



THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

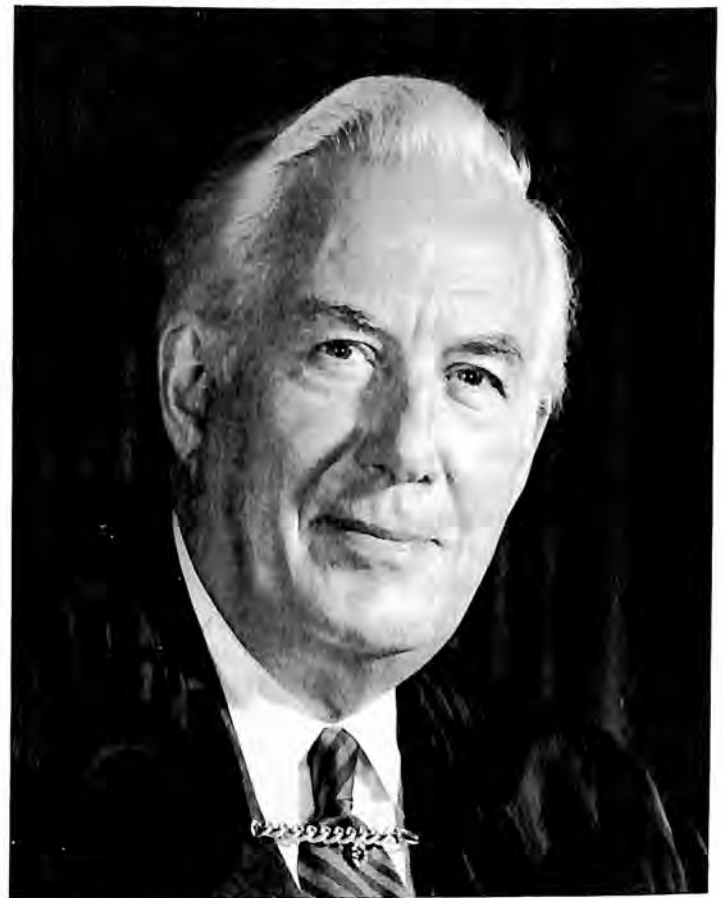
VOLUME VII

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Announcement of Chief Justice Burger's Retirement Takes Nation By Surprise; President Reagan Nominates Justice Rehnquist to Fill Center Chair



Associate Justice William H. Rehnquist



Chief Justice Warren E. Burger

After fourteen years on the Supreme Court as Associate Justice, William H. Rehnquist was nominated by President Reagan to be the Chief Justice of the high bench upon the retirement of Chief Justice Burger.

Born October 1, 1924 in Milwaukee, Wisconsin to William and Margery Rehnquist, the future Justice served in the U.S. Army Air Corps from 1943 to 1946 during World War II. Mr. Rehnquist was discharged with the rank of sergeant and at-

— continued on page three

On Tuesday, June 17, 1986, President Ronald Reagan took the nation by surprise, calling a 2:00 PM press conference to announce several pending changes on the Supreme Court bench. Chief Justice Warren Burger would be resigning said the President. Associate Justice William H. Rehnquist would be nominated to replace his colleague, Chief Justice Burger, in the Court's center chair. And, Judge Antonin Scalia of the U.S. Court of Appeals for the District of Columbia Circuit would be

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Judge Antonin Scalia Nominated to Succeed Associate Justice Rehnquist

Culminating a quarter century-long legal career which included six years in private practice with a large Ohio firm, government service during two presidents' administrations, ten years of teaching at top laws schools, and four years as a judge on one of the most important courts in the nation, Antonin Scalia has now been nominated by President Reagan to be an Associate Justice on the Supreme Court.

Born March 11, 1936 to Sicilian immigrant parents in Trenton, New Jersey, Antonin Scalia's biography reads like a classic American success story. As in many American immigrant families, education was held in high regard by the Scalia family. The parents of Antonin Scalia were both teachers — his mother a grade school teacher and his father a professor of Italian literature. After graduating from the Jesuit St. Francis Xavier High School in Manhattan where, according to recent press accounts, Mr. Scalia demonstrated academic promise, he went on to attend the University of Fribourg, Switzerland and, in 1957, graduated summa cum laude from Georgetown University, with an A.B., and as valedictorian of his class. From Georgetown, Mr. Scalia went to the Harvard Law School where, in 1959-60, he served on the law review as note editor. Taking his law degree in 1960, magna cum laude, Mr. Scalia was appointed a Sheldon Fellow by Harvard University for the 1960-61 academic year.

