



THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

VOLUME III, NO. 4

FALL, 1981

Justice O'Connor Joins Court

On September 25, 1981, Sandra Day O'Connor, an appellate judge from Arizona, became the first woman ever to sit on the Supreme Court of the United States. In a short ceremony in the Supreme Court chamber, which began a little past 2:00 PM and which was attended by President Reagan, members of the Senate Judiciary Committee, and several hundred other guests, Justice O'Connor was sworn in by Chief Justice Burger after her commission was presented to the Court by Attorney General William French Smith and read aloud by the Clerk of the Court. Following her swearing in, Justice O'Connor was escorted to her seat behind the high mahogany bench, the first new member of the Court in over five years, and the new junior justice.

Date Set For Annual Meeting

By action of the Executive Committee of the Board of Trustees, the Society's 7th Annual Meeting and Dinner has been scheduled for Friday, April 30th, in Washington, D.C. Although each member will receive additional information in the mail, members interested in attending may wish to reserve this date on their calendars now.



President Reagan joins Justice O'Connor and the other members of the Court.

The Original Oliver Wendell Holmes

The Reverend Abiel Holmes was a careful, methodical man passionately interested in history and the traditions of Calvinism. He read histories of states and towns, old colonial records, clerical records and accounts of travellers and military expeditions. Fortified with all of this background material he commenced work in 1800 on a work he entitled *American Annals* in which he attempted to record and interpret the history of the new world as American, rather than Colonial history. With his characteristic care and accuracy, he kept a personal record in which he recorded daily events. Opposite the date August 29, 1809 he wrote the following footnote: "—Son b." This small note served to mark the arrival of Oliver Wendell Holmes: doctor, professor, lecturer, author and poet laureate of Boston, and father of Associate Justice Oliver Wendell Holmes, Jr.

Oliver Wendell Holmes was born in Cambridge, Massachusetts, the third child and eldest son of Abiel Holmes and Sarah Wendell Holmes. Abiel was the Pastor of the First Church in Cambridge, a Calvinist congregation. Abiel's father, Captain David Holmes had fought in the French and Indian Wars and at the age of fifty, had volunteered to serve as a physician in the American Revolution. Sarah Wendell Holmes was the daughter of Judge Oliver Wendell. The first Wendell ancestor, Everet Jansen Wendell, had arrived in the new world from Holland in 1640. In the early eighteenth century, Jacob Wendell moved to Boston where he married Sarah Oliver. Sarah was the great granddaughter of Anne Bradstreet, the author of the first book of poems by an American writer.

The Wendell legacy included a talent for gracious living, good taste and culture, success and standing in the community, with more liberal beliefs than those of many of Cambridge's other residents. From the Holmes side of the family came adherence to the strict code of conduct and standards of the Calvinist beliefs, and a passionate love of

learning and record keeping. Wendell, as Holmes was called by his family members, would eventually reject his father's Calvinist beliefs, "shocked and disgusted beyond endurance" by its tenets. As he wrote in his autobiographical notes: "No child can overcome these early impressions without doing violence to the whole mental and moral machinery of his being. He may conquer them in after years, but the wrenches and strains which his victory has cost him leave a cripple as compared with a child trained in sound and reasonable beliefs."

Despite his strong feelings against Calvinism, Wendell loved and respected his father and family. Holmes had one brother, John, and three sisters—Mary Jackson, Ann Susan, and Sarah Lathrop who died at the age of seven. Both Mary and Ann eventually married and left the family to raise their own families. John remained a bachelor, apparently unable to forget his first love who died of consumption. He became a lawyer and gentleman bachelor, returning home to live with his mother upon the death of Reverend Holmes.

From his mother, Holmes inherited a bright, vivacious personality. Early in life he developed a great love of books which he attributed to the blood of ministers in his veins. Among his father's library of doctrinal treatises and histories, Holmes also found several volumes of poetry. In searching through one volume of Dryden's poetry, he found that several pages had been torn out of the book. On the facing page his father had written "*Hiatus haud deflendus*" (an omission by no means to be regretted.) This encounter with his father's censorship caused him to begin asking his father what he called "*enfant terrible*" questions; questions which the elder Holmes could not answer to Wendell's satisfaction.

Wendell concluded that in order to live amidst the conflicting orthodoxies which surrounded him, he would simply have to create his own philosophy of life. To an unusual degree, Holmes was able to live at peace with himself and the world, and he expected others to attempt to do the same. As the Old Master, a character in Holmes' *The Poet at the Breakfast Table* responds in answer to the question "what do you consider the one central fact in the order of things which solves all questions," Holmes' answer was that "It's quite as well to crack your own filberts as to borrow the use of other people's teeth."

Holmes was educated in the manner of the times and displayed a talent for poetry at an early age. Despite his rigid Calvinism, Abiel Holmes read poetry, and perhaps the books Wendell found in his father's library formed the source of inspiration for his own poetry. More likely, however, Abiel Holmes provided his son with a great deal more than just a library. One evening while the family was gathered in the living room singing, Abiel Holmes came into the room and with his pocketknife inscribed something on the window pane. After he left the room, Oliver was surprised to see that his father had drawn a tangle of branches with stars above them; underneath he had written: "*Per aspera ad astra*" (Through adversity to the stars). This unexpected show of sensitivity from his father would become for Holmes one of his most cherished memories.

Upon completion of his preparatory studies, Holmes entered Harvard College in 1825. There he participated not only in the normal course of studies, but also in debate, at which he excelled. He was voted "Class Poet", writing and presenting his poems for various special occasions. Many of his poems were in the style of humorous drinking songs, but he prepared a more serious and longer poem for commencement. He frequently recited his poetry from memory, some of which took more than an hour to recite.

