THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME IV, NO. 1 WINTER, 1982

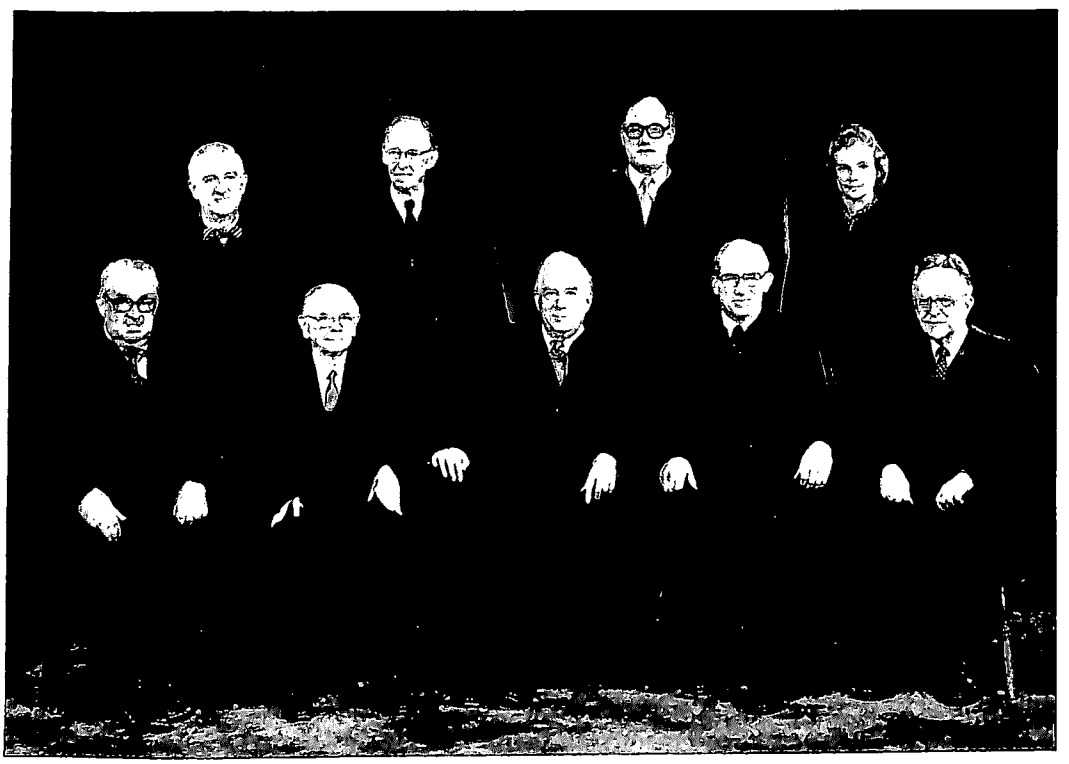
Society Plans 7th Annual Meeting

The Society will hold its Seventh Annual Meeting and Dinner on Friday, April 30, in Washington, D.C. The Chairman of this year's Annual Meeting Committee, Chief Judge Howard T. Markey of the U.S. Court of Customs and Patent Appeals, noted the change from the Monday evening meetings of the past several years, explaining that a Friday had been chosen in response to the growing sentiment that a Monday evening was inconvenient for many members, especially those who live any distance from the Capital.

The Annual Lecture, traditionally presented on the day of the annual meeting, will be given this year by Dr. Henry J. Abraham, James Hart Professor of Government and Foreign Affairs at the University of Virginia. The lecture will be presented at 2:00 p.m. in the Restored Supreme Court Chamber in the U.S. Capitol. A well-known author, whose works include *The Judicial Process, Justices and Presidents, Freedom and the Court,* and *The Essentials of American National Government,* Professor Abraham took his undergraduate degree from Kenyon College. A member of Phi Beta Kappa, he did his post-graduate work at Columbia University and the University of Pennsylvania, where he was a member of the faculty for many years. In addition to his major publications, Professor Abraham has written widely for law reviews and other journals on constitutional law and the judicial process. He has also lectured at universities in this

(continued on page ten)

New Court Photograph Available



Continuing the century-old tradition of having a formal photographic portrait taken upon the installation of each new justice, the Court this month released its most recent formal photograph.

Copies of this photograph are available at the Society's Kiosk at the Supreme Court in three forms: 8x10 black and white ($8.00); 11x14 color ($16.00); and, 11x14 color on a 13x16 mat ($20.00).

Mail orders should be directed to the Society's offices at 1511 K Street, N.W., Suite 612, Washington, D.C. 20005 and must include an additional $2.00 for postage and handling. As with all other materials distributed by the Society, members enjoy a 20 percent discount on the prices listed above.

