Associate Justice was $4,500. Royalties had far outstripped his salary.

When we talk about writing, we should consider not just quantity but also quality. Story's writings show careful analysis and a depth of research. Story's son wrote that Joseph Story was:

well versed in the classics of Greece and Rome.... He was omnivorous of knowledge, and read every thing he could obtain. No legal work appeared, that he did not examine. Every volume of Reports in England and America he studied.... Of all the leading cases he could cite volume and page, and quote them without referring to the book.[9]

The breadth of Story's citations in his various Commentaries on widely different subjects reflects the fact that he was very knowledgeable about not only the common law tradition but also civil and Roman law. His various Commentaries routinely cite Brisson, Cujas, Domat, Duranton, Duvergier, Erskine, Halifax, Heineccius, Huber, Livermore, Pardessus, Pothier, Puffendorf, Stair, Vinnius, Voet, The Code Civile of France, the Code of 1825 of Louisiana, the Digest and Institutes of Justinian, and the

Corpus Juris Civilis. And Story did not only cite this wide range of sources; he checked them.[20]

Of all his Commentaries, Story may best be remembered for his Commentaries on the Constitution. Rave book reviews greeted this influential book when it was published in early 1833: The reviewers praised the Commentaries on the Constitution as a tremendous intellectual achievement, an "important and instructive work,"[21] and also recognized it as a vital force advocating nationalism and supplying the theoretical framework to attack the theories of state rights, reserved powers, and dual sovereignty forcefully advanced by Calhoun and others.

The American Monthly Review, for example, compared Story's new book on the Constitution to Blackstone's Commentaries on the Laws of England.[22] The comparison was significant, for Blackstone's Commentaries had "revolutionized the study of law in America."[23] Lawyers in Story's time cited Blackstone in American courts as today they would cite opinions in their state's highest court. Blackstone had the authority of precedent. James Iredell represented a typical reaction to Blackstone. Iredell, who would later become a Justice of the U.S. Supreme Court, wrote his father in 1771 to

be so obliging as to procure Dr. Blackstone's Commentaries on the Laws of England for me and send them by the first opportunity. I have indeed read them through by the favor of Mr. Johnston who lent them to me; but it is proper I should read them frequently and with great attention.... Pleasure and instruction go hand in hand.[24]

Blackstone, said Iredell, made the common law not merely "a profession, but as a science."[25] Sir Edmund Burke noted in 1775 that almost as many copies of Blackstone's Commentaries were sold in the colonies as were sold in England. To compare Story's writings to Blackstone's was high praise indeed.

The American Monthly Review went on to praise Story, the successor to Blackstone, as supplying the ammunition to attack the states' rights advocates. "If there was ever a time," the *American Review* wrote,

when a sound and full survey and exposition of our Constitution was wanted, it is the present, when we find ourselves in the midst of perplexities, springing from a misconception and perversion of the Constitution, such as have caused many of the wise and good to despair of the republic.... The appearance of the present work is opportune.[26]

It commended:

the work as a rare union of patience, brilliancy, and acuteness, and as containing all the learning on the Constitution brought down to the latest period, so as to be invaluable to the lawyer, statesman, politician, and in fine, to very citizen who aims to have a knowledge of the great Charter under which he lives.[27]

Justice Story, in his Commentaries, metaphorically rolled up his sleeves and went to bat for the cause of an effective national government led by an effective Chief Executive.

Edward Everett, the famous politician and statesman, noted that, because of the turbulence of the times, Story's study of American constitutional law had more than a theoretical

Story's first wife died after less than a year of marriage; his second wife, Sara Waldo Wetmore, bore seven children, five of whom died. His son, William Wetmore, *(pictured below)* graduated from Harvard Law School in 1840, but went on to have a very distinguished career as a sculptor after attending art school in Italy.

significance; it had "an element of real life."[28] Everett realized that Story's study was not only intellectually interesting but was politically in the center of the storm. Everett summarized Story's history of the colonies and the Confederation prior to the Constitution and rhapsodized:

It is impossible to go through these volumes without feeling, that, from the first frail New England Confederacy of 1693 down to the ratification of the Federal Constitution in 1789, Union, Union, Union is the great destiny of our country. [29]

Finally Everett concluded:

We rejoice in its appearance; -- in its appearance at this crisis. Earnestly do we desire, that it may perform the salutary office of aiding to win back the judgments of our Southern brethren to the sound doctrines of 1789. It seems impossible to us to resist the conviction, that the theories, which have been recently broached, carry us back to the rude and abortive confederacies and plans of confederacies of other days. Well may that doctrine be called Nullification....[30]

Story had a tremendous formative influence on American legal education through the texts he wrote elucidating the legal and philosophical bases of law. This marble sculpture of the Massachusetts Justice was crafted by his son.

The prestigious periodical, *American Jurist* -- a publication to which the prolific Story was a frequent contributor[31]--echoed Everett. The magazine praised the "patriotic national tone of feeling [that] runs through the work...."[32] And *The American Quarterly Review* used the appearance of the Commentaries as an occasion to present arguments supporting the Federalists, attacking the Anti-federalists, and limiting the doctrine of reserved rights.[33]

Story, in an effort to spread his message, published, just a few months after the publication of his Commentaries on the Constitution, a one-volume Abridgment. Story designed his one-volume work as a textbook for use in law school and in college. The Abridgment eliminated all of the footnotes and the more technical sections and references. Otherwise, the text and the political theory included in the one-volume version is identical to the corresponding sections of the three-volume version.

Story's one-volume Abridgment of his Commentaries may well have been even more influential than his three volume work, because it saw a much larger audience, as Story had expected. The Abridgment became required reading at Harvard and in other academic centers, such as the Citadel at Charleston, which used Story's book until 1850, when it was replaced by the writings of Calhoun.[34] The Abridgment influenced at least two generations of academics, the bench, and the bar. Soon after the Abridgment's publication it was translated into French, and later published in Spanish.

The passage of time has vindicated Story's view regarding the basic role of the Constitution, as reflected in his Commentaries on the Constitution. Perhaps Story's Commentaries have stood the test of time, "simply because they were on the winning side of history. But surely, to some extent, Story's side won because he was on it."[35]

Joseph Story, lawyer, teacher, scholar, author, jurist. When we celebrate our Constitution and what it has become, in no small measure we celebrate him. A man for all seasons.

Endnotes

[1] Letter of January 23, 1831, from Joseph Story to his son, William W. Story, reprinted in W. Story, Life and Letters of Joseph Story, vol. 1 (1851). *See also*, E. Bauer, Commentaries on the Constitution: 1790-1860 (1952); M. Schwartz & J. Hogan, ed., Joseph Story: A Collection of Writings By and About an Eminent American Jurist (1959); A. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967 (1967); G. Dunne, Justice Joseph Story and the Rise of the Supreme Court (1970); J. McClellan, Joseph Story and the American Constitution (1971); R. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic (1985).

[2] Quoted in R. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 3 (1985).

[3] W. Story, *supra* note 1, vol. 1 at 44.

[4] *Id.* at 67.

[5] *Id.* at 194-195.

[6] *Id.* at 201.

[7] *Id.* at 127.

[8] *Id.* at 95.

[9] Rotunda, "The Confirmation Process for Supreme Court Justices in the Modern Era," 37 *Emory L. J.* 559 (1988).

[10] 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97 (1816). *See generally*, J. Nowak, R. Rotunda, & J. Young, Constitutional Law 15-17 (West Pub. Co., 3d ed. 1986); 1 R. Rotunda, J. Nowak, & J. Young, Treatise on Constitutional Law: Substance and Procedure sec. 1.5 (West Pub. Co. 1986).

[11] *See*, 1 R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure sec. 2.2 (West Pub. Co. 1986).

[12] Note, "Extension of Federal Jurisdiction over State Canals," 37 *Am. L. Rev.* 911, 916 (1903).

[13] 41 U.S. (16 Pet.) 539, 10 L.Ed. 1060 (1842).

[14] 41 U.S. (16 Pet.) at 625, 10 L. Ed. at 1093.

[15] Rotunda, "Bicentennial Lessons from the Constitutional Convention of 1787," 21 *Suffolk U. L. Rev.* 589, 616-21 (1987).

[16] U.S. Constitution, Art. IV, sec. 2, cl. 3:
"No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the party to whom such Service or Labour may be due."

[17] A. Sutherland, The Law at Harvard; A History of Ideas and Men, 1817-1967 at 98 (1967).

[18] Letter of May 19, 1829, quoted in C. Warren, History of the Harvard Law School, vol. 1, 417-419 (1908).

[19] W. Story, *supra* note 1, vol. 2 at 564-565. *See also*, *Id.* at 507-511.

[20] *See* Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer," 29 *Am. J. Legal History* 36, 57-59 & n.100 (1985).

[21] *E.g.*, Book Review, 14 *Am. Q. Rev.* 327, 367 (Dec. 1833).

[22] Book Review, 4 *Am. Monthly Review* 499, 500 (Dec. 1833) stated:
"Allusions are often made to the points of resemblance between the situations of Mr. Justice Blackstone, Vinerian Professor of Law, at Oxford, and Mr. Justice Story, Dane Professor of law at (Harvard) Oxford.... The fruits of the Vinerian professorship was Blackstone's Commentaries. The work, now before us, is, to our Constitution, all that Blackstone's Commentaries were to the English Constitution...."

[23] A. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967 24 (1967).

[24] G. McRee, Life and Correspondence of James Iredell 91 (1857).

[25] *Id.*

[26] 4 *Am. Monthly Review* 499, 501 (Dec. 1833).

[27] 4 *Am. Monthly Review* at 513.

[28] Everett, Book Review, 37 *No. Am. Rev.* 63, 66 (1834).

[29] 37 *No. Am. Rev.* 63, 83. Note that Everett refers to the Constitution of 1789. The Constitution was drafted in 1787, but it was March 4, 1789 which was the date fixed to commence the operation of Government under the new Constitution. Nowadays we typically refer to our Constitution as the Constitution of 1787.

[30] 37 *No. Am. Rev.* at 83.

[31] L. Friedman, A History of American Law 329 (2d ed. 1985).

[32] 9 *Am. Jurist and Law Magazine* 241, 288 (April, 1833).

[33] Hopkinson, Book Review, 14 *Am. Q. Rev.* 327 (Dec. 1833). Hopkinson noted: "The researches of the Judge [Joseph Story] are peculiarly acceptable at this time, when many of the questions he has discussed have an interest from the movements which they lately excited in the South." *Id.* at 329.

[34] Hoeflich, "John Austin and Joseph Story: Two Nineteenth Century Perspectives on the Utility of the Civil Law for the Common Lawyer," 29 *Am. J. Legal History* 36, 60 (1985).

[35] R. Newmyer, Supreme Court Justice Joseph Story: Statesman of the Old Republic 195 (1985).

George Wythe

Lewis F. Powell, Jr.

Editor's Note: Justice Powell delivered this paper as the Society's Annual Lecture on May 14, 1990.

Justin Stanley, the President of the Supreme Court Historical Society, is a friend of many years whom I admire. I therefore accepted his invitation to be your speaker. The practice on this occasion has been, understandably, to talk about the Supreme Court, about some of the more interesting Justices, or about some of the Court's historic decisions. It occurs to me that a change of pace--perhaps I should say a change of general subject--may be appropriate.

I therefore will talk about a lawyer and an early Chancellor of Virginia. His name is George Wythe--sometimes mispronounced as "Weyth."

Governor Thomas Jefferson appointed Wythe Professor of Law at William and Mary in 1789. He thus occupied the first chair of law in this country. It was not until 1816 that Harvard created a chair for a law professor.

Wythe was a towering figure in our history, not in the sense of holding the highest offices, but because of his influence on those who did. Yet historians have paid scant attention to Wythe, and even his name is largely unknown beyond Virginia.

In the long reach of history, it is difficult for a lawyer or a professor to leave behind him an enduring reputation unless he has held high office or written extensively. Wythe did neither of these.

Yet Wythe was admired -- even revered -- in his time. Following Wythe's death, Jefferson spoke of his friend and tutor:

No man ever left behind him a character more venerated than George Wythe. His virtue was of the purest kind; his integrity inflexible and his justice exact; [He was a man] of warm patriotism, and devoted...to liberty and the natural and equal rights of men.... A more disinterested person never lived. [1]

Wythe was not merely a man of rare quality personally. He was a distinguished lawyer, judge and scholar. Although he neither sought nor held the highest offices, he was a conspicuous leader in Virginia.

His teaching career is perhaps best known. Few, if any, teachers in our history have taught such an exceptional group of students. In addition to Jefferson, there were John Marshall; Henry Clay; John Breckenridge, who became Jefferson's Attorney General; Judge Spencer Roane, famous for his opinion in *Kamper v. Hawkins* [2] that anticipated *Marbury v. Madison*; and he taught numerous other persons of prominence in and after the revolutionary era.

The best known of his pupils, of course, was Thomas Jefferson. Through his influence on Jefferson, one could say that Wythe was the godfather of the Declaration of Independence. We should resist the temptation to make too much of it, but the long and close association between Wythe and Jefferson suggests almost a father-son relationship.

Jefferson did not serve as an apprentice under Wythe. Rather, recognizing Jefferson's genius, Wythe outlined a course of study, and then allowed Jefferson to pursue his studies largely in his own way. This process no doubt contributed to both the depth and originality of Jefferson's highly discriminating mind.

Wythe encouraged the young Jefferson to probe the origins of Roman and Saxon law by reading the original Greek and Latin texts, rather than translations. Wythe also instructed Jefferson in history, ethics, science and literature, and encouraged him to read Italian and French. Compare this education with the "diploma mills" we have today.

The young Jefferson also was instructed in manners and hygiene. In sum, the tutelage under Wythe was the equivalent for Jefferson of the most demanding university education--indeed, far more demanding than what is called a university education today.

The questions often are asked: how did Wythe become such a wise and influential scholar of the law? Where--and by whom--was he taught? The fact is that Wythe, not unusual in the eighteenth century, was largely self-taught.

He was born in a small community--I believe near what is now Hampton, Virginia. He attended a neighborhood private school long enough, as he said, to learn "reading and writing English and the five first [tables] of Arithmetic."[3] His mother, a gifted woman, was his primary teacher.

His self-education apparently never ceased. It was after receiving a license to practice law at the age of 20 that Wythe pursued his most serious studies. He is said to have exhausted the Greek and Roman classics without a guide or tutor. He studied thoroughly the origins of English law. To the dismay of opposing lawyers, he used his vast knowledge in the courtroom, supporting arguments with scholarly quotations.

Jefferson recalled one minor case--long since forgotten--in which Wythe fired a bewildering barrage of authorities at his adversary. He cited Virginia and British statutes, decisions of the British courts, sections of Justinian's Roman Code, and Cicero's Orations.

I hardly need add that comparable erudition is rarely heard even in arguments before the Supreme Court of the United States.

Wythe was no Patrick Henry urging revolution, but he did assume leadership when it became clear that British policy was inflexible and unjust. Though he was the last of the seven Virginians to sign the Declaration of Independence, Wythe wrote his name above the other six signatures.

He signed his name fully as "George Wythe" rather than "G. Wythe," his customary signature. He wished to identify himself unmistakably as a revolutionary.

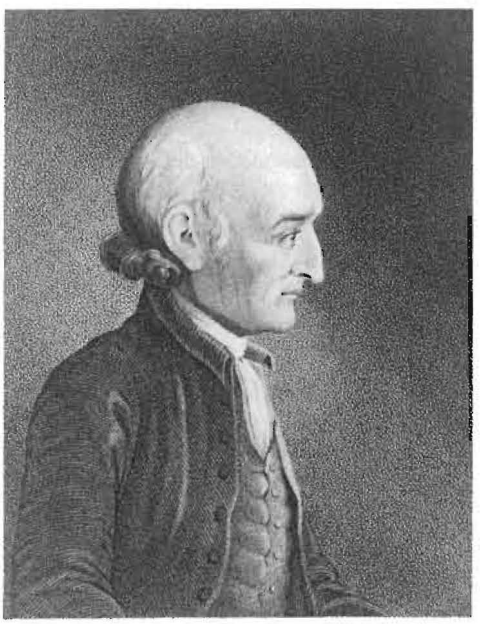
Wythe also sought to enlist in the cause. When Virginia militiamen appeared on a Williamsburg green near his residence, the 49-year-old lawyer put on a hunting shirt, took his musket, and sought to join the young men of the militia. He was gently, but firmly rejected.

But his ardor for the cause did not cool. It is reported that near the end of the Revolutionary war, Wythe and a couple of hunting companions opened fire with shotguns on a party of British soldiers in boats near Jamestown.

Happily, Wythe's place in history does not depend upon his military record. It was after independence had been won that he achieved leadership and prominence. He chaired the Committee of the Whole when the Virginia Convention adopted the Constitution. He was one of the leaders of that historic convention.

The College of William and Mary lost him in 1791 when he moved to Richmond to become the presiding judge of the High Court of Chancery. His service there merits more

George Wythe (1726-1806) occupied the chair of law at William and Mary, the first in an American college. His concept of the law greatly influenced Thomas Jefferson, John Marshall, James Monroe and Henry Clay.



careful study. At least one of his early decisions is noteworthy. He believed, as did other Virginia lawyers and judges, that the judiciary had authority to determine the law of the land. He made this clear in the case of *Commonwealth v. Caton:*

If the whole legislature...should attempt to overleap the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.[4]

His decision in *Caton* was one of the first recorded judicial assertions of the supremacy of the Constitution, and was prophetic of things to come.

To the last hours of his life, this singular man--George Wythe--remained serene, wise and compassionate.

Wythe's death was tragic. In his old age he was a widower and lived with two of his former slaves, his housekeeper Lydia Broadnax and a youth named Michael Brown. Wythe had educated Brown, and provided for him in his will. Wythe's 19-year-old grandnephew, George Wythe Sweeney, also had moved into the Wythe residence.

On a Sunday morning in 1806, in his eighty-first year, Wythe was poisoned by Sweeney. The grandnephew was the primary beneficiary under Wythe's will, and stood to inherit even more if the former slave Brown should die.

But Sweeney was unwilling to wait. He had forged Wythe's name on several checks. To hasten his inheritance, and perhaps to cover up his forgeries, Sweeney put arsenic in Wythe's coffee. Wythe drank the poisoned coffee while reading the newspaper. He lingered for two weeks, long enough to disinherit Sweeney. The servant, Michael Brown, and Wythe's faithful housekeeper, Lydia, also drank the coffee. She recovered, but Michael died.

It is ironic that the murderer of this great man who had devoted his life to the pursuit of justice was never punished. Sweeney was tried for the murders of Wythe and Brown and found not guilty by a jury. The results of an

Justice Powell (retired) delivered the Society's 1990 Annual Lecture on the topic of George Wythe, a fellow Virginian and influential lawyer, judge and scholar who had significant impact on legal education in the late eighteenth century.

autopsy were inconclusive. Moreover--as strange as it seems--under the law at that time Lydia Broadnax, the key witness, was a black person. She therefore was not permitted to testify against a white person.

Sweeney left Virginia in disgrace. Reportedly he came to a "bad end" in the west. One can hope this occurred.

I have presented only brief vignettes of the life of one of the most fascinating characters of American history. Perhaps I have said enough to make clear why Wythe's stature and influence loom large two centuries after he became our country's first formal professor of law.

Endnotes

1. Oscar L. Shewmake, The Honorable George Wythe, College of William and Mary, 1921, pp. 19-20.
2. *Kamper v. Hawkins* 3 Va. (1 Va. Cas.) 20 (1793).
3. "Memoirs of the Late George Wythe, Esquire," I *The American Gleaner* No. 1, p.11 (Richmond, Jan. 24, 1807).
4. 8 Va. (4 Call.) 5, 8 (1792).

The Translation of James Wilson

David W. Maxey

You adde earth to earth in new purchases,
and measure not by Acres, but by Manors,
nor by Manors, but by Shires; And there
is a little Quillet, a little Close,
worth all these, A quiet Grave.[1]
--John Donne

By his own standards James Wilson failed to make it. He reached for glory and for wealth; yet both in the end eluded his grasp. He died a tormented man, on the run from his creditors and on the verge of impeachment. More than a century would pass before an attempt was made to rehabilitate him in a secular rite that entailed the removal of his remains from that quiet grave which John Donne commended to all those who coveted the things of this world.

"The love of honest and well earned fame," Wilson proclaimed, "is deeply rooted in honest and susceptible minds."[2] It was certainly deeply rooted in his, and under different circumstances, his achievements, which were far from meager, would have entitled him to a prominent place in the American pantheon. He belonged to an elite category of patriots who signed both the Declaration of Independence and the Constitution; in the drafting of the latter document, his role was a fundamental one, second only, it is often said, to that of Madison. He was a lawyer to whom clients flocked, a philosopher and a teacher of the law, and a member of the first Supreme Court of the United States. As much as he loved honors, of equal importance to him -- and this passion proved his undoing -- was the accumulation of "private landed property," that visible sign of success which he, the son of a poor Scottish farmer, of parents imbued with Calvinist principles, sought in emigrating to America. Such, after all, he would remind himself, was the reward given in the glorious age of republican Rome when "the farmer, the judge, and the soldier were to each other a reciprocal ornament" and when the Roman magistrate, his public career concluded, might savor the security of "a rural and independent life."[3]

Absorbed during his lifetime in erecting his monument and composing his epitaph, Wilson has dwelt in relative obscurity these two centuries since his death. Robert McCloskey, an admirer of Wilson, conceded that he was an unlikely candidate for resurrection, even though, in the preface he supplied to the modern edition of Wilson's Works, Professor McCloskey did his elegant best to revive him as a subject for sympathetic appreciation. That the judgment of history has been less than generous to Wilson may be explained by the simple fact that many of his contemporaries did not feel comfortable with him, or, to put it more bluntly, they often mistrusted him. If they were forced to acknowledge his formidable learning and his professional skills, they also took measure of his ambition and greed. Fame, Professor McCloskey points out, is not easily fabricated: "...the great whom the present recognizes tend to be those who were thought of as great in their time. Tomorrow may enhance or diminish yesterday's reputation; it does not often create a wholly new one."[4] It is, in short, his own generation's hesitancy about Wilson that has significantly affected the view we have of him in a longer perspective.

Suspicion about his motives originated as early as the debates in the Second Continental Congress when Wilson, as a member of a badly split Pennsylvania delegation, pleaded for

a postponement until the instructions of the Pennsylvania delegates could be clarified on the crucial vote for independence. However clear his calling as a lawyer to provide the oppressed a defense, Wilson would later win no friends -- indeed he stirred up enmity in an easily excited populace -- when he came to the aid of beleaguered loyalists.[5]

Near the end of the Revolution, he ran the risk of offending Washington by extracting an exorbitant sum, "much higher than was usually paid to the other gentlemen of the bar [in Philadelphia]," in agreeing to accept Washington's nephew, Bushrod, as a student in his law office. If Washington was offended, he gave no immediate evidence of it; on the contrary, he overrode his nephew's "intention...of entering some other office on account of that difference" and impressed on him the value of the training he would get under Wilson's tutelage.[6] Still, that incident may have lingered in the memory of the newly elected President to whom Wilson applied some years afterwards for the position of Chief Justice of the United States. It was characteristic of Wilson, in florid, ingratiating language, to aim for the top, and characteristic of Washington, in carefully chosen words, to deflect the inquiry. Though Washington's reply ran true to the form he had devised for the host of office-seekers who descended on him, it did contain, in Wilson's particular case, a discernible trace of censure. At some cost to his pride, therefore, James Wilson had to settle for an appointment as Associate Justice of the Supreme Court.[7]

Wilson's judicial status did not cause him to be more prudent in the continued acquisition of land or in the further subsidizing of fanciful and economically draining schemes for its development. A Philadelphia Quaker of that day, Henry Drinker, whose rectitude could be intimidating, shared Wilson's enthusiasm for land as an investment. Unlike Wilson, however, Drinker was seldom distracted from his business concerns: he kept a watchful eye on his extensive holdings -- and also, because he did not completely trust him, on Judge Wilson (as, in the style of that time, he referred to his neighbor).

During the summer of 1794, Drinker's agents in upstate Pennsylvania alerted him to Wilson's folly in attempting to construct overnight a factory-town in the middle of the wilderness, at a place that had already been named, not surprisingly, for its patron. Laborers, always scarce in the backwoods, were being diverted to Wilsonville by the offer of very high wages and by the even more potent inducement of a liberal ration of rum awarded daily to every man employed at the factory.[8] In the face of these repeated warnings from his agents that Wilson was going under and that he should look closely at his own relations with him, Drinker fretted not so much about the judge's ability to survive financially as about his honesty. He objected to "a swinging Caveat" that Wilson had entered on technical grounds against property in which Drinker had an interest. He asked Wilson

how it would appear for a person in his exalted station, appointed to promote and distribute equal justice through the land, to come into the land office a long time after and search for some informality or deficiency in the descriptive part of our Locations.[9]

As problems of a severe sort multiplied for Wilson, Drinker approached him again on another grievance in much the same vein:

It is worth real concern that I see a Scene about [to be] exposed to public view & public animadversion, so injurious in its consequences to thy Reputation & Interest.[10]

To this last message from Drinker, Wilson sent a conciliatory but weary response, for he could then do very little to fend off disaster.[11] In conditions of general financial panic at he end of 1796, Wilson was pulled down, and with his collapse came total humiliation. His work on the circuit finished in the spring of 1797, Wilson and his young second wife retreated some fifty miles north to Bethlehem in order to escape the crowd of angry creditors that was congregating in Philadelphia. When his wife left to visit her family in Boston, Wilson moved from Bethlehem to Burlington, New Jersey, where in August, on the application of a relentless creditor, he had to endure imprisonment for a time. The Supreme Court of New Jersey would thus confront the "nice" question whether a federal judge who had been

arrested in the course of carrying out his duties could take advantage of a limited immunity and be discharged on nominal bail. Well before a sufficient number of judges in that court could be assembled to rule on the matter -- a majority of them eventually denied the claim of privilege -- Wilson's son, Bird, had scraped together the funds necessary to procure his father's release and to permit him to resume his flight south.[12]

In January, 1798, Wilson landed in the small town of Edenton, North Carolina, the home of his Supreme Court colleague, Justice James Iredell. There he would stay for eight months, still pursued by those to whom he owed money. Racked by worry and malarial fever, he dispatched a series of querulous letters to Bird in which he criticized his son, then in his apprentice years as a lawyer, for failing to appease his creditors and to bring some order out of the chaos that Wilson had left behind him.[13] What comfort he experienced in Edenton was provided by his wife who joined him that spring to bolster his spirits and to nurse him back to health. Hannah Wilson was almost constantly at her husband's bedside during his last illness: "I had not my cloaths off for three days and nights, nor left him till the evening of his death, when I could not bear the Scene any longer."[14] Wilson's death on August 21, 1798, did save him from the ignominy which Samuel Johnston, Justice Iredell's brother-in-law and the Governor of North Carolina, regarded as inevitable if he survived: his forced removal from the Supreme Court by a conviction on impeachment.[15]

A handful of mourners accompanied Wilson to his grave in the small country cemetery of the Johnston family, located less than a mile from the main street of Edenton. Iredell, who had arrived home from Philadelphia the day of Wilson's death, immediately wrote to inform the Secretary of State, Timothy Pickering, of the vacancy on the Court; he urged that a successor to Wilson be appointed as soon as possible to cope with the pending cases that had

James Wilson was buried in the cemetery in Edenton, North Carolina, following his death on August 21, 1798. Having fled to Edenton to escape his creditors, Wilson died of malarial fever eight months after his arrival. This photograph was taken at the cemetery on the morning of November 21, 1906, just prior to the transfer of Wilson's remains to Philadelphia.

piled up for disposition on the southern circuit -- that circuit having been Wilson's assigned responsibility.[16] Iredell next wrote to Bird Wilson to praise the heroic conduct of his stepmother, but also to encourage the long-suffering Bird to pay promptly his father's funeral expenses and the large bill that the Wilsons, living on the cuff, had run up at the inn in Edenton where they had taken refuge those several months preceding Wilson's death.[17] Enclosed with Iredell's message was a letter from Hannah Wilson to Bird in which she consoled him "how much happier your papa is, it would be from a selfish motive if we wished his return, his mind had been in such a state for the last six months, harrassed and perplexed." She confessed that it was only after he died that she had learned of his arrest, "and now can account for many things he said in his delirium." For Hannah Wilson it had been an incredible ordeal: "I am astonished," she concluded in this letter to Bird, "when I think of what I have gone through." Though she signed herself "your affectionate mother," she was but two or three years Bird's senior, having consented five years before to marry the widower James Wilson when she was nineteen and he in his early fifties.[18]

Obituary notices mounted up in the Philadelphia newspapers during the late summer of 1798. The city was in the grip of a yellow fever epidemic as harsh in its impact as the one that had decimated the population of Philadelphia five years before.[19] The newspapers made no mention, however, of Wilson's passing. Nor did any member of the Supreme Court consider a eulogy appropriate -- one can almost hear, in fact, a collective sigh of relief from his colleagues on the Bench. There was, of course, speculation about who would succeed to his seat on the Court. Taking for granted that the position was reserved for a Pennsylvanian, Benjamin Rush impulsively submitted to Pickering the name of his brother, but Jacob Rush, when consulted, indicated that he had no interest in the appointment.[20] John Marshall also declined to serve, and President Adams's choice finally fell on Wilson's former law student, Bushrod Washington.[21]

In the century that followed Wilson's death, he was occasionally identified as one of the outstanding members of that early Court, but more because of the reputation he had earned prior to his tenure than because of any major contribution he made as a Justice. Wilson has left one extended essay from his Court years, his opinion in *Chisholm v. Georgia*,[22] which illustrates a persistent tendency on his part to parade learning and to wear out his reader. Nowadays, when discovering the original intent of the Framers is often taken as the necessary starting point in constitutional adjudication, it may be of at least some interest to record that Wilson, in his opinion in *Chisholm v. Georgia*, resorted to principles of general jurisprudence, the philosophy of matter, Sir Francis Bacon, Cicero, the history of France, Sir William Blackstone (but only to refute him), Socrates, the suit of Columbus's son against King Ferdinand, the Emperor Frederick of Prussia, an anecdote concerning Louis XIV, Homer, Demosthenes, and Bracton -- all before he felt prepared to tackle the question of what he and the other Framers meant when they authored the Constitution a scant six years earlier. *Chisholm v. Georgia* and the Eleventh Amendment, whose immediate adoption that decision precipitated, have to be regarded, in any event, as a somewhat dubious legacy.[23]

Wilson was to be given a special postmortem opportunity to recapture some of the honors he had gambled away while he was alive. At the end of the nineteenth century, in a society that would have disclaimed attachment to ancestor worship or the collection of relics, Americans engaged in a variety of quasi-religious exercises which aimed at making the national past at once more accessible and more serviceable. This was the era of the colonial revival in literature and the arts, of the publication of countless local histories intended to put otherwise out-of-the-way communities on the historical map, of the beginnings of the preservationist movement, of the founding of patriotic societies, and of the first focusing on the flag as an object of veneration.[24] In this period of its coming of age, when the realities of life in a rapidly industrialized America collided with some of its more cherished ideals, the country turned for support to heroes from its past, and if, in this quest, resources were sometimes found lacking to meet a particular need, it was permitted practice to touch up or reshape these heroes so that they might assume a more imposing stature.

In S. Weir Mitchell's novel Hugh Wynne: Free Quaker, James Wilson *(above)* makes an appearance as Hugh's tutor in mathematics and Greek. In reality, Wilson did agree to tutor aspiring lawyer Bushrod Washington at the request of the future Justice's uncle, George Washington.

To a Philadelphia physician, S. Weir Mitchell, goes the initial credit for resuscitating James Wilson as a revered statesman, scholar, and judge. While an army surgeon in the Civil War, Mitchell gained insight into nervous disorders and their treatment; in the postwar years he became a pioneering specialist in this field, whom neurasthenic Philadelphians regularly sought out for advice. As an aside, one may regret that in this professional capacity Mitchell was not available to help James Wilson when the latter became unhinged during his financial crisis -- so much so that Benjamin Rush reported, as convincing proof of Wilson's emotional distress, that he had surrendered to the incessant reading of novels.[25] Mitchell's advertised remedy for patients suffering from depression was the "rest cure," but by his producing well researched historical novels that attracted a wide reading public, he could have also satisfied Wilson's yearning for escape literature.

Hugh Wynne: Free Quaker, published in 1896, was an instant best seller. Slightly more than a decade later Mitchell would acknowledge this success as, in the introductory note he inserted in no less than the nineteenth edition, he defended the novel against criticism that he had derided deeply held principles of the Society of Friends. John Wynne, the hero's father and an unbending Quaker, was diagnosed by Mitchell as experiencing the onset of "senile dementia" in the stern relationship he maintained with his son and in his condemnation of any resistance to George III. James Wilson steps forward early in this story as Hugh's tutor in mathematics and Greek at the College of Philadelphia (now the University of Pennsylvania). Hugh warmed immediately to Wilson as "a most delightful teacher" who "put up with my flippancy and deficient scholarship." Throughout the book Wilson retains his kindly qualities: he liked to walk in the woods and to sail and fish; he guided Hugh gently in his conversion to the revolutionary cause; and, as a famous lawyer, he volunteered his help in a family land squabble -- without any apparent discussion of a fee. Claiming in his preface that he was protected by a certain poetic license, Mitchell may have been aware of the liberties he was taking in portraying so endearingly this dour Scotsman -- by most reports reserved and aloof in personal encounters.[26] We have to wonder, for example, if Wilson's son, Bird, would have had any chance of recognizing his father in the garb in which Mitchell had clothed him.

As Hugh Wynne launched on his memoirs years after the Revolution was over and its principal actors were dead, he paused to reflect on the significance of "the burying-ground...in and about the sacred walls of Christ Church" where the honor roll of those interred there included Benjamin Franklin, Francis Hopkinson, Peyton Randolph, and Benjamin Rush. At that distance from events Hugh Wynne was unable to place in such distinguished company his good friend James Wilson, who had died and been buried elsewhere in circumstances that were understandably omitted from the narrative. But for Wynne the precincts of Christ Church were hallowed ground and "a neighbourhood which should be forever full of interest to those who love the country of our birth."[27]

In March, 1904, S. Weir Mitchell approached the Dean of the University of Pennsylvania Law School with a proposal which might have been called "The James Wilson Rescue Operation." To Dean William Draper

Lewis he forwarded two letters "from a very respectable colored man" in Edenton who had confirmed to Mitchell the location of Wilson's unmarked grave in the Johnston family cemetery. "These altogether identify, without doubt," Mitchell wrote the Dean, "the situation and present neglect of one of the greatest men Pennsylvania can claim as her own." Mitchell called upon Dean Lewis to enlist the lawyers of Philadelphia, and especially of the University on whose faculty Wilson had twice served, in the formulation of a plan for the transfer of Wilson's remains to Philadelphia, which Mitchell envisioned as "a very great state affair," involving but limited expense. "I have taken a good deal of pains," he lectured the Dean, "to put the matter in shape and if it belonged to my profession, [I] would put it through, but as it is, I believe as the young ladies say, 'It is up to you.' "[28]

The next month Dean Lewis submitted to his faculty the correspondence from Dr. Mitchell and the Chancellor of the Law Association in Philadelphia, Samuel Dickson, "in reference to the grave of Hon. James Wilson," and a resolution was thereupon adopted requesting the University's Provost to appoint a committee to consider the proposal made by Dr. Mitchell.[29] This lawyerlike action having been taken, the Dean and the law faculty appear to have abandoned any further notion of pressing forward with Mitchell's proposal. One deterrent, among others, was the attitude of Chancellor Dickson, who argued strongly for leaving Wilson where he was, in peace. He was especially leery of Wilson's resurrection if it would lead, as Dr. Mitchell plainly hoped it would, to some extravagant state ceremony in which Theodore Roosevelt might participate. An old-line Democrat, Dickson shrank from the specter of a James Wilson propped up as an apostle of the new nationalism and an advocate of implied powers granted the federal government under the Constitution.[30]

Enter now, as Dr. Mitchell's challenge to the legal profession is about to be submerged in committee, two curious characters who would compete for the privilege of ferrying James Wilson back across the Styx -- for the role, if the image be allowed, of a Charon in reverse passage. The first was the Reverend Burton Alva Konkle. Originally from Indiana, Konkle studied for the ministry, but in the course of postgraduate studies in Chicago, he was bitten by the history bug. Toward the turn of the century he came to the Philadelphia area and took up residence in Swarthmore, vowing to "give my life...to put Pennsylvania into national history as she ought to be." In 1941, when he sent to the press his last book, he congratulated himself on having accomplished that goal by publishing biographies of twenty-one neglected Pennsylvanians.[31] How much Konkle drew on Mitchell's prior inspiration is unclear. What is clear, however, is that, for all his quirkiness (maybe because of it), he forged ahead, disregarding the many practical objections that others had raised. Under his leadership as secretary, a James Wilson Memorial Committee was organized and important personages, including Chancellor Dickson, were persuaded to serve on it.

Largely on the strength of an effusive review given one of his books, Konkle recruited Lucien H. Alexander, a member of the junior bar in Philadelphia, to act as his assistant.[32] Within a month of his appointment, Alexander was apologizing to Konkle for appearing to take center stage in a newspaper article, which "puts me out of proper perspective, and in the minds of those who happen to see it, out of all proportion to the real workers in the cause."[33] Hard on the heels of that apology, Alexander outlined to Konkle the agenda for the Wilson memorial proceedings: the transportation to Philadelphia of Wilson's remains by a warship that the Secretary of the Navy would make available for that purpose; bringing Wilson's coffin to Independence Hall where it would lie in state; a solemn cortege of dignitaries accompanying the remains to Christ Church; and the delivery of an address by a senior Justice of the Supreme Court, preferably Chief Justice Fuller himself, who would render long overdue tribute to this predecessor redux.[34]

So it was that Konkle and Alexander, not always in perfect harmony, would round up the necessary allies and plan for the great day when James Wilson would return home in triumph. At the beginning of 1906, Alexander traveled to Hot Springs, Virginia, to appeal to a vacationing Andrew Carnegie for his endorsement and that of the St. Andrew's Society; it was of some help that Carnegie, a Scottish lad who

had made good, hailed from the same shire of Fife that was Wilson's birthplace. In June of that year, Konkle and Alexander took the train to Washington to brief President Roosevelt on their plans and to ask him to contribute to the success of the Wilson memorial proceedings by his attendance. They returned to Washington in October to confer with Chief Justice Fuller, Justice White, and Attorney General Moody, all of whom were counted on to participate, and again in November to firm up arrangements with the Secretary of the Navy for the vessel which would convey Wilson's remains from Norfolk, the nearest port, to Philadelphia.[35]

Theodore Roosevelt no doubt produced a good reason for declining the invitation to be present in Philadelphia on November 22, the date that had at last been set for Wilson's reinterment. Even T.R.'s patriotic ardor had its limits: just a short time before this interview with Konkle and Alexander, he had officially welcomed back to these shores the body of another revived American hero, John Paul Jones.

Jones died in Paris in 1792 -- if not an outcast, a very great nuisance for the American minister to France, Gouverneur Morris, who refused to foot the bill for Jones's funeral. His French friends, however, looking forward to the day when Jones's body might be reclaimed by a nation more appreciative of the services he had rendered, saw to his burial in a lead-lined coffin filled with alcohol as a preservative. The ambassador to France in Theodore Roosevelt's administration, General Horace Porter, made it his assignment of highest priority to track down Jones's grave in a long-abandoned Parisian cemetery; his task was made all the more daunting by the fact that several buildings, including a public laundry, had been constructed on the cemetery site. Porter advanced his own funds for the excavation work, and after two months of burrowing and a series of disappointments, his crew uncovered the mummified corpse of Jones -- in remarkably good shape, it was asserted, because of the ambient alcohol he had absorbed. An impressive funeral ceremony

Theodore Roosevelt enlisted Wilson as a valued ally in this speech that the President delivered at the dedication of the new state capitol building in Harrisburg on October 4, 1906. A pensive Governor Samuel Pennypacker, who would later eulogize Wilson at his second burial, is seen sitting hatless at the right.

was orchestrated by Porter in Paris, following which Jones's remains were taken back to the United States, escorted by a flotilla of American and French warships.[36]

The Naval Academy at Annapolis would be Jones's final resting place, and the commemorative proceeding held there in April, 1906, provided President Roosevelt with a "bully pulpit." The flag-draped coffin in front of him, he preached a sermon on "the lessons that history teaches." Every midshipman and officer was put on notice by their commander-in-chief: "You will be worthless in war if you have not prepared yourselves for it in peace." To the members of Congress in the audience he issued a different challenge:

Those of you...in public life have a moral right to be here...only if you are prepared to do your part in building up the Navy of the present; for otherwise you have no right to claim lot or part in the glory and honor and renown of the Navy's past.[37]

In what was left of John Paul Jones, the President had obviously found a useful surrogate.

If strengthening the navy was an essential part of the presidential program, so too was disciplining the abusive power of the corporate giants. Roosevelt did have on his calendar a trip to Pennsylvania that fall. He was to be the featured speaker at the dedication of the new capitol building in Harrisburg, and just as he had done with John Paul Jones at Annapolis, on this occasion he would summon back to duty James Wilson. Konkle and Alexander, when they went to the White House in June, had virtually handed the President the opening sentence of his speech in Harrisburg on October 4: "I cannot do better than base my theory of governmental action upon the words and deeds of one of Pennsylvania's greatest sons, Justice James Wilson."[38]

The worst apprehensions of Chancellor Dickson were about to be realized. Wilson's achievement, the President said, was to foresee the need for a strong national government which had "full and complete power to work on behalf of the people." Even before John Marshall, Wilson had the wisdom to develop "the doctrine (absolutely essential not merely to the efficiency but to the existence of this nation) that an inherent power rested in the nation, outside of the enumerated powers conferred upon it by the Constitution."

Yet certain tribunals and jurists had done, the President lamented, exactly what Wilson would have condemned: "They have, as a matter of fact, left vacancies, left blanks between the limits of possible State jurisdiction and the limits of actual national jurisdiction over the control of the great business corporations." A narrow and stultifying interpretation of the Constitution, in breach of the principles espoused by Wilson, would leave the national government impotent to provide "adequate supervision and control over the business use of the swollen fortunes of to-day," as well as "to determine the conditions upon which these fortunes are to be transmitted and the percentage they shall pay to the government whose protecting arm alone enables them to exist." To relegate responsibility to the states in the name of strict construction would be "a farce...simply another way of saying that it shall not be done at all." That was provocative stuff to serve up to his listeners in Harrisburg, much less to attribute to the enlarged vision of James Wilson. His political instincts intact, the President felt compelled to add that only by so proceeding could the nation be immunized against the twin evils of "anarchy" and "socialism."[39]

At dawn on Sunday, November 18, the U.S.S. *Dubuque* weighed anchor and set off from Philadelphia for Norfolk. The Pennsylvania delegation on board consisted of Konkle, Alexander, and a representative of the Governor. Alexander came very close to missing the boat; he had to hire an automobile at the considerable expense of $10 and just managed to get to the embarkation point at 2:30 a.m.[40] Also on board the *Dubuque* was the casket donated by the St. Andrew's Society, draped in the colors and under a guard of Marines.

As Konkle would subsequently report in a published article, "the dignity of the occasion was somewhat infringed upon late on Sunday afternoon, when Neptune attacked the Pennsylvania delegation." The most likely victim of this assault was Konkle himself, for when the *Dubuque* docked in Norfolk on Monday morning, he sent ahead Alexander and Mr. Bringhurst, a Philadelphia undertaker, so that the disinterment could be completed by the time the rest of

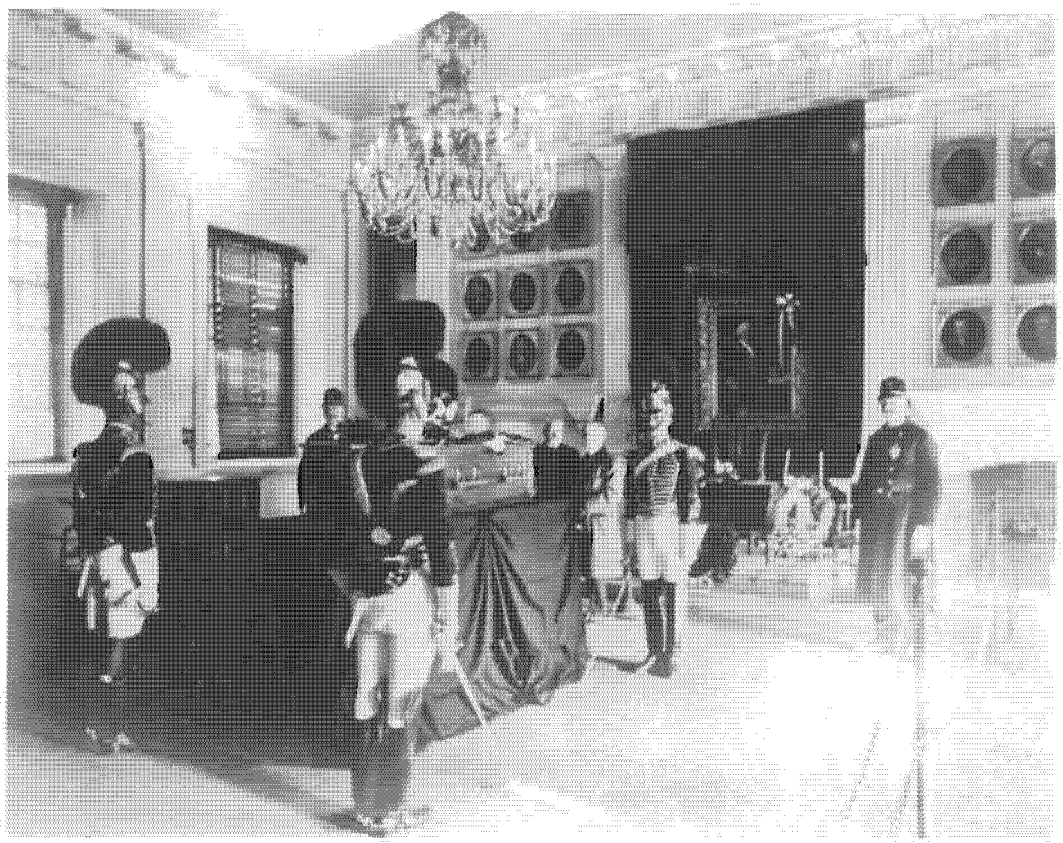
the party arrived in Edenton the next day. On Tuesday, there was a sizable gathering in the Johnston cemetery: it included, in addition to the contingent from Pennsylvania and the captain of the *Dubuque*, members of the local Wilson committee, the Lieutenant Governor and Chief Justice of North Carolina, and an honor guard from the Society of the Cincinnati and the Sons of the Revolution. After a prayer was said, Konkle read the request from the Commonwealth of Pennsylvania for permission to remove Wilson's remains, to which Lieutenant Governor Winston formally assented. The group then adjourned for a cordial luncheon at a nearby mansion.[41]

As the *Dubuque* steamed out of Norfolk that afternoon, the flags of all vessels in the harbor were at half-mast and minute-guns sounded a respectful salute. We owe, by the way, to Konkle's special descriptive talents further testimony to the close alliance formed between Theodore Roosevelt and James Wilson: "...it is now known," wrote Konkle of Wilson's exhumed remains,

> *that Wilson's heavy hair, tied in the fashion of the day, was of a slightly sandy color, not unlike that of President Roosevelt, and his well-preserved teeth also rivalled those so well known at the White House.*[42]

James Wilson's reception in Philadelphia was an extraordinary affair, and all the more so when one recalls how sharply his stock had fallen during the last years of his life and the shabby circumstances in which he died. At the outset, not everything proceeded as smoothly as the managers of this event would have liked. The *Dubuque*, delayed by fog, kept Governor Pennypacker of Pennsylvania and a cluster of other notables waiting for three hours at the Chestnut Street wharf.

When the *Dubuque* hove into sight, a convoy of small craft moved out to meet it, guns boomed again in Wilson's honor, foreign vessels in port dipped their flags, and bells in the



James Wilson was accorded a special honor when his coffin was installed in the historic east room of Independence Hall toward midday on November 22, 1906. The coffin had been transported from Norfolk aboard the U.S.S. *Dubuque* by arrangement of the Secretary of the Navy.

city began to toll. All this noise and bustle led to an anxious moment on the Delaware: the *Dubuque* nearly ran into a Reading Railroad ferryboat whose captain saved the day by throwing the engine of his boat into full reverse.[43]

Lifted on the shoulders of sailors from the *Dubuque*, the casket was carried in procession to Independence Hall and placed on a catafalque in the very room in which Wilson and his fellow delegates had assembled to debate and vote on the Declaration of Independence and the Constitution. To Wilson was accorded a privilege previously bestowed on John Quincy Adams, Henry Clay, and Abraham Lincoln, for their remains had also lain in this historic east room.[44] With officers of the First City Troop present in full regalia, and two burly Philadelphia policemen stationed less grandly in the background, the public filed past Wilson's bier from 11 a.m. to about 1:30 p.m.

It is a short walk from Independence Hall to Christ Church, a distance of four blocks. On this second trip to his grave, James Wilson would be escorted by three Justices of the Supreme Court of the United States. At the head of the cortege, leaning on his cane, the Chief Justice, Melville Weston Fuller, was engaged in animated conversation with Justice Oliver Wendell Holmes, Jr. Not a matched pair by any measurement -- Fuller a diminutive figure, barely five feet tall, and Holmes at an elevation that compelled him to bend down to converse with the Chief -- the two of them had nevertheless gotten along famously since Holmes had joined the Court in 1902. In all probability, Holmes had come along just for the ride, solely to please Fuller and not because he thought much of Wilson's philosophy of the law or relished participating in the staged events that were in prospect. The third member of the Court, designated to speak for his brethren, was Edward Douglass White, who in four years would succeed Fuller as Chief Justice; like Holmes, White had fought in the Civil War, but on the opposite side, enlisting as a Confederate drummer-boy at the age of fifteen.[45]

As the national anthem rang out from the organ of Christ Church, these three Justices were installed in the pew reserved for George Washington when he resided in Philadelphia as President. The church was filled to overflowing by a crowd that could gain admittance by invitation only. Wilson had shifted from the Presbyterianism of his forebears to Anglicanism at

Chief Justice Fuller and Justice Holmes led the cortege on the way to Christ Church where Wilson was given, this second time around, a solemn state funeral. A third Justice, Edward Douglass White *(not pictured)*, also participated in the ceremonies and spoke as the designated representative of his brethren on the Court.

about the time he married his first wife. Hence, the religious service was appropriately entrusted to the bishop coadjutor of the Episcopal Diocese of Pennsylvania, who, in this situation, may have had to improvise on the ritual prescribed in the Book of Common Prayer.[46]

Ecclesiastical duties discharged, Governor Pennypacker rose as the first of the speakers lined up to extol Wilson. Nations which fail to give due recognition to men of Wilson's rank and capacities "either still linger within the trammels of barbarism," the Governor intoned, "or are moving on the downward path toward decadence."[47] It appeared that, by the narrowest of margins in Wilson's case, the United States was about to escape these unattractive alternatives.

Samuel Dickson, as spokesman for the lawyers of Pennsylvania, submitted a brief. He was determined, among other things, to repair some of the damage caused by President Roosevelt's speech in Harrisburg. When Dickson had finished, the Wilson he had reconstructed was a quintessential conservative, trained by a conservative John Dickinson, zealous in protecting the autonomy of first the colonies and then the states "as self-governing communities," reluctantly ready to participate in a "conservative Revolution," and committed to a slowly evolving, dependable common law as the foundation of our jurisprudence. Dickson was at special pains to prove that, far from being attached to the concept of inherent powers, Wilson believed that what the Constitution did not give explicitly or by necessary implication to the national government was reserved to the states. Wilson saw no need, he argued, for a bill of rights -- neither, one suspects, did Dickson -- but if such a charter of basic liberties had to be, then the Tenth Amendment restored the necessary balance.[48]

After reviewing Wilson's career on the faculty of the College of Philadelphia and the lectures he gave as its first professor of law, Dean William Draper Lewis labeled Wilson "the most democratic among the fathers of our country, prevented from being a scientific anarchist only by his final conclusion, that the individual man can bind himself and by his consent turn a proposed rule of conduct into a binding law." Dean Lewis flatly contradicted Samuel Dickson's reading of Wilson's opposition to a bill of rights and, in fact, praised Wilson as an advocate of a theory of implied or inherent powers "more extreme than any which has been adopted by our courts."[49]

The next three speakers steered clear of controversy. S. Weir Mitchell, as the representative of American literature, borrowed from the pages of Hugh Wynne by referring to the burial ground of Christ Church as the consecrated resting place of those who had struggled in the War of Independence, including "the Tory gentlemen who stood for the King" and lay there "in the peace which is past understanding." Andrew Carnegie, deputized to speak for Scottish-Americans, rather let himself go when he asked rhetorically whether life is worth living and answered, "Yes, grandly worth living if lived as James Wilson lived." Alton B. Parker, Theodore Roosevelt's Democratic opponent in the election of 1904 and the President of the American Bar Association, had the professional good sense to play to the occupants of Washington's pew by concentrating on Wilson's membership in what had become "the greatest court in history."[50]

Ever so delicately in his remarks, Justice White touched on the issue of the effect and adequacy of a constitution "framed in generic terms." That the nation came into existence at all was due to "the self-abnegation of the fathers in declining to insist upon the full adoption of their views when the Constitution was framed, thus leaving sufficient flexibility to enable the adjustment of questions as they might arise." True, a price had to be paid in ensuing constitutional litigation for this lack of precision: "a perfect babel of voices upholding first one interpretation of the Constitution and then another." Just how far White had himself progressed in accepting the necessity of a strong central government was revealed in the appeal he made in his peroration to "the great and tender soul of Abraham Lincoln" and to the concluding words, "which shall never die," of the Gettysburg Address.[51]

Of Wilson, Attorney General (and later Justice) Moody began by admitting: "It is one of the mysteries of history, which I have not been able to solve, why his fame has not kept pace with his service." There as the President's representative, the Attorney General had little choice but to echo the party line. Wilson de-

The graveyard of Christ Church, Philadelphia, at the moment of committal. Chief Justice Fuller stands, bareheaded, beside Wilson's grave. About to be put in place is a tombstone which misstates by a week the date of Wilson's death.

sired, he said, that "the government should be endowed with extensive powers, and that in respect of them it should be supreme over all."[52]

The principal and last address, delivered by Hampton L. Carson, the Attorney General of Pennsylvania, was worthy of Wilson himself: a Latin quotation, a reference to Rome in its heyday, a side trek or two -- and the whole of considerable duration. Wilson's opinion in *Chisholm v. Georgia* he pronounced a masterpiece that "must be regarded as the climax of Federalism." What was more, "the architecture of our Constitution, as conceived by the brain of this marvelous man, resembles that of the heavens, where states circle like planets about the Federal government as a central sun."[53]

A long afternoon soon drew to a close. A brief committal service occurred in the churchyard, and as the gentlemen present (it was mostly a male gathering) removed their hats, Wilson's casket was lowered into the ground beside the remains of his first wife. Konkle, who fancied himself a specialist in lapidary inscriptions, was responsible for the text which appears on the identical tombstones that were put in place in Edenton and at Christ Church:

James Wilson, a Signer of the Declaration of Independence, a maker of the Constitution of the United States and a Justice of the United States Supreme Court at its creation, born September 14, 1742, died August 28, 1798 at Edenton, N.C. On November 20, 1906, the Governor and People of Pennsylvania removed his remains to Christ Church, Philadelphia, and dedicated this tablet to his memory. " That the Supreme Power, therefore, should be vested in the People, is, in my judgment, the great panacea of human politics."--Wilson.[54]

By the end of this memorable day, Konkle and Alexander were no longer on speaking terms. Though their joint venture had been deemed a great success, there was simply not enough acclaim to satisfy them both. Each had jockeyed for position and precedence, and each was certain that the other had encroached on his territory. Moreover, Konkle reacted angrily to Alexander's barb that, in the tombstone inscription, he had missed the date of Wilson's death by a full week -- a discrepancy that had come to Alexander's attention when he was in Edenton.[55]

Minor skirmishes turned into all-out-

war. Konkle summarily dismissed Alexander from the Wilson Memorial Committee for insubordination.[56] His previously trusted lieutenant retaliated by suggesting that Konkle had taken leave of his senses and that he had better get his own contribution into proper perspective, else "you will utterly destroy your usefulness for the future." On the bottom of the letter from Alexander containing this advice, Konkle scrawled a rejoinder which he fired back to the sender: "Relations with you are the only injury to my usefulness that I know. You are as much an authority on preserving one's usefulness as you are on untrustworthiness and common impudence."[57]

A quiet grave was thus denied James Wilson. Hostilities between Konkle and Alexander continued for more than a year, eliciting newspaper comment (such as "Row Spoils Holy Rite") and bewildering the other participants in the business of the Wilson Memorial Committee.[58] After an embarrassing delay in settling its accounts, the committee finally disbanded. In the separate reports the two antagonists published on the work of the committee and the memorial proceedings, honors were distributed according to their contrasting notions of merit. More elaborate projects, such as Alexander's proposed commemorative volume, with a preface written by Lord Bryce, the British ambassador to the United States, and Konkle's definitive biography of Wilson, were necessarily put aside.[59]

In two respects, James Wilson was "translated." Looked at as ritual, the transfer of his remains from an obscure country graveyard to Christ Church in Philadelphia corresponds, in strikingly similar ways, to the translation of the relics of saints in late antiquity and the medieval period. The modern mind may resist this comparison, but the continuities are there, including the discovery of the saint and the verification of sainthood, the ceremonies associated with the translation, the speeches given, the erection of a monument, and what an acute observer of this phenomenon has dubbed the "impresarios" of the cult of saints. These impresarios, ancient counterparts of Konkle and Alexander, had both an expediting and self-serving function: they were privileged intermediaries between the past and the present, the dispensers of glory, the translators of fame, whose reputation in their own community rose in direct relation to the perceived power of the saint whom they were promoting.[60]

James Wilson was also translated in the more conventional understanding of that word. Not completely decipherable in the original version, he became more intelligible as he was made more relevant. When translation is defined as the effective delivery of a message, Wilson's revival should be seen in the larger context of our recurrent temptation to put the past and its inhabitants to work for present purposes. In that sense, the translation of James Wilson must be viewed as something other than a bizarre episode, consigned to an age of innocence far removed from our own time.[61]

Acknowledgments: *I am again indebted to Linda Stanley, Curator of the Manuscripts and Archives Department at The Historical Society of Pennsylvania, for her patient help. I have also benefited from initial guidance provided by Professor Michael Kammen of Cornell University, who must, however, be completely exonerated from any responsibility for what has followed.*

Endnotes

1. From a sermon preached on January 30, 1625. John Donne: Selected Prose, ed. Neil Rhodes (Penguin Classics, 1987), p. 223.
2. James Wilson, The Works of James Wilson, ed. Robert Green McCloskey, 2 vols. (Cam-bridge: Harvard University Press, 1967), 1:405.
3. *Ibid.*, 2:716, 719-20.
4. *Ibid.*, 1:47.
5. Charles Page Smith, James Wilson: Founding Father (Chapel Hill: University of North Carolina Press, 1956), pp. 82-89, 117-23, 133-39. Professor Smith's biography remains the single most reliable source of information about Wilson.
6. Bushrod Washington to Bird Wilson, October 26, 1822, Wilson Papers, The Historical Society of Pennsylvania, Philadelphia, Pa. (hereafter cited as HSP), vol. 2, pp. 122-23. George Washington covered the stipend with his own note delivered to Wilson: "Necessity obliges me to give you my promissory Note instead of the deposit of a hundred guineas. I will take it up as soon as I can." Washington to Wilson, March 22, 1782, The Writings of George Washington, ed. John C. Fitzpatrick, 39 vols. (Washington, D.C.: U.S. Govt. Printing Office, 1931-44), 24:88.
7. Wilson's letter of application dated April 21, 1789, may be found in The Papers of George Washington (Presidential Series), ed. W.W. Abbot (Charlottesville: University Press of Virginia, 1987-), vol. 2, April-June 1789, ed. Dorothy Twohig, 2:111-12, and Washington's reply dated May 9, 1789, in The Writings of George Washington, 30:314.
8. John Kinsey to Henry Drinker, September 24, 1794, and Samuel Preston to Henry Drinker, September 24, 1794, Drinker Collection, HSP. Wilson was not alone in imagining that a prosperous settlement could be created almost instantly in the backwoods, on the sole condition that there was sufficient water power to run the mills. For Wilson's model, *see* Tench Coxe, A View of the United States of America (Philadelphia: William Hall and Wrigley and Berriman, 1794), pp. 380-404, an influential book on which foreign investors, in particular, relied.
9. Henry Drinker to John Canan, Esquire, May 26, 1794, Drinker Letterbook (1793-96), HSP, pp. 167-68, in which Drinker purports to quote verbatim from a letter sent to Wilson.
10. Henry Drinker to James Wilson (copy), August 4, 1796, Drinker Collection, HSP.
11. James Wilson to Henry Drinker, August 18, 1796, Drinker Collection, HSP.
12. Smith, James Wilson, pp. 382-84; *Gratz v. Wilson*, 6 New Jersey L. Rep. 419 (1798).
13. James Wilson to Bird Wilson, January 17, February 4, February 24, March 17, April 21, May 5, 1798, Wilson Papers, HSP, vol. 5, pp. 1-8.
14. Hannah Wilson to Bird Wilson, September 1, 1798, Wilson Papers, HSP, vol. 6, pp. 11-12; *see* Smith, James Wilson, pp. 386-88.
15. Samuel Johnston to James Iredell, July 28, 1798, in Griffith J. McRee, Life and Correspondence of James Iredell, 2 vols. (New York: D. Appleton and Company, 1857), 2:532.
16. James Iredell to Timothy Pickering (corrected copy), August 25, 1798, James Iredell Papers, William R. Perkins Library, Duke University, Durham, N.C.
17. James Iredell to Bird Wilson, September 1, 178, James A. Montgomery Collection, HSP.
18. Hannah Wilson to Bird Wilson, September 1, 1798, Wilson Papers, HSP, vol. 6, pp. 11-12; *see* Smith, James Wilson, pp. 97, 361, 366. Hannah Wilson remarried Dr. Thomas Bartlett of Boston, whom she accompanied to England, where she died in 1807. McRee, Life and Correspondence of James Iredell, 2:535.
19. "It is more malignant...than in 1793." William Rawle (in Philadelphia) to James Iredell, September 26, 1798, in McRee, Life and Correspondence of James Iredell, 2:537.
20. Jacob Rush to Benjamin Rush, September 8, 1798, Rush Collection, HSP; Timothy Pickering to Benjamin Rush, September 19, 1798, Gratz Collection, HSP.
21. Adams preferred Marshall to Bushrod Washington, but sent to Pickering from Quincy, Massachusetts, a signed commission in blank so that Pickering could fill in the name of the candidate who did accept. The Works of John Adams, ed. Charles Francis Adams, 10 vols. (Boston: Little, Brown and Company, 1850-56), 8:595-98.
22. 2 U.S. (2 Dall.) 419, 453-66 (1793).
23. *See* Justice Brennan's dissent in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247-302 (1985).
24. *See* Alan Axelrod, ed., The Colonial Revival in America (New York: W.W. Norton & Company, 1985), pp. 10, 241-77; Wallace Evan Davies, Patriotism on Parade: The Story of Veterans' and Hereditary Organizations in America, 1783-1900 (Cambridge: Harvard University Press, 1955), pp. 45-46, 218-19; Charles B. Hosmer, Jr., Presence of the Past: A History of the Preservation Movement in the United States Before Williamsburg (New York: G.P. Putnam's Sons, 1965), p. 299; and Karal Ann Marling, George Washington Slept Here: Colonial Revivals and American Culture, 1876-1986 (Cambridge: Harvard University Press, 1988), pp. 65-70, 75-76, 121-25.
25. The Autobiography of Benjamin Rush: His "Travels Through Life" together with his Commonplace Book for 1789-1813, ed. George W. Corner (Princeton: Princeton University Press, 1948), p. 237
26. S. Weir Mitchell, Hugh Wynne: Free Quaker (New York: The Century Co., 1909), pp. viii-ix, 60-62, 133-34, 536-47.
27. *Ibid.*, pp. 3-4.
28. S. Weir Mitchell to William Draper Lewis (copy), March 14, 1904, Lucien H. Alexander Papers (hereafter cited as Alexander Papers), HSP.
29. Excerpt from minutes of Faculty of Law Department, April 4, 1904, Alexander Papers, HSP.
30. Lucien H. Alexander to Arthur G. Dickson (copy), May 23, 1907, and Arthur G. Dickson to Lucien H. Alexander, May 24, 1907, Alexander Papers, HSP.
31. Burton Alva Konkle, The Life of Andrew Hamilton, 1676-1741 (Philadelphia: National Publishing Company, 1941), preface.
32. Lucien H. Alexander, review of The Life and Speeches

of Thomas Williams, Orator, Statesman and Jurist, 1806-1872, by Burton Alva Konkle in The Legal Intelligencer (Philadelphia), January 19, 1906; Lucien H. Alexander to Burton Alva Konkle, January 23, 1906, Alexander Papers, HSP.