Perhaps influenced by the example of his grandfather, Holmes decided to study law after completing his studies at Harvard. However, only four months after he began, Holmes was convinced that the law was not for him. He wrote to a college friend explaining: "I am sick at heart of this place and almost everything connected with it. I know not what the temple of the law may be to those who have entered it, but to me it seems very cold and cheerless about the threshold."

Having left the law in 1830, Holmes enrolled as a medical student at Tremont Medical School in Boston. In addition to his studies with the School's five doctors, he attended medical lectures and spent many hours at the Massachusetts General Hospital working in the wards and dissecting rooms. Holmes was very sensitive to the pain and suffering of the patients, and particularly to the horrors of operating rooms lacking the benefits of modern anesthesiology. He coped with the more revolting aspects of medicine by developing an acute sense of observation, and a methodical, systematic process for keeping medical records. Early in his studies, he became intent on employing a scientifically rigorous method of studying the details of medical evidence rather than merely following the established rules of treatment which to his mind frequently proved more fatal than the disease.

In 1833, Holmes concluded that the best medical training available was in Paris, and that he would go to France to continue his studies. He lived on the Left Bank, and followed the customary pattern of attending lectures, visiting hospitals, and observing medical procedures. He found the French more scientific in their approach to medicine than the Americans, and perhaps more importantly, more innovative and open-minded. Holmes developed three important principles while in France which would discipline all his future work in medicine: "Not to take authority when I can have facts; not to guess when I can know; not to think a man must take a physic when he is sick." Although seemingly straightforward, these three principles represented a radical departure from traditional medical practice of the day, and would distinguish Holmes' work from that of his colleagues.

While he was a student in Paris, Holmes took the opportunity to travel on the Continent, and to experience such activities as horse races and the theater, of which his father certainly would not have approved. Holmes was forced to return to Cambridge in 1835, as his family could no longer afford to support his education in Paris. Although disappointed that he could not complete his third year of study, Holmes brought back an intense dedication to the scientific approach to medicine, and a variety of new medical instruments, among them a microscope.

Upon his return to Cambridge, Holmes was required to prepare an essay in order to receive his medical degree from Harvard. He passed his examinations the following year, and

was awarded his degree of Doctor of Medicine. Shortly after receiving his degree, he wrote a paper on "Direct Exploration" (use of the stethoscope) which won for him the highly regarded Boylston Medical Prize. In 1837, Holmes turned his energies towards further research rather than toward establishing a medical practice.

Two additional papers prepared during 1837 won Boylston prizes. The subject of the first paper was the study of intermittent fever (malaria) in New England. Holmes diligently sent out inquiries through his friends in different areas to broaden the scope of his research. He also utilized colonial records and town histories. Many of these records had been kept by ministers, and Holmes frequently found it difficult to extract pertinent medical information from extraneous doctrinal commentary. He found Cotton Mather's records particularly frustrating, admitting that he had read only "some few ecclesiastical papers, sermons, and similar treatises of Cotton Mather, which being more likely to cause a fever than mention one, I left to some future investigator." As a result of Holmes' attention to detail and thoroughly systematic approach, his medical conclusions were among the first in the country based upon actual investigation. As recently as 1945, Holmes' work received praise as one of the best regional histories of malaria ever written. His second paper, on neuralgia, won the prize more for its vigorous, clean style than for original research.

The medical paper for which Holmes was probably best known, however, was entitled *The Contagiousness of Puerperal Fever*. The disease was contracted by mothers at childbirth, and Holmes was intrigued by the possibility that the illness was transmitted to the mothers by attending midwives and physicians. He began an exhaustive study, relying upon records from Europe to supplement available American records. His paper, presented in 1843, scandalized many of his colleagues, as Holmes concluded that doctors were in fact carrying the disease from patient to patient. Although unable to establish precisely how the disease was spread, Holmes concluded from the medical evidence that it was being transmitted in some way, either by actual physical contact, or mere association, and urged his colleagues to be extremely cautious. Opposition from the medical profession to Holmes' findings disappeared by 1857, by which time the theory of contagion had become generally accepted in the United States.

Perhaps Holmes' most enduring contribution to medicine
(continued on next page)



The beguiling Dr. Holmes, who considered his face "more of a convenience than an asset."

THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

Published four times yearly, in Spring, Summer, Fall, and Winter by the Supreme Court Historical Society, 1511 K Street, N.W., Suite 612, Washington, DC 20005.

Distributed to members of the Society, law libraries and interested individuals and professional associations.

Editor Alice L. O'Donnell
Assistant Editor David T. Pride

Holmes (continued from page three)

was achieved in a rather indirect way. In 1846, W.T.G. Morton, a dentist, began experimenting with sulphuric ether as a way to render a patient insensible during an operation. The first operation using ether was performed in the Massachusetts General Hospital with Dr. Morton administering the ether. Holmes was not present for this historic occasion, but on November 21, he wrote to Morton with his suggestion for naming the process:

Everybody wants to have a hand in a great discovery. All I will do is to give a hint or two as to names—or the name—to be applied to the state produced and the agent.

The state should, I think be called Anaesthesia.

In addition to his many papers, Holmes was a noted medical lecturer for many years. He served briefly as the Professor of Anatomy at Dartmouth Medical College, as Professor of Anatomy and Physiology at Harvard Medical School for 23 years, and for seven years, as Dean of the Harvard Medical School. Holmes was an unusually gifted lecturer—knowledgeable, articulate, and imbued with a wonderful wit and sense of humor. His students' dedication to his classes can be evaluated in part by the fact that Holmes presented his lectures during their regular lunch hour. Holmes' scientific interests extended beyond his own field, including particularly, the developing profession of dentistry. Applying his keen powers of observation and characteristic sense of humor to this field, Holmes commented once with reference to George Washington that: "Had the art been thus perfected in the last century, we should not now see the Father of his Country, in Stuart's portrait, his attention divided between the cares of the State and the sustaining of his uppers in position."