Law And Politics In The Jeffersonian Era

By **George L. Haskins**

(**Editor's Note:** *The following article was originally presented by George L. Haskins, Esq., Algernon Sidney Biddle Professor of Law at the University of Pennsylvania, on August 25, 1981, before a gathering of professional and businessmen in Ellsworth, Maine. It has been adapted for publication in the* **Quarterly** *by permission of the author.)*

So much has been written in recent years about Thomas Jefferson and his times that it may be worthwhile to say something about certain episodes which occurred during his Presidency which concerned the federal judiciary and which have received little concerted attention. As the eminent historian, Admiral Morison, wrote cynically but astutely, perhaps it is time to admit that the defeat of John Adams in 1800, and the election of Jefferson was "bad" for the United States. In other words, while Jefferson justly deserves credit for his many accomplishments in education, the arts, and agriculture, his political reputation may well have exceeded his actual performance.

In the early years of the Republic, that is up to 1800, the three branches of government worked together, though separately, and for the most part the system worked well. Our first two Presidents, the majority in Congress, and also the judiciary, espoused the unifying principles of nationalism which had made possible the unification of the former colonies and the new States. Most of the elected officials, and all the federal judges, belonged—with varying degrees of enthusiasm—to what was known as the Federalist Party. But in the election of 1800 came a close but dramatic shift. Thomas Jefferson, riding a platform of agrarian interests, as opposed to commercial and trading interests, defeated John Adams at the polls. Careful political maneuvering by his party, known then as Republicans, captured a majority of the seats in Congress. But the judges, who were independent of election and had tenure except for high crimes and misdemeanors, remained Federalists. Thus, his victory at the polls was only two-thirds complete, for the judges, especially those of the Supreme Court, were in a position to block or modify his intended programs, particularly through judicial review. The parallel to the situation under President Franklin D. Roosevelt in the 1930s immediately comes to mind.

To Jefferson the imbalance was outrageous, the more so since one of the last acts of the outgoing President, John Adams, had been to appoint John Marshall as Chief Justice. Although Marshall was his own cousin, Jefferson literally hated the new Chief Justice of whom it was said he was intensely jealous. Thus, the Supreme Court at once became Jefferson's whipping boy; the passage of legislation restricting the Court's power and a campaign to impeach its judges became pressing priorities.

Hence, it became the immediate task of the new Chief Justice to see that the integrity and independence of the national judiciary were not impaired, and that the Supreme Court in particular should not suffer from the lash of the active contempt of Republicans. This he accomplished largely during the Jefferson years, 1801-1808, by establishing through the decisions of the Court a rule of law that would not and did not bend to the expediencies and uncertainties of legislative and executive action. He further relied on the clear constitutional directive that the various departments of government were separate to support his argument that one branch could not interfere with the proper function of another.

Jefferson's attack on the courts and the judges is almost unbelievable, especially to ears accustomed to hearing nothing but voices of praise. Two specific instances by way of illustration must suffice. Jefferson had hardly assumed office when he began to explore impeachment as a means of removal of judges who were Federalists and who therefore held different political views from his own. He engineered the impeachment of John Pickering, federal judge of the District of Maine, who though aged and infirm and frequently incapacitated was not permitted to be represented at his impeachment proceedings in Congress. Through the technique of using third parties as vehicles to launch his projects, Jefferson was also responsible for the impeachment proceedings against Supreme Court Justice Samuel Chase, alleging that because of some unwise remarks made to a grand jury in Baltimore, Chase was guilty of high crimes and misdemeanors. Fortunately for Chase, and for Marshall who was also on Jefferson's hit-list, the proceedings failed and Chase was acquitted. But later, in the course of a special message to Congress following Aaron Burr's acquittal of treason by a jury over which Marshall had presided, Jefferson expressly urged the House of Representatives to impeach Marshall, but to no avail.

The other instance relates to legislation sponsored by Jefferson via his loyal Republican lieutenants in Congress which imposed increased burdens on the justices of the Supreme Court. For several years before 1800, legislation had been under consideration in Congress to lighten the Court's demanding and exhausting workload, chiefly by creating new circuit courts to hear preliminary appeals, freeing the Supreme Court judges from the burden of riding circuit about the country. This task was extremely taxing, and especially exhausting to the older justices. Some of the justices covered as much as 1000 miles a year on horseback. The aging Justice Cushing whose home was just south of Boston and who was assigned the First Circuit was more fortunate; he rode in a specially built horse-drawn phaeton, frequently accompanied by Mrs. Cushing who reportedly read to him from his law books and fed him light snacks along the road. A bill was finally passed by Congress, just before President Adams left office in 1801. Within a year, however, Jefferson saw to it that the act was repealed, and the judges were again sent out on the road.

