



THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## The Investiture of Chief Justice Rehnquist and Associate Justice Scalia

Friday, September 26, 1986 marked the investiture of the sixteenth Chief Justice and also the 103rd member of the Supreme Court of the United States. In ceremonies at the White House, William Hubbs Rehnquist and Antonin Scalia took the constitutional oath prior to being sworn in as Chief Justice and Associate Justice of the Supreme Court respectively. With President Reagan looking on, retiring Chief Justice Warren E. Burger administered the oath to both candidates.

President Reagan, saying that "today we mark one of those moments of passage and renewal that has kept our republic alive and strong," praised Chief Justice Rehnquist and Justice Scalia noting that they were "brilliant" jurists. The President also paid tribute to retiring Chief Justice Burger saying that his seventeen years in office were "a monument of integrity and of

dedication to principle, and especially to the judiciary itself." Chief Justice Burger noted that changes in the membership of the Court would not disrupt the routine of the Court and that as an institution the Court is committed "to continuity" and to the interpretation of the Constitution as a "living document."

The constitutional oath taken by Chief Justice Rehnquist and Associate Justice Scalia at the White House is taken by all federal employees and is spelled out in the Constitution itself, hence its designation. In this oath, the nominee swears to "support and defend the Constitution of the United States against all enemies, foreign and domestic," and to "bear true faith and allegiance to the same. . . ."

After taking his constitutional oath, Chief Justice Rehnquist  
*(Continued on next page)*



Shortly after the investitures of Chief Justice Rehnquist and Associate Justice Scalia, the new Rehnquist Court posed for this informal photograph. Left to right are Associate Justices Sandra Day O'Connor, Lewis F. Powell, Jr., Thurgood Marshall, William J. Brennan, Jr., Chief Justice William H. Rehnquist, Associate Justices Byron R. White, Harry A. Blackmun, John Paul Stevens and Antonin Scalia.

**Rehnquist & Scalia** (Continued from page one)

expressed thanks to the President saying: "Mr. President, I am grateful beyond measure to you for affording me the opportunity to serve my country as Chief Justice of the United States. And I pray that God will grant me the patience, the wisdom and the fortitude to worthily follow in the footsteps of my illustrious predecessors in discharging the responsibilities of this office."

Justice Scalia thanked the President for appointing him saying, "I am very grateful and will do my best to live up to [your] confidence. . . . I have to thank my wife Maureen who's an extraordinary woman, and without whom I wouldn't be here, or if I were here, it wouldn't have been as much fun along the way. And I have to thank a lot of other people, going way back to teachers in Public School 13 in Queens." He remarked that he had "enormous personal regard for all current Justices," and that he looked "forward to working with them in our common enterprise for many years to come."

After the ceremony at the White House, the Justices took their judicial oaths at a ceremony in the Supreme Court Chamber. This ceremony set a precedent in the history of the Court, as it marks the first time that a Chief Justice and an Associate Justice took their judicial oaths in the same place, at the same occasion.

At 2 PM on the afternoon of September 26, 1986, with Chief Justice Warren E. Burger presiding over a special session of Court, William H. Rehnquist took the judicial oath requisite to enter upon his duties as Chief Justice of the United States. Chief Justice Burger, sitting in the center chair for the last time, opened the special session of Court. Attorney General Edwin Meese 3rd delivered to the Clerk of the Court, Joseph F. Span-



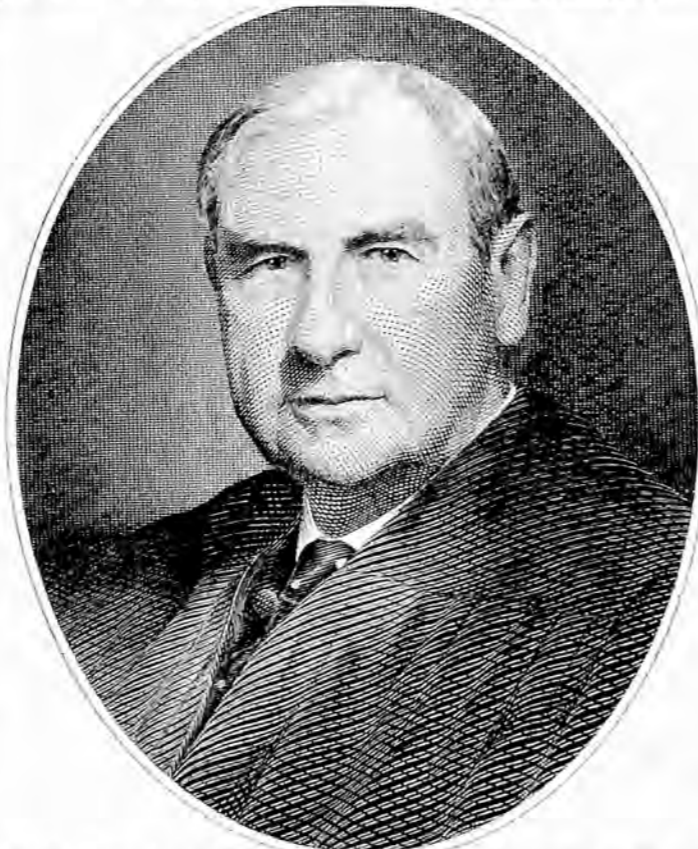
Chief Justices Edward Douglass White (left) and Harlan Fiske Stone (right) were the only two associate justices prior to Chief Justice Rehnquist to have been elevated to the center chair directly from the same bench.

iol, Jr., the parchment commissions signed by President Reagan calling for the appointment of William H. Rehnquist as Chief Justice of the United States, and Antonin Scalia as an Associate Justice. Mr. Spaniol read the commissions after which Chief Justice Burger called Justice Rehnquist from his usual place at the bench to come to the center chair and take the judicial oath.