Dr. Holmes was a small, quick, irrepressible man, self-assured, intensely observant and involved in everything around him. He listed among his non-medical accomplishments, "whittling, whispering, smoking cigars and playing the flute." Somewhat later in his life, Holmes became devoted to boating, driving fast horses and measuring trees. He described in his writings his penchant for measuring trees with a thirty-foot tape always at a height of five feet. He would go around the New England countryside measuring all the most celebrated trees because, as he expressed it, he had "a most intense, passionate fondness for trees in general", and "several romantic attachments to certain trees in particular." Holmes was able to gratify his outdoor interests at his summer home, "Canoe Meadow", near Pittsfield, Massachusetts, and in his later life, at a brown summer cottage under a jasmine-covered cliff near Beverly. In jest, he named his cottage "Beverly-by-the-Depot", poking obvious fun at his fashionable and socially conscious neighbors, who had their summer stationery engraved "Manchester-by-the-Sea."

But of all Holmes' talents and interests, perhaps the one at which he most excelled was the art of talking. According to his nephew, John T. Morse, Jr., the Doctor "talked better than he wrote . . . His thoughts, his humor, his similes rose as fast,

as multitudinous, as irrepressible, as the bubbles of champagne, and nothing could prevent their coming to the surface." Holmes himself said that he believed "talking is one of the fine arts—the noblest, the most important, and the most difficult." Holmes' love for and indulgence in talking was to last throughout his life and he frequently referred to his "tendency to linguacity" in his writings.

While Holmes was still a college student, his brother, John, who often signed autographs "John Holmes, *frere de mon frere*", (my brother's brother) gave him some advice about seeking a spouse. He told Wendell that if he could find a girl who could shut him up, he should marry her, and marry her fast. In 1840, Holmes finally found a woman that could render him speechless, and heeding his brother's sage advice, he married Amelia Lee Jackson. She was the daughter of Judge Charles Jackson of the Supreme Judicial Court of Massachusetts, and a niece and cousin of the Jacksons with whom Holmes had studied during his medical training. Holmes was just past thirty and his bride twenty-two when they were married. She was a woman of refined taste and gracious dignity who complemented and enhanced his own well established reputation in Boston and Cambridge. Their eldest child, Oliver Wendell Holmes, Jr., was born March 18, 1841. Although he was destined to achieve fame and recognition in his own right for his original legal writings and distinguished judicial service, Oliver Wendell Holmes, Jr. would for his first forty years be overshadowed by his famous father. Their second child, Amelia Jackson, was born October 20, 1843. She married Turner Sargent in 1871, and together they made their home in Boston near her parents. Her husband died only a few years after their marriage, and Amelia spent much of her time with her parents, returning to live with them in 1888. Their third and last child, Edward Jackson, was born October 17, 1846. He studied law and



Dr. Holmes (far right) shown with his family shortly before his son, Oliver Wendell Holmes, Jr. (seated next to him), enlisted for duty in the Civil War.

married Henrietta Goddard Wigglesworth in 1870, but suffered from acute asthma, and died in 1884.

Even as the family grew, Dr. Holmes pursued his medical career, hobbies, and interests with the same limitless vigor he had always shown. Next to talking, Holmes loved writing best. A prodigious author, he wrote and published numerous poems, lectures, articles and books. He enjoyed a successful career as a public lecturer which successfully combined his most outstanding skills. In addition to several notable public addresses, he delivered countless eulogies and tributes. He was an adept author and the materials he penned spanned a wide range of styles and techniques. His most characteristic and endearing writing is characterized by a combination of concrete detail, exaggeration, colorful diction and an intimate, personal tone. The result was a chatty, witty style, frequently satirical, but never judgmental. One example of this particular style comes from a letter he wrote to T.W. Higginson in 1872 in which he declined an invitation to deliver a memorial address. After several paragraphs he concluded:

I know you are on your knees by this time asking the Lord to forgive you for making a suggestion that I should try this last experiment on the patience of mankind. I cannot say whether He will forgive you or not but you have my full pardon inasmuch as you have joined a very complimentary request with a word of praise which coming from so good a judge of what will bear praising makes me willing to do almost anything except what you ask me to do.

Holmes' writing enjoyed a wide audience, especially his articles for the *Atlantic Monthly*, the first literary magazine in America to have an enduring life. His writings were mingled in the Atlantic with those of Emerson, Whittier and Hawthorne, as well as those of the renowned scientist Louis Agassiz and the noted diplomat and historian John Lothrop Motley. His articles were serialized and many of them were incorporated into the successful "Breakfast Table" series. In these books Holmes makes use of short, one-line passages that are witty, perceptive observations and statements. Some of the best examples come from *The Autocrat of the Breakfast Table*, the first book of the series: "Sometimes it becomes almost a physical necessity to talk out what is in the mind, before putting anything else into it"; "Good feelings help society to make liars of most of us—not absolute liars, but such careless handlers of truth that its sharp corners get terribly rounded"; "Sin has many tools, but a lie is the handle which fits them all." In many ways, Holmes became for his generation, what Dr. Franklin had been a century before.

Much of the material in these books was extremely personal and some readers found it offensive; however, the majority found it engaging and entertaining, and the books became very popular. Perhaps the best summary of Holmes' writing comes from one of his characters in *The Poet at the Breakfast Table*: "I give the Old Master the credit of this compliment. If one does not agree with half of what he says, at any rate he always has something to say, and entertains and lets out opinions and whims and notions of one kind and another that one can quarrel with if he is out of humor, or carry away to think about if he happens to be in a receptive mood."



A light-hearted caricature of "the Autocrat" which appeared in *Spy*, a contemporary British magazine.