In addition to such direct assaults on the federal judiciary, Jefferson also sought to use his political power in other ways detrimental to judicial independence. Two examples of Jefferson's personal involvement in essentially judicial matters readily come to mind. The first is the famous case of *Marbury* v. *Madison* decided in 1803. The case arose because, in a fit of annoyance, Jefferson had directed James Madison, his Secretary of State, not to deliver to William Marbury his duly authenticated commission as a justice of the peace. The appointment had been made by President Adams just before leaving office, but the official commission had not yet been delivered when Jefferson took office. Marbury applied to the Supreme Court for a writ ordering the Secretary of State to deliver the commission.

Now, in the politically tense situation of the time, it would have been ill-timed, to say the least, for the Federalist-manned Court to order the new Republican Secretary of State to deliver the commission. Suppose Madison refused? Members of the Department of State, including Madison, had indicated that presidential privilege excused them—that they were above the law. Marshall was naturally anxious to avoid a head-on confrontation with either the President or his Secretary of State, and he found a clearly constitutional way of doing so. Marshall held that although Marbury did have a legal right to his commission, he had filed his complaint in the wrong court. His opinion stated that the Supreme Court had no power to redress the injury; only on an appeal from a lower court could the high Court act on Marbury's complaint, if the Constitution was to be complied with.

Marshall's opinion also stated that individual vested rights such as Marbury's were within the protection of the law, and that neither the President nor his ministers could "sport away," as he put it, the vested rights of others. If those rights were violated, the power of judicial review was available to prevent it. Marshall recognized, however, that in other situations, where political matters only were involved, the doctrine of separation of powers prevented the judges from encroaching on the powers of the legislature or the executive. Not long afterwards, a federal district court, reflecting Marshall's conclusion, held in a Massachusetts case that Jefferson's embargo laws, though they had crippled New England shipping, were nevertheless constitutional and not within the sphere of judicial review by the courts.

It is interesting to note what Marshall was doing. He was

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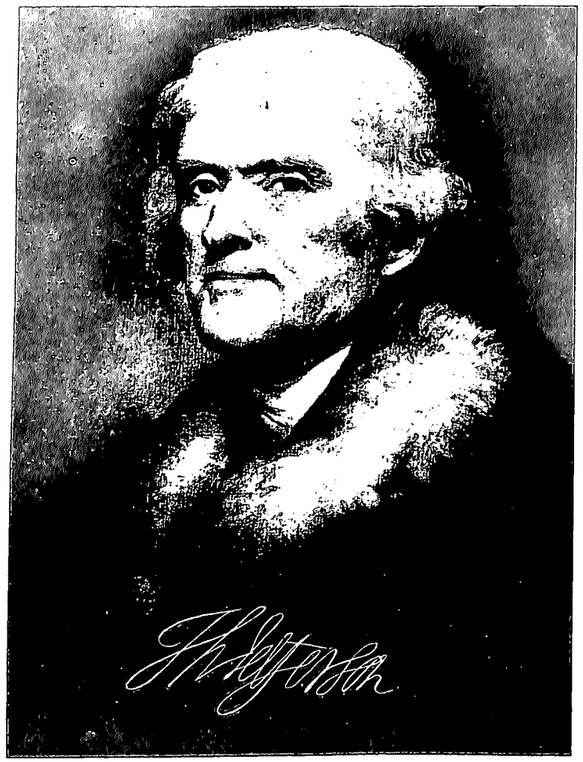
Courtesy of the Library of Congress

Courtesy of the Library of Congress



Though related, and both natives of Virginia, there was no love lost between Chief Justice John Marshall (left) and President Thomas Jefferson (right).

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

Stephen J. Field: Frontier Justice

On the morning of March 10, 1863, the Supreme Court announced its decision in the *Prize Cases,* upholding President Lincoln's executive order blockading southern ports in the Spring of 1861. The decision had split the Court 5-4, and the margin defending the Union had been a narrow one. Fearful of an adverse ruling, Republicans in the Congress had already made provision for enhancing Union sympathies on the Court by adding to it an unprecedented tenth seat. This plan promised the added advantage of cementing Oregon and California to the Union camp by providing those states with their own federal circuit, and representation on the high court.

If the creation of a new circuit and of a tenth seat were extraordinary measures, the man Lincoln nominated to fill the new vacancy was equally extraordinary. Stephen Johnson Field was a Democrat, and his appointment represented the first clear instance of a President crossing party lines to fill a Court vacancy. President John Tyler, a Whig, had nominated Democrat Samuel Nelson in 1845, but Tyler had come into office on the death of President Harrison, and party infighting had substantially alienated him from his Whig supporters. By the time of the Nelson nomination, Tyler was no longer clearly identified with either party.

Strongly and outspokenly pro-Union, Field satisfied the exigency of appointing someone who could be expected to vote sympathetically on issues pertaining to the war. Unlike his Radical Republican supporters, Lincoln was also looking toward the war's end in Field's nomination, at which time a Democrat might prove less of an obstruction to reconstruction plans than a member of his own party.

Courtesy of the Library of Congress

An early photograph of Justice Field taken shortly after his appointment to the Supreme Court of the United States.