At the beginning of that academic year, on September 10, Mr. Scalia was married to Maureen McCarthy. The Scalias now have nine children ranging in age from the eldest, Ann (Forest), 24, to the youngest, Margaret Jane, age 5.

Over the next ten years, Mr. Scalia was admitted to the bars of two states: Ohio in 1961 and Virginia in 1970. From 1961 to 1967, Mr. Scalia practiced law as an associate with the Cleveland firm of Jones, Day, Cockley and Reavis. Following this period as a private attorney, Mr. Scalia began what would be a long attachment to teaching by joining the law school faculty at the University of Virginia for seven years, first, as associate professor and then, as of 1970, as a full professor. Taking leave from Virginia, 1971-1974, Mr. Scalia commenced his six years of government service as General Counsel in the Office of Telecommunications Policy under President Nixon, from March 1971 to September 1972, and then as Chairman of the Administrative Conference of the United States until August of 1974. From the Administrative Conference, Mr. Scalia moved to the Department of Justice to serve, until January 1977, as Assistant Attorney General in the Office of Legal Counsel under President Ford, a position which Justice Rehnquist had held from 1969 to 1971.

Mr. Scalia returned to academia in 1977 as Visiting Professor at the Georgetown University Law School; during the same year, Mr. Scalia was also a Visiting Scholar at the American Enterprise Institute where he has been the editor and a regular contributor to AEI's publication, *Regulation*, and a member of the Advisory Council for that organization's Legal Policy Studies Program.

Throughout the 1970s, articles written by Mr. Scalia were being published in a number of law reviews and journals around the country. His 1976 (28 *Administrative Law Review* 684) and 1979 (*Regulation* Nov/Dec) articles concerning the constitutionality of the legislative veto are of special interest. Another 1979 article, entitled "The Disease as Cure: In order to



Judge Antonin Scalia

get beyond racism, we must first take account of race." (*Washington University Law Quarterly* 147), also has been cited in recent press accounts.

Mr. Scalia's tenure in Washington was interrupted in 1977 when he left to teach at the University of Chicago until 1983, during which time he took leave to teach as a Visiting Professor at Stanford. On August 17, 1982, President Reagan appointed Mr. Scalia to the United States Court of Appeals for the District of Columbia Circuit.

Judge Scalia's articles and opinions from the bench reveal a strong intellect which clearly reasons his view of the Constitution. He is also well-known for having developed an expertise in administrative law. As a member of the American Bar Association, Judge Scalia served as Chairman of the ABA's Section of Administrative Law during 1981-82. His membership in the Administrative Conference of the U.S. and on the Board of Directors of the Center for Administrative Justice also reflect this long-standing interest of Judge Scalia.

In his paper entitled "Historical Anomalies in Administrative Law," delivered by Judge Scalia at The Supreme Court Historical Society's 1985 Annual Lecture (printed in the Society's 1985 *Yearbook*), he argued that the "irrational" development of the doctrine of sovereign immunity and independent regulatory agency law demonstrate that reliance upon the most recent precedent in law is inadequate to understanding the law. Judge Scalia concluded his lecture about the "anti-historical bias" which pervades "modern judicial culture" with the observation that "The result is a decisional literature that has all the historical underpinnings of the morning newspaper."

Society Adds to Its Portrait Collection

The Society has recently added two new portraits of former Justices to its collection for display in the Supreme Court Building. The new portraits are of former Justices Arthur Goldberg and Abe Fortas.

Tuesday, July 9, 1985, a brief, private ceremony was held for the unveiling of former Associate Justice Goldberg's portrait. The event was attended by Justice Goldberg, Chief Justice Warren E. Burger, several of the Justices, as well as personal guests of Justice Goldberg. Senator Edward Kennedy made a short appearance and brief speech.

The portrait was painted by Lucien LeBreton of New York City, and is a three-quarter length portrait. It was commissioned and paid for by The American Judges Association, which donated the portrait to the Society for display in the Supreme Court building. Associate Justice Goldberg served on the Court from October 1, 1962 until July 25, 1965. The portrait is currently on display in the exhibit area on the ground floor of the Court building.

The June 30th unveiling of the portrait of Associate Justice Abe Fortas marked the culmination of a successful fund-raising effort coordinated by the Supreme Court Historical Society. Contributions from Carolyn Agger Fortas, former law clerk of Justice Fortas, Society Board member David Lloyd Kreeger, and others made it possible for George Augusta to be commissioned to do the well-received Fortas portrait.