The writing that seemed most satisfying to Holmes himself was poetry. Among his list of titles one finds "The Stethoscope Song", "Ballad of the Oysterman", "Height of the Ridiculous" and "Dorothy Q", suggesting the variety of topics on which he wrote. His three best known poems were "Old Ironsides", "The Chambered Nautilus", and "The Last Leaf". "Old Ironsides" was written in 1830 as an impassioned plea to his countrymen to rescue the frigate "Constitution" from being scrapped. The stirring lines, "Ay, tear her tattered ensign down! . . ." build to the famous climax; "And give her to the god of storms, The lightning and the gale!" Largely as a result of appeal of his poem, the Constitution was saved and preserved.

In "The Chambered Nautilus"—generally considered to be Holmes' masterpiece—Holmes describes the sea shell as a "ship of pearl", a "web of living gauze", with "shadowed main" and "irised ceiling". The poem closes with lines of majestic measure:

*Build thee more stately mansions, O my soul,
As the swift seasons roll! . . . Leaving thine outgrown shell by
life's unresting sea.*

"The Last Leaf", written while Holmes was still a medical
(continued on next page)

Holmes (continued from page five)

student, achieved great popularity during his lifetime. One measure of its following was that Abraham Lincoln knew all the verses by heart. The poem was inspired by Herman Melville's grandfather, Thomas Melville, who in 1831 was conspicuous on the streets of Boston by reason of his cocked hat, knee breeches and silver-buckled shoes—all remnants of a by-gone era. Holmes approached this subject with compassion and sympathy, and the closing verse was one often repeated by Holmes himself in later life:

*And if I should live to be
The last leaf upon the tree
In the spring,
Let them smile, as I do now,
At the old forsaken bough,
Where I cling.*

Holmes did in fact outlive most of his friends. On October 7, 1894, Oliver Wendell Holmes, aged 85, died at his home at 296 Beacon Street in Boston. On October 10, his funeral services were held in King's Chapel on the Harvard campus. A most fitting epitaph would come from a letter Holmes wrote his parents on the eve of his departure from Paris in 1834. Although it was written while he was a young man, its sentiments were as true sixty years later as they were when it was written:

I have lived comfortably, liberally if you please, but in the main not extravagantly, I have employed my time with a diligence that leaves no regret. My aim has been to quality as my faculties would allow me, not for a mere scholar, for a follower of other men's opinions, for a dependent upon their authority, but for the character of a man, who has seen and therefore knows, who has

thought and has therefore arrived at his own conclusions. I have lived among a great, a glorious people . . . I have drawn close the ties of social relations with the best formed minds I have been able to find . . .

Indeed, it was this legacy of an independent and responsible spirit, and of an inquisitive and engaging mind, which Dr. Holmes left his son, and which by his death had marked Oliver Wendell Holmes, Jr. for greatness.



An elderly Dr. Holmes seated on a stone bench below his home, "Beverly-by-the-Depot."

Memorials Published

It has been the practice of the Bar of the Supreme Court to gather shortly after the death of a Justice to honor him with a series of individual encomiums, and to adopt a formal resolution of the Bar expressing its condolences. These proceedings have been preserved since 1864 through limited private publications of each memorial session of the Bar, and consequently, have not been available to the general public. The subject matter of the proceedings, the stature of the individual eulogists, and the intrinsic quality of their remarks, suggested that these materials ought to be made more available to scholars, researchers, and others who share a particular interest in the history of the Supreme Court. Accordingly, the Fred B. Rothman Company, in cooperation with the Society, has recently published the *Memorials of the Justices of the Supreme Court of the United States*, with a preface and index prepared by Roger F. Jacobs, Librarian of the Supreme Court. The five volume set does not include proceedings since 1971 which are already available in West's *Supreme Court Reporter*. Further information regarding this important addition to the available biographic literature of the Court may be obtained by contacting the Society's offices at (202) 347-9888.

Remembrances of the Supreme Court As I Knew It Years Ago

By Robert Ash

Editor's Note—1981 marked the sixtieth anniversary of Robert Ash's membership in the Bar of the Supreme Court of the United States. In 1921, as now, a lawyer seeking admission to practice before the Court had to have a sponsor who was a member of its Bar. Together they would appear before the Court on a Monday, which was always admissions day. Bob Ash's sponsor was James M. Beck, at that time Solicitor General of the United States. Whether because of Mr. Beck's position or because Mr. Ash's name began with "A", they stood first before Chief Justice Edward Douglass White, both wearing the traditional black cutaway coats and gray striped trousers. The Solicitor General said, "I move the admission of Mr. Robert Ash. Mr. Ash is a member of the bar of the highest court of the District of Columbia and in good standing and is otherwise qualified under the rules." The Chief Justice said, "Mr. Ash, will you step to the Clerk's desk and take the oath?" And with the appropriate response, Robert Ash joined the Bar of the High Court, fulfilling one of his greatest ambitions.

Born on October 1, 1894 in Buffalo, New York, Robert Ash had come to Washington to attend law school at George Washington University. Following his graduation in 1918, he quickly established himself as one of the leading tax lawyers in the city. For many years, he practiced alone, assisted from time to time by junior associates. He eventually became a senior member of the firm of Ash, Bauersfeld and Burton.

For many years, Mr. Ash served as Tax Counsel for the American Bar Association, and in 1960, his "Tax Problems Encountered in the General Practice of Law" was distributed to

every member of the ABA by its Special Committee on the Economics of Law Practice. An attorney who had argued cases before all eleven U.S. Courts of Appeals, Mr. Ash served from 1960-1968 as a member of the Judicial Conference's Advisory Committee on Appellate Rules of Practice and Procedure. Two of his publications—"How to Write a Tax Brief" and "Preparation and Trial of Tax Cases"—continue to be regarded as definitive works in the field of tax law.

Mr. Ash was a Fellow of the American Bar Foundation, a member of the American Law Institute, the American Judicature Society, and was twice awarded his alma mater's "Alumni Achievement Award," first in 1965 and again in 1977, in recognition for his contributions to George Washington University.