The judicial oath, which is set out in an act of Congress, calls for the appointee to: . . . "solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding. . . ." All federal judges take this oath prior to assuming their responsibilities on the bench.

During this portion of the ceremony, Judge Antonin Scalia sat in an historic wooden chair in the well of the Court Room close to the Clerk's desk. This chair was used in the 19th century by Chief Justice Marshall when he presided over the Court. Lewis F. Powell, Jr., William H. Rehnquist, John Paul Stevens, and Sandra Day O'Connor all used the same chair as they awaited their swearing in as Associate Justices. Chief Justice William H. Rehnquist then called Judge Scalia to the center chair and administered the judicial oath to him. Upon the completion of the oath, Chief Justice Rehnquist wished Justice Scalia "a very long life, and a very long and happy career in our common calling." After this exchange, the Clerk of the Court announced: "May it please the Court, ladies and gentlemen, I have the honor to present the new Supreme Court of the United States."

Chief Justice Rehnquist became the third Chief Justice to be promoted directly from service as an Associate Justice, to serv-



Chief Justice Charles Evans Hughes also served as an associate justice, but his tenure on the high court was interrupted when he resigned to run as the Republican presidential candidate in 1916.

ice as a Chief Justice. His two predecessors were Edward Douglass White who took his oath as Chief Justice on December 19, 1910, after having served as an Associate Justice since 1894, and Harlan Fiske Stone who took his judicial oath on July 3, 1941, after having served as an Associate Justice since 1925. Chief Justice Stone took his oaths from a park commissioner in the Rocky Mountain National Park where he was vacationing when the Senate confirmed his nomination.

Two other Chief Justices came from the ranks of Associate Justices, but neither of them was serving as an Associate Justice at the time nominated as Chief Justice. The first of these

was John Rutledge who served as an Associate Justice for only one year, from 1790-1791. In 1795 he received an interim appointment as Chief Justice of the United States. He took his oaths and entered service on August 12, 1795, presiding over the Court and participating in several cases. However, the Senate rejected his nomination on December 15, 1795. Mr. Rutledge is the only individual in the history of the Court to have served without eventually being confirmed.

The other "promotion from within," after an absence from the bench, was that of Charles Evans Hughes. Chief Justice Hughes served as an Associate Justice from 1910 until 1916 when he resigned to run for President of the United States. Fourteen years later, in 1930, Charles Evans Hughes rejoined the bench, this time as Chief Justice. He served there from 1930 until 1941. Hughes to this day holds the distinction of being the only man to have served as an Associate Justice, leave the Court for an extended period, and later be confirmed as Chief Justice of the United States.

While these individuals represent the only promotions from within the Court that actually took place, there were at least two occasions when incumbent or former Justices were nominated and confirmed to serve as Chief Justice, but for some reason declined the appointment. The first was in 1796, when Justice Cushing was nominated and confirmed by the Senate to serve as Chief Justice. He declined the appointment, however, saying that his advanced age and ill health precluded his taking on the additional duties of the Chief Justice, but he continued to serve as an Associate Justice until his death in 1810.

The second was in 1800 when John Jay who was completing his second term as governor of the state of New York, was selected by President John Adams to serve again as Chief Justice to replace Oliver Ellsworth. He was nominated by the President on December 18, 1800 and was confirmed by the Senate the following day. He formally declined the appointment on January 2, 1801 saying that he had resigned in 1795 because he was doubtful that the Court would ever . . . "obtain the energy, weight, and dignity" . . . essential to its functioning as the . . . "last resort of the justice of the nation" . . . and that he saw no indication in 1800 that the Court had accomplished these goals.

According to the statistics there have been two other occasions on which any two members of the Court took the judicial oath at the same time. The first was on January 3, 1911, when Associate Justices Willis Van Devanter and Joseph Rucker Lamar took their judicial oaths in the same ceremony. The second was on January 7, 1972 when Lewis F. Powell, Jr. and William H. Rehnquist both took their judicial oaths in open Court. It is interesting to note that Chief Justice Rehnquist is not only the first person to serve on the Court to take his judicial oaths in two ceremonies where he was not the only member of the Court being sworn in, but he is also the first Chief Justice of the United States to take his judicial oath in ceremonies with an Associate Justice.

Usually the constitutional and the judicial oaths are taken on the same day, but there have been occasions when they were not. The Judicial Act of 1789 stipulates that "the associate justices shall have precedence according to the date of their commissions [or letters patent], or when the commissions of two or more of them bear date on the same day, according to the respective ages." This latter stipulation has been construed to apply to all federal judges as well.

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

## William Rufus Day: Lawyer, Statesman, Justice

**Editor's note:** [This is part two of this article; the first half appeared in Volume VII, Number 4 of the *Quarterly*.]

Day arrived at the Spanish Embassy the afternoon of February 9 with a copy of the offensive letter in hand, prepared to ask that Spanish Minister Dupey de Lome resign his post. Senor de Lome, when queried about the letter, admitted to writing it but said he disagreed somewhat with the translation. Day then asked for de Lome's resignation, but was informed by Senor de Lome that he had already cabled his resignation to the Spanish crown and would be leaving the city as soon as he could make arrangements for transportation.

The letter, which had been written shortly after McKinley's annual message to Congress, read in part as follows:

Besides the natural and inevitable coarseness with which he repeats all that the press and public opinion of Spain have said of Weyer, it shows once more that McKinley is weak and catering to the rabble and, besides, a low politician who desires to leave a door open to himself and to stand well with the jingoes of his party

After his discussion with de Lome, Day cabled the Ambassador to Spain from the United States, Mr. Woodford, to inform him that with de Lome's removal from his post in Washington the incident was "fortunately closed. . . Everybody I see seems well pleased with it, and no one wished trouble about a matter of this kind. If a rupture between the two countries must come, it should not be upon any such personal and comparatively unimportant matter."