Senate approval of the Field nomination, by coincidence, fell on the same day that the Court announced its decision in the *Prize Cases.* Two months later, in his adopted state of California, Field took his oath of office.

Field arrived in California in December 1849, 2 years after Mexico had ceded the territory to the United States. During the previous year, he had toured revolution-torn Europe with his father, David Field, a strict congregationalist minister from Connecticut. When he returned to New York in October 1849, he learned of the discovery of gold in California and immediately booked passage to Panama. Once there, he contracted with some natives to ferry him in a canoe across the Isthmus. By late December, Field reached San Francisco, with only ten dollars in his pocket and no immediate prospect of a job.

Unlike many of his travelling companions, Field had no intention of breaking his back in search of gold. He had graduated at the top of his class from Williams College in 1837, and had studied law with his eldest brother, David Dudley Field, and with John Van Buren, the Attorney General of New York. He was admitted to the New York State Bar in 1841, and subsequently practiced law with his brother in New York for several years. As much entrepeneur as lawyer, Field travelled to California with the hope of establishing a lucrative legal practice in the rapidly expanding San Francisco area. After spending a month or so there, Field realized that his expectations had been illusory. He decided to move inland, travelling 100 miles by boat up California's Sacramento and Feather Rivers to what would become "Marysville"—so named for one of the few survivors of the Donner party, and one of the few women within miles of the new settlement.

When Field arrived, he found the town's 600 or so residents living in tents, shacks, and a few small adobe buildings. Outside one of the adobe structures, a man was displaying a map marked off in lots for which people were signing at the cost of $250 per lot. On inquiring of the consequences of signing up for a lot and deciding later not to take it, Field was informed that no penalty would be imposed. Field acted accordingly:

> *I took him at his word and wrote my name down for sixty-five lots, aggregating in all $16,250. This produced a great sensation. To the best of my recollection I had only about twenty dollars . . . but it was immediately noised about that a great capitalist had come up from San Francisco to invest in lots in the rising town.*

Emotions ran high and a local celebration ensued; a dinner was held during which the town's new "benefactor" was called upon to speak. He persuaded his audience of the necessity of electing a local government, and though in town only three days, his eloquence secured his own election as the town's first alcalde. A judicial office originating under

Courtesy of the Library of Congress

A view of Marysville, California, as it appeared shortly after Field's arrival in 1850.

Spanish law, the position encompassed a wide range of powers as the only form of legitimate local authority surviving Mexican cession of the territory.

Field promptly established a police force to maintain order by levying a tax upon the local gambling tables. At the outset, he found himself in somewhat of a predicament in providing justice for serious offenses, as there was no jail nor any funds to build one. The prevailing local prescription for theft and other crimes had been lynching, for which Field had considerable personal disdain. The new alcalde settled upon an alternative form of punishment which he applied as circumstances warranted. One such instance involved a man convicted of stealing a large quantity of gold dust, the location of which he refused to reveal after his capture. Field instructed his new sheriff accordingly:

> *Therefore it is ordered that said defendant, John Barrett, is to be taken from this place to Johnson's Ranch, and there to receive on his bare back within twenty-four hours from this time, fifty lashes well laid on; and within forty-eight hours from this time, fifty additional lashes well laid on; and within three days from this time, fifty additional lashes well laid on; and within four days from date fifty additional lashes well laid on. But it is ordered that the four last punishments be remitted provided the said defendant make in the meantime restitution of the said gold dust bag and contents.*

Only twenty lashes of the first installment were inflicted when the man had had enough, and decided to surrender his cache. Unfortunately, the sheriff's second reading of Field's order revealed no provision for remitting any of the first fifty lashes, and despite the prisoner's full confession, the remaining thirty were "laid on" as the order instructed. Field later recalled this incident with some considerable satisfaction; "the sense of justice of the community was satisfied. No blood had been shed; there had been no hanging; yet a severe public example had been given."

Aside from his duties as the town's first alcalde, Field also served as an informal arbiter for land disputes, directed the grading of the river banks to facilitate landings by river traffic, and performed various administrative services for the town. He proved equally energetic in his private affairs, amassing the substantial sum of $14,000 in three short months through real estate speculation and fees charged as alcalde.

Field's duties as alcalde ended in May 1850 with the installation of new local officials under the newly approved California state constitution. Relations between Field and his successor, California District Court Judge William R. Turner, were openly hostile from the outset, motivated perhaps by mutual jealousy and political differences. Whatever the cause, Field's first appearance before Turner produced a heated verbal exchange which earned the former alcalde a $500 fine, two days incarceration in the judge's

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Field *(continued from page five)*

chambers and disbarment. Field immediately secured a ruling from the California Supreme Court overturning the decision and also petitioned the Governor for Turner's suspension. Failing in this latter effort, Field engaged Turner in a running exchange of editorial abuse throughout the summer of 1850 in the local newspapers. One such volley, signed by Field, so enraged the Judge that he ordered Field brought before him and demanded that he show cause why he should not again be expelled from the bar. Once in court, Field characteristically unleashed a vituperous assault on his adversary's judicial competence and personal character. The future Supreme Court justice was once again disbarred.