Appearing frequently before the Court during his sixty-year tenure, Robert Ash observed first-hand and at close range more than a quarter of the Court's entire history. The following is excerpted from an article prepared by Mr. Ash shortly before his death on August 10, 1981.

On June 30, 1921, William Howard Taft became Chief Justice of the United States. He had already held the highest elected office in the land—that of President—and had been Solicitor General. Despite these lofty positions, he had remained a very kind, modest and compassionate man. One day when I was in the courtroom, a young, red-haired lawyer with an Irish name began to argue a case. I have forgotten his name so we shall call him Mr. O'Shaughnessy. He was apparently well qualified as a trial lawyer in labor cases. Shortly after he had begun his argument, Mr. Justice Oliver Wendell Holmes asked, "Mr. O'Shaughnessy, is there a summons and severance in this case?" (At that time, when there had been more than one litigant in the lower court and one of the litigants wished to appeal the case to the Supreme Court, a summons to all other litigants had to be served so they could either join in this action or file severance from it.) Mr. O'Shaughnessy replied, "Your Honor, I will get to that in a minute." After looking through the file, Justice Holmes again interrupted, "Mr. O'Shaughnessy, please tell me the page in the record where I can find the summons and severance." At this point, Chief Justice Taft broke in, "Mr. O'Shaughnessy, I suggest that the argument in this case be continued until tomorrow so you can examine the record to find out if there has been a summons and severance." The Chief Justice paused, and then continued, "Mr. O'Shaughnessy, I speak feelingly. When I first became Solicitor General and came before this Court to argue one of my cases, one of the Justices asked me, 'Mr. Taft, is there a summons and severance in this case?' And do you know, Mr. O'Shaughnessy, I'd never heard of a summons and severance. But I found that this question if properly raised could have a disastrous effect on one's case." Is it any wonder that all who knew this wonderful Chief Justice loved him?



Robert Ash and his wife, Frances, shortly after Ash was admitted to the Supreme Court Bar.



Oliver Wendell Holmes.

Depicted on Holmes' bookplate is the chambered nautilus, subject of the author's favorite poem, and in Latin, "through growth to greatness," a phrase suggested by the shell itself.

Remembrances *(continued from page seven)*

Prior to William Howard Taft's becoming Chief Justice, the Clerk of the Supreme Court received all of his compensation out of the fees paid to the Clerk's Office. From these fees he also paid the salaries of all the personnel and all the expenses of his office. As a result of this arrangement, the Clerk's compensation was often greater than that of an Associate Justice. Chief Justice Taft did not approve of this situation, and during his tenure, a change was made. The Clerk became a salaried officer of the Court, entitled to only a fixed stipend paid out of the fees. It was not until many years later under Chief Justice Warren that this last vestige of the earlier emoluments of the office was eliminated, and the Clerk's compensation was limited entirely to his salary.



Chief Justice William Howard Taft (1921-1930)

In 1921, William R. Stansbury was Clerk of the Court and Charles Elmore Cropley was his Deputy. Elmore Cropley had come to the Court as a page when he was thirteen years old. He was imbued with the traditions and procedures of the Court and was completely devoted to the Court. He was one of my first acquaintances when I came to live in Washington, and later he became one of my closest friends.

When Stansbury died, Chief Justice Taft appointed Cropley Clerk of the Court on June 6, 1927. He remained Clerk until his death in 1952.

Ennalls Waggaman, called "Swiftly" by his friends, was the Marshal. He had a deep, resounding voice. I can hear it ringing now as he struck his gavel and announced the arrival of the Chief Justice and the Associate Justices as they filed in. It used to amuse me when he said "The Court is now sitting", for they weren't—frequently they were still walking to their large chairs. They were an awe-inspiring sight, these venerable men in their black robes. As the Marshal's gavel sounded, everyone in the courtroom jumped to his feet and stood motionless until the entire Court was seated. They were the Chief Justice, William Howard Taft; and Associate Justices Oliver Wendell Holmes, George Sutherland, James Clark McReynolds, Willis Van Devanter, Louis Dembitz

Brandeis, Edward Terry Sanford, Pierce Butler and Harlan Fiske Stone.

Each New Year's Day, Chief Justice Taft held open house. No invitations were ever sent, but lawyers practicing before the Court and their wives, and certain government dignitaries would call to pay their respects. I recall the double line that formed on Wyoming Avenue moving slowly to his hospitable residence. Sometimes this line looked a block long, and seemed even longer, as Washington could be very cold on January first. But the open fires in the drawing room and library, and the warm and friendly host awaited, so we never really minded the wait. The Chief Justice was a great story teller and he knew a great many stories to tell. He enjoyed telling them so much that sometimes he would begin to shake with laughter before reaching the point of the story. His laughter was so contagious that we would often find ourselves laughing too before we'd heard the punch line.

One New Year's Day when we reached the Chief Justice, after he shook hands with Mrs. Ash, he continued to hold her hand and proceeded to tell one story after another. He knew he had an appreciative audience in us and he seemed oblivious to the people in line behind us. I could almost feel the breath of those waiting as their impatience must have grown, but we could not move until he decided to let go of my wife's hand.

Every four years when a President was to be sworn in by the Chief Justice, we and several other close friends of the Clerk, his Deputies, the Marshal, etc., would be invited to a delightful luncheon and to view the swearing-in from a vantage point just back of the members of the Court, their families, and a few other dignitaries. We would stand on a platform built over the steps of the Capitol. Since that ceremony always took place in January, it was usually very cold. Elmore Cropley would stand between the Chief Justice and the President-elect. He would hold the large, heavy Bible as the Chief Justice administered the oath of office. These luncheons I remember very well. There was always sherry to warm us a bit, then chicken salad, Virginia ham, hot rolls, coffee and tea, brownies and cookies. It was always a very enjoyable occasion and Elmore Cropley was a perfect host.