Unfortunately for Day's peace overtures, the incident of the Battleship *Maine* took place only a week later. The ship had been sent to Havana at McKinley's orders and upon the advice of Consul-General Fitzhugh Lee, the American representative



Secretary of State William Rufus Day sits at a desk piled with the numerous foreign questions the United States faced during its emergence as a major power amid the world-wide imperialist expansion of the *fin de siècle*.

in Cuba, after serious rioting in Havana. The Cubans were protesting the Spanish promises of autonomy and were demanding nothing short of complete independence. On February 4, 1898 Day wired Lee to report the Secretary of the Navy felt that for health reasons the *Maine* should leave the harbor in Havana. Lee responded by saying he did not feel the health hazards were great and that he felt it was unwise to remove the *Maine* until another first-class battleship was able to replace her.

Lee's assessment proved inaccurate when little more than a week later, on February 15, 1898, the *Maine* was destroyed in an explosion. In addition to the ship, more than 250 men were lost. This incident, which was volubly and sensationally reported in *The Journal* and *The World*, infuriated the American public and even the Congress seemed frenzied. A commission was established to determine the cause of the incident, but the American public, encouraged by the reports of the yellow journalists, had already found the Spanish guilty.

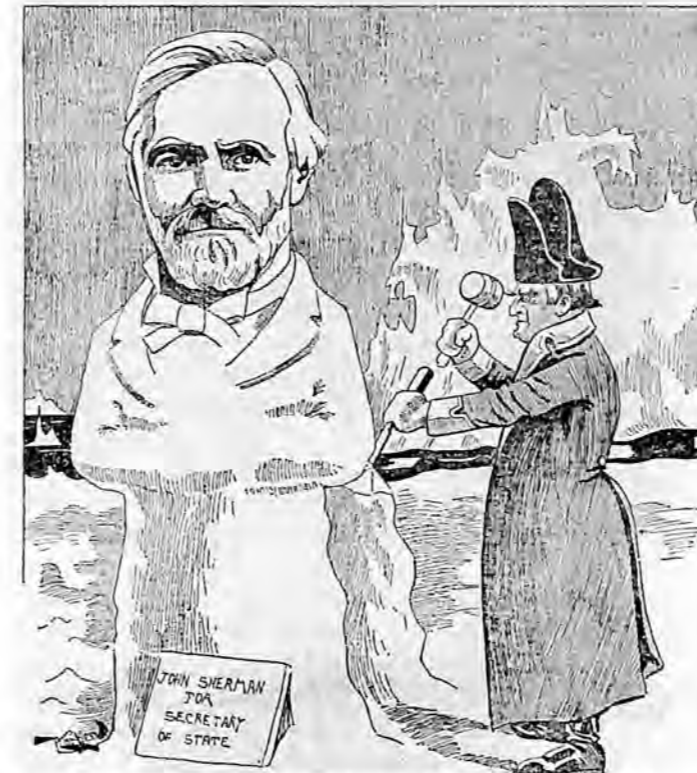
The American Commission reported that the *Maine* had been destroyed by a mine, but they were unable to name the culprits. The Spanish Commission later turned in a report which alleged that the ship had been destroyed following an explosion of undetermined origin in the forward magazine. It is generally believed the American report was correct, but responsibility has never been determined.

As soon as the findings of the American Commission were made public, the American people demanded war. "Remember the *Maine*" became the cry for a patriotic outpouring of tremendous proportions. Despite the public clamor, Day and McKinley attempted another peaceful solution. They asked for an armistice between Spain and the insurgents pending negotiations for a permanent solution through the good offices of the President of the United States. Spain refused to accept the terms as outlined and countered with proposals which would allow it to determine the degree of autonomy it would concede to the Cubans.

Day realized that war was inevitable, and privately summoned John Bassett Moore, a leading authority on foreign relations and international law, to meet with him and instruct him how to draft terms of war. After consultation with Day and Moore, the President was ready to submit the issue to Congress, which surely would have meant a declaration of war given the mood of the country, but Consul-General Lee asked for time to evacuate American citizens. During the interim, several of the European powers joined together and asked the Pope to intercede with the Queen of Spain to ask for a suspension of hostilities which she reluctantly agreed to. Angered by this interference, and sensing this was only another ploy for time, President McKinley went to Congress on April 11, 1898 suggesting forcible intervention as the only solution in the Cuban problem. He referred to the incident with the *Maine* as "a patent and impressive proof of a state of things in Cuba that is intolerable."

Two days later the House passed a resolution by a vote of 324-19, directing the President to "intervene at once to stop the war in Cuba with the goal of establishing by the free action of the people thereof a stable and independent government of

## A "COLD DEAL" FOR THE COUNTRY.



President McKinley, regularly depicted in Napoleonic garb in reference to his imperial policies and diminutive stature, carves a figurehead Secretary of State John Sherman from a block of ice. Sherman proved both unpopular and incompetent and was replaced by William Day in 1898.

their own on the island." That same day the Senate Committee on Foreign Relations passed a resolution demanding the immediate withdrawal of Spain from the island of Cuba and the recognition of the independent Cuban republic as currently organized. The added stipulation that the current Cuban republic be recognized placated those Senators who were opposed to American imperialism and who feared the United States would annex Cuba.

On April 19, the Resolutions were adopted, thus declaring war with Spain. As soon as the resolutions were passed, diplomatic relations were severed between the two countries and the American Ambassador, Woodford, was recalled from Spain. The North Atlantic Squadron under the command of Rear Admiral William T. Sampson, was ordered to blockade the northern coast of Cuba, while Commodore George Dewey was ordered from Hong Kong to Manila Bay to capture or defeat the Spanish fleet based in Manila.

