

THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## David Hackett Souter Takes Oath As 105th Member of Supreme Court



A smiling Justice Souter is welcomed to the Court by his new colleagues. He replaces Justice Kennedy (right) as junior member of the Court.

On October 9, 1990 the 105th member of the United States Supreme Court took the oath of office and assumed his seat on the Bench. Associate Justice David Souter, a 51-year-old judge from Weare, New Hampshire, had been nominated by President Bush one week after Justice William J. Brennan, Jr. announced his retirement on July 20. Former colleagues, friends, dignitaries, members of the Court and their staffs attended the investiture and reception for Justice Souter when he took his constitutional oath in the courtroom.

The new Justice has a distinguished academic record and an impressive career in the New Hampshire judiciary. He attended Concord High School before entering Harvard University, where he majored in philosophy. Justice Souter wrote his master's thesis on Justice Holmes's belief that a judge should not be influenced by either politics or ideology. He graduated magna cum laude and Phi Beta Kappa, and won a Rhodes scholarship to Magdalen College at Oxford. When he returned, he attended Harvard Law School and eventually took a job at Orr & Reno, a law firm in Concord, New Hampshire.

Not content with private practice, in 1968 he joined the New Hampshire attorney general's office. Two years later, Warren

Rudman, then state attorney general, hired him as his top aide. When Rudman resigned in 1976 to run for the Senate, Governor Meldrim Thomson appointed Souter attorney general. Named to the Supreme Court of New Hampshire by then Governor John Sununu in 1983, Souter served on that court until he was elevated to the U.S. Court of Appeals for the 1st Circuit last April.

The state of New Hampshire has bred several Supreme Court Justices; Salmon P. Chase, Nathan Clifford and, most recently, Harlan Fiske Stone were all born in the Granite State, although they made their careers in other states. Levi Woodbury, who served from 1845 to 1851, is the only Justice other than Souter to be appointed from that state.

Justice Souter also follows in the footsteps of seven unmarried Court members: Henry Baldwin, Samuel Blatchford, William Moody, James McReynolds, John Clarke, Benjamin Cardozo, and Frank Murphy were all bachelors.

Justice Souter is keenly interested in history and was an active member of the New Hampshire Historical Society. He will present membership and endowment awards at the Society's January 10 meeting.

David Souter photographed on October 9, the day of his investiture. The previous day Chief Justice Rehnquist administered the oath of office at the White House following a speech by President Bush.



## A Letter From the President

by Justin A. Stanley

As 1990 draws to a close I am happy to report that the Endowment Fund campaign has reached the \$2 million mark. Achieving this threshold before the new year was an important step toward completion of the drive by the end of 1991. With luck we may even make our goal by June 3, the date which has now been set for the 1991 Annual Meeting. I thank all who have enabled us to meet this year-end goal and encourage all who have not done so already to pledge their support in the new year.

This *Quarterly* will reach you around the time you receive the 1990 edition of the *Yearbook of the Supreme Court Historical Society*. You will notice a big change in that publication when it arrives. It boasts a new title: *Journal of Supreme Court History*. The decision to change the title reflects a desire to convey better the publication's content and to facilitate indexing. The new title was proposed by the Publications Committee, which is chaired by Kenneth S. Geller, and was subsequently approved by the Board of Trustees. I hope you like it.

The 1990 *Journal* is about one-third longer than it has been in past years. This reflects a banner year for article submissions, generated in part by the activity surrounding the bicentennial of the Judiciary Act of 1789 and of the Supreme Court.

Our publications program is expected to expand next year to include work on a book of illustrated biographies of the Justices. Many of the short biographical sketches that have appeared in the *Quarterly* will be included in this book, which the Society will co-publish with Congressional Quarterly Inc., a highly respected company. We are pleased to be working with them. The book, which will be a one-volume work of short biographical sketches and appropriate illustrations of each Justice, is expected to be ready for distribution sometime during the summer of 1992. There is a clear need for this type of book and we look forward to the publication of this excellent research tool intended for the general reader.

Slated for January are two important meetings. On January 3, members of the Board of Editors--Michael Cardozo, Walter Gellhorn, Craig Joyce, Michael W. McConnell, David O'Brien and Charles Alan Wright will convene to discuss the *Journal* and to suggest ways in which it might be improved. That evening they will be honored for their work at a dinner attended by Chief Justice Burger and Justices O'Connor and Powell. The meeting of the Board of Editors, the first time it has ever formally met, was scheduled to coincide with the annual meeting of the Association of American Law Schools here in Washington, enabling our editors to participate in both activities. It is high time we got this distinguished group of scholars together to benefit from their advice.

January 10 will bring a dinner to recognize endowment donors who have made leadership gifts and to honor our 70 State Chair and Vice-Chairs for the work they have done to increase the Society's membership. Justice Souter will be in attendance to present awards to major donors and to chairs who have met their annual membership goals. Membership is currently a little over 3,600 and a major membership drive is planned for the spring with a stated goal of 4,000.