Chief Justice Taft's dream was that the Supreme Court should have its own building. To that end he worked tirelessly persuading Members of Congress that this should be done. The other Justices concurred, of course, and I'm sure added their persuasion. When Congress finally agreed, the Chief Justice appointed Justice Van Devanter chairman of the Court's committee for the new building. Van Devanter was a very precise person and a stickler for detail. The Chief Justice knew this and had always assigned cases to him involving a great deal of detail. I feel sure his supervision of the new Court building as it was being built resulted in the fine execution of every exquisite detail the architect had designed. It took a long time to build it. Mrs. Ash and I attended the ceremony when the cornerstone was laid for this magnificent building. It was a bitterly cold and windy day and most of us were shivering before it was over. Even though Chief Justice Taft had gone to his reward, I'm sure his spirit must have been there.

William Howard Taft: An Unparalleled Public Servant

"The truth is, that in my present life I don't remember that I ever was President".

—Chief Justice William Howard Taft
December, 1925

Four strenuous years had scarcely dimmed the enthusiasm and sense of fulfillment William Howard Taft felt as he carried the mantle of Chief Justice of the United States. His appointment to that post in 1921 satisfied the greatest aspiration of his life. Perhaps Taft also found it difficult to single out his recollections of his four years in the White House because of his unparalleled record of public service. In addition to the four years he had already spent on the Court by 1925, and his term as President, Taft had served the public as a local tax collector, an assistant prosecuting attorney, a judge on the Ohio State appellate bench, Solicitor General of the United States, a judge on the Circuit Court of Appeals, Governor General of the Philippines, Governor of Cuba, and Secretary of War. When reflecting upon this remarkable career of public service, it is not surprising that Taft received the rare Senate tribute of confirmation as Chief Justice on the very day his nomination was received from President Harding—June 30, 1921.

Taft was sixty-three at the time of his appointment, and as his record on the Court reveals, he was a staunch conservative in philosophy and practice. His attitudes and perspectives were both the product of personal experience and his childhood upbringing. Though born and raised in the

comparatively tolerant and non-doctrinaire environment of Cincinnati, Ohio, Taft's early years were moulded by the resolute New England traditions of his parents. His father, Alphonso Taft, was born in 1810 in Vermont where his family had resided for over a century at the time of his birth. He was the son of Peter Rawson Taft, a judge on the probate and county courts in Windham County, Vermont. His earliest American ancestor had emigrated from England and settled in Braintree, Massachusetts in 1678. Soon thereafter the Taft family moved to Vermont where it established itself more by its size than any particular accomplishments. It was Alphonso, William Howard Taft's father, who first ventured forth from the family's traditional home when he moved to Cincinnati. Taft's father was also the first member of the family to gain national prominence. He served two terms on the Ohio Superior Court before he was named Attorney General and later Secretary of War in the Grant administration. He was also appointed to consecutive posts as U.S. Ambassador to the Austro-Hungarian Empire and as U.S. Ambassador to Russia at St. Petersburg by President Arthur.

Alphonso moved to Cincinnati in 1838, but returned briefly to Vermont in 1841 to court and marry Fanny Phelps. The marriage ended only eleven years later when Fanny fell victim to tuberculosis and died in 1851. Only two of their five children survived childhood.

In December 1853, Alphonso Taft once again returned to New England to find a new wife and mother for his children.

continued on next page



A formal portrait of the Taft Court taken in 1925 on Harlan Fiske Stone's succession to the seat formerly held by Justice Joseph McKenna. Justice Stone (standing, far right) became the fifth new member of the Court in only four years. Other recent additions to the bench (standing, left to right) were: Justices Edward T. Sanford

(1923); George Sutherland (1922); Pierce Butler (1923); and (seated, center), Chief Justice Taft (1921). The senior justices (flanking Taft, from left to right) are: James C. McReynolds (1914); Oliver Wendell Holmes, Jr. (1902); Willis Van Devanter (1911); and Louis Brandeis (1916).

Taft (continued from page nine)

On December 26, following a brief courtship, he married Louisa Maria Torrey, whom he had met while dining at her father's home in Massachusetts the previous year. She would bear Alphonso five more children, the eldest surviving childhood being the future President and Chief Justice.

"Willy," as William Howard was called in his youth, was a blessing to the Taft family which had suffered so many infant tragedies. He was healthy, quite large even at birth, and as a child, Willy's parents recognized him to be exceptional. Young William was an excellent student, and through his amiable nature easily made friends. Indeed, it was this latter quality which evoked some concern on his father's part during Taft's years at Yale. On reading his son's reports of the new friends he had acquired while away at college, the elder Taft expressed his doubt "that such popularity was consistent with high scholarship." In fact, Taft's father had little cause for concern. Bill Taft, as he was known during his college years, had left none of the stern lessons of his childhood behind on entering his father's alma mater. He never developed a liking for tobacco or strong drink, and his parents' characteristic frugality saw expression in the detailed records he kept of his expenses. Many of his fellow students consequently came to look upon Bill Taft as a model of gentlemanly behavior.

Taft would also be recognized for his academic abilities, graduating second in a class of 132, and taking many prizes for scholarship along the way. It seems, in fact, that the only shortcoming of this otherwise model student was his disinterest in participating in the school's daily and mandatory religious services. Taft's father had found the strictures of his own Baptist upbringing equally difficult to endure and had revolted against them in earlier years by joining the Unitarian Church. He probably had some sympathy, therefore, when his son once wrote to complain of Yale's services saying "... the Fickle Goddess sleep wouldn't come worth a cent, and so I was doomed to listen to one of the driest [sic] sermons I ever heard."