33. Lucien H. Alexander to Burton Alva Konkle (copy), February 19, 1906, Alexander Papers, HSP.

34. Lucien H. Alexander to Burton Alva Konkle (copy), February 28, 1906, Alexander Papers, HSP.

35. Lucien H. Alexander to Francis Rawle (copy), February 6, 1907 (enclosing an itemized account confirming trips taken), Alexander Papers, HSP.

36. By joint resolution of Congress, it was directed that a volume be prepared on the discovery, transfer, and reburial of Jones's body, complete with photographs, and pursuant to this authorization, 11,000 copies were printed. John Paul Jones -- Commemoration at Annapolis, April 24, 1906 (Washington: U.S. Govt. Printing Office, 1907).

37. *Ibid.*, p. 19.

38. The text of the speech, entitled "Legislative Actions and Judicial Decisions," is found in Theodore Roosevelt, The Works of Theodore Roosevelt, 24 vols. (New York: Charles Scribner's Sons, 1923-26), 18:82-89.

39. *Ibid.*, pp. 83-86.

40. Lucien H. Alexander to Francis Rawle (copy), February 6, 1907, Alexander Papers, HSP.

41. Burton Alva Konkle, "The James Wilson Memorial," *American Law Register* 55 (1907), 1, 5-6.

42. *Ibid.*, p. 6.

43. *Public Ledger* (Philadelphia), November 23, 1906, pp. 1 & 2.

44. J. Thomas Scharf and Thompson Westcott, History of Philadelphia, 1609-1884, 3 vols. (Philadelphia: L.H. Everts & Co., 1884), 3:1790.

45. Sheldon M. Novick, Honorable Justice: The Life of Oliver Wendell Holmes (Boston: Little, Brown and Company, 1989), pp. 241-44, 255-57.

46. For Wilson's conversion to Anglicanism, *see* Smith, James Wilson, pp. 28-29, 37-42.

47. "Tributes Delivered at the Memorial Services," *American Law Register* 55 (1907), 12.

48. *Ibid.*, 13-19.

49. *Ibid.*, 19-22.

50. *Ibid.*, 22-27.

51. *Ibid.*, 27-31.

52. *Ibid.*, 31-34.

53. "Oration," *American Law Register* 55 (1907), 35-46.

54. Konkle, "The James Wilson Memorial," *American Law Register* 55 (1907), 7.

55. Lucien H. Alexander, "Concerning The Rev. Mr. Konkle's Attack on the Accuracy of Mr. Alexander's Assertion that Dr. Mitchell was the Author of the Movement to Bring Wilson's Body Home to Pennsylvania...," undated memorandum, p.2, Alexander Papers, HSP.

56. Alva Burton Konkle to Lucien H. Alexander (copy), December 1, 1906, Alexander Papers, HSP.

57. Lucien H. Alexander to Alva Burton Konkle, December 3, 1906 (with Konkle's undated reply), Alexander Papers, HSP.

58. *The Evening Bulletin* (Philadelphia), November 8, 1907, p.10; *see also The Philadelphia Inquirer*, November 4, 1907, pp. 1 & 2, and November 5, 1907, p. 9.

59. In effect, Konkle's report was his previously cited introductory essay published in the issue of the *American Law Register* devoted to the Wilson proceedings. Alexander produced his own account in a study on "James Wilson: Nation-Builder," *The Green Bag* 19 (1907), pp. 1-9, 98-109, 137-46, 265-76.

60. Peter Brown, The Cult of the Saints (Chicago: The University of Chicago Press, 1981), pp. 36-39, 86-105. Two other examples of this kind of translation at the end of the nineteenth century and the beginning of the twentieth century are instructive. The first was the attempt to move the remains of William Penn from England to Fairmount Park in Philadelphia, which failed because of Quaker sensibilities, and the second was the reinternment of General Nathanael Greene, over possession of whose remains the States of Rhode Island and Georgia contested for several months (during which period the relics of Greene were lodged in the safe deposit vault of the Southern Bank of the State of Georgia). George L. Harrison, The Remains of William Penn (Philadelphia: Globe Printing House, 1882); The Remains of Major-General Nathanael Greene (Providence, R.I.: E. L. Freeman & Sons, 1903).

61. A Harvard professor was responsible for the 1988 reburial in Arlington National Cemetery of Matthew Arnold Henson, a black valet-cum-navigator who accompanied Robert Peary to the North Pole; the translation of the long-neglected Henson was hailed as marking a new day in race relations. *New York Times*, April 7, 1988, p. A16. Thirty-one years after he was hanged and his body thrown into a prison grave, Imre Nagy, the leader of the 1956 uprising in Hungary, was rehabilitated and given a state funeral in Budapest. *New York Times*, June 17, 1989, pp. 1 & 6.

Dual Office Holding and the Constitution: A View From Hayburn's Case

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***Editor's** Note: This article will appear in The Judiciary Act of 1789, to be published by Oxford University Press in the spring of 1991. The book is a compendium of the papers delivered at a conference held at Georgetown University to mark the bicentennial of the Judiciary Act. Maeva Marcus, who organized the conference, is the editor.*

The Supreme Court's January 1989 decision in *Mistretta v. United States* rejected a constitutional challenge to the manner in which the United States Sentencing Commission was composed.[1] The constitutional challenge, premised on the principle of separation of powers, had several elements. As Justice Blackmun's opinion for the Court noted, one of these elements recalled the arrangements brought into question early in the history of the federal judiciary, for the Sentencing Commission, described as an independent agency located in the judicial branch, used the talents of sitting federal judges by making three of them members of the Commission. Because the Commission was not a court but was instead an agency of the United States, the federal judges who serve on the Commission hold two positions under the United States, one as judges and the other as Commissioners. This dual office holding was challenged as a violation of the Constitution. Justice Blackmun's opinion noted that a similar issue had arisen in connection with *Hayburn's Case,* 2 U.S. 409 (1792), in which Congress asked judges of the Circuit Courts to serve as commissioners for the determination of certain questions regarding entitlements to pensions for service during the Revolutionary War. Although the Justices of the Supreme Court, sitting as circuit judges, held that the underlying statute was unconstitutional, most of them agreed that Congress could require them to serve as commissioners, not as judges.

This paper examines the constitutional terrain in which the Justices located the problem in *Hayburn's Case*, in an attempt to understand the distinction they drew between their constitutionally limited duties as judges and the more expansive possibilities for action in their individual capacities. At the outset, though, it should be noted that what we are dealing with may perhaps best be described as a 500-piece jigsaw puzzle, of which we have before us only a handful of pieces from which we are to determine what the overall picture is like. Under the circumstances, the best I can hope to do is identify certain aspects of the conceptual universe in which the federal judiciary was located, which shed some light on the problem of dual office holding and therefore some light on the conception of judging embedded in the Constitution.

I. The Invalid Pensions Act in the Circuit Courts

A. The Constitutional Issues Addressed

The story behind *Hayburn's Case* is well-known.[2] The Invalid Pensions Act of 1792 was a public assistance program[3] designed to help the families of soldiers injured in the Revolutionary War adjust to the dislocations caused both by their injuries and by the economic disruption that occurred in the war's aftermath.[4] The Act suspended a previous statute of limitations on claims by soldiers' widows and orphans for two years, and allowed disabled soldiers and seamen to receive a pension. The applicant had to present the circuit court of his residence with a certificate or affidavits attesting to his disability. The circuit court, which was required to sit for at least five days to receive pension applications, would, after receiving the required documents, certify the degree of disability to the Secretary of War, along with a determination of the appropriate pension. The Secretary could then determine whether there had been "imposition or mistake" and withhold the pension recommended by the circuit court. Finally, the Secretary of War would report the list of applicants he found ineligible to Congress, which then would appropriate money for the pensions of the eligible applicants. Congress apparently chose this system for administering the pension scheme for sensible reasons. In modern times the duties given to the circuit courts would be assigned to some bureaucracy, either already existing or created for the purpose. In the early republic, though, the administrative apparatus of the new national government was rudimentary to say the least.[5] The circuit courts had the advantage of being already in place throughout the nation, even though they had been created for other purposes. In addition, one of the fears expressed during the debates over the ratification of the Constitution was that the new government would become a powerful source of patronage, and would therefore come to displace the states as the primary locations of citizen identification. In *Federalist* 45 Madison had responded to this fear by saying that "the number of individuals employed under the Constitution... will be much smaller than the number employed under the particular States."[6]

One way to minimize the number of national executive officials, of course, was to give multiple duties to the ones that were created.[7] Further, on one obvious interpretation of the Act the division of authority between the circuit courts, located throughout the country, and the Secretary of War, located in the nation's capital, made a great deal of sense. The circuit courts would determine the degree of disability by examining the applicant personally or by evaluating affidavits that could be produced readily in the district of the applicant's residence; the Secretary of War, in turn, would examine the records of the military forces to determine whether the applicant had in fact served during the Revolutionary War, "imposition or mistake" thus being defined as fraud or mistake with respect to service rather than with respect to disability. Finally, in proposing a pension system to Congress, Secretary of War Henry Knox was concerned that applicants for pensions had to be examined skeptically because it would be "easy, from the influence of humanity, to obtain plausible certificates, even from men of good character."[8] Federal judges, certainly men of good character, might be able to resist the pull of humanity better than any other possible examiner of pension applicants.

In 1989, Justice Harry Blackmun led the Court in rejecting a constitutional challenge to the manner in which the U.S. Sentencing Commission was composed. Because the Commisssion was designed as an agency of the United States, federal judges who serve on it were perceived as dual office holders, but not in violation of the Constitution.

The judges of the circuit courts responded to the Invalid Pensions Act by holding it unconstitutional. The Justices of the Supreme Court, who were required by statute to serve as judges in the circuit courts, were already unhappy with the burdens that circuit riding placed on them,[9] and did not find the new duties under the Act at all attractive. The reasons for finding the Act unconstitutional varied slightly among the circuit courts, though they all relied on concepts of separation of powers. The circuit court for New York, consisting of Chief Justice John Jay, Associate Justice William Cushing, and Judge James Duane, ruled on April 5, barely two weeks after the Act had been adopted. The court said that the duties assigned to it under the Act were not judicial, as was shown by the fact that

it subjects the decisions of these courts made pursuant to those duties, first to the consideration and suspension of the Secretary of War, and then to the revision of the Legislature; whereas, by the constitution, neither the Secretary of War, nor any other executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

On April 18 the judges of the circuit court of Pennsylvania--Associate Justices James Wilson and John Blair, and Judge Richard Peters--wrote President Washington of their decision not to "proceed" under the Act, because "the business directed by this act is not of a judicial nature" and because the judgments of the court

might... have been revised and controlled by the Legislature and by an officer in the executive department. Such revision and control we deemed radically inconsistent with the independence of that judicial power which is vested in the courts....[10]

Travel being what it was, it took longer for the circuit court for North Carolina to register its objections.[11] On June 8, Associate Justice James Iredell and Judge John Sitgreaves wrote Washington that the Act may have conferred a "power not in its nature *judicial*" on the circuit courts but in any event that the possibility of revision of the decisions of the courts by the Secretary of War "subjects the decision of

A trusted general of George Washington during the Revolutionary War, Henry Knox was made Secretary of War under the Articles of Confederation. In his proposal to Congress of a pension plan for war veterans, he voiced concern over fraudulent claims.

the court to a mode of revision which we consider to be unwarranted by the constitution," for all forms of appellate review of judicial decisions had to be done by judges with the guarantees of tenure provided in Article III.[12]

The circuit courts rested their objections, then, on two grounds. Since 1792 it has become clear that neither ground is entirely well-founded. To the objection that the duties under the Act were not "judicial in nature," one could respond that the courts were being asked to make simple factual determinations, of the degree of disability and the amount of an appropriate pension, and that these determinations are indistinguishable in principle from a wide range of decisions made by judges exercising the judicial power of the United States.[13] Further, even though they did not mention this difficulty, to the extent that the judges were concerned about the fact that the proceedings under the Act were nonadversarial, one could respond first that at this early stage in the development of constitutional law they need not have defined the judicial power to require the presence of full-fledged adversariness in all instances and second that the power of judges to

issue certificates of naturalization has historically occurred in nonadversarial proceedings without being held to violate Article III.[14]

The circuit courts' second objection was that their decisions were subject to revision by the Secretary of War and by Congress. As to the former, the answer seems clear. If the Secretary's power to refuse to place an applicant on the list sent to Congress because of "imposition or mistake" were interpreted to mean that the Secretary could so act only in cases where the applicant had not served in the armed forces during the Revolutionary War--an issue not determined by the circuit courts--there would be no executive revision whatsoever.

The answer to the objection based on Congress's power to refuse to appropriate money for some or all of the pensions is more complicated. Roger Taney, who served as Chief Justice from 1836 to 1864, drafted an opinion holding that the Supreme Court could not take jurisdiction over appeals from the Court of Claims; one of his reasons for the constitutional difficulty was the fact that Congress had the unreviewable power to decide whether to appropriate money to pay judgments of the Court of Claims.[15] The Court itself, in a later case, dismissed an appeal from the Court of Claims after Congress had repealed the statute on which the respondent had received a judgment and directed that no such judgments be paid.[16] The Court subsequently avoided deciding the constitutional questions posed by a provision that Congress had to appropriate separately funds to pay judgments over $100,000.[17] With respect to that provision, Justice Harlan wrote that an historical record showing that Congress had refused to appropriate money to pay judgments only fifteen times in seventy years established the justiciability of decisions by the Court of Claims.[18] Of course the judges in 1792 could not rely on that sort of historical record, but one would think that the political pressures that led Congress to establish the pension scheme would operate effectively to ensure that the pensions, once determined by the courts and the Secretary of War, would be paid. The Supreme Court itself never ruled directly on these constitutional objections to the Act of 1792. The Act was amended within a year to remove the objectionable features,[19] although only by authorizing the district judge to appoint commissioners to do the work, thereby beginning to create the kind of national bureaucracy that had been discussed during the ratification debates.[20] When the full court was presented with the constitutional question, the judges backed away from their previous decisions on circuit to find the Act unconstitutional if interpreted to give them the claims-inspection tasks as commissioners. The Justices of the Supreme Court, sitting as circuit judges, though, did more than express their views on the constitutionality of the Act. As Justice Blackmun put it in his 1989 *Mistretta* opinion, Jay and Cushing "believed that individual judges acting not in their judicial capacities but as individual commissioners could exercise the duties conferred upon them by the statute."[21] Analyzing the distinction between judicial capacity and individual role is the topic of the remainder of this paper.

B. The Statutory Issue Addressed

The belief that the judges could sit as commissioners rested on two propositions, a question of statutory interpretation that the judges discussed and an additional constitutional question regarding the permissibility of dual office holding that they did not discuss.[22] The statutory difficulty is that the Act imposed its duties on the "circuit courts." Had it imposed the duties on the judges of the circuit courts, or even more cleanly on the present judges of the circuit courts, the statute could be read to designate those people as what the judges ended up calling "commissioners," that is, bureaucrats for the purpose of administering the Act. In New York the judges understood the statutory difficulty but finessed it. As they saw it, the Act appointed commissioners "by *official* instead of *personal* descriptions." Having been so designated, the individual judges believed themselves to be commissioners and "therefore" to be "at liberty to accept or to decline that office." Because

> *the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress; and as the judges desire to manifest, on all proper occasions, and in every proper manner their high respect for the National Legislature, they will execute this act in the capacity of commissioners.*[23]

The Invalid Pensions Act of 1792 was a program of public assistance to help the families of soldiers injured in the Revolutionary War. It was intended to ease the plight of veterans, caused both by injuries and the economic disruption of the war's aftermath.

The judges in North Carolina were more circumspect, in part perhaps because at the time they wrote they had not yet been asked by any applicant to perform any duties either as judges or as commissioners. They too praised Congress's "benevolence" and spoke of their own "feelings as men for persons whose situation requires the earliest as well as the most effectual relief," but had "great doubts" that they "could be justified in acting under this act personally in the character of commissioners during the session of a court." Their concern was that the Act "appears" to give power "to the court only, and not to the judges of it." Implicitly countering one canon of statutory construction, that statutes of this sort should be construed to accomplish their benevolent purposes, with another one, the judges noted that the effect of acting as commissioners would be to "draw [ ] money out of the public treasury," and that their designation as commissioners should therefore be authorized by clearer language than that used in the Act. They did say that, once an application to them had been made, they might give more consideration to the view that they could act as commissioners.[24]

Finally, two of the judges in the district of Connecticut acted as commissioners "notwithstanding some objections." A newspaper in York, Pennsylvania, praised these judges' "candor and indulgence in proceeding to the laborious task of examining the claims of the numerous applicants for pensions, a task which, in their opinion, their duty does not require them to undertake." This, it said, did "great honor to their humanity and compassion."[25]

One of the judges in Connecticut was Associate Justice James Iredell, who had expressed misgivings when in the North Carolina circuit court. He elaborated on his reasons for acting as a commissioner, which he did only after "mature reflection" had overcome "considerable hesitation." His concern was whether the statute could fairly be interpreted to allow the judges to exercise "the authority individually... out of Court." He began by stressing the use in the statute of the term "Circuit Court."

> *These expressions are so strong that if there were not others in the Act to induce an opinion that Congress may probably have meant, in using the expression "Circuit Court," rather a designation of the persons in whom they chose to repose such confidence, than a description to be strictly confined to its legal import, I should deem it utterly unwarrantable to say that the authority could be exercised otherwise than in Court.*[26]

Justice Iredell then launched into an extremely ingenious bit of statutory interpretation, which, but for the benevolent purposes to which it was put, might seem more than a little hypertechnical. Justice Iredell found other language in the Act that led "to a very probable supposition that Congress may have contemplated it as a personal rather than a judicial exercise of power."

At one point the Act mentioned the District Judge, which

> *at least shows either that the Judge of the District Court was in that instance the object of their personal confidence as an individual, or that they did not think it material to distinguish accurately*

between the Court, as a Court, and the Judge of that Court as an Individual out of it.

Of course Congress could not have "meant otherwise" when dealing with the circuit courts. Justice Iredell had now found the statute "equivocal," and thought it appropriate to adopt the construction of the Act that would support it. Similarly, in directing that applications be received for at least five days, the statute provided that "it shall be the duty of the judges... to remain at the places where the said courts shall be holden, five days, at the least." To Justice Iredell, phrasing this requirement as imposing a duty on the judges, rather than directing the Court to sit for five days, further brought out the ambiguity in the Act. Consider, he said, a court that concluded its business in three days. The Act required them to remain for two more days. If they did so, they would be fulfilling a "personal trust" imposed on them as individuals, for their duties as judges would have been concluded. Next Justice Iredell mentioned the sloppiness of legislative drafting "where a Legislature are employed in transacting in a very short time business of the most intricate and important nature." It would have been better to designate the judges in their individual capacities, but, given the fact that circuit riding meant that Congress could not know in advance which Justice of the Supreme Court would be attending which circuit court, it would have taken a careful draftsman to figure out how to identify the judges individually.[27]

Justice Iredell concluded by saying that he was happy to be able to construe the Act to allow him to execute its purposes. His construction, as he saw it, made the Act "in all parts consistent and its purpose practicable." It also avoided the conclusion that Congress "with the purest intentions [had] inadvertently trespass[ed] on a boundary of the Constitution not immediately discernible." At this point, however, it may be that Justice Iredell himself had overlooked a boundary of the Constitution. He did note that he could not exercise the personal trust "in any manner inconsistent with [his] Judicial Duty," but he could not see such an inconsistency in the obligations imposed on him by the Act. Yet, it might have been thought that imposing additional, nonjudicial duties on judges was unconstitutional even if there was no "inconsistency" between the judicial and the nonjudicial duties. If we call the nonjudicial duties "executive" or "legislative" tasks, we can see that the problem is that dual office holding of this sort might infringe on ideas of the separation of powers. A closer examination of the Constitution's provisions regarding dual office holding, legislators, the President, and judges provides some indication of why neither Justice Iredell nor any of the other judges who served as commissioners in their "personal" capacities saw constitutional objections to that course of action.

Associate Justice James Iredell expressed misgivings about serving as both judge and commissioner because he worried that the statute would not allow judges to exercise their authority out of Court. Iredell did not, however, consider that his taking on the additional duties would be unconstitutional.

C. The Resolution

In 1794 the Supreme Court decided the case of *United States v. Yale Todd*.[28] Sitting as commissioners, Chief Justice Jay, Justice Cushing, and Judge William Law advised that Todd should receive a pension of $100 a year. Todd received his pension from the Treasury, and then was sued by the Attorney General for return of the payment on the ground that it was not lawfully authorized. The Supreme Court agreed with the position of the United States that, as the pleadings put it, "the... judges sitting

as commissioners and not as a circuit court had [no] power and authority...so to order and adjudge of and Concerning the premises." The Supreme Court did not issue an opinion in *Yale Todd*, and we therefore cannot know whether the judges lacked power because the statute did not purport to authorize them to act as commissioners or because, even if it did, it was unconstitutional, although the phrasing of the pleadings suggests that the statutory ground played the major role.

II. The Constitution and Dual Office Holding

Several provisions in the Constitution bear on the question of dual office holding. Article I, section 6, clause 2, the so called "incompatibility clause," addresses the issue directly:

> *No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.*

This provision, which bars members of Congress from serving in the executive branch and bars members of the executive branch from serving in Congress, might be taken to approve, or at least not invalidate, service by judges in Congress or the executive branch, according to the principle *expressio unis est exclusio alterius.*[29] In addition, the provisions regarding the ability of Congress to alter the salaries of the President and of judges suggest that the Framers thought that judges were less susceptible to certain types of corruption than were ordinary politicians. Yet, I believe, the arguments available from the framing ultimately have a gap that can be filled only by making assumptions about judges that are not easily reconciled with the basic presuppositions of the Framers' political thought.

A. The Incompatibility Clause

The primary purpose of the incompatibility clause is obvious. It is designed to avoid that bane of political life in civic republican theory, "corruption." Corruption, in this context as in others, took two forms. First, there is dependency. Members of Congress who also served in the executive branch might find themselves torn between their desire to advance their executive branch careers, which would make them dependent upon the President, and their desire to retain their electoral office. They could reconcile these desires by using their executive positions to enhance their political power as legislators, for example, by dispensing patronage to their constituents, but, given the President's role in the executive hierarchy, only if their use of patronage were approved by the President. By disbursing some portion of their executive assets to their constituents, thereby corrupting the constituency as well, members of Congress could enhance their long-term executive and legislative assets. This version of the concern for corruption as dependency, though, has some anomalies. It is, of course, quite symmetrical. I have presented the concern in the form of distortion of executive action in the service of legislative goals. But, corruption as dependency could also occur through the distortion of legislative action in the service of executive goals. To advance their executive branch careers, members of Congress could enact legislation that promoted the narrow goals of the executive branch, buying off opposition by enacting legislation that conferred benefits, unrelated to the executive's narrow goals, on the opponents. The symmetry of the arguments about corruption as dependency suggests that, without an additional theory to account for which force would be more powerful, dual office holding might be self-limiting, with those members of Congress dependent on the executive branch cancelled entirely by the members of the executive branch dependent on Congress.[30]

In addition, corruption as dependency accounts for only part of the incompatibility clause, the outright prohibition on dual office holding. In the debates over the Constitution, this prohibition was completely uncontroversial. What concerned the Framers was the first part of the clause, barring members of Congress from positions created or enhanced during their terms of office. Here the concern was

for a second type of corruption, the use of public offices to enhance the personal wealth of office holders. An ambitious man might seek election to Congress in order to create a position for himself to occupy after his brief period of service in the legislature.[31] Or, members of the House of Representatives might pay off their allies in the Senate by creating positions for them.[32]

The incompatibility clause guarded against this form of corruption, but only imperfectly. After all, as opponents of the Constitution noted, nothing in the clause barred a member of Congress from occupying a position already in existence during his term of office. Members could manipulate the occupants of existing positions to create vacancies to which they would then be appointed.[33] The risk of this sort of corruption might be lessened by certain structural constraints. For example, if "term of office" meant the entire period of service of a member, the longer the term--either by constitutional design, as with the Senate's six-year term, or through the practice of reelection--the less attractive this strategy would be, for more positions would have been created during the member's term. In addition, the ban on enhanced emoluments meant that the executive branch position would have to be one that was more attractive at the moment of entry into Congress, which would further limit the strategy. And, to the extent that a member might hope that his former colleagues would reward his service in Congress by increasing the pay after he left Congress, the implicit bargain could not be enforced, thereby introducing some risk into the strategy of seeking election in order to occupy an executive branch position.

These constraints on corruption as office seeking seemed inadequate to some at the Convention, for the initial version of the incompatibility clause barred members of Congress from taking an executive branch position for one year after they left Congress, as well as during their term of service in Congress. Hamilton, who recognized the danger of dual office holding, opposed this broader exclusion. As he saw it, "take mankind in general, they are vicious." People are motivated by a combination of ambition and interest, and the prospect of an executive branch position was one of the motivations ambitious and self-interested people--all there were, after all--would have for serving in Congress.[34] Madison proposed the emoluments clause as "a middle ground" that would encourage legislative service without running the danger of a proliferation of unnecessary or unnecessarily expensive offices.[35] The incompatibility clause in its final version, then, combined the civic republican concern for avoiding corruption with the liberal recognition that people were moved primarily by self-interest (of which ambition was a subdivision). In this it mirrored the structure of the Constitution as a whole.

Having seen the two forms of corruption that the incompatibility clause guarded against, we can examine the possible grounds for exempting federal judges from a similar prohibition.[36] One ground might be that the anticipated length of service of federal judges was so great that even self-interested and ambitious people would not rationally calculate that their long-term goals could be met first by serving in the judiciary and then moving on to an executive or legislative branch position.[37] This might reduce the risk of corruption as office seeking, but it is not responsive to the problem of corruption as dependency. Consider, though, the federal judge who simultaneously serves in an executive branch position. In what sense is that judge dependent on the President? As the Court in *Mistretta* pointed out, the constitutional guarantees of tenure and salary mean that a judge who displeases a President might lose the executive branch position but otherwise can suffer no retaliation.[38]

Corruption, though, is not avoided simply by establishing a structure that makes it possible for someone to be independent. Dual office holding poses the risk that the office holder will shade his or her judgments in the service of Congress or the President. Here, finally, we come to what seems to me the only substantial difference between legislators and executive officials on the one hand and judges on the other. As Hamilton put it in one of the most celebrated passages in *Federalist* 78, the judiciary has "neither force nor will but merely judgment."[39] It would appear, then, that as a matter of definition judges are not susceptible to the corruption of dependency. A similar definitional move occurs at the end of the same paper, in Hamilton's defense of life tenure for

federal judges. "To avoid an arbitrary discretion in the courts," Hamilton wrote, judges must be bound by "strict rules and precedents," which "must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them." Few people would have the necessary skill, "and making the proper deductions for the ordinary depravity of human nature, the number must be still small of those who unite the requisite integrity with the requisite knowledge."[40] Federal judges will simply be people of sufficient integrity to guarantee that they need not be barred from dual office holding in order to avoid the risk of corruption as dependency.

At this point, though, we have come up against one of the most fundamental difficulties in the Constitution's attempt to reconcile civic republicanism and liberalism. Structures get us a long way toward a virtuous government made up of vicious people, but at crucial points we apparently must simply assume that people of integrity will occupy at least some positions in the government. I will return to this difficulty after considering another structural contrast between federal judges and other officials of the national government.

B. The Salary Guarantee

Federal judges are protected in Article III against a reduction in their salaries. There is another salary provision in the Constitution. Article II, section 1, paragraph seven provides that

the President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected.

Originally Article III would have similarly barred increases as well as decreases in judicial salaries, but the ban on increases was struck by a vote of six states to two.[41]

On the face of it, eliminating the bar to salary increases is entirely sensible. The President was to serve a four-year term, while the judges had lifetime appointments. The longer the term was, the more vulnerable the occupant of the position was to fluctuations in the value of money. A ban on salary increases for federal judges would make it impossible for Congress to respond to changing economic circumstances.[42]

Yet, giving Congress that power did create some risks. In discussing the salary provision for the President, Hamilton said that it meant that Congress could neither "reduce him by famine" by reducing the President's salary nor "tempt him by largesses" by increasing it. "They can neither weaken his fortitude by operating upon his necessities; nor corrupt his integrity by appealing to his avarice."[43] The ban on salary reduction for judges did indeed avoid "famine." Governeur Morris, moving to strike the ban on salary increases for judges, contended that "this would not create any improper dependence in the Judges." Madison, though, responded that a situation in which there would be "some dependence" was troublesome.[44]

And "some dependence" there would surely be. Consider, for example, the problems faced by federal judges during periods of relatively rapid inflation. Congress will be concerned with a range of public issues, some related to inflation and others unrelated to it. Somehow the federal judges have to get the attention of a Congress with many other things to do. One attention-getting device is to act visibly in ways showing that the judges are basically on Congress's side. Even more dramatically, consider a Congress desirous of getting the courts to rule in a particular way. Just as it could tempt the President "by largesses," so it could tempt the judges, offering them substantial increases in salaries as part of an implicit deal regarding what the judges would then do. The judges might resist the temptation, or they might renege on the implicit deal, but then, so could a President, whom the Constitution had to hedge around with a ban on salary increases.

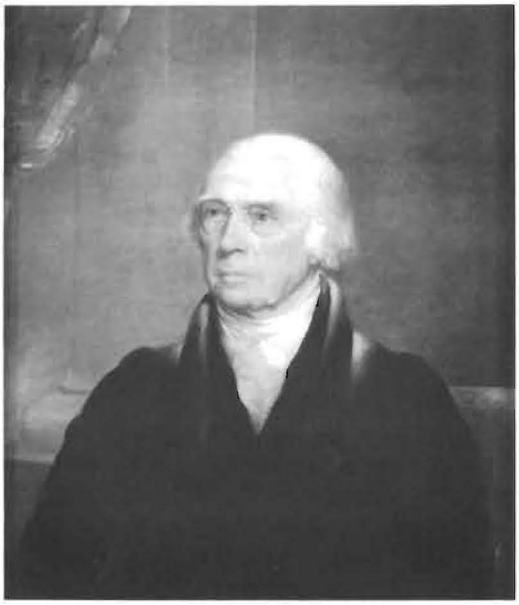
It is possible, of course, that the risk of this sort of behavior by judges was low enough to be acceptable, particularly in light of the difficulty of devising a salary provision that took account of the judges' lifetime terms.[45] We might wonder, though, why the identical risk was too great in the case of the President, again putting aside the greater ability to guard against the risk in that instance. As with the absence of a ban on dual office holding for federal judges, it seems likely that the Framers assumed that

judges were somehow different from ordinary politicians. Their technical training, and the fact that their power lay in exercising judgment rather than force or will, meant that they were simply less susceptible to corruption than ordinary politicians. I will consider this assumption, and its implications for our understanding of the structure of the Constitution, in the final section of this paper.

III. The Republican/Liberal Tension in the Constitution

Recent scholarship has directed our attention to the civic republican assumptions that underlie the Constitution, assumptions that, we are told, were held by the Framers' generation and are, in any event, normatively attractive.[46] As we have seen, though, the more traditional account of the Framers as liberal individualists is also accurate. The Framers' generation, that is, was both liberal and republican.[47] Because the fundamental assumptions of civic republicanism and liberalism are incompatible, the structure of the Constitution, which attempts to incorporate both sets of assumptions, is bound to be awkward. This awkwardness is apparent in The Federalist Papers, whose discussion of certain issues unrelated to dual office holding illuminates that problem as well.

Consider first the basic problem of dual office holding when judges are involved. Federal judges might have been used as commissioners in pension cases for a number of reasons, including efficiency and avoiding patronage. Among those reasons might also be the republican one of utilizing the federal judiciary to demonstrate visibly the virtue of the national government in dispensing justice, both in deciding cases and in the broader domain of public policy represented by the pension statutes.[48] Yet, we should recall that the judges were employed in the first place in part to avoid the susceptibility of ordinary "men of good character" to the "influence of humanity," and then compare that to the judges' willingness, out of concern for the "exceedingly benevolent" purposes of the statute, to act as commissioners. This contrast suggests that, at least in situations where the judges' distinctive technical abilities were not directly implicated,[49] they were not all that different from ordinary men of good character.[50]



Although James Madison extolled the virtues of a representative democracy, he was quick to note that it did not guarantee that "men of factious tempers, of local prejudices, of sinister designs" would not get elected.

In Ralph Lerner's analysis of the judiciary as expositors of republican virtue, technical ability plays a crucial role.

> *The judiciary is the only branch of the government whose members require special training and competence, and one of the effects of that training is to set those individuals apart from the populace. The judicial function itself occupies some sort of middle ground between a technician's deductions from general rules and a legislator's pure reason prescribing such general rules. In construing the Constitution, the judge performs a political duty through the exercise of a technical duty.*[51]

As an exposition of the Framers' assumptions, Lerner's is persuasive. Yet, he offers little reason to explain why technical ability as a limitation to the power of the courts solves the problems of corruption, or susceptibility to corruption, that concerned the Framers.[52] What we might call today the socialization of judges into the professional culture is assumed to constrain them from corruption in contrast to ordinary politicians, who are socialized into either a purely political culture or into

the cultures of diverse non-technical occupations and professions. What this overlooks, though, are two possibilities. First, as the judges' benevolent instincts in administering the pension act suggest, the technical and professional culture may not be strong enough to support the kind of fortitude that Lerner's analysis requires. Second, the technical culture of lawyers itself contains the potential for corruption, at the least in the service of the profession itself and perhaps more generally in the service of the strata of society from which lawyers are likely to be drawn.

Lerner offers a reading of The Federalist in which virtue prevails in the judiciary because of ungrounded assumptions about the impact of technical training on judges. The same kinds of difficulties pervade The Federalist, and a brief examination of some other important aspects of its argument will shed further light on the problem of dual office holding. Madison's classic discussion of the virtues of an extended representative democracy in *Federalist* 10 begins by saying that a representative democracy

refine[s] and enlarge[s] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.[53]

If we could be sure that the representatives would be people of that description, the case for representative democracy would be easy. But, as Madison immediately notes, there are no such guarantees.

Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people.[54]

Madison then argues that such people would have a harder time of it in an extensive republic. Organizing a vicious faction is more difficult in a larger republic, both because the individual districts will be larger so that to "obtain the suffrages" by corruption and the like will be more difficult and because combining the interests of numerous districts is likely to be difficult for technical reasons.

Already we can see some difficulties in Madison's account: If members of the electorate whose votes are not obtained by corruption are "more free" and are therefore "more likely to center on men who possess the most attractive merit and the most diffusive and established characters,"[55] one wonders why representative rather than direct democracy is appropriate. Madison's later discussion of federalism compounds the difficulty. In arguing that those who are attached to their state governments need not fear encroachments by the new national government, Madison says that the people who are selected for office in the national government are likely to have extensive contacts with the states, so much so that "a local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States."[56] Here too Madison appears to argue that the people, left to themselves, will choose as members of Congress people just like themselves, in which case it is unclear how the people's views will be "refined and enlarged" by means of their representation in Congress. These difficulties in Madison's account result, I believe, from the impossibility of combining civic republican assumptions with liberal ones. The people are simultaneously self-interested and factious, susceptible to corruption in the service of self-interest, and yet able to discern and choose those with the more diffusive characters. Similarly, their representatives are going to be just like them in their attachment to the states, and yet somehow able to select national policies that overcome those local attachments.

A second form of the general problem is presented in The Federalist's account of judicial review. As we have seen, the judiciary is said to have only judgment, and not force or will. Yet, the general account of the separation of powers offered earlier in The Federalist insists that, for the system to work, each branch must have a will of its own, such that "the interest of the man must be connected with the constitutional rights of the place" through the mechanism of "ambition...counteract[ing] ambition."[57] If the judges do not have will--ambition in the relevant sense--they cannot resist the encroachments of the other branches, and yet if

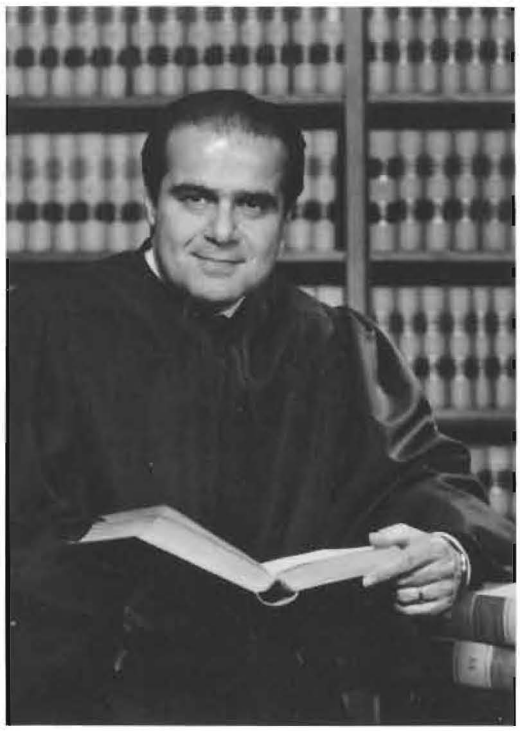
they are willful they lose what makes the judicial branch distinctive. I have argued elsewhere that The Federalist is able to resolve this tension only by adopting a normative theory of constitutional interpretation that is ungrounded in the assumptions about human motivation that it adopts.[58] The normative theory is ungrounded, once again, because the assumptions are internally incompatible.

The problem of dual office holding displays the same difficulties. Nothing in the structure of the Constitution guarantees that judges will differ from ordinary politicians in their motivations. Technical training, life tenure, and salary protection all contribute to a set of motives that is different from the set of motives held by ordinary politicians, but there are elements common to each set, and it is those common elements that cause the difficulties of corruption by dependence. It turns out, then, that the differences in structural arrangements for legislators, members of the executive branch, and judges are the product of the fundamental tension in the Constitution between civic republican and liberal assumptions.

The problem posed by *Hayburn's Case* suggests one method for resolving that tension. The tripartite structure of the government created by the Constitution suggests that the Framers had some distinctions in mind among policy, law, and administration. Yet, the problem posed by *Hayburn's Case* shows that it is too facile to identify policy with the legislature, law with the judiciary, and administration with the executive branch. Rather, the allocation of those functions to different branches was worked out in the early decades of the Republic. Judges sitting as commissioners were law propounders who, in another capacity, could administer the law. Eventually administration and law were more sharply separated. Law and policy were more cleanly separated from the beginning, with the rejection of the proposal that the Justices of the Supreme Court sit as a Council of Revision whose charter would allow them to disapprove legislation on policy as well as on legal grounds. Yet, as George Haskins and Herbert Johnson argued, the final steps in the separation of law and policy were not taken until, as part of a general political strategy on the part of the Marshall Court, the Supreme Court in the early years of the nineteenth century provided a firm grounding for the distinction.[59]

In concluding, it may be helpful to examine two recent cases in which the Supreme Court examined the problem of dual office holding. In both the Court's conceptualization of the problem seems rather different from the concern for dependency and corruption that the Framers expressed. *Schlesinger v. Reservists Committee to End the War* was a challenge to a system in which members of Congress were allowed to hold commissions in the reserve forces of the United States.[60] The challengers argued that commissions in the reserves were "offices of the United States" which members of Congress could not, under the Incompatibility Clause, occupy. The Supreme Court refused to address the merits of the challenge, holding that the plaintiffs lacked standing. Justice Douglas dissented from the denial of standing, arguing that the essence of plaintiff's claim was that the Incompatibility Clause was designed to protect against the appearance of a conflict of interest arising because of dual office holding.[61] As we have seen, the concepts of corruption and de-

Justice Antonin Scalia dissented in *Mistretta*, taking issue with the Sentencing Commission's authority to make law by objecting to what he perceived as a violation of the norms of democratic responsibility.



pendency are related to, or at least can be rephrased in modern terms as, the idea of avoiding a conflict of interest. Yet, in the Framer's era, the problems of corruption and dependency were much more intimately connected to ideas of governing a democratic republic than the relatively bland phrase "conflict of interest" suggests.

As in *Reservists*, so too in *Mistretta* is the sense that there is something problematic about dual office holding expressed only in dissent. The majority opinion in *Mistretta* conveys no sense that there is some tension between dual office holding and the basic premises of our constitutional system, although it expresses some misgivings about the overall design of the Sentencing Commission. Justice Scalia's dissenting opinion focuses on the delegation of lawmaking authority to the Commission, and objects to the Commission in part because it violates norms of democratic responsibility and in part because even if it does not do so directly, it threatens to lead Congress down the slippery slope to real incursions on democratic responsibility.[62] Here we can see some indication of the connections among dual office holding, corruption, dependency, and the design of a democratic republic. Even so, the threat that concerns Justice Scalia comes from Congress; he does not acknowledge what the Framers knew but could not fully deal with, that judges perhaps only slightly less than ordinary politicians combine self-interest, ambition and civic virtue in ways that pose threats to the development of sound public policy. Justice Blackmun's opinion for the Court is more straightforward. Transforming Hamilton's idea that judges have special technical training in the law into a general defense of bureaucratic expertise, Justice Blackmun found the Sentencing Commission justified because of the judges' "experience and expertise."[63]

I have argued that the Constitution did not resolve, because the Framers' political theories made it impossible for them to resolve, the tension between civic republicanism and liberalism that the Constitution's treatment of dual office holding exemplifies. Those theories, though, are quite rich. Somehow *Mistretta* seems distressingly thin in contrast. Yet, may not that result, too, from the impossibility of carrying out the internally inconsistent program of the Constitution?

Acknowledgements: *I would like to thank Vicki Jackson, Susan Low Bloch, Maeva Marcus, and Gerry Spann for their comments on a draft of this essay.*

Endnotes

1. *Mistretta v. United States*, 109 S.Ct. 647 (1989).
2. The most recent presentation is Marcus & Teir, "Hayburn's Case: A Misinterpretation of Precedent," 1988 *Wis. Law. Rev.* 527, which focuses on an aspect of the case not dealt with in this paper.
3. For reasons that will appear, I use this anachronistic term deliberately.
4. Act of Mar. 23, 1792, 1 Stat. 243 (1792).
5. Rakove, "The First Phases of American Federalism," in Comparative Constitutional Federalism (M. Tushnet ed. 1990).
6. The Federalist Papers 45, p. 291 (C. Rossiter ed. 1961).
7. For an additional reason for conferring the duties under the Invalid Pensions Act on the circuit courts, *see* text accompanying note 47 *infra*.
8. 1 American State Papers (Claims), 28.
9. For a recent discussion, *see* Holt, " 'The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects': The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793," 36 *Buff. Law Rev.* 301 (1987).
10. 1 American State Papers (Misc.), 50 (New York), 51 (Pennsylvania).
11. The delay may also have resulted from the strength of Justice Iredell's misgivings about his position, and from his desire to wait until he was on his home ground to express them.
12. *Id.* at 52-53. In October 1792, Justice Thomas Johnson joined his colleagues by refusing to process applications by veterans, saying only that the court could not "constitutionally take Cognizance of and determine [the] said Petitions." *See* Bloch, "The Office of Attorney General on Its Bicentennial; From Edmund Randolph and *Hayburn's Case* to Edwin Meese and Special Prosecutors--Lessons From the Past," *Duke L.J.* (forthcoming).
13. Russell Wheeler suggests that the determination of the pension level was what made the task nonjudicial, because the standard that the rate must be comparable to the

applicant's degree of disability was so vague that it would inevitably elicit nonjudicial policy judgments. Wheeler, "Extrajudicial Activities of the Early Supreme Court," 1973 *Sup. Ct. Rev.* 123, 137. In modern terms this would be an objection that the delegation of authority to the judges failed to provide them sufficient guidance; again in modern terms, that objection would almost certainly fail, as the Court's analysis of the nondelegation issue in *Mistretta* demonstrates.

14. *See Tutun v. United States*, 270 U.S. 568 (1926); Hart and Weschler's The Federal Courts and the Federal System 99-101 (3d ed. 1988); Wheeler, *supra* note 12, at 134-35.

15. *Gordon v. United States*, 117 U.S. 697, 702-03 (1866) (appendix).

16. *District of Columbia v. Eslin*, 183 U.S. 62 (1901).

17. *See* Hart & Weschler, *supra* note 14, at 104-05.

18. *Glidden Co. v. Zdanok*, 370 U.S. 530, 570 (1962) (opinion of Harlan, J., announcing the judgment of the Court).

19. Act of Feb. 28, 1793, 1 Stat. 324 (1793).

20. What the Supreme Court actually did do is insightfully analyzed in Marcus & Tier, *supra* note 2.

21. 109 S.Ct., at 670.

22. The judges in Pennsylvania did not address this question at all.

23. 1 American State Papers (Misc.), 50. Note, incidentally, that the praise of Congress's benevolence undercuts the argument that the possibility that Congress might not appropriate money for the pensions makes the judges' decisions subject to legislative revision.

24. *Id.* at 53.

25. *Pennsylvania Herald and York General Advertiser*, York, Pa., Oct. 10, 1792. (I am grateful to Maeva Marcus and Susan Low Bloch for making this and other material used in this essay available to me.)

26. Quoted in Marcus and Teir, *supra* note 2, at 39-40.

27. Wythe Holt has pointed out to me that at the time the Act was passed, the Justices were fixed in their circuits not by statute but by their own internal rule. Before the Act was passed on March 23, Justice Iredell had apparently been assured by his brother-in-law that the Judiciary Act would be amended to require rotation of the Justices among the circuits, which it was on April 13. *See* Holt, " 'The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects': The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793," 36 *Buff. L. Rev.* 301, 329-30 (1987).

28. For a recounting of the decision, *see United States v. Ferriera*, 54 U.S. (13 How.) 40, 52-53 (appendix).

29. *See Mistretta*, at 668.

30. The additional account, of course, was the assumption common to the Framers that Congress was the branch most likely to end up controlling the government. *See, e.g.*, The Federalist No. 51, p. 322 (C. Rossiter ed. 1961) ("In republican government, the legislative authority necessarily predominates").

31. *See*, e.g., 2 The Framers' Constitution 346 (P. Kurland & R.Lerner eds. 1987) (Butler), 347 (Mason), 350 (Gerry).

32. *See id.* at 352-53 (Wilson at Pennsylvania ratifying convention).

33. In fact, this possibility materialized in 1801. Three Federalist Senators and one Federalist Representative from the outgoing Congress that had created the so-called "midnight judges" in February 1801, each of whom had been defeated for reelection, were appointed by President Adams to the federal district court to replace district judges elevated to the new circuit courts. Although three of these nominees never sat (two because the judges who they were named to replace decided not to accept the elevation, and one because his commission was (improperly filled out), one, Elijah Paine, was a district judge for 41 years. (I thank Wythe Holt for this information.) S. Turner, "The Midnight Judges," 109 *U. Pa L. Rev.* 494 (1961).

34. *Id.* at 347.

35. *Id.* at 347-48.

36. It may be worth pointing out that a provision like the emoluments clause standing alone might have been sufficient to reduce the risk of corruption to an acceptable level, because the length of service of federal judges, with their lifetime appointments, might reduce the number of positions for which they are eligible quite substantially.

37. It may be worth noting that this prediction, if it was part of the calculation, may not be borne out by recent experience. For a list of people who resigned federal judgeships for executive or legislative branch positions, *see* Tushnet, Kovner, & Schneider, "Judicial Review and Congressional Tenure: An Observation," 66 *Tex L. Rev.* 967, 980 (1988). (The list would now include Kenneth Starr.)

38. *Mistretta*, at 674-75. The Court did note, at 675 n.34, that a judge fired by a President might suffer "some embarrassment or even damage to reputation," but considered that a judge who held an executive branch position would have assumed the risk of that harm. (It should be noted that Congress provided that the Sentencing Commission would be "located in the Judicial Branch." As far as I can tell, however, this statement has no analytical consequences either for the Court's discussion in *Mistretta* or for general constitutional concerns.)

39. The Federalist 78, p. 465 (C. Rossiter ed. 1961).

40. *Id.* at 471.

41. 4 The Framers' Constitution, *supra* note 31, at 133, 137.

42. *See id.* at 136-37 (Franklin: money may "become plentier"), 140 (Thomas McKean at Pennsylvania ratifying convention); The Federalist 79, p. 473 (C. Rossiter ed. 1961) (mentioning "fluctuations in the value of money," and the difference between salary provision for judges and the President). It should be noted that the "fluctuations" of concern all must be in the direction of inflation; in cases of substantial deflation, the ban on salary reductions would convert an acceptable level of pay into an extravagant one.

43. The Federalist 73, pp. 441-42 (C. Rossiter ed. 1961).

44. 4 The Framers' Constitution, *supra* note 30, at 136-37.

45. Madison proposed fixing salaries with reference to wheat or "some other thing of permanent value," *id.* at 137, which suggests the difficulty.

46. *See* "Symposium: The Republican Civic Tradition," 97 *Yale L.J.* 1493-723 (1988).

47. *See* M. Tushnet, Red, White And Blue: A Critical Analysis Of Constitutional Law 4-16 (1988), criticized on this point, among others, in Gerhardt, "Critical Legal Studies and Constitutional Law," 67 *Tex. L. Rev.* 393, 404-10 (1988).

48. For the basic insight, *see* R. Lerner, "The Supreme Court as Republican Schoolmaster," in The Thinking Revolutionary (1987; this essay was originally published in 1967). Lerner focuses on the judges' explicit instruction in

republican principles, as conveyed through their charges to grand juries, but his insight seems valid across a broader range of the judges' activities.

49. But *see* note 13 *supra*.

50. According to Wheeler, note 13 *supra*, at 138, the elimination of the judges from the administration of the pension act in 1793 was not primarily the result of the judges' constitutional objections to their role, but rather resulted from the generosity of the judges, sitting as commissioners, in awarding pensions. Given that many of the judges were in fact administering the pension statute, Wheeler's conclusion seems sound; the constitutional objection had been overcome by statutory interpretation, and there was therefore no longer any need to remove the judges from the administration of the act in order to avoid a constitutional problem.

51. Lerner, *supra* note 48, at 124. *See also id.*, at 130 ("at still another level--transcending its other functions, and implied in the technical knowledge needed by this branch of government alone--the judiciary stands as special guardian of the principles of the Constitution"), 133 ("The judges--and the judges alone, of all government officials--needed to have special training and character in order to do their job at all").

52. This is particularly evident because Lerner goes to some length to establish that the courts will not be "weak" or "unnoticed." *Id.* at 127.

53. The Federalist 10, p. 82 (C. Rossiter ed. 1961).

54. *Ibid.*

55. *Id.* at 83.

56. The Federalist 46, p. 296 (C. Rossiter ed. 1961).

57. The Federalist 51, p. 322 (C. Rossiter ed. 1961).

58. Tushnet, "Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers," 61 *S. Cal. L. Rev.* 1669 (1988).

59. G. Haskins & H. Johnson, The Oliver Wendell Holmes Devise History Of The Supreme Court Of The United States, Volume II: Foundations Of Power: John Marshall, 1801-1815 (1981).

60. 418 U.S. 208 (1974).

61. *Id.* at 232-234 (Douglas, J., dissenting).

62. *Mistretta*, at 680 (Scalia, J., dissenting).

63. *Id.* at 673.

Judging What Justices Do Off the Bench

Russell R. Wheeler

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Throughout its history, members of the Supreme Court have engaged in various politically significant activities in addition to deciding cases and explaining those decisions. My goal in this brief article is to consider the arguments supporting and discouraging such extrajudicial behavior, with reference to specific instances of such behavior throughout the Court's history.

Briefly, what are the various kinds of extrajudicial activity of interest to us as students of the Supreme Court? First are duties that Justices perform *ex officio*--such as the Chief Justice's service, pursuant to statute, as a member of the Board of the Smithsonian Institution[1] or as the presiding officer of the Judicial Conference of the United States[2] or of the Board of the Federal Judicial Center.[3] Somewhat akin to these specific *ex officio* designations are statutory requirements that a commission include a certain number of federal judges, without specifically designating the judges; Congress has required that the United States Sentencing Commission include at least three federal judges,[4] a requirement that the Supreme Court has said is consistent with the Constitution.[5]

Second, Justices have accepted personal appointments to official government posts, usually temporary ones. Chief Justice Earl Warren, for example, accepted President Johnson's request that he chair the commission that investigated the assassination of President Kennedy.

Third, Justices have engaged in all kinds of informal political and governmental activity, such as providing advice to Presidents and members of Congress, to candidates for those offices, and, in general, participating in the political affairs of the day. Bruce Murphy's 1982 book documenting the off-the-bench and out-of-the-limelight lobbying by Justices Brandeis and Frankfurter[6] shocked casual observers by revealing more extensive activity than most people assumed is the case.