The ceremonial unveiling of the portrait by the Chief Justice Burger took place in the East Conference Room of the Supreme Court, followed by remarks given by the Chief Justice and by David Lloyd Kreeger who represented the Society on the occasion. A small, private reception followed in the East Conference Room with members of the Court, Mrs. Fortas and other invited guests in attendance.

The portrait of Justice Fortas, who served on the Supreme Court from October 4, 1965 to May 14, 1969, will be displayed in the lower exhibition hall near the Potter Stewart portrait, which was dedicated last year.



Following the unveiling of the Fortas portrait, Chief Justice Burger posed with Mrs. Carolyn Agger Fortas and the artist, George Augusta.



Justice and Mrs. Goldberg stand next to the Justice's portrait in the Court's East Conference Room.

Rehnquist (continued from page one)

tended Stanford University on the GI Bill, graduating with a B.A. and an M.A., Phi Beta Kappa, in 1948.

From Stanford, Mr. Rehnquist went to Harvard University where he received an M.A. in 1950. He then returned to Stanford to study law. A fellow law student of Mr. Rehnquist at Stanford was Sandra Day O'Connor. Taking his law degree in 1952, and inducted into the Order of the Coif, Mr. Rehnquist was admitted to practice law the following year.

From law school, Mr. Rehnquist came to Washington, D.C. to serve as a law clerk to Justice Robert H. Jackson during the 1952-53 term. In August of 1953, William Rehnquist was married to Natalie Cornell. They have three children, James, Janet and Nancy. The Rehnquists moved to Phoenix, Arizona where he was in a private practice for the sixteen years from 1953 to 1969. During that time, the primary focus of his practice was in the area of civil litigation. While living in Phoenix, Mr. Rehnquist was active in professional, civic and church affairs.

Mr. Rehnquist's years of government service began with his appointment by President Nixon in 1969 as Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. He served in this capacity until he assumed his seat on the Court on January 7, 1972 after being nominated to the Court by President Richard Nixon on October 21, 1971.

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Eleventh Annual Meeting Opens With Capacity Crowd For Annual Lecturer Daniel Meador of the University of Virginia



Before taking the podium, Professor Daniel Meador (second from left) met with Society Trustee John Shepherd (far left), Executive Director Cornelius Kennedy (second from right) and Governor Linwood Holton (far right), the Society's President.

Society members and their guests provided a capacity audience on Monday, May 12, 1986 to hear Professor Daniel Meador of the University of Virginia Law School deliver this year's annual lecture. Professor Meador, who spoke at the personal invitation of Chief Justice Burger, discussed the 1888 appointment of Associate Justice Lucius Quintus Cincinnatus Lamar.

Professor Meador's lecture was the opening event in a day-long schedule of activities comprising the Society's eleventh annual meeting. Speaking in the restored Supreme Court chamber in the U.S. Capitol building, Professor Meador discussed the historical ramifications Lamar's appointment held for the reconciliation of North and South during the post Civil War era. Professor Meador's approach to his topic was noteworthy for both building the interest of his audience throughout the hour-long lecture and for his inclusion of considerable illustrative detail without the benefit of notes. In one historical aside, for example, Professor Meador recounted for his listeners' benefit the composition of the Court and respective years of appointment of each of the justices on the Court during the late 1880s. The full text of Professor Meador's talk will appear in the 1986 *Yearbook*, to be printed this coming Fall.

Following the lecture, a number of members went to the Supreme Court for a special tour of the building. Conducted by an informative guide from the Court Curator's staff, the tour took members through areas of the building not included on most tours. Among these was the Justices' Dining Room where many of the Society's antiques are on display.

Those members who did not attend the Court tour visited the Society's headquarters building, immediately behind the Court's grounds, where an informal reception was held. The main floor of the Society's building has recently been furnished in the style of the early nineteenth century through special contributions donated by Ambassador Kenneth Rush, Mrs. Virginia Warren Daly, Mrs. Patricia Collins Dwinnell and the Bankers Trust Company.

At six o'clock, in the Supreme Court chamber where attorneys have addressed the Supreme Court since 1935, Governor



One of the members who attended the informal reception held in the Society's headquarters building following the annual lecture. The building's main floor is furnished in the early nineteenth century style.

Holton, the Society's President, convened the eleventh annual membership meeting. The Governor opened his remarks by extending a special acknowledgement for the efforts of Annual Meeting Chairman J. Roderick Heller, III, who supervised the planning of the day's events.