Reinstated by the California Supreme Court, Field decided upon a different tack, and in the Fall of 1850, he ran for election to the California State Assembly. Victorious, he introduced a variety of judicial reforms, one of which succeeded in banishing Judge Turner to a newly created district in the comparative wilderness of Trinity and Klamath Counties in the extreme northwestern corner of California. Despite this victory, Field's poor relations with Judge Turner continued to plague him for many years. Ongoing friction between the two men's political camps nearly resulted in a shoot-out on the floor of the California State Assembly in January 1851, and as his political career progressed, Field's opponents frequently sought to exploit the Field-Turner skirmishes to discredit and embarrass him.

Despite these efforts, Field's political career advanced. While a member of the State legislature, he served on the Judiciary Committee where he was primarily responsible for codifying California's morass of Spanish law, frontier practices, and American legal precedents into a single body of civil and criminal state law which could be generally applied. The example for this code writing was drawn from his experience a few years earlier in assisting his brother to codify the laws of the State of New York. His substantial legal training tempered by a rough-hewn practicality proved well suited to California's early years of statehood, and his contribution to the state's legal system laid a foundation that became a model for codification in surrounding states in the years to come.

In the summer of 1851, Field hoped to advance his legislative career by running for California's State Senate, and he acquired a sufficient number of proxies to assure his nomination from loyal delegates unable to attend the Democratic Convention in Sacramento. Upon his arrival, he distributed the proxies to several of his cronies to be voted on his behalf. To Field's dismay, his supposed friends promptly traded away the votes for political favors. Field thus lost the nomination by two votes and immediately set out to take his revenge:

> *For the moment I was furious, and hunted up the man who . . . had been seduced from my support. When I found him in the room of the convention, I seized him and attempted to throw him out of the window. I succeeded in getting half of his body out when the bystanders pulled me back and separated us. This was fortunate for both of us; for just underneath the window there was a well or shaft sunk fifty feet deep.*

Following his unsuccessful bid for the State Senate, Field returned to private practice until 1857, when he made an equally unsuccessful bid for the Democratic nomination to the U.S. Senate. Field's exuberant confidence in his victory over his opponent was shared by few of his political allies; but Field's campaign in the senate primary provided an important springboard for his election to the California Supreme Court the same year.

In 1857, Field was sworn in as an Associate Justice on the California Supreme Court by Chief Justice David S. Terry, a southerner by birth, who like Field, had been trained in the East as a lawyer and followed the Gold Rush to California. Seven years Field's junior, Terry had joined the high court as an Associate Justice in 1853 at the age of 32, becoming Chief Justice only a short time before Field's arrival. A brilliant but irascible man with a violent temper, Terry reflected the harsh realities of the frontier environment. While serving as an Associate Justice, Terry had severely wounded a man by stabbing him in the chest during a street fight in San Francisco. Only his victim's recovery saved Terry from prosecution. In 1859, he resigned his position as the state's highest judicial officer to challenge a political adversary, U.S. Senator David C. Broderick, to a duel on the sand dunes outside San Francisco. At dawn, on September 13, 1859, they faced each other, each holding a pistol. They fired, and Broderick fell, mortally wounded.

Field had been made Chief Justice upon Terry's resignation, and four years later would become Lincoln's choice to fill the seat on the U.S. Supreme Court representing the newly created western circuit. Terry and Field would meet again in court, however, in 1888 with Field sitting as a federal judge, and Terry representing his new wife, Sarah Althea Hill Terry, in the notorious Sharon divorce case. While Field was reading the Court's opinion, Mrs. Terry, hearing the adverse decision, interrupted Field and screamed, "Judge Field, how much have you been paid for that decision? I know it was bought." Field ordered the Marshal to remove Mrs. Terry, her husband intervened, and a struggle ensued. Terry and his wife were both removed from the courtroom; Mrs. Terry received a thirty-day jail sentence, and her husband, a six-month sentence. They served their time, but vowed to get even with Field. (For details concerning Terry's death in a railway dining room, shot by a Deputy U.S. Marshal charged with protecting Justice Field, see S.C.H.S. *Yearbook* 1977, pp. 11-19).

In June 1859, Chief Justice Field married Sue Virginia Swearingen, whose moderating influence would prove of great benefit to the furtherance of his judicial career. The couple had no children, and their marriage endured until Field's death in 1899. Upon their arrival in Washington in 1863, the Fields quickly became a regular feature at Washington's semi-official social functions, where Field's eventful life in California and his unlimited capacity for embellishment provided an abundance of lively anecdotes with which to entertain and amuse his fascinated listeners.