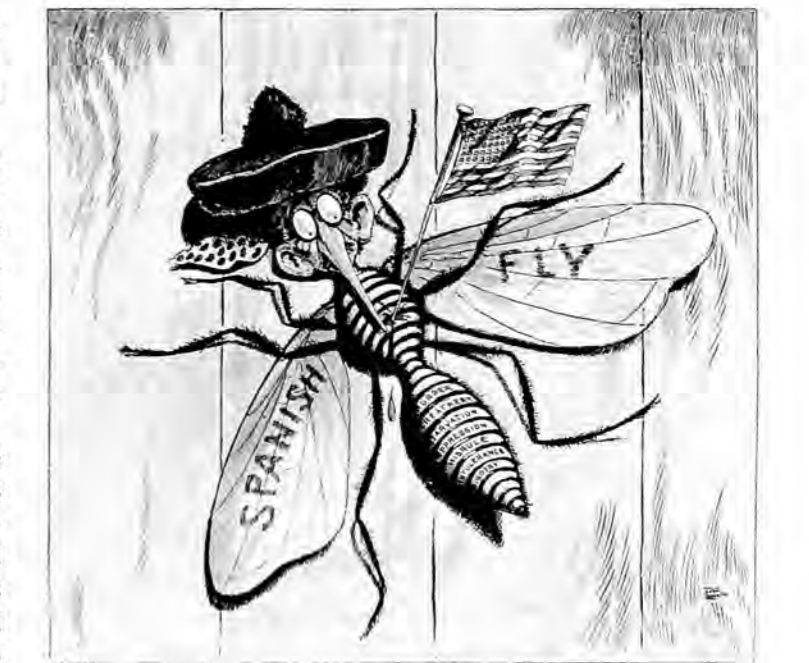
After issuing military orders, McKinley next undertook the important task of obtaining John Sherman's resignation as Secretary of State. The charade that had been conducted during the days of crisis before the war formally commenced could not continue any longer. There was apparently little love lost between the American public and Sherman who was perceived as being cold and unfeeling as well as incompetent. Upon securing Sherman's resignation, McKinley quickly appointed the reluctant Day to serve as Secretary of State. Day then asked that John Bassett Moore be appointed First Secretary of State, and that Alvee A. Adee retain the position of Second Secretary

of State. This gesture met with great approval because Moore, in addition to being an expert in international law, was a Democrat and it seemed a magnanimous gesture to invite him to serve at this critical time. Adee's continued retention was favored by those who wished to see career public service rewarded. Both appointments seem to indicate Day's sincere desire to surround himself with those most knowledgeable and capable of service.

Day found himself an almost lone voice of restraint during the period of expansionist fever that raged higher and higher as it fed upon great military victories such as Santiago and Manila Bay. It seemed that even the elements were on the side of the Americans, and battle after battle was won despite predictions that the Spanish Fleet would annihilate the largely outdated American Fleet. It seemed the Americans could do no wrong. The "splendid little war" was really over in a mere ten weeks but it produced larger-than-life heroes such as Admiral Dewey and Colonel Roosevelt whose fame long outlived the brief duration of the war itself. To many Americans the victories against seemingly overwhelming odds confirmed that God was on their side and in the words of the English hymn was indeed "Lord of our far-flung battle plan," . . . leading "forth in beauty all the starry band."

In seeming confirmation of the idea that "might makes right," even international opinion grudgingly swung to the

(Continued on next page)



PINNED!

*Vim's* jingo cartoon unflatteringly depicts the "Spanish Fly" pinned by the "Stars and Stripes." Written between the stripes on the fly's abdomen are "murder, treachery, starvation, oppression, misrule, intolerance and bigotry."

**Day** (Continued from page five)

Americans as the overwhelming military victories crippled the Spanish. By July of 1898 the international as well as the American press began to call for an end to the hostilities.

The Americans felt no compunction to limit the hostilities with Spain to Cuba and the Spanish fleet in the Philippines alone. After the surrender of Santiago, General Miles and 16,000 American troops moved into Puerto Rico and in two weeks took the island with casualties amounting to only three dead and forty wounded. The Spaniards finally asked the French government to authorize the French Ambassador to the United States to arrange the terms of peace. The negotiations resulted in a protocol issued August 12 which set the following terms: the immediate evacuation of Cuba and the relinquishment of Spanish sovereignty; the cession of Porto Rico [sic] and one of the Ladronez [islands off the west coast of Panama] by way of indemnity; the occupation by the United States of "the city, bay, and harbor of Manila pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines."

The protocol further called for a meeting by peace commissioners in Paris to finalize the terms of the peace in October of the same year. Day resigned from the Department of State to lead the American delegation at the Peace Conference. Although Day was a strong proponent of anti-Expansionist views, pressure from such leading American figures as Senator

Henry Cabot Lodge, Captain Alfred Thayer and Colonel Theodore Roosevelt was hard to counteract. Day favored retention of the port of Manila, but was against outright annexation. Day felt annexation ran contrary to America's commitment to self-government. In addition he expressed a concern in assuming responsibility for "eight or nine millions of absolutely ignorant and many degraded people." Although the language of this objection sounds reprehensible, it echoed Day's sincere belief that if the United States annexed these areas the American government must then be prepared to care for the people and provide economic and social aid. In Day's opinion, American control of an area should benefit the territory, in addition to providing economic advantages to the United States.

At first McKinley seemed disposed to retain the bay and city of Manila as a naval base and part or possibly all of the island of Luzon. But sentiment in the country was strongly in favor of complete acquisition. In addition, the British and the Japanese favored American acquisition. Day favored retaining control of only the northern islands, as he pointed out that the southern islands, particularly Mindanao, were of a different race and religion.