Turning to the business of the meeting, Governor Holton delivered a progress report on the Society's various projects — noting in particular the recent publication of the largest *Yearbook* in the Society's history and the first volume of the *Documentary History* series. Governor Holton also pointed out that the final installment on the loan taken out by the Society to partially fund its headquarters purchase had been retired. This, he remarked, was a significant step toward assuring the Society's future. Similarly, said Governor Holton, the increases in membership and kiosk revenues realized by the Society this past year "have placed within our reach the goal of meeting our annual expenses from operating revenues." The continuation of this financial trend, Governor Holton observed, would allow the Society to devote all of its grant solicitation efforts toward



Mrs. Virginia Warren Daly, the Society's Secretary, delivers the report of the Nominating Committee while Annual Meeting Chairman J. Roderick Heller, III follows the proceedings in his notes.

funding expanded historical projects.

Following his report, the Governor called on Mrs. Virginia Daly to deliver the report of the Nominating Committee. Mr. Frank Jones, the Society's Membership Chairman for Georgia and a partner in the Atlanta-based firm of King & Spalding, was nominated and elected for his first term as a trustee. Also nominated and elected for an additional term on the Board of Trustees were: Mrs. Gwendolyn Cafritz, Mrs. Patricia Collins Dwinnell, Mr. Francis R. Kirkham, Mr. William Barnabas McHenry, Mr. Richard A. Moore, Mr. David A. Morse, Mr. Walter S. Rosenberry, III, Mr. Bernard G. Segal, Mr. Obert C. Tanner, Miss Alice L. O'Donnell, Mr. David Lloyd Kreeger and Dr. Melvin M. Payne. At the Annual Trustees Meeting which followed the Membership Meeting, Ambassador Kenneth Rush and Governor Linwood Holton were nominated, respec-



Justice Brennan stops to speak with a member on his way to dinner in the Great Hall.



Members, and their guests, as usual, provided a capacity crowd for the annual dinner held in the Court's Great Hall.

tively, for new terms as Chairman and President, and were both subsequently elected by the Trustees.

Following the meetings, members adjourned to the Court's East and West Conference rooms for the Society's eleventh annual reception. Entertainment for this event was provided by the U.S. Army Band ensembles. At 8:00 PM, members gathered in the Great Hall of the Supreme Court building for the annual dinner where they were treated to an after-dinner performance by the Army's Strolling Strings and the U.S. Army Chorus.



The U.S. Army Chorus provided entertainment at the annual dinner.

William Rufus Day: Lawyer, Statesman, Justice

Editor's Note: The editor would like to thank Jerry Gundlach, a student intern, for his assistance in researching this article.

On the night of February 15, 1898, the battleship *Maine* blew up in the Havana harbor. Sentiment in the United States immediately rose to near fever pitch. Fanning the fires of public opinion, the headlines of Randolph Hearst's paper, *The Journal*, told its readers "The *Maine* is destroyed by treachery"; "Maine split in two by an enemy's infernal machine"; and "Remember the *Maine*, to Hell with Spain". The last headline became the rallying cry of the American public who had watched the war between Spain and Cuba over the last three years with increasing interest and anxiety. Congress, reflecting the popular opinion of the time, was ready to declare war almost immediately after the incident had been reported, but the President, William McKinley, and the First Assistant Secretary of State, William Rufus Day (who was the de facto Secretary of State), both advocated mediation with Spain rather than an armed conflict. Thus it was that two men from a small town in Ohio stood at the vortex of a storm that would signal the unravelling of the Spanish colonial era, and the entrance of the United States as a world power complete with a tropical empire she had wrested from the Spanish crown.

The personal history of William Rufus Day is that of an unassuming man almost reluctantly being catapulted into places of power and prestige. Born in the small town of Ravenna, Ohio to a respected family with New England roots, Day was heir to the Puritan ethic, small-town respectability, industry, the Republican Party and a legal tradition. He spent little time in promoting himself, but his ability, loyalty and dedication resulted in his serving as a lawyer, Ohio state judge, Assistant Secretary of State, Secretary of State, Chairman of the Commission negotiating the Treaty of Paris at the close of the Spanish-American War, United States Circuit Judge and Justice of the Supreme Court of the United States.

Judge Day, as William Rufus Day later was commonly called, was born on April 17, 1849, to a family with jurist traditions. His mother, Emily Spaulding Day, was the granddaughter of Chief Justice Zephania Swift of Connecticut, and the daughter of Rufus Spaulding, who pursued a career as a lawyer and eventually served as an Ohio Supreme Court Justice. Day's father, Luther, was also a lawyer by profession and served as Chief Justice of the Ohio Supreme Court. It seems that Day's choice to enter the legal profession was almost a foregone conclusion.