The Endowment campaign is still in full swing with luncheons scheduled for January 23 in Los Angeles and April 4 in Boston. We are greatly encouraged by our progress to date, but a good deal of work remains to be done. Approximately one half of our members have received individual requests to support this program and eventually you will all receive a request. Again, we need your support to assure the Society's future and I urge you to make a generous donation appropriate to your circumstances. All our standing committees continue to work to create and implement projects and activities which help us achieve our programs and goals.

### Annual Meeting

The Annual Meeting date has been set for Monday June 3. As usual, there will be an annual lecture in the afternoon, followed by a tour of the Court, and then a reception and dinner in the Great Hall that evening. Invitations will be mailed to all members approximately six weeks in advance.

### Acquisitions Committee

The Supreme Court Historical Society is interested in contacting relatives, associates, or any others who might have knowledge of former Justices of the Supreme Court in the interest of preserving the valuable history of our highest court. The Society is endeavoring to acquire artifacts, memorabilia, literature or any information related to the history of the Court and its members. If any of our members or others have anything they would care to share with us, please contact The Acquisitions Committee, at the Society headquarters, 111 Second Street, N.E., Washington, D.C., 20002. (202) 543-0400

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## The Supreme Court Historical Society *Quarterly*

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The following Members have joined the Society between September 24 and December 31, 1990. Names and honorifics appear as they do on membership applications.

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## Warren E. Burger Memorial Library Dedication

On Sunday, September 16, 1990, the William Mitchell College of Law dedicated its new library building, named for its most noted alumnus, Chief Justice Warren E. Burger. The ceremony was conducted under the direction of Dean James Hogg. Joining Chief Justice Burger and the faculty and friends of the law school for this occasion was Justice Sandra Day O'Connor, who delivered the keynote address.

Justice O'Connor commenced her speech by describing some of the unique circumstances of Chief Justice Burger's association with the law school, noting that he had graduated from St. Paul College of Law, the forerunner of William Mitchell College of Law, in 1931. She explained that "Chief Justice Burger could not have attended a traditional day law school. He shouldered family obligations, and if it were not for the opportunity that St. Paul offered him, we would have been deprived of the leadership of the man we are honoring today. Then, as now, the college provided students with an opportunity to study law at night while working during the day."

Continuing her speech, Justice O'Connor explained that some of Chief Justice Burger's greatest achievements involved

Pictured below is the academic procession at the beginning of the dedication of the Warren E. Burger Library at William Mitchell College of Law, September 16, 1990. Immediately behind Chief Justice Burger and Justice O'Connor are (left) Chief Justice Peter S. Popovich of the Minnesota Supreme Court and (right) Chief Judge Donald Lay of the Court of Appeals for the Eighth Circuit. Immediately behind Chief Judge Lay is Judge Edward Devitt of U.S. District Court for the District of Minnesota.



his work in the administrative area of the federal court system. Justice O'Connor said: "Chief Justice Rehnquist has called his predecessor the greatest judicial administrator of our time. He was also the most prolific. Chief Justice Burger left his mark on every facet of our judicial system. The Chief Justice presided over the Court during a time when the bar, caseloads and the federal judiciary were growing rapidly. Yet the system within which they operated remained unchanged, partly out of neglect, partly out of a reverence for tradition that sometimes hampers our progress. As early as his confirmation hearings the Chief Justice was thinking of how he might deploy his office in the cause of improving the operation of our legal system. Asked his views on the duties of the office, he answered that he would, of course, be responsible for deciding cases. But he went on to say that 'the Chief Justice of the United States is assigned many other duties, administrative in nature. I would think it was the duty of the Chief Justice . . . to make our system work better. And I would expect to devote every energy and every moment of the rest of my life to that end should I be confirmed.'"

Justice O'Connor then explained that despite the difficulties involved, Chief Justice Burger had lobbied for congressional support, and support within the judicial system itself, and then proceeded to make recommendations and plans for improving the administration of justice. His guiding philosophy was that "we risk some false starts rather than make no starts at all." After studying the problems, Chief Justice Burger identified a need for "professional administrators 'to manage and direct the machinery [of the courts] so that judges could concentrate on their primary constitutional duty of judging.' To achieve that goal, he urged the creation of an Institute for Court Management. . . . He was also involved in creating the offices of circuit executives and state court administrators, who have further alleviated the administrative burdens of federal and state judges and improved the efficiency of the courts."

Chief Justice Burger was also "instrumental in working to expand the jurisdiction of federal magistrates," thereby alleviating some of the burden on federal judges. Justice O'Connor mentioned several other areas in which Chief Justice Burger was an advocate of reform in the workings of the federal judiciary and further noted that he had not limited his interest in the workings of the judicial system to the members of the federal judiciary itself, but had also been a "proponent of heightened ethical and professional standards for the practicing bar." Justice O'Connor observed that, while many of his suggestions met with opposition and skepticism, "most of the Chief Justice's campaigns for reform, . . . unpopular as they may have been initially, were necessary examinations of serious problems."