One might first ask why Justices should engage in extrajudicial activities. There are several conceivable benefits from various kinds of extrajudicial behavior, benefits that I summarize here and then discuss in more detail. First, the role of judges in political society may give them unique attributes to bring to other aspects of public policy. At a different level, they bring the special knowledge and perspective of those who have "been there" to debates over how our judicial institutions should be administered and who should be judges. In addition, judges have likely developed perspectives and some degree of political acumen before their appointments that could be put to extrajudicial service. And, by a similar token, an occasional extrajudicial role might maintain the breadth of a judge's perspectives and inform the judicial mind.

To many, these statements do nothing but illuminate the threats that extrajudicial activity poses to the judicial function. That activity may,

By statute, the Chief Justice of the United States is Chairman of the Board of the Federal Judicial Center. On January 24, 1969 members of the first Board of the Federal Judicial Center posed for this photograph: *(standing, left to right):* Judge Wade McCree; Judge Harold Tyler; Ernest C. Friesen, Jr., Director of the Administrative Office; *(seated, left to right)* Justice Tom Clark, Director (as Director of the Center, he was not a member of the Board); Chief Justice Earl Warren, Chairman; Judge James Carter; and Judge Edward Deritt.

by example, deprive judges of the time and energy they need to decide cases fairly and explain their decisions clearly. Extrajudicial contact with a matter may inhibit the impartial consideration of that matter in the context of litigation. Similarly, the desire to stay in the graces of a President who could bestow the favor of an extrajudicial activity might prevent their considering other matters impartially. Finally, regardless of whether an extrajudicial activity affects judicial behavior, it may create doubt -- an ambiguity -- in the minds of those who must have confidence that judges will be fair, those without whose confidence the judicial fiat stands in danger of disrespect.

I In Support of Extrajudicial Activities

Ajudication, especially constitutional ajudication, requires judges to participate in political society in a special way, applying fundamental norms to resolve controversial fact situations. This experience, building on judges' pre-judicial experiences, arguably creates a unique political perspective and even political skills that might well be of value to the resolution of matters outside case-or-controversy fora. This view was held much more widely in the founding period than it is now. Many then agreed with George Mason, who told the constitutional convention that the judges' "habit and practice of considering laws in their true principles, and in all their consequences," laid a strong case that "further use be made of the Judges, of giving aid in preventing every improper law."[7] In fact, John Jay's major contribution as Chief Justice was to show the dangers of too heavy a reliance on "further use" of judges as commission members and presidential advisers.[8]

Despite Jay's efforts, Presidents and Congress have continually called upon members of the Court for additional service, as when Justice Jackson took on the job of chief American prosecutor at the Nuremberg trials. One of Jackson's colleagues at Nuremberg justified Jackson's role in a blunt, if possibly self-serving, fashion: Fourth Circuit Court of Appeals Judge John Parker proclaimed that Jackson's mission was justified because there are occasionally calls "for a judge to do something for his country which no one but a judge can do so well."[9]

Obviously the degree to which judges can contribute extrajudicially as judges will vary with the task at hand and with the judge performing it. A desire to grace an important mission with an ornament of impartiality is not enough to justify involving judges in the task. For example, having Justices serve on the commission to resolve the disputed presidential election of 1876 appears, in retrospect, to have been a poor idea. Given the venality of the age, and the Court's still-incomplete recuperation from the *Dred Scott* wound, it was unlikely that the Justices' service could have helped resolve challenged election results at the end of the Reconstruction Era. The problem is captured in a Southern newspaper's editorial hope that "if Justice Bradley could withstand the party pressure that reached him [to sustain Reconstruction legislation on the Bench], there does not appear to be any reasonable grounds for supposing that he will succumb to such pressure" on the commission.[10] I have serious doubts, for a contemporary example, that the Supreme Court Justices should be directed to set congressional salaries, despite the assertions by two members of the Senate leadership in 1982 that a constitutional amendment to that end would be the "wisest and most apolitical delegation of such compensation setting authority...."[11]

Few, however, would contest the basic assumption behind Canon 4B of the American Bar Association's Code of Judicial Conduct. The canon permits judges to write and lecture on the administration of justice, to appear before or consult with governmental bodies or officials on matters concerning the administration of justice, and to serve as members or directors of judicial improvement organizations. In these matters, asserts the commentary, a judge "is in a unique position to contribute," and it encourages judges to do so as their time permits.[12] Procedural rule-making benefits from their involvement.[13] Their advice on jurisdictional matters, for which Alexander Bickel claimed they are "uniquely expert,"[14] is similarly beneficial. Even though judges are hardly infallible in shaping judicial administration policies, and although they certainly do not reflect all the perspectives that need to be brought to bear on the process, surely they should be heard.

Judges have also been active participants in the process of choosing other judges. Frankfurter, for example, developed a particular view of criteria that should--and that should not--govern judicial selection;[15] it would be surprising to find a judge who has not. Judges know, in a way that others cannot, what the judicial office entails, what qualities it needs most, and what kinds of individuals would be appropriate for it. "Merit selection" commissions for state judicial nominations often include judges as members. In Missouri, where the system has been most rigorously probed, Watson and Downing report that of all the commissioners, "the judges...have evidenced the greatest variety of perspectives on judicial selection."[16] They bring the lawyer's knowledge to the task, but without attendant bar rivalries, and they surely have a special insight into what the job of judging entails. As with judicial administration innovations, sitting judges' perspectives on judicial selection are limited and hardly apolitical, and there are risks, described below, to their involvement. But there are benefits as well.

Judicial-related attributes aside, individuals who manage to get appointed to the bench, especially the highest bench in the land, presumably bring to their chambers more than legal experience and perspective. Almost by definition, they have been actively involved in the affairs of the day. Forbidding all extrajudicial service would, by definition, deprive the nation of benefits of those personal attributes.

Forbidding extrajudicial activity is, in a sense, at odds with the democratic notion that poltical society benefits from the participation of its members. Justice Douglas once expressed something of this view. In 1939, the Supreme Court decided *O'Malley v. Woodrough*,[17] up-

holding the constitutionality of legislation subjecting federal judges to the income tax.

"As I entered my vote in the docket book," Douglas claimed,

I decided that I had just voted myself first-class citizenship.... Since I would be paying as heavy an income tax as my neighbor, I decided to participate in local, state, and national affairs, except and unless a particular issue was likely to get into the Court, and unless the activity was plainly political or partisan.[18]

Douglas's assertion of cause and effect is somewhat disingenuous: even without *O'Malley,* one suspects, he would have decided to "register and vote;...fight to raise the level of the [Yakima] public schools [and] become immersed in conservation, opposing river pollution, advocating wildlife protection, and the like... [and] travel and speak out on foreign affairs."[19]

To say that we have no assurance that Justices' activities off the Bench will produce "contributions" is to miss the point entirely. We would not think of requiring such assurances before sanctioning the political activities of any non-judge.[20] Brandeis's role in turning the direction of the New Deal, or Frankfurter's in affecting American foreign policy,[21] would not have unanimously been labeled "contributions" at the time, nor would they today. The test of the propriety of their action is not the degree of approval on the merits, but the costs, if any, to the Court -- and to the system of justice generally -- of Supreme Court Justices' acting extrajudicially.

Finally, it may be that extrajudicial activity can also work to the advantage of the judicial process itself. Justice Douglas offered a stronger reason for exercising his "first-class citizenship" than his status as a taxpayer, a reason captured in his rather cavalier assertion that a "man or woman who becomes a Justice should try to stay alive; a lifetime diet of the law alone turns most judges into dull, dry husks."[22]

Then-Associate Justice Rehnquist treated a tangential aspect of this question in explaining his refusal to disqualify himself from the Court's reconsideration of *Laird v. Tatum*[23] because of his involvement as an executive department official in matters before the Court. Apart from his specific involvement with the matter was the contention, as he summarized it, "that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance." Rehnquist's response serves as a reminder that Justices of the Supreme Court are drawn from the legal political community in part because they are among its more prominent members. He noted numerous Justices who, before they went on the Bench, played roles in matters that presented themselves to the Court in the case-or-controversy context, and reasoned that it

would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete tabula rasa *in the area of constitutional ajudication would be evidence of lack of qualication, not lack of bias.*[24]

The question remains whether certain kinds of extrajudicial activities might similarly enhance a Justice's work on the Court. Judging in a democracy is a vital process, and the nation has some interest in knowing that its judges are not permanently cut off from the juices that flow through society. Moreover, it may be that Justices see the opportunity for such involvement as an advantage. The reaction of one of Brandeis's law clerks, J. Willard Hurst, to Murphy's book on Brandeis and Frankfurter is instructive: "The Supreme Court deals with matters of important public policy," and thus, he said, "[y]ou want people sophisticated in the affairs of the country, not the naive or simple-minded...."[25] To seek extrajudicial outlets may be a natural inclination of the kind of people appointed to the Court. Brandeis and Frankfurter, one suspects, may have seriously reconsidered joining the Court if all extrajudicial involvement could, somehow, have been proscribed. They would have been different persons, at least, frustrated by the proscription. Would the nation have benefited from either of those possibilities?

II Questioning the Dangers of Extrajudicial Activity

In *O'Malley*, the case that Justice

Douglas claimed liberated him from a life beyond the purple curtain, Justice Frankfurter wrote that judges' "particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[26] Judges do have a "particular function in government," which takes precedence over any other function. The benefits that extrajudicial activities may bring to American political life must be weighed against the burdens those activities may impose on that particular function.

Weighing those burdens, to be sure, requires a profound judgment. It also requires, much more than commentators have been willing to acknowledge, answers to basically empirical questions, *i.e.*, questions of fact that can, in principle at least, be proved wrong. We are short on facts and long on suspicions about the consequences of extrajudicial activities.

The facts needed to inform our judgment are of various types. Some can come only from the judges and those who work directly with them. For example, what *is* the impact of extrajudicial activity on judges' time demands and work habits? Although there have been some efforts to measure how judges spend their time, there has been no focus on extrajudicial activities' impact on their judicial work and such a focus would surely be seriously blurred.[27] Our sense of the costs that discrete extrajudicial activities may extract is likely to derive largely from specific examples. Chief Justice Warren, for instance, insisted that he would not give up

Members of the Court donned morning dress to march in President Kennedy's funeral procession along Pennsylvania Avenue. Depicted from left to right are Potter Stewart, John Marshall Harlan, Earl Warren, Hugo Black, William Douglas, Tom Clark, Byron White, Arthur Goldberg, and William Brennan. Chief Justice Warren did not give up his judicial duties when he agreed to head the commisssion that investigated the Kennedy assassination, so he commuted between the two offices, working until midnight for ten months straight.

his judicial duties during the investigation of the Kennedy assassination. After he left office, he told a television interviewer that he "would run back and forth between [the Court and the commission offices across the street]. I don't believe I left my work before midnight any night for ten months."[28] What the impact of the extra burden was on his Supreme Court activities one can only surmise.

Justice Frankfurter's extrajudicial work also had an impact on his Court work. During Frankfurter's pre-and early-World War II involvement in all manner of foreign policy matters, his rate of opinion production did not decline, evidently because he delegated a larger share of his judicial work to his law clerks during the period from 1941 to 1943 than he did before or after it. Save for those years, Frankfurter himself prepared the initial drafts for his judicial opinions. From 1941 to 1943, however, his law clerk did so in every case but one.[29] Although any difference in the final product has evidently eluded observers of the Court, the shift in work patterns was arguably an abdication of judicial responsibility to pursue extrajudicial goals. But what of the benefits -- if that is what they were -- that the arrangement allowed, especially since, if Murphy is to be believed, Frankfurter may have influenced some important events in ways in which others could not?

A judge's judicial administration work -- in which the judicial perspective is essential but not sufficient -- presents this matter of costs and benefits in sharper contrast. We accept as elementary the normative proposition that each judge should dispose of the cases before him or her as fairly, quickly, and economically as possible. Such case disposition may not be achievable simply if each judge tries hard to do so. The administrative and organizational arts -- securing resources, devising procedures, promoting cooperation, and assessing what works -- are necessary to the objective, surely, in any large court system, and judges must perform them. The administration of justice is a systemic need that may deserve a judge's time at the expense of prompt attention to an individual case or set of cases.

Perhaps the most frequently asserted cost of judges' extrajudicial activity is bias -- the inability to do justice because an extrajudicial contact creates a partiality to one side that affects the judge's decision. What of it when judges are asked to decide questions on the bench that bear a relatively distinct relationship to matters that they touched off the bench, perhaps in a lecture, perhaps in an informal consultation with a government official? The late Alexander Bickel took up an aspect of this question during Senate Judiciary Committee hearings in the wake of Justice Fortas's resignation:

> *[A] judge is supposed to have an open mind, or at least a mind reachable by reasoned briefs and arguments. If he goes on public record concerning issues that are likely to come before him in his judicial capacity, he thereby at least appears to close his mind, to make himself less reachable by reasoned briefs and arguments. And in some measure every man who goes on record in this fashion does in fact close his mind.*[30]

Here we have some clear questions about how human beings behave. Was Bickel right, for example, in the basic message of his hyperbolic assertion that "[n]othing is more persuasive to ourselves than our own published prose"?[31]

Answers to that question have been consistently intuitive, perhaps reflecting larger policy objectives. English judges in the eighteenth century justified their practice of giving advisory opinions with the claim that they could change their minds "without difficulty"[32] if arguments at bar showed an earlier advisory opinion to be in error. Vermont Congressman Israel Smith told his colleagues in 1802 that "nothing gives [a judge] greater pleasure than to have it in his power to correct an error, which he may discover in a former opinion."[33] Smith, though, was arguing for abolition of the separate circuit courts created by the Federalist Judiciary Act of 1801,[34] one effect of which would be to restore the Justices' dual service as circuit judges. The Justices themselves, however, had never wanted the onerous burden of traveling about the circuits. Ten years earlier, in making their case, they told Congress that

> *appointing the same men finally to correct in one capacity the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confi-*

Would Justices Louis Brandeis and Felix Frankfurter have joined the Court if all extrajudicial activities had somehow been proscribed? Frankfurter certainly enjoyed involving himself in matters extrajudicial--notably U.S. foreign policy--but this involvement does not seem to have diminished the rate at which he wrote opinions.

dence in the Supreme Court which it is so essential to the public interest should be reposed in it.[35]

Justice Blair put the question when the Court reviewed a circuit court's decisions. He recused himself but announced that he held "the impressions which my mind first received," adding parenthetically, however, that he did not know if those impressions persisted "whether through the force of truth, or from the difficulty of changing opinions, once deliberately formed."[36]

It takes nothing from the eloquence of the phrasing -- nor the sincerity of the writers -- to observe that the debate has not come very far in almost 200 years. Is our knowledge -- not suspicion, but knowledge -- about the factors that may create extrajudicial bias much more today than it was in the eighteenth century?

The ways in which extrajudicial activity might warp a judge or Justice are varied. Impartial decisionmaking might be frustrated by prior contact with an issue off the bench. It is certainly well established that Justices are able to keep separate their judgment of the legal merits of a specific enactment from their general view of its policy objectives. Murphy, for example, showed that Justice Brandeis's votes in various cases testing economic regulatory statutes could not be foretold by his lobbying activities with respect to the statutes.[37]

There are, though, other threats to judicial impartiality than simply the judge's desire to cling to positions already espoused. A judge might want to please those in a position to award opportunities for extrajudicial service. In fact, the major objection to the first serious instance of a Justice's extrajudicial service--Jay's serving as ambassador to Great Britain -- was not that he would be unable to decide cases fairly because of any diplomatic contacts with litigated issues. Rather it was that Justices would decide cases as the President wished in

order to earn prestigious extrajudicial appointments.[38] The same thought shows itself in Frankfurter's opposition to judges who run for office from the Bench, namely Douglas. Douglas's votes on cases, Frankfurter feared, were determined by "whether they might help or hurt his chances for the Presidency." He was "'writing for a different constituency."[39]

Others might respond that these are wrong questions; regardless of whether Justices actually become tainted, the citizenry will perceive the judges as biased, and the Court will lose the public support essential to acceptance of its decisions.

Those who worry about public opinion, however, sometimes assume a level of public knowledge well beyond what the evidence justifies. Murphy, for example, asserts that in the early twentieth century "a forgiving public [had] recently acquiesced for the first time in over forty years to a close advisory relationship between a Supreme Court Justice [William Moody] and a President [Theodore Roosevelt]."[40] The evidence suggests, though, that the public knows little of the Justices or what they do on the Bench, and it is likely that the public knows less of extrajudicial activities, even when publicly reported. In short, the public could not "forgive" Moody's relationship with Roosevelt because it probably had no clue that there was any relationship.

The visibility of the Supreme Court is not easy to measure, but probably it is lower than might be inferred from popular opinion polls that appear in the press -- based on forced-choice responses to questions about which people may in fact have no information. Walter Murphy and Joseph Tanenhaus set about the task of measuring the Court's visibility in the 1960s, and found that, in 1964 and in 1966, less than

Justice William Moody *(pictured below)* served as President Theodore Roosevelt's Secretary of the Navy and then as Attorney General before Roosevelt named him to fill a vacancy on the Bench. Although the public may have known nothing about it, Moody and Roosevelt maintained a close advisory relationship even after the Supreme Court appointment.

half their respondents even attempted to answer "an open-ended question seeking to learn what the Supreme Court in Washington has done that you have disliked... liked...?"[41] To a question about the Supreme Court's constitutional role, less than 40 percent could give answers that could be coded according to one of ten broad functions--*e.g.*, "interpret the Constitution," or "settle basic questions." Furthermore, this survey was conducted in a period of heightened and presumably visible Supreme Court activity. On the other hand, as Murphy and Tanenhaus note, open-ended questions may underestimate visibility because people have difficulty remembering what they do know. Moreover, visibility increased with education.[42]

Nevertheless, it is hard to ignore the results of a *Washington Post* national survey in 1989 in which over half the respondents could name the judge who appears on a popular daytime television program but only nine percent could identify the Chief Justice of the United States.[43] Given these measures of visibility of the Court, one can wonder how many people have any knowledge--much less any views-- about a Justice's speech, lecture, or visit with the President.There is, though, another consideration. Even if John Q. Citizen is unaware of what the Justices do -- on or off the Bench -- the Court does have a constituency of those who follow public events, and, more particularly, of various segments of the legal community. That constituency's attitude toward the Court probably influences the Court's effectiveness, by setting a climate of trust, or distrust, regarding the Court's ability to reach its decisions free from the pressure of improper influence. A controversial matter off the Bench -- regardless of whether it affects judicial performance -- creates an ambiguity, a doubt, that a Justice can have a partisan position on one issue (in, for example, a speech off the Bench) but maintain a dispassionate, neutral position on the Bench on another issue. This doubt is possible even if the two sets of issues are completely distinct for the judge, and probable if they are not.

When Brandeis voted to sustain the Agricultural Adjustment Act after lobbying against it,[44] he may have committed a serious error just the same, simply by threatening a judicial rebuke to the Act. As Murphy wisely observes, Brandeis's action may have led the officials with whom he consulted to believe that they had persuaded a Justice how to vote in a case.[45] What would be the effect, for another example, on trust in the Court if it were known that one of its members was lobbying actively for the appointment of certain individuals to the Bench? There is presumably a limit to how much of this kind of ambiguity the Court's constituency will tolerate before it begins to discount the authority of the judicial fiat.

The implications of this speculation, however, tend to becloud what the speculation is about, *viz.*, empirical questions. How, in fact, does extrajudicial activity affect the Justices' work on the Bench -- their ability to decide cases without prejudice -- or public confidence in the Court? I do not pretend that we have the methodological tools to answer those questions, but I think we would elevate the debate if we recognized the kinds of questions they are.

Endnotes

1. 20 U.S.C. sec. 42.
2. 28 U.S.C. sec. 331.
3. 28 U.S.C. sec. 621 (a) (1).
4. 28 U.S.C. sec. 991 (a)
5. *Mistretta v. U.S.* 109 S. Ct. 647 (1989).
6. Murphy, The Brandeis/Frankfurter Connection: The Secret Political Activities of Two Supreme Court Justices, New York: Oxford University Press (1982).
7. 2M. Farrand, The Records of the Federal Convention of 1787, at 78 (rev. ed. 1937). The convention of course rejected the specific objective that Mason was advocating, *viz.*, a Council of Revision, with judicial membership.
8. Wheeler, "Extrajudicial Activities of the Early Supreme Court," 1973 *Sup. Ct. Rev.* 123.
9. Parker, "The Judicial Office of the United States," 23 *N.Y.U. Law Quarterly Review*, 225, 237 (1948).
10. C. Woodward, Reunion and Reaction 154 (1951) (quoting the Louisville Courier-Journal, Jan. 22, 1877).
11. *See* proposed S.J. Res. 164, 97th Cong., 1st Sess., 128 Cong. Rec. 4028 (1982), and statements by Senators Ste-

vens and Baker, *id.* at 4027-28.

12. *Model Code of Judicial Conduct* Canon 4B, & commentary (1990).

13. *See* the discussion, and the literature cited therein, in W. Brown, *Federal Rulemaking: Problems and Possibilities* (Federal Judicial Center 1981).

14. *Nonjudicial Activities of Supreme Court Justices and Other Federal Judges: Hearings on S. 1097 and S. 2109 Before the Subcomm. on Seperation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 138 (1969) (statement of Alexander Bickel, Chancellor Kent Professor of Law and Legal History, Yale University) [hereinafter cited as *Nonjudicial Activities Hearings*].

15. Murphy *supra* note 6 at 316-317.

16. R. Watson & R. Downing, The Politics of the Bench and the Bar 337-38 (1969). The United States Judicial Conference's Committee on the Codes of Conduct has accepted "the premise that, as [federal] judicial selection processes become more institutionalized and with wider participation, judges have a responsibility [when asked specifically or by a general call for information] to communicate their recommendations and evaluations to the appointive authorities--the President and Senators--and their selection committees or commissions." Advisory Opinion No. 59, Apr. 16, 1979.

17. 307 U.S. 277 (1939).

18. W. Douglas, Go East, Young Man: The Early Years 466 (1974).

19. *Id.*

20. Murphy, *supra* note 6 at 185, 343.

21. *Id.* at 227, 282, 302.

22. Douglas, *supra* note 18, at 469.

23. 409 U.S. 824 (1972) (memorandum of Rehnquist, J.).

24. 409 U.S. at 835.

25. Margolick, "2 Justices' Friends Back Secret Role," *New York Times*, Feb. 21, 1982, sec. 1, at 27, col. 1.

26. *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939).

27. There have been few serious efforts to calculate how Justices allocate their time. One is Hart, "Foreword, The Time Chart of The Justices," 73 *Harvard Law Review* 84 (1959), partially updated in Baker and McFarland, "The Need for a New National Court," 100 *Harv. L. Rev.* 1400, 1401-04 (1987). Hart's study involved, by his admission, "guesswork in part," *id.* at 84, and, more than that, estimates expressed in averages, which say little about the capacity of nonfungible Justices to allocate their time. In any event, Hart's concern was not the amount of time drained away by extrajudicial activities. An analysis in 1972 of the United States Court of Appeals for the Third Circuit revealed that 40 percent of the judges' time was devoted to matters unrelated to cases--mainly court administration activity. The study could not say--it would have been imprudent to ask--what amount of time went to the full range of extrajudicial activities. *See* Federal Judicial Center, *A Summary of the Third Circuit Time Study* (Federal Judicial Center 1974).

28. Transcript of "A Conversation With Earl Warren," in *Brandeis [University] Television Recollections*, taped May 3, 1972, WGBH, Boston, p. 21, quoted with permission of Dr. Abram L. Sachar.

Justice Hughes' arbitration of the Guatemala-Honduras boundary dispute, although successful, led him to counsel against similar assignments to Justices because of "the draft upon time and energies." The Autobiographical Notes of Charles Evans Hughes 167 (D. Danelski & J. Tulchin eds. 1973).

29. Murphy, *supra* note 6 at 273-75.

30. *Nonjudicial Activities Hearings, supra* note 14, at 142.

31. *Id.*

32. *Sackville's Case*, 2 Edens Ch. 371-72 (1760).

33. 11 Annals of Congress 706 (1802). Federalist James Bayard saw it differently: To assume a Justice would not "be gratified" by an affirmance of an earlier decision "is estimating the strength and purity of human nature upon a possible, but not on its ordinary scale." 11 Annals of Congress 618.

34. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801).

35. Letter of the Justices to the Congress, Nov. 7, 1792, *reprinted* in 1 American State Papers 52.

36. *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54 at 109 (1795).

37. *See* Murphy, *supra* note 6 at 54-55 and 142.

38. A Jeffersonian paper complained that it was necessary that Jay be in the country were he needed to preside over any impeachment proceedings, but also "that he should be above the bias which the honor and emoluments in the gift of the executive might create,..." *Aurora General Advisor* (Philadelphia), May 10, 1794.

39. Murphy, *supra* note 6 at 267.

40. *Id.*, at 17.

41. Murphy & Tanenhaus, "Public Opinion and The United States Supreme Court," in Frontiers of Judicial Research 273, 276-77 (J. Grossman & J. Tanenhaus eds. 1969).

42. Murphy & Tanenhaus, *supra*, at 276-86. *See also* Tanenhaus & Murphy, "Patterns of Public Support for the Supreme Court: A Panel Study," 43 *J. Pol.* 24, 29 (1981).

43. The Chief Justice's recognition was highest for all members of the Court except Justice O'Connor, who was named by about a fourth of the respondents. Morris, "Wapner v. Rehnquist: No Contest," *Washington Post*, June 23, 1989, A-21.

44. Murphy, *supra* note 6 at 142.

45. *Id.*

Extrajudicial Writings of Supreme Court Justices

Miriam Ching

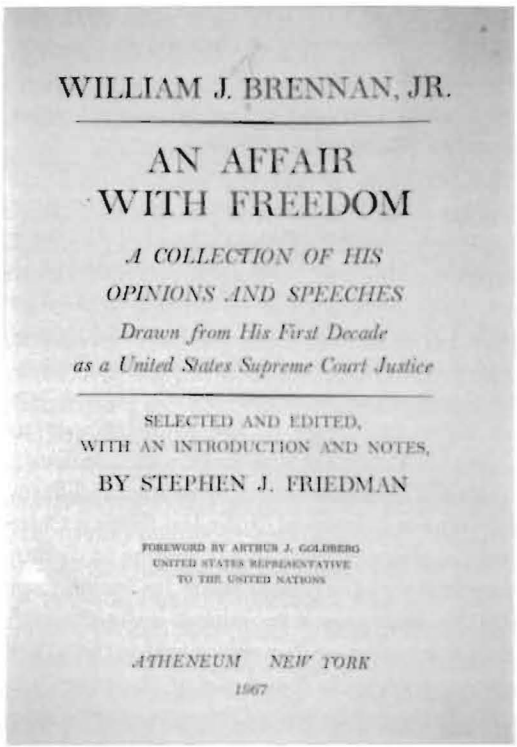
Extrajudicial writings of Supreme Court Justices have taken a wide variety of forms over the past two hundred years. In general, anything a Justice wrote and published before, during, or after coming on the Supreme Court outside of usual adjudicative proceedings can be called extrajudicial. Under that definition, all the Justices have recorded something of a "personal" nature that has become public material.

Less personal writings usually consisted of lectures on legal issues,[1] which in the twentieth century mostly covered interpretations of the Constitution. Some judges wrote monographs with a professional audience in mind, such as Benjamin Curtis's Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States, Henry Baldwin's A General View of the Origin and Nature of the Constitution and Government of the United States, Harlan Stone's Law and its Administration, and Robert Jackson's The Supreme Court in the American System of Government. Others aimed to educate the general public about the judicial branch--William Brennan's An Affair with Freedom being a notable example.

Still other writings have taken on the combined form of an autobiography followed by a monograph. This type tended to consist of an account of a few important years in a Justice's life or a short narrative of his personal experiences, followed by chapters on constitutional interpretation or case analysis. Wiley Rutledge's A Declaration of Legal Faith is a good example of this format.

The vast majority of Justices who have written about their personal and professional lives followed a standard model, giving detailed accounts of family, childhood influences, schooling and career. Those who have written in this third style include John Marshall, Joseph Story, Roger Taney, Stephen Field, Henry Brown, Joseph Bradley, Charles Evans Hughes, Felix Frankfurter, James Byrnes, William O. Douglas, Hugo Black, Earl Warren and William Rehnquist.

Justice William Brennan wrote An Affair with Freedom in 1967 in an effort to educate the general reader about the judicial branch.



WILLIAM J. BRENNAN, JR.

AN AFFAIR WITH FREEDOM

A COLLECTION OF HIS OPINIONS AND SPEECHES

Drawn from His First Decade as a United States Supreme Court Justice

SELECTED AND EDITED, WITH AN INTRODUCTION AND NOTES, BY STEPHEN J. FRIEDMAN

FOREWORD BY ARTHUR J. GOLDBERG
UNITED STATES REPRESENTATIVE TO THE UNITED NATIONS

ATHENEUM NEW YORK
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Typically, they prefaced their work by protesting that modesty made them hesitate to write such a self-centered work.

Due to the autobiography's ease of comprehension and purpose, in contrast to a monograph on a specialized area of the law, this paper will focus principally on this third type of detailed, personal account published in book form, rather than analyze the numerous legal treatises, private papers, correspondences, and interviews available. Autobiographies are a useful tool to enlarge the study of an individual Justice beyond his case opinions, to witness a Justice's personal dialogue, and to understand past generations' legal customs.

John Marshall set the nineteenth-century style for autobiographies with his passive, non-political vignette covering only his family lineage and pre-Court years. The style of judicial autobiographies changed in the twentieth century due to influences within and upon the Court. Innovators such as Oliver Wendell Holmes and Benjamin Cardozo became widely acknowledged for their groundbreaking, non-biographical writings on scholarly legal subjects. Extroverts such as Felix Frankfurter and William O. Douglas wrote longer, more detailed, and admittedly political autobiographies for the general public to read. How and why have judicial autobiographies changed in the past two hundred years?

II. The Nineteenth Century

Nineteenth and twentieth century extrajudicial writings reflected the Court's image of itself. The individual Justice responded to the environment in which he functioned.[2] The early Court carried less prestige and power than it did in later decades. During George Washington's Administration, the Court was not equal in stature to the Presidency or to Congress. President Washington experienced a hard time filling the Bench, with five candidates declining appointment. John Jay, the first Chief Justice, resigned after five years due to disillusionment with the office. Some Justices did not feel that they gained prominent status through their occupation, and appointments to the Court were considerably less coveted than they are now. In the public's mind, who sat on the Court did not matter as much as it would later.[3]

In the early days, the majority of Justices were politically active before their elevation to the Court, and were often political on the Court.[4] During the Marshall Court era, however, the Court spoke as a body, and if it or its individual members acted politically, no Justice said so. Instead, they claimed to discover the law. Marshall said that judges did not give effect to their own will, but to the will of the legislature and of the law.[5] As Chief Justice, he instituted the non-seriatim Court opinion, whereby the individual Justices no longer expected their own writings of the case to be distinguished from a single Court opinion, as English cases were written. The Marshall Court spoke in unison in the majority of cases.

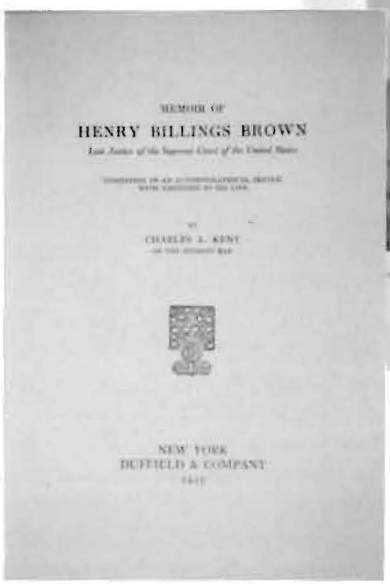
Since the nineteenth-century Supreme Court often acted as a group and considered itself or desired others to consider it the least dangerous branch,[6] the public showed little interest in the lives of the individual Court members. From without, the public did not expect or request judicial biographies, let alone autobiographies. From within, the Justice sought to convey a modest, unobtrusive appearance. Thus, those few Justices who wrote autobiographies did so only for their family or friends to read. This explains why the autobiographies of Marshall, Story, and Taney are now difficult for the general reader to obtain, and similarly why the memoirs of nineteenth-century Justices Samuel Miller, Joseph Bradley and Henry Brown are found only in depositories for rare books. An autobiographical sketch that Justice James Wayne wrote for his children, if still in existence, remains undiscovered.[7]

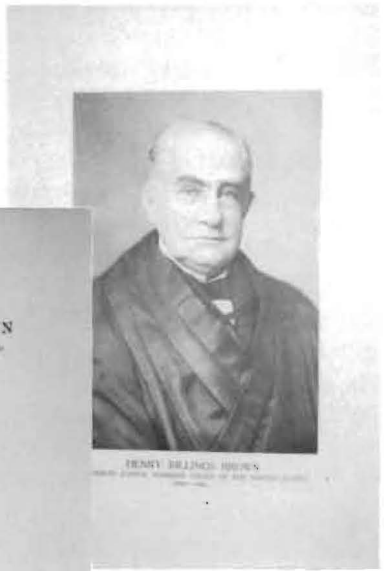
Judicial autobiographies stayed short and unpretentious throughout the nineteenth century. Roger Taney began his autobiography hesitantly: "I may not live to finish it, and, if finished, it may not be thought worthy of publication."[8] Justice Joseph Bradley wrote in 1883 of his collateral ancestors and early life. He deemed such coverage uninteresting to everybody but himself, but could not refrain from writing it down for the perusal of his children.[9] Stephen Field said that he composed "at the request of a few friends, [who] have an interest which they could not excite in others."[10] After submitting to the persuasion of his friend Charles Kent, Henry Billings Brown, whose career bridged the twentieth century, set down what he

called a skeletonized, simple affair to assist "anyone who may feel sufficient interest to write a brief memorial, I am not ambitious for a regular biography."[11]

Joseph Story, writing for his son, said that he would:

write very frankly and freely, and in a manner which would not be justifiable, if this were designed for the public, or even for the eyes of a friend. But between a parent and child all forms may be dropped, and we may write as we feel; and if here and there a spice of personal vanity should appear, it would be but as the small talk of the fireside, where mutual confidence allows us to think *aloud, and tell our honest thoughts as they arise.*[12]





Copies of Henry Billings Brown's memoirs, along with those of Samuel Miller and Joseph Bradley, are obtainable only in depositories for rare books.

Brown wrote a skeletonized autobiography to assist biographers who might be interested in writing "a brief memorial," although he was "not ambitious for a regular biography."

Story's autobiography does not convey vainglorious pretension, for he wrote it in much the same expository style that he wrote the case of *Martin v. Hunter's Lessee.*[13] It compares in literary importance to the autobiography of Benjamin Franklin; its portrayal of early American life and emphasis on praising worthy men and ideas as a means of giving moral lessons are all depicted in an artistic, idealistic way that is similar to Franklin's.

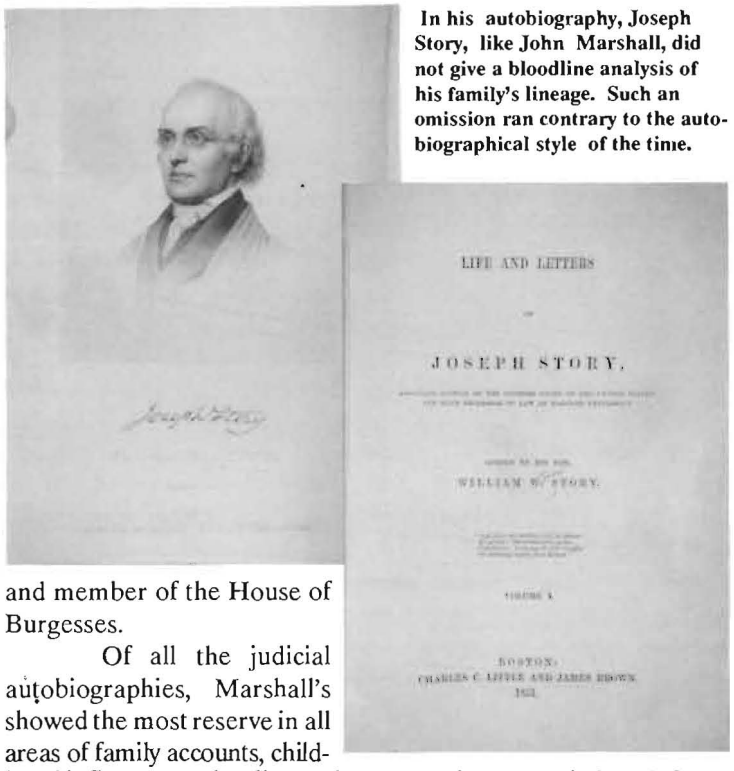
Through much of the nineteenth century the Justices remained relatively unknown as individuals, except for the Chief Justices, although even they did not seek public recognition. Marshall set the trend for modesty and discretion when he opened his autobiography by saying:

The events of my life are too unimportant, and have too little interest for any person not of my immediate family, to render them worth communicating or preserving. I felt therefore some difficulty in commencing their detail, since the mere act of detailing, exhibits the appearance of attaching consequence to them.[14]

Marshall did not overcome this difficulty until, in one account, his highly valued friend Joseph Delaplaine requested he write an autobiographical sketch in 1818 for a serial publication titled Repository of the Lives and Portraits of Distinguished American Characters.[15] In other accounts, the request came in the summer of 1827 from a different friend, Joseph Story, who desired it for his review called History of the Colonies.[16]

Following Marshall's lead, Chief Justices Salmon Chase, Morrison Waite, and Melville Fuller displayed modesty in their writings and did not try to boost their reputations by publishing memoirs. Although Chief Justice Roger Taney did publish an autobiography, he refrained from writing about his role in the infamous *Dred Scott* [17] decision, and covered only his early life and education from the years 1777 to 1801, before he came to the Court.

In their autobiographies, Story and Marshall omitted what nineteenth century Justices usually included--highlights of their family lineage and judicial career. Story did not give a bloodline analysis of whether it was William of Ipswich or Elisha of Boston who first came to America among his ancestors. Marshall did not mention his family lineage at all, though his father distinguished himself as a surveyor for George Washington, and acted as vestryman



In his autobiography, Joseph Story, like John Marshall, did not give a bloodline analysis of his family's lineage. Such an omission ran contrary to the autobiographical style of the time.

and member of the House of Burgesses.

Of all the judicial autobiographies, Marshall's showed the most reserve in all areas of family accounts, childhood influences, schooling and career. In introducing Marshall's sketch, John Stokes Adams said:

It is difficult to think of Marshall as the author of an autobiography. His character was marked by simplicity and modesty, and he has none of that egoitsm which causes a man to imagine that he benefits mankind by talking about himself.[18]

Marshall wrote that he felt repugnant "to anything which may be construed into an evidence of that paltry vanity which, if I know myself, forms no part of my character."[19]

Marshall revealed his unwillingness to write by depersonalizing the sketch with colorless chronological events. He found no pleasure in writing about the places he visited or the people who influenced him, and refrained from defending or denouncing persons and positions. Grudging even the few pages he did write, Marshall concluded with an apology for what he called the minute and tedious details of the sketch. Characteristically, when Marshall wrote a defense of *McCulloch v. Maryland*[20] for the press, he did so using a pseudonym.[21] For admirers of Marshall, such diffidence merely adds to his veneration, though it does limit the sources available to students seeking to understand the man from what he wrote.

Justice Stephen J. Field's Personal Reminiscences of Early Days in California remains the unique exception to both century's judicial autobiography format. Field's personality stands out, as does his inflexible, almost dogmatic interpretation of the Constitution,[22] in his digressive, colorful autobiography. In Field's pre-Court years as a California state judge, he had been accused by California Judge William Turner of provoking a mob to threaten his life.[23] Turner and California Supreme Court Justice David Terry[24] subsequently tried to defame Field. In order to redeem his reputation and honor, the future Justice wrote a detailed and humorous autobiography covering these unusual and highly controversial pre-Court experiences.

Field's biographer, Carl Swisher, uses Field's autobiography to confuse the incident further by making unfounded conclusions about the California judge's personality before Turner, also a judge and therefore a threat, arrived in the same town. He claims that Field had "perfect confidence in himself," felt "extremely proud," and became a "bit intoxicated by his rise in position from obscurity in his brother's office to czardom in a frontier town," but that "with deepest satisfaction he looked upon his work and saw that it was good." Swisher wrote that after Turner came to town Field showed his hot temper and became "jealous because of the loss of his own prerogatives in the town."[25]

In fairness to Field, readers of his autobiography would probably arrive at a more favorable impression of the author. Swisher, again citing Field's Personal Reminiscences, confused the incident of the crowd cheering Field in a pre-trial mob scene by claiming that the crowd saved three cheers for Field and three groans for Turner. In his autobiography,

however, Field stated that the people cheered him enthusiastically and that in a later scene at Turner's house, the mob gave Turner three groans. Such a mistake in research puts Field in an undeservedly negative light. Yet even Personal Reminiscences cannot be entirely relied upon because it contains biased denunciations such as Field's passing accusation that Terry exhibited the virtues and prejudices of men of the extreme south.

In summary, most nineteenth-century Justices believed moderation and non-obtrusive political attachment to be the desired judicial temperament. Dissents were not welcome.[26] Justices refrained from deprecating each other, and the direction of the Court was not openly displayed. Because the Justices did not publicly criticize each other, autobiography was not a necessary or desired medium in which to reply to a slight, or to set the story straight. Some observers also claim that the professional and personal writing style of this period was so murky that the Justices found autobiography more difficult to write than in the next century. After reading the autobiographies from the nineteenth century, however, one can say that they displayed as much precision and command of language as those of the next century.

III. The Twentieth Century

A gradual change in judicial autobiography occurred around the turn of the century. Influence came from within and without the Court. The Court matured and grew in prestige.[27] Legal supremacy became a reality with the evolution of organizational and ideological support for judicial claims over politics.[28] At the same time, the twentieth century brought a rise in leisure and popular culture. Society began wondering about its leaders on the decisive social, cultural and commercial fronts. The public became regular observers and saw the Supreme Court Justices as more than just decision makers of cases. With the coming of mass culture and the extension of educational opportunity, popular culture began to "complement the more formal social institutions through which values are instilled."[29] Some psychologists suggest that interest in autobiographies arose in part from readers who compared their own lives with those about whom they read, and sought encouragement from stories of the struggles of successful people.[30]

The trend flowered in the 1970s when legal historians began producing innovative works that increased public inquisitiveness about the Justices. In that decade members of the Court finally became objects of attention in American culture,[31] reaching new levels of visibility. An indication of the growing popularity of individual Justices occurred in 1969 when Hugo Black's television interview "Justice Black and the Bill of Rights" won an award for the best cultural documentary of the year.[32] Beginning in the late 1970s, *The Supreme Court Historical Society Yearbook* ran a series of biographical articles titled "My Father the Chief Justice." Written by children of Chief Justices Hughes, Stone, and Warren, these articles recalled personal incidents in the Justices' private and Court lives.[33]

By the 1980s, commentary on the Justices in the form of opinions and personality profiles increasingly became increasingly available through the mass media. In the space of six years, the *New York Times Magazine* published feature articles on "The Supreme Court: A Decade of Constitutional Revision," November 11, 1979; "A Candid Talk with Justice Blackmun," February 20, 1983; "The Partisan: A Talk with Justice Rehnquist," March 3, 1985; "A Life on the Court: A Conversation with Justice Brennan," October 5, 1986.[34]

Contributing to this popularization of the personalities of the Justices, was the change in the way they interpreted law. At the turn of the century, Court jurists discarded their mechanistic role of oracling the law. Judges realized that they could not find the rule of law in the "brooding omnipresence in the sky."[35] This realization caused an era of sustained judicial activism from 1890 to 1930. When the Justices discarded the nineteenth century cult of the robe, and its surrounding mantel, their individual identities as political actors became more widely acknowledged.[36] As their identities became more public, so did their philosophies of law based on life experiences.

The twentieth-century trend toward publicly esteemed extrajudicial works most likely originated with the highly acclaimed jurisprudential writings of Justices Holmes, Cardozo, and Taft. Not since Joseph Story's treatises had

Court members received such recognition for their scholarly works. Holmes established himself as a leading judicial philosopher before becoming a United States Supreme Court Justice. In The Common Law, published in 1881, he claimed that "the life of the law has not been logic; it has been experience." His idea became widely accepted, even among his brethren. Justice Brewer wrote in 1898 that the Supreme Court was not beyond criticism:

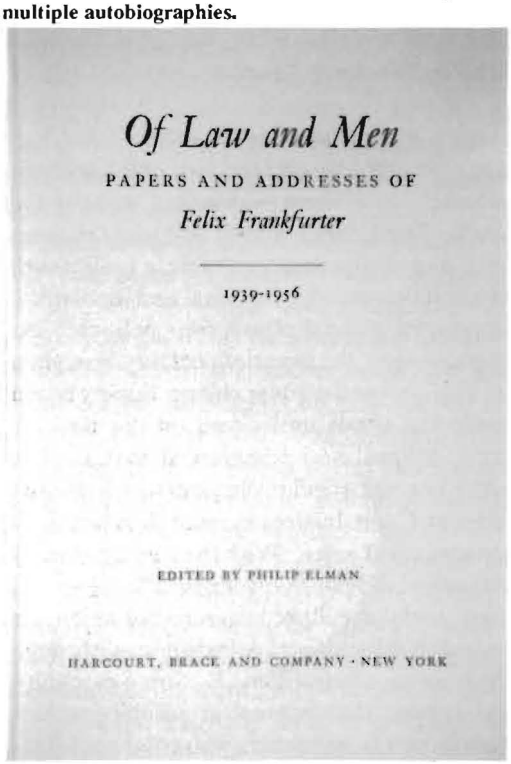
The life and character of its Justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past...when any living man or body can be set on a pedestal and decorated with a halo.[37]

As Dean of the Columbia University Law School, in 1915 Harlan Stone, echoing Holmes, lectured to his students that logic must necessarily yield to the test of experience.[38] But Holmes had not only changed the way Justices interpret the law, he had also set a new standard of professional legal competence.[39] After Holmes resigned from the highest Court, there was pressure to fill his vacancy with a similarly acclaimed scholar--Benjamin Cardozo.[40] Before being appointed to the Supreme Court, Cardozo achieved fame for his innovative work on the New York bench and for his 1921 study The Nature of the Judicial Process--considered as classic as Holmes's The Common Law.[41] Cardozo further amplified his views in The Growth of the Law, Paradoxes of Legal Science, and Law and Literature.

Another independent, political Justice with a love for scholarly legal analysis, William Howard Taft, stated outright in his book The Anti-Trust Act and the Supreme Court that judges were mortals whose judicial decisions were affected by the times in which they lived.[42] Taft believed that judges played an active role in changing the law, and stated to the Court after he became Chief Justice that he planned to overrule a few decisions.[43] In another book, Popular Government, Taft promoted his theory on the judicial process.[44] In practice, his theory translated to the unanimous opinion remaining the norm under the Taft Court. During Harlan Stone's tenure as Chief Justice in the 1940's, the number of dissenting opinions grew, due to his encouragment of a proliferation of opinions.[45]

Primarily as a result of the academic works of Holmes, Cardozo, and Taft, a new type of autobiography suggested itself to later Court members. Extrajudicial writings began to aim at bettering the law and the legal community. Wishing to instruct a wider audience, members of the Court wrote autobiographies intended for the lay public which also included instruction and inspiration for the law community. James Byrnes, who served as a Representative, Senator, Governor and Justice, hoped to persuade his readers in All in One Lifetime of the high satisfaction found in public service.[46] Similarly, Chief Justice Earl Warren thought that because he had spent almost his entire adult life in public service, readers might learn about the benefits and pitfalls of a career as a public official by reading his Memoirs.[47] William O. Douglas ebulliently wrote to inspire Americans to a new awareness:

Felix Frankfurter was a prolific writer who, unlike most nineteenth century Justices, was not shy about broadcasting his opinions on the the nation, and on the Court and its members. He was the first Justice to publish multiple autobiographies.



The overall aim of this volume and the volume to follow is the hope that our people will come truly to love this nation. I hope it may help them see in the perspective of the whole world the great and glorious tradition of liberty and freedom enshrined in our Constitution and Bill of Rights.[48]

William Rehnquist wrote The Supreme Court for the "interested, informed layman, as well as [for] lawyers who do not specialize in constitutional law," in order to convey "a better understanding of the role of the Supreme Court in American government."[49]

Autobiographies giving advice on the study and practice of law abounded. Hughes suggested a poker face as decorous when one listened to the opponent's argument in Court. Douglas wrote that contests in the law should be intellectual rather than emotional.[50]

The year 1956 brought the first volume of what was to become the first multiple autobiography by a Supreme Court Justice. Frankfurter wrote Of Law and Men (1956), Of Law and Life and Other Things That Matter (1965), and was interviewed by H. Phillips in Felix Frankfurter Reminisces(1960). Douglas followed with two standard autobiographical books, Go East, Young Man, and The Court Years, 1939-1975, and so many other books on diverse topics that Chief Justice Warren complained that he spent too much time writing books.[51]

Frankfurter, a confirmed, almost compulsive writer,[52] showed himself to be an extraordinarily social creature, an eighteenth-century Enlightenment man in his scope of interests.[53] Gone were the days when Justices sought obscurity and used pseudonyms. Frankfurter wrote numerous letters to judges, lawyers, law professors, politicians, philosophers, and scientists. He broadcast his views on the Court and the nation, often criticizing Warren's activism. He wrote letters to historians concerning events in which he participated in order to have his views recorded for posterity.[54]

The public started perceiving the Supreme Court as a political branch at the time of President Franklin Roosevelt's criticism of its judicial authority. What was recognized by Abraham Lincoln[55]--that when the Supreme Court acted on political issues it was a political institution--became obvious to the public in the 1930s. Critics realized that the ties that bound Justices to their prior experiences and attitudes before coming on the Court were not easily dissolved.[56] The judges emerged from their robes and people widely acknowledged their identity as political actors.[57]

Certain Warren Court Justices' public praise and criticism of their brethren reached unprecedented proportions. Defensive attitudes found their way into autobiographies written for the layperson. Though Frankfurter said that he felt a natural distaste for talking about colleagues,[58] he continued to speak of his disagreements with Warren, Black, and Douglas. Open admission of unpleasant facts of contemporary life exhibited in the Warren Court decisions [59] spilled over into the detailed autobiographies of Douglas, Goldberg, and Warren.

The late 1960s was an era in which Americans thought, spoke, wrote, and associated more freely. Many Warren Court members wrote frankly, not heeding the traditions of judical autobiography. As a decision-making body, the Warren Court broke with customs and folkways,[60] and used its legal authority in a potent way.[61] In turn, Justices utilized the power of autobiography. Initiative in the courtroom expanded into initiative in the judicial autobiography. Through that medium, Justices described behind the scene events and factors that influenced their behavior.

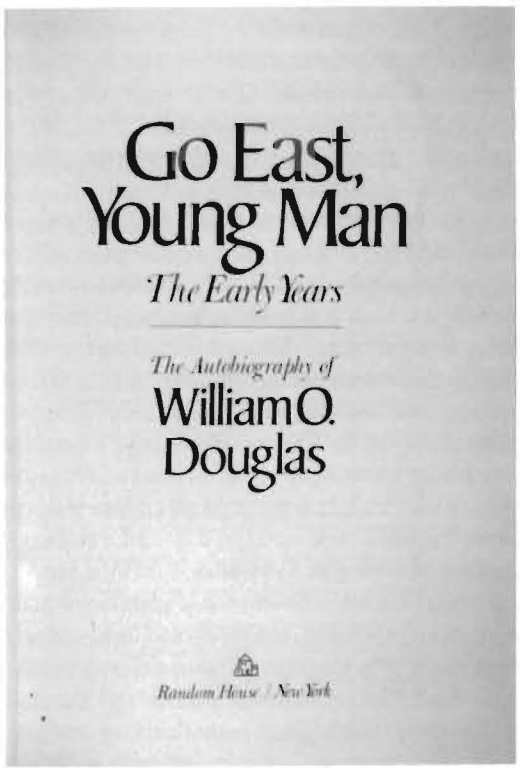
In contrast to the Justices of this century, Story and Marshall showed regard for the traditional privacy of court deliberations. Story said:

I shall not dwell upon the circumstances attending my judicial life, because they are open to you in the decisions as well on my circuit as in the Supreme Court, in the published Reports.[62]

Because of this conviction, Story omitted personal coverage of his difficulties with Thomas Jefferson and of the Taney Court. So too, Marshall elusively wrote a paragraph or two about each year from 1775 to 1800, leaving out his Court years completely.

Chief Justice Warren exemplified a more modern kind of autobiographical style by bringing numerous corrections to light, including minor ones:

Here I would like to correct something I



William O. Douglas's biographer, James Simon, has uncovered some minor inaccuracies and embellishments in the Justice's autobiographies.

have seen in print to the effect that I was first offered a place on the Court other than that of the Chief Justiceship. That is positively not the fact.[63]

He also tackled controversies such as the American Bar Association's denunciations of the Warren Court at a conference Chief Justice Warren attended in London:

Never before have I discussed any phase of this affair, although I have been asked many times to divulge the story. I tell it here now.... This is the first public disclosure of the facts of my resignation from the American Bar Association, and I do not write now to create controversy. Few people will care about my personal situation, but it really is an important factor on the appraisal of the Supreme Court by the public.[64]

As for the controversial, non-Court situations Douglas addressed, biographer James Simon identified minor discrepancies between Douglas's version of an event and the other party's version.[65] In a job interview with John Foster Dulles, Douglas claimed to have tipped Dulles a quarter for having helped him on with his coat, but Dulles insisted this never occurred. Douglas also claimed that he chose to work for the Cravath firm over Dulles's firm because the attorneys at Cravath were earnest, frank, and unpretentious. Dulles responded that Douglas was not offered the job because he did not meet their standards. Douglas said he was paid $1800 a year with an increase to $3600 that same year at Cravath, but the firm's records showed an initial $1800 with a raise of $3000 after two years.[66] In another incident, the University of Chicago dean offered Douglas a teaching position with a salary of $20,000, but Douglas said the amount totaled $25,000.[67] When Douglas was appointed chairman of the Securities and Exchange Commission, he claimed that Joseph Kennedy personally escorted him to the White House, where Roosevelt told him he was his man. However, a letter signed by Douglas suggests that he did not meet Roosevelt for at least six months after his appointment to the Commission.[68] Douglas himself told his daughter Millie that if he embellished a little here or there about his life, a writer had license to do so.[69]

As the Warren Court increasingly came under attack, Warren, Douglas, Frankfurter, and Goldberg felt obligated to explain their positions in autobiographies. In the conclusion of Go East, Young Man, Douglas wrote with pride of his stay of execution after what some would call his inexplicable actions concerning the *Rosenberg* case.[70] After his Court career ended, Arthur Goldberg felt free to write Equal Justice, defending the Warren Court against accusations that it acted without principle.

In The Supreme Court, Chief Justice Rehnquist, however, refrained from discussing his experiences on the Court. He ended his coverage of the Court's substantive doctrines at the time of Chief Justice Fred Vinson's death in 1953, thus omitting discussion of cases and doctrines which involved his colleagues. But as for personal doctrine, Rehnquist said outright that a judge could not isolate himself from public opinion, and that "the role of judge was little different from that of any other public official--do your best to see that the matter is settled in the way you believe is correct."[71]

Gone were the days when Justice William Johnson of the Marshall Court wrote a separate concurrence and "heard nothing but lectures on the indecency of judges cutting at each other."[72] The extrajudicial writings of Taft, Warren, Douglas, Frankfurter, and Rehnquist included numerous criticisms of Presidents and Justices, unlike Hugo Black, who told his wife Elizabeth that he thanked God for never having written anything reflecting discredit on one of his brethren.[73]

IV. Conclusion

As a whole, autobiographies by United States Supreme Court Justices provide a unique primary source for study of the Court and its relation to American life. Such works personalize the Court and make its members palpable individuals. Nineteenth century autobiographies emphasized a Justice's family background and formative experiences, thus looking solely to the past. Twentieth century autobiography has shown some of the same, but extended the focus to include the Justice's present situation and where he hoped to lead others, thus covering both past career and future concern for the Court, Constitution, and nation. In his autobiography, Justice Taney summarized his inducement to put his life into words: "My life is, therefore, to form a part of the history of the country." [74]

Endnotes

1. As an exception, *see*, John Marshall, The Life of George Washington (1805-07).
2. R. Highsaw, Edward Douglass White, Defender of the Conservative Faith xii (1981).
3. L. Tribe, God Save This Honorable Court 4 (1985).
4. R. Hodder-Williams, The Politics of the U.S. Supreme Court 32 (1980).
5. A. Mason, The Supreme Court from Taft to Warren 13 (1958).
6. *See* The Federalist Papers, Number 78.
7. R. Spector, "Judicial Biography and the United States Supreme Court: a Biographical Appraisal" 11 *The American Journal of Legal History* 13 (1967).
8. S. Tyler, Memoir of Roger Brooke Taney, LLD. 17, (1872).
9. J. Bradley, Family Notes Respecting the Bradley Family of Fairfield 41 (1894).
10. S. Field, Personal Reminiscences of Early Days in California, frontplate (1893).
11. C. Kent, Memoir of Henry Billings Brown, Late Justice of the Supreme Court of the United States, Consisting of an Autobiographical Sketch with Additions to His Life 109 (1915).
12. W.W. Story, ed., The Miscellaneous Writings of Joseph Story 1 (1852). Story intended the writing to be private, so one can group it with Justice Salmon Chase's diary found in Diary and Correspondence of Salmon P. Chase (1971). The Library of Congress has the unpublished diaries of Justices George Sutherland and Levi Woodbury.
13. 1 Wheat. 304 (1816).
14. J.S. Adams, ed., An Autobiographical Sketch by John Marshall 3 (1937).
15. *Id.* at xii.
16. F. Stites, John Marshall, Defender of the Constitution 169 (1981); D. Grier Stephenson, Jr., The Supreme Court and the American Republic, an Annotated Bibliography 230 (1981); J. Servies, A Bibliography of John Marshall 182 (1956).
17. *Dred Scott v. Sandford*, 19 How. 393 (1857).
18. Adams, *supra* note 14, at xiii.
19. *Id.* at xiv.
20. 4 Wheat. 316, 4 L.Ed 579 (1819).
21. G. McDowell, Curbing the Courts 136 (1988).
22. Highsaw, *supra* note 2, at 70.
23. Not an unusual event during the gold rush era. For Turner's viewpoint, see W.R. Turner, Documents in Relation to Charges Preferred by Stephen J. Field and Others, Before the House of Assembly of the State of California, Against Wm. R. Turner (1856).
24. On Terry, *see* A. R. Buchanan, David S. Terry of California (1956); A.E. Wagstaff, Life of David S. Terry (1892); for Terry's viewpoint, *see* D. Terry, Character and Career of Stephen J. Field as It Is Known in California (1889).
25. C. Swisher, Stephen J. Field, Craftsman of the Law (1930), pp. 32-55.
26. J. Brigham, The Cult of the Court 68 (1987).
27. *Id.* at 48.
28. *Id.* at 35.
29. L. Lowenthal, Literature, Popular Culture, and Society 113 (1961); M. Laforse and J. Drake, Popular Culture and American Life viii-ix (1981).
30. L. Lowenthal, *supra* note 29, at 114.
31. H. and E. Black, Mr. Justice and Mrs. Black 223 (1986).