Day spent his childhood in Ravenna, a small, but prosperous town thirty miles southeast of Cleveland. The political furor of the Civil War era created many changes in the town. Most of its residents found themselves on the side of the Free-soilers, and after the passage of the Fugitive Slave Act, most of the hitherto loyal Democrats changed their allegiance to the alternative anti-slave Republican Party. Day's family were among those who joined the ranks of the infant Republican Party. In payment for political loyalty, William Day's maternal grandfather, Rufus Spaulding was nominated to run for a seat in Congress, and his father was appointed Chief Justice of the Ohio Supreme Court.

Day graduated from the Ravenna high school at the age of 16 and in September of 1866 entered the class of 1870 at the Uni-



Associate Justice William Rufus Day
(1903 - 1922)

versity of Michigan in Ann Arbor. There is no indication that his four years of college were marked by any particular triumphs. Indeed, he admitted years later while serving as a Justice of the Supreme Court of the United States and being seated next to the President of the University, Harry Hutchins, who had been in his graduating class, that "I find myself nearer the head of the Class of '70 than I ever succeeded in getting while in the University."

Upon his graduation from Michigan, Day returned home to Ravenna where he read law in a local judge's law office for a year. In 1871, he returned again to the University of Michigan to spend a year in the Michigan Law School. In the spring of 1872 Day decided to strike out on his own, and moved to Canton, Ohio where he spent the next twenty-five years of his life as a trial lawyer and partner in the city's leading law firm, Lynch and Day. During this period, Day married, established a respected place in the legal and political community, and perhaps most important for his future, formed a close friendship with a fellow Canton lawyer, William McKinley.

Day's law partner, William S. Lynch, introduced him into the Canton community providing the local contacts that enabled Day's personal career and the partnership, to prosper. Day specialized in criminal law, earning himself a reputation as a shrewd trial lawyer. Lynch pursued corporate law, sitting on several corporate boards. The firm represented dozens of large and small corporations, including railroads, banks, mines and utility companies, and many of their corporate clients would grow to become companies of national importance.



The front page of *The World* trumpeted the anti-Spanish sentiments evoked by the *Maine* disaster. Day's able handling of this and other incidents as Secretary of State led to his appointment to the Court in 1903.

Lynch was also responsible for introducing Day to Mary Elizabeth Schaefer, who became his wife in August of 1875. This marriage lasted thirty-seven years, until Mary's death in 1912. They were the parents of four sons, William L., Rufus, Stephen and Luther. According to one of his colleagues, the "... domestic relations of Judge Day were exceptionally happy. He was a devoted husband and father. He also had many friends, not because he made a conscious effort to gain them, but because

he was innately considerate of others and also inspired confidence."

Both Lynch and Day were interested in politics and Lynch ran against Major McKinley, a Civil War hero, in two consecutive elections for prosecuting attorney of Stark County. Lynch was defeated in both elections but naturally in the business of campaigning, Day and McKinley became acquainted.

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Day (continued from page seven)

Day and McKinley had several things in common: both had married daughters of established Canton families, both were active in Republican politics, and both were interested in the law. A strong and enduring friendship developed between the two men which lasted throughout their lives. Loyalty was one of Day's strongest traits. His intense loyalty was evident in his devotion to McKinley. Even after McKinley's assassination, Justice Day continued to observe the anniversary of McKinley's birth by distributing carnations to his brothers on the Supreme Court Bench. Justice Brandeis commented that he felt this showed "a rare loyalty of one man to another, a loyalty that was present in small as well as important matters."

Physically, Day was a small man with a rather frail constitution. He suffered from several serious illnesses during his life and took frequent vacations in an attempt to renew himself. He was described as "rather above the average height, several accounts say he was about 5 feet 6 inches tall, thin, with a scholar's face and the old-fashioned scholar's shoulders, light complexion, reddish-brown hair and mustache, and brown eyes which added to the power in the lines of his face when they were not covered by his eye-glasses . . . he had a low, but distinct and pleasing voice and a simple and courteous manner . . . he looked like a gentle old-fashioned professor." Day did not pursue many leisure activities. According to his son Rufus most of his evening "relaxation" reading was comprised of the *Michigan Review* and other serious works. He did some bass fishing, played an occasional game of golf and enjoyed a polite game of baseball when his health permitted. His main leisure activity was the national pastime — baseball, and he was reported to have missed very few games while in Washington, often going directly from the Court to the ball park.