In Cabinet meetings he and several other Cabinet members had expressed the desire for a naval base only. McKinley said that "Judge Day only wants a hitching post." After the meeting adjourned Day pointed out that McKinley had not put Day's motion forward for a naval base. The President reportedly answered: "No Judge, I was afraid it would be carried."

After much consideration, McKinley finally instructed Day to call for the acquisition of all the Philippine Islands. The Treaty, as finally agreed upon, called for the complete independence of Cuba, the outright acquisition of Puerto Rico and Guam, and in return for a payment of \$20,000,000, the entire 7,000 islands that comprise the Philippine Islands. Day is credited with the idea of paying \$20,000,000 for the Philippines. How he determined the figure is not clear, but it is obvious that he felt better paying for it than taking it. There were many Americans who shared Day's opinions against acquisition, but the expansionists won the victory.

McKinley himself apparently struggled over the disposition of the Philippines. He defended his policy in a speech he made in an Episcopal church on November 21, 1899 where he explained his decision.

... I have been criticized a good deal about the Philippine business. I have but don't deserve it. The truth is I didn't want the Philippines, and when they came to us, as a gift from the gods, I did not know what to do with them. When the Spanish War broke out, Dewey was at Hongkong and I ordered him to go to Manila and to capture or destroy the Spanish fleet, and he had to; because, if defeated, he had no place to refit on that side of the globe, and if the Dons were victorious, they would likely cross the Pacific and ravage our Oregon and California coast . . .

When next I realized that the Philippines had dropped into our laps I confess I did not know what to do with them. . . . I went down on my knees and prayed Almighty God for light and guidance more than one night. And one night it came to me this way . . . (1) That we could not give them back to Spain — that would be cowardly and dishonorable; (2) that we could not turn them over to France or Germany — our commercial rivals in the Orient — that would be bad business and discreditable; (3) that we could not leave them to themselves — they were unfit for self-government — and they would soon have anarchy and misrule over there worse than Spain's was; and (4) that there was nothing left for us to do but take them all, and to educate the Filipinos, and uplift and civilize and Christianize them, and by God's grace do the very best we could by them . . .

The Treaty was signed on December 10, 1898 and was sent to the Senate for ratification on January 4, 1899. There was strong opposition in the Senate, led by Senator Hoar of Massachusetts, who said that acquisition of the Philippines was in violation of the spirit of the Declaration of Independence and the Constitution. William Jennings Bryan came to Washington and called on the Democratic Senators to ratify the treaty saying that the fate of the Philippines could be determined at the next Presidential election. When fighting broke out between American and Filipino Troops, the Treaty was ratified on February 6. The United States stood on the threshold of the twentieth century with an empire that spread from the Caribbean to the Pacific.

John Bassett Moore, who served as Secretary of the American Peace Delegation to the Peace Conference, later wrote that the Commission had been "singularly harmonious and agreeable . . . All my colleagues have distinctly risen in my estimate of them during these six weeks; and Judge Day, in particular, has shown great clearness, precision of views, and well-balanced judgment." Senator Gray of Delaware also served on the Commission and he made the following remarks about Judge Day: "No State in this Union could have contributed to that function of statecraft, a mind and a character more equipoised, settled, clear, and strong than was contributed by Ohio when she sent that quiet, sensible, strong statesman, William R. Day to Paris to conclude the treaty of peace. . . ."

With the conclusion of the Peace Conference in Paris, Day's career as a diplomat ended. Before going to Paris he had expressed to McKinley his desire to become a private citizen again, and he did return briefly to Canton and resume his law practice. There were rumors in Ohio that he would run for Governor or some other high political office, but Day denied them all and emphatically stated that he would not be a candidate for Governor. But on February 25, 1899, McKinley prevailed upon him to accept an appointment to the United States Court of Appeals for the Sixth Circuit. Day took his seat on the bench with two other Judges who would also later serve on the Supreme Court bench, William H. Taft and Horace H. Lurton.

The Sixth Circuit encompasses Kentucky, Michigan, Tennessee and Ohio. During his four-year tenure on the Court, Day wrote some eighty opinions. Most of the cases involved private litigation, and technicalities concerning rules of evidence and

(Continued on next page)



Secretary of State Day (seated, center) and President McKinley (standing, far left) observe as a member of the Spanish delegation signs the August 12, 1898 protocol which ended U.S. and Spanish hostilities.



"It won't come down." read the Puck cartoon caption depicting the U.S. flag over the Philippines. Despite some limited anti-expansionist sentiment, the public generally favored U.S. imperial claims stemming from the Spanish-American War and this popularity was reflected in the country's diplomatic policies.

**Day** (Continued from page seven)

procedure. In *Chesapeake and Ohio Fuel v. United States*, he dealt with public policy relating to the application of the Sherman Anti-Trust Act. In his opinion he expressed his view of the anti-trust law:

The statute is not limited to contracts or combinations which monopolize interstate commerce in any given commodity, but seeks to reach those which directly restrain or impair the freedom of interstate trade. The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge "trust" which shall control the production and sale of a commodity.

His decision was that the Sherman law prohibited all restraints of trade whether reasonable or unreasonable, a ruling which concurred with the Supreme Court's original rejection of the "rule of reason."

His service on the Court precluded Day's involvement in politics to any great extent. He did not participate in the campaign of 1900 when McKinley ran for reelection except for a brief speech in Canton on the eve of the election. He was also involved with Taft's appointment as Governor of the Philippines. Biographers differ as to whether he made the original suggestion that Taft be offered the position, but he at least encouraged Taft to accept the job.