For an autobiographical sketch, *see* H. Black, "Reminiscences" 18 *Ala. L. Rev.* 3-11 (1966).
32. Brigham, *supra* note 26, at 19.
33. *Id.* at 19.
34. *Id.* at 4.
35. 244 U.S. 205, at 222 O.W. Holmes dissent; *see* also A. North, The Supreme Court: Judicial Process and Judicial Politics 8 (1966).
36. Brigham, *supra* note 26, at 63.
37. J. Frank, Courts on Trial 259 (1949).
38. H. Stone, Law and its Administration 37 (1915).
39. Brigham, *supra* note 26, at 77.
40. *Id.* at 30.
41. L. Pfeffer, This Honorable Court 290 (1965).
42. W. Taft, The Anti-Trust Act and the Supreme Court 33 (1914).
43. A. Mason, William Howard Taft: Chief Justice 50 (1964).
44. *Id.* at 58.
45. Hodder-Williams, *supra* note 4, at 103.
46. J. Byrnes, All in One Lifetime 4 (1958).
47. E. Warren, The Memoirs of Earl Warren (1977).
48. W. Douglas, Go East, Young Man p.155 (1974).
49. W. Rehnquist, The Supreme Court 8 (1987).
50. Douglas, *supra* note 48.
51. B. Schwartz, Super Chief 52 (1983).
52. P. Kurland and G. Casper, ed., *Supreme Court Review* 115 (1980).
53. Schwartz, *supra* note 51, at 38.
54. B. Murphy, The Brandeis/Frankfurter Connection 32 (1982).
55. Pfeffer, *supra* note 41, at 165.
56. Tribe, *supra* note 3, at xviii.
57. Brigham, *supra* note 26, at 129.
58. Kurland, *supra* note 52, at 129.
59. A. Goldberg, Equal Justice 31 (1971).
60. R. McCloskey, The Modern Supreme Court 308 (1972).
61. *Id.* at 326.
62. Story, *supra* note 12, at 35.
63. Warren, *supra* note 47, at 27.
64. *Id.* at 324.
65. J. Simon, Independent Journey: the Life of William O. Douglas (1980).
66. *Id.* at 82.
67. *Id.* at 110.
68. *Id.* at 153.
69. *Id.* at 234.
70. *Rosenberg v. United States* 346 U.S. 273 (1953); *see* M.E. Parrish, "Cold War Justice: The Supreme Court and the Rosenbergs" 82 *American Historical Review* 823 (1977).
71. Rehnquist, *supra* note 49, at, 185.
72. *Id.* at 120.
73. Black, *supra* note 31, at 108. At the same time, Black advocated absolute freedom of speech, and seemed highly amused when critics verbally abused him. *See* Dennis, Gillmor, and Grey, editors, Justice Hugo Black and the First Amendment (1978).
74. Tyler, *supra* note 8, at 17.

The Rosenberg Case in Perspective-- Its Present Significance

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In April 1951, Julius and Ethel Rosenberg were convicted under the Espionage Act of 1917 for conspiring to obtain and turn over to agents of the Soviet Union secret information as to the construction of the atomic bomb. This information had been obtained in 1944 and early 1945. The testimony as to the continuance of the conspiracy until 1950, when the Rosenbergs were indicted, after the enactment of the Atomic Energy Act of 1946, related in large part to their efforts to conceal their prior conduct and to avoid arrest until they could escape to the Soviet Union.[1]

They were sentenced to death by District Judge Irving Kaufman, now long a member of the Court of Appeals for the Second Circuit. Before imposing sentence, Judge Kaufman had consulted Circuit Judge Frank and District Judge Weinfeld, who disagreed with each other as to the death penalty. He also urged the United States Attorney "to solicit the opinion of the Department of Justice." The reply was, "There were differences all around among them, but capital punishment for one or both was in not out."[2] Judge Kaufman determined that the death sentences were called for because:

your conduct in putting into the hands of the Russians the A-bomb years before our best scientists predicted Russia would perfect the bomb has already caused, in my opinion, the Communist aggression in Korea, with the resultant casualties exceeding 50,000 and who knows but that millions more of innocent people may pay the price of your treason. Indeed, by your betrayal you undoubtedly have altered the course of history to the disadvantage of our country.[3]

My participation in the case, which I argued in the Supreme Court on June 18, 1953, in my capacity as Acting Solicitor General of the United States, was during its last seven days from June 13-19. I will not attempt to summarize everything which occurred. Many volumes and articles have been written on both sides of the case.[4]

Perhaps the most objective analysis, which cited and reviewed most of the others up to 1983, is The Rosenberg File: A Search for the Truth, a 578-page volume by Ronald Radosh and Joyce Milton. Professor Radosh describes his introduction to the case as a young supporter of the Rosenbergs who believed that, after the FBI and other government records were disclosed at the insistence of the Rosenbergs' sons, the innocence of their parents would be established. The subsequent study of many thousands of those pages by Radosh, by then a professor of history, concluded that, even though he still regarded himself "as a man of the democratic Left," "historical truth also had its claims -- even if some of that truth was unpleasant."[5]

Radosh and Milton found the evidence compelling that Julius Rosenberg "managed over a period of years to become the coordinator of an extensive espionage operation whose contacts were well placed to pass on information on top-secret military projects in the fields of radar and aeronautics," and that "Ethel Rosenberg probably knew of and supported her husband's endeavors, and it seems almost certain that she acted as an accessory."[6]

The authors believe that "the Rosen-

Government attorneys arguing for the overthrow of the stay of execution granted the Rosenbergs by Justice Douglas are shown above while leaving the Supreme Court on June 18, 1953. From left to right are: Acting Solicitor General Robert L. Stern (the author); Robert S. Erdahl, Chief of the Appellate Section of the Criminal Division, Justice Department; and James Kilsheimer, Assistant U.S. Attorney.

berg spy ring was surprisingly productive, given its origins, but it was never the primary conduit of U.S. atomic secrets to the Soviets," that "the data stolen by David Greenglass, while not without significance, was less important than that provided by Klaus Fuchs"[7] and that "the government was well aware of this."[8] They assert tha :

the real reasons the federal prosecutors, the FBI, and the Atomic Energy Commission wanted the Rosenberg *case pursued to the limits of the law... was the expectation, first of all, that Julius Rosenberg could provide the names of other amateur spies in important positions -- though not necessarily connected to atomic research. And, secondly, there was the very real desire to frighten other individuals who might potentially lend themselves to such activities in the future.*[9]

Defendants, of course, were no less culpable because someone else had preceded them in stealing and disclosing vitally important confidential information. Moreover, for law enforcement officials to prosecute and seek heavy penalties in order to deter others from committing similar serious crimes is not improper. That cannot be said however of the charge, which the authors thought clearly established, that "the precipitous arrest of Ethel Rosenberg was made for one reason and one reason only: so that she could be held hostage in order to pressure her husband into breaking his silence."[10]

Nevertheless, the reason given by Judge Kaufman for imposing death sentences suggests that he might not have done so if he had known that the secrets of the atomic bomb had previously been turned over to the Soviet Union by other spies.[10a] The death sentence rested upon a literal interpretation of the Espionage Act of 1917,[11] which permitted capital punishment for espionage in time of war. The stolen information was turned over to Soviet agents during the last years of World War II, when Soviet Russia was an American ally, not an enemy. That was probably not the type of situation Congress had in mind when it passed the statute. By the time of the indictment in August 1950, however, North Korea had invaded South Korea, with the approval and support of the Soviet Union, and United States forces were engaged.

After the Court of Appeals in New York, speaking unanimously through Judge Jerome Frank, had affirmed the conviction and sentences, 195 F. 2d 583 (1952), the Supreme Court denied the petition for certiorari challenging the Rosenbergs' conviction and sentences on October 13, 1952,[12] and a petition for rehearing on November 17.[13] A motion to

vacate the judgment and sentence, filed under 28 U.S.C. sec. 2255, was subsequently denied by the District Court and the Court of Appeals, and certiorari as to these orders was denied by the Supreme Court on May 25, 1953 with Justices Black, Frankfurter and Douglas dissenting.[14] An order of the Court of Appeals staying the execution was vacated at the same time. "Execution of the sentence was set for the week of June 15th by the District Judge," and "two further motions to vacate" the sentences were denied by the District Court and the Court of Appeals early in June.[15]

On June 12, an application to the Supreme Court to grant a stay was filed with Justice Jackson, the Circuit Justice for the Second Circuit, who referred it immediately to the full Court with a recommendation that it be argued orally.[16] Although Justices Black, Frankfurter, Jackson and Burton would have granted oral argument, a majority of the Court (including Justice Douglas) refused to hear such argument or to grant a stay on Monday, June 15, the last session of the 1952 Term. A petition for rehearing of the May 25th denial of certiorari was denied at the same time. Thus the Court had denied the defendants' requests for relief six times by that date.[17]

Justice Frankfurter's notes state that in a conversation with him on Tuesday, June 16, Justice Jackson had said "that it was perfectly understood yesterday at conference that in view of the Court's denial of *habeas corpus* no individual Justice to whom application was made would overrule the Court's determination."[18] Such an informal, and on its face, reasonable agreement at the conference could not have anticipated that new lawyers would present an entirely new issue in the few days remaining. Nor need it be treated as precluding a Justice to whom such a question was presented from acting judicially. Justice Douglas did not so regard it, and no other Justice indicated that the subsequent agreement was a reason for his vote to overrule Douglas's subsequent stay order. Indeed, there is no reason to believe that any member of the majority would have voted differently, agreement or no agreement.

Justice Frankfurter's memorandum had pointed out that "when it was clear that the *Rosenberg* case would be heard because of the memorandum [Douglas] kept it from being heard." According to Justice Frankfurter, Justice Jackson also had stated that:

every time a vote could have been had for a hearing Douglas opposed a hearing in open Court, and only when it was perfectly clear that a particular application would not be granted did he take a position for granting it.[19]

Frankfurter's notes and the Court's orders indicate that was true, that on several occasions when Jackson and Burton indicated that they would join in providing the number of votes necessary to grant a hearing by the Court, Douglas voted the other way. Professors Parrish and Cohen[20] expressed opposing views as to whether Jackson was justified in believing that Douglas was improperly motivated. I am impressed by Professor Cohen's caveat that "it is impossible, of course to rebut [and I add, or prove] conclusively an assertion about Douglas's state of mind."[21] Whether or not the other Justices were annoyed at Justice Douglas's conduct, and some of them may well have been, there is no reason to believe that they would otherwise have voted in favor of the Rosenbergs.

It was in this context that on Monday, June 15, Emanuel Bloch of New York City and John Finerty of Washington D.C., who had represented the defendants from the beginning of the case, applied to Justice Douglas for a stay. On the next day, after the Court had adjourned for the summer, a petition for *habeas corpus* and a stay was filed with Justice Douglas by different lawyers, Fyke Farmer of Nashville and Daniel Marshall of Los Angeles. They had had nothing to do with the case or the defendants, but purported to act for one Edelman, who described himself as "next friend" to the Rosenbergs, but who also had no connection to them.[22] In the usual course, the application should have been submitted to Justice Jackson, who was the Justice assigned to the Second Circuit in which the case had been brought and tried. Justice Douglas's autobiography states that he "referred it to Jackson, who instantly responded by saying that I should consider it in light of the lateness of time and my imminent departure for the Far West."[23] These lawyers presented a defense which several months before they had submitted to Bloch and Finerty, who were not

Klaus Fuchs was an atomic scientist who escaped from the U.S. to Great Britain, where he was convicted, and, after doing time, was released to live in East Germany. Many believe that Fuchs had already passed the principal atomic secrets to the Soviet Union before the Rosenbergs transmitted their information.

impressed. The Espionage Act of 1917,[24] upon which the indictment had rested, did not require jury approval of a death sentence. The new claim was that this provision had been superseded for atomic energy cases by the provisions of the Atomic Energy Act of 1946[25] which did require jury approval. "The crux of the charge [against the Rosenbergs] alleged overt acts committed in 1944 and 1945,"[26] before that statute was enacted. The alleged conspiracy continued, however, until 1950.

Justice Douglas allowed Farmer and Marshall, and government counsel in opposition, to argue this question on Tuesday. The Justice thought the point was a substantial one which needed further consideration.[27] He asserted that:

it is law too elemental for citation of authority that where two penal statutes may apply -- one carrying death, the other imprisonment -- the court has no choice but to impose the less hard sentence.[28]

He did not mention the effect of a provision in the second statute which on its face seems to provide the contrary. Section 10 (b) (6) of the 1946 Act stated that "This section shall not exclude the applicable provisions of any other laws, except that no Governmental agency shall take any action under such laws inconsistent with the provisions of this section."[29]

After Douglas completed a draft opinion, according to his autobiography:

At one o'clock in the morning I went out a back door and drove my car to Fred Vinson's apartment. After I told him I had almost decided to issue the stay, we talked for an hour. He tried to dissuade me, and I finally decided to sleep on the matter and come to a decision in the morning.[30]

On the morning of Wednesday, June 17, Justice Douglas denied the stay requested by counsel for the defendants, Bloch and Finerty, since it raised only "questions already passed upon by the Court."[31] But the Justice granted the stay requested by counsel for Edelman. His order stated:

I will not issue the writ of habeas corpus. *But I will grant a stay effective until the question of the applicability of the penal provisions of sec.10 of the Atomic Energy Act to this case can be determined by the District Court and the Court of Appeals, after which the question of a further stay will be open to the Court of Appeals or to a member of this Court in the usual order.*[32]

Differing versions have appeared as to the details of what transpired before the Chief Justice ordered the Supreme Court to reconvene to review Justice Douglas's order. One report, based on triple hearsay in an FBI memorandum, says that Justice Jackson arranged for Attorney General Brownell to see Chief Justice Vinson, apparently before Justice Douglas's order and opinion were issued. My own recollection is that the Attorney General and I called upon the Chief Justice at his apartment to request that the Court be reconvened in time to review Justice Douglas's ruling before it effectively had postponed the order that the Rosenbergs be executed that Friday. I had thought that this occurred after we knew of the Douglas order, but my memory (though not

hearsay) is obviously not infallible after 36 years, and there is no reason to doubt the honesty of the writer of the FBI memorandum. We obviously had some reason to believe that Douglas was about to grant the stay. But it is of little consequence whether the Attorney General decided to ask the Chief Justice to reconvene the Court after the Chief was informed by Justice Douglas himself that he had "almost decided to issue the stay," or after the stay issued a few hours later. Douglas was not concealing the fact that he was giving the application serious consideration. I have no recollection that Justice Jackson had previously spoken to the Attorney General or to the Chief Justice on the subject, but I am skeptical. I might not have known about that. I am quite sure Jackson was not at the meeting.

Although for attorneys on one side of a case to argue the merits before a judge without the knowledge or appearance of the opponents is unethical, this principle does not necessarily apply to an *ex parte* motion that a hearing be promptly held when time is urgent. Temporary injunctions or stays or orders dissolving stays are not uncommonly granted for short periods until a full court can be convened and can give a matter more thorough consideration. The Attorney General was merely asking the Chief Justice to convene the Court the next day, not to decide anything or to set aside Justice Douglas's order on his own. There would not have been time for the normal filing of a written application with notice to the opposing party or lawyers, who had themselves obtained a hearing before Justice Douglas on short notice the day before. Of course they were notified when the order to reconvene was issued.

Certainly as a matter of less hurried hindsight it is not at all clear to me why immediate reversal of the Douglas order was so important, why a delay of a few months would have been so serious. As Justice Douglas subsequently wrote:

Upholding [my stay] would mean only that the District Court would consider the question and rule on it, before fall the Court of Appeals could pass on it, and it would then be ripe for decision by us in October[33]

The opinion of the Chief Justice for the Court was not so optimistic. He estimated that "the stay which had been issued promised many more months of litigation in a case which had otherwise run its full course."[34]

Why did the majority believe it so important that the execution of the Rosenbergs not be postponed? The reasons appeared in opinions in which the majority of six joined. Justice Clark's opinion stated:

The defendants were sentenced to death on April 5, 1951. Beginning with our refusal to review the conviction and sentence in October 1952, each of the Justices has given the most painstaking consideration to the case. In fact, all during the past Term of this Court one or another facet of this litigation occupied the attention of the court. At a special Term on June 15, 1953, we denied for the sixth time the defendants' plea.[35]

Justice Jackson's opinion declared:

Thus, after being in some form before this Court over nine months, the merits of all questions raised by the Rosenbergs' counsel had been passed upon, or foreclosed by denials.[36]

The last batch of such motions, submitted by the Rosenbergs' counsel, had been denied that Monday. In normal course, the Court adjourned for the summer. To allow lawyers who had no connection with a case or the parties, on behalf of a "stranger" to the defendants, then to reopen the case with a new issue was not merely highly unusual. To permit prolongation by outsiders of a case which had been before the Court so often and so recently would, in the Court's words, run counter to the Court's "duty to see that the laws are not only enforced by fair proceedings, but also that the punishments prescribed by the laws are enforced with a reasonable degree of promptness and certainty."[37]

These factors would have justified a refusal to reopen the case on the application of a complete outsider. The Court did not, however, merely dispose of the case on that procedural ground. It explained why it would not go along with Justice Douglas's order that the case be resubmitted to the District Court.

The question preserved for adjudica-

tion by the stay was entirely legal; there was no need to resort to the fact-finding processes of the District Court; it was a question of statutory construction which this Court was equipped to answer. We decided that a proper administration of the laws required the Court to consider that question forthwith.[38]

Justice Douglas and other commentators give the impression that the motivation for what was asserted by others to be the persecution of the Rosenbergs was the nation's anti-Communist hysteria, to which six members of the Supreme Court succumbed. There was also a vast amount of contemporaneous publicity on the other side, not only by Communist or Communist influenced organizations but by strong advocates of civil rights and opponents of capital punishment. Radosh and Milton years later declared that "Bloch had to know that the Communist element, which by now dominated the Committee [to Secure Justice], could only be satisfied by the Rosenbergs' martyrdom."[39] Justice Douglas's "own impression was that Bloch never raised the point because the Communist consensus of that day was that it was best for the cause that the Rosenbergs pay the extreme price. That is a harsh thought; but it must be remembered that Stalin was still in power."[40]

Radosh and Milton's analysis of the contention that Bloch's failure to press the Farmer-Marshall argument on the Court had an ulterior motive leans toward supporting that position but still suggests uncertainty on their part.[41] I am not sure what to conclude from their statement that

Bloch did not want the Rosenbergs dead, at least not consciously, as some outsiders had come to believe. He had long come to love Julius and Ethel, and in his love he paid them the compliment of seeing them as they saw themselves: as heroes willing to sacrifice their lives to frustrate a government witch-hunt. Bloch's emotional identification with the Rosenbergs had become his own prison, one from which there was no logical means of escape.[42]

All this of course is highly speculative, although there is good reason to believe that the Communist Party was less interested in saving their lives than in benefiting from widespread publicity that the United States government was persecuting them.[43] A more likely conclusion, at least in my opinion, is not that Bloch was devious, but that he never advanced the argument presented to him several times by Fyke Farmer and Daniel Marshall because he believed the point had no merit. As to that, he was not alone. His two co-counsel, John F. Finerty and Gloria Agrin, agreed at least at the beginning, as did six members of the Supreme Court as well as government counsel. It is highly

Julius and Ethel Rosenberg were photographed in a patrol car after their conviction on April 5, 1951. They were executed on June 19, 1953.

unlikely that any of the Justices would have changed their minds if they had heard additional argument in the case. This justifies Bloch's judgment that the point was not a winning one. It does not mean that the point should not have been argued. Counsel should not abandon points which persuade one Supreme Court Justice and leave two others in substantial doubt. No sensible lawyer would, *if* he could foresee that result.

The case was argued on June 18, 1953 by me for the government and by Bloch, Finerty, Marshall and Farmer for the Rosenbergs. There was no written transcript, and I have no memory of what was said except for one comment by Justice Black that I did not appear to be as thoroughly prepared as I usually was. That, of course, was correct, since no one had known until the day before that an argument would be held. As to that, Justice Black's dissenting opinion stated:

I do not believe that Government counsel or this Court has had time or an adequate opportunity to investigate and decide the very serious question raised in asking this Court to vacate the stay granted by Mr. Justice Douglas. The oral arguments have been wholly unsatisfactory due entirely to the lack of time for preparation by counsel for the Government and counsel for the defendants. Certainly the time has been too short for me to give this question the study it deserves. [44]

In rejecting the argument that the 1946 statute superseded the older one, Justice Clark's concurring opinion invoked principles which the Court had followed in a number of prior cases in which a criminal defendant might have violated two somewhat different but overlapping statutes. As stated in Justice Clark's concurring opinion for six Justices:

Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: "At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." Unites States v. Beacon Brass Co., *344 U.S. 43, 45 (1952); see also* United States v. Noveck, *273 U.S. 202, 206 (1927);* Gavieres v. United States, *220 U.S. 338 (1911). Nor does the partial overlap of two statutes necessarily work a* pro tanto *repealer of the earlier Act.* Ibid. *"It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible....The intention of the legislature to repeal 'must be clear and manifest'....It is not sufficient....'to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary.' There must be a positive repugnancy between the provisions of the new law, and those of the old."* United States v. Borden Co., *308 U.S. 188, 198 (1939). Otherwise the Government when charging a conspiracy to transmit both atomic and non-atomic secrets would have to split its prosecution into two alleged crimes.*[45]

Whether a statute is to be construed as superseding another is, of course, a matter of legislative intent. Congress did not leave its intention in doubt in the Atomic Energy Act of 1946. As the opinion states:

Section 10 (b) (6) of the Atomic Energy Act itself, moreover, expressly provides that sec. 10 "shall not exclude the applicable provisions of any other laws...," an unmistakable reference to the 1917 Espionage Act. Therefore this section of the Atomic Energy Act, instead of repealing the penalty provisions of the Espionage Act, in fact preserves them in undiminished force. Thus there is no warrant for superimposing the penalty provisions of the later Act upon the earlier law.[46]

Certainly this provision of the 1946 statute should be controlling when the critical conduct charged against the defendants occurred before the passage of that Act. As Justice Clark's opinion further stated:

In any event, the Government could not have invoked the Atomic Energy Act against these defendants. The crux of the charge alleged overt acts committed in 1944 and 1945, years before that Act went into effect. While some overt acts did in fact take place as late as 1950, they related principally to defendants' efforts to avoid detection and prosecution of earlier deeds. Grave doubts of unconstitutional ex post facto *crimi-*

nality would have attended any prosecution under that statute for transmitting atomic secrets before 1946. Since the Atomic Energy Act thus cannot cover the offenses charged, the alleged inconsistency of its penalty provisions with those of the Espionage Act cannot be sustained. [47]

At this point the opinion cited an article written several years before the *Rosenberg* case by the former counsel to the Senate Subcommittee on Atomic Energy, who stated that the phrase "applicable provisions of any other laws, while general, must be read as pointing particularly to the Espionage Act."[48] After quoting this statement, the Government's brief, for which I was responsible, reviewed the legislative history of the Atomic Energy Act in some detail, and concluded that it supports a literal interpretation of Section 10 (b) (6). Justice Douglas's opinions did not mention this provision at all, much less its history.

Justice Frankfurter's dissent,[49] however, relies on other passages from Mr. Newman's article as suggesting the contrary. Even though enough time has passed to permit me to view the subject reasonably objectively, I recognize that I still may not be an impartial observer. There would seem to be no reason at this late date to review the historical material in depth in an effort to attempt to determine which interpretation of the statute was correct, or to do more than state that the statutory language supports Justice Clark's opinion for the Court, and that reasonable judges and lawyers have disagreed, possibly depending on their original biases. If a majority of the Court had thought the question doubtful, they might have decided the case differently, or at least allowed more time.

The assumption of some commentators that the Justices who composed the majority of the Court and persons who agreed with them were acting in bad faith or with political or other improper motivation, is in my opinion, no more justified than would be the contrary position that all those who believed the death sentence unwarranted were Communist sympathizers.

The answer to the question as to which of two criminal statutes applies to a conspiracy which occurred both before and after the second statute was passed will ultimately depend upon the language and history of the two statutes. It is not likely to recur in the precise circumstances presented by the *Rosenberg* case. It can no longer arise with respect to the two statutes involved. The death penalties were removed from the Atomic Energy Act in 1969, primarily because the Supreme Court in *United States v. Jackson* 390 U.S. 576 (1968), had invalidated a similar provision in the Federal Kidnapping Act. The Court there held that "permitting imposition of the death penalty only upon defendants who assert their right to be tried by a jury, discourages assertion of, and thereby imposes an impermissible burden upon the exercise of, a constitutional right."[50] The anomalous result was that a provision designed to insure that defendants could not be sentenced to death without a jury's approval had the effect of invalidating death sentences completely.

More recently, the death penalty provisions of the Espionage Act were found by the Ninth Circuit[51] to be inconsistent with the principles approved by the Supreme Court in *Furman v. Georgia*, [52] and *Gregg v. Georgia*, [53] Those cases established that capital punishment can be constitutional only when the governing statute provides the sentencing authority with adequate standards and information to guide its exercise of discretion. The Court of Appeals noted that the Department of Justice agreed that the Espionage Act clearly did not satisfy that standard.

The aspect of the *Rosenberg* case which still has significance is the Court's determination that lawyers having no connection with a case or its parties should not be permitted to participate to the extent of raising questions which counsel for the parties either deliberately or inadvertently failed to present.

With respect to this, Justice Jackson stated, for the majority of six:

This is an important procedural matter of which we disapprove. The stay was granted solely on the petition of one Edelman, who sought to appear as "next friend" of the Rosenbergs. Of course, there is power to allow such an appearance, under circumstances such as incapacity of the prisoner or isolation from counsel, which make it appropriate to enable the Court to hear a prisoner's case. But in these circum-

Hy Rosen's cartoon reflected the belief that the Communist party benefited from the publicity of the *Rosenberg* case because it generated sympathy among those who believed the Rosenbergs were being persecuted by the government.

stances the order which grants Edelman standing further to litigate this case in the lower courts cannot be justified.

Edelman is a stranger to the Rosenbergs and to their case. His intervention was unauthorized by them and originally opposed by their counsel. What may be Edelman's purpose in getting himself into this litigation is not explained, although inquiry was made at the bar.... The attorneys who appear for Edelman tell us that for two months they tried to get the authorized counsel for the Rosenbergs to raise this issue but were refused. They also inform us that they have eleven more points to present hereafter, although the authorized counsel do not appear to have approved such issues.

The Rosenbergs throughout have had able and zealous counsel of their own choice. These attorneys originally thought this point had no merit and perhaps also that it would obscure the better points on which they were endeavoring to procure a hearing here. Of course, after a Justice of this Court had granted Edelman standing to raise the question and indicated that he is impressed by its substantiality, <u>counsel adopted the argument and it became necessary for us to review it</u>..... [Emphasis supplied]

Every lawyer familiar with the workings of our criminal courts and the habits of our bar will agree that this precedent presents a threat to orderly and responsible representation of accused persons and the right of themselves and their counsel to control their own cases. The lower court refused to accept Edelman's intrusion but by the order in question must accept him as having standing to take part in, or to take over, the Rosenbergs' case. That such disorderly intervention is more likely to prejudice than to help the representation of accused persons in highly publicized cases is self-evident. We discountenance this practice.[54]

As the underscored sentence indicates, the Court found it necessary to decide the new point because at the end it was also pressed by the Rosenbergs' counsel.

The significance of the Court's disapproval of what happened in *Rosenberg* becomes apparent if one considers what the effect would have been if the Court had said the opposite -- that any lawyer has a right to present, and require a court to pass upon, any argument in any case in which a lawyer who represents no party may be personally interested, particularly after the available remedies had been exhausted in all the appellate courts.

Lawyers not representing parties to a case have, of course, long been able to present their positions as *amici curiae*, usually by obtaining leave of court, or, in some courts, the consent of the parties. Lawyers may also, of course, move on behalf of non-parties with an interest in a litigation to intervene and thereby become parties. And, as Justice Douglas subsequently stated in discussing the *Rosenberg* case in his autobiography:

There is in the law the "next friend" doctrine, especially applicable to habeas corpus *proceedings. This procedure serves to allow friends of prisoners who may not be able to reach a court to bring an action on account of the prisoners.*[55]

This in substance was what Justice Jackson had said in his *Rosenberg* opinion about prisoners who are incapacitated or iso-

lated from counsel,[56] and what Chief Justice Burger said in his opinion in *Gilmore v. Utah* (quoted below) about a person unable to seek relief on his own behalf. But the Rosenbergs had counsel acting on their behalf, and neither Edelman nor Fyke Farmer, who were unconnected to them in any way and did not know them, could satisfy such a test unless anybody can claim to be everybody's "next friend." Even though courts have not construed the phrase very strictly to require a real "friend," it cannot be read that broadly without becoming a nonsensical fiction. Thus apart from the special circumstances in which outside help is essential, outside lawyers do not have the status of parties. They are not entitled to make either new motions on behalf of a party, to request relief after the parties have exhausted all available remedies, or to ask that a case be reopened to consider questions not previously raised by competent counsel.

I recognize that few lawyers are likely to try to interject themselves into cases in which they do not represent an interested party otherwise than by moving for leave to intervene or file an *amicus* brief. In recent years the problem seems to have arisen only in the rare situations in which a defendant does not wish to challenge a death sentence, presumably because he fears a life in prison even more. In *Gilmore v. Utah,*[57] the Supreme Court held that a mother had no standing to object to a death sentence imposed upon a competent adult son who through his attorneys and in person made "a knowing and intelligent waiver" of his right to appeal. The concurring opinion of Chief Justice Burger and Justice Powell declared, citing *Rosenberg,* that a court would have jurisdiction over a "next friend" application "only if it were demonstrated that [the party] is unable to seek relief in his own behalf."[58]

More recently, in *Whitmore v. Arkansas,* [59] decided in April 1990, seven members of the Court agreed that the limitation of the jurisdiction of federal courts to "cases" and "controversies" precluded institution of suits by plaintiffs who had no personal relationship to the issue presented. A prisoner sentenced to death was there found to have no constitutional standing to challenge a death sentence imposed upon another prisoner who had made it plain that he did not desire to appeal from the sentence against him. Chief Justice Rehnquist, speaking for the Court, cited Justice Jackson's concurring opinion for six Justices in the *Rosenberg* case as discountenancing the

practice of granting "next friend" standing to one who was a stranger to the detained persons and their case and whose intervention was unauthorized by the prisoners' counsel.[60]

The Chief Justice added that:

Indeed, if there were no restriction on "next friend" standing in federal courts, the litigant asserting only a generalized interest in constitutional governance could circumvent the jurisdictional limits of Art. III simply by assuming the mantle of "next friend.""[61]

A Supreme Court decision allowing lawyers to attempt to represent any stranger would have opened a wide door to the prolongation of capital and perhaps other types of litigation. If that were generally permitted, neither the public, the bar, nor the courts could be certain when a case was concluded. High-minded lawyers, as well as some others, might have strong feelings about various types of cases, though probably not many would go as far as to emulate the tactics of Fyke Farmer and Daniel Marshall on behalf of the Rosenbergs. The Supreme Court's refusal to approve such a procedure thus protected a public interest which overall may be more important than anything else involved in the *Rosenberg* case. I suspect that few, if any, lawyers or judges would go so far as to believe that such a procedure for prolonging cases by outsiders should be open in all types of litigation, including criminal.

The three dissenting Justices and doubtless other critics of the *Rosenberg* decision have insisted that such a limitation should not apply to death sentences. Justice Douglas's response to the suggestion that the Rosenbergs were raising the question too late concluded:

The question of an unlawful sentence is never barred. No man or woman should go to death under an unlawful sentence merely because his lawyer failed to raise the point. It is that function among others that the Great Writ [of habeas corpus] *serves... Here the trial court was*

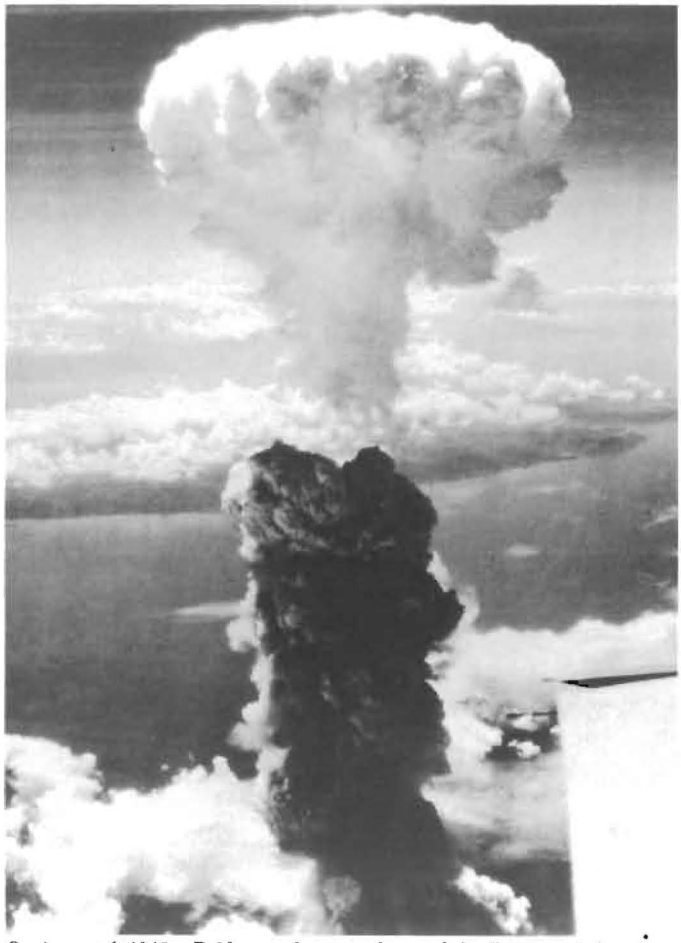
without jurisdiction to impose the death penalty, since the jury had not recommended it.[62]

In response to the similar argument advanced in the *Whitmore* case that "a relaxed application of standing principles" was warranted when a death penalty was imposed, Chief Justice Rehnquist declared that:

The short answer to this suggestion is that the requirement of an Art. III "case or controversy" is not merely a traditional "rule of practice," but rather is imposed directly by the Constitution. It is not for this Court to employ untethered notions of what might be good public policy to expand our jurisdiction in an appealing case... [R]estraint is even more important when the matter at issue is the constitutional source of the federal judicial power itself.[63]

Unquestionably, petitions for *habeas corpus* can raise constitutional contentions not previously presented which would otherwise have been untimely. The unique feature of the *Rosenberg* case, however, was that the new contentions were raised by lawyers having no connection with the defendants or the case. To say that such a remedy may be invoked if a criminal sentence is "unlawful" means that a court must act on anything a lawyer claims to be unlawful. This would open the door for any lawyer to require a court, and eventually the whole tier of trial and appellate courts, to consider every such claim even if it has no merit. The policy that lawsuits should eventually terminate must apply to some extent to capital punishment as well as to other types of cases or sanctions, even though perhaps not as strictly.

A different decision in the *Rosenberg* case on this point might have enabled some capital cases to be continued even longer than they now are. Whether that is deemed desirable is likely to depend on one's attitude toward capital punishment. If one is opposed to the death penalty, the proper remedy should be to abolish it, not to permit capital cases to be prolonged indefinitely.



On August 6, 1945 a B-29 superfortress dropped the first atomic bomb on the city of Hiroshima. Several weeks earlier, the United States had entered the atomic age by exploding its first nuclear device in the desert near Alamogordo, New Mexico. The work to build the bomb had been carried out in secrecy, and only a few who worked on the project knew or understood for what purpose the parts for assemblage had been designed.

The imposition of death sentences on the Rosenbergs may well have been the result of bad luck. The most important factor was probably the assignment of the case to then District Judge Kaufman, who was a tough judge for criminal defendants generally as well as for the Rosenbergs. If Klaus Fuchs had been captured and tried in the United States instead of England, Judge Kaufman might have known that he rather than the Rosenbergs and Greenglass was primarily responsible for the disclosure of atomic bomb secrets to the Soviet Union, and thus for the loss of American lives

Although the stolen secrets were passed to the Soviet Union when it was an American ally, by 1950, when the Rosenbergs were indicted, North Korea had invaded South Korea with the support of the Soviet Union. The engagement of American forces in Korea caused some to blame the Rosenbergs for the loss of American lives, arguing that the Soviet Union would not have backed the Communist aggression in Korea if it had not had nuclear capability.

during the Korean War.[64] And only between the fall of 1949 and 1954 was the Supreme Court (between 1940 and 1969) so composed as to have been likely to have overridden Justices Black, Frankfurter and Douglas.[65]

What I knew at the time and what I have learned since leaves me with no doubt as to the Rosenbergs' guilt. I was not at all sure that a death sentence was warranted, particularly for Mrs. Rosenberg. Even though we were at war in 1944 and 1945, when the atomic secrets were transmitted to it, Russia was not then an enemy of the United States but an ally. The reason given by Judge Kaufman for imposing such a sentence was substantially undermined by the subsequent disclosure that Klaus Fuchs had almost certainly turned over much more damaging information to the Soviet Union at or about the same time. But the severity of a sentence within lawful limits is not within the province of appellate judges or lawyers to decide. (As to this the federal law, at least, is no longer so rigid under the new Sentencing Commission Act.) I am not persuaded that the capital punishment provision of the 1946 Atomic Energy Act governed a conspiracy which in large part was effectuated before 1946. I would not be so sure if all or most of the acts had occurred thereafter, even though the literal words of sec. 10 (b) (6) still seem to me to be decisive.

Despite the charges made against many members of the Court, in part by each other, I am not convinced that the actions of any of them, most of whom I knew, were improperly motivated by either a liberal or conservative bias, or personal motives or dislikes which undoubtedly existed. This cannot, of course, be proved or disproved. Even though the Justices differed in ability and outlook, there is no reason to doubt that they were acting with judicial integrity. Nor, at least in retrospect, am I persuaded that time was sufficiently of the essence to justify the pressure for an immediate execu-

tion of the defendants without allowing lawyers and judges time to give careful consideration to a new question. But I can understand why judges who had rejected requests for relief over and over again during the preceding months should -- entirely apart from the presumed pressures from anti-Communist public opinion -- feel that further delay would merely be giving in to dilatory tactics, contrary to the reasonable public interest against undue delay in enforcement of the law.

Endnotes

1. *Rosenberg v. United States*, 346 U.S. 273, 295-296 (1953).
2. M. Parrish, "Cold War Justice: The Supreme Court and the Rosenbergs," 82 *Am. Hist. Rev.* 805, 811 n (1977).
3. 346 U.S. at 312.
4. A leading volume supporting the conviction is The Implosion Conspiracy (1973) by Louis Nizer, who relied mainly on the trial transcript. On the other side, *see* Invitation to an Inquest (1965 and 1983), by Walter and Miriam Schneir (1965 and 1983), Was Justice Done ? (1956), by Malcolm P. Sharp, and Fatal Error (1989), by Joseph H. Sharlitt. For articles disagreeing as to the conduct of members of the Supreme Court *see* M. Parrish, "Cold War Justice: The Supreme Court and the Rosenbergs," 82 *Am. Hist. Rev.* 805 (1977), and "Justice Douglas and the *Rosenberg* Case: A Rejoinder," 70 *Corn. L. Rev.* 1048 (1985); W. Cohen, "Justice Douglas and the *Rosenberg* Case: Setting the Record Straight," 70 *Corn. L. Rev.* 211 (1985).
5. Ronald Radosh and Joyce Milton, The Rosenberg File: A Search for the Truth. 1983. Page xiv.
6. *Id.,* at 450.
7. Fuchs, an atomic scientist, had escaped from the United States to Great Britain where he was eventually convicted, imprisoned for a number of years, and released to live for many years in East Germany. He undoubtedly knew and disclosed to the Soviet Union a great deal more than did the Rosenbergs, David Greenglass, and their other associates.
8. Radosh, Milton, *supra* note 5 at 451.
9. *Id.*
10. *Id.*
10a. Recently released information indicates that the secrets the Rosenbergs passed to the Soviet Union were more valuable than previously believed. In tapes recorded after his forced retirement, but witheld from his earlier memoirs, Nikita Khruschev stated expressly: "I was part of Stalin's circle when he mentioned the Rosenbergs with warmth. I cannot specifically say what kind of help they gave us, but I heard from both Stalin and Molotov, then Minister of Foreign Affairs, that the Rosenbergs provided very significant help in accelerating the production of our atom bomb. Let this be a worthy tribute to the memory of those people. Let my words serve as an expression of gratitude...." *Time*, October 1, 1990.
11. 40 Stat. 217-219 (1917), now 18 U.S.C. sec. 794.
12. 344 U.S. 838.
13. 344 U.S. 889-90.
14. 345 U.S. 965.
15. 346 U.S. at 279.
16. *Id.* at 280.
17. *Id.*, at 293.
18. Filed in the Library of Congress Manuscript Division.
19. Justice Frankfurter's memorandum, p. 8, Addendum, p.4.
20. Parrish, Cohen, *supra* note 4.
21. 70 *Corn. L. Rev.* at 231.
22. 346 U.S. at 282.
23. W. Douglas, The Court Years, 80 (1980).
24. 40 Stat. 217, 218-19 (1917).
25. 60 Stat. 755, 766-767 (1946).
26. 346 U.S. at 295.
27. *Id.* at 313-321.
28. *Id.* at 312.
29. 60 Stat. 768 (1946), as to which see pp.85, *infra.*
30. The Court Years, p. 81.
31. 346 U.S. at 283.
32. *Id.* at 321.
33. The Court Years, p. 80.
34. 346 U.S. at 287.
35. *Id.* at 293.
36. *Id.* at 291.
37. *Id.* at 287.
38. *Id.*
39. Radosh, Milton, *supra* note 5 at 409.
40. The Court Years, p. 79.
41. Radosh, Milton, *supra* note 5, at 409-410.
42. *Id.*
43. *Id.*, at 327-329, 407-409.
44. 346 U.S. at 296.
45. *Id.* 294-295.
46. *Id.* at 295.
47. *I d.*, at 295-296.
48. J. Newman, "Control of Information Relating to Atomic Energy," 56 *Yale L.J.* 769, 790 (1947).
49. 346 U.S. at 307-309.
50. Sen. Rept. 91-553, 91st Cong., 1st Sess. (1969), published in 2 U.S. Code, Cong. and Admin. News 1613.
51. In *United States v. Harper,* 729 F. 2d 1216, 1225-1226 (1984).
52. 408 U.S. 238 (1972).
53. 428 U.S. 153, 185 (1976).
54. 346 U.S. at 291-292.
55. The Court Years, p.79.
56. *Id.,* at 291.
57. 429 U.S. 1012 (1978).
58. *Id.* at 1014.

[59] 58 USLW 4495.
[60] *Id.* at 4499.
[61] Justices Marshall and Brennan, who dissent from all death sentences, thought it more significant that in *Rosenberg* the majority "addressed the application on its merits." (58 USLW 4504, n. 7). But this gives no weight to the majority's disapproval of the procedure invoked by the "next friend" in that case.
[62] 346 U.S. at 312-313.
[63] 58 USLW at 4498-4499.
[64] In light of the recent disclosure in the Khruschev tapes, *see supra* note 10a, the Rosenbergs' role in the development of the Soviet Union's atomic bomb may be greater than was previously believed.
[65] In 1949 liberal Justices Frank Murphy and Wiley Rutledge died and were replaced by Tom Clark and Sherman Minton. In 1953, within a few months of the *Rosenberg* decision, Chief Justice Vinson died and was replaced by Earl Warren, and in 1955 John Harlan replaced Robert Jackson.

A Personalized View of the Court-Packing Episode

Joseph L. Rauh, Jr.

Editor's Note: Joseph Rauh was Justice Cardozo's last law clerk and the first law clerk of Justice Frankfurter. This article is a partial excerpt from a lecture the author delivered on February 13 and 15, 1990, as a Regents Lecturer at the University of California, San Diego. The entire speech also appeared in Volume 69 North Carolina Law Review *(1990) pp. 213-249, under the title "An Unabashed Liberal Looks at a Half-Century of the Supreme Court," and is reprinted with permission. Copyright 1990 by the North Carolina Law Review Association.*

When I went to work for Justice Cardozo in 1936, the Court was hopelessly divided. The dominant faction consisted of four ultra-conservative Justices: Willis Van Devanter, appointed by Taft in 1910 and no longer productive; James Clark McReynolds, appointed by President Wilson to get rid of him as United States Attorney General; Pierce Butler, a railroad lawyer appointed by President Harding in 1922, who spent an inordinate amount of his time and effort on the Court trying to reverse judgments against the railroads under the Federal Employers Liability Act; and George Sutherland, another Harding appointee and Republican Senator who had fought against Louis Brandeis's confirmation in 1916.

Against this bloc stood the three liberals: Brandeis, the people's attorney, appointed by President Wilson; Harlan Stone, former dean of the Columbia Law School and United States Attorney General, appointed by President Coolidge; and Benjamin Cardozo, the Chief Judge of the New York Court of Appeals, appointed by President Hoover. The appointment of so liberal a Justice as Cardozo, by so conservative a President as Hoover, was remarkable in itself. Moreover, Cardozo would be the second Jewish Justice on the Court and was already 62 years of age. But the Senate Republican leadership conveyed to Hoover its belief that the best politics for 1932 lay in choosing the best man for the Court, and Cardozo was almost universally acknowledged as the proper successor to the Olympian Holmes.

Hostility between the two blocs was inevitable and open; they even held intra-bloc "skull practice" regularly. The four conservative Justices rode in the same automobile to and from the Supreme Court building for oral arguments and for the Saturday conferences of all nine Justices at which the Justices decided the cases (in those days the Justices' offices were in their homes). To compete with these regular get-togethers of the conservatives, the liberals began to meet at Brandeis's home on Friday evenings to plan their strategies for the Satur-

Charles Evans Hughes, Jr., *(left)* resigned his post as Solicitor General when his father accepted President Hoover's nomination to be Chief Justice in 1930. In this photo, probably taken in the summer of 1916, Chief Justice Hughes holds his grandson, Charles E. Hughes the 3rd, in his arms.

day conferences. I always waited until Justice Cardozo returned to his apartment so I could get a full report on the liberal warm-up. I never found the Justice more unhappy than on the few occasions when Brandeis or Stone announced that they were not going to join his dissent in a particular case the following day despite their belief that the majority was going to make a wrong decision.

The balance of power, of course, lay with the other two Justices, Chief Justice Charles Evans Hughes and Associate Justice Owen Roberts. When Chief Justice Taft retired in 1930, there was considerable speculation about who would be named as his successor. Justice Frankfurter later relayed to me the story of Hughes' nomination as told to him by Joseph Cotton, Hoover's Under-Secretary of State. A meeting to discuss Taft's successor was held in Hoover's office, which Cotton attended. The President said he felt obligated to offer the position to Hughes, a former Associate Justice of the Supreme Court and the Republican standard-bearer in the 1916 Presidential race. One of those present at the meeting told the President he was safe in making the offer because Hughes would have to decline since his son, Hoover's Solicitor General, would resign his post as the Government's spokesman before the Court if his father became Chief Justice. So Hoover called Hughes on the telephone and offered him the position of Chief Justice. After a short period of small talk, Hoover hung up the phone, blurting out, "The son of a bitch doesn't give a damn about his son's career."[1] Despite Senator Norris's attack on Hughes on the Senate floor as the exemplar of "the influence of powerful combinations in the political and financial world,"[2] Hughes was confirmed 52-26 and became, at least in Justice Cardozo's oft-stated opinion, a "brilliant and efficient Chief Justice but one without wisdom."

Roberts' road to the Court was an equally uncertain one. Shortly after the Hughes confirmation, Hoover's nomination to the Supreme Court of Federal Judge John J. Parker of the 4th Circuit came before the Senate. Parker had upheld the so-called "yellow dog contract" against union membership.[3] This action, combined with earlier ugly racist public statements, was enough to defeat Parker. Roberts, a prominent corporation lawyer who had been the prosecutor in the Teapot Dome scandal, became the ninth Justice. Together with Hughes, Roberts held the legal fate of the soon-to-be New Deal and much state social legislation in his hands.

Justice Roberts quickly became a fellow-traveler of the conservative four, with the Chief Justice swinging back and forth sufficiently to earn the sobriquet: "the man on the flying trapeze." The Court, in the hectic years of 1935 and 1936, invalidated Roosevelt's National Recovery Act, his Agricultural Adjustment Act, Railroad Retirement Act, Bituminous Coal Conservation Act, as well as other New Deal legislation and administrative actions. These decisions, plus the Court's ruling at the end of the 1935-36 Term invalidating the New York minimum wage law[4] not only killed the laws already considered but threatened those enacted but untested such as the Wagner Labor Relations Act, the Social Security Act, the Holding Company Act and bills on the drawing board, including a federal wage-hour-child-labor law.

Something had to be done if the New

Deal was to be saved and expanded. Talk was in the air about constitutional amendments, including expanding the Commerce Clause of the Constitution; prohibiting less than two thirds of the Court from invalidating federal or state legislation; permitting a majority of the two houses of Congress to reenact a law invalidated by the Court without further Court review of the law; and making laws passed by two thirds of each House unreviewable.

Roosevelt's landslide reelection in 1936 settled the matter. He would act on the Court, but the constitutional amendment route was too slow for him. Shortly after the election, he referred publicly to Congress's power to enlarge the Court and gave out hints that the time for action on the Supreme Court front was not far off. Nevertheless, Justice Cardozo seemed considerably shaken when, in early February 1937, just three months after the election, he came into the little room in his apartment where I worked to give me the news of the Court-packing plan that President Roosevelt had just submitted to Congress. He said Roosevelt wanted to add a Justice for every one who did not retire after the age of 70, up to a maximum of six. Cardozo at once spoke of his opposition to the Court-packing plan, saying rather plaintively, "No judge could do otherwise." But, at least to me, there was no sign that his devotion to Roosevelt lessened one bit.

Roosevelt's original rationale for his plan was that the Justices were behind in their docket because they were too old to do their work. This theory simply did not hold water. The Court may have been doing its work too intrusively or too harshly, but it was not behind in its docket. Hughes' brilliance and administrative drive saw to that. This weak rationale hurt the President's cause.

I had a front row seat at the ensuing battle. On the surface, the adversaries were

Ben Cohen and Thomas Corcoran *(pictured left to right)* were photographed together on April 18, 1935, the year the author worked for them, at a meeting of the Senate Interstate and Foreign Commerce Committee. The Committee was debating pending legislation to regulate holding companies in public utilities.

Roosevelt and Senator Burton K. Wheeler. But at the working level, the adversaries were men who had once been bosom allies: Ben Cohen and Tom Corcoran took the Roosevelt side,[5] Justice Brandeis the other. Cohen and Corcoran, for whom I had worked in 1935, stated repeatedly that they had not participated in the drafting of the original Court-packing bill predicated on the age and inadequacy of six of the Justices. Cohen wrote Brandeis later in 1937, "Neither Tom nor I was consulted in the formulation of the Court proposals which the President did decide to sponsor.... Once the President's proposals were made, Tom and I worked for their adoption...."[6] Although Cohen and Corcoran may have been more involved in the early stages than the letter to Brandeis implies, they certainly disagreed with the initial age-inadequacy rationale for the bill.

Warner Gardner, who worked closely with Attorney General Homer Cummings on the preparation of the Administration's Court-packing plan, has written in Pebbles From the Paths Behind, his 1989 memoir, that "Cummings and I spent a morning with the ubiquitous Corcoran and Cohen, finding that they were in strong support and without suggestions for change."[7] There is no record of this meeting in Cummings' diary, although there is a reference in his diary to the President telling him "he had tried it on Tommy Corcoran and the latter agreed it would work."[8] As a fervent believer in Mr. Cohen's integrity and truthfulness, I suggest that the apparent contradictions may be explained by Corcoran and Cohen's unawareness of the age-inadequacy rationale for the packing as opposed to the packing itself.

The Administration soon had the age-inadequacy rationale turned around. Roosevelt began preaching the need "to save the Constitution from the Court and the Court from itself"[9] and stressing the importance of the New Deal legislative program and the importance of having it *now*. Roosevelt began gaining ground.

But Justice Brandeis was also at work. Senator Wheeler's son Ed remembers how the opposition to the Court-packing plan evolved. His sister Elizabeth had just had a baby. The Wheelers and Brandeises were close enough for a visit from Mrs. Brandeis to Elizabeth and the baby. During the course of the "courtesy" call, Mrs. Brandeis casually mentioned to Elizabeth that "Louis [Brandeis] agrees with your father." As expected, as soon as Mrs. Brandeis left, Elizabeth called her father, and Wheeler promptly arranged a meeting with the Justice. Brandeis then put Wheeler in touch with the Chief Justice. Out of that conversation came the Chief Justice's letter to Wheeler demonstrating that the Court was fully abreast of its work and that any increase in the number of Justices could only impair the Court's efficiency. Wheeler fueled his attack on the bill before the Senate Judiciary Committee by presenting the letter from the Chief Justice. Hughes had only obtained the approval of Brandeis and Van Devanter for his letter to Wheeler, and I always had the feeling Cardozo was as opposed to the Hughes-Brandeis intervention as he was to the plan itself.

In any case, big goings-on occurred down at the Court. Shortly after Roosevelt announced his Court-packing plan, Roberts publicly switched to the liberal side on the validity

After clerking for Justices Cardozo and Frankfurter, Joseph Rauh went on to serve as counsel for the Leadership Conference on Civil Rights, the Mississippi Freedom Democratic Party, the United Auto Workers and the Department of Labor. He was also one of the founders of Americans for Democratic Action.

of state minimum wage laws, providing a 5-4 majority for the constitutionality of such a law from the State of Washington.[10] Many thought that the switch came as a result of FDR's proposal, but this hardly could have been the case. Roberts had cast his vote *for* the Washington law in conference before Roosevelt made his proposal. If Roberts were affected by any extraneous influence, it must have been the landslide 1936 election. While humorist Finley Peter Dunne's popular creation, Mr. Dooley, put the proposition most inelegantly when he stated "th' Supreme Coort follows th' iliction returns," Roberts could well have been affected by the realization that F.D.R was speaking for the hopes and aspirations of the vast majority of Americans.

Whatever the reason for Roberts' switch in the minimum wage law case, another switch soon occurred of such magnitude in so important a case that its only possible explanation was the Court-packing plan. In 1936, the Court had ruled by a 6-3 vote in *Carter v. Carter Coal Co.*[11] that Congress's power over interstate commerce was not broad enough to support federal regulation of labor conditions in the mines. In February 1937, just days after Roosevelt made his proposal for restructuring the Court, advocates argued the constitutionality of the National Labor Relations Act of 1935 before the Court. At the ensuing conference of the Justices, the vote was 5-4 to uphold the law, both Hughes and Roberts switching from their positions in *Carter Coal.* When Cardozo reported on the conference action during our ride home from the courthouse, he was elated by the switches. But about all that this kindly gentleman could bring himself to say in criticism was that he "considered it quite an achievement to make the shift without even a mention of the burial of a recent case." He did smile some time later when I told him the gag going around about "a switch in time saves Nine," but he never said anything like that himself.

When the decision upholding the Labor Act came down in April 1937,[12] the anti-New Deal conservative bloc knew that the jig was up. "Every consideration brought forward to uphold the Act before us," McReynolds literally shouted as he read from his dissenting opinion, "was applicable to support the Acts held unconstitutional in causes decided within two years."[13] Shortly after the decision, in early May, there was a knock on Justice Cardozo's apartment door: there was Justice Van Devanter asking to see Justice Cardozo. Minutes later, Cardozo brought me the news that Van Devanter was retiring. The judicial struggle against the New Deal was over.

Actually, Van Devanter had wanted to retire a few years earlier because he recognized his drastically reduced productivity. Had he done so, his action might well have obviated the necessity for any Court-packing plan. But from what I gathered from Cohen and others, Van Devanter consulted Brandeis about his retirement, and Brandeis, after conferring with then-Professor Felix Frankfurter, urged Van Devanter to stay on the Court because of his valuable input in conference. I have never been able to understand this "valuable input in conference" talk; in all Cardozo's detailed reporting of the conferences, I never remember him ever mentioning Van Devanter's name, although there were repeated references to what McReynolds, Sutherland or Butler had said. The Brandeis-Frankfurter advice to Van Devanter was a judicial tragedy.

With the retirement of Van Devanter and the favorable action of the Court in the Labor Act case, and in the Social Security cases soon afterward,[14] the urgent need for the plan was over. Roosevelt could have declared victory and departed from the battlefield with head held high. But he apparently had gone too far to turn back or, at least, that's what he must have thought. So the struggle went on.

On June 14, 1937, the Senate Judiciary Committee filed a report excoriating the President and his Court-packing bill.[15] The bitterness of the Committee report is summed up in its last sentence: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."[16] As Professor Leuchtenburg has related, however, two days later F.D.R pulled a rabbit out of his hat.[17] He invited all 407 Democratic Senators and Congressmen to picnic with him over the weekend at Jefferson Island, where he used his geniality and charm to his advantage.[18] The tide started to turn once again in his favor. The Administration offered a new bill that looked more like a compromise than it really was.

When debate on the bill opened in July, Democratic Majority Leader Joe Robinson indicated that he had the votes for passage.[19] Robinson's sudden death, apparently due to the unnatural heat of that summer coupled with the tension of debate, led to the bill's defeat.[20] The Senate voted to recommit the bill to the Committee, and that was the end of the struggle.

Justice Cardozo wrote me from his summer place just afterwards: " 'It was a famous victory.' Have you any idea what I refer to?" Small wonder the Justice was jubilant. His opposition to the bill, even though on the theory that "no judge could do otherwise," had been vindicated. More importantly, he was on the verge of becoming the leader of a new liberal majority on the Court. Sadly, after only two months with the new Court, Justice Cardozo became ill and was bedridden. In July 1938, he passed away.