Day's son Rufus related an interesting anecdote regarding his father's passion for baseball. "In the fall of one year, a case came up in Court which didn't involve very much — not of human interest, legal principle, or money. Suddenly the reporters noticed a great deal of activity on the bench. They thought that they had overlooked some great constitutional issues, but they discovered that Judge Day had received the World Series scores and was passing them among the justices." Several sources refer to Justice Day's penchant for keeping abreast of the baseball scores and the incident related above was apparently not an isolated one. Indeed, it was reported that he sent notes to his other brethren while on the bench apprising them of the scores and even making comments on the standings of the teams for those less knowledgeable, and one assumes, less interested, in the subject.

Throughout his career, Day's rather mild manner and appearance belied not only his wit, but his active and able intellect. During his years in Canton, Day was called upon to represent many corporate clients. Senator Fairbanks of Indiana later told a story of Day's encounter with some Boston lawyers over the question of control of an Ohio railway.

According to Fairbanks, seven or eight of Boston's "finest" had been employed by the bondholders and would-be "re-organizers" against the "country lawyer", William Day, who represented the local stockholders and management of the railroad. For the first few days, the Bostonians made many motions and suggestions that were patently unfair to the current

owners, and made humorous allusions to the dull wit of the country lawyer. During this stage of the trial, they outlined their entire plans for reorganization and committed themselves to a procedure which would leave Day's clients "out in the cold."

On the fourth day, according to Senator Fairbank's account,

. . . the country lawyer came forward and modestly interposed a few objections in the interest of his clients. The Boston crowd attempted to throw him down with a rush, but he quietly plunged his spear into the weak spots of the armor of everyone of them and drew blood at every thrust. Before the day was over he had them all thoroughly demoralized and quarreling among themselves, while he submitted a few motions to the Court which were immediately sustained. The result . . . was that when the case was concluded the country lawyer walked off with the whole thing, leaving the lights of the Boston bar in a semicomatose condition and wondering what had happened to them. The Senator says it was as keen and complete a case of legal strategy as he has ever known in his long practice at the bar, and that the country lawyer was William R. Day of Canton, Ohio, now secretary of state and a member of the peace commission.

Day's practice prospered, and he earned approximately \$15,000 per year in the 1890's. He was actively involved in the political affairs of the area and continued to support his friend William McKinley in his career. At the age of 34 McKinley was elected to the U. S. House of Representatives and throughout his career, McKinley called upon Day for legal, personal and political advice. Day took an active part in McKinley's presidential campaign in 1896.

In 1893, while serving as Governor of Ohio, McKinley experienced serious financial problems. The crisis was precipitated by the bankruptcy of Robert L. Walker, "whose notes McKinley had endorsed to the extent of \$130,000". Day, aided by Myron T. Herrick, and H. H. Kohlsaat came to McKinley's aid, acting as his personal counsel. McKinley turned over all his personal property to the men who acted as trustees. His estate alone was not sufficient to honor all the debts, so in order to satisfy the demands, the men raised money from wealthy donors and paid all the notes "taking care that the Governor should not know even the names of the contributors".

Despite his involvement in politics, Day was reluctant to be a candidate for any public office. In 1886, he was drafted by both the Republican and Democratic parties to serve as Judge of the Court of Common Pleas. He resigned his post after only six months, claiming financial hardship as the reason. After his death, newspaper reports said that he had found the life of a judge distasteful, but his brother, David Day, confirmed that the reason had been financial.

In 1889, President Harrison nominated Day for a United States District judgeship. The Senate confirmed the appointment, but Day was unable to accept it because of illness. At this time Day left Ohio for a prolonged vacation in an effort to regain his health.

William McKinley won the presidential election of 1896 and many felt that Day's long friendship and political assistance would entitle him to claim any position he desired in the new



President McKinley (far left) meets with his Cabinet in 1898. Day (seated center, facing McKinley) served as Secretary of State.

administration. Many rumors linked Day with Justice Department positions, most notably Attorney General, but the rumors were unfounded.

The position of Secretary of State was filled by Senator John Sherman, the senior Senator from Ohio. Sherman's vacated seat was filled by appointment from the Ohio legislature, by McKinley's political manager, Marcus Hanna. The change smacked of a political deal, and there was much criticism that Sherman had been lured out of his Senate seat with the bait of the Secretariat. Whatever the reasons were, the end result was indeed unfortunate. Sherman's mental abilities had deteriorated to the point where he was not only ineffective, but a liability. To remedy the situation, McKinley announced Day's appointment to the position of First Assistant Secretary of State on April 23, 1897. This appointment "confounded Washington officialdom for a time, until they came to know that in the slight, silent figure of Day, clothed with a dignified reticence and distinguished by amazing tact and ability, the President had found a man who could be relied upon in any emergency."