In September of 1901, Day's close association with McKinley was ended by the President's assassination. McKinley was shot while attending the Pan-American Exposition in Buffalo, New York on September 6 by an anarchist. The President was standing in a receiving line and had just given a little girl the red carnation out of his buttonhole when an anarchist named Leon Czolgosz, gun concealed in a handkerchief, shot him twice. According to the account in *The New York Press* on September 7, only one bullet was removed, while the other remained in his body. At first the doctors thought that he would recover, but on September 14, 1901, McKinley died of complications.

Day was, of course, devastated by the murder of his friend. He made a speech on September 12 decrying the anarchists:

The advocates of its awful tenets must be kept from our shores; its principles must be torn, root and branch, from every foot of our domain, until its adherents learn that to attack the government through its highest official is one of the most heinous of crimes, sure to meet with swift and terrible retribution. Let there be no nook or corner of the civilized world in which it can hide and call itself safe.

Following McKinley's funeral, Day resumed his duties on the U.S. Court of Appeals. His influence in Washington had seemingly died with McKinley, but on January 29, 1903, President Theodore Roosevelt nominated Day to the Supreme Court of the United States to replace Justice George Shiras who was retiring. In a sentimental gesture, Roosevelt announced his candidate for the bench by addressing Day at a McKinley memorial meeting as "Mr. Toastmaster, Mr. Justice Day." The nomination was presented to the Senate on February 19, and confirmed on the 23rd. The appointment took effect on March 2, 1903.



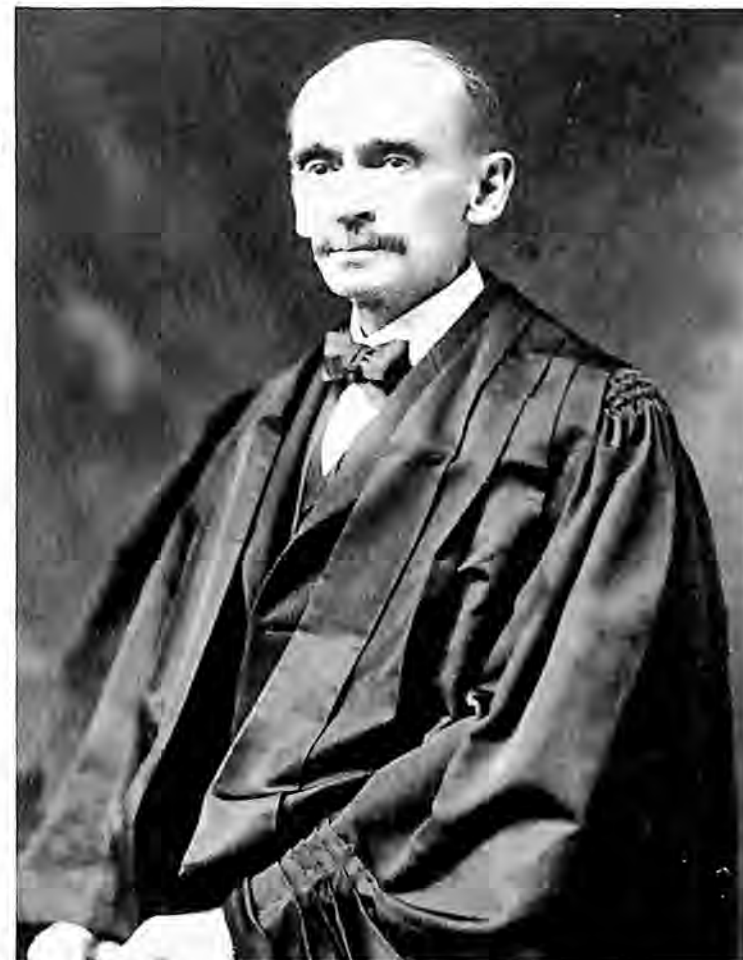
THE NATION MOURNS.

The Nation mourned the passing of President McKinley who was felled by an assassin in September 1901.

Apparently Day had not been Roosevelt's first choice as a candidate for the position. He had previously offered the position to William Howard Taft who was serving as the Governor of the Philippines. Taft declined the position on the grounds that he was sorely needed in the Philippines, but his great desire to serve as Chief Justice, not as an Associate Justice, was probably also a consideration in his decision. In the postscript of a letter Roosevelt wrote to Taft regarding the matter, he said: "If only there were three of you! Then I would have put one of you on the Supreme Court, as the Ohio member, in place of good Day; one of you in Root's place as secretary of war, when he goes out; and one of you permanently governor of the Philippines."



President McKinley (left) poses with his second term Vice President Theodore Roosevelt (right). Ironically, Roosevelt's predecessor, Garrett A. Hobart, died in office leading to Roosevelt's nomination as his replacement for the 1900 campaign. Fate struck again a year later when an anarchist's pistol ended McKinley's life and elevated Roosevelt to the presidency.



Associate Justice William R. Day  
(1903-1922)

But it was "good Day" who took the oath of office on March 2, 1903. The investiture was described in one paper as follows:

Justice William R. Day, succeeding Justice George Shiras, Jr., was inducted into office as an Associate Justice of the Supreme Court of the United States today, in the presence of a crowd of members of the bar and visitors, which filled the historic chamber to overflowing. Chief Justice Fuller announced to the members of the bar that William R. Day, of Ohio, who had been appointed to a seat on that bench was present and ready to take the oath.

Clerk McKenney read his commission and the new Justice read the oath in a firm, clear tone, and followed it by kissing the Bible, upon which he made the declaration, 'So help me God' evidently to the surprise of the clerk.