For myself, I thought then and I think now, that divine providence must have played a hand in what seems to me a perfect outcome of a venture that began so dubiously. The Roosevelt Court-packing plan resulted in the change of course by Justices Hughes and Roberts, and their switch saved the New Deal. At the same time, the ultimate defeat of the plan after Joe Robinson's death prevented a dangerous precedent from threatening the stability of our constitutional legal system based on the separation of powers and the independence of the federal judiciary. Both the effect of the plan, while it was alive, and its ultimate death, are monuments to the resiliency of our democratic system. Senator Hiram Johnson's shout to the galleries, "Glory be to God," right after the Senate voted to send Roosevelt's bill back to committee was an appropriate ending for one of the most dramatic periods in the Court's history.[21]

Acknowledgments: *The author acknowledges the able assistance of Georgetown law students Helen Pearce and Steven Swenson.*

Endnotes

1. While I was in San Diego as a Regents' Lecturer at the University of California there, I had the good fortune to encounter Chief Justice Hughes' grandson, Professor Stuart Hughes. I told him this story which I had heard from Felix Frankfurter. He smiled and said, "Well, that story was certainly told often enough inside our family."
2. S. Hendel, Charles Evans Hughes and the Supreme Court 79 (1951).
3. *International Org., United Mineworkers of America v. Red Jacket Consol. Coal & Coke Co.*, 18 F.2d 839 (4th Cir. 1927); *see* J. Rayback, A History of American Labor 319 (1966).
4. *Morehead v. Tipaldo,* 298 U.S. 587 (1936).
5. The role of Cohen and Corcoran, two very close advisors of President Roosevelt, is related in J. Lash, Dealers and Dreamers 291-316 (1988).
6. Letter from Cohen to Brandeis dated July 30, 1937. Box 13 Cohen papers, Library of Congress.
7. W. Gardner, "The Public Path 1909-1947," in Pebbles from the Paths Behind, at 77 (1989).
8. J. Lash, *supra* note 5, at 293.
9. Commager, Documents of American History Vol. II, 384 (7th ed. 1963).
10. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
11. 298 U.S. 238, 297-310 (1936).
12. *See N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).
13. *Id.* at 77 (MacReynolds, J., dissenting).
14. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937).
15. Senate Committee on the Judiciary, Reorganization of the Federal Judiciary, S. Rep. No. 711, 75th Congress, 1st Session, 1 (1937).
16. *Id.* at 23.
17. *See* Leuchtenburg, "F.D.R.'s Court-Packing Plan: A Second Life, A Second Death" *Supreme Court Historical Society Yearbook* 1988, at 80 (1988).
18. For a fuller account of the weekend at Jefferson Island and its effect on the President's plans, *see* Leuchtenburg, *supra* note 17, at 81.
19. *Id.* at 82.
20. *Id.* at 84-86.
21. *Id.* at 87.

Court Packing: The Drafting Recalled

Warner W. Gardner

Editor's Note: *The following is an excerpt from Pebbles From the Paths Behind, published privately by Warner W. Gardner in 1989. In the book's preface, the author describes his motive for writing a memoir: "I have in any case addressed these pages to a sharply defined audience: me. One finds, I may note, a relaxing freedom from exacting standards when he is in an hermaphroditic condition of conjoined author and reader." Despite his intention, Mr. Gardner has nonetheless relented and permitted us to publish this portion of his memoir. Copyright 1989 Warner W. Gardner.*

In early October, 1936, Solicitor General Stanley Reed assigned me to Attorney General Homer Cummings for some research assistance. It is not irrelevant that I was then a week or two past my 27th birthday. Cummings said that if Roosevelt were reelected, as was expected, he was determined to move against the five or six Justices who were so stubbornly opposed to any government regulation that nothing could be done to strengthen the still devastated economy of the nation. I was to survey every suggestion short of constitutional amendment that had been made, and to report back as soon as feasible after the election.

I must have made occasional oral reports to Cummings or Reed, but don't recall any. On December 10, 1936, I handed in a 65-page memorandum entitled "Congressional Control of Judicial Power to Invalidate Legislation." I am confident that neither the Department nor the White House had made any other constitutional inquiry undergirding the President's proposal of February 5, 1937. In rereading the paper a half century later, I consider it well short of perfection but adequate to the need. In 1981 I sought retrieval of the paper, which had been in the 40-year custody of Paul Freund pending completion of his Holmes Devise history of the "New Deal" Court. In returning a copy, Paul remarked that the paper "has stood the test of time very well." I replied,

I seem to have combined what was in view of the importance of the issue comparatively superficial research with a remarkable confidence in my judgmental conclusions. While I should hope this reflected a short allowance of time, I have encountered, in the subsequent 45 years, some meanspirited people who have suggested that such is my customary condition.

The paper concluded that the Court's constitutional review had solid historical support; that the Court would not accept a Congressional declaration that the legislative findings of fact were conclusive; that Congress could not oust state courts of constitutional review unless there were a federal court alter-

After clerking for Justice Harlan Stone during the 1934-35 Term, Warner Gardner served the Office of the Solicitor General at the Justice Department for five years. He then became Solicitor of the U.S. Department of the Interior in 1942, and served as Assistant Secretary in 1946-47.

native; that the Congress could not enact a "procedural" rule which specified the number of votes required to declare an act unconstitutional; and that the Court would invalidate a statute which excised constitutional adjudication from the jurisdiction of federal courts. Finally, a didactic one-page discussion concluded, "There is no possible doubt as to the power of Congress to regulate the number of judges who shall constitute the Court." I indicated that it seemed undesirable, chiefly on administrative grounds, but thought this must be weighed against the fact that only this expedient was assuredly constitutional.

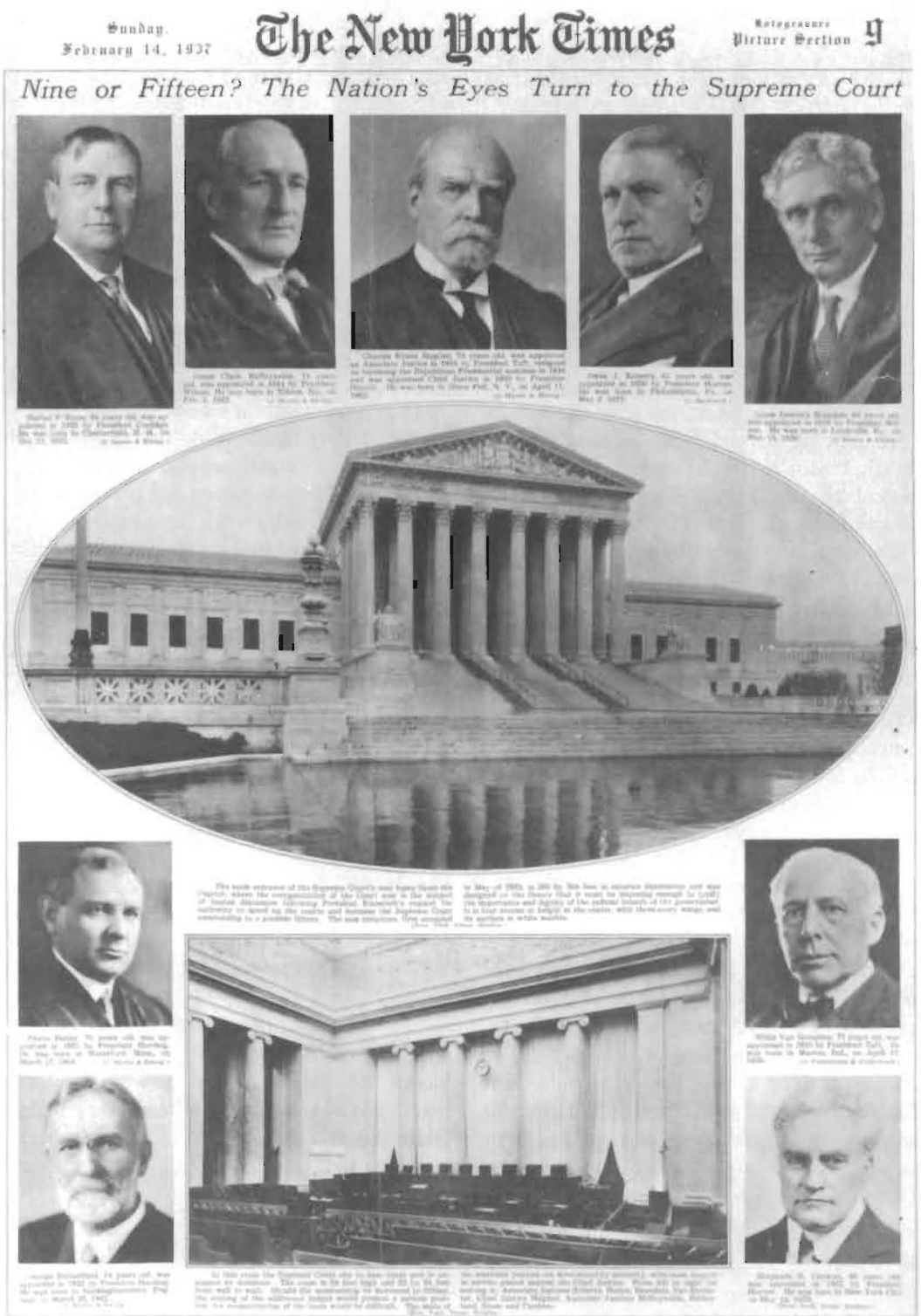
After some considerable discussion with Cummings I was told to go draft a bill. In the course of drafting I thought that I had found a solution to the administrative problems which had earlier concerned me. If an additional Justice were appointed for each Justice over 70 who had not retired, and without a subsequent appointment on the retirement of the over-70 judge, the Court would fall back to nine members as the old codgers retired.[1] The result was a pure confrontation of power, would surely work to make retirement at 70 invariable, and would do no other harm to the functioning of the Court. At the age of 27 it is axiomatic that senility settles in from the 70th year forward, a conclusion I find dubious in my 80th year. I was in any case highly pleased to find so neat a solution to the constitutional crisis.

Cummings and I spent a morning with the ubiquitous Tommy Corcoran and Ben Cohen, finding that they were in strong support and without suggestions for change.[2] Cummings, early in the White House consideration of the bill, twice dispatched his young assistant to represent the Department at the White House. One was a morning conference with Roosevelt as he lay abed (that being easier for him than strapping himself into braces and a wheel chair) and the other a lunch with the White House aides, chaired by Jimmy Roosevelt. But after that, probably from early January, I was not part of the consultative process, but would draft or revise according to Cummings' instructions.

To my dismay, the stated purpose of the bill was transformed into a measure to relieve the Justices of their crushing burden of work, made especially difficult by their advanced age. An additional Justice was to be appointed for each that was over 70, but the addition was permanent and subject to a maximum of 15. The justifying papers, from the President's message on down, spoke almost exclusively of overwork, with little or no reference to judicial usurpation of power. As the Justices were not overworked, and were comfortably discharging their duties, a constitutional confrontation that men could fight for became an exercise in Madison Avenue sleaze.

I have never known the origin of this strategy, but have always guessed that Carl McFarland, who was very close to Cummings and of a notably practical cast of mind, may have been responsible. If I had been somewhat older, I would probably have begged out of the subsequent drafting, but as it was I stated my disagreement and continued to work as I was directed. Out of a fine schoolboy honor, I complained to none of the distortion of my handiwork. I did no work on any of the justifying memoranda or statements; I cannot now remember whether I managed to avoid it or was never asked.[3]

On February 5, 1937, the President sent to the Congress his "Court-packing" mes-



Sunday, February 14, 1937

The New York Times

Rotogravure Picture Section 9

Nine or Fifteen? The Nation's Eyes Turn to the Supreme Court

The New York Times analyzed President Roosevelt's proposed changes in Court size in a full-page cover story on February 14, 1937.

sage and bill. A substantial majority of the legal profession and of the press were in shocked dissent.

The Senate hearings[4] opened with a statement by Cummings on March 10 and one by Bob Jackson, then in charge of the antitrust division, the next day. When they are reread 50-odd years later, the Cummings statement, directed exclusively to the unfair burden cast on these aged men, was a smoothly crafted bit of hokum, while the Jackson statement, which never mentioned over-work but only judicial tyranny, was a brillantly effective demonstration of what the matter was really about.[5]

The Court-packing bill died, by an almost unanimous vote of the Senate Judiciary Committee, in May 1937. A crumb tossed to the Administration was passage of the judicial retirement bill, which by keeping a retired Justice eligible for Article III service served to give him constitutional protection against a salary reduction after retirement. Associate Justice Willis Van Devanter retired under its provisions on June 2, 1937. In fact, however, the Administration, although ignominiously defeated in the Congress, had already won its campaign in the Court.

On March 29, 1937, about a week short of two months after Roosevelt's message, the Court by a 5-4 vote in *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, held constitutional the state of Washington law fixing minimum wages for women, thereby overruling *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), and *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936), which had been decided only the year before. *West Coast Hotel* was argued on December 16 and 17 and in normal course the Justices would have voted on the following Saturday. The final vote could have reflected *sua sponte* reformation, or Charles Evans Hughes and/or Owen Roberts could have changed their vote in February. Whether the result was due to the Court-packing project can be, and has been, argued either way. The case in favor of *sua sponte* reform is strengthened by the circumstance that Tom Harris has told me that Harold Leventhal, Stone's clerk of that year, said that the vote was taken before the Court-packing bill was announced.

West Coast Hotel was followed in April by a series of cases which by a 5-4 vote sustained the power of Congress to protect collective bargaining where the work was in or affected interstate commerce.[6] In May the Court, again by a 5-4 margin, upheld state and federal social security taxes, levied to support payments to the unemployed and the aged.[7] The Court was not again, at least during the next half century, to hold that the common law rights of contract and property were beyond the reach of regulatory legislation.

It is accepted wisdom that the extravagances of Court packing were unnecessary, and that the process of attrition would in ordinary course have produced this shift in constitutional doctrine. So, one may suppose, it would have. But who can know how long that process would have taken, nor what would have happened to a country still devastated and yet unable to enact corrective legislation? The Court, long after the event, has itself attested to the impact of the effort. Justice White, writing for the Court in *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986), said:

> *The court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process clauses.*

I thought that I owed Stone a confession, and called upon him in order to admit authorship of the bill. He was not distressed, but made response in terms humiliating to one possessed of the maturity of 27 years. He chuckled and said, "after all, you were very young."

Endnotes

1. I cannot recall whether I developed this on my own or whether my attention had been drawn to the fact that a broadly similar proposal had in the 1913-1916 period been made in respect of lower federal court judges by the House Committee, President Taft, and Attorney General McReynolds.

2. Joe Rauh has been emphatic and vociferous that Cohen and Corcoran were shocked and were opposed to the bill. I do not know whether Joe has given full rein to a somewhat romantic memory or whether their distaste arose when the bill was fundamentally changed before its public proposal.

3. It is only fair to note that, as best I can recall, I am more outraged now than I was in 1937 at the transformation of my handiwork into what seems to have been an effort to market deceit. I was probably made tolerant by a feeling of team rapport; we were all working together to achieve an important goal and nobody had elected me captain.

4. Hearings before the Senate Committee on the Judiciary on S. 1392, 75th Cong., 1st Sess. (1937).

5. Among other points, he explained that the Court's membership was changed from 6 to 5 in 1801, to 6 in 1802, to 7 in 1807, to 9 in 1837, to 10 in 1863, to 8 in 1866, and to 9 in 1869; in each case the motivation was blatantly political.

A year later Bob Jackson became Solicitor General and I worked very closely with him. But in 1937 we were barely acquainted and our views, while identical, were independently developed.

6. *Labor Board v. Jones & Laughlin*, 301 U.S. 1 (1937); *Labor Board v. Fruehauf Co.*, 301 U.S. 49 (1937); *Labor Board v. Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. Labor Board*, 301 U.S. 103 (1937).

7. *Carmichael v. Southern Coal Co.*, 301 U.S. 495 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

Remembrances of William O. Douglas on the 50th Anniversary of his Appointment to the Supreme Court

William J. Brennan, Jr., Richard W. Benka, Richard H. Chambers, Ramsey Clark Milton V. Freeman, Thomas J. Klitgaard, Simon H. Rifkind, Gerhard A. Gesell Erwin N. Griswold, Milton Handler, Leonard F. Jansen, William A. Reppy Marshall L. Small, Jay Kelly Wright, Eric Sevareid

Editor's Note: *The following reminiscences were solicited by Cathy Douglas Stone for a booklet which was distributed at a reception at the Supreme Court on May 9, 1989 to honor the 50th anniversary of the appointment of Justice Douglas to the Court.*

WILLIAM J. BRENNAN, JR.

Retired Associate Justice Brennan sat on the Bench with Justice Douglas from 1956 to 1975.

I was very fond of Bill. I first met him on October 16, 1956 when I as a recess appointee took my seat on the Court. October 16 also happened to be Bill's birthday. He was having a birthday party at his house and invited my wife and me. There was a large number of guests and Bill was a most delightful and gracious host. When we were leaving he suggested that we ought to get together on October 16 in future years and celebrate our anniversaries together. We did that except when one or both of us was out of town on that date. That did not happen very often and our October 16 date held until the year before he suffered his disabling stroke. On occasions, we invited a third couple (Abe and Carol Fortas, for example). We dined either at his house or ours or, on occasions, at a good restaurant. Without exception, they were delightful, amusing occasions which we simply refused to spoil by talking shop. I only wish I had kept a diary of the things we did talk about. Bill was a natural storyteller and his details of his latest fishing or mountain climbing adventures in far away places were fascinating and often gripping. Bill also had a long-time reputation as an incorrigible practical joker, but would not indulge in horseplay on those occasions.

In the early weeks after I took my seat, Bill's close friend, Fred Rodell, wrote a piece for the *Progressive* deriding my appointment. Bill was much disturbed by this and wrote Fred a strongly phrased letter in my defense. That provoked from Fred an apology, but never any commitment not to repeat his appraisal if events justified.

Bill's relationship with his colleagues was generally very warm, but he took considerable delight in teasing Justice Frankfurter who, he thought, treated his colleagues as if they were his students and subservient to him. Jim Simon quoted Bill as saying,

Justice Black sat to Justice Frankfurter's left and I sat across the table from him. I told Felix that Hugo was the nutcracker and he, Felix, was the nut. After Hugo got finished with him I just picked up the pieces. Felix never thought this was very funny. Again, once after I read a story in the paper that Felix and I weren't speaking I came into conference and offered to shake his hand. Felix just stood there. I said, "you'll have to

Justice Douglas liked to try to predict how his colleagues would vote at the close of oral argument, and, if he sensed he was in the minority, he would dictate his dissent immediately for later use.

hurry, Felix, I am a busy man." He didn't think that was funny either.

Our conferences, at which we discuss and vote on cases after argument, are limited to the nine of us. On many occasions Justice Frankfurter would speak to a case not from his seat but while walking around the conference table. The bookshelves containing the reports of the Supreme Court decisions were along the walls. Justice Frankfurter would reach into the shelves, take down a volume of decisions and read, sometimes at length, excerpts from opinions that he argued supported his position. When this took more time than Bill thought justified, he, on occasions, would rise from his seat, approach the Chief Justice and say, "When Felix finishes, Chief, I'll be back," and leave the conference. Justice Frankfurter would be furious but nevertheless would continue until he had fully expressed his view.

Bill was a very fast worker. I have sat with 22 Justices during my time on the Court and Bill turned out his opinions in vastly less time than the rest of us were able to. He had an uncanny ability at oral argument to listen and at the close make up his mind how he believed each of his colleagues would probably vote. When his judgment was that he would be in the minority he often dictated a dissent immediately after the close of the day and put the dissent in his desk drawer awaiting the circulation of a Court opinion, often months later. Time and again, almost within minutes after circulation of a Court opinion, the Douglas dissent would be circulated and it was extraordinary how often the dissent squarely met the circulated Court opinion.

Bill usually finished the Term's work much earlier than the rest of us. He would then depart for Goose Prairie. Quite often he would leave with me his votes in as yet uncirculated cases. On at least one occasion, however, he slipped up. He left me with a vote to affirm in a case. I did so only to receive some days later a dissenting opinion from Goose Prairie. Bill had forgotten to tell me he had changed his mind.

Bill was a powerful figure. He had a brilliant and meteoric career highlighted by a special talent for persuasion. Intelligent, humane, imaginative, yet compassionate and practical, he was intensely loyal to the Court while not sacrificing his own creative independence. Few Justices in our history played a more influential role in shaping our modern jurisprudence. He provides still an inspiring example of devoted public service. I miss him very much.

RICHARD W. BENKA

A partner in the Boston law firm of Foley, Hoag & Eliot, Mr. Benka clerked for Justice Douglas in 1972-73.

I'll use this opportunity to relate two brief stories, one of which reveals the Justice's beartrap memory and facile draftsmanship and the other of which demonstrates how his decisions were profoundly governed by his sense of justice and human need.

At the time of his 75th birthday celebration, in 1973, the Justice in his remarks said that he had only one "unrealized ambition" on the Court, and that was "to be the author both of the majority and of the minority opinions in one case." I was clerking for the Justice at the

time, and -- in his inimitable fashion -- he had filed away in his memory the fact that a justice of the Kansas Supreme Court had accomplished the feat sometime in the 1920s. We were able to find the actual cases, and the Justice cited them in his remarks.

What the Justice did not tell, however, was that he actually had written both the majority and the dissent of a Supreme Court opinion, as he confided to the three of us who were clerking for him in 1973. The Justice had years before been in dissent in a "trivial tax case," he said, and after Conference he returned to chambers and dashed off his dissent for circulation (typically, again, before the majority opinion had circulated). Weeks later, the Justice to whom the majority opinion had been assigned (who will remain nameless), came to the Justice and said he was agonizing over the majority opinion. With evident relish as he told the story, the Justice continued: "I told him I wasn't surprised -- he was dead wrong. But I told him that I'd help him out, and ghostwrite the majority opinion for him, which I did."

My other comments involve *Kahn v. Shevin*, 416 U.S. 351 (1974), which came before the Court during the 1973-74 Term. This case involved a small Florida state property tax exemption given to widows (but not widowers). The three law clerks, having learned about "suspect classifications," "strict scrutiny," "rationality," and the like in law school, were convinced that the statute should be struck down.

We made our legal arguments to the Justice, and pointed out that in our day and age this sex-based difference should not be sustained. He listened -- briefly. Perhaps he was thinking of his own mother, for he had at the time been working on his autobiography, Go East, Young Man. In any event, he looked squarely at us and said: "I've known a lot of starving widows." The Justice was voting to uphold the statute -- no doubts, no second thoughts, no more discussion.

RICHARD H. CHAMBERS

Judge Chambers has served as a judge for the U.S. Court of Appeals Ninth Circuit (Tucson) since 1954.

There was one facet about the character of William O. Douglas that few have noticed, or if noticed, not written about. It is this: In reversing a lower court, he always gave the losing court judges an eminently fair statement of the facts, perhaps canting a little toward the losers.

I call this not shabby, but the hallmark of greatness.

RAMSEY CLARK

Mr. Clark served as Attorney General of the United States from 1967 to 1969, and is now in the private practice of law in New York City.

How many of us practice what we preach in the face of extreme personal adversity? Bill Douglas did. This in no small way accounts for the special power of his words.

The impeachment effort against him, an assault on the independence of the Supreme Court of the United States no less, was an extremely dangerous matter.

Mr. Justice Douglas understood this completely. He had at that very moment an important new book, Points of Rebellion, ready for publication by Random House. His publisher had sold rights to one chapter to a magazine, *Evergreen*, that would clearly create a storm of protest in the House since it regularly ran pictures of less than scantily clad ladies and articles by some of America's most notorious radicals.

His cautious lawyers first urged the Justice, then meeting rejection, begged him to either cancel, or at least delay publication of the book and the chapter in *Evergreen* until the storm clouds of impeachment blew over.

Bill Douglas quietly, but firmly, refused. He would not demean the spirit of his precious First Amendment by an act of self-censorship if it meant risking his seat on the Court and the independence of the judiciary as well.

Because of his life, his words and his deeds, our chance to see the truth in time through the protections of the First Amendment is clear. The rest is up to us.

MILTON V. FREEMAN

Mr. Freeman was the Assistant Solicitor of the S.E.C. from 1942 to 1946 and on the General Counsel's staff at that agency from 1934 to 1942. He is now a partner at Arnold & Porter in Washington, D.C.

A. When Bill Douglas became Chairman of the Securities and Exchange Commission, he would frequently see the President. On one occasion he came to me and said, "The President has asked me for a bill on federal incorporation of public companies." He said the President had two conditions (1) the bill must not stop payroll and (2) it must be no more than two pages long. Needless to say I got up a draft that afternoon and he told me it was on the President's desk the next morning. It never got any further, except that to this day some government agencies appear to be making partial moves in that direction.

B. At the time Bill was Chairman of the SEC, I was President of the SEC Employees Union, and Dave Ginsburg (later Bill's first clerk when he went to the Supreme Court) was Chairman of the Adjustment Committee. Bill and two other commissioners signed an agreement for promotion of employees from within. Dave and I were signatories for the union. This was the first written agreement of a government agency with a union, except for one similar and prior agreement by the National Labor Relations Board with its own employees union.

I remember that Bill came to union parties and dances. We all danced to the "Big Apple" which was the popular dance at the time.

C. In the 1930s it was well-established law that federal employees were not subject to state taxation. Bill was living in Maryland at the time and as a Commissioner he requested a legal opinion to this effect. It was duly given to him. He thought this was unfair and decided he would file and pay Maryland taxes anyway.

D. Bill Douglas and Jerry Frank (a

Justice Douglas paying a visit to the set of producer-director Stanley Kramer's film "Judgment at Nuremberg." Actor Spencer Tracy, who played a U.S. judge presiding at one of the Nuremberg trials, stands to the right of Douglas.

Commissioner and later Douglas's successor as Chairman) were baseball fans. In those days Washington had a baseball team, the Washington Senators. Once at a ball game at Griffith Stadium between the Washington Senators and some other team, a runner at first base was called out by the first base umpire. The runner objected violently, shouted and jumped up and down. At this point the umpire folded his arms and majestically turned his back on the player. Bill Douglas turned to Jerry Frank and said, "That is what we call giving them a fair hearing at the SEC."

E. In 1938 and 1939 there was a great movement to amend the Securities Act by the business community. Oddly enough, compared with current public opinion on the subject, the industry placed substantial emphasis on a desire to repeal the limitations on insider trading by officers, directors and principal stockholders provided in Section 16 (b) of the 1934 Act. (Rule 10 b-5, under which many current proceedings are brought, had not yet been adopted.)

Bill, as Chairman of the SEC, agreed that meetings should be held to discuss possible amendments but arranged that they would not be held on the Commission's premises. Accordingly, staff members, principally on the legal side, John Davis, Assistant General Counsel, and I (as Chief Interpretive Attorney or some such title) would go to meetings held at the Metropolitan Club one block away from the Commission. The meetings were presided over by Colonel Milbank, counsel for the New York Stock Exchange. It was a peculiar arrangement which went on for about a year. At some point Bill issued a statement denouncing the suggestions being advanced by the financial community, and the meetings were discontinued.

F. Shortly thereafter, Bill was appointed to the Supreme Court. When I went in to see him to wish him luck, together with Bob O'Brien, then Assistant General Counsel, he said to us, "My rejection of the Wall Street proposals will kill any possibility of weakening amendments of the securities laws for some time. Then there will be a war in which it will not be possible for Wall Street to succeed, so the securities laws are safe from attack for a substantial period of time. Please keep up the fight."

G. When Bill was on the Supreme Court he would always call up about SEC cases to see if he should disqualify himself. Frequently we would say there was no need for disqualification because he had not been at the Commission when the matters in controversy arose. Nevertheless he would frequently not vote in those cases for reasons which he did not explain.

H. When Bill was on the Supreme Court, I was in private practice with Thurman Arnold, Abe Fortas and Paul Porter. We had a very important civil liberties case for a government employee named Dorothy Bailey. It involved the asserted right of the government to dismiss a government employee as of doubtful loyalty on the basis of secret statements made to the FBI without normal due process protections. The deciding officials did not know who the informants were and knew only that the statements were given not under oath to an agent of the FBI who had recorded the statements. The case duly came to the Supreme Court. The Solicitor General, Philip Pearlman, opened his argument by saying that our firm in its reply brief stated that the government "admitted" something. He said, "I want the court to know that we do not admit anything." At this point Justice Douglas said, "So that means you do not admit it is unconstitutional?"

Although the case was affirmed against our client on a 4 to 4 decision without opinion, Justice Douglas in a related case took great pains to make it clear that he regarded the sanctions against the employee as not only outrageously unfair, but also unconstitutional under the due process clause.

I. Properly, Bill's career on the Supreme Court is regarded as devotion to the rights of those whose liberty or freedom of expression is threatened by government action. To those of us who worked with him at the SEC it seems appropriate to remember that he had a superb expertise in commercial matters. His insight and his pen were equally adept at dealing with these matters. For example, the entire theory of public utility rate regulation is clearly and simply set forth in the space of one paragraph in his opinion in the *Hope Natural Gas* case 320 U.S. 591, 603, (1944).

J. Bill's emphasis on the long view is not something he came to on his ascension to

the Supreme Court. It was always in his thinking. One instance that comes to mind is from the time when he was Director of the SEC's Protective Committee study. He and Thurman Arnold, who was working with him on that matter, went to see the distinguished leader of the New York Bar, Samuel Untermeyer. In the course of the examination it appeared that Mr. Untermeyer's firm had received legal fees under an indenture. Since the indenture provided that such fees could be paid only upon receipt of a legal opinion, inquiry was made as to what firm had rendered the opinion. Mr. Untermeyer's reply was that his own firm had rendered the opinion that it was entitled to receive the fees in question.

At this point it was possible to take the short range view common in prosecutorial circles, *i.e.*, of denouncing conflict of interest, etc. Douglas, however, had a longer range point of view. He asked further questions which revealed that Mr. Untermeyer regarded this act as not only appropriate but in accordance with the general practice among firms operating under such indentures. As a result of this inquiry it was established, not that one man had erred, but that there was a well-established practice among reputable law firms which would be generally regarded as unacceptable and should be outlawed by specific legislation. This was in fact done in the various laws which the Congress adopted as a result of the Protective Committee study.

K. When Bill Douglas came on Board at the SEC, the new legal personnel consisted largely of Harvard Law School graduates provided by Commissioner Jim Landis, a former Harvard professor. When Douglas was named Director of the Protective Committee study, he brought with him his colleague on the Yale faculty, Abe Fortas. So that study started with a Director and Associate Director destined for the Supreme Court.

In addition, we began to get not only superb Harvard lawyers, but also superb Yale and Columbia lawyers in SEC legal positions. Besides many very prominent practitioners, the people who came down from Yale under Douglas's auspices who are in public life now were Gerhard Gesell, who would make anyone's list of candidates for the best trial judge in the United States, and Professor Louis Loss, the leading author and theoretician on the securities laws.

THOMAS J. KLITGAARD

Mr. Klitgaard was clerk to Justice Douglas during the 1961 Term, and is now Senior Vice President, General Counsel, and Secretary of Tandem Computers Inc. in Cupertino, California.

I remember with particular fondness coming in on Saturday to work with the Justice and Nan Burgess or Faye Aull, his secretaries, and then going to lunch at the Methodist Building across the street, or over at Jimmy's on Pennsylvania Avenue. We would leave the Court around 12:45, and spend an hour or so, and then come back to do a little work before going home. The Justice spent lunchtime reminiscing about his experiences in FDR's New Deal and at the Securities and Exchange Commission, talking about old cases or giving insights into people that he knew in Washington. He was particularly fond of telling stories about his days at Columbia and later at Yale. The experience was like a history lesson. Conversation at Jimmy's was usually a little different, turning to sports and comments on the current political scene. The Justice told me the first time we went to Jimmy's that it was then run by ex-convicts and that he was welcome there, presumably in light of some of his opinions.

I found the Justice always very kind to people who did not have his intellectual capacities, or who were in some difficulty, either in a legal matter or in some personal way. He did not take advantage of people and when he did them a kind turn he did not talk or brag about it. The kindness was just there and passed as part of the ordinary events of the day.

Justice Douglas loved it when other Justices would come to visit him -- in particular when Justice Frankfurter paid a visit during the 1961 Term after a long absence of personal visits -- or when he received a nice note from Justice Harlan, whom he admired greatly, or from Justice Brennan, whom he considered his great friend, or from the Chief Justice or Justice Black. The Justice particularly liked to tell a story about how some commentators would analyze the "Douglas-Black" interpretations of the First Amendment. He said that these

Justice Douglas's chambers have been carefully recreated at the Yakima Valley Museum in Yakima, Washington, where Douglas spent his childhood years.

commentators focused on a single word or phrase, while entirely missing the point as to the First Amendment's real meaning.

One of the Justice's favorite stories was about Charles Evans Hughes, Chief Justice in the late 1930s when Justice Douglas was appointed to the Court. Justice Douglas liked to tell how Chief Justice Hughes, with his imposing personality, was held in awe by the other Justices. At that time, the Conference was held on Saturday morning. Justice Douglas explained that the Chief Justice liked to end the Conference at 11:30 A.M. sharp, and that if there was not enough work to fill the calendar, the other Justices would each have one or two items in reserve to bring up, so that the Chief could end the Conference at the appointed time. It was a small point, perhaps, but it illustrated to me that there was a decency and respect in the Court among the Justices that existed despite their philosophical differences, and that Justice Douglas treasured the traditions of the Court.

I also remember his tales about the Clerk's office, and how one of the clerks came down to bring an important order for the Justice to review and sign, and then went to sleep on the Justice's couch while the Justice was reviewing the order. The Justice liked the clerk, thought that this was a great incongruity, and enjoyed repeating this story. This was part of an oral history about the Court, similar to Homer's day, when remembrances were passed down orally from generation to generation. The relationships and traditions within the Court reflected those experiences, and affected those who came afterward.

Before starting my clerkship, I had heard rumors that the Justice was a fearsome taskmaster. I never found this to be so. He was demanding, but fair. He expected the very best, but in looking back through my old certiorari memoranda and other notes to him, I was reminded how tolerant he was of a young clerk's

This view from Round Top Mountain in Hancock, Maryland looks over the C & O Canal. In a well-publicized effort in the 1950s, Justice Douglas hiked the entire 180-mile length of the canal, from Cumberland Maryland to Georgetown, in 10 days. In doing so, he succeeded in getting the canal and its towpath declared a National Historic Park and prevented it from being paved over into a freeway. Every spring he and alumni of the expedition led a one-day hike along a selected stretch and invited the public to join in.

lack of experience.

The Justice did not like thoughtless questions and he was not particularly communicative in his oral expression. However, he went out of his way in many small acts to show his appreciation and his kindness. I think this was in part due to the Justice's shyness. He would often express his affection by passing along the latest jokes, or by giving some insight into his thinking.

The Justice did not frequently ask directly for opinions from his law clerks, but I know from my own experience, and from others, that he was grateful for their input. From time to time, he liked to hear what other law clerks were saying in the law clerks' dining room about some of the pending cases. He was interested in what others were doing and thinking, but did not let this control his own thinking. Instead, as we all know, he went his own way.

I learned the value of an instant response in working for the Justice, and the necessity of being innovative in legal research. In this respect, the Supreme Court library, with Helen Newman, Ed Hudon, Bob Higbie, and its other wonderful people, was invaluable. The library personnel enjoyed the Justice because he asked interesting questions and he always deeply respected the library's capabilities.

In preparing this reminiscence, I was reminded again of the notes the Justice sent to me at the Court. There was one which illustrated his great sense of humor and wry observations. I am sure the Justice would not mind my sharing it:

TJK:

If you have time (and not otherwise) would you send me airmail a paragraph for each case in recent years on the procedural requirements for dealing with obscene literature. You might start with Manual Enterprises *and work back. I remember* Kingsley *from New York and the one from Missouri involving a search warrant so broad that the Sheriff could seize anything that was offensive to him (and by Presbyterian standards that could include everything except algebra).*

I remember the Justice with feeling.

SIMON H. RIFKIND

Mr. Rifkind received an L.L.B. degree from Co-

lumbia Law School in 1925. He was U.S. District Judge, Southern District of N.Y., from 1941-1950 Special Master, Colorado River Litigation, U.S. Supreme Court from 1955-61, and President of the American College of Trial Lawyers in 1976-77. He is now a partner in the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison.

Justice Douglas was a great man. By every scale that I can employ, he was a person of large dimensions intellectually and morally. I am not competent to measure his greatness, and I suffer from two disqualifications: first, because I loved him; and second, because I stood in awe of his genius.

My first encounter with William O. Douglas occurred at Columbia Law School in the fall of 1922. The chasm of difference which divided us was so wide that the possibility of bridging it never entered my mind. My preparatory schooling had all been achieved on the island of Manhattan. I was totally ignorant of what existed on the other side of the Hudson. Bill Douglas was, in appearance, a storybook version of the Western American. He was tall, rugged-looking, soft-voiced, with an inflection quite foreign to the one to which I was accustomed. I heard from his friends that he came from a place called Walla Walla. I did not believe such a place existed. I thought I was being teased in order to expose my provincialism. The only condition Douglas and I had in common was that, unlike Earl Mountbatten, neither of us suffered from the necessity of overcoming our privileges.

Fortunately, the law generates a vocabulary of its own and a universe of communications which is indifferent to regional inflections. It was not long before we exchanged ideas.

In those days, Bill must have regarded words as very precious. He used them so frugally. When it came to putting words on paper in his student days, he was positively parsimonious.

In later years, I could easily understand the outpouring of hundreds of his opinions because he was always keenly alive to his duties and responsibilities. But that he should produce some thirty books, under no compulsion whatever, represented a new kind of maturation of his talents.

Bill Douglas was unquestionably a genius, if by that is meant that his intellectual talents reached far beyond the limits of the ordinary. In a class of students often described as of vintage quality, he towered like a redwood. His memory was prodigious; his imagination was of enormous dimensions; his capacity to isolate a unifying principle, tying many disparate elements together, was quite exceptional. Once convinced of the merit of a proposition, he would espouse it without fear of opposition and with complete indifference to criticism.

To the public, he always exhibited a granite-like exterior. In private, he could be affectionate and sentimental.

In the course of the fifty-eight years we knew each other, our paths were sometimes far apart and sometimes they crossed. It was always a warm meeting, as if we had never parted.

I remember once finding myself in an inn in Tucson, Arizona, intending merely to spend the night. He discovered my presence and within minutes his car was at my door, moving my wife and me and my belongings to his place of abode.

The time came when I acted as his counsel, in the last attempt to impeach him. Never have I encountered so cooperative a client. He undoubtedly had strong views of the many propositions of law that I asserted, especially with respect to the constitutional issues. Whatever his reservations, he never uttered a dissent or suggested a revision. Never once did he discourage my search for a fact on the ground that it might be irrelevant or might invade his privacy. For a man of such strong convictions, this was an extraordinary form of submission, an acceptance of the role of client.

The attempt to impeach Douglas was a reckless challenge to the independence of the judiciary. If the doctrine upon which the impeachment was launched -- the doctrine that an impeachable offense was whatever Congress said it was -- had prevailed, judges would thereafter serve at the pleasure of transient congressional majorities. Douglas perceived it as subversive of the separation of powers and of judicial independence. Against the acceptance of that principle as part of our constitutional structure, he set his face with a fierce and fearless determination.

The last time I saw him in public was on December 6, 1979, when, at the Supreme Court, he received the honorary degree of Columbia University. By this time, his strength had ebbed but his spirit shone brightly in his eyes. It was plain that he was glad to receive this honor from his alma mater. To me it seemed that he greatly honored Columbia University by accepting the degree.

William O. Douglas was a free spirit. He was as unshackled as any human being could possibly be. The only restraints he acknowledged upon the roving of his mind were those that he, himself, had forged, through the formulation and acceptance of principles which he embraced. But these, too, were subject to his reexamination.

His discipline was all self-discipline. He did not submit to any dogmatic religious commandment, to any philosophical imperative, to any fixed political credo.

His self-discipline, however, was firmly in place. He did not, in the world of ideas, freewheel in response to whim or fancy. Nor was he likely to forge rules for one occasion only, to be cast on a scrap heap after a single usage. His compass had a few fixed points. But he had placed them there himself, in response to his own reason and to his own vision of the good, the true and the beautiful.

The essence of his personality was his persevering courage, and the key to his character was his unyielding independence. His life as a Justice of the Court can be fitted only within this framework, and can no more be measured by the shifting values of liberalism or conservatism than by the dubious analyses of activism or restraint.

For more than three decades, in concurrence and dissent, he carried on a dialogue with generations of lawyers. Deeply influenced by his predecessor, Brandeis, he was interested in ideas as well as facts, in justice as well as law. A skeptical man who troubled our dogmas, a religious man who appealed to our conscience, he raised vexing questions that did not always yield tranquil answers.

His constant concern was with the diffusion and interplay of constitutional powers, and with the need to set the limits on government interference with political liberty. But his opinions ranged the entire gamut of American constitutional law, and to these he brought his strong intellect and his warm compassion. No one can dispute that Mr. Justice Douglas was a major influence in the history of the Court. He has left us a tradition that will endow future generations of lawyers with a larger grasp of the ultimate issues of law and the Constitution.

Mr. Justice Holmes once admonished us that a civilized man "should be passionate as well as reasonable." It was the fusion of these twin qualities in the mind and heart of Bill Douglas that made Mr. Justice Douglas the judge that he was.

But what made Bill Douglas the man that he was, was yet an added dimension that he possessed to an extraordinary degree--his heightened sensitivity, and his wide-ranging imagination.

I have, on occasion, enjoyed reading out loud excerpts of his nonjudicial writing. My ear detected in them the rhythm and movement of the Psalms of David. One of my favorites was the following passage from Of Men and Mountains:

One cannot reach the desolate crags that look down on eternal glaciers without deep and strange spiritual experiences. If he ever was a doubter, he will, I think, come down a believer. He will have faith. He will know there is a Creator, a Supreme Being, a God, a Jehovah. He will know it because otherwise the mind cannot comprehend how life could have been created out of the inert matter. When he sees the stuff that was the beginning of life, he will know that it took an omniscient One to sculpture man; to fashion one who can laugh and cry, and love; to mold out of rock a soul that can aspire to the stars and a heart that can sacrifice all for an idea or a loved one.

"Your old men shall dream dreams," Scripture says, "and your young men shall see visions, and where there is no vision the people perish." Bill Douglas dreamt of a just society. And, in his own unique way, he bequeathed to us a vision, a vision of the triumph of individuality over conformity, of persuasion over force, and, finally, of a system of law as the enduring basis of a civilized and free society.

GERHARD A. GESELL

Judge Gesell was with the SEC from 1935 to 1941, the firm of Covington & Burling from 1941 to 1967, and has been a judge on the U.S. District Court in D.C. since 1968.

By pure chance I was in Bill's office at the SEC when the White House told him his name was going to the Hill for the Supreme Court vacancy. There had been rumors to this effect, but Washington always has rumors suggesting the most unlikely people for key jobs. He put down the phone and told me he was going on the Court. My reaction was one of anger and surprise. I blurted out, "For God's sake, why?" All he said in his laconic way was, "I need the money." To this date I still don't know why he took the job.

Many of us at the SEC thought he was too young, that he would be bored, that the work was too restrictive, that a contemplative life for Bill was not in the cards. But most of all we felt deprived. He had been the rallying point for much needed change. His drive, his energy, his insight, his ability to get things done had led us to envision a far different career for him. But, of course, as always, he was his own man.

Now it is apparent he was a man of many careers and many interests. Because he was at one of his highest and most productive points when he guided the SEC, I will try to capture some of this as a survivor of those halcyon days.

I got the New Deal-SEC bug from Bill as one of his students at Yale Law School. In small seminars he brought real life into class, unraveling the machinations of Wall Street based on his own first-hand experiences. The daily financial news during the Depression years came to life. He was investigating financiers of the town he hated and his classes opened our eyes to the realities of a marketplace hit by depression and greed. He decried the absence of concern for the small investor, hidden deals, conflicts of interest and the cynicism of it all.

Although Justice Douglas returned each summer to his home near the Yakima mountains *(below)*, he also found time for hiking expeditions to many remote places around the world. In his book Of Men and Mountains he explained his fondness for mountain climbing: "One cannot reach the desolate crags that look down on eternal glaciers without deep and strange spiritual experiences. If he ever was a doubter he will come down, I think, a believer."

This was practical stuff and it seemed even more so as he described what was happening in his pithy Western talk. Some of us might drink and play absurd games with Thurman Arnold, Walton Hamilton, Wes Sturgis, Bill Gaud, along with Bill and other kindred souls, but we still came to class without much sleep, still eager to learn more. We had had enough academic talk and his classes were a breath of fresh air.

Later, when Bill came to the SEC, I had already been there about two years trying to be a lawyer. Things brightened up. It is difficult to recapture what the place was like in those days. We worked six or seven days a week, often late into the night. There was a sense of purpose, vitality, mission and impatience to get the job done. The General Counsel's office was packed with young talent. There was adventure and opportunity on every side. No matter that on my first fumbling attempt at dictation the girl from the pool, who had never taken dictation, fainted.

Bill was a reformer. He hated pretentious people and had no pretense himself. He was easy to work with and evoked extraordinary loyalty. He cursed, used plain English, never held back what he thought and never lost his roots. He outpaced all of us in hours worked, ideas, as well as at poker. Yet he was somewhat aloof at times, occasionally moody and while he placed great responsibility in me and others he kept his distance and we never felt he was truly a close friend. Nonetheless, he loved people and had the widest, most eclectic aggregation of acquaintances of any man I have ever known. He met people at their level and they responded. Once you had his confidence he let you run with the ball and thus, in many ways, he was a superb administrator. Underneath, the fires of reform burned and he could not be diverted from his goals.

Don't get the idea he was bureaucratic. Quite the opposite. He could wait out an older dissenting Commissioner until nature caused the dissenter to leave a meeting to seek the men's room and then vote the matter his way, leaving the irate colleague only a chance to draw a male organ across the minutes to reflect his absence. Or consider how I was forced to commit two years of hard work. Called hastily to his office by the back way, he said "you have just agreed to become Special Counsel to the TNEC" (Temporary National Economic Committee). When I asked what the hell that was, without answering he said to his secretary, "Show Mr. Corcoran in." Tommy had a candidate for the TNEC job with him and Bill, with a straight face, said, "Tom, I'm sure you will be pleased to hear that Gerry has just accepted the TNEC job." So I pitched in.

Perhaps now you can see how we missed him when higher duties called.

ERWIN N. GRISWOLD

From 1929 to 1934 Dean Griswold served as special assistant to the U.S. Attorney General. He was Dean of Harvard Law School from 1946 to 1967, and U.S. Solicitor General from 1967 to 1973. He has since become a partner at the Washington firm of Jones, Day, Reavis & Pogue and Chairman of the Supreme Court Historical Society.

It is hard to realize that 50 years have passed since William O. Douglas became a Justice of the Supreme Court of the United States, on April 17, 1939. I was not present on the occasion, for I had duties in Cambridge. But I well remember when it occurred and I have many memories of the intervening half century.

Justice Douglas and I were never intimates. Indeed, there was perhaps at times a certain tension between us, possibly going back to differences which may have arisen from his Columbia-Yale background and my Harvard-influenced outlook. Needless to say, it was plain to me from the beginning that he was a brilliant addition to the Bench. He had the same sort of business and factual approach as that of his predecessor Louis D. Brandeis, stepped forward a generation into the post-depression business atmosphere. Beyond that, he was a skilled lawyer, with a powerful mind, and an effective writer of legal prose. I always read his opinions with interest, and often with admiration. He made many important contributions to many fields of law. He was especially enlightening in the more complicated cases. He always made things look relatively easy, more easy than they usually seemed to me.

Justice Douglas had been on the Su-

In 1939 President Franklin D. Roosevelt nominated Douglas to fill the seat vacated by the retirement of Justice Louis D. Brandeis. He was only 41 years old when his nomination sailed through the Senate on a 62-4 vote.

preme Court bench for 28 years when I became Solicitor General in 1967. Pursuant to long-established custom, I called on each of the Justices. I remember that my call on Justice Douglas was made with some trepidation. But that was unwarranted. He was gracious and friendly, if a bit crisp. He welcomed me as an aide to the Court, and indicated that he expected the usual high standards of the Solicitor General's office to be maintained.

On a number of occasions, both before and after I became Solicitor General, I appeared as counsel before the Court while Justice Douglas was sitting. He did not ask a great many questions, but when he did, they were usually rapier-like, piercing deeply, and to the heart of the case. Preparation for argument involved careful thought in advance about the questions which might come, and there was great satisfaction on those occasions when a Douglas question could be effectively answered -- even greater on those rare occasions when an adequate answer could be made to a question which had not been anticipated.

Justice Douglas served for more than two-thirds of the 50 years since he took his place on the Bench in 1939. It was a great privilege to know him, even at a distance, and to appear before him. His mark has been left on our law through his long career and his many distinguished opinions.

MILTON HANDLER

A widely published author, Professor Handler has taught at Columbia Law School since 1927. He is now a professor emeritus and a partner in the New York firm of Kaye, Scholer, Fierman, Hays & Handler.

Bill and I both served on the Columbia Law Review in 1925, when he was a third-year

and I a second-year student in the Law School. Bill never limited himself to any one task. In addition to his class work, his research for the review, and his outside jobs, he was devoting twenty hours a week as an assistant to his mentor, Underhill Moore. Typically, even as a student, he engaged in a multiplicity of activities which provided an outlet for his inexhaustible energy.

Upon graduation, he taught a course on Damages while working as an associate in the Cravath firm. He continued teaching Damages the following year, at which time I was law clerk to Justice Harlan Fiske Stone.

I returned to Columbia in 1927, joining Bill on the Law School faculty. By then he had undertaken the monumental task of fusing the courses on Agency, Partnership and Corporations into one on Business Associations. Again, one or two jobs were not enough for Bill -- he worked with Professor James C. Bonbright on the latter's seminal studies of Judicial Valuation.

During the 1927-28 academic year, Bill and I spent most of our days in the Officers Library, reading hundreds of cases in our respective fields. As the two youngest members of the faculty, we lunched together practically every day at the Faculty Club. This laid the foundation of our life-long friendship. In those days Bill was very taciturn and business-like. Levity, gossip or idle chatter were not in his nature. Our conversations were on a very serious and professional level and rarely dealt with our personal lives. I only learned of his difficult childhood and the hardships he encountered in going East in order to enter Columbia when in later life I read his autobiography.

Unfortunately for Columbia and for me, at the end of 1928 Bill, together with Professors Underhill Moore and Frederick C. Hicks, left Columbia and joined the Yale Faculty. Herman Oliphant, my mentor, and Hessel Yntema also left Columbia to establish an Institute of Law at Johns Hopkins University. These departures came about because a substantial part of the faculty objected to the elevation of Young Berryman Smith as Dean of the Law School. Before leaving, Bill talked to me at length about his distress at Smith's elevation, expressing his pessimism about the Law School's future under the new dean's leadership. In that regard, happily for Columbia, Bill turned out to be a poor prophet.

Roosevelt's principal advisors during his governorship and in the 1932 campaign were members of the Columbia Law School and college faculties. I worked with the so-called Brain Trust as their antitrust expert. By going to Yale, Bill missed this exciting and exhilarating experience. However, with the enactment of the Securities Act and the subsequent creation of the Securities and Exchange Commission, Bill's assistance was soon enlisted and ultimately he became a member and then Chairman of the SEC. Whenever I went to Washington, I visited him at the Commission. Busy as he was, he always found the time to greet me and to engage in a short chat.

My first visit after his appointment to the Court followed the publication of his landmark opinion in the *Socony-Vacuum* case. We spent more than an hour together in his chambers. I told him that his was the best antitrust opinion that the Court had ever rendered in the fifty years the Sherman Act had been on the books. Here, as Stone had sought to do in *Trenton Potteries*, the basic policy postulates of the legislation and the course of decision were coherently explicated. There is much in the opinion that has been questioned in later years as our knowledge of antitrust has deepened and as the law has been reshaped in response to the country's changing views of economic policy. But my views of the seminal nature of Bill's handiwork remain unchanged, even though I did not agree entirely with his analysis or the breadth and absolute nature of the principles he formulated. To be sure, not everything he wrote has survived.

LEONARD F. JANSEN

After taking a law degree at Columbia in 1947, Mr. Jansen became a founding attorney of the Washington Association of Wheat Growers, and served for some 20 years as general counsel of the East Columbia Basin Irrigation District and the Big Bend Electric Cooperative Inc. He is now in private practice in Spokane.

Justice Douglas was many things to

After suffering a polio attack as a child, Douglas developed a life-long passion for the outdoors. To rebuild the strength in his withered legs, he became an avid hiker and horseman.

many persons. Much has been written about William O. Douglas: as a world traveler, an early environmentalist, a distinguished professor of the law, and the longest sitting Justice of the United States Supreme Court. The influence cast by this man during his lifetime will cause him to be remembered for generations. However, I remember William O. Douglas as the man who paused once to befriend a poor farm boy named Len Jansen, and who, having befriended that boy, remained a friend through the rest of his life.

I first met Justice Douglas in August, 1940, in Walla Walla, Washington, at the home of his long time friend J. Howard Shubert. At the time, he was 44 years old and was already a member of the Court. I had graduated from Whitman College, which was his alma mater also, and was on my way to Columbia Law School, armed only with a scholarship. I could not even imagine law school, much less Columbia University and New York City. William O. Douglas extended his hand to me, not as an acquaintance, but as a friend. He took from his precious time that day to tell me about law school, New York and the world of law.

Whitman College was as far away from my home in Lind, Washington, as I had ever been. So one can imagine my apprehension, and even some dread, as I faced the big city and the big law school for the first time. As promised, Justice Douglas supplied me with letters of introduction to the Associate Dean of the school, James P. Gifford, and, more importantly, to Miss Mary Wegner, who was in charge of finding jobs for needy law students, of whom I was one. She favored me with outside jobs which supplied needed bed and board. During that first year I was faced with having to adapt to the law school's "case-hardening method" of legal education, studying my eyes out to keep up, working for my room and board, and worrying over a failing romance at home. As a result, I became increasingly discouraged. From his own experience at Columbia some 20 years earlier, Justice Douglas knew what was happening to me without my telling him. Being an interested and concerned friend, he urged me to persist. Numerous letters of encouragement from him really did help to pull me through. When a friend and I went to Washington, D.C., by bus during Christmas vacation for a personal visit, he literally took us in, giving freely of his time and sending us back to school with renewed vigor and determination.

It was Justice Douglas who urged me to forsake Wall Street employment and return home to begin my law practice. After my second year, law school was interrupted by 53 months of service as a naval officer in World War II. During all that time Justice Douglas continued our friendship through his letters and occasional personal visits. He had always warned me against "going downtown like the rest of the boys," which at Columbia meant joining one of the big city's law firms on graduating. He always said the big New York firms would "pick your brains" and then let you go when they could hire some younger person at a lower salary. "I am confident you will have a happier and better life back home," he advised.

That phrase "pick your brains" stuck in my mind all during those naval years and almost unconsciously thoughts of Wall Street were replaced with those of returning west. On July 1, 1947, accompanied by little except my dear wife and tiny daughter, I began practice in my home town of Lind, Washington. I have never failed to be grateful for the sound advice

Franklin D. Roosevelt seriously considered Justice Douglas for the Vice-Presidency in 1944, but chose Harry S Truman as his running mate instead. As President, Truman offered Douglas the job of Secretary of the Interior, but he elected to stay on the Bench.

from that wise man.

In October, 1949, Justice Douglas was severely injured in an accident while horseback riding in the mountains above Yakima, Washington. The horse slipped and fell on him, crushing his chest, breaking all his ribs but one, and collapsing a lung. I hastened to Yakima to be a friend in time of need. Although in great pain, he expressed his delight at my coming. Hearing about my developing rural eastern Washington practice lifted his spirits.

I was required to go to Washington, D.C., on a tax matter in 1957, and my wife accompanied me on the trip. Entertained at dinner by Justice and Mrs. Douglas, we shared a delightful evening reminiscing. The next day, May 20, 1957, I was admitted to practice before the Supreme Court. I shall never forget the beaming smile and personal nod he gave me as I stood before that august body.

In August, 1960, I was privileged to be included in a cultural tour of the Iron Curtain countries. Upon hearing of the invitation, Justice Douglas not only encouraged me to accept but supplied me with a personal briefing based upon his travels there. He also provided me with introductions to three distinguished lawyers, one each in Moscow, Warsaw, and Belgrade. Having traveled extensively all over the world, he had acquired enviable international recognition and stature. His introductions resulted in friendly and interesting visits with distinguished professionals in communist countries during the cold war. They added greatly to the trip.

That same year, I was in Washington again as General Counsel for the East Columbia Basin Irrigation District of the Columbia Basic Project in Eastern Washington. During dinner with Justice and Mrs. Douglas, I explained that the United States Bureau of Reclamation had refused to turn over the operation of that project to the farmers so all the negotiators had been called to Washington in an effort to resolve the conflict. During a visit of the negotiators to his private chambers and the Court, Justice Douglas suddenly asked the government officials present, the single question, "Why won't you turn this project over to the people?" After that, even when we were deadlocked, a reference to Justice Douglas's personal interest would bring relaxing smiles and eventually led to a happy resolution of the matter.

The above glimpses were gleaned from several hundred letters we shared and recollections from our personal conversations.

Just what were some of the qualities of this great man which produced such a diversity of response? First, his background is of importance since he had struggled against poverty and from poor health as a result of polio. His minister father died while he was a youngster, leaving him lonely and aloof. He escaped to the nearby mountains of Yakima, Washington, where he found solace and inspiration as well as physical strength and endurance.

He roamed all over the world, hiked the high mountains, fished in the virgin lakes, observed the plight of the underdog, including the hobos with whom he shared the rails across our land. Out of this grew a man filled with a fighting spirit and possessed of dynamic ideas. He grew to believe strongly in our fundamental rights and stood up to fight for them.

Hard work was his secret to success.

He not only authored over 1,200 opinions while a Justice of the Supreme Court, but he also published over 30 books and made many public appearances.

He indicated it was his fond hope that Americans would truly love our country and appreciate its great and glorious traditions of liberty and freedom enshrined in our Constitution. He hoped they would develop a willingness to fight to retain our fertile lands and our pure waters.

His greatness was also demonstrated by his tolerance of the views of others as he respected those who differed with him. To many, it may well be that he appeared to be difficult in nature with a rock-hard exterior. In private, he could be sentimental and affectionate. That is the bounty he heaped upon me.

Over the 40 years of our friendship, time after time he perceived others' needs and came forward without request to fill them. Although everyone has a different perception of this great man, I have spoken from my personal perspective. Perhaps he saw a little of himself in that poor Eastern Washington farm boy recently graduated from his alma mater. But for whatever reason, his lasting generosity and support were evidences of the greatness of his spirit.

WILLIAM A. REPPY, JR.

After clerking for Justice Douglas in 1967, Professor Reppy practiced law in Los Angeles for three years before joining the faculty of Duke Law School in 1971.

One morning not long after I came to work for Justice Douglas I answered a buzz and was handed papers by WOD with the first printed draft of a majority opinion. The case was *Whitehill v. Elkins*, 389 US 54 (1967), one of the first to be decided in that Term of the Court. The Court would hold unconstitutional a loyalty oath required of teachers at the University of Maryland that they were not engaged in an attempt to overthrow the federal or state governments by force. The enabling legislation underlying the oath indicated that an attempt to forcefully "alter" the form of government would violate the oath. Apparently, so would being a member of the Communist Party.