As First Assistant Secretary of State, Day found himself in a very uncomfortable position. Sherman had become so enfeebled that he was unable to make good decisions. He frequently advocated several contradictory policies at the same time. Coupled with these problems were the twin barbs of complete unawareness of his inadequacies, and personal pride. Most of the diplomatic corps were cognizant of the situation and paid token courtesy visits to the Secretary, while attempting to pursue their business with the reticent Day, who had become even more withdrawn because of the discomfort of the situation with his superior. Day was also painfully aware of the inadequacy of his past career experience for the demands of his current post.

As Second Assistant Secretary of State, McKinley appointed Alvie A. Ade, "an utterly indispensable career official who spent more than forty years mastering the nuances and minutiae of diplomatic detail." Ade was a very capable man, but he was stone deaf. One of the diplomats on Embassy Row expressed his frustration in dealing with the State Department by saying: "I am at a loss about conducting business with your government. The head of the Department knows nothing; the First Assistant says nothing; and the Second Assistant hears nothing."

Sherman's disability became a serious problem and his garrulous nature further complicated the situation. As a result of several bad experiences, Day and Ade stopped trying to brief him and work with him on current affairs. Because all the real decisions were being made and implemented by Day and Ade, Sherman was essentially unaware of the actual business of the State Department. This situation led to embarrassing moments. Early in the summer of 1897 Sherman unequivocally assured the Japanese Minister that the United States had no intention of annexing the Hawaiian Islands, just as the State Department finished its work on the annexation treaty.

By the end of 1897 Day and Ade had determined that just leaving Sherman uninformed was not enough. In the summer of 1897 Sherman held a press conference in which he managed to insult the British and the Japanese and antagonize the Spanish. Even leaving Sherman alone in public became a worry. Years later, in 1910, Justice Day admitted in a conversation with President Taft, recounted by his military aide, Archibald Butt, how serious the problem really was.

(continued on next page)

He [Justice Day] told the President that Sherman's mind was infinitely worse than the public supposed it to have been. Day never dared leave him alone for a minute and always attended the cabinet meeting with him. It was published at the time and was taken as a joke, said Justice Day, but he did once decide to declare war against Austria [while walking] between the State Department and the White House. Didn't Mr McKinley put him in the Cabinet just to make a place in the Senate for Mark Hanna? innocently asked Mrs. Day. My dear, said her husband, there are some things we do not admit even to ourselves.

Disability in the Secretary of State is not an easy situation at any time, but it was particularly difficult in early 1898 when the war in Cuba began to heat up. The Cubans had been conducting guerrilla warfare against the Spaniards for some time. By the end of 1896, the Spanish had sent approximately 150,000 troops to Cuba, of which 50,000 had been killed, and 50,000 disabled by injuries or disease. By 1898, fanned by the inflamed rhetoric of William Randolph Hearst's *Journal* and Joseph Pulitzer's *World*, American sentiment was running strongly in favor of the Cuban rebels. Reports of cruelty and excesses were reported daily in the newspapers, as they endeavored to increase their sales and circulation by using sensational stories. Both papers suggested that the administration's reluctance to intervene in Cuba was due to McKinley's lack of manhood.

Americans had vastly divergent views about intervention in the conflict. American business interests in Cuba were estimated at approximately \$50,000,000. Many of the investments were related to the sugar industry which was of course severely crippled by the continuing warfare and the Spanish blockade of the ports. Opinion was split between businessmen: some favored action regardless of the consequences as being preferable to the slow but inexorable loss of assets, while others feared intervention would result in increased and irreparable losses. A large group of Cuban refugees, called the Cuban Junta, pressed for intervention. Spurred on by dreams of expansion and world power, Big Navy men like Assistant Navy Secretary Theodore Roosevelt and his circle of Large Policy (non-isolationist) advocates urged action of any sort. The Anti-Imperialist Leaguers like William Jennings Bryan and Mark Twain lobbied against such intervention.

At the center of the maelstrom of sentiment stood Day and McKinley. During the presidential campaign of 1896, McKinley's primary campaign promise had been the restoration of the national economy. The Cuban issue had not been mentioned directly. The Republican Platform clearly favored Cuban independence from Spain, as well as enlargement of the Navy, and a firm vigorous foreign policy to guard American property and lives in all parts of the world. In addition, it advocated expansion to include purchase of the Danish West Indies, annexation of the Hawaiian Islands and construction of an American-owned Nicaraguan canal. McKinley himself, however, had not made these issues a central part of the campaign, and did not have a firm foreign policy.