Thus began Day's two decades of service on the Supreme Court. He proved to be a strict constructionist of national powers on the one hand, and a liberal constructionist of state powers on the other. One distinguishing aspect of his legal philosophy was his narrow definition of the meaning of commerce. He did not consider production in any of its forms to be a part of commerce, therefore he construed the federal government as having very little power under the commerce clause. In fact, he viewed production or manufacturing, transportation, and selling or marketing all as separate categories, making a clear dis-

inction between each, feeling that each area should be regulated separately. While in private practice many of Day's clients had been railroads, and perhaps this contributed to his concept of the separation of the various elements of commerce.

Day was also opposed to large corporations amassing extensive economic power, and was, therefore, a strong proponent of anti-trust law enforcement. While he saw the federal government's role in commerce as a narrowly defined area, he did construe liberally the state's power to exercise police power in relation to commerce. In areas where the state's power conflicted with the federal government's power in policing commerce, he generally found in favor of the state. He interpreted congressional inaction in an area of regulation, or the absence of a "direct" burden or effect upon interstate commerce, as reason to uphold the state legislation. His views on the importance of state and local government powers were probably influenced by his active participation and interest in state and local politics in Ohio, thus contributing to his opinion that the federal government should not exercise undue control in these areas.

Speaking for the Court in *Caminetti v. United States* Day approved the federal government's use of police power to prohibit the interstate transportation of women for immoral purposes, and in *Pittsburgh Melting Co. v. Totten*, he ruled that the federal government had the power to prohibit the shipment of adulterated and impure meats in interstate commerce. These opinions reflect his view that it was appropriate for the federal government to regulate areas where there were moral and health hazards involved.

In *Hammer v. Dagenhart*, Day, speaking for the majority in a sharp five to four vote of the Court, struck down the Keating-Owen Child Labor Act of 1916. This act had attempted to limit the sale of articles produced by child labor by outlawing interstate shipment of such items. Day's opinion was predicated on his belief that manufacturing was not encompassed in the term commerce, and therefore not subject to the federal government's power to police interstate commerce. While he was clearly opposed to the abuse of children, his concept of commerce would not allow him to rule in favor of the act.

Day's distrust of corporate excess was expressed perhaps most bitingly in the dissenting opinion he wrote in the case of *United States v. United States Steel Corporation*. The Court ruled in favor of United States Steel by a four to three vote. Day wrote the dissenting opinion for himself and Justices Pitney and Clarke. This scathing dissent categorically attacked all giant combinations, denying the underlying justification that they were in fact inevitable and desirable. Day considered that they were neither, and made his opinion very clear. He accused United States Steel of blatant and open defiance of the law under the Sherman Act, and called upon his brethren on the Court to return to a strict and literal interpretation of the Act.

During his tenure on the bench, Day wrote a total of 439 majority opinions and 18 dissents. The most opinions he wrote in a single year numbered 36 majority opinions, and 2 dissents. He was an active member of the Court during his tenure, except for the years 1911 and 1915 when his activity was limited due to personal reasons. In 1911 his wife became ill and subsequently died, which affected Day markedly. He did participate in the work of the Court, but only wrote 14 majority opinions and one

(Continued on next page)

**Day** (Continued from page nine)

dissent that year. After her death, Day lived with his son Rufus who served as legal secretary to his father. Day suffered from a serious illness himself in 1915 which prevented him from working to any great extent. That year he wrote only seven majority opinions.

His relations with other members of the Court were congenial. When he first joined the Court, Melville Fuller was serving as Chief Justice. Their relationship was courteous and pleasant, and Fuller chose one of Day's sons to serve as his secretary. Day and Chief Justice Edward Douglass White both practiced the fine art of storytelling and also enjoyed one another's company. White was reported in the *Washington Herald* as pouring his tales "into the ears of his cronies, Senator Foster of Louisiana, Associate Justices Holmes and Day, his brother Dr. White who lives with him, and secretary, W. H. Pope." Justice Holmes reportedly made Day the object of some of this congeniality on one occasion when Day's son, William L. Day, came into the court room. In contrast with his somewhat frail father, William L. was a strong, robust man of approximately six feet. Holmes, noticing the contrast, quickly pencilled a note which he circulated to his brothers on the bench: "He's a block off the old chip."

Day was characterized by Justice Brandeis as being exceedingly loyal and possessed of an intensity of feelings and a noticeable determination. He was hard working, a serious scholar, but at the same time, was congenial and charming. Justice John W. Davis noted: "His greatest value probably was in conference. His tact, his personal charm, his knowledge of the law, and his honest-mindedness were of extreme importance in discussions with his brother jurists."

Day was also an alumnus of the University of Michigan. On February 4, 1911, the alumni of the University decided to hold a banquet in New York City honoring the University and many of its outstanding graduates. At the time the University could number among its alumni 28 members of the United States House of Representatives and Senate, and one Supreme Court Justice, William R. Day. Day was one of the honored guests and speakers at the dinner. The evening was filled with cheers and songs, toasts and laughter. The toast to Justice Day was: "*His name is William Rufus, He sports a silken gown; He lets the little lawyers talk, and then he knocks 'em down. Here's to you, William Rufus, And the Bench whereon you sit; There isn't any kind of doubt That William R is IT!*"

Day was one of the keynote speakers on the occasion and he spoke about the University and the Supreme Court. He remarked that:

The Supreme Court of the United States is unique in that it may summon to its bar and there determine the conflicting rights of sovereign States. That which between nations, far less important in wealth and numbers than one of our great States of America, would be a cause of war against a neighboring nation, is under our system, but the ground of invoking the jurisdiction of the Supreme Court, whose decree is uniformly accepted as conclusive between the contending States. In this feature of its jurisdiction hopeful and patriotic jurists and statesmen see the prototype of a great international tribunal, so constituted in its jurisdiction as to settle peaceably the controversies of the nations of the world without resort to the horrors and sufferings of war.