Field's linguistic skills proved to be of equal benefit in his duties on the Court. His judicial opinions abound in pithy, often blunt analysis. His majority opinions left no doubt as to the Court's intentions. His dissents, strongly reasoned and strongly worded, were noted for the discomforting effect they had upon his colleagues.

Courtesy of the Library of Congress

Senior Associate Justice Field (seated second from right) in the formal portrait of the Fuller Court of 1888. Also shown seated (from left to right) are Justice Joseph P. Bradley, Justice Samuel F. Miller, Chief Justice Melville W. Fuller, and Justice Lucius Q. C. Lamar. Standing (left to right) are Justice Stanley Matthews, Justice Horace Gray, Justice John M. Harlan, and Justice Samuel Blatchford.

Field was one of five justices selected to serve on the electoral commission set up to resolve the hotly disputed presidential election of 1876. The commission split along partisan political lines to install Rutherford B. Hayes, the Republican candidate, as president over his Democratic rival, Samuel J. Tilden, resulting in Field's heated epithets against his Republican counterparts on the commission—most notably, Justice Joseph P. Bradley. Field was conspicuous by his absence at the Hayes inauguration; his colleague and fellow Democrat, Justice Nathan Clifford, frequently referred to Hayes as the "illegitimate president" and refused to enter the White House during his tenure in office.

Though Field possessed an unforgiving memory, he channelled his energies toward a more productive end by immediately launching a high-profile campaign for the next Democratic presidential nomination. During this period of his political career, as well as after his unsuccessful bid for nomination, Field never allowed party differences to interfere with his judicial duties or the close working rapport he held in common with his fellow justices. This rapport is reflected in the frequency with which Field was called upon to write the Court's majority opinions in landmark cases. In *Reynolds* v. *United States* (1879), Field voted with the majority to declare polygamy a crime in one of the Court's first direct pronouncements on First Amendment guarantees of religious freedom. A subsequent and similar case, *Davis* v. *Beason* (1890), presented Field with an opportunity to expound his own strongly held convictions on the subject. His opinion for the Court condemned the non-traditional practice, saying: "Crime is not the less odious because sanctioned by what any particular sect may designate as religion." Field's conservative approach remained the Court's guiding principle on religious freedom until modified three quarters of a century later in *Torcaso* v. *Watkins* (1961), *United States* v. *Seeger* (1965), and *Welsh* v. *United States* (1970).

Field's economic philosophy was equally conservative, and he was known to be a champion of America's growing corporate structure. Big business could hardly have found a better friend on the Court than Field who felt unfettered enterprise was the primary source of national strength and prosperity. A consistent opponent to income taxes, which he viewed as a socialist tool, Field wrote a concurring opinion in 1895 striking down the government's first peacetime effort to impose such a tax: "The present assault upon capital is but the beginning . . . the stepping stone to others . . . till our political contests will become a war of the poor against the rich." It is an interesting coincidence that Field was joined in this view by his nephew, Justice David Brewer, who had been appointed to the Court five years earlier. Although their personal relations on the Court were not always close, as could be expected with an intemperate uncle providing abundant but frequently unheeded advice to his new charge, Field and Brewer tended more often than not to find

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Field *(continued from page seven)*

themselves on the same side of the issues coming before them. Field's growing infirmity further strained his relations with his nephew, and much of the rest of the Court, as Field entered his fourth decade on the Court. By 1895, he was in constant pain as a result of a poorly healed knee injury, and found it increasingly difficult to move about. This added inconvenience did little to improve Field's already limited capacity for tact and patience. On one occasion, Field's irritability manifested itself in a severe verbal assault against one of the Court's young pages. Chastised by his colleagues, Field was encouraged to go to the boy and apologize. Field composed himself, and in a gesture typical of his acute sense of justice, replied: "No! You say I insulted him. I'll make the apology as good as the insult." He then called the boy into the conference room and apologized to him there before his fellow justices.

Courtesy of the Library of Congress

An 1890 etching of senior Associate Justice Field.

By the 1896 term, Field's powerful physique had long since given way to his years, and his normally alert mental processes had begun to fail so noticeably as to become a source of public concern. His fellow justices determined it was time that they intervene to persuade Field to resign, and delegated the responsibility of broaching the subject to Justice Harlan. Chief Justice Charles Evans Hughes described the incident in later years:

> *I heard Justice Harlan tell of the anxiety which the Court had felt because of the condition of Justice Field. It occurred to other members of the Court that Justice Field had served on a committee which waited upon Justice Grier to suggest his retirement and it was thought that recalling the incident to his memory might aid him to decide to retire. Justice Harlan was deputed to make the suggestion. He went over to Justice Field, who was sitting alone on a settee in the robing room apparently oblivious to his surroundings, and after arousing him gradually approached the question, asking if he did not recall how anxious the Court had been with respect to Justice Grier's condition and the feeling of the other justices that in his own interests and in that of the Court he should give up his work. Justice Harlan asked if Justice Field did not remember what had been said to Justice Grier on that occasion. The old man listened, gradually became alert and finally, with his eyes blazing with the old fire of youth, he burst out: "Yes! And a dirtier day's work I never did in my life!" That was the end of that effort of the brethren of the Court to induce Justice Field's retirement.*