WOD's draft opinion held that the First Amendment protected advocating a revolution that would "alter" the form of our government and concluded that Maryland's loyalty oath legislation was unconstitutional. But that statute had a typical severability clause (if one provision is unconstitutional, the other parts shall be enforced even though the former provision may not be). I felt the opinion ought to deal with the possibility that the vague oath could be sustained under the provision of the enabling law directed at Communist Party membership even if the portion of that statute about altering the form of government was unconstitutional. A reported Maryland decision involving an attorney's loyalty oath had raised the possibility that the oath legislation was not directed at mere passive membership in the party, so that a colorable argument could be made for sustaining the teachers' oath.

Along with doing a normal cite check of the Justice's draft, I typed up and stapled to the print of his opinion a suggested insert addressing the problem of severability by holding that the limited construction given the Maryland loyalty oath for attorneys could not apply to the state teachers' oath because the Maryland state constitution barred mere members of a party advocating the overthrow of the government from state employment. That was unconstitutional, I said, and the state constitutional provision was a gloss on the oath enabling legislation. This was the kind of suggested addition to an opinion I would have made for the judge who I had clerked for in California, and as a newcomer to WOD's chambers I just didn't know the trouble I was getting myself in.

The print opinion with my addition went to the Justice's chambers, and later that day I responded to a buzz from him. He reacted to my suggested addition to his opinion by giving me a serious dressing down. Only persons nominated by the President and confirmed by the Senate were to be writing Supreme Court opinions. I had been impertinent. And so forth.

My reply was simply to say that I was sorry and that I would dispose of the offending proposed addition to the opinion. I was holding the evidence of my impertinence at the time and ripped off the stapled-on insert, crumbled it up, and threw it in the Justice's wastebasket. Humbly, I retired to the clerks' office (believing that I

had been fired, a notion which the kind secretaries of the Justice put to rest by advising me that everyone working at the chambers got "fired" now and then and should keep coming to work until WOD made a more definitive discharge).

To my amazement, the second draft of Douglas's opinion in *Whitehall v. Elkins* that got routed to me about two days later contained in a footnote my suggested addition. How did the insert get out of the Justice's wastebasket? I never asked secretaries Fay Aull or Nan Burgess if he had one of them fish it out -- highly unlikely even though the secretaries suffered their share of WOD's abuse. He must have retrieved the insert himself, which always seemed to me to be astonishing.

The official report of *Whitehall* contains my text. (It is footnote 2.) Not long after the release of his opinion the *Washington Post* published an editorial critical of the *Whitehall* majority opinion. The newspaper had no quarrel with the invalidation of the teachers' loyalty oath but opined that the Court had gone too far in indicating that a part of the Maryland state constitution itself was invalid. I assume that WOD must have seen the editorial, but he never indicated an awareness that in a sense it made him the ultimate victor in our small battle of wills.

MARSHALL L. SMALL

A partner in the firm of Morrison & Foerster, Mr. Small clerked for Justice Douglas in 1951.

Although I cannot now recall that WOD ever explicitly told me so, I suspect that he rather resented Felix Frankfurter's posing as the champion of judicial restraint, and allowing WOD to be publicly portrayed as an unrestrained activist who went about striking down any government action he did not personally like. WOD was probably annoyed by Frankfurter's self-imposed restraint in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), where Frankfurter opined that the practice of requiring streetcar passengers to hear canned messages and commercials was so personally offensive that he refused to participate in the case. WOD also found the practice offensive, but saw no reason not to say so in a dissenting opinion based on constitutional principles rather than personal pique. The Judge would have (and I think did) enjoy the irony of seeing Frankfurter dissent that Term in *Leland v. Oregon*, 343 U.S. 790 (1952), a case in which the Court upheld an Oregon statute placing the burden of proof on a defendant in a criminal case to sustain the defense of insanity over Frankfurter's claim that the state statute offended his innate sense of decency. WOD enjoyed even more the opportunity to question Frankfurter's reputation for judicial restraint in a concurrence in *Rochin v. California*, 342 U.S. 165 (1952). In the majority opinion, Frankfurter had struck down the action of California law enforcement authorities in securing evidence by forcibly pumping out the contents of an accused's stomach, as so brutal and offensive to human dignity as to violate the Due Process Clause. The Judge had me collect what proved to be a substantial number of state cases that would have upheld the admissibility of such type of evidence, and was pleased to be able to state in his concurring opinion that he did not agree that a rule which a majority of states had fashioned violated the "decency of civilized conduct," noting that "It is a rule formulated by responsible courts with judges as sensitive as we are to the proper standards for law administration." WOD, of course, went on to agree that the action in question was improper, but on the narrower ground of violating the privilege against self-incrimination rather than on a broader due process ground.

I do not offer these recollections simply to emphasize the differences between WOD and Frankfurter. Indeed, I did not sense during the 1951 Term the deep antagonism that Melvin Urofsky concluded had developed between them based on his own review of WOD's private papers. But I do remember that the Judge felt at times that his positions were misunderstood by the public. It would have been far easier--especially in the atmosphere prevailing in 1951--for him to find shelter in the doctrine of judicial restraint. But WOD would never have done so when he felt constitutional freedoms were threatened by government action. He was a man of courage and was willing to question prevailing orthodoxy even when it was not popular to do so.

JAY KELLY WRIGHT

A Douglas clerk during the 1974 Term, Mr. Wright later became a partner at Arnold & Porter in Washington, D.C.

I reported for duty as a law clerk in June 1974. WOD was in Goose Prairie, although the Court was still in session. The "Nixon tapes" case was awaiting decision. Although several draft opinions were in circulation, it was not clear how the case would be decided. WOD had circulated a draft opinion; my co-clerk Don Kelley had worked on it. A few days before July 24, a Conference was scheduled and WOD flew back from Goose Prairie. There was a flurry of activity in chambers as we got paperwork ready for his arrival.

When WOD came to Court, he showed up in the office the three law clerks shared, shook my hand and said welcome. My co-clerk Alan Austin remarked that this was the warmest welcome any of us had received, but that I should not let this go to my head.

After the Conference held that day, WOD came back to chambers and gave us the multiple buzzes signaling that he wanted the law clerks in his office. We were followed into the office by Harry Datcher, who carried a beat-up cardboard box that made clinking noises. Datcher hauled out a bottle of Scotch, and WOD poured us drinks. He poured himself a Dubonnet; anything else, he said, made him sneeze.

He told us that the Court would unanimously affirm Judge Sirica's order requiring President Nixon to turn over tapes to the special prosecutor. The Chief Justice would deliver the opinion. WOD would withdraw his own opinion, as would other Justices who had circulated their own. He talked to us about the importance of a unanimous decision in this momentous case, even though he obviously did not agree with everything in the Chief Justice's opinion. He disagreed with the notion that a sitting President has a special constitutionally-protected privacy interest. Every citizen has a right of privacy, WOD explained, but there was no reason to give the President special treatment.

War correspondent, television commentator and news reporter, Eric Sevareid was a close friend of Justice Douglas and interviewed him in 1972 at his home in Goose Prairie.

ERIC SEVAREID

In June 1972 Mr. Sevareid taped an hour-long interview with Justice Douglas at Goose Prairie for CBS television.

I know there was never a boring moment when I was in the company of Bill Douglas, so it is a persistent regret that memory loses its strength and many of the moments with Bill are lost to me now. But he existed in my young man's consciousness long before we ever met. He was, after all, a hero of American liberals when he was still quite young himself.

I can't recall our first meeting, which was probably in 1941, but I do remember him and his first wife sitting on my open deck at the ultra modern house I bought in 1946 in Valley Lane, off Seminary Road in what was then Fairfax County, Virginia. The Douglases lived about a mile away, near the Episcopal High School, and, as I remember it, their son delivered the *Washington Post* by bicycle to my mailbox down the hill.

He originated in the far west, I at the edge of the Great Plains -- North Dakota. We both had crossed much of the country by freight train. We both had been poor. We both loved

the West and horses, two of which grazed just below that open deck. When his own horse rolled on him, in Arizona, I think, we all sent our telegrams of anxiety and hope to the hospital and received, ultimately, his cheerful responses.

One spring day, he asked me if I would like to join him in a hiking trip around India's hill country. I politely but firmly declined. I had had all the tropical hiking I could take during the war, and had long since decided that when the urge to exercise occurred, I would, like his friend, Robert Hutchins, lie down until the impulse died away. "How old are you, Sevareid?" he said. "Thirty-six," I replied. "Oh, hell," he said. (He was fifty.)

When he made his challenge to the Washington press boys to join him on a hike from Cumberland Gap to the Capital along the old canal route, I was canny enough to keep my mouth shut in the CBS-WTOP newsroom. A colleague, Lou Shollenberger, accepted the challenge. He enjoyed the long hike, but, he recounted, the challengers only caught glimpses of Douglas. He would bolt his breakfast at dawn and start down the trail. When the others saw him again he had already cooked his supper on the trail and rolled up in his sleeping bag. He was damn well going to put those uppity reporters in their place and he did -- far behind, in his dust.

The pain and physical disibility Douglas suffered after a paralytic stroke in January 1975 caused him to retire from the Court ten months later. At thirty-six years, he had served longer than any other Justice in history.

Douglas traveled a great deal and one summer his travels took him around the Soviet Union in the company of the very youthful Robert Kennedy. Joe Kennedy, Sr. was an admiring friend of the Justice, philosophically odd as that may seem. In fact, he got Douglas to Washington to reorganize the SEC, not because he agreed with Douglas about anything political but because he knew Douglas knew something about the laws of finance. Old Joe asked Douglas to take young Bobby along on the trip to Russia, to broaden him out a bit. Bobby was his early belligerent self. He carried a Bible with him and wanted to argue about communism versus capitalism with anybody he met. Douglas got him off that kick, telling him to use his time to understand a very different culture. At CBS TV we wanted to make some kind of program out of their journey, so we carefully instructed the Justice in the uses of a sixteen millimeter, hand-held movie camera.

The party returned. We met Douglas at the Yale Club in New York and escorted him, his wife and his rolls of film to a projection room at Grand Central where CBS News had studios. The Douglases sat in the front row of seats as we played the film on a big screen. There was nothing, just occasional flashes of light, a quickly passing scene of a wheat field or factory, and so on. All the cans of film had been exposed to light, either by the KGB or by some Soviet bureaucrat in the customs office.

As we watched in horror, Douglas's head sank slowly into his chest. His wife said, "This is a tragedy." We all trudged back to the Yale Club for a drink, in silence.

The years passed. Bill was in the news now and then, whether a Justice should be or not. He wrote an article for *Playboy* magazine, because, he said later, he wanted to get some ideas into the heads of American youth. This was one of the actions that seemed to persuade a handful of Republican Congressmen that Mr. Justice Douglas needed his character investigated. Their leader in this was Representative Gerald Ford. When the whole silly thing was dropped, Douglas received a phone call from a strange source -- President Richard Nixon.

Privately, Nixon must have been hoping against hope that Douglas would resign, giving Nixon another chance to fill a seat on the Court. But his phone call was one of his famous "stroking" calls, to tell the listener how much he admired him and sympathized with him. (If Nixon disapproved of the investigation attempt, all he had to do was put in one non-stroking call to Representative Ford.) I asked Douglas what had been his reaction to the call. He just shrugged, as if to say, "What can you do about a man like that?"

How does one define or categorize such a man as Bill Douglas? Sometime after his tragic stroke I helped to arrange a public dinner in his honor at the Shoreham Hotel in Washington. I would like -- most immodestly -- to quote from my own little speech at the dinner. I said that he could he called a classical humanist. Like the Greeks, he believed that man is the measure of all things. Therefore, I remarked, while Douglas loved nature, he did not climb the mountain "because it was there." He climbed it because he was there.

He was a man who lived every day as if it were his last. When the last days were really at hand, there was a reception for him at the Library of Congress. Columbia University belatedly bestowed an honorary degree on the Justice. He sat there as we passed slowly by. He was gaunt, unspeaking. To take his hand would cause him pain. I lightly touched his knee as I passed. His eyes followed me, with a yearning look. It was an old friend saying goodbye.

John Marshall and Spencer Roane: An Historical Analysis of their Conflict over U. S. Supreme Court Appellate Jurisdiction

Samuel R. Olken

Introduction

Between 1810 and 1821 Chief Justice John Marshall of the United States Supreme Court participated in a series of fierce debates with Spencer Roane, Chief Justice of the Virginia Supreme Court of Appeals. Essentially, theirs was a conflict over the authority of the United States Supreme Court to review the actions of state courts and legislatures. In *Cohens v. Virginia* [1] the controversy reached its crescendo.

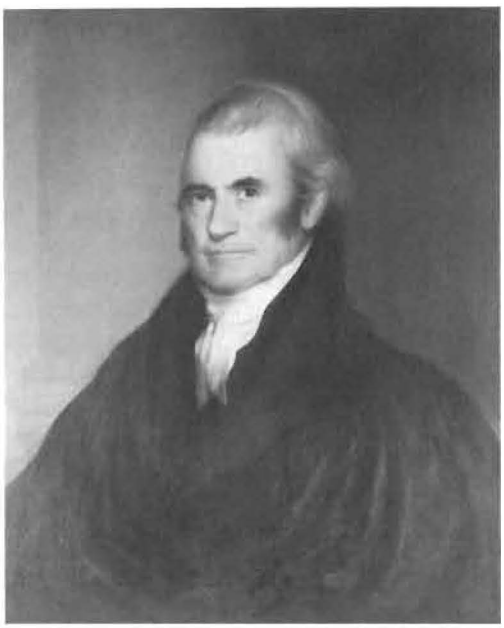
As a leading proponent of a strong national government, John Marshall believed in a powerful federal judiciary with the United States Supreme Court as the final arbiter in disputes involving questions of federal and constitutional law. Spencer Roane favored a relatively weak national government and argued the United States Supreme Court did not have the authority to review the decisions of state courts in matters involving federal or constitutional issues.

Many historians have analyzed their conflict as a personal one and have portrayed Roane as a bitter, frustrated Republican aspirant to the United States Supreme Court. When John Adams replaced Oliver Ellsworth with the Federalist Marshall in December 1800, this purportedly precluded Roane's appointment when Jefferson became President the following March.[2]

For several reasons, however, Jefferson would not have made Roane Chief Justice. Despite the latter's prestige, he remained a junior member of the Virginia Supreme Court in 1801. Jefferson barely knew Roane; the two did not become close friends until 1815. Finally, Roane's intimate association with Patrick Henry, a past political foe of Jefferson, probably prevented the appointment.[3]

This paper examines the development of the Marshall-Roane conflict over Supreme Court appellate jurisdiction. It suggests two reasons why their bitter dispute over the *Cohens* decision did not occur spontaneously. First, by 1821 these jurists had formed divergent conceptions of federal judicial power. Marshall's points represented the refinement of constitutional views he initially presented in his defense of the federal judiciary during debates with Roane's mentor, Patrick Henry, and George Mason in the Virginia Ratifying Convention of 1788.

In contrast, Spencer Roane's continual immersion in Virginia politics and law for forty years explains his belief in a federal judiciary with limited constitutional authority. Roane viewed his judicial post as a means of preserving the power of his court to decide matters of federal and constitutional law.[4] In addition, the *Cohens* decision marked the final piece in a trilogy of cases involving Supreme Court appellate jurisdiction. In *Martin v. Hunter's Lessee*[5] and *McCulloch v. Maryland*[6] the Marshall Court addressed this issue in broad constitutional and legal terms, but in *Cohens* the Chief Justice delivered an exhaustive analysis of federal judi-



The first challenge to Chief Justice John Marshall's belief that the United States Supreme Court had the authority to reexamine cases involving federal or constitutional law came from fellow Virginian Spencer Roane *(right)*. Roane, who eventually became chief judge of the Virginia Court of Appeals, fiercely denied that the Marshall Court had the power to review decisions by state courts.

cial power that elaborated on principles presented in the earlier cases. Moreover, Marshall's opinion responded directly to the criticisms levied against his Court by Spencer Roane and other Republican Virginia jurists from 1810 to 1821. Inasmuch as this essay traces the contours of this debate, it suggests the political and judicial positions of each man affected his understanding of the relationship between Virginia and the federal government.

The first part examines the arguments over the federal judiciary in the Virginia Ratifying Convention of 1788. The second discusses the political and legal influences upon each jurist's developing notions of federal judicial power until 1810. For purposes of this study the term federal courts also signifies the United States Supreme Court. The final section analyzes the extent of their conflict over Supreme Court appellate jurisdiction between 1810 and 1821.

I. The Debates in the Virginia Ratifying Convention

In the summer of 1788 Virginia held a ratifying convention in which delegates from throughout the state debated the merits of adopting the Constitution. From the conclusion of the Revolution to 1787 a loose confederation of states existed, at the head of which was a weak government unable to regulate commerce among the states, raise taxes and to construct an adequate national defense. Its relative powerlessness emanated from the reluctance of individual states to delegate authority to a central government more powerful than their own.

In 1787 representatives from all the states met in Philadelphia to discuss amending the Articles of Confederation. The Philadelphia convention did not, however, merely amend the Articles of Confederation. Under the leadership of Virginia's James Madison, the delegates created a federal system in which the national government would derive its authority from the provisions of a written constitution, and this government would have supreme authority in conflicts of power between individual states and the nation.

John Marshall, a veteran of the Revolutionary War and an attorney in Richmond, attended the Virginia Convention as a representative from Fauquier County. Although Spencer Roane did not participate in the meeting, his political mentor, Patrick Henry, did

attend the convention. Throughout the 1780s and into the 1790s Roane enjoyed a close political and personal relationship with Henry, who greatly influenced the young attorney's political views.[7]

While a member of the Virginia legislature representing the interests of aristocratic Tidewater planters, Roane became acquainted with the elder statesman of Virginia politics. In 1784, Roane gained election to Governor Patrick Henry's Privy Council and advised him on affairs of state.[8] Roane's ties with Henry went beyond politics, though, as he married Henry's daughter, Anne, in September 1786.

At the Virginia Ratifying Convention Patrick Henry and George Mason emerged as the leading critics of the Constitution. They objected to a system in which the states became subordinate to a strong central government.[9] They disliked the lack of explicit authority in the federal system, and the absence of a bill of rights bothered them.[10] At the core of their criticism lay the fear the proposed national government would abuse its powers and tyrannize the states and reproduce the type of relationship extant between England and her colonies before the Revolution. Both Henry and Mason believed the Articles of Confederation superior to the Constitution because it allowed states to maintain their sovereign powers through a loose confederation in which the bulk of governmental authority resided within the states.

In particular, they found the Constitution's provisions for a federal judiciary alarming. From the standpoint of this essay it is important to discuss their views because their criticisms foreshadowed those of Spencer Roane several years later. Similarly, Marshall's defense of federal judicial power contained constitutional views he would express more explicitly during his conflict with Roane.

Henry and Mason believed the Constitution's provisions for a federal judiciary meant the destruction of state courts. Henry disliked the idea of state court judges swearing to uphold the Constitution because he feared they would then automatically decide in favor of the federal government in conflicts between a state and the federal government.[11] Henry and Mason also interpreted Article III as a direct attempt to weaken state courts because it enabled the federal judiciary to exercise appellate jurisdiction in state court cases involving issues arising under Constitutional and federal law.[12] Mason thought more power should belong to the state courts and disputed the authority of federal courts to decide disputes between citizens of different states. He felt, as did Henry, the Constitution unfairly questioned the competence of state courts to hear these types of cases.[13]

In response, John Marshall made a stirring speech in defense of the proposed federal judiciary. He stressed the importance of having the federal judiciary function as prime guardian of constitutional rights and asked: "To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the [federal] judiciary?"[14] He also understood federal courts would play a critical role in preserving the delicate balance of power implicit in the federal system.

Unlike Henry and Mason (and much later Spencer Roane), Marshall believed in the value of a strong central government. As an attorney and former member of a legislative committee that reviewed Virginia courts,[15] Marshall may have harbored some concerns about the ability of state tribunals to decide issues of national interest in a consistent and fair manner. Moreover, his military experiences in the Revolution revealed to him the importance of a strong central government in matters of national welfare.[16]

He favored having the federal judiciary issue binding interpretations of the laws of the United States and the Constitution because he considered it more likely to base its decisions on the good of the nation rather than on the interests of a particular state. He emphasized this concern in refuting Henry's objection to the exercise of federal judicial power in disputes between citizens of one state and another state or between two states. Henry thought this provision appalling because he considered states as sovereign powers incapable of becoming defendants in law suits.[17]

Uninhibited by adherence to the notion of state sovereignty, Marshall preferred to view the problem from the perspective of a citizen and asked:

If an individual has a just claim against

any particular state, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a state recover any claim from a citizen of another state, without the establishment of these tribunals?[18]

Marshall thought a federal judiciary would curb "disputes between the states" because federal courts would serve as impartial umpires in these types of cases.[19] He also assured Henry, states would not always become defendants in cases before the federal courts.[20]

Marshall' s speech anticipated his debate over federal court appellate jurisdiction with Henry's protege, Spencer Roane. Like Henry and Mason, Roane felt uneasy about the Constitution's failure to provide explicit distinctions between the powers of the federal and state governments.[21] Quite possibly, Roane's implicit trust of Virginia government prevented him from trusting the concentration of power in a government beyond the direct control of the states.

Throughout his early years Tidewater (eastern) planters of considerable wealth and prestige controlled the Virginia colonial assembly, creating an intricate fusion of social prestige and political power in a relatively small group of men, many of whom Roane knew and admired.[22] Abstract concentration power in a central government signified a threat to this network and compelled Spencer Roane's mentor, Patrick Henry, to criticize the Constitution. This also may explain the genesis of Roane's initial hesitance toward the new federal system.[23]

II. John Marshall and Spencer Roane: 1798-1810

Over the next 22 years John Marshall and Spencer Roane occupied political and judicial positions which enabled them to refine their views on federalism, and, in particular, on federal judicial power. Marshall remained in

Aristocrats from plantations in the Tidewater area controlled the Virginia colonial assembly through their wealth, social prestige and political connections. One such plantation, Westover, situated along the James River near Richmond, is pictured below.

Richmond until 1797, where he practiced law and became a leading member of the Virginia Federalists.[24] He maintained close ties with national leaders such as Washington, Hamilton and Adams and participated in complex diplomatic negotiations with the wily French foreign minister, Talleyrand, in the XYZ affair. At the behest of George Washington, Marshall ran for Congress in 1798,[25] and during his successful campaign helped craft a constitutional defense of the Alien and Sedition Acts.[26]

A. John Marshall and the Alien and Sedition Acts

Enacted by the Federalists in response to intense Republican criticism of the Adams Administration, the measures extended the naturalization period for foreigners and made criminal published criticism of either the President or Congress. Republican leaders Thomas Jefferson and James Madison, native Virginians, drafted the Kentucky and Virginia Resolutions,[27] which criticized the acts for exceeding the Constitutional powers of Congress.

Implicit in the Resolutions were two ideas that deemphasized the authority of the national government. First, the states did not relinquish their sovereign powers upon ratifying the Constitution. Second, the states agreed to form only a federal compact and not a consolidated union in which their powers would become subordinate to those of the national government. Consequently, states could declare federal laws such as these acts invalid if they deemed them unconstitutional.[28] Essentially, the Resolutions expressed a more refined version of the views set forth by Patrick Henry and George Mason ten years before. Many Virginians agreed with these sentiments, including a relatively new member of the Virginia bench, Spencer Roane.[29] Notwithstanding these criticisms, John Marshall argued the supremacy of the federal government enabled Congress to use implied constitutional powers on behalf of the general welfare.[30] For Marshall and other Federalists the Acts signified Congressional use of implied constitutional authority. Ultimately, Marshall reaffirmed this view in *McCulloch v. Maryland.* [31]

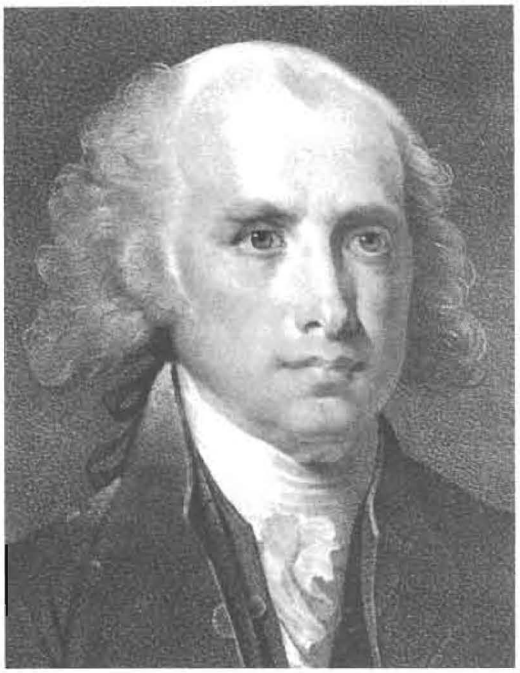
B. John Marshall's Early Years as Chief Justice

John Marshall became Chief Justice of the United States Supreme Court in 1801 and during his initial decade on the Court wrote two majority opinions which revealed his understanding of federal judicial power. In *Marbury v. Madison*[32] the Marshall Court held unconstitutional Section 13 of the Judiciary Act of 1789, which expanded the Court's original jurisdiction by authorizing it to issue mandamuses upon federal officials.[33] Pursuant to this provision William Marbury, one of the "midnight appointees" who had not received his commission as justice of the peace from the new Secretary of State, Republican James Madison, requested the Court to issue a writ of mandamus to compel Madison's delivery of the commission.

Marshall's decision minimized the underlying political controversy,[34] and made clear the Court's prerogative to review the constitutionality of Congressional acts.[35] Without denying Marbury's right to his commission, Marshall ruled the mandamus provision contravened the implicit distinction between the Court's appellate and original jurisdiction as set forth in Article III of the Constitution.[36] In holding that the Court lacked original jurisdiction to issue the mandamus, Marshall emphasized principles of constitutional supremacy and judicial review.[37] Though the opinion did not specify whether the Court would declare state acts unconstitutional if they conflicted with the Constitution, Marshall implied this.

In *Fletcher v. Peck* [38] the Supreme Court exercised its appellate jurisdiction and ruled a 1795 Georgia law that rescinded a prior statutory land grant impaired a contractual obligation in violation of the contract clause of the Constitution.[39] Marshall imbued his opinion with principles of federal and constitutional supremacy and reasoned that Georgia was not "a single, unconnected, sovereign power, on whose legislature no other restrictions [were] imposed than may be found in its own constitution."[40]

Justice William Johnson, a South Carolina Republican appointed to the Court by Jefferson in 1805, wrote a concurrence in which he agreed with Marshall's views on jurisdiction. Indeed, when he said: "the right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty,"[41] he stressed a



Roane sided with his fellow Virginian, James Madison *(above)*, when he and Thomas Jefferson drafted the Kentucky and Virginia Resolutions which de-emphasized the authority of the national government.

predominant theme in Marshall's jurisprudence and the fundamental premise of the impending conflict between the Chief Justice and Spencer Roane.

C. Spencer Roane: Politics and the Virginia Judiciary, 1793-1810

While John Marshall became increasingly identified with the national government after 1788, Spencer Roane followed a different course. He served on the Virginia General Court for six years and became a leading proponent of the right of Virginia courts to review state legislative acts. For example, in *Kamper v. Hawkins* Roane invalidated a state law that enabled a district court to issue injunctions because the provision violated the Virginia constitution.[42]

Inasmuch as Roane favored a powerful state judiciary, by 1798 he also demonstrated distaste for the concept of federal supremacy implicit in Marshall's constitutional defense of the Federalist measures. Roane, like many other Virginia Republicans, endorsed the Kentucky and Virginia Resolutions' recognition of state sovereignty and supported Edmund Randoph's formal opposition to the Alien and Sedition Acts.[43]

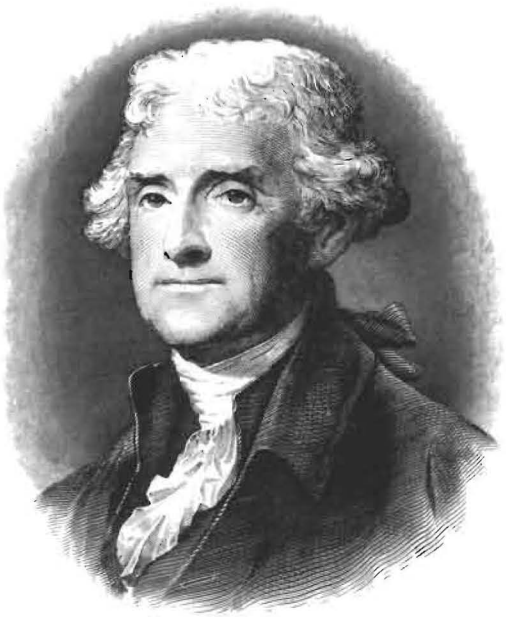
Appointed to the Virginia Supreme Court of Appeals (Virginia Supreme Court) in 1795, Roane aligned himself politically with the Republicans by 1798. In 1802 he established the *Richmond Enquirer* with his cousin, Thomas Ritchie, to provide Republicans in that city an effective vehicle.[44] Two years later Roane helped create the Richmond Junto, a secret political organization designed to consolidate the Virginia Republicans and to strengthen the party's influence over national affairs.[45]

At first membership was small, but by Roane's death in 1822 it comprised an extensive network in control of Virginia's judiciary, legislature and major financial institutions.[46] The group embodied the political ideas of Roane's Tidewater background; many members came from this region, and several viewed the state government as the prime reservoir of political sovereignty. The Junto helped refine Roane's views and reinforced his ties with Virginia Republicans such as John Taylor of Caroline County, who wrote treatises in opposition to nationalism.[47] The Junto also gave Roane valuable support during his ensuing battles with John Marshall.

The power and prestige of the Junto emanated from the personal and political prestige of its members.[48] By 1804 Spencer Roane enjoyed enormous popularity and exercised considerable influence because of his outstanding reputation as a jurist. His rapid rise through the state judiciary culminated in his elevation to Chief Justice of the state's supreme court in 1803, a post he held until his death in 1822.

The direction in which Roane's political and constitutional ideas developed during his early years as Chief Justice emerged in his concurring opinion in *Brown v. Crippen*.[49] Crippin and Wise, citizens of Virginia, sued Brown, of Pennsylvania, in a Virginia trial court, but Brown sought direct removal of the dispute to a federal court. Section 12 of the Judiciary Act of 1789 authorized removal of diversity suits.[50] The Virginia Supreme Court ruled Section 12 authorized removal of the case but emphasized that it and *not* the trial court could issue the removal order.[51]

Roane concurred with the opinion



Many believe that Roane's ambition to sit on the U.S. Supreme Court was frustrated when John Adams replaced Chief Justice Oliver Ellsworth with John Marshall in December 1800, thereby precluding Thomas Jefferson *(above)* from nominating Roane when Jefferson became President three months later. The author contends, however, that there are several reasons why Jefferson would not have have selected Roane for the seat, had he had the opportunity.

written by Virginia Supreme Court Judge Tucker, which expressed some doubts about removal of the suit to a federal court:

Neither the Constitution of the United States, nor any act of Congress does, or can...deprive the superior Courts of this Commonwealth of... control over the proceedings of the inferior Courts, which the laws of this country give to them.[52]

Ultimately, Roane refined this view over the next decade.

III. The Jurisdiction Trilogy

Between 1810 and 1821 John Marshall and Spencer Roane became embroiled in a complex, and, at times, personal, dispute over federal court appellate jurisdiction. Although *Cohens v. Virginia* [53] marked the apogee of their conflict, two other cases formed its parameters: *Martin v. Hunter's Lessee*[54] and *McCulloch v. Maryland.*[55] Consequently, these cases form a trilogy from which to assess the development of each jurist's notion of federal judicial power.

A. *Martin v. Hunter's Lessee*: The Initial Stage of Conflict

Martin v. Hunter's Lessee[56] involved conflicting property rights to the extensive Fairfax estate in northern Virginia. The suit began in 1791 when Hunter sought to eject a Fairfax heir from the land pursuant to Virginia laws that confiscated property of British citizens. The Fairfax heir claimed United States treaties with Great Britain gave him title to the land, and the lower court agreed.[57]

Eventually, the case came before the Virginia Supreme Court, and Spencer Roane wrote the majority opinion. The court held Hunter obtained title under a 1782 state law despite federal treaties that invalidated confiscation of British aliens' property.[58] Fairfax then appealed to the United States Supreme Court under Section 25 of the Judiciary Act of 1789.[59] This provision authorized the Court's review of any case in which a state court ruled against a claim made under federal law, the Constitution or a treaty.[60]

The Court reversed Roane's decision and held the 1782 Virginia statute did not escheat the Fairfax land to the state, nor did the treaties allow the state to grant Hunter the property.[61] The Court remanded the case and ordered Roane's tribunal to give Fairfax title. John Marshall did not participate in the decision because he had represented some Fairfax heirs in a Virginia dispute, and he purchased a portion of the estate in the late 1790s. Instead, Joseph Story wrote the Court's opinion.[62]

Roane refused to follow Story's orders and in *Hunter v. Martin*[63] launched his initial attack on the power of the United States Supreme Court to review state court decisions. Roane specifically objected to Supreme Court review of cases that originated in state courts.[64] He perceived Section 25 of the Judiciary Act of 1789 diminished the importance of state court decisions on constitutional and federal matters because it permitted litigants to appeal adverse state judgments to the United States Supreme Court.

In part, Roane's concern emanated from his confused conception of jurisdiction:

The judicial power of the United States, is to be determined by the suit or action being proper for the cognizance of their courts, and being actually instituted or brought therein. If brought or instituted in the courts of another government, though they may involve the construction of the Constitution, laws or treaties of the United States, they form a part of the judicial power of that government, and not that of the United States.[65]

He did not question either the authority or the competence of his court to make a final judgment in the Fairfax dispute.

Roane focused on the initial location of the suit and failed to consider that its subject matter--rights claimed under federal treaties--raised issues with legal and political consequences beyond Virginia's borders. However, questions of jurisdiction involve judicial authority, and this power derives from either the types of parties involved or the underlying subject matter.

Moreover, in questioning the propriety of Supreme Court review, Roane expressed concerns about federalism first voiced in the Virginia constitutional convention by Patrick Henry and George Mason and reiterated during the Alien and Sedition Acts imbroglio. For these early critics of federalism, the subordination of individual state governments to a national body whose powers emanated from a constitution and with plenary authority in matters affecting all citizens threatened individual states' autonomy.

Perhaps Spencer Roane inherently trusted the states to preserve men's fundamental rights and hesitated in relinquishing this authority to sources beyond the state. As a jurist who had spent all but one year in Virginia, Roane became more solicitous about state sovereignty than John Marshall, and even Jefferson and Madison, all of whom received extensive direct exposure to national affairs. Jefferson and Madison may have helped craft the compact theory Roane endorsed, and, yet unlike him, by 1816 they were less doctrinaire in its application.

For example, Roane's opinions manifest his fundamental conception of the relationship between the state and federal governments:

The government of the United States is not a sole and consolidated government. The governments of the several states, in all their parts, remain in full force, except as they are impaired, by grants of power, to the general government.[66]

From this perspective Roane viewed his court and Story's as parts of two distinct governments. Story's reversal of his decision signified an abhorrent attempt to erase the distinction and meant the federal government would "ingulph and sweep away, every vestige of the state" governments.[67] Finally, Roane's opinion marked his refusal to accept the United States Supreme Court's supremacy in the interpretation of constitutional and federal issues.

Subsequent to Roane's decision, Fairfax filed another appeal to the United States Supreme Court. Joseph Story wrote the Court's opinion in *Martin v. Hunter's Lessee,*[68] Marshall again having recused himself. Though Story and not Marshall wrote the opinion, Story expressed the Chief Justice's views. In a subsequent letter Story wrote to Charles Ticknor, he implied Marshall exerted considerable influ-

At the Virginia Ratifying Convention of 1788, George Mason *(below)* and Patrick Henry objected to the Constitution because they saw it as outlining a system in which the states were subordinate to a powerful federal government. They particularly objected to a strong federal judiciary, fearing it would spell the destruction of state courts.

ence over the decision.[69] Quite possibly, they worked on the opinion together.[70]

Story reversed Roane's decision and upheld the Court's power to review the Virginia ruling pursuant to Section 25 of the Judiciary Act. Story argued that the judicial power of the United States is exclusive even when the federal issues arise incidentally in state courts.[71] Moreover, "the judicial power of the United States is...exclusive of all state authority."[72] Story perceived the problem of Roane's jurisdiction test and suggested "it is the case... and not the court, that gives the jurisdiction."[73]

The decision of the United States Supreme Court did not finish the squabbles between the Virginia court and its federal counterpart. The case made clear the Marshall Court's association with the ascendant wave of nationalism that characterized the policies of the federal government.[74] In contrast, Spencer Roane's emergence as an outspoken advocate of state judicial authority spawned from a growing awareness among many leading Virginia Republicans of their waning political prestige and influence in national affairs.[75]

Between 1816 and 1821, Tidewater Republicans like Roane, who came from eastern Virginia, chafed at President Monroe's ambitious national internal improvements program because it meant increased taxes and significant federal intervention during a period of sharp agricultural and economic decline in their part of the state.[76] Junto members viewed the federal plan as a direct threat to the state's economic prosperity, and the *Martin* decision confirmed their political fears. The extent to which these political, economic and constitutional concerns proliferated their views became manifest in the controversy over *McCulloch v. Maryland.*[77]

B. *McCulloch v. Maryland* and the Debate over Implied Constitutional Powers

In *McCulloch v. Maryland*[78] the United States Supreme Court held unconstitutional a Maryland tax on notes issued from the Baltimore branch of the United States Bank. Before the Court were two questions: the constitutionality of the federal bank and the authority of Maryland to tax its operations within the state. Although the dispute did not directly raise problems of federal Court jurisdiction, Marshall's opinion and subsequent correspondence revealed his perception of the Court's role in the federal system.

Patrick Henry *(above)* was Roane's political mentor and, when Roane married Anne Henry in 1786, he became his father-in-law. Their close affiliation may have prevented Roane's appointment to the U.S. Supreme Court because Henry was a past political foe of President Thomas Jefferson.

Marshall ruled the necessary and proper clause of the Constitution implicitly authorized Congress to create the Bank.[79] He considered the Bank essential in the establishment of a strong national government able to preside effectively over the country's commercial and economic interests. Perhaps his support came from his knowledge of the Continental Congress's inability to adequately fund the Revolution. As a member of Washington's army he learned the importance of a depository for national revenue.[80] No such bank existed during the Revolution, and consequently the army lacked sufficient economic support.

Moreover, the Chief Justice perceived the dispute as a conflict between Maryland and the federal government and emphasized the latter's supremacy in matters of national interest. To this extent he analyzed the different sources of governmental authority in this problem. He defined, as did Roane, this authority as sovereignty. Marshall believed the United States government possessed the authority, or sover-

eignty, to create a federal bank.[81] He did not think Maryland had the right to tax the federal bank because the tax exceeded the scope of her sovereignty.[82] He viewed the tax as "usurpation of a power which the people of a single state cannot give."[83] For this reason Marshall considered the tax as a deliberate attempt to subordinate the federal government to Maryland.

Maryland justified the levy as an exercise of sovereignty and argued the sovereignty of the American people remained with the states and did not pass to the federal government upon ratification of the Constitution.[84] Maryland saw herself as a sovereign power independent of the federal government, free to enact laws applicable within her borders regardless of their effects upon the nation.

In response, Marshall noted the United States government derived its authority directly from the American people and not from individual states.[85] Ethical and personal considerations prevented him from addressing similar arguments in *Martin v. Hunter's Lessee*;[86] in this dispute he used the Bank controversy to refute notions of state sovereignty that he believed threatened the federal system.

Marshall's opinion did not pass without criticism from Spencer Roane and other Junto members in Virginia. In the *Richmond Enquirer* Judge William Brockenbrough, using the pseudonym "Amphictyon," reiterated the compact theory Roane expressed in his *Hunter* opinion.[87] He observed "the respective states then in their sovereign capacity did delegate to the federal government its powers, and in so doing were parties to the compact."[88]

Like Roane, Brockenbrough derived this idea from the Kentucky and Virginia Resolutions and from Madison's 1799 Committee Report to the Virginia House of Delegates. Although Madison later claimed his definitions of state sovereignty were ambiguous and only designed to incite criticism of the Federalists,[89] both Roane and Brockenbrough chose to quote him at length when they invoked the principles of state rights.[90]

John Marshall read the published "Amphictyon" essays at his Richmond home. He realized their dangerous implications and arranged to publish his response in the *Philadelphia Union*. In late April, his essays appeared under the pen name of "A Friend to the Union."[91] Throughout them ran this theme: the unanswered arguments of "Amphictyon" would ultimately subvert the federal system, and the national union would be replaced by a loose league of states, similar to that extant under the Articles of Confederation.[92] The essays reiterated his opinion in the Bank cases and emphasized the federal government's authority to charter the Bank under implied constitutional provisions.

Ultimately, Marshall's fear and anger compelled his publication of additional articles,[93] but not before Spencer Roane wrote the "Hampden" essays. Although not directly involved in the Bank case, he immediately interpreted Marshall's opinion as another threat to state sovereignty and published his views in the *Richmond Enquirer* during the late spring of 1819. He thought Marshall's constitutional interpretation was too liberal in its assessment of the federal government's powers under the necessary and proper clause.[94] He believed this clause only provided precautionary measures deemed absolutely essential for the nation; he did not sanction its use for expansion of implied federal powers.[95] Roane further argued the Constitution gave the national government only limited, express powers and that the Tenth Amendment preserved the authority of state action in the absence of specific constitutional federal authority.[96]

Roane said Marshall's opinion signified an attempt to create a consolidated union when the states had formed a "federal government, with some features of nationality."[97] He claimed individual states had a "duty to preserve" their own interests that were distinct from those of the nation.[98] He also said state governments were "so important they [could] alter and even abolish the present system."[99] Though Roane never advocated Virginia's secession,[100] he used this language to express the depth of his revulsion toward John Marshall 's concept of federalism.

In his essay of June 22, 1819 Roane specifically criticized the Chief Justice's ideas about national judicial power. He questioned the authority of the United States Supreme Court to decide the *McCulloch* case and found no explicit constitutional provision for the Court's jurisdiction.[101] Roane viewed the relationship between the states and federal government as a

contract, and the Supreme Court's exercise of appellate jurisdiction precluded an impartial resolution of the parties' conflict.

For Roane and other Junto members the Court violated "the principle which forbids a party to decide his own cause."[102] Judge Brockenbrough anticipated this point in his "Amphictyon" essay when he observed: "the supreme court may be a perfectly impartial tribunal to decide between two states, but cannot be considered in that point of view when the contest lies between the United States, and one of its members."[103] Significantly, neither Roane or Brockenbrough doubted the ability of a state Court to make impartial decisions of constitutional law.

John Marshall responded to Roane's objections in nine essays published under the pseudonym "A Friend of the Constitution" in the *Alexandria Gazette*. His particular sensitivity about criticism of the Court emerged in this observation:

The case of McCulloch...presents the fairest occasion for wounding mortally, the vital powers of the government, thro' its judiciary. Against the decision of the court, on this question, weighty interests & deep rooted prejudices are combined. --The opportunity of the assault was too favorable not to be seized.[104]

For John Marshall and Spencer Roane more than the immediate outcome of a legal decision mattered. Indeed, each jurist sought to defend his views of federalism and judicial authority.

Marshall believed, as did many other veterans of the Revolution, that a strong nation required a powerful national government whose authority emanated not from the states but rather from the American people. The Chief Justice and the other members of his Court considered the federal judiciary an efficient and reliable means of attaining uniform and consistent interpretation of constitutional and legal questions that affected the national welfare. To this extent he asked:

What must have been the primary motive of a people forming a national government for endowing it with a judicial department? Must it not have been the desire of having a tribunal for the decision of all national questions? If ques-

Although born in a log cabin on the Virginia frontier, John Marshall lived in the city of Richmond, in the house pictured above, from 1790 to 1835. His descendants sold the house to the city in 1907; after restoration, it was opened to the public in 1913.

tions which concern the nation might be submitted to the local tribunals no motive could exist for establishing this national tribunal.[105]

Undaunted by this reasoning, Spencer Roane and the Richmond Junto sought passage in the Virginia legislature of formal resolutions condemning Marshall's principles of federal judicial supremacy. In February, 1820 the lower house approved the measures, but the subsequent intervention of the Missouri Compromise controversy prevented their formal passage. Instead, the legislators concentrated on issues of slavery and territorial expansion.[106] Still, the conflict over Supreme Court appellate jurisdiction had not completely subsided in Virginia.

C. *Cohens v. Virginia* and its Aftermath

By 1821 John Marshall and Spencer Roane had formed divergent conceptions of federal court jurisdiction. The *Martin* and *McCulloch* decisions established the parameters of their conflict, but *Cohens* produced the complete distillation of their views. After *McCulloch* their conflict became increasingly personal and reflected each jurist's deep concern for preserving his vision of courts in the federal system.

Virginia convicted the Cohen brothers of selling lottery tickets in violation of the state's criminal law. The Cohens appealed directly to the United States Supreme Court under Section 25 of the Judiciary Act of 1789, the same jurisdictional provision involved in the *Martin* case.[107] They made this appeal because the Virginia law prohibited appeal to the state appellate courts.[108] The brothers claimed Congressional law authorized sale of the tickets to help finance construction of the federal capitol; therefore, a federal question existed in the case.

Philip Barbour, a member of the Richmond Junto and friend of Spencer Roane, represented Virginia and raised three issues before the Court. First, the Court lacked appellate jurisdiction in a dispute between a state and her citizens. Second, the criteria for Supreme Court review depended entirely on the character of the parties regardless of the subject matter. Nor did Barbour think the Cohens' claim that a federal law precluded their conviction constituted a viable issue over which the Court had jurisdiction. Indeed, Barbour claimed the Court did not have authority in conflicts between state criminal laws and federal acts. For this reason he urged the limitation of *Martin* to civil law disputes.

Finally, Virginia opposed Supreme Court review because of the Eleventh Amendment's limited prohibiton of suits in federal court against a state.[109] Absent the state's consent to suit, a federal court lacked jurisdiction in the matter.[110]

The Supreme Court had faced similar questions about its appellate powers in *Martin*, and the Bank case indirectly raised these issues; however, neither case entirely resolved the problem. Although Marshall upheld the Cohens' conviction, his opinion vigorously defended the Court's appellate authority. In essence, the opinion represented the refinement of arguments he made on behalf of the federal judiciary in the Virginia Ratifying Convention of 1788.

He rejected the argument that jurisdiction depended on the character of the parties regardless of subject matter, and he stressed the Constitution extended federal judicial power "to all cases arising under the constitution and laws of the United States."[111] The Court properly exercised appellate review because the case involved a federal question: the Cohens' right to sell lottery tickets pursuant to a federal act.

Barbour's contention that the Virginia law prohibited the Cohens' appeal to the Supreme Court particularly irked Marshall because it signified Virginia's continued refusal to acknowledge the supremacy of federal courts in constitutional and national matters. He thought this restrictive interpretation meant "the course of the government may be, at any time, arrested by the will of one of its members."[112]

Marshall had emphasized this theme before in *United States v. Peters* in which he sternly chastised the Pennsylvania legislature for circumventing a federal court order.[113] Though he had briefly addressed the concept of federal judicial supremacy in *McCulloch*, his opinion in the *Cohens* case displayed his inherent distrust of state courts. Further, it more cogently explained the necessity of Supreme Court appellate jurisdiction than did Story's opinion in the

Philip Barbour *(above)* was a member of the Richmond Junto, a political group organized by Spencer Roane, and had just become Speaker of the House of the U.S. Congress at the time of the *Cohens* decision in 1821. He would go on to be named to the U.S. Supreme Court by President Andrew Jackson in 1835.

Martin controversy.

Marshall analyzed the dispute over appellate review from an historical perspective and remembered the period before the Constitution when the intransigence of individual states threatened economic and legal chaos.[114] To this extent he said:

There is certainly nothing in the circumstances under which our Constitution was formed...which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.[115]

In fact, he argued that by virtue of their provincial concerns, state courts were unable to interpret correctly the Constitution and federal laws. He feared that if these courts were given the same powers as the United States Supreme Court chaos would ensue. He also expressed doubts about their ability to act fairly in conflicts between states and the federal government.[116] Finally, Marshall also did not accept Virginia's invocation of the Eleventh Amendment. The writ of error did not make the state a defendant; it enabled the court to review the trial record.[117] Further, the amendment did not block the Court's appellate review because the case involved a federal question.[118]

Spencer Roane immediately perceived the implications of the *Cohens* decision and in the spring of 1821 published a series of articles under the pseudonym "Algernon Sydney" in the *Richmond Enquirer.* Once again, the Virginia jurist accused the Supreme Court of expanding federal judicial power at the expense of state courts, and he stressed cases originating in the states could not be appealed to federal tribunals.[119]

In part, Roane based these claims on John Taylor's Construction Construed and Constitution Vindicated (1820), a treatise on state sovereignty written in response to the *McCulloch* decison. Taylor derived much of his analysis from the compact theory he helped articulate in the Virginia and Kentucky Resolutions of 1798.[120]

As in *Martin,* Roane used the compact theory to explain his opposition toward the Court's broad invocation of appellate review:

It is essential to the nature of compacts, that when resort can be had to no tribunal superior to the authority of the parties, the parties themselves must be the rightful judges, whether it has been violated...if one of the parties, in such cases is not an impartial and competent judge, neither can its subordinate departments be so; that in truth, usurpation may be made by the judiciary itself.[121]

Roane also believed the appeal made Virginia a defendant in the suit in contravention of the Eleventh Amendment and concluded "a sovereign state cannot be made a party in the courts of another without its consent."[122]

Roane also invoked the Tenth Amendment[123] in his argument to express the constitutional provision authorizing Supreme Court review of the *Cohens* case. To this extent he remarked: "If the jurisdiction is not given in this case expressly, or by fair and necessary implication, the power is retained by the states, and the decision of the state courts is, consequently final."[124]

Roane's fears about the impending

destruction of state court autonomy echoed the sentiments of Patrick Henry and George Mason in the Viriginia Ratifying Convention of 1788, as he accused Marshall of making "unwarranted expositions"[125] of judicial power and warned "all states might be demolished by the supreme court."[126]

Roane had expressed this view in the *Martin* case and in his "Hampden" essays of 1819, but his new articles appeared more emphatic and personal. Marshall's ideas insulted him because they implied state courts were unable to interpret correctly issues of federal and constitutional law. As a longtime state jurist, Roane was proud of the Virginia courts, and, in particular, of his own skills. He cited his opinion in *Kamper v. Hawkins* as an example of a state court's ability to act independently from a state legislature and declare a local act unconstitutional.[127] By analogy, he thought if a state court could exercise judicial review of state laws, it could make final decisions on federal and constitutional matters.[128]

However, Roane's logic did not consider the problem of inconsistent constitutional interpretations from different state supreme courts. His immersion in Virginia law and politics limited his ability to perceive constitutional problems from a national perspective. Consequently, he never appreciated the importance of the United States Supreme Court as the ultimate arbiter of constitutional and legal conflicts inherent in the federal system. In contrast, John Marshall's tenure on the Court sharpened his understanding of that tribunal's role in the federal system.

Nevertheless, Roane's harsh criticisms exacerbated the Chief Justice's anxiety about state rights, and he wrote Joseph Story that Roane's essays represented "a deep design to convert our government into a mere league of states."[129] In part, Marshall's concern emanated from his knowledge of the intimate connection between law and politics in Virginia. He confided to Justice Story:

The judicial department is well understood to be that through which the government may be attacked most successfully, because it is without patronage, and of course without power. And it is equally well understood that every subtraction from its jurisdiction is a vital wound to the government itself. The attack upon it therefore is a masked battery aimed at the government itself.[130]

Nor did Marshall limit his anger to letters he wrote Story; the two used their influence to persuade the *American Law Journal* to suspend its publication of Roane's essays.[131]

During the fall of 1821, Roane encouraged a political ally, John Eppes, to submit to the Virginia House of Delegates a proposal for a new amendment to the Constitution. In fact, Roane himself may have authored the measure, as its three provisions embodied his criticisms of the Supreme Court. First, it urged prohibition of congressional passage of laws under the necessary and proper clause.[132] Second, it did not give federal courts the power to review and revise state court decisions. Finally, it blocked federal court review of any cases in which a state was a party except for disputes where both parties were states.[133]

The Virginia legislature ultimately rejected the proposal. During this time the South became embroiled in the escalating conflict over slavery and territorial expansion, and these issues may have preoccupied the legislators. In addition, the measures never gained the support of elder Republican statesmen such as Thomas Jefferson and James Madison.[134] Madison, for one, believed Roane had gone too far.[135]

Spencer Roane died nearly eight months later, on September 4, 1822. During the remaining thirteen years of John Marshall's tenure, the Supreme Court continued to exercise its power in resolving conflicts between the states and the federal government.[136] That the Court did so relatively free from criticism stemmed in large part from Roane's noteworthy absence. After his death, no other "judicial advocate of states rights" emerged.[137]

Conclusion

The conflict over United States Supreme Court appellate jurisdiction between John Marshall and Spencer Roane did not arise spontaneously, nor did it occur within a legal vacuum. Indeed, Marshall's debates over federal judicial power with Patrick Henry and George Mason in the Virginia Ratifying Con-

vention of 1788 anticipated his subsequent disagreements with Spencer Roane.

Political, and, perhaps to some extent, economic factors help explain the divergent conceptions each jurist developed over the next thirty-three years, as Marshall became Chief Justice of the United States Supreme Court and Roane assumed control of Virginia's highest tribunal. And while their dispute at times involved complex and often abstract principles of law, it also revealed the powerful personalities of two men from Virginia, each of whom used his judicial position to preserve distinct notions of law and government.

Endnotes

1. 19 U.S. (6 Wheaton) 264 (1821).
2. E. Smith, Spencer Roane in 2 The John P. Branch Historical Papers of Randolph-Macon College (W. Dodd, ed. 1905) no. 1 at 14; *see* Kerr, "If Spencer Roane Had Been Appointed Chief Justice Instead of John Marshall," 20 *ABA Journal* 167, 169 (1934); *see* 3 A. Beveridge, The Life of John Marshall 113, 200 (1929).
3. C. Gelbach, "Spencer Roane of Virginia, 1766-1822: A Judicial Advocate of State Rights" 104-05 (Dissertation, Univ. of Pitt. 1955).
4. *See generally*, Gelbach, *supra* note 3; *see* M. Horsnell, "Spencer Roane; Judicial Advocate of Jeffersonian Principles" (Dissertation, Univ. of Minn. 1967).
5. 14 U.S. (1 Wheaton) 304 (1816).
6. 17 U.S. (4 Wheaton) 316 (1819).
7. Horsnell, *supra* note 4, at 32.
8. Gelbach, *supra* note 3, at 17.
9. 3 Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 522 (2nd. ed. 1836); *see* Horsnell, *supra* note 4, at 18.
10. 3 Elliot, *supra* note 9, at 442, 445-49, 462; *see* G. Wood, The Creation of the American Republic, 1776-1787 536-543 (1969).
11. 3 Elliot, *supra* note 9, at 539.
12. *Id.* at 522, 539-546.
13. *Id.* at 526-527.
14. *Id.* at 554.
15. Smith, Spencer Roane in 2 John P. Branch Papers, *supra* note 2, at 6-7.
16. *See generally* 1 J. Marshall, The Life of George Washington, Commander in Chief of the American Forces, During the War Which Established the Independence of his Country, and First President of the United States (2nd ed. 1832); *see* Lerner, "John Marshall and the Campaign of History," 39 *Colum. L. Rev.* 396, 398-399(1939); *see* 1 A. Beveridge, The Life of John Marshall, 69-107 (1916).
17. 3 Elliot, *supra* note 9, at 542-543.
18. *Id.* at 556.
19. *Id.* at 556-57.
20. *Id.* at 555.
21. Note, "Judge Spencer Roane of Virginia: Champion of States' Rights -- Foe of John Marshall," 66 *Harv. L. Rev.* 1242, 1244 n. 19 (1953); Horsnell, *supra* note 4, at 18-19; Kerr, *supra* note 2, at 169.
22. C. Sydnor, American Revolutionaries in the Making; Political Practices in Washington's Virginia 16-17, 60-116 (1965).
23. Gelbach, *supra* note 3, at 54-5, 124.
24. II Beveridge, *supra* note 2, at Chapters 3 and 4.
25. J. Marshall, An Autobiographical Sketch 25-26 (J.S. Adams ed. 1937); II Beveridge, *supra* note 2, at 374-78.
26. L. Baker, John Marshall: A Life in Law 303-07 (1974) suggests Marshall may not have thought the Acts politically prudent.
27. 6 The Writings of James Madison 326-331 (G. Hunt ed. 1906) contains the text of the Virginia Resolution.
28. Horsnell, *supra* note 4, at 44-45; 6 The Writings of James Madison, *supra* note 27, at 349.
29. *See* D. Malone, Jefferson and the Ordeal of Liberty 395-405 (1962).
30. J. Marshall, "Address of the Minority" in *Journal of the Virginia House of Delegates* at 88-90 (December 1798); *see* G.E. White, The American Judicial Tradition: Profiles of Leading American Judges 19-20 (1976).
31. 17 U.S. (4 Wheaton) 316 (1819).
32. 5 U.S. (1 Cranch) 137 (1803).
33. Judiciary Act of 1789, ch. 20, section 13, 1 Stat. 73, 81 (1789).
34. *See* Haskins, "Law Versus Politics in the Early Years of the Marshall Court," 130 *U. Pa. L. Rev.* 1 (1981); *see* Nelson, "The Eighteenth-Century Background of John

Marshall's Constitutional Jurisprudence," 76 *Mich. L. Rev.* 893 (1978); *see* R. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic 43-45, 58, 64-68 (1971).