At the age of 73, on November 13, 1922, Justice Day retired from the Supreme Court. The frail Day had survived many of his more robust peers, including many of the heroes of the Spanish American War. President Harding asked him to serve as an umpire on the Mixed Claims Commission which had been established by the United States and Germany to resolve claims from the first World War. The Commission was very much in keeping with the ideals Day had espoused in his speech to the Michigan Alumnists and he was eager to serve. But in May of 1923, Day's poor health forced his resignation from this Commission.

Early in the summer of 1923, Judge Day and his son William L. went to the family camp in Mackinac as usual. By this time Day had grown very frail, but he enjoyed a few days of sun and bass fishing before his death on July 9. According to the attending physician, "Mr. Day had been living 'on his nerve' for the last few years, believing he must do his part in public affairs despite his advanced age." Justice Brandeis paid tribute to him when he said: "Judge Day gave to the nation the distinguished service of a lifetime. Those of us who were privileged to be associated with him knew also the deep affection and loyalty of his nature. He leaves a distinguished and endearing memory. We join in loving thoughts of him."

Judge Day was buried in a simple ceremony in Canton, Ohio. A few of the great dignitaries of the time attended the ceremony filling the small city of Canton with vestiges of the glory it had known when it could boast it was the birthplace of the President. Perhaps Senator Gray of Delaware's tribute paid to Day at the time of the Paris Peace Conference would serve as a fitting epitaph for Judge Day: "... always self-contained, never self-exploitive, always self-suppressed, yet firm and courageous in the performance of duty as he saw it, he had illustrated the very highest traits of American statesmanship and American character."



Day retired from a life-long career in public service in May 1923 due to failing health. He passed on just 2 months later.

## New Members

*New members who have joined the Society between July 1, 1986 and September 30, 1986:*

### Alabama

Samuel E. Upchurch Jr., Birmingham

### Arkansas

Richard W. Roachell, Little Rock

### California

Franklin Brockway Gowdy, San Francisco  
Rudolph A. Hoffman, Hillsborough  
Louis Edward McDonough, Menlo Park  
P. Michael Mudgett, San Diego  
William David Shapiro, San Bernardino  
Edward L. Smilow, Orange

### District of Columbia

Andrew D. Alpert  
Elliott Ashkenazi  
Sidney Dickstein  
Kenneth S. Geller  
Jeffrey A. Rosen  
Bonnie Marie Ryan  
Luther J. Strauge III

### Florida

Robert Brian Judd, Fort Lauderdale  
Graham H. Nicol, Gainesville

### Georgia

Ronald Emery Nelson, Statesboro  
Matthew H. Patton, Atlanta

### Illinois

Gerald P. Noonan, Glenview  
Edward G. Proctor, Chicago  
Keith Shay, Winnetka

### Indiana

Jeffrey T. Thorne, Michigan City  
Ted A. Waggoner, Rochester

### Kansas

James F. Vano, Overland Park

### Louisiana

Herschel L. Abbott Jr., New Orleans  
Louis B. Claverie, New Orleans  
Robert P. Kemp, New Orleans  
Phillip A. Wittmann, New Orleans

### Massachusetts

Marsha V. Kazarosian, Haverhill  
William C. McPhee, Norwell

### Maryland

Gilbert R. Giordano, Lothian  
George E. Monk, Kensington

### Maine

Harold E. Woodsum Jr., Portland

### Michigan

Richard R. Danforth, Hillsdale

### Missouri

Joseph Wrigley Mooney, University City

### New Jersey

Ingrida B. Jansons, Hackettstown  
Jeffrey Kantowitz, Fair Lawn  
Norman I. Klein, Clifton

### New York

Phyllis Engler, Monsey  
Philip L. Friedman, New York  
Martin I. Kaminsky, New York  
Arnold Y. Kapiloff, New York  
Kaye Pestaina, Ithaca

### Ohio

Benjamin E. Hiser, Troy  
Richard Myers, Cleveland

### Pennsylvania

Serena H. Dobson, Philadelphia  
W. Thomas McGough Jr., Pittsburgh

### Rhode Island

John Zannini, Cranston

### South Carolina

Daniel A. Speights, Hampton

### Tennessee

James E. Beckner, Morristown  
Mark E. Stephens, Knoxville

### Texas

Richard B. Dewey, Houston  
John R. Knight, Houston  
Robert M. Roach Jr., Houston  
T. F. Weiss Jr., Houston

### Virginia

Trudi Ann Berlin, Alexandria  
Jeffrey A. Breit, Norfolk  
John E. Mock, McLean

### Wisconsin

Krista M. Ralston, Madison

## Inside Look at Court Featured in New *Illustrated History*

*The Illustrated History of the Supreme Court of the United States*, which has just been published, may well be the perfect book about the Supreme Court as a library resource, to have and display, or to receive as a gift. This book is for people interested in the Supreme Court of the United States as an institution, its heritage, and its role in the economic, social and political life of our nation. The book contains a lively text by Robert Shnayerson, former law editor at *Time* magazine as well as former editor-in-chief of *Harper's Magazine*, and contains copious color and black and white illustrations of the people, places and events indelibly bound up with the history of the Supreme Court.

The handsome coffee table size volume begins with a special

twenty-four page color photo section entitled "A Tour of the Court," providing readers with an exclusive "inside look" at both public rooms and private chambers in the Supreme Court building. The carefully chosen illustrations add much to the fascinating story which the author unfolds of the development of the Supreme Court from "the weakest department of power," as Alexander Hamilton described it, to the most powerful and effective judicial body in the world today. Important landmark cases decided by the Court come alive as Shnayerson fits them into the economic, social and political life of their time.

The Society, as the co-sponsor of the book, is happy to be able to provide this beautiful 304 page book to our members at the special discounted price of \$48.00 per copy.

Supreme Court Historical Society  
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