Field remained on the Court through November 30, 1897, setting a record for tenure of service exceeded only recently by Justice William O. Douglas. He had served thirty-four years, eight months, and twenty days. Born November 4, 1816, Field had lived a long and eventful life, which ended in his eighty-fourth year on April 9, 1899. He was buried, following a simple ceremony at Washington's Rock Creek Cemetery under a monument inscribed "Justice of the Supreme Court for over thirty-four years."

For the Careful Reader

The Fall 1981 *Quarterly* inadvertently omitted credits for the photographs and illustrations which accompanied the articles. The Society gratefully acknowledges the assistance of the following:

Michael Evans, White House photographer
(photograph of President Regan and the members of the Court, page one);

Library of Congress
(sketches of Dr. Oliver Wendell Holmes, pages two and five; photograph of Holmes, page six; photographs of William Howard Taft, page eleven);

Harvard Law School Library
(Holmes' family portrait, page four; Holmes' bookplate, page six);

Mrs. Frances Ash
(photograph of Robert and Frances Ash, page seven);

Curator of the Supreme Court
(engraving of Chief Justice Taft, page eight; formal portrait of the Taft Court in 1925, page nine); and,

Office of the Librarian of Congress
(photograph of the Chief Justice accepting the Marshall volume from Dr. Boorstin, page twelve).

In response to several requests, the Society has arranged to provide for sale copies of the four available volumes of the Oliver Wendell Holmes, Jr. Devise *History of the Supreme Court.* For additional information on how to order these volumes, please contact the Society's offices, or telephone (202) 347-9888.

Jefferson *(continued from page three)*

laying down principles, setting limits, within which the Court would and could act. A skilled trial lawyer, Marshall was carefully separating legal from political matters. He was not, as some have supposed, simply avoiding an uncomfortable political confrontation with Jefferson. By the *Marbury* decision, Marshall announced in a statesmanlike manner that political questions would be kept away from the doors of the national courts where they did not belong, *unless* the constitutionally protected rights of an individual petitioner were violated. Then, if the case came before the appropriate court in the proper procedural way, the federal judiciary would act as the watch-dog and guarantor of such rights. His basic justification was that the dictates of the Constitution made the departments of government separate and independent, and that the actions of one should not overstep the proper boundaries of another; but of the legitimacy of those actions, the Constitution made the Supreme Court the ultimate judge.

A second illustration of Jefferson's efforts to meddle with the judiciary and politicize its normally independent functions can be seen in the trial of Aaron Burr, his former Vice-President, for treason against the United States. Few acts in the public career of Thomas Jefferson have so blackened his reputation and revealed his "darker side" than his relentless persecution of Aaron Burr, and his obsession to see him convicted and hanged for treason. Few acts of any President have so adversely reflected on the office of the presidency as did Jefferson's special message to Congress, on January 22, 1807 in which he named Burr as the prime mover in a conspiracy to sever the Union and attack Mexico. Well before Burr had been arrested and long before he had even been indicted or tried, Jefferson openly declared that his guilt was beyond question, and this on the flimsiest of hearsay evidence.

Reference to the Burr trial is relevant less to highlight the darker aspects of Jefferson's career and personality than to illustrate how his personal antagonisms could be turned into political and even judicial policies that threatened the independence of the judiciary, and which jeopardized the growing awareness of a distinct rule of law. Equally important, it emphasizes the masterful way in which Marshall dealt with this head-on confrontation with a President who sought to use his executive power to further vengeful ends against those he considered his political enemies. Burr was tried at Richmond before John Marshall in his capacity as circuit judge. Although George Hay, the United States attorney at Richmond, was nominally in charge of the prosecution, he was directed and guided personally by the President in his conduct of the trial. The full array of evidence, from his initial declaration of Burr's guilt to the collection of blatantly false affidavits, makes unpleasant