35. Bloch and Marcus, "John Marshall's Selective Use of History in *Marbury v. Madison*," *Supreme Court Historical Society Yearbook*, 94-95 (1987).
36. 5 U.S. (1 Cranch) at 174-176.
37. *Id.* at 178.
38. 10 U.S. (6 Cranch) 87 (1810).
39. *Id.* at 139. U.S. Const. art .I, section X, cl. 1 says "No state shall enter into any...law impairing the obligation of contracts."
40. 10 U.S. (6 Cranch) at 136.
41. *Id.* at 143.
42. 1 VA Cases 20, 40-41 (1793); *see* J. Radabaugh, "Spencer Roane and the Genesis of Virginia Judicial Review," 6 *Am. J. Legal Hist.* 63, 70 (1962).
43. Horsnell, *supra* note 4, at 52; Kerr, *supra* note 2, at 169.
44. Beach, "Spencer Roane and the Richmond Junto," 22 *Wm. & Mary College Q. Hist. Mag.* 1, 1-3 (2d ser., no. 1 1942); 66 *Harv. L. Rev.*, *supra* note 21, at 1244.
45. 66 *Harv. L. Rev.*, *supra* note 21, at 1244; Horsnell, *supra* note 4, at 4; Gelbach, *supra* note 3, at 54-55,124.
46. Beach, *supra* note 44 at 16.
47. *See* Malone, *supra* note 29, at 404-05 for discussion of Taylor's contribution to the Kentucky and Virginia Resolutions; Taylor wrote Construction Construed and Constitution Vindicated (1820); *see* R. K. Newmyer, The Supreme Court under Marshall and Taney 46-47 (1968).
48. Ammon, "The Richmond Junto, 1800-1824," 61 *Va. Mag. of Hist. & Bio.* 395, 417 (1953).
49. 4 VA Cases (Henning & Munford) 173 (1809).
50. Judiciary Act of 1789, ch. 20, section 12, 1 Stat. 73 (1789).
51. 4 VA Cases (Henning & Munford) at 179.
52. *Id.*
53. 19 U.S. (6 Wheaton) 264 (1821).
54. 14 U.S. (1 Wheaton) 304 (1816).
55. 17 U.S. (4 Wheaton) 316 (1819).
56. 14 U.S. (1 Wheaton) 304 (1816).
57. *Hunter v. Fairfax's Devisee* VA Cases (April 24, 1794).
58. *Hunter v. Fairfax's Devisee*, 15 VA Cases (1 Munford) 218, 228-29 (1810).
59. Dodd, "Chief Justice Marshall and Virginia, 1813-1821," 12 *Am. Hist. Rev.* 776, 778 (1907).
60. Judiciary Act of 1789, ch. 20, section 25, 1 Stat. 73, 85 (1789).
61. *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 612-28 (1813).
62. Marshall represented Denny Martin Fairfax in *Hite v. Fairfax*, 4 Call. 42 (1786); *see* Haines, The Role of the Supreme Court in American Government and Politics, 1789-1835 340- 41 (1944).
63. 18 VA Cases (4 Munford) 1 (1814).
64. *Id.* at 50.
65. *Id.* at 36.
66. *Id.* at 30.
67. *Id.* at 26.
68. 14 U.S. (1 Wheaton) 304 (1816).
69. Letter from J. Story to C. Ticknor (Jan. 22, 1831) reprinted in 2 Life and Letters of Joseph Story 48-49 (W. Story ed. 1851).
70. Dunne, "Joseph Story: 1812 Overture," 77 *Harv. L. Rev.* 240, 277 (1963).
71. 14 U.S. (1 Wheaton) at 339.
72. *Id.* at 336-37.
73. *Id.* at 338.
74. N. Risjord, The Old Republicans: Southern Conservatism in the Age of Jefferson 178 (1965).
75. Ammon, *supra* note 48, at 410.
76. Risjord, *supra* note 74, at 177-78; *see* Gelbach, *supra* note 3, at 93; *see generally* Campbell, "John Marshall, the Virginia Political Economy, and the *Dartmouth College* Decision," 19 *Am. J. Leg. Hist.* 40, 55 (1975).
77. 17 U.S. (4 Wheaton) 316 (1819).
78. *Id.*
79. *Id.* at 420-24; *see* U.S. Const. art. I, section 8.
80. *See generally* J. Marshall, *supra* note 16; *see generally* I Beveridge, *supra* note 2; *see* L. Baker, John Marshall: A Life in Law 46 (1974).
81. *See* G. Gunther, John Marshall's Defense of *McCulloch v. Maryland* (intro. 1969).
82. 17 U.S. (4 Wheaton) at 429.
83. *Id.* at 430.
84. *Id.* at 350. (argument of J. Hopkinson, counsel).
85. Gunther, *supra* note 81, at 25.
86. 14 U.S. (1 Wheaton) 304 (1816).
87. Gunther, *supra* note 81, at 1-20 attributes Brockenbrough with authorship of the "Amphictyon" essays.
88. "Amphictyon" letter (March 30, 1819), reprinted in Gunther, *supra* note 81, at 56.
89. Horsnell, *supra* note 4, at 42-43.
90. "Amphictyon" letter (March 30, 1819), *supra* note 81, at 61- 62.
91. Gunther, *supra* note 81, at 13-14.
92. *Id.* at 15; *see* "A Friend to the Union" letter (April 24, 1819), reprinted in Gunther, *supra* note 81, at 86.
93. Letter from John Marshall to Joseph Story (May 27, 1819), *reprinted* in 14 *Mass. Hist. Soc. Proceedings* 325 (2d ser. 1900- 01).
94. "Hampden" letter (June 18, 1819), *reprinted* in 2 John P. Branch Historical Papers of Randolph-Macon College 93-94, 101-05 (1905).
95. *Id.*
96. Note, 66 *Harv. L. Rev.*, *supra* note 21, at 1253; *see* U.S. Const. amend. X.
97. "Hampden" letter (June 22, 1819), *reprinted* in Gunther, *supra* note 81, at 145.
98. *Id.*
99. *Id.*
100. Horsnell, *supra* note 4, at 165.
101. "Hampden" letter (June 22, 1819) *reprinted* in Gunther, *supra* note 81, at 152-53.
102. *Id.* at 152.
103. "Amphictyon" letter (March 30, 1819) *reprinted* in Gunther, *supra* note 81, at 58.
104. "A Friend of the Constitution" letter (June 30, 1819) *reprinted* in Gunther, *supra* note 81, at 156.
105. "A Friend of the Constitution" letter (July 14, 1819) *reprinted* in Gunther, *supra* note 81, at 203-04.
106. Gunther, *supra* note 81, at 17.
107. Judiciary Act of 1789, ch. 20, section 25, 1 Stat. 73, 85 (1789).
108. Baker, *supra* note 80, at 620.
109. U.S. Const. amend. XI.
110. 19 U.S. (6 Wheaton) at 290-312 contains Barbour's arguments.
111. *Id.* at 382-83, 391.
112. *Id.* at 385.

113. 9 U.S. (5 Cranch) 115 (1809).
114. I Beveridge, *supra* note 2, at Ch.'s 6-8; J. Marshall, *supra* note 25, at 10.
115. 19 U.S. (6 Wheaton) at 388.
116. *Id.* at 415-16.
117. *Id.* at 410.
118. *Id.* at 412.
119. "On the Lottery Decision" (Spencer Roane as "Algernon Sydney," May 29, 1821) *reprinted* in 2 John P. Branch Papers of Randolph-Macon College 91 (1906).
120. *See* Malone, *supra* note 29, at 404-05; *see* Newmyer, *supra* note 47, at 46-47.
121. "On the Lottery Decision" (May 29, 1821) *reprinted* in 2 John P. Branch Papers, *supra* note 119, at 103.
122. "On the Lottery Decision" (June 1, 1821) *reprinted* in 2 John P. Branch Papers, *supra* note 119, at 117.
123. U.S. Const. amend. X.
124. "On the Lottery Decision" (June 1, 1821) *reprinted* in 2 John P. Branch Papers, supra note 119, at 113.
125. *Id.* at 113; *see also* "On the Lottery Decision" (June 5, 1821) *reprinted* in 2 John Branch Papers, *supra* note 119, at 143.
126. "On the Lottery Decision" (June 1, 1821) reprinted in 2 John P. Branch Papers, *supra* note 119, at 119.
127. 1 VA Cases 20 (1793).
128. "On the Lottery Decision" (June 1, 1821) reprinted in 2 John P. Branch Papers, *supra* note 119, at 129.
129. Letter from John Marshall to Joseph Story (Sept. 18, 1821) *reprinted* in 14 *Mass. Hist. Soc. Proceedings* (2d ser. 1900-01) 327-330.
130. Letter from John Marshall to Joseph Story (Sept. 18, 1821) *reprinted* in *Mass. Hist. Soc. Proceedings*, *supra* note 129, at 330-31.
131. *Id.* at 330; *see* Dodd, *supra* note 59, at 784; *see* Lerner, *supra* note 16, at 426 n. 100.
132. Ammon, *supra* note 48, at 408.
133. Note, 66 *Harv. L. Rev.*, *supra* note 21, at 1256.
134. Letter from Spencer Roane to Archibold Thweatt (Dec. 24, 1821) *reprinted* in 2 John P. Branch Papers, *supra* note 94, at 142.
135. Letter from James Madison to Spencer Roane (June 29, 1821) *reprinted* in 9 The Writings of James Madison (1819-1836) 66-68 (G. Hunt ed. 1910).
136. *See Osborne v. Bank of United States*, 22 U.S. (9 Wheaton) 738 (1824); *see Bank of United States v. Planters' Bank of Georgia,* 22 U.S. (9 Wheaton) 904 (1824); *see Brown v. Maryland,* 25 U.S. (12 Wheaton) 419 (1827).
137. This comes from part of the title of Clyde Gelbach's dissertation, *supra* note 3.

Determinants of the Amount of Time Taken by the Vinson Court To Process its Full-Opinion Cases

Jan Palmer and Saul Brenner

To Process Its Full-Opinion Cases

Is it possible to identify and to measure some of the factors that determine the amount of time needed by the Supreme Court to process a full-opinion case? Or, are the cases so heterogeneous that it is impossible to find any consistent predictors of how much time will pass between the conference vote on-the-merits and the announcement of the official opinion? To answer these questions, we investigate the Vinson Court (the October 1946 Term through the October 1952 Term). This Court is chosen because of the availability of a complete dataset containing information necessary to test a number of hypotheses: the individual Justice's conference votes, the dates of these votes, and the names of the Justices who were assigned or reassigned the responsibility for writing the majority opinion.[1] Although the number of cases docketed has increased, the Supreme Court's procedures have not changed substantially since Vinson's tenure. Thus, this study of the Vinson Court not only provides insight into the decisionmaking of that Court but also generates hypotheses that can be retested when complete and reliable conference vote and other data from later periods become available.

Previous Studies

Observers of the Supreme Court have long wondered how Justices spend their time. This question is related to many others: Is the Court overworked? Should its jurisdiction be altered? Is it deciding too many or too few cases? Has the steady growth in the number of cases docketed each term reduced the Court's productivity? The Justices do not publish time charts and most of their activities are safely hidden from public view. Thus, scholars are forced to engage in educated guessing to answer these questions.

Hart[2] provided the first appraisal of how Justices of the modern Court spend their time. He estimated the amounts of time needed to complete various activities and inferred that the Court was overworked. Hart's study was criticized by Justice Douglas who claimed that the Court's caseload was not a burden.[3] But the *Report of the Study Group on the Caseload of the Supreme Court*[4] (frequently known as the "Freund Report"), agreed with Hart's finding that the Court was overworked. Casper & Posner[5] extended Hart's analysis and concluded that the amount of time spent screening cases had increased but that the Court was not overworked. All these studies examined the typical Justice rather than the Court as a whole.

Rathjen[6] took a very different approach in his analysis of the time needed to process full-opinion cases. Rather than studying individual Justices, he examined the Court as a whole for the 1964-1973 Terms and concluded that processing time was positively related to importance, level of dissension, and whether the case dealt with "Freedom and Equality" issues. He also found that business issues and cases in which a liberal Justice wrote the opinion were processed more quickly.

Like Rathjen, we examine the Court as

a whole. We retest some of his findings and are able to test additional hypotheses because we have the advantage of using data derived from the Justices' private papers to which Rathjen did not have access.

Processing Full-Opinion Cases on the Vinson Court

Almost all cases arrived at the Vinson Court either by a writ of appeal or as a petition for a writ of certiorari. Noting probable jurisdiction for an appeal or granting a certiorari petition required positive votes from four of the nine Justices. Most cases were denied review, which meant that the decision of the lower court remained the law in the case.

If a case was accepted for review, the litigants submitted written briefs after which the case was argued orally before the Court. A few days later, there was a secret conference vote at which time the Justices voted either to affirm or reverse the decision of the lower court. The Court sometimes had additional conference votes on-the-merits if the original conference vote resulted in an equally divided Court or if the opinion writing process uncovered new issues or changed several minds.

After the conference vote, the Chief Justice, if he was in the majority, assigned the writing of the Court's opinion either to himself or to another member of the majority. When the Chief Justice was in the minority, the senior Associate Justice in the majority assigned the opinion. The other Justices were free to write concurring or dissenting opinions. Drafts of all opinions were circulated to the Justices who frequently returned them with written comments and suggestions which served as a basis for further negotiations about the majority opinion's content. When a Justice was satisfied with an opinion, he joined it by sending a written memorandum to the author. Because Justices were free to change sides while the opinion was being written, the original majority opinion assignee at times lost the assignment to a colleague.

Some cases were so complex or contentious that the Court ordered reargument following a conference vote or after all the written opinions failed to attract a majority. Occasionally, reargument was required because the Court could not complete a case during one Term, requiring that it be held over until the next.

Once the majority, concurring, and

The composition of the Vinson Court in 1946: *(seated, from left)* Felix Frankfurter, Hugo Black, Fred Vinson, Stanley Reed, William O. Douglas; *(standing, from left)* Wiley Rutledge, Frank Murphy, Robert Jackson, and Harold Burton. The faster writers were favored with more assignments, with Douglas issuing the most opinions and Burton the least.

Table 1

Relationship between number of majority opinion assignments and the number of days it took Justices to write opinions.

	First Natural Court October 1946-48 Terms			Second Natural Court October 1949-52 Terms		
Justice	Number Opinions	Percent Opinions	Mean Days	Number Opinions	Percent Opinions	Mean Days
Minton				42	10.8	38
Clark				47	12.1	35
Burton	22	5.5	99	37	9.7	73
Rutledge	30	7.5	75			
Jackson	42	10.6	61	44	11.3	51
Murphy	39	9.8	55			
Douglas	71	17.8	43	42	10.8	34
Frankfurter	40	10.1	104	38	9.7	77
Reed	47	11.8	84	42	10.8	59
Black	69	17.3	40	57	14.6	40
Vinson	38	9.5	99	41	10.5	75
Total	398	99.9		390	100.1	

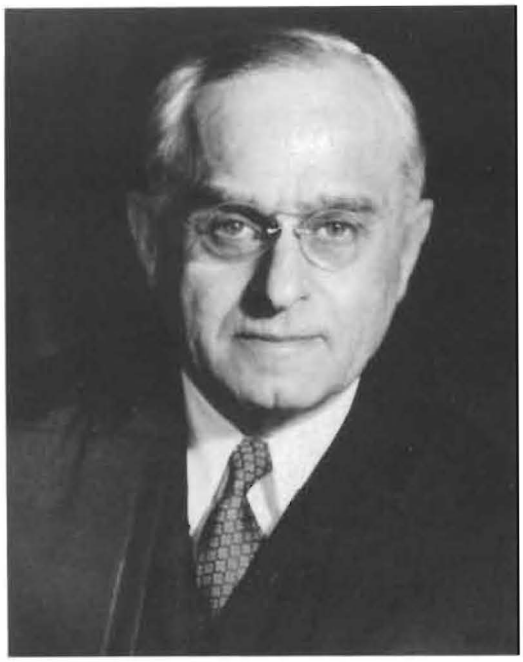
dissenting opinions were completed, they were announced by the Court and printed in U.S. Reports in a format that allows scholars to infer each Justice's position. Conference votes, however, are not published and can only be obtained from the Justices' private papers. Similarly, opinions in *U.S. Reports* identify the author of the majority opinion but do not indicate whether he obtained the opinion through assignment or through reassignment. Information on assignments and reassignments is available only in private papers.

Our earlier analysis[7] of opinion assignment patterns for the Vinson Court shows an inverse relationship between the number of assignments given to a Justice and the amount of time he took to complete opinions. Table 1 shows the number and percent of opinions assigned to each Justice as well as the average number of days each took to complete opinions. The data is divided between the Vinson era's two natural Courts, *i.e.*, periods of constant membership. There are substantial differences among the Justices in both the number of assignments and the average amount of time.

During the first natural Court, the number of assignments ranged between 71 (Douglas) and 22 (Burton). The average number of days taken to complete opinions varied between 40 (Black) and 104 (Frankfurter). As a group, the liberals, Rutledge, Murphy, Douglas, and Black wrote more quickly than did their conservative brethren. The results for the second natural Court show that although the amount of inequality in the number of assignments declined, the faster writers were still favored with more assignments. The three slowest writers (Burton, Frankfurter, and Vinson) became about three weeks faster than they had been during the first Court.

Additional findings which are not shown in Table 1 include the following: The distribution of assignments made by Chief Justice Vinson is similar to the distribution of all assignments shown in Table 1. Vinson favored the two fastest writers, Black and Douglas, even though

their ideological orientation was substantially different from his own. The distributions of assignments in minimum winning cases (e.g. five-to-four) are different from the distributions in nonminimum winning cases. The wide variation in the amount of time taken to complete opinions poses an additional question. Did the Justices agree on whether the Court was overworked? For example, Frankfurter, who took twice as long to write opinions as did Douglas, complained more or less continuously that the Court was accepting too many unimportant cases.[8] Douglas, however, wanted the Court to accept more.[9]



Justice Frankfurter *(above)* complained that the Court was overworked, but Justice Douglas, who wrote opinions in half the time it took Frankfurter, wanted the Court to accept more cases.

Hypotheses

We assume that there are at least three underlying factors that increase a case's processing time: the importance of the case, divisiveness or disagreement among the Justices, and fluidity or vote changes. Fluidity can be measured directly by inspecting the available data. But there are no direct measures of importance and divisiveness. For these two variables we use sets of proxies or related measures, three for importance and two for divisiveness. The first proxy for importance is obtained from the Justices' earliest conference vote on-the-merits. Ulmer,[10] Provine,[11] Brenner,[12] and Palmer[13] show that Justices were more likely to vote for granting review if they expected to reverse the lower court's decision because more was gained from reversing an incorrect decision than from affirming a correct one. Because the Court rarely granted review to unimportant cases when it agreed with the decision of the lower court, cases in which the Court expected to affirm are likely to be more important. Obviously, there were many cases in which the Justices did not know how they would vote on the merits when they voted to accept the case for review. In addition, it is impossible to determine from the printed record whether the Court intended to reverse or to affirm when it selected a case for review. The closest approximation of the Court's intention is obtained from the Justices' first conference vote. Thus, our first hypothesis, hereafter H1, is that the processing time for affirm cases (*i.e.*, cases in which a majority voted to affirm at the first conference) will be longer than for reverse cases.

The second and third proxies for importance are obtained from Schubert's dataset[14] which categorizes Supreme Court cases according to the type of dispute. Two of Schubert's categories, civil liberties cases and economic cases, are used to retest Rathjen's[15] findings that "Freedom and Equality" cases took "a week longer to adjudicate" than the "average decision duration," while "Business" cases took "approximately 11 days fewer to adjudicate." One reason for this expectation is that civil liberties cases were often more important and more controversial to the Justices. Civil liberties cases, in addition, were likely to be more divisive. Thus, our second hypothesis, H2, is that the processing time was longer for civil liberties cases than it was for all other cases. Our third hypothesis, H3, is that the processing time was shorter for economic cases than it was for all other cases.

The next factor underlying the disposition time for full-opinion cases is divisiveness, which we measure as the difference between the size of the majority and the size of the minority at the first conference vote. The larger the difference, the greater the probability that

Table 2

Variables Related to Processing Time for Full Opinion Cases by the Vinson Court Bivariate Analysis

	N	Median Days	GAMMA
All Cases	716	56	
(H1) AFF = 1 (Court voted to affirm at first conference)	342	58	.19
AFF = 0 (Court voted to reverse at first conference)	374	51	
(H2) CIVIL = 1 (civil liberties)	202	58	.08
CIVIL = 0 (non civil liberties)	514	52	
(H3) ECONOMIC = 1 (economic)	244	51	-.14*
ECONOMIC = 0 (non-economic)	472	58	
(H4) Difference between sizes of majority and minority			
0 or 1 vote	162	65	.28
2 to 4	249	58	
5 to 7	206	51	
8 to 9	99	30	
(H5) FIRST = 1 (first Court)	352	65	.22
FIRST = 0 (second Court)	364	51	
(H6) FLUIDITY 0 votes changes	372	51	.18
1 to 3 changes	295	58	
4 to 9 changes	49	77	
(H7) REASSIGNMENT = 1 (opinion reassigned)	55	142	.84
REASSIGNMENT = 0 (opinion not reassigned)	661	51	
(H8) LIBERAL = 1 (liberal opinion author)	436	65	.40
LIBERAL = 0 (conservative opinion author)	280	44	

*Negative relationship hypothesized

the issues were uncomplicated or did not involve conflicting legal principles or precedents. A larger difference also reduced the likelihood that the majority would break up and thereby prolong the process. In addition, a larger majority simplified the opinion writing process for two reasons: First, a larger majority decreased the probability that a dissenting opinion would be written. Second, a larger majority increased the bargaining power of the opinion author while reducing that of the assenting Justices because no single vote was essential to holding the majority. Therefore, our fourth hypothesis, H4, is that processing time became shorter as the difference between the sizes of the majority and minority at the first conference vote increased.

Divisiveness is also related to the Supreme Court's membership. The Vinson era can be divided into two periods of constant membership, *e.g.*, two natural Courts. Schubert,[16] Provine,[17] and Pritchett,[18] identify two loose ideological blocs during the Vinson era. For the first natural Court, October 1946-1948 Terms, the liberal bloc consisted of Justices Rutledge, Murphy, Douglas, and Black, while the conservative bloc included Justices Burton, Jackson, Frankfurter, Reed, and Vinson. Rutledge and Murphy, both of whom were liberals, died during the summer of 1949 and were replaced by Clark and Minton, both of whom were conservatives. Because the liberal bloc was reduced from four to two members, the second natural Court was more homogeneous in its ideology and, therefore, less divisive. In addition, during the second natural Court, Chief Justice Vinson succeeded in his efforts to get opinions written more expeditiously.[19] Thus, we hypothesize, H5, that cases decided during the first natural Court had a longer processing time.

The next element underlying disposition time is fluidity or vote changes by individual Justices. We measure fluidity directly by determining the number of strong vote changes (*i.e.*, affirm to reverse or the converse) between the first conference vote and the decision of the Court. We expect, H6, that processing time increased as the amount of fluidity increased. Reassignment of the responsibility for writing the Court's opinion is directly related to both fluidity and divisiveness. We hypothesize, H7, that processing time was greater if there was a reassignment because of the time needed to discover that the original majority opinion assignee could not hold the majority as well as the time required for the new author to write an opinion. Finally, we include one hypothesis that is unrelated to importance, divisiveness, or fluidity: We know that the liberal Justices (*i.e.*, Rutledge, Murphy, Douglas, and Black) were able to write majority opinions more expeditiously than were their conservative colleagues. As a consequence, the processing time was shorter when a liberal wrote the majority opinion. This hypothesis, H8, is based on our earlier finding (summarized in Table 1) that the liberal Justices (especially Black and Douglas) wrote more quickly during the Vinson era and on Rathjen's[20] similar findings for the Warren and Burger eras. The reasons for the liberals' greater speed are uncertain. Perhaps the liberal ideology is simpler and, therefore, defending a liberal position is easier.

Data and Research Results

The dataset contains 716 cases. Most of the information was obtained by Palmer[21] from the private papers of seven Vinson era Justices. Information regarding whether a case is included in the civil liberties or economic cases was obtained from Schubert's data.[22] Unlike Rathjen's analysis, our dataset includes cases that were held over, *i.e.*, cases in which the Court voted on the merits in one Term but did not announce its decision until the next.

We measure processing time as the number of days, including Saturdays and Sundays, between the date of the first conference vote on the merits and the date when the majority opinion was handed down. The mean is 82 days. The median is 56.

We test the eight hypotheses using two methodologies: one bivariate (*i.e.*, separately examining each explanatory variable's impact on processing time), the other multivariate (i.e., simultaneously examining the impact of all the explanatory variables). The statistical results, which are presented in the appendix, can be summarized as following.

There are six relationships strong enough to be considered statistically significant, *i.e.*, not chance occurences. (1) Cases took approximately eleven days longer if the confer-

ence vote was to affirm rather than to reverse. (2) Processing time was related to the difference between the sizes of the majority and minority at the conference vote. A one vote increase in the difference decreased time by approximately 3.3 days. (3) Liberal Justices finished opinions about a month quicker than did their conservative colleagues. (4) Cases were completed approximately one month faster during the second natural Court. (5) Processing time increased by about a week for each Justice who switched sides between the conference vote and the opinion announcement. (6) Processing time increased by approximately 139 days if the opinion was reassigned.

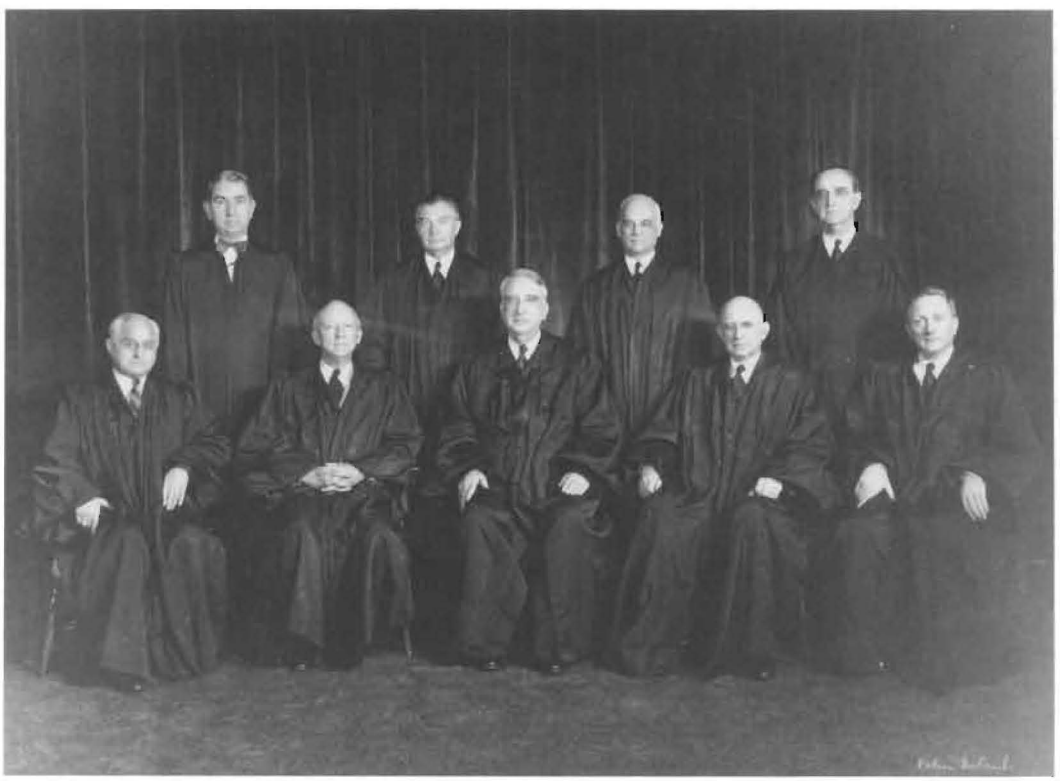
The relationship between processing time and whether the cases dealt with civil liberties is not statistically significant. Likewise, the relationship between processing time and whether the cases dealt with economic issues does not have a significant relationship. The model explains about one-third of the variation in processing time. The other two-thirds of the variation result from the many factors not included in the model, *e.g.*, the complexity of the case, the amount of research time needed by the opinion author, etc.

Conclusions

Is it possible to distinguish and measure variables that affect processing time? The answer is clearly "yes." The empirical results identify six variables which together explain about a third of the variation in processing time and provide insights into the Court's procedures. Five of the six significant variables relate to the underlying factors of importance, divisiveness, and fluidity. The only significant variable not related to one of these factors is whether the opinion writer was a liberal.

There is no *a priori* reason to believe that the variables we identify will not pertain to other eras of the Court's history. The hypotheses tested in this analysis can be re-tested when comparable data become available for other time periods.

We have three ancillary findings. First,



The second natural Vinson Court was photographed during the 1950 Term, after Tom Clark *(standing at left)* and Sherman Minton *(standing at right)* had replaced Frank Murphy and Wiley Rutledge. The author finds that the second Vinson Court processed cases approximately one month faster than did the first Court.

the wide variation in processing time shows that examining the number of cases docketed each Term is not a useful measure of the Court's workload. Second, the large differences among Justices in both the numbers of opinions written and the amounts of time taken to complete opinions indicates that the "Court's workload" may not be a meaningful concept--at least in terms of opinion writing. Third, examining the Court as a whole, rather than individual Justices, is useful, especially given that information on how individual Justices spend their time may never be available.

STATISTICAL APPENDIX

Bivariate Analysis

The bivariate results, which are presented in Table 2, compare values at or above the median processing time with those below the median. We employ median rather than the more usual mean values because the distribution is skewed by a few outliers, all of which are above the mean, *i.e.*, a few cases that were held over until the next Term and therefore took more than a year to process. A GAMMA statistic, a measure which ranges between -1 and 1, is used to measure and to compare the strength of each variable's relationship with processing time. GAMMA statistics with absolute values above .10 show the existence of relationships. Those with larger absolute values indicate stronger relationships.

Table 2 shows that there is a seven-day difference between the median processing times of cases in which the Court's original conference votes were to affirm, 58 days, and to reverse, 51 days. This relationship is consistent with H1. The GAMMA of .19 indicates a low positive relationship.

There is a six-day difference between the median processing time of civil liberties cases, 58 days, and non-civil liberties cases, 52 days. This difference is consistent with H2 and with Rathjen's[23] conclusion that such cases took "a week longer to adjudicate." The GAMMA of .08, however, shows only a negligible association.

For economic cases, the median processing time, 51 days, is a week shorter than the median processing time for non-economic cases, 58 days. This result appears to support H3 and is also similar to Rathjen's finding. The GAMMA of -.14 indicates a low negative relationship.

For DIFFERENCE, there is a monotonically decreasing relationship between processing time and the difference between the sizes of the majority and minority at the original conference vote. When the difference was 0 or 1 vote, the median processing time was 65 days. In contrast, when the difference was 8 or 9 votes, the median processing time was only 30 days. The GAMMA of .28 indicates that there is a low positive relationship between DIFFERENCE and median processing time. Thus, H4 is supported.

The median processing time declined by two weeks between the first, 65 days, and second, 51 days, natural Courts. The relationship is low (GAMMA = .22), upholds H5, and is consistent with earlier research that indicates that opinions were written more expeditiously during the second natural Court.[24]

For FLUIDITY there is a monotonically increasing relationship between the number of vote changes and processing time. The median time with no changes, 51 days, is more than three weeks shorter than the median with 4 to 9 changes, 77 days. This relationship upholds H6 with a GAMMA of .18.

With REASSIGNMENT, median processing time was dramatically longer for cases in which the majority opinion was reassigned, 142 days, as compared to those in which the original assignee wrote the opinion, 51 days. The GAMMA of .84 shows a very strong relationship which supports H7.

Lastly, median processing time was substantially shorter when a liberal Justice wrote the majority opinion, 44 days, as compared to when a nonliberal Justice wrote, 65 days. The GAMMA of .40 indicates a moderately strong relationship which supports H8.

Multivariate Results

Linear regression analysis measures the relationships between the dependent variable, TIME, and all the explanatory variables simultaneously. Because the explanatory variables are themselves interrelated, regression analysis gives a more appropriate and accurate measure of these relationships because it at-

Table 3

Variables Related to Processing Time for Full Opinion Cases by the Vinson Court Multivariate Analysis

Dependent Variable = TIME (number of days needed to process the case)
Mean = 82 days. Median = 56 days. Standard deviation = 87 days.

VARIABLE	REGRESSION COEFFICIENT	T-Statistic
Constant	83.6	10.57
(H1) AFF (majority voting to reverse at first conference)	11.4	2.05*
(H2) CIVIL liberties case	-9.9	-1.45
(H3) ECONOMIC case	-2.8	-0.44
(H4) DIFFERENCE between sizes majority and majority	-3.3	-2.98**
(H5) FIRST natural Court	33.5	5.77**
(H6) FLUIDITY	6.8	3.46**
(H7) REASSIGNMENT of majority opinion	139.0	13.44**
(H8) LIBERAL opinion author	-32.0	-5.28**

R-squared = .32 **F-statistic = 40.84****
*** = significant at 5%.** ** = significant at 1%.**

tempts to separate the impact of each explanatory variable from the impacts of the others.

The linear regression results are presented in Table 3. The regression coefficients indicate the impacts (measured in days) of the individual explanatory variables. The r-squared statistic, .32, indicates that about a third of the variation in TIME is explained by the explanatory variables. The F-statistic, 40.84, shows that the overall model is statistically significant. The t-statistics indicate the statistical significance of the individual variables.

The regression coefficient for AFF, 11.4, is statistically significant, *i.e.*, H1 is supported by the analysis. This means that, *ceteris paribus,* cases took approximately eleven days longer to process if the conference vote was to affirm rather than to reverse.

For civil liberties cases, the regression coefficient is negative and statistically insignificant. Thus, H2 must be rejected. The difference between the bivariate analysis, which shows a positive relationship between processing time and civil liberties cases, and the multivariate analysis, which shows a negative relationship, result from the dissimilarity of the statistical methods.

The regression coefficient for economic

cases has the correct (negative) sign but is not statistically significant. H3, therefore, is rejected.

For DIFFERENCE, the regression coefficient is statistically significant, *i.e.*, H4 is supported. A one vote increase in the difference between the sizes of the majority and the minority, everything else the same, decreased the processing time by approximately 3.3 days.

Cases were processed about a month faster, *ceteris paribus,* during the second natural Court. The regression coefficient for FIRST, 33.5, is statistically significant. H5 is, therefore, supported by the analysis.

For FLUIDITY the regression coefficient, 6.8, is statistically significant and supports H6. For each Justice who switched sides between the conference vote and the opinion announcement, processing time increased by approximately one week. The regression coefficient for LIBERAL, -32.0, is statistically significant. Thus, H6 is supported. Everything else being the same, a case in which a liberal wrote the opinion was processed about a month faster.

Finally, for REASSIGNMENT, the regression coefficient is quite large, 139, and is statistically significant. Thus, H6 is supported. If the opinion was reassigned, *ceteris paribus*, the processing time was increased by four and a half months. This very large increase in processing time resulted because reassigned cases were often the most difficult and divisive and because the reassignment frequently required reargument during the next term.

Endnotes

1. Palmer, Jan. The Vinson Court Era: The Supreme Court's Conference Votes; Data and Analysis, New York: AMS Press (1990).
2. Hart, Henry. "The Time Chart of the Justices," 73 *Harvard Law Review* 84 (1959).
3. Douglas, William 0., "The Supreme Court and Its Case Load," 45 *Cornell Law Review* 401 (1960)
4. Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (1972).
5. Casper, Gerhard and Richard Posner, "A Study of the Supreme Court's Caseload," 3 *Journal of Legal Studies* 339 (1974).
6. Rathjen, Gregory "Time and Dissension on the United States Supreme Court," 7 *Ohio Northern University Law Review* 227 (1980).
7. Brenner, Saul and Jan Palmer, "The Time Taken to Write Opinions as a Determinant of Opinion Assignments," 72 *Judicature* 179 (1988).
8. Felix Frankfurter Papers, Harvard Law School Library, 176-4; Provine, Doris. Case Selection in the United States Supreme Court, Chicago: University of Chicago Press (1980), p. 189.
9. For example, Douglas's grant rate for certiorari petitions was the highest on the second natural Court and was second only to Murphy on the first. Palmer, Chapter 5.
10. Ulmer, S. Sidney, "The Decision to Grant Certiorari as an Indicator to Decision On the Merits, " 4 *Polity* 429 (1979).
11. Provine, pp. 105-113.
12. Brenner, Saul. "The New Certiorari Game," 41 *Journal Of Politics* 649 (1979)
13. Palmer, Jan. "An Economic Analysis of the U.S. Supreme Court's Certiorari Decisions," 39 *Public Choice* 387 (1982).
14. Schubert, Glendon. The Judicial Mind: The Attitudes and Ideologies of Supreme Court Justices 1946-1963. Evanston: Northwestern University Press, 1965.
15. Rathjen, p. 243.
16. Schubert, p. 103-116.
17. Provine, pp. 135-139.
18. Pritchett, C. Herman. Civil Liberties and the Vinson Court. Chicago: University of Chicago Press (1954), chapter IX.
19. Brenner and Palmer, p. 183.
20. Rathjen, p. 245.
21. Palmer, chapter 4.
22. Dataset available from the Inter-University Consortium on Political and Social Research in Ann Arbor.
23. Rathjen, p. 243.
24. Brenner and Palmer, p. 183. Slotnick, Elliot. "Who Speaks for the Court? Majority Opinion Assignment from Taft to Burger," 23 *American Journal of Political Science* 60 (1979).

The Judicial Bookshelf

D. Grier Stephenson, Jr.

Observances in 1991 commemorating the Bill of Rights are a reminder that protection of individual rights in the United States has long been judicially based. This relationship between courts and rights even predates ratification of the Constitution.

For America's first experiment with a national bill of rights, one must look to the meeting of the Continental Congress in Philadelphia on October 14, 1774. Some 21 months before the signing of the Declaration of Independence, delegates adopted a Declaration of Rights which they pronounced valid on the authority of "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts," of the American colonies. Worthy of protection, they said, were rights of property, assembly, petition, and trial by jury, the English common law, as well as restrictions on standing armies in peacetime.[1] Soon, independence meant that Americans had to assume a new responsibility: alone they now shouldered the twin burdens of defining and defending the rights they would enjoy.

Yet this pre-revolutionary preview of a national bill of rights had to wait seventeen years for the real thing. Unlike state constitutions drafted in 1776 and after, the proposed federal Constitution did not contain a detailed charter of liberties when it left the hands of the Framers in 1787. Among other critics, Thomas Jefferson wanted curbs over and beyond the structural checks stressed by convention delegates James Wilson and Alexander Hamilton. Wilson doubted the wisdom of making exceptions to power not granted. "In a government of enumerated powers," he declared, "such a measure would not only be unnecessary but preposterous and dangerous." For Hamilton, bills of rights "would sound much better in a treatise on ethics than in a constitution of government." Jefferson persisted. A bill of rights would "render unnecessary an appeal to the people, or in other words a rebellion on every infraction of their rights." When a reluctant James Madison yielded to Jefferson's plea for a bill of rights and strained to find supporting reasons, Jefferson singled out an argument of "great weight"--the legal check it would place in the hands of the judiciary. In presenting a series of amendments to the First Congress for the Bill of Rights, Madison made Jefferson's argument his own. Thanks to the Bill of Rights, "independent tribunals of justice" would be "an impenetrable bulwark against every assumption of power in the legislative or executive."[2]

After two centuries, the Bill of Rights is a document of the present as well as of the past. Its place in the life of the nation is more than merely symbolic or hortatory largely because of decisions by the United States Supreme Court giving it vitality and meaning. Three developments have now made it virtually impossible to speak or write about the Bill of Rights without reference to the Supreme Court. First, the Court assumed a guardianship of the Constitution during the formative years of the nation. Formally this happened through judicial review. Explained, defended, and applied in 1803,[3] judicial review had already been implicit at least as early as the Court's decision in *Chisholm v. Georgia* in 1793.[4] In deciding that the State of Georgia was suable in federal courts by a citizen of another state, the Court

rendered an interpretation of Article III. More important, Congress's prompt resort to the formal amending process as a corrective was a testimonial to the stature of the judiciary. Congress, in proposing the Eleventh Amendment, and the states, in ratifying it, had within a short time equated the Court's interpretation of the Constitution with the document itself. So, judicial review has provided a means for enforcement of guarantees of individual liberty, just as Jefferson anticipated. It has also provided the missing piece in the puzzle, dating at least from Magna Carta, of how a government could be made to control itself.

Second, in construing the Bill of Rights, the Court has usually not considered its provisions time-bound. Instead, during the twentieth century and part of the nineteenth, the Justices have frequently agreed with Justice Brandeis's position that "[c]lauses guaranteeing to the individual protection against specific abuses of power, must have a...capacity of adaptation to a changing world...."[5] Although hardly without controversy and dissent on the bench and in the nation, the Court has even gone beyond the particulars of the Bill of Rights to extend constitutional protection to other liberties deemed equally fundamental.[6]

Third, the Court has applied most of the provisions of the Bill of Rights to the states. Ironically, one of the amendments Madison originally laid before Congress in 1789 would have set limits on the states as well. But Congress failed to include this stipulation among the twelve amendments it proposed to the states. As the eleventh state (three-fourths of fourteen), Virginia's ratification in December 1791 made the Bill of Rights, consisting of ten of the proposed amendments, part of the Constitution. The remaining three states (Connecticut, Georgia, and Massachusetts) did not ratify until the 150th anniversary of the Bill of Rights in 1941. Never ratified were an amendment on the apportionment of members of the House of Representatives and one (sometimes called the "lost amendment") delaying any increase in congressional salaries until a new Congress convened following the next election. In recent years, some state legislators have resumed the drive to obtain ratification of the amendment on salaries, after a hiatus of more than two hundred years. At the outset, however, the Bill of Rights applied only to the national government.

It took a long time to close the gap. The first step came with ratification of the Fourteenth Amendment in 1868. Section one contained majestic, but undefined, checks on state power that begged for interpretation. The second step came as the Court, acting for the most part in a series of cases after 1920, read almost every part of the Bill of Rights into the amendment. With consequences that can scarcely be exaggerated, state and local governments became bound by the same restrictions that had applied to the national government.

Since 1791 Americans have not been distinctive among peoples of the world because they have a bill of rights. Rather, they have been distinctive because they have long regarded liberty as a juridical concept: "a constitutional limitation, enforceable by courts upon the legislative branch of government...."[7] Even many who normally have little interest in public affairs are quick to take note when television highlights a court decision supposed to have expanded or contracted personal freedom.[8] While cases involving individual rights usually comprise only about half the Court's business each Term, these are the cases which in the public mind have inexorably linked the Justices to the Bill of Rights.

Recent books are ample evidence that the Supreme Court remains near the center of attention. Their timing may be merely coincidental with the bicentennial of the Bill of Rights, but most reflect an intense interest in the Court's evolving relationship with this parchment symbol of American freedom.

In thinking about the Court or any other institution, a framework of analysis is essential. For the Court, a useful framework consists of at least five elements: political and intellectual environment, personnel, past, process, and product. The first refers to the governmental and social systems in which the Court operates. The second includes individual Justices. The third encompasses the nation's history, as well as the vast body of judicial decisions from earlier eras. The fourth points to the manner in which the Court arrives at its decisions. The last element, product, consists of the Court's current and recent decisions -- the end result of the decisionmaking process--as well as their

acceptance and implementation. Each of these elements finds expression in varying degrees in the books surveyed here.[9]

Political and Intellectual Environment

To say that the Supreme Court is part of the American political system raises a question of accountability. Three authors have recently addressed this problem from different perspectives: Thomas R. Marshall asks whether the Court's decisions lead, follow, or depart from public opinion; David M. O'Brien examines the electoral link between federal judges and the process which chooses them; and Robert H. Bork ties accountability to constitutional interpretation.

Public Opinion and the Supreme Court by Marshall is probably the most exhaustive effort to probe the connection, if any, between what people think and what the Supreme Court does. The question is significant because the Court's influence in the political system rests on the reaction its decisions receive. As Justice Samuel Miller long ago recognized,

> *Dependent as its courts are for the enforcement of their judgments upon officers appointed by the executive and removable at his pleasure, with no patronage and no control of purse or the sword, their power and influence rest solely upon the public sense of the necessity for the existence of a tribunal to which all may appeal for the assertion and protection of rights guaranteed by the Constitution and by the laws of the land, and on the confidence reposed in the soundness of their decisions and the purity of their motives.*[10]

The question of the wisdom of an unelected and "independent" judiciary had already surfaced during the ratification debates in 1787-1788. On one side, Hamilton defended an institution which he presumed would stand against public opinion, "as an essential safeguard against the effects of occasional ill-humors in the society."[11] On the other, antifederalist (and fellow New Yorker) Robert Yates branded Hamilton's "safeguard" a threat to the people. The Constitution made the Justices "independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself."[12] Sentiments like Yates's later fueled the drive for elected state judiciaries.

Finley Peter Dunne *(above)* created the popular cartoon character Martin Dooley, an Irish saloonkeeper. Mr. Dooley made his observation, "th' Supreme Coort follows th' iliction returns," in the wake of the Court's decision in the Insular Cases, notably *Downes v. Bidwell* (1901).

In the twentieth century, the role of public opinion in Supreme Court decisionmaking has been no less troubling. One recalls Mr. Dooley's observation that "th' Supreme Coort follows th' iliction returns."[13] Justice Stevens asserts that "it is the business of judges to be indifferent to unpopularity,"[14] but Judge (later Justice) Cardozo advised that "[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by."[15] In *Patterson v. McLean Credit Union*[16] where the Court declined to reconsider *Runyon v. McCrary*,[17] Justice Kennedy acknowledged the influence of public opinion. *McCrary* had construed the Civil Rights Act

of 1866 to permit a challenge to racially segregated nonsectarian private schools. Suggesting that this decision might have been based on a mistaken interpretation of the Civil Rights Act of 1866, he nonetheless explained that the existing interpretation was "not inconsistent with the prevailing sense of justice in this country."[18]

In such contexts, Thomas Marshall poses two questions: "first, how accurately has the modern Supreme Court reflected public opinion; and the second, why?"[19] The questions are particularly poignant because of the usual characterization of the American political system as democratic. Marshall notes that scholars today do not agree on whether the Framers of the Constitution intended the Supreme Court to have the power of judicial review, nor is there consensus on the compatibility of judicial review with democracy. Yet agreement prevails that the Supreme Court is countermajoritarian both in its composition (a bench of unelected jurists) and its operation (invalidation of decisions made by elected officials).

Marshall recasts the debate by re-defining terms. For him, a majoritarian ruling "is one that, in substance, agrees with a contemporary public opinion majority (or at least, a plurality)." A countermajoritarian ruling "is one that disagrees with a contemporary public opinion majority (or plurality)."[20] This approach has the virtue of addressing the Court's relationship to the popular will directly, and avoids the assumption, which Marshall believes is mistaken, that the policies of the elected branches necessarily represent dominant opinion in the nation.[21]

Although questions of succession periodically heighten public interest in the Supreme Court, it is a well-documented fact that the public tends to pay more attention to the activities of Congress and the White House. This 1932 cartoon reflects the public's interest in whom President Hoover was considering to replace Justice Holmes on the Court.

Since scientific polling of opinion dates only from the 1930s, the author is limited to examining relatively recent Supreme Court decisions. So Marshall's research begins with decisions in 1935-1936 and concludes with the 1985-1986 Term. His conclusions rest on the 146 instances "in which part or all of a specific Supreme Court decision can be directly matched or compared to a specific poll item drawn from a scientific, nationwide poll."[22] His findings confirm neither Hamilton's hopes nor Yates's fears: the Supreme Court has been majoritarian more often than not.

This agreement does not derive from judicial influence on public opinion. He concludes that the Court has little ability to shape public opinion on issues, even though its decisions certainly influence public opinion about the Court itself. Rather, the tendency of the modern Court to reflect dominant public opinion in its rulings comes from a combination of other factors: judicial deference to federal policies, deference to public opinion in "crisis times," and the pronounced stability over time of those decisions which echo prevailing opinion.[23]

Nonetheless, deficiencies in the data lead one to expect that Marshall's answers are not necessarily the final answers to the questions he poses. One major limitation is the existence of polls, a fact over which he had no control. His study could include only those cases linked to a specific question in a poll. Because pollsters typically select questions on what they regard as the most salient issues of the day, those issues may not accurately reflect the bulk of the Court's decisions. Moreover, among the 146 "matches" between polling topics and Court decisions[24] (a number about equal to the number of Supreme Court decisions each Term during the period he studied), half fell between 1970 and 1986, that is, during the last sixteen years of a fifty-year study. Thus, the matches in some Terms might be a better reflection than in others. A second limitation lies in the polling. Wording and timing both make a difference in the responses a pollster receives. A third limitation stems from the well-documented fact that the public tends to pay more attention to the President and the Congress than to the Supreme Court. While the disparity is apparently the result of woefully uneven coverage in the news media, one nevertheless wonders about the degree to which the opinion reported in surveys is an informed opinion and how this circumstance affects the significance of Marshall's conclusions.[25]

The irony of an unelected judiciary within a government otherwise electorally accountable is the starting point for Judicial Roulette.[26] In 1985, the trustees and staff of the Twentieth Century Fund decided that selection of members of the federal judiciary, including Justices of the Supreme Court, was worthy of review by a task force consisting of "experts who could knowledgeably examine a system...that seemed to be growing ever more political..."[27] Of course, judicial selection is an old controversy, one that dates from President Washington's first term. What seems to have made selection of judges "ever more political" is the changing nature of the business confronting the federal judiciary. Cases today spawn courtroom questions which would have been unthinkable a half century ago. With the stakes so high, there should be little wonder that the politics of judicial nomination and confirmation has also changed.

The volume consists of two parts. The first (and shorter) part contains the report and recommendations of the Task Force. These include an emphasis on merit as the most important criterion for the nomination of a judge by the President, the widespread use of nominating commissions to screen candidates, greater visibility for nominations to the district and appeals benches, and less visibility for nominations to the Supreme Court.[28] Interestingly, the last recommendation would be accomplished by returning to the old custom by which nominees were not expected to appear before the Senate Judiciary Committee. (Harlan F. Stone in 1925 was the first nominee to do so. The second was Felix Frankfurter in 1939, but he stated that his presence was "not only bad taste but inconsistent with the duties of the office for which I have been nominated for me to attempt to supplant my past record by personal declaration." A decade later, Sherman Minton simply refused to appear, saying that his "record speaks for itself.")[29] Televised hearings now give a nominee added visibility, a practice which began with Sandra Day O'Connor in 1981.

David O'Brien's background paper

comprises the bulk of the volume. Compared to the usual book-length manuscript, his contribution is relatively brief, but it is nonetheless comprehensive, current, and packed with useful data. It is also unique among recent writings about the Court and the lower judiciary. Among older studies, it is most like the scholarly Lawyers and Judges[30] or Federal Judges,[31] rather than The Benchwarmers[32] which was largely journalistic and anecdotal.

According to O'Brien, controversy over selection of federal judges stems from the Constitution itself. "By giving the president the power to nominate and -- with the advice and consent of the Senate -- appoint federal judges, the Constitution provided a prescription for political struggle as much as an invitation for cooperation and compromise."[33] The "swing" of electoral politics largely "determines who makes it to the federal bench," a conclusion which must surely be the source of the title of the volume.

During any presidency, potential candidates identified with the party out of power are virtually excluded from the pool of contenders. Other traditions work to exclude or underrepresent segments of the population. As a result, the federal judiciary is neither a meritocracy nor expressly representative of the general public.[34]

Even so, judgeships are a product of more than presidential or senatorial patronage. "The nominating and confirmation process imposes a kind of internal check," with the result that nominations in the twentieth century have taken professional qualifications very seriously. Principal exceptions have been recent. "All administrations seek party faithful, but both Carter and Reagan gave less weight to professional qualifications than to their own legal-policy goals." Each wanted standards bent: Carter sought "to bring racial, gender, and ethnic diversity to the federal bench"[35] and Reagan tried "to appoint those sharing his philosophy of judicial conservatism." Yet neither was unusual in choosing judges with particular values in mind. Controversies arise, however, when an Administration casts nominees as "symbols of presidential power and instruments for achieving some narrow political agenda,"[36] especially when the agenda is unacceptable to a significant number of Senators.

For those who believe that judicial selection at the federal level has become too politicized or ideological, O'Brien is dubious about proposals for change. Even though he frowns on Presidents who pick single-issue nominees, he concludes that most remedies would be worse than the defect they are designed to cure. For example, implementation of Governor Mario Cuomo's plan for nomination by a "nonpartisan" commission, where merit would be the sole criterion,[37] conceivably "might improve the quality of the federal bench," but would not eliminate politics. Based on experience with similar systems in the states,[38] "the configuration of the politics of judicial selection would simply change -- for better or worse."[39] Nor is O'Brien attracted to certain neutral or nonpartisan standards by which the Senate might evaluate nominees. Laurence Tribe, for one, has urged the Senate to reject nominees whose views are at variance with the American vision of a just society or whose outlook might disturb an existing equilibrium or intensify a prevailing bias on the bench.[40] For O'Brien, these "are the very grounds on which senators most often disagree."[41] Instead, there is much to be said for not reducing the impact of electoral swings on judicial selection. Through such swings the federal courts have historically remained aligned with the general opinion of the nation.

Judicial Roulette gained significance because of its timing. After the study was launched, but before its publication, the Senate rejected the nomination of Judge Robert H. Bork to fill Justice Powell's seat on the Supreme Court. The vote on October 23, 1987, was 58 against, and 42 in favor, apparently the widest negative margin ever. The four-month struggle over confirmation was rancorous. Not since Woodrow Wilson nominated Louis Brandeis in 1916 had a battle over a Supreme Court vacancy been so vitriolic. Moreover, Bork's was the first in which direct mail, television and newspaper advertisements, and other techniques of modern interest-group politics were aimed squarely against a nominee to the Court. The Judiciary Committee's record-setting twelve days of hearings (Bork testified and was questioned on five of those days) indicated the degree to

Since 1793, when President Washington withdrew William Paterson's name for nomination to the Court, 28 other men have had their nominations postponed, withdrawn, rejected or left untouched. Judge Robert Bork *(right)* is the most recent nominee to fail to gain Senate approval.

which the political and intellectual environment of the nation influences the composition of the Court.

As one whose nomination failed to gain Senate approval, Bork is not alone. Twenty-eight other men have had their nominations postponed, withdrawn, rejected, or left untouched since President Washington withdrew William Paterson's name in 1793 for technical reasons.[42] Judge Bork has taken his case to the people by writing a book. The Tempting of America is really three small books in one. Part I surveys the history of constitutional development, concentrating mainly on decisions since the 1930s. Part II outlines Bork's view of correct constitutional interpretation and critiques those in academia and on the bench who disagree. Part III recalls the confirmation battle and reflects on what it may mean for future nominees. Each part lends significance to the title, for the "temptation" is the belief "that nothing matters beyond politically desirable results, however achieved."[43]

According to Bork, several characteristics mark the Court's impact on constitutional law. From the beginning, the Court has been "a strong force for centralization in our national life," although perhaps no more so than during Chief Justice Warren's tenure when the Court "imposed political and moral uniformity across wide areas of American life." Second, the Court has written values into the Constitution. Third, those values have often reflected the Justices views and not the Constitution. "This means we are increasingly governed not by law or elected representatives but by an unelected, unrepresentative, unaccountable committee of lawyers applying no will but their own."[44] This "will" may be the conservative constitutional revisionism of Justice Rufus Peckham in *Lochner v. New York*[45] or of the second Justice John Marshall Harlan in *Poe v. Ullman*.[46] It may be the liberal constitutional revisionism of Justice William 0. Douglas in *Griswold v. Connecticut*[47] or of Justice William J. Brennan in *Texas v. Johnson*.[48] Bork opposes revisionism in whatever ideological guise.

In place of revisionism, "[t]he judiciary's great office is to preserve the constitutional design." But if the federal judiciary is, by that same design, "unelected, unaccountable, and unrepresentative," how are the people to be protected from their constitutional protectors? The answer is that judges must be "bound by law that is independent of their own views of the desirable." Whether faced with a statute or the Constitution, judges must construe the law "as generally understood at the enactment."[49]

One purpose of his book "is to persuade Americans that no person should be nominated or confirmed who does not display both a grasp of and devotion to the philosophy of original understanding." Any other interpretation assigns a role to the judges that should be left "for the people and their elected representatives...."[50] Otherwise, there is "no set of propositions...too preposterous to be espoused by a judge or a law professor who has cast loose from the historical Constitution."[51] Only rarely since Marshall's time, apparently, has the Court been faithful to what Bork sees as the true judicial role.

This is not the place to re-examine either the politics of Judge Bork's nomination or original intent as an approach to constitutional interpretation. There are five volumes of published hearings by the Senate Judiciary Committee which explore his candidacy, plus ample commentary in the literature.[52] Nonetheless, it is worth noting that Bork discusses at length the application of his theory to the challenge posed by the Fourteenth Amendment and racial segregation. Because it is widely agreed that the "original understanding" of those who drafted and ratified the Fourteenth Amendment did not include proscription of laws requiring segregation of the races in public facilities, Bork believes that, for many, *Brown v. Board of Education* [53] dealt a killing blow to the appropriateness of original intent as an acceptable method of constitutional interpretation.[54] In rebuttal, Bork believes that the Warren Court could have rested the result it reached in *Brown* on original understanding. Since the primary purpose of the Fourteenth Amendment's equal protection clause was "equality under the law," Bork reasons that by 1954,

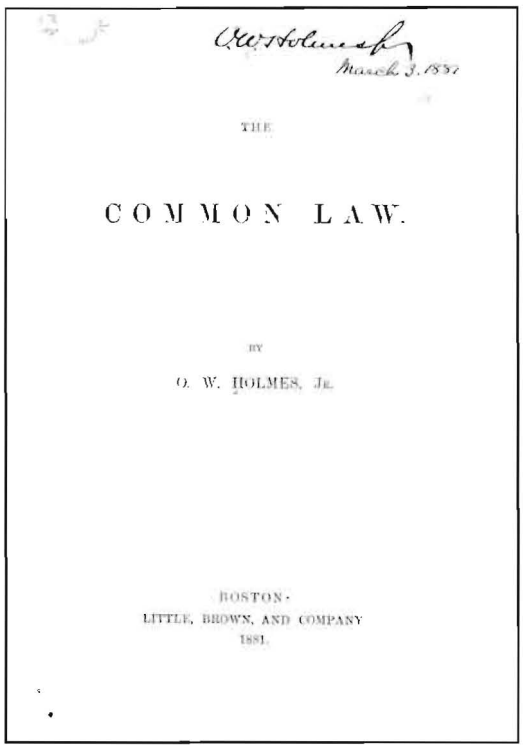
it had been apparent...that segregation rarely if ever produced equality....The Court's realistic choice, therefore, was either to abandon the quest for equality by allowing segregation or to forbid segregation in order to achieve equality. There was no third choice. Either choice would violate one aspect of the original understanding, but there was no possibility of avoiding that. Since equality and segregation were mutually inconsistent, though the ratifiers [of the Fourteenth Amendment] did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the... amendment into being was equality before the law, and equality, not separation, was written into the text.[55]

Original intent is therefore not as static as it might first appear. One may wish to ponder the practical difference between Bork's original-intent-in-practice as it might have been in *Brown*, and reliance on an evolving standard of "human dignity," as Justice Brennan advocated in his 1985 Georgetown lecture.[56] There, Brennan wished to avoid an interpretative method, such as Bork's, which accepted the death penalty as part of the constitutional order. Perhaps Bork's theory is not necessarily as limiting and Brennan's is not plainly as boundless as some adherents contend.

Personnel

"The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court Justices that lives after them."[57] Two Justices--one of a bygone era and the other a member of the present Court--are the subjects of three recent studies. Two consider Justice Oliver Wendell Holmes, Jr., and the other is the first book-length work on Justice John Paul Stevens.