By early 1898, the treaty of annexation for Hawaii had been drawn up and executed, but the administration had taken no firm position on the other expansionist issues. Day saw his role



The July 9, 1898 issue of *Judge* depicts "The Spanish Brute" committing atrocities against American soldiers following the Maine incident.

as being that of an adviser, rather than a policy maker, and he sought to carry out McKinley's policies, rather than create them. Both men were conservative and reluctant to be drawn into an armed conflict and repeated efforts were made to maintain peaceful relations with Spain, as well as to mollify the American public who were becoming increasingly strident in their demands for intervention. On February 8, 1898 an incident occurred which further intensified American feelings against the Spanish.

The *New York Journal* printed a letter purported to be written by the Spanish Minister Dupey de Lome to Mr. Jose Canalejas, a Spanish agent in Havana. In the letter, which had been written in December of 1897 as a confidential missive, the Spanish Minister commented on McKinley's annual message, making many insulting references to McKinley himself. Printed in its entirety in the February 8 editions, it infuriated the American public. On the morning of February 9, a Junta-affiliated lawyer, John McCook, who worked as a lobbyist for American business interests in Cuba, brought the original de Lome letter to a very glum Judge Day. It was now up to Day to try and prevent an international incident. Ever thorough and prudent, Day spent the next few hours authenticating the handwriting of the letter, by comparing it with documents formally executed by de Lome. Finally, convinced that the letter was in fact genuine, Day took the highly unusual step of calling in person at the Spanish embassy.

(Part Two will be published in the next edition of the *Quarterly*.)

New Members

New members who have joined the Society between February 1, 1986 and June 30, 1986:

Arizona

Thomas Chandler, Tucson
Richard J. Gonzales, Tucson
Russell A. Kolsrud, Phoenix
Robert A. May, Tucson
Roger C. Mitten, Phoenix
Paul G. Rees Jr., Tucson

California

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Burger *(continued from page one)*

nominated to become the Court's newest Associate Justice.

The press conference followed a May 27, 1986 meeting between President Reagan and Chief Justice Burger during which the Chief Justice informed Mr. Reagan of his intention to retire from the Court. Citing the pressing demands of his role as Chairman of the Commission on the Bicentennial of the U.S. Constitution, Chief Justice Burger asked to be excused from his duties as Chief Justice at the end of the Court's current term.

Though four presidents have occupied the White House during his tenure, for the over sixty million Americans born since his 1969 appointment, Chief Justice Burger's resignation marks the first transfer of leadership in the judicial branch of government in their lifetimes.

Chief Justice Burger was nominated by President Richard Nixon on May 21, 1969 to replace retiring Chief Justice Earl Warren. He was confirmed by the Senate on June 9, 1969 by a vote of 74-3 and took the judicial oath on June 23rd of that year.

Prior to his elevation to the Supreme Court, Chief Justice Burger devoted sixteen years to public service, beginning with a 1953 appointment as Assistant Attorney General of the United States. Three years later, in 1956, President Eisenhower named him to the U.S. Court of Appeals for the District of Columbia Circuit where he served until his 1969 appointment to the high bench.

In addition to his career in public service, Chief Justice Burger had acquired significant legal experience in private practice before joining the Court. Subsequent to graduating magna cum

laude from the St. Paul College of Law (now Mitchell College of Law) in 1931 he joined a respected Minnesota law firm in which he practiced until 1953. Concurrently he taught law part time at his alma mater from 1931 until 1948. Today he serves as a Trustee Emeritus of the College.

Chief Justice Burger married Elvera Stromberg in 1933. They have two children, Wade Allan Burger and Margaret Elizabeth Burger (now Mrs. Edward Louis Rose). Chief Justice Burger himself is the fourth of seven children born to Charles and Katherine Burger. His parents were Swiss and German immigrants who settled in St. Paul, Minnesota prior to the future Chief Justice's birth on September 17, 1907.

Chief Justice Burger's retirement marks an end to the longest tenure of any twentieth century Chief Justice. During his service on the high court, he devoted considerable effort toward administrative reforms both for the Supreme Court and the federal judiciary as a whole. He has promoted these reforms in coordination with fulfilling his statutory responsibilities as presiding officer over the Judicial Conference of the United States and as Chairman of the Board of the Federal Judicial Center.

Chief Justice Burger has said that the preparations for the celebration of the bicentennial of the Constitution will occupy most of his time during the coming year. However, he is expected to continue his involvement with the Institute of Judicial Administration, Project '87 and the Supreme Court Historical Society — all of which have named him as their Honorary Chairman. Chief Justice Burger will also begin serving as Chancellor of the Marshall-Wythe Law School in Williamsburg, Virginia in early 1987.

Supreme Court Historical Society

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