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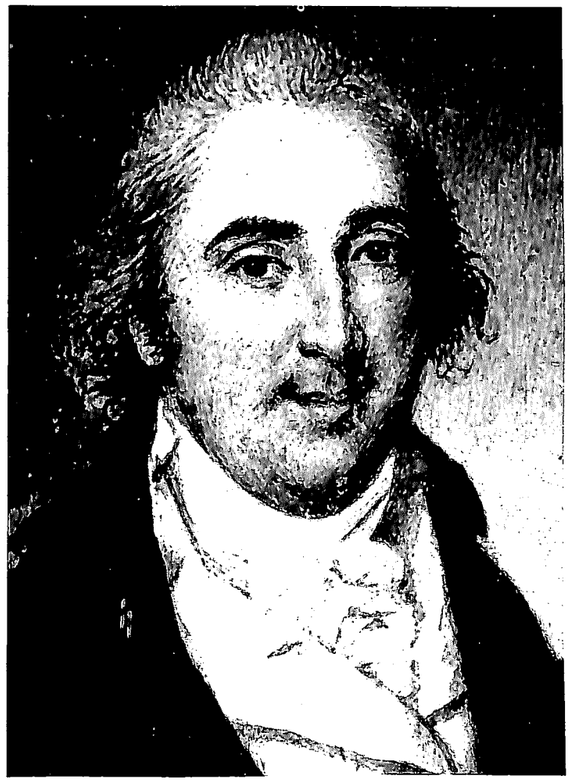
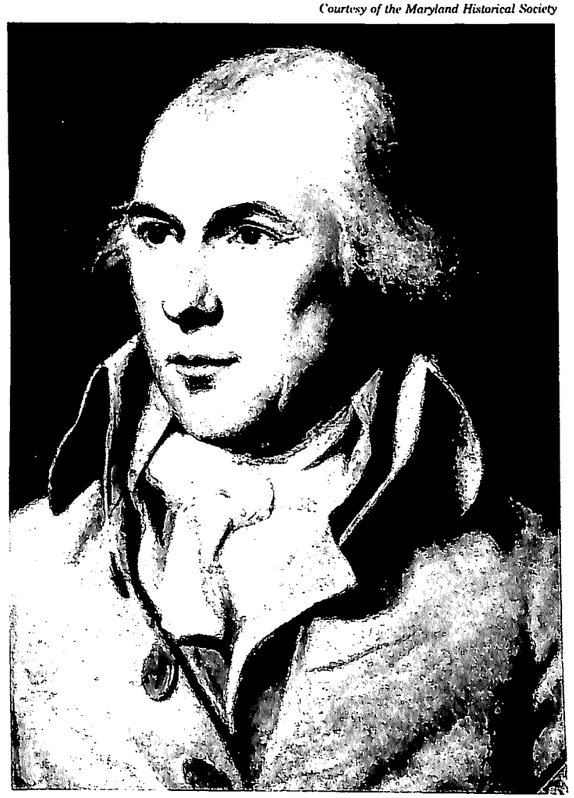
Courtesy of the Maryland Historical Society



Courtesy of the Maryland Historical Society



William Marbury (left) and James Madison (right), protagonists in the famous lawsuit bearing their names.

Jefferson *(continued from page nine)*

reading for those with preconceived notions about Jefferson's self-proclaimed moral virtues. On the other hand, the printed record of the trial, as it appears in the *Annals of Congress,* occupying some 400 pages of small print, illustrates how adroitly, and in the most painstaking and lawyer-like way, Marshall dealt with every motion, made for or against the accused. In the end, Burr was acquitted of the treason charge, and Jefferson was outraged to the point of asking Congress to impeach John Marshall.

What conclusions can be fairly drawn from these brief episodes in our history that may have relevance today? In spite of opposing onslaughts, Chief Justice Marshall was able to keep core segments of the constitutional process free from the intrusion of politics. Although the Constitution was adopted by the people and hence reflected the popular will, it embodies as Marshall once said, "certain great principles of justice universally acknowledged." The vital clue to the survival and success of the Marshall Court lies in its dedication to the ideas of the supremacy of law distinct from the self-interest or unpredictable actions of the executive and the legislature. More than one distinguished constitutional lawyer has observed that the legacy of that fundamental era in American constitutional development must first be comprehended if it is to be possessed, and not lost or destroyed.

Annual Meeting *(continued from page one)*

country and abroad as a Fulbright Fellow, a Rockefeller Foundation Scholar, and most recently, in connection with the National Endowment for the Humanities Summer Research and Teaching Program. Professor Abraham's topic for this year's Annual Lecture will be "Some Historical Reflections on the Theory and Practice of the Supreme Court Appointment Process."

The annual meeting of the general membership will follow the trustees' meeting, and will be held in the Supreme Court Chamber at 6:30 pm. A reception will be held in the East and West Conference Rooms beginning shortly after the meeting is adjourned, with dinner to be served in the Great Hall promptly at 8:00 pm.

Within the next several weeks, every member will receive an invitation and program providing additional details. Members are advised that, due to the limitations of the Great Hall, reservations for the reception and dinner will once again be limited. Beginning on Monday, March 29, reservations will be confirmed as payment is received, on a first-come, first-served basis, with reservations for no more than four persons accepted per member. For additional information concerning the Annual Meeting/Dinner, please contact the Society's Executive Offices, 1511 K Street, N.W., Suite 612, Washington, D.C. 20005, or telephone (202) 347-9888.

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