Publication of Gary J. Aichele's Oliver Wendell Holmes, Jr.[58] and Sheldon M. Novick's Honorable Justice[59] is especially noteworthy. Among prominent Justices whose service ended before the Burger Court (1969-1986), Holmes is unusual in that few comprehensive book-length studies exist. In part the explanation lies in the vast quantity of material any scholar must consider--more, probably, than for any other American jurist. Holmes wrote more than 2000 judicial opinions, half of those while on the United States Supreme Court. There are his own published books, addresses, and articles, plus eight volumes of letters edited by others. If there has been a dearth of biographies, there has been no shortage of books and articles about one or more aspects of Holmes's long public life as scholar and judge. There are also approximately 36,000 documents (most unpublished) in the Holmes Papers at Harvard, access to which is closed except with permission, plus references to Holmes in other collec-


O. W. Holmes Jr.
March 3. 1881

THE

COMMON LAW.

BY

O. W. HOLMES, JR.

BOSTON:
LITTLE, BROWN, AND COMPANY
1881.

Until recently, there has been a dearth of comprehensive biographies of the Massachusetts Justice who published his seminal work, The Common Law, in 1881.

tions such as the William Howard Taft Papers at the Library of Congress. Holmes is one of a small number of Justices (perhaps including John Jay, Salmon Chase, William Howard Taft, Louis Brandeis, Charles Evans Hughes, Benjamin Cardozo, and Earl Warren) whose contributions clearly would have demanded biographies even if they had never gone on the high bench.

Happenstance is also part of the explanation. Frankfurter himself was the first authorized biographer of Holmes. Upon his appointment to the Court, that responsibility fell to Mark DeWolfe Howe. His two volumes of a projected multi-volume work covered Holmes's life only to 1882.[60] Howe's death terminated the project. Death also cut short the work of biographer Grant Gilmore.[61]

A third part of the explanation may lie in Holmes himself. He has long been regarded as enigmatic. One scholar concluded that "the apotheosis of Holmes defeats understanding."

Primarily interested in the common law, as a judge Holmes greatly influenced only constitutional law. Remarkably dogmatic, Holmes exemplifies "humility." Fatalistic, mistrustful of reason, and obsessed with the ubiquity of force, Holmes is nevertheless classified with John Dewey. Generally indifferent to civil liberties interests, Holmes is regarded as their champion. Unconcerned with contemporary realities, Holmes inspired a school of legal "realists." Uninvolved with the life of his society, Holmes affected it profoundly.[62]

Perhaps of no other Justice considered "great" by many have assessments varied so much.[63] For Frankfurter, "No judge of the Supreme Court has done more to establish it in the consciousness of the people. Mr. Justice Holmes is built into the structure of our national life and has written himself into the slender volume of the literature of all time."[64] For others, Holmes was a totalitarian.[65] A would-be biographer concluded that he was a distasteful, if nonetheless important, figure.

Put out of your mind the picture of the tolerant aristocrat, the great liberal, the eloquent defender of our liberties, the Yankee from Olympus. All that was a myth, concocted principally by Harold Laski and Felix Frankfurter, about the time of World War I. The real Holmes was savage, harsh, and cruel, a bitter and lifelong pessimist who saw in the course of human life nothing but a continuing struggle in which the rich and powerful impose their will on the poor and weak.[66]

Neither Aichele nor Novick attempts a categorization of Holmes. Encompassed by the subject, they apparently chose to let Holmes's life speak for itself. As Paul A. Freund observed three decades ago, "Although a new generation of readers may attend to the voice of Holmes as to an echo from another age, they will find...that it has a disturbingly close resonance."[67] "If Holmes is of interest today to any but scholars," Novick muses, "it is for his character, which shines through his writings even from the distance of a century or more.... Perhaps the life, even beyond its intrinsic interest, will help others to understand better Holmes's elusive, tantalizing ideas."[68] Even on the Court there was distance between Holmes and those touched by his opinions. "With each dissent, he became

more celebrated, but he did not look back with much interest at the parade of strangers who were carrying him at the head of their march."[69] Aichele hints that Holmes was no more reflective of his era than of ours.

[T]he figure that emerges will be seen from the perspective of the present age, and not in the light of his own. Each reader will find...his or her own Holmes, and whether that man is a hero or not will depend more upon the reader's judgment than upon historical evidence.[70]

The lingering question is "whether Americans ever shared the faith of...Holmes...."[71]

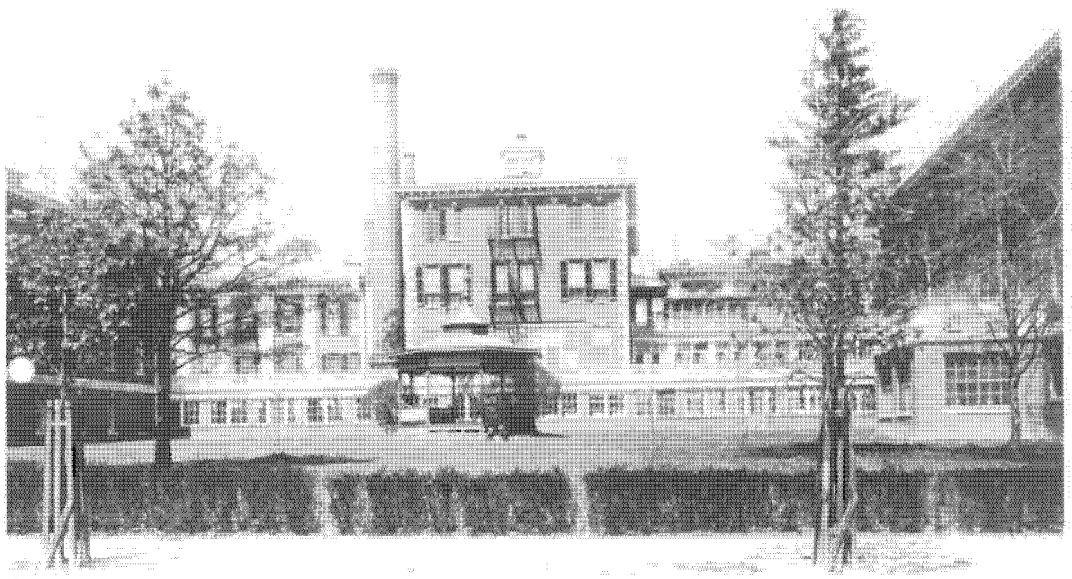
Of the two books, Novick's is by far the longer--by a factor of at least three in number of words. Aichele's devotes a somewhat smaller part (about a fifth) of his book to Holmes's years on the United States Supreme Court. With Novick's, Holmes's years in Washington comprise about a third. Novick also devotes more attention to Holmes's relations with others, although past a certain point Holmes's private life seems impenetrable. Neither author hesitates to point out lapses in Holmes's thinking. The reasoning of his dissent in *Bailey v. Alabama*[72] strikes Aichele as "especially suspect."[73] Novick considers his opinion in *Giles v. Harris*[74] "a bad one, perhaps his worst."[75]

Both volumes contain comprehensive, helpful, and complementary bibliographies. Aichele's is a nine-page essay, and Novick's is mainly a twenty-two-page listing of sources. Anyone contemplating serious work on Holmes should begin with them. Each author includes a detailed chronology of Holmes's life in an appendix, and each provides extensive documentation throughout. Aichele's citations run twenty-five pages, Novick's seventy-seven. The latter's lamentably resemble the lengthy explanatory kind that characterize law reviews. Inconvenience for readers is compounded because the citations appear as endnotes, presumably at the publisher's stipulation.

Given what a biography of Holmes must embrace, any reader is likely to have one or more quibbles with the authors. With Aichele, one wishes for greater attention to Holmes's tenure on the Court. Discussion of some major cases is far too brief. Since the book is part of the publisher's American Biography Series, however, its length may not have been negotiable.

With Novick, several interpretations and characterizations raise questions. In his brief reference to *Adkins v. Children's Hospital*,[76] he notes Holmes's dissent "when the Taft majority united to strike down the District of Columbia's minimum wage law for women workers."[77] If by "Taft majority" he means the majority of the Taft Court, then the statement is of course correct. But it would have been more accurate to add that Taft wrote a dissenting opinion too. As an example of Taft's diminished influence at the White House, Novick states without citation that upon Justice McKenna's resignation, "Coolidge filled the vacancy without consulting Taft."[78] But Alpheus Mason quoted two of Taft's letters from January 1925 which make clear not only that Taft professed to have consulted with the President but that, in doing so, he gave Coolidge his assessment of Harlan Fiske Stone who was then nominated.[79] Henry F. Pringle also accepted Taft's assertion as fact.[80] When Stone read Pringle he wrote James Barrett Moore, "President Coolidge...had almost as little regard for President [Nicholas Murray] Bulter's opinions as he did for Chief Justice Taft's, who I see also claims the credit or discredit for my appointment."[81]

On changes in the judicial system, Novick writes, "Most dramatically [Chief Justice Taft] secured legislation--drafted by a committee of the Justices--fundamentally reforming the jurisdiction of the Supreme Court. Henceforth, in most cases, the Court would have discretion to grant or deny a hearing. Holmes had not favored this reform.... But Holmes did not openly oppose Taft."[82] Reference must be to the important act of 1925, but some discretionary or certiorari jurisdiction had already been allowed by Congress in 1891.[83] Among other changes, the 1925 statute moved further in this direction by eliminating more of the Court's mandatory jurisdiction.[84] As for Holmes's opposition (for which Novick provides no citation) Alpheus Mason found that Holmes opposed Taft's unsuccessful effort in the 1920s to have the Court empowered to rewrite the federal rules of procedure. According to Mason, misgivings within the Court about the change in jurisdiction came from Brandeis who opposed sweeping legislation and wondered whether it



On April 9, 1923 the majority of the Court struck down an Act of Congress setting a minimum wage for women and children workers in the District of Columbia, such as those working at Children's Hospital *(pictured above)*, because the Court found it to be a price-fixing measure. Justice Holmes dissented in *Adkins v. Children's Hospital*, as did Chief Justice Taft and Justice Sanford. Justice Brandeis abstained.

might "not be desirable to introduce a bill lopping off some odds and ends...."[85]

Aichele's and Novick's books appeared more than a half century after Holmes's death. Less common are books published during a Justice's tenure, and only infrequently do books appear within the first fifteen years of a Justice's service.[86] In the last category is Robert Judd Sickels's John Paul Stevens and the Constitution. The book is not a biography of the man who was President Ford's only nominee to the Supreme Court,[87] for there is only a little attention paid to Justice Stevens's formative years or to other aspects of his life before his appointment by President Nixon as a judge on the Court of Appeals for the Seventh Circuit in 1970.[88] Sickels's study is more narrow, "an analysis of a pragmatic, independent-minded judge's thoughts about judicial review and the Constitution." Even though Sickels believes Stevens came to the Court with a well-conceived judicial role in mind[89] his subject "has been something of an enigma." Even though he was the only new arrival between 1972 and 1981, and was therefore understandably the focus of attention, there is "still no widespread understanding of [his] judicial philosophy." That philosophy is present in his opinions, but because it reflects primarily a pragmatic method and a concern for clarity, rather than conservatism or liberalism, "it has not caught the public eye."[90]

The Stevens method is "balancing," which entails openmindedness and a willingness to gather and weigh facts as the complexity of each case requires. It involves a respect for precedent as well as constitutional and statutory text, and a deference to the judgments of legislators, bureaucrats, and trial judges when their expertise and first-hand observations matter. His approach is much like that of the second Justice Harlan who

viewed balancing not as an escape from judicial responsibility, but as a mandate to perceive every...interest in a situation and to scrutinize every justification for a restriction of individual liberty. Moreover, after the closest possible analysis had isolated the crucial conflicts of values, Justice Harlan strove for unifying principles that might guide future decisions. The Harlan legacy is devoid of simplistic rules and categorical answers; but it is rich in sensitive, candid, and articulate perceptions of competing concerns....[91]

Stevens's distinguishing mark is not value-free balancing but sensitivity to a diversity of values. Unlike other balancers such as Frankfurter, however, Stevens is less likely to defer to legislative authority. To support this assessment Sickels has compiled comparative voting statistics for members of the Court during eleven terms. Moreover, an appendix to the book contains a "sampler" of excerpts from six opinions illustrating Justice Stevens's judicial mind at work.

In this compound balancing, certain values usually have priority over others: due process "has an edge over equal protection," as do liberal values over conservative ones. There seems to be no "mechanical preference" for one side or the other as is true of more ideologically oriented members of the Bench.[92] For precisely this reason, Sickels predicts that persons like Stevens will probably not be chosen for the Supreme Court in the near term. "It is an age of ideology again."[93] Yet Sickels could also have concluded that, precisely in this age of ideology, persons like Stevens may prove especially attractive to Presidents.

The Past

No institution operates free of history, especially its own. The Supreme Court may be vastly different from the Court over which John Jay presided, but the Court of the late eighteenth century, no less than the more familiar Court of the nineteenth century, has left a mark which remains.

The earliest years of the Supreme Court are the subject of the ambitious multi-volume series entitled The Documentary History of the Supreme Court of the United States, 1789-1800. Under the principal editorship of Maeva Marcus and with support from The Supreme Court Historical Society, The Documentary History unveils the Court's first and least familiar decade.[94] These years witnessed a struggle with identity which has not been generally understood. Between 1789 and 1800, three Chief Justices and ten Associate Justices took their seats on a Bench the membership of which had been fixed by Congress at six.[95] Low prestige compounded the frequent turnover. The President's first choice for a seat refused nomination on more than one occasion. There were only a handful of constitutional decisions, even if a few of them such as *Chisholm* were highly significant. Indeed, there were relatively few decisions of any kind. For those accustomed to writing about the "Marshall Court," the "Fuller Court," or the "Warren Court," the common designation of the first decade simply as the "pre-Marshall Court" says much about latter-day perception and knowledge of the institution's beginnings.

Volume two of The Documentary History portrays the Justices during the first half of this least-known era in what is probably their least-appreciated capacity--as circuit judges. In a contemporary three-tiered federal judicial system containing the district courts, the courts of appeals, and the Supreme Court, each staffed by a different set of judges, it is easy to forget that the Judiciary Act of 1789 created a three-court system staffed by only two sets of judges. There were at the outset no separate circuit court judges. Instead, the circuit courts were operated by the judges of the district courts and the justices of the Supreme Court. Moreover, aside from admiralty and certain other cases, the circuit courts were not appellate tribunals, but, like the district courts, were trial courts dealing with different kinds of litigation. Two Justices were assigned to each circuit; a quorum for semi-annual sessions consisted of one Justice and the district judge. In 1793, Congress began a long process of reducing the circuit duties of the Justices by requiring attendance of only one Justice at circuit court. In the absence of the district judge, the Justice alone could hold circuit court.[96] (There were existing models for such "mixed" judiciaries. The Pennsylvania Supreme Court had a trial court jurisdiction, some of which persisted until 1874. Moreover, its Justices rode circuit, a peripatetic re-

sponsibility which survives today as the court, unlike the high courts of most states, annually sits in three locations.)[97]

The volume is not a history of cases decided by the early circuit courts. Rather, the editors have brought together a massive, chronologically arranged, collection of 457 pieces of correspondence, newspaper articles, diary entries, and grand jury charges which "reveal some aspects of the lives of the justices as they rode circuit and [which] provide some insight into a number of significant issues that came before them...."[98] In addition, there are five appendices containing pertinent statutes and court calendars. Throughout, the editors have interspersed some seventy portraits, maps, and other illustrations.

A bonus of the compilation is the insight some of the documents provide into the private lives and personalities of the Justices. Some of the glimpses are treasures. There is, for example, the letter from John Quincy Adams to Thomas Boylston Adams in June 1793:

The most extraordinary intelligence, which I have to convey is that the wise and learned Judge & Professor Wilson, has fallen most lamentably in love with a young Lady in this town, under twenty, by the name of Gray. He came, he saw, and was overcome. The gentle Caledon, was smitten at meeting with a first sight love--unable to contain his amorous pain, he breathed his sighs about the Streets; and even when seated on the bench of Justice, he seemed as if teeming with some woful [sic] ballad to his mistress eye brow....[99]

Justice James Wilson was fifty-one at the time; Hannah Gray, who became the second Mrs. Wilson, was nineteen.

More apparent from beginning to end is evidence of the rigors of the Justices' work and the devotion they must have had to Court and country. Not only were the travels long, but each Justice paid his expenses out of his own salary. Unless staying with friends, accommodations were rarely ideal. Justice Cushing once found himself with twelve other lodgers in single room, and Justice Iredell reported encountering, unexpectedly, "a bed fellow of the wrong sort."[100] The travels were also frequently ardu-

Volume II of The Documentary History of the Supreme Court of the United States is subtitled "The Justices on Circuit, 1790-1794" and was researched, written and edited by: *(from left to right)* Maeva Marcus, Editor; Natalie Wexler, Christine R. Jordan, and Stephen L. Tull, Associate Editors. The Documentary History Project is co-sponsored by the Supreme Court and the Supreme Court Historical Society, and is funded in part by the National Historical Publications and Records Commission.

ous. As the Justices wrote to Congress in 1792, "some of the present judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome Journies [sic]." In 1793, arriving in Boston by boat from Philadelphia, Justice Blair was examined by the health officer to make sure he was not carrying yellow fever.[101] In 1800, while crossing the frozen Susquehanna River at Havre de Grace, Maryland, Justice Chase fell through the ice and almost drowned.[102] Justice Iredell apparently kept the most detailed chronicle of his "journies." As the editors explain, "His letters to Hannah [his wife] often take on a marveling, enthusiastic quality as he describes his journeys from town to town and court to court. Without Iredell the chronicler, these volumes would not be possible."[103]

Circuit-riding generated professional as well as personal worries. Since there was no intermediate body between the circuit courts and the Supreme Court (the circuit courts of appeals were not established by Congress until 1891; the circuit courts survived until 1912), Justices would face on appeal cases they had decided as circuit judges. This feature of the system raised questions at the start. As Attorney General Randolph explained in a report to Congress, "The detaching of the judges to different circuits, defeats the benefit of an unprejudiced consultation."[104] The Justices felt so strongly about their dual role that after President Washington invited them to send him their impressions of the new judicial system, they collectively prepared a letter in September detailing their objections.[105] The letter was virtually an advisory opinion, indicating why the existing system was incompatible with the Constitution.

Had the Constitution permitted the Supreme Court to sit in Judgment, and finally to decide on the Acts and Errors, done and committed by it's [sic] own Members, as Judges of Inferior and subordinate Courts, much Room would have been left for Men, on certain Occasions, to suspect, that an Unwillingness to be thought and found in the Wrong, had produced an improper Adherence to it; or that mutual Interest had generated mutual Civilities and Tendernesses injurious to the right.... These, we presume, were among the Reasons which induced the Convention to confine the Supreme Court, and consequently, it's [sic] Judges, to appellate Jurisdiction--We say, "consequently it's [sic] Judges," because the Reasons for the one, apply also to the other.[106]

Two months later Chief Justice Jay wrote Washington his views on several other constitutional issues such as the currency and roadways.[107] Yet later, when Washington (at Secretary of State Thomas Jefferson's behest) requested an advisory opinion on presidential regulations enforcing the Neutrality Proclamation of 1793, Jay tactfully declined because of the doctrine of separation of powers, a position which remains the rule today.[108] (Ironically, Jay, acting in a behind-the-scenes role, had prepared the first draft of the proclamation for Washington.)[109]

Charges to grand juries in the circuit courts are examples of the Justices' thinking about the Constitution as well as their role as jurists-on-the road. For example, Chief Justice Jay's first charge to the grand jury in New York included these sentiments:

[W]ise and virtuous Men have thought and reasoned very differently respecting Government, but in this they have at Length very unanimously agreed: That its Powers should be divided into three, distinct, independent Departments -- The Executive legislative and judicial. But how to constitute and ballance[sic] them in such a Manner as best to guard against Abuse and Fluctuation, & preserve the Constitution from Encroachments, are Points on which there continues to be a great Diversity of opinions, and one which we have all as yet much to learn.... [I]f the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by Practice -- if on such difficult Questions men may differ in opinion and yet be Patriots -- and if the Merits of our opinions can only be ascertained by Experience, let us patiently abide the Tryal [sic], and unite our Endeavours to render it a fair and an impartial one.[110]

Sometimes charges were preceded by prayers offered by local clergymen, as in Providence, Rhode Island, in 1793.[111] Sometimes grand juries in their replies to the charge or in presentments would offer opinions on a range

of current issues. A grand jury in Georgia in April 1793 complained of "depredations" by Creek Indians, protested the Supreme Court's decision in *Chisholm v. Georgia*, and observed "that no attention seems to have been paid to the Presentment of the last Federal grand Jury at Savannah, relative to appropriating a fund for building a Seaman's Hospital in this Port."[112]

As an addition to the literature on the Court, The Documentary History opens a window to a time long past. The view is both engaging and instructive.

Process

The Court's decisionmaking process as well as its past shapes its decisions. Unlike the old circuit courts, decisionmaking in the Supreme Court customarily involves all the Justices because the Court sits as a collegial body. Glimpses of its internal workings promote understanding. "That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court," Justice Frankfurter argued. "But the passage of time may enervate the reasons for this restriction, particularly if disclosure rests not on tittle-tattle or self-serving declarations."[113] Two recent books shed light on an important dimension of the Court at work: influence.

The Antagonists by James F. Simon should have wide contemporary appeal. Within its pages are revealing portraits of strong-willed personalities like Hugo Black and Felix Frankfurter, clashing positions on civil liberties, debates on the role of the Supreme Court in

Black's previous affiliation with the Ku Klux Klan caused a stir when it was reported by the media after his Senate confirmation. This 1937 cartoon illustrates Attorney General Homer Cummings's embarrassment at not having been aware of Black's early Klan membership.

American government, and a tug-of-war for the mind of the Court and the nation in the mid-twentieth century. This is the stuff of good fiction, but in this case it is also fact.

No stranger to research on the Court and its Justices,[114] Simon has drawn on a wide range of primary and secondary sources, including the extensive collection of papers of Justice Frankfurter at the Library of Congress and at the Harvard Law School, the comparatively meager collection of Black's papers, and dozens of interviews with present and former Justices, law clerks, and others who knew them. Simon has also tapped one previously unreferenced source: the files of the Federal Bureau of Investigation. The "thick dossier on Frankfurter" contains both "crank letters" and "serious investigative reports." One prominent military figure accused the Justice of being "the brains behind the Communist conspiracy in the U.S." A leading motion picture mogul "reported to the FBI that Frankfurter was a radical to be watched carefully." There were also questions about Frankfurter's American citizenship because of the possibility that Leopold Frankfurter, his father, had never become a naturalized citizen. Director Hoover instructed investigators to "go thoroughly into this and get all the facts." (Doubts over father Leopold's citizenship proved unfounded. The FBI established that he had become a naturalized citizen in 1898.)[115]

As Supreme Court Justices, Frankfurter and Black wrestled with a dilemma bequeathed by the Framers: freedom from direct accountability to the electorate has invited rule by judges, but this independence has worked a constraint. Even before their appointments to the Court by President Franklin Roosevelt, both men were acutely aware of the tensions that abrogation of the popular will entailed. Over a long judicial career each attempted to construct an elaborate resolution which helped to define constitutional jurisprudence for a third of a century. And the reverberations of the debate between these giants continue. "No two members of the modern Supreme Court," Simon writes, "have been more important in developing the contemporary constitutional debate than Hugo Black and Felix Frankfurter."[116]

The relationship between Black and Frankfurter was a contest for the intellectual leadership of the Court. This is the heart of the story Simon unfolds. Black was the successful Alabama trial lawyer, United States Senator, and wily politician with no significant judicial experience when Roosevelt named him to the Bench in 1937. Justice Stone, for one, was so troubled by Black's judicial technique that he asked Professor Frankfurter for help. "Do you know Black well?" Stone wrote Frankfurter in February 1938.

> *You might be able to render him great assistance. He needs guidance from someone who is more familiar with the workings of the judicial process than he is. With guidance, and a disposition to follow it until he is a little surer of himself, he might do great things.*[117]

Frankfurter's "great assistance" took the form of a long schoolmaster's memorandum to the new Justice.

Frankfurter was the Harvard-educated constitutional scholar and nationally known civil libertarian. His appointment to the Supreme Court followed Black's by less than two years. As one journal commented editorially, "No other appointee in our history has gone to the Court so fully prepared for its great tasks."[117]

For good reason, therefore, most expected Frankfurter to assume the mantle of intellectual leader of the newly emerging Bench. While the President had to wait until his second term to make his first appointment, seven new Justices sat on the "Roosevelt Court" before the end of 1941. Only Justice Roberts and newly elevated Chief Justice Stone survived from the Hoover and Coolidge Administrations. Rarely had the Court's membership changed so completely at such a momentous time. But popular expectations were wrong.

The famous flag-salute cases were the initial battleground. Over religious objections by Jehovah's Witnesses, the Court in *Minersville School Board v. Gobitis*[119] upheld a school board in Pennsylvania which required all students to salute the flag. Justice Stone was the lone dissenter. Chief Justice Hughes assigned the opinion to Frankfurter apparently for two reasons: first, at conference Frankfurter had made a moving statement about the role of the public schools in instilling patriotism in a pluralist society; second, Hughes considered the

Justice Black joined Justice Frankfurter's opinion in the *Gobitis* case, but paid a visit to Frankfurter's chambers to tell him that he "didn't like this kind of law." Lillian and William Gobitas ("Gobitis" is misspelled in the record) are pictured above with their father in 1935, the year they refused to salute the flag because as Jehovah's Witnesses their religion forbade it.

"effect that Frankfurter, one of the most celebrated civil libertarians of his generation, would have on his countrymen when he argued in his opinion that the claim of the free exercise of religion...should not prevail."[120]

Frankfurter's position and opinion even earned the vote of arch-civil libertarian Justice Frank Murphy who confessed to Frankfurter, "this has been a Gethsemane to me. But after all, the institution presupposes a government that will nourish and protect itself and, therefore, I join your beautifully expressed opinion."[121] This may explain why Murphy chose not to join Stone's dissent. (A biography of Murphy explains that he had abandoned a draft dissent of his own, presumably unwilling to be the freshman Justice writing against Chief Justice Hughes's position.)[122] Black, William 0. Douglas, and Stanley Reed (the second Roosevelt appointee) also went along. Yet Simon reports that Black's position was not as clear as his vote in the case suggests. It seems that he was one of only two Justices (Stone was the other) who had not declared his vote at the conference.

Later, when Frankfurter had circulated his draft opinion to his colleagues, and had received laudatory comments from the Chief Justice and several other colleagues, Black did not join in the praise. Frankfurter later wrote that Black had stopped by his chambers the Saturday morning before the decision was announced to say that he "didn't like this kind of law" but saw nothing in the Constitution to justify declaring it unconstitutional.[123]

It is well known that Black, Douglas, and Murphy not only later changed their minds about their votes in *Gobitis* but soon in *Jones v. Opelika*[124] publicly acknowledged their error. But Black had made up his mind less than three

months after the first flag-salute case. Simon reprints the entry Frankfurter made in his scrapbook of a conversation with Douglas: "Hugo thinks maybe we made a mistake in *Gobitis*," Douglas told Frankfurter. "Has Hugo been rereading the Constitution?" asked Frankfurter. "No, he's been reading the newspapers," Douglas replied.[125] Reversal came in *West Virginia Board of Education v. Barnette*[126] in 1943, where the Court struck down on free speech grounds West Virginia's flag-salute requirement. This time the vote was six to three, with Stone, Black, Douglas, and Murphy joining the recently appointed Justices Jackson (who wrote the majority opinion) and Rutledge. Frankfurter's dissent commanded the support of Justices Reed and Roberts from the *Gobitis* majority. For Simon, the Court's startling about-face marked the beginning of the decline in Frankfurter's influence among his colleagues. Respected still, his views would no longer command the adherence among "the brethren" which observers anticipated in 1939. It was the jurisprudence of Black, not Frankfurter, which would later prevail in many of the Warren Court's major decisions.

Tension over constitutional doctrine is what one would expect in a book entitled The Antagonists. And the title suggests more--the personal relations among Justices which also affect the Court's decisionmaking process. Justice Frankfurter once remarked to Chief Justice Vinson that the Court was like a family.[127] The characterization brings to mind teamwork, mutual support, and loving concern. Simon demonstrates that differences over doctrine did not mean that Black and Frankfurter were personal enemies. Much of the book shows exactly the opposite. Though they thought differently and frequently voted for opposite results, a strong bond of mutual admiration developed between the two. Yet Simon shows that the Court can be like a family in another, and unflattering, respect. Frankfurter had a habit of indulging in "vituperative gossip" about less-favored colleagues. His "all-time low in scurrility" may be a letter to Harlan in 1958, which complained about Black's plan to attend the annual meeting of the American Bar Association: "I have little doubt that Hugo now believes it will help the Court, for he has infinite capacity--beyond anyone I've known--for self deception."[128] Despite such comments, Frankfurter conducted himself on a "higher level" by extending courtesies to Black, including invitations to private luncheons for visiting dignitaries and special attention to his wife Josephine and the three Black children. Black's style was different. He "had long ago learned the value of muting acrimony toward colleagues..., and accentuating their good qualities. It had made for more effective advocacy in the conference room...."[129]

A note Black sent Frankfurter shortly after declining health drove the latter to retirement in 1962 captures his approach: "we're going to miss you on the Court because we need you." For Simon, Black had paid his former colleague the highest compliment. "Black's core message was, in fact, true. The Court and the nation were stronger because Black and Frankfurter had served *together*."[130] Intellectual clashes pushed each to his best.

Like The Antagonists, The Unpublished Opinions of the Burger Court by Bernard Schwartz depicts the Court at work as it tries to resolve the questions that divide and perplex the nation. Rather than demonstrating influence through clashing personalities, Schwartz lays bare the Court's decisionmaking process through a study of judicial give-and-take in ten decisions rendered between 1970 and 1979.[131] The book is a companion to The Unpublished Opinions of the Warren Court[132] and is modeled after Alexander Bickel's The Unpublished Opinions of Mr. Justice Brandeis.[133] Schwartz sets out to illustrate the "collaborative efforts in which nine individualists must cooperate to bring about the desired result."[134] As Felix Frankfurter prophetically explained two years before his own appointment to the Bench,

> *Divisions on the Court and the greater clarity of view and candor of expression to which they give rise, are especially productive of insight. Moreover, much life may be found to stir beneath even the decorous surface of unanimous opinions.*[135]

Frankfurter was correct--much life "stirs" in The Unpublished Opinions.

Schwartz organizes each chapter around one of the ten cases, reviewing its history, alignment of the Justices at conference, and initial drafts of opinions. He then reprints a previ-

ously unpublished lead opinion with a discussion of how that opinion took its final form (as a majority, plurality, or dissenting opinion) in the United States Reports. Of particular interest is his speculation about the impact on the government and the nation had opinions come down in their earlier form.

For example, chapter 3 introduces *Frontiero v. Richardson*[136] (initially, *Frontiero v. Laird*) and the subject of gender discrimination. While the Warren Court is remembered for a host of landmark rulings in civil rights, that Court dealt only once with gender discrimination, and when it did, the Court upheld the challenged law.[137] In *Reed v. Reed*,[138] decided after Warren Burger became Chief Justice, the Court first ruled that a gender-based distinction (here, a state's preference for males over females in selecting administrators for estates) violated the rationality standard required by the equal protection clause. *Frontiero* challenged a Defense Department policy on payment of quarters allowances for dependents which required proof of need from female claimants but not from males. According to Schwartz, the majority voted at conference to strike down the regulation because, like the law in *Reed*, it lacked minimum rationality.

Justice Brennan drafted an opinion (which Schwartz reprints) reflecting the conference consensus. The covering memorandum explained that he did not reach

the question whether sex constitutes a "suspect criterion" calling for "strict scrutiny".... I do feel however that this case would provide an appropriate vehicle for us to recognize sex as a "suspect criterion." And...perhaps there is a Court for such an approach. If so, I'd have no difficulty in writing the opinion along those lines.[139]

Brennan then decided that *Frontiero* should rest on the higher standard, not the lower standard of *Reed*. There ensued an exchange of memoranda among the Justices debating this point. The outcome of the case was never in doubt (the government lost by a vote of eight to one), but the appropriate constitutional test was. In the end, Brennan's opinion never acquired a fifth vote, and so what had begun as a consensus opinion structured around the rational basis test appears in the Reports as a plurality opinion resting on strict scrutiny. Had the initial draft prevailed, Schwartz believes that it is unlikely that the Court would have later abandoned that approach in gender discrimination cases. As it was, Brennan's sortie in *Frontiero* led to a compromise majority position three years later in *Craig v. Boren*.[140]

Obviously, the account of *Frontiero* and the other cases derives from sources to which most students of the Court lack access. Schwartz is careful to say that all the opinions were made available to him "on a confidential basis." Moreover, he draws on interviews with Justices and Court memoranda, sources he

Bernard Schwartz's new work, The Unpublished Opinions of the Burger Court, examines the Court's decision-making process by focusing on ten cases rendered between 1970 and 1979. Above, members of the 1972 Burger Court pose for an informal portrait in the East Conference Room.

documents in endnotes, except where necessary to protect confidentiality. While some have raised questions--ironically in at least one instance by a journalist--about the propriety and desirability of publication of internal Court documents at least while participating Justices are still sitting members of the Court,[141] some members of the Court have evidently concluded that no harm is done after some period of time. (Nine years lapsed between the most recent decision in 1979 and publication of the volume in 1988.) Otherwise Schwartz could not have written this book.

What is learned from The Unpublished Opinions? Overall the benefit to the reader would be measurably greater had the volume contained an index. The judicial literature of the past several decades has generously documented the collaborative nature of the Court's work even if it is true, as Schwartz believes, that the collaboration is not widely known. At least since publication in 1956 of Alpheus Mason's biography of Chief Justice Stone,[142] studies of the Court have disclosed that compromise, politicking, bargaining, and vote switches are the rule, not the exception, at the Marble Palace. The sagas Schwartz chronicles sustain the observation J. Woodford Howard made of the Supreme Court in the years 1940-1949, that "hardly any major decision... was free from significant alteration of vote and language before announcement to the public."[143] Yet Schwartz does more than confirm that this fluidity was true of the 1970s as well. Along with ample detail of the decisionmaking process in a series of important cases are jurisprudential and personal insights into the behavior of individual Justices, most of whom arrived at the Court after publication of the landmark studies.

Product

Scholars delve into the Court's process because of its influence on decisions. Because cases like *Frontiero* are politically significant, the Court has long been a major participant in American government. Two recent books venture into some of the Court's most controversial rulings.

In Truman's Court, Frances Howell Rudko combines attention to the Court, its Justices, the process, and decisions during the tenures of Chief Justice Vinson and Justices Burton, Clark, and Minton. President Truman named each to the Court between 1945 and 1949. Of the four, Clark served the longest, from 1949 until his retirement in 1967. The volume is thus not a study of the work of the Vinson Court (1946-1953) but an examination of the decisions in which one or more of the Truman appointees took part between the end of World War II and the height of the Vietnam War. C. Herman Pritchett's book on the Vinson Court[144] looked at civil liberties decisions during part of this period, but Pritchett largely ignored the Truman appointees, except for Vinson himself. Rudko's research took her to the Court's decisions and the expected published sources, but she consulted manuscript collections and oral histories as well. Of these, Justice Burton's papers were apparently the most helpful.

Based on the contentious issues of the period such as judicial and criminal procedure, loyalty-security, racial discrimination, and rights of aliens, she concludes that a judicial philosophy of restraint--not political ideology--explains why, among the Justices with whom they sat, Vinson, Burton, Clark, and Minton were least supportive of civil liberties claims. Rudko acknowledges that the concept of judicial restraint itself can be politically misleading because it does not have to support a particular ideology. Referring to the conflict in 1987 over the confirmation of Judge Bork to the Supreme Court, she contends that both Bork's leading supporter [President Reagan] and his most politically conspicuous adversary [Senator Biden] sought to obscure their differing political motivations by adopting a similar stance in favor of a politically neutral Court in which 'restraint' carried positive implications while 'activism' had negative connotations."[145] Moreover, judicial restraint can be misunderstood. Even though Justice Clark wrote an opinion in the Steel Seizure Case[146] against President Truman's claim of authority--thus seeming to be an "activist" because the Court substituted its view of presidential authority in place of Truman's--Clark's reliance on precedent in his opinion demonstrated judicial restraint. "Clark deferred to the legislative branch instead of to the executive branch as Truman would have preferred."[147]

Of course not all of the votes and

Frances Howell Rudko contends that a judicial philosophy of self-restraint, not political ideology, characterized President Truman's appointees to the Court. Eight members of the Supreme Court: *(from left)* Stanley Reed, Harlan Stone, William O. Douglas, newly appointed Harold Burton, Wiley Rutledge, Hugo Black, Frank Murphy, and Felix Frankfurter (Robert Jackson is absent), stood with President Truman on the steps of the White House on October 16, 1945. Attorney General Tom Clark *(upper right corner)* would join the Court in 1949.

opinions by the Truman four can be categorized as restraint-oriented. After Chief Justice Vinson's death, the three joined Chief Justice Warren's opinion of the Court in *Brown v. Board of Education*. Moreover, Justice Clark wrote the majority opinion in the landmark exclusionary rule case of *Mapp v. Ohio*,[148] and concurred in the far-reaching Tennessee reapportionment case of *Baker v. Carr*,[149] to name but two. Nonetheless, she contends that the overall preference of the four for restraint governed most of their votes, yet their position did not grow out of a "controlling philosophy of law." In this they were unlike their more articulate colleagues Black and Frankfurter. Instead their votes stemmed from a view of government as a cooperative instrument to satisfy the needs of the nation which were reflected in statutes and administrative law.

The Reports show that the Truman four routinely voted against the rights of criminals, aliens, and alleged subversives. During 1946-1953, Vinson voted 83 percent of the time to reject a claimed individual right. For the other three, the percentages were 74 for Burton, 75 for Clark, and 87 for Minton.[150] Rudko believes such numbers are misleading because they suggest the four placed no value on the rights in question. Rather, they chose to give

> *priority to the rights of society over the rights of individuals.... Some Justices, admittedly, sit to mete out justice, but the Truman appointees, more often than not, made case by case decisions conscious of a framework of shared governmental power.*[151]

If they voted similarly, it was not because they held identical beliefs on the weight which should be accorded individual liberty, but because they shared the same belief in the judiciary's place in a democratic government.

In contrast to the breadth of Truman's Court, The Christ Child Goes to Court embraces a single, if complex, part of the modern Court's jurisprudence: the establishment clause of the First Amendment.[152] A case study in its methodology and organization, Wayne Swanson's Christ Child is a thoughtful and instructive look at *Lynch v. Donnelly*,[153] the Supreme Court's first creche decision. In dispute was a municipally owned nativity scene which the city of Pawtucket, Rhode Island, purchased in 1973. Along with secular holiday figures, the creche had annually been part of a display in a private park. Litigation began on December 17, 1980 with a suit filed in United States District Court by the American Civil Liberties Union on behalf of Daniel Donnelly, a resident of Pawtucket, against Mayor Dennis M. Lynch and the city. It concluded on March 5, 1984 when the Supreme Court ruled five to four that the city had not violated the establishment clause. From the first page to the last, Swanson depicts the judicial process and the unfolding of a contemporary constitutional issue.

The subject is an excellent barometer of the establishment clause. How courts de-

cide, and how people respond to, cases involving public-sponsored displays of religious symbols reveal much about the evolving relationship between religion and government in the United States. Unlike sectarian school aid, a public display is rarely touched by a broader social purpose such as improving education. Moreover, as a constitutional issue, the controversy arises easily. In most localities it does not require passing a law or ordinance. It may involve little or no expenditure of public funds. It can happen as easily as allowing a group to erect a display on the courthouse steps. Perhaps for these reasons, a creche case is a good test of religious establishment. This writer's view is that Americans are virtually united in believing in separation of church and state, but that this consensus is uncertain.[154] While there are doubtless policies that most would consider in conflict with the Constitution's command of no establishment, there are other connections between the state and religion which many would find unobjectionable.

Church-state cases have been a recurring part of the Supreme Court's docket since the Justices applied the establishment clause to the states in 1947.[155] Some of this litigation has challenged state support for religious endeavors, such as public assistance for sectarian schools. Like *Donnelly*, other litigation has contested a religious presence in official settings or programs. All the litigation has been difficult because of the prevalence of religion in American life. The difficulty has been compounded because even the Court has sent conflicting signals.[156] In 1947, for example, Justice Black declared for the Court:

> *Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion....In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."*[157]

Five years later, Justice Douglas offered a different perspective, again for a majority of the Bench.

> *We are a religious people whose institutions presuppose a Supreme Being.... We find no constitutional requirement which makes it necessary for government to be hostile to religion or to throw its weight against efforts to widen the effective scope of religious influence.... When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.*[158]

Difficulties with application of the establishment clause also arise because, as Swanson explains, the language of this part of the First Amendment conflicts with practices that appear to many both harmless and congenial. "I am convinced," Justice Brennan declared in his dissent in *Donnelly*, "that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable."[159]

Swanson makes no pretense of resolving the issue, although he also makes no pretense of hiding his own prescription for correct constitutional policy.[160] Writing perceptively before the Court's second creche decision in July 1989,[161] Swanson realized

> *that no single court case would put the Nativity scene question to rest. All important political questions in the United States tend to be recurring. All solutions tend to be interim. This even applies to questions that go to the heart of the Constitution....*[162]

The observation is especially true of the religion clauses. The twin commands of free exercise and no establishment guarantee that the division required by one clause will be forever tested because of the liberty assured by the other.

Long ago constitutional scholar Robert Cushman remarked that

the Supreme Court does not do its work in a vacuum. Its decisions on important constitutional questions can be understood in their full significance only when viewed against the background of history, politics, economics, and personality surrounding them and out of which they grew.[163]

In Swanson's Christ Child, as in the other books surveyed here, authors from different perspectives have explored facets of the Court's political and intellectual environment, its personnel, its past, its process, and its product. The common objective of each has been better understanding of an institution intimately tied to some of the nation's most vital concerns, especially those lodged in the Bill of Rights. Each has portrayed a Court caught up in the internal and continuing contradiction of a political system which accepts the necessity of both majority rule and minority rights.

The volumes surveyed in this article are listed alphabetically by author below.

GARY J. AICHELE, Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge (Boston: Twayne, 1989). Pp. xi, 212.

ROBERT H. BORK, The Tempting of America: The Political Seduction of the Law (New York: Free Press, 1990). Pp. xiv, 432.

MAEVA MARCUS et al., eds., The Documentary History of the Supreme Court of the United States, 1789-1800; Volume Two; The Justices on Circuit 1790-1794 (New York: Columbia University Press, 1988). Pp. xlvii, 582. Foreword by William H. Rehnquist.

THOMAS R. MARSHALL, Public Opinion and the Supreme Court (Boston: Unwin Hyman, 1989). Pp. x, 214.

SHELDON M. NOVICK, Honorable Justice: The Life of Oliver Wendell Holmes (Boston: Little, Brown, 1989). Pp. xxi, 522.

DAVID M. O'BRIEN, Judicial Roulette; Report of the Twentieth Century Fund Task Force on Judicial Selection (New York: Priority Press, 1988). Pp. ix, 145.

FRANCES HOWELL RUDKO, Truman's Court: A Study in Judicial Restraint (Westport, Conn.: Greenwood Press, 1988). Pp. xv, 162.

BERNARD SCHWARTZ, The Unpublished Opinions of the Burger Court (New York: Oxford University Press, 1988). Pp. 488.

ROBERT JUDD SICKELS, John Paul Stevens and the Constitution: The Search for Balance (University Park: Pennsylvania State University Press, 1988). Pp. xi, 203.

JAMES F. SIMON, The Antagonists: Hugo Black, Felix Frankfurter and Civil Liberties in Modern America (New York: Simon and Schuster, 1989). Pp. 314.

WAYNE R. SWANSON, The Christ Child Goes to Court (Philadelphia: Temple University Press, 1990). Pp. xi, 242.

Endnotes

1. R. Rutland, The Birth of the Bill of Rights 26 (1955).
2. Quotations come from A. Mason and D. Stephenson, Jr., American Constitutional Law; Introductory Essays and Selected Cases 303 (9th ed., 1990).
3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
4. 2 U.S. (2 Dallas) 419 (1793).
5. *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (dissenting opinion).
6. For example, *Griswold v. Connecticut*, 381 U.S. 479 (1965).
7. E. Corwin, Liberty Against Government 1 (1948). As Corwin had written a decade earlier, "outside of America, written constitutions did not yet exist. The idea of putting legal restraints upon government in the interest of private rights, though of respectable antiquity, had never before received institutional embodiment." Corwin, Court Over Constitution 226 (1938).
8. E. Katsh, "The Supreme Court Beat: How Television Covers the U.S. Supreme Court," 67 *Judicature* 6 (June-July 1983). Also *see* S. Iyengar and D. Kinder, News That Matters 98-111 (1987).
9. Books are listed in full citation just before the endnotes.
10. *United States v. Lee*, 106 U.S. 196, 223, (1882).
11. *Federalist*, No. 78.
12. "Brutus," No. 15. Yates's "Letters of Brutus" related to the judiciary are reprinted in E. Corwin, Court Over Constitution 231-262.
13. Elmer Ellis, ed., Mr. Dooley at His Best 77 (1938). Finley Peter Dunne's famous comment was made in the wake of the Court's decision in the Insular Cases, including *Downes v. Bidwell*, 182 U.S. 244 (1901).
14. J. Stevens, "Reflections on the Removal of Sitting Judges," 13 *Stetson Law Review* 215, 217 (1984).
15. B. Cardozo, The Nature of the Judicial Process 168 (1921).
16. 57 U.S.L.W. 4705 (1989).
17. 427 U.S. 160 (1976).
18. 57 U.S.L.W. at 4707.
19. T. Marshall, Public Opinion and the Supreme Court ix (1989) [hereinafter cited as Marshall].
20. *Id.*, 5.
21. For example, *see* R. Davidson, "What Judges Ought to Know About Lawmaking in Congress," in R. Katzman, ed., Judges and Legislators: Toward Institutional Comity (1988).
22. Marshall, 6.
23. *Id.*, 192-3. These three factors stand out from a group of twelve which Marshall considered.
24. *Id.*, 194-201.
25. S. Wasby, The Supreme Court in the Federal Judicial System 276-311 (1984).
26. D. O'Brien, Judicial Roulette; Report of the Twentieth Century Fund Task Force on Judicial Selection (1988) [hereinafter cited as O'Brien].
27. Foreword by M. J. Rossant, in *id.*, v. Task Force members included present and former public officials, attorneys, and professors: Hugh L. Carey, Walter Berns, Joseph A. Califano, Jr., Lloyd N. Cutler, Philip B. Kurland, Jack W. Peltason, Nicholas J. Spaeth, Michael M. Uhlmann, and Robert F. Wagner. David M. O'Brien, as rapporteur, wrote the background paper.
28. Some members of the Task Force dissented from particular recommendations.
29. O'Brien, 10.
30. J. Grossman, Lawyers and Judges: The ABA and the Politics of Judicial Selection (1965).
31. H. Chase, Federal Judges: The Appointing Process (1973).
32. J. Goulden, The Benchwarmers (1974).
33. O'Brien, 15.
34. *Id.*, 95.
35. Carter is the only president to have served at least a full four year term who did not have the opportunity to make an appointment to the Supreme Court.
36. O'Brien, 106.
37. Governor Cuomo made his proposal in an address to the American Bar Association, August 11, 1986. Chief Justice Burger had retired on June 17, 1986, the same day President Reagan nominated Justice Rehnquist to be Chief Justice and Judge Scalia to be Associate Justice. The Cuomo proposal appears as the essay "The Constitution, the Courts, and Judicial Competence," 116 *USA Today* 34 (July 1987).
38. *See*, for example, R. Watson and R. Downing, The Politics of the Bench and Bar (1969).
39. O'Brien, 97.
40. L. Tribe, God Save This Honorable Court (1985).
41. O'Brien, 80.
42. The first rejection was Washington's nomination of John Rutledge to be Chief Justice in 1795. The list includes seven from the twentieth century: John J. Parker, Abe Fortas, Homer Thornberry, Clement F. Haynsworth, Jr., G. Harrold Carswell, Robert H. Bork, and Douglas H. Ginsburg.
43. R. Bork, The Tempting of America 1 (1990) [hereinafter cited as Bork].
44. *Id.*, 129-132.
45. 198 U.S. 45 (1905).
46. 367 U.S. 497 (1961).
47. 381 U.S. 479 (1965).
48. 57 U.S.L.W. 4770 (1989).
49. Bork, 4-5.
50. *Id.*, 9.
51. *Id.*, 352.
52. For example, *see* the materials in "The Bork Nomination: Essays and Reports," 9 *Cardozo Law Review* 1 (1987), and the articles in National Legal Center for the Public Interest, Politics and the Constitution: The Nature and Extent of Interpretation (1990).
53. 347 U.S. 483 (1954).
54. Bork, 76-77.
55. *Id.*, 82.
56. "The Constitution of the United States: Contemporary Ratification." This lecture has been widely reprinted. *See* A. Mason and D. Stephenson, American Constitutional Law 607-615 (8th ed., 1987).

57. "Felix Frankfurter," *The Nation*, January 14, 1939, p. 52.
58. G. Aichele, Oliver Wendell Holmes, Jr.: Soldier, Scholar, Judge (1989) [hereinafter cited as Aichele.
59. S. Novick, Honorable Justice: The Life of Oliver Wendell Holmes (1989) [hereinafter cited as Novick].
60. M. Howe, Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870 (1957); Justice Oliver Wendell Holmes: The Proving Years, 1870-1882 (1963).
61. But see the references to Holmes in his book The Ages of American Law (1977).
62. Y. Rogat, "The Judge as Spectator," 31 *University of Chicago Law Review* 213, 256 (1964).
63. *See* G. White, "The Rise and Fall of Justice Holmes," 39 *University of Chicago Law Review* 51 (1971).
64. F. Frankfurter, Mr. Justice Holmes and the Supreme Court 112 (Atheneum ed., 1965).
65. *See* F. Biddle, Justice Holmes, Natural Law, and the Supreme Court 33-49 (1961) for a discussion of this charge.
66. Gilmore, The Ages of American Law 48-49.
67. P. Freund, "Preface," in Frankfurter, Mr. Justice Holmes.
68. Novick, xviii.
69. *Id.*, 353.
70. Aichele, xi, 166.
71. *Id.*, at 160.
72. 219 U.S. 219 (1911). The case involved Alabama's contract-fraud statute, as applied to a black farm laborer.
73. Aichele, 147.
74. 189 U.S. 475 (1903). The case involved racial discrimination in voter registration procedures in the Alabama Constitution.
75. Novick, 458, n. 15.
76. 261 U.S. 525 (1923).
77. Novick, 352.
78. *Id.*, 360.
79. A. Mason, William Howard Taft: Chief Justice 172 (1964).
80. 2 H. Pringle, The Life and Times of William Howard Taft 1043 (1939).
81. Quoted in A. Mason, Harlan Fiske Stone 184 (1956).
82. Novick, 347.
83. F. Frankfurter and J. Landis, The Business of the Supreme Court 99 (1928).
84. Readers should also compare Novick's description of the national judicial conference (p. 347) established by Congress in 1922 with C. Dickerman Williams's account. "The 1924 Term: Recollections of Chief Justice Taft's Law Clerk," *Yearbook 1989* 40, 41-42. Of the 1922 act, Alpheus Mason reported that it "fell short of the all-encompassing power so repulsive to Senators Shields, Overman, and others [but] it did enlarge the Chief Justice's stature as head of the federal judiciary." William Howard Taft 106. See also Frankfurter and Landis, The Business of the Supreme Court 242-244.
85. Quoted in Mason, William Howard Taft 124.
86. Books such as J. Frank, Mr. Justice Black (1949), and C. Williams, Hugo L. Black (1950) are noteworthy exceptions to this rule.
87. For background on the selection of Stevens in 1975, *see* D. O'Brien, "Filling Justice William 0. Douglas's Seat: President Gerald R. Ford's Appointment of Associate Justice John Paul Stevens," *Yearbook 1989* 20.
88. As an undergraduate at the University of Chicago, Stevens edited the Daily Maroon (the campus newspaper). Sickels finds the ideas expressed in one column ("Peace Strikes Are Silly") strongly suggestive of the decisional style he later developed as a judge. R. Sickels, John Paul Stevens 34 (1988) [hereinafter cited as Sickels].
89. Justice Stevens is one of three current Justices to have clerked at the Supreme Court. He clerked for Justice Wiley Rutledge in 1947-1948.
90. *Id.*, ix, 1. Indeed, Stevens himself has not caught the public eye. A poll by the Associated Press in 1987 found that fewer people (15 percent) had an opinion of him than of any other member of the Court. *Id.*, 180, n. 1. (The least obscure was Justice O'Connor, with 38 percent.) One reason for such low visibility may be that his judicial philosophy is not one that journalists find easy to articulate or even appealing to report. Ideological positions may make more interesting stories.
91. G. Gunther, "In Search of Judicial Quality on a Changing Court," 24 *Stanford Law Review* 1001, 1013-1014 (1972).
92. Sickels, 151.
93. *Id.*, 161.
94. 1 The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: J. Goebel, Antecedents and Beginnings to 1801 (1971); 1 C. Warren, The Supreme Court in United States History 1-168 (Rev. ed., 1926).
95. This tally includes John Rutledge twice -- first as Associate Justice (1789-1791) and second as a nominated (but never confirmed) Chief Justice (1795).
96. Frankfurter and Landis, The Business of the Supreme Court 1-55.
97. E. Surrency, "The Development of the Appellate Function: The Pennsylvania Experience," 20 *American Journal of Legal History* 173 (1976).
98. M. Marcus et al., The Documentary History of the Supreme Court of the United States, 1789-1801; Volume Two: The Justices on Circuit 1790-1794 1 (1988) [hereinafter cited as Marcus].
99. *Id.*, 408-409.
100. *Id.*, 3.
101. *Id.*, 426.
102. *Id.*, 206.
103. *Id.*, 4.
104. Quoted in Frankfurter and Landis, The Business of the Supreme Court 17.
105. Marcus, 89-92. The editors report, however, that it is not known whether they ever sent the letter to Washington.
106. *Id.*, 90.
107. *Id.*, 107-110.
108. *Muskrat v. United States*, 219 U.S. 346 (1911).
109. W. Wiecek, The Supreme Court in American Life 24-25 (1988).
110. Marcus, 26-27.
111. *Id.*, 430.
112. *Id.*, 366-369.
113. F. Frankfurter, "Mr. Justice Roberts," 104 *University of Pennsylvania Law Review* 311, 313-314 (1955).
114. J. Simon, Independent Journey: The Life of William 0. Douglas (1980); In His Own His Own Image: The Supreme Court in Richard Nixon's America (1973).
115. J. Simon, The Antagonists 195-196 (1989) [hereinafter cited as Simon].
116. *Id.*, 9.
117. Mason, Harlan Fiske Stone 469.

118. *The Nation*, January 14, 1939, p. 53. Referring to some Justices who turned out differently than expected, the editorial continued: "Other justices--Holmes, Brandeis, Cardozo--were known quantities before their nomination and fulfilled all that was expected of them. It is in this last category that we feel safe in placing Justice Frankfurter."
119. 310 U.S. 586 (1940).
120. Simon, 110.
121. *Id.*, 111.
122. S. Fine, Frank Murphy: The Washington Years 186 (1984).
123. Simon, 114. Simon reports that Frankfurter was the only Justice who "regularly whistled 'Stars and Stripes Forever' as he walked through the corridors of the Supreme Court building." *Id.*, 109.
124. 316 U.S. 584 (1942).
125. Simon, 115. Newspaper comment on *Gobitis* was highly negative.
126. 319 U.S. 625 (1943). Court records misspelled the Gobitas and Barnett family names; hence, the landmark decisions continue the error.
127. Frankfurter Papers, Library of Congress, n.d.
128. Simon, 239-240.
129. *Id.*, 257.
130. *Id.*, 258.
131. *Barlow v. Collins*, 1970 (standing and access to the courts), *Kirby v. Illinois*, 1972 (police lineups), *Frontiero v. Richardson*, 1973 (gender discrimination), *Roe v. Wade*, 1973 (abortion), *United States v. Nixon*, 1974 (executive privilege), *O'Connor v. Donaldson*, 1975 (mental commitment and treatment), *Michelin Tire Corp. v. Wages*, 1976 (state taxation), *Houchins v. KQED*, 1978 (right of access to news), *Barry v. Barchi*, 1979 (due process), *Gannett Co. v. DePasquale*, 1979 (right of access to criminal proceedings).
132. B. Schwartz, The Unpublished Opinions of the Warren Court (1985).
133. A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis (1957). Bickel's objective was as much to shed light on Brandeis's thinking as to depict the Court's decisionmaking process.
134. B. Schwartz, The Unpublished Opinions of the Burger Court 4 (1988) [hereinafter cited as Schwartz]. In this book Schwartz does on a small scale with ten cases what he did on a larger scale with one case in Swann's Way: The School Busing Case and the Supreme Court (1986).
135. F. Frankfurter, The Commerce Clause 9 (1937).
136. 411 U.S. 677 (1973).
137. *Hoyt v. Florida*, 368 U.S. 57 (1961).
138. 404 U.S. 71 (1971).
139. Schwartz, 68.
140. 429 U.S. 190 (1976). The test in this case was one of moderate scrutiny, asking whether there was a close relationship between the policy in question and an important government objective. Justice Brennan had pushed for an even more stringent standard in *Frontiero*.
141. See the review by Anthony Lewis in the *New York Times Book Review* 20 (December 29, 1985), and the review by Erwin N. Griswold in 69 *American Bar Association Journal* 1506 (1983).
142. A. Mason, Harlan Fiske Stone: Pillar of the Law.
143. J. Howard, "On the Fluidity of Judicial Choice," 62 *American Political Science Review* 43, 44 (1968).
144. C. Pritchett, Civil Liberties and the Vinson Court (1954).
145. F. Rudko, Truman's Court xii (1988) [hereinafter cited as Rudko].
146. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
147. Rudko, xiv.
148. 367 U.S. 643 (1961).
149. 369 U.S. 186 (1962).
150. J. Frank, "Fred Vinson and the Chief Justiceship," 21 *University of Chicago Law Review* 212, 212 (1954).
151. Rudko, 131.
152. W. Swanson, The Christ Child Goes to Court (1990) [hereinafter cited as Swanson].
153. 465 U.S. 668 (1984).
154. D. Stephenson, "Religion and the Constitution: An Uncertain Consensus," 86 *South Atlantic Quarterly* 95 (1987).
155. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).
156. One can say this without necessarily agreeing with George Will's observation that the establishment clause "has come to resemble something that has spent a month in a Cuisinart." Quoted in Swanson, 155.
157. 330 U.S. at 15-16.
158. *Zorach v. Clauson*, 343 U.S. 306, 313-314.
159. 465 U.S. at 696.
160. Swanson, ix-x.
161. *Allegheny County v. ACLU*, 57 U.S.L.W. 5045 (1989). While the book was in production, Swanson inserted into a footnote (n. 45, p. 226) a brief discussion of the outcome of the Pittsburgh creche case.
162. Swanson, 206.
163. R. Cushman, "Preface," Leading Constitutional Decisions (1925).

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