By the time of Taft's graduation, his father had completed his brief term as Secretary of War, and his appointments to the foreign service posts were still several years away. The future Chief Justice began his legal training at Cincinnati Law School in the Fall of 1878, and took a part-time position as a reporter on legal affairs for a local newspaper, the *Cincinnati Commercial*, to help support his education. Taft gave up his journalistic career upon graduation, becoming assistant prosecuting attorney for Hamilton County, Ohio in 1881. This marked his first direct involvement in Republican Party politics, and was followed shortly thereafter by a brief tenure as tax collector, a post from which Taft resigned in 1883 to remove himself from involvement in the corrupt appointment practices of the local political organization.

After several years of courtship, Taft married Nellie Herron in 1886. They would have a daughter and two sons, one of whom, Robert Alphonso Taft, would follow his father into public service as a United States Senator from Ohio. In 1887, the twenty-nine year-old newly wed groom was appointed as a judge to the Ohio Superior Court. A rapid succession of appointments followed, which Taft explained in

later years by saying he had simply always had his "plate the right side up when offices were falling." In truth, Taft's succession of offices may be accounted for by his recognized competence, his capacity for public service, and his aversion to political arrangements which might involve him in scandal. His loyalty and diligent efforts to promote his party's interests certainly played a role as well. Then too, when Taft might have been satisfied to accept that which fortune alone provided, his wife Nellie constantly pressed him to employ his exceptional talents to their fullest capacity.

In 1890, at the age of thirty-three, Taft was appointed by President Benjamin Harrison as Solicitor General. Two years later, after Congress had created additional jurisdictions for the federal circuit courts, Taft sought and gained an appointment to the Sixth Circuit. During his eight year tenure on the bench Taft became noted for his conservative legal scholarship. President McKinley, recognizing Taft's competence, asked him to head a commission appointed to ensure the smooth transition from a military to a civilian government in the Philippines in the aftermath of the Spanish-American War. Reluctantly, Taft accepted the appointment and in 1901 was named Governor General of the protectorate. Once again he demonstrated the diversity of his administrative skills by improving the local economy, building roads and schools, and uniting the islands' political factions.

McKinley's death in 1901 brought Theodore Roosevelt and the progressive faction of the Republican Party to power. Roosevelt was an early admirer of Taft's abilities and brought him to Washington in 1904 to join his Cabinet replacing Elihu Root as Secretary of War. Taft quickly became one of Roosevelt's most trusted and respected advisors. As Secretary of War, he was responsible for overseeing the successful construction of the Panama Canal, a critical factor in Roosevelt's efforts to give the nation a two ocean strategic capability.

As a member of the Cabinet, Taft traveled throughout the Caribbean and the Pacific as a foreign policy trouble shooter for the President, and served briefly in 1906 as the provisional governor of Cuba. As Taft's prestige grew in the administration, so did his influence. Viewing Taft's success as a recommendation for further elevation, President Roosevelt pressed the Party to accept Taft as its next candidate for President. Taft's own conservative political connections in the East, in concert with Roosevelt's progressive supporters in the West, carried Taft to victory in the 1908 presidential election. However, after Taft's election Roosevelt and his followers became disenchanted with the seemingly conservative bent of Taft's administration. It is debatable whether Roosevelt's complaints were well-founded, for during Taft's administration the government initiated twice the number of antitrust suits that had so characterized Roosevelt's seven years in office. Taft also carried out a far-reaching conservation policy which might well have pleased the progressives had not Roosevelt's popular Secretary of the Interior, James R. Garfield, been replaced by Richard A. Ballinger, a conservative lawyer from Seattle. Taft also tried to help the "common man" by establishing a parcel post system, a postal savings system, the Childrens' Bureau to stem the evils of child labor, and a Commerce Court.

Unfortunately, Taft found himself embroiled in a power



Taft supervises construction of the Panama Canal during his tenure as Secretary of War.

struggle between the conservative and progressive members of his party, which made his term in office most uncomfortable and his chances for reelection uncertain. While recognizing the need for reforms, he antagonized the progressives by refusing to follow Roosevelt's example of expanding the use of presidential powers to achieve political ends. By 1912, the schism had grown beyond repair, and an embittered Roosevelt bolted the Republican Party to oppose Taft with his own "Bull Moose" candidacy. The division within the party which resulted ensured the election of the Democratic candidate, Woodrow Wilson.

Through much of the eight years that followed his unsuccessful bid for a second term, Taft served as a Professor of Law at Yale University. Over the years he had kept his contacts with his undergraduate alma mater, and in 1899 he had regretfully declined an offer to become the institution's president. Despite the solace he found in those peaceful years on the Yale faculty, Taft was unable to withdraw himself entirely from public life. Long before his presidency, Taft had gazed upon an appointment to the Supreme Court as his ultimate ambition in life. Although the possibility of such an appointment seemed unlikely under Wilson, his name nevertheless figured prominently on many of the lists of candidates appearing in various newspapers as seats became vacant. While Taft publicly expressed little hope for appointment to the Court during the Wilson administration, his private expectations appear to have been less gloomy. Who, after all, was more qualified than he for such an appointment? Moreover, as President he had crossed party lines on three of his six appointments to the high bench. A vacancy on the Court in January 1916 prompted Taft to comment privately that, "I am wicked enough to enjoy the assault upon Wilson to force him to offer me an appointment. Of course, it will fail, but he does not like it."

Harding's election as President in 1920 brought a change of fortunes. The President-elect met with Taft shortly after the election and informed him that, should he still be interested in an appointment to the Court, one would be offered at the first opportunity. From Taft's private papers it appears that an appointment to the Court as an Associate Justice would have been accepted. But the electoral re-

putation of 1912 had been a deep wound to Taft's pride, and the vindictive assaults of his one-time friend Roosevelt had also left their scars. Moreover, Wilson's liberal appointments—particularly that of Louis Brandeis—had been vigorously opposed by the conservative Taft as inconsistent with the Court's stature and public image. Accordingly, Taft informed the President-elect that his only real ambition was to occupy the center chair—in short, that he would only guarantee acceptance of an appointment as Chief Justice.

Soon thereafter, President Harding was confronted by a rather undignified campaign by Taft and his supporters in the Party to guarantee his nomination as Chief Justice as soon as Edward Douglass White could be encouraged to vacate the post. Taft even went so far as to call upon the aging Chief Justice, who was known to be in poor health, to ask him to resign in his favor. White steadfastly refused, and it was not until his death a year later that Taft gained the long-coveted appointment.

Chief Justice Taft inherited a strongly divided Court that was far behind in its work. Several of the Associate Justices were aged and infirm, and no longer able to carry the full weight of their judicial responsibilities. Litigation from the First World War was just beginning to find its way onto the Court's docket, and the proliferation of legal contests born of the nation's rapid industrialization was swelling the Court's workload as well.

Taft's efforts to ease the Court's internal disharmony through personal diplomacy met with only limited success. He addressed the problem of a burgeoning workload by initiating and promoting various kinds of judicial reform. He successfully lobbied for passage of the Judiciary Act of 1925, which gave the Court greater discretion in what cases it would

(continued on next page)



Taft poses with his family at the White House on his 25th wedding anniversary in 1911.

Taft (continued from page eleven)

hear, and allowed the Court to give its prompt attention to questions involving constitutionality and other important matters. He may also be credited with the creation of the Judicial Conference of the United States, a body which continues to provide the federal judiciary with greater cooperation and coordination amongst its many courts. Implementation of these reforms allowed the Court to successfully eliminate its backlog of cases and to assume a more effective role at the apex of the national judiciary.

Prior to these reforms, certain political factions in Congress had pressed to alleviate the Court's backlog of cases by expanding its membership and possibly restricting its jurisdiction. Taft felt these measures would dilute the Court's power and prestige, and determined accordingly to resolve the problem by improving the Court's efficiency. The judicial reforms he promoted were but one aspect of his program. Another was his successful campaign to acquire new quarters for the Court, which had long ago outgrown the cramped confines allotted to it in the Capitol building. His personal involvement with the Congress is credited with securing funds to construct the first building designed specifically for the Court's use. To ensure that the building would meet the Court's needs, Taft personally supervised its design and the early stages of its construction, though he did not live to see the great marble structure completed.

Despite the satisfaction Taft derived from the administrative improvements achieved during his tenure, his leadership was threatened by the Court's internal bickering. Though he was often supported by a conservative majority, the majority was frequently slim, and often challenged by the highly critical dissents of Mr. Justice Holmes and Mr. Justice Brandeis. Cases involving prohibition and labor-management disputes proved particularly divisive in this regard, as the Court often split along partisan political lines. The issue of prohibition aroused rancor within Taft's own household as well, as the Chief Justice's wife, Nellie, though loyal in all other ways, was known to support the repeal of the Eighteenth Amendment, while the Chief Justice felt morally and legally obligated to defend its strict enforcement. Regardless of the personal discomfort Taft experienced as a result of his perception of the responsibilities of his high office, he never allowed such considerations to alter his convictions. Taft's efforts to reduce the number of dissents during his tenure as Chief Justice would go largely unrewarded, and late in life, as his own health began to fail, he became increasingly concerned that the conservative ideals he had championed would lose expression on the Court. This factor played an important role in Taft's decision to remain on the bench despite his growing awareness that he was no longer physically equal to the job. Even though the Chief Justice took a month off in January, 1930 to recuperate from an illness, his condition continued to deteriorate. High blood pressure and hardening of the arteries brought a series of crippling strokes near the end of the month, and brought with them the realization that Taft would never be able to return to his duties. His resignation was submitted to the President on February 3. Confined to his bed, and lapsing in and out of consciousness, Taft lingered only a month, sufficient time,

however, to see his close personal friend Charles Evans Hughes confirmed as his successor. Appointed by President Hoover to the post Taft had denied him 20 years earlier, Hughes took his oath of office on February 24, 1930, only a few days before Taft's death on March 8, 1930.

Marshall Volume Presented

On October 23 at a reception at the Court sponsored by the Society to commemorate the 25th Anniversary of the American Society for Legal History, the Librarian of Congress, Daniel J. Boorstin, presented to Chief Justice Burger Volume II of the *History of the Supreme Court of the United States*. Entitled *Foundations of Power: John Marshall 1801-15*, and written by George L. Haskins, Algernon Sydney Biddle Professor of Law at the University of Pennsylvania, and Herbert A. Johnson, Professor of Law and History at the University of South Carolina, the work is the fourth to be published in the Oliver Wendell Holmes Devise Series. In a foreword to *Foundations of Power*, Professor Paul Freund of the Harvard Law School writes:

In the period covered by this volume—roughly the first half of John Marshall's Chief Justiceship—the Supreme Court faced one or another of two dark fates. The Court might languish in benign obscurity or it might go down under the lack of active contempt. How Marshall and his colleagues were able to escape these opposing perils and establish the authority of the Court is the pervading theme of this richly documented and multidimensional study, which draws on manuscript sources and contemporary journals as well as official records for an insight into this critical stage of the Court's history.

The *History*, a definitive, ten-volume study of the history of the Supreme Court of the United States, is being written under the auspices of the Permanent Committee for the Oliver Wendell Holmes Devise, of which the Librarian of Congress is Chairman, Ex Officio. Created in 1955 by an Act of Congress, the Committee supervises the expenditure of a bequest made to the people of the United States by Associate Justice Oliver Wendell Holmes, Jr. The preparation of the *History* series is the Committee's principal function.



Chief Justice Burger accepts the Marshall volume from Dr. Boorstin (far right) as the authors, Professor George Haskins (far left) and Professor Herbert Johnson (second from right), look on.