In conclusion, Justice O'Connor noted Chief Justice Burger's deep love of history. She mentioned that in 1974, he "founded the Supreme Court Historical Society. He also created the position of curator of the Court. . . . I am reminded of the Chief Justice every day as I admire the transformation of the interior of our building into a vastly more attractive space which now includes displays of historical documents, portraits of retired Justices, and busts of the retired Chief Justices. . . . The Chief Justice is a man of unusual talents and special qualities. He always had time to offer his colleagues a cup of tea and to share

with them some conversation. He loved to relax and reminisce with his law clerks." Justice O'Connor observed that since his retirement, he has "performed splendidly as chairman of the Bicentennial Commission to commemorate the bicentennial of the writing and ratification of our Constitution. . . . He has helped to reeducate the nation about what he describes as 'one of the greatest stories . . . in the history of human liberty'."

Chief Justice Burger spoke briefly at the conclusion of Justice O'Connor's speech, thanking her for coming to support this occasion. He expressed his own appreciation and that of his family for the recognition, noting that he was "very, very proud to have you identify our name with this great school. People ask me, 'what class were you in?' From now on I'm going to respond

that I'm in the 'but for' class. What do I mean by the 'but for' class? But for this night law school, I could not have gone to law school. It just wasn't financially and otherwise possible. That's true for thousands of other graduates of this school and will be for thousands of others in the future."

The ceremony commemorating the dedication of the library not only honored Chief Justice Burger and his contributions to the legal community, but also honored the American academic community that strives to provide appropriate opportunities and training for students in all walks of life and economic situations. The Society joins in congratulating Chief Justice Burger for this honor and also commends the legal academic community for its commitment to excellence in education.



The Warren E. Burger Library at William Mitchell College of Law was designed by Winsor/Faricy Architects, Inc. of St. Paul. Groundbreaking for construction of the building took place in spring 1989.

### Call for Papers and Participants

For a conference on "The U.S. Bill of Rights In A Bicentennial Perspective" on September 19-20, 1991, the multidisciplinary Conference Committee of the Ninth Annual Fall Forum at the Louisiana State University in Shreveport welcomes papers and panelists on the general theme of the U.S. Bill of Rights from state, national and international perspectives. Special consideration will be given to papers and panelists dealing with an application of the Bill of Rights in the South. Papers on other topics will be considered.

#### Deadlines:

**January 15, 1991:** Proposals, Resume, Request for Airfare **June 15:** Draft Paper **August 15:** Completed Paper--two copies Selected Papers will be published; limited travel stipends are available.

For information: William D. Pederson, Director, American Studies, Department of History and Political Science, Louisiana State University, One University Place, Shreveport, LA 71115-2399, phone (318) 797-5349 or 5337.

## Authenticity of "A Dirtier Day's Work" Quote In Question

by Charles Alan Wright

### Editor's Note:

Senility is a delicate issue, especially on the Supreme Court. When a respected Justice's mental prowess wanes, his brethren may realize it before he does. The formidable task of asking a colleague who is past his prime to step down is exemplified in this oft-recounted story: Another young Justice looking for a gentle way to ask a senior Justice to resign broaches the subject by inquiring if he remembers the time when he himself had to tell an aging Justice that his time had come. But the older Justice, instead of taking the bait, replies "Yes! And a dirtier day's work I never did in my life!"

Which judicial duo enacted this well-known scenario? In the 1989 Yearbook, C. Dickerman Williams, clerk to Chief Justice William H. Taft in the 1932 Term, identified the junior Justice as David Brewer, who was part of a committee that felt Justice Stephen Field should resign. Professor Michael Cardozo, Chairman of the Society's Board of Editors, believed for more than half a century that it was Justice Oliver Wendell Holmes who made the remark about Field, because that is what he remembered Walton Hamilton taught him in his Constitutional Law course at Yale. Chief Justice Charles Evans Hughes, on the other hand, wrote that it was Justice John Marshall Harlan who approached Field by reminding him of the time he had to inform Justice Robert Grier that it was time to retire.

Who is correct? Whose memory is playing tricks? Charles Alan Wright, a member of the Society's Board of Editors and a professor of law at The University of Texas at Austin, investigated the myth in a memorandum he drafted on March 1, 1990 to his colleagues. He has graciously permitted the Quarterly to publish his discoveries.

It was not Field, as a junior, who waited on Justice Grier in 1869. A letter from his daughter, Mrs. Beck, quoted in Fairman, "The Retirement of Federal Judges," 51 *Harvard Law Review* 418 (1938), says: "The Chief and Judge Nelson waited on Pa this morn'g to ask him to resign." The Chief would have been Salmon P. Chase and Samuel Nelson was then the senior associate.

It was Harlan, who was the senior associate except for Field, who bore the news to Field. The only authority we have for the story is Harlan's version, as later told to Hughes.

"I heard Justice Harlan tell of the anxiety which the Court had felt because of the condition of Justice Field. It occurred to the 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 that 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 of his surroundings, and after arousing him gradually approached the question, asking if he did not recall how anxious the Court had become with respect to Justice Grier's condition and the feeling of the other Justices that in his own interest and in that of the Court he should give up his work. Justice Harlan asked if Field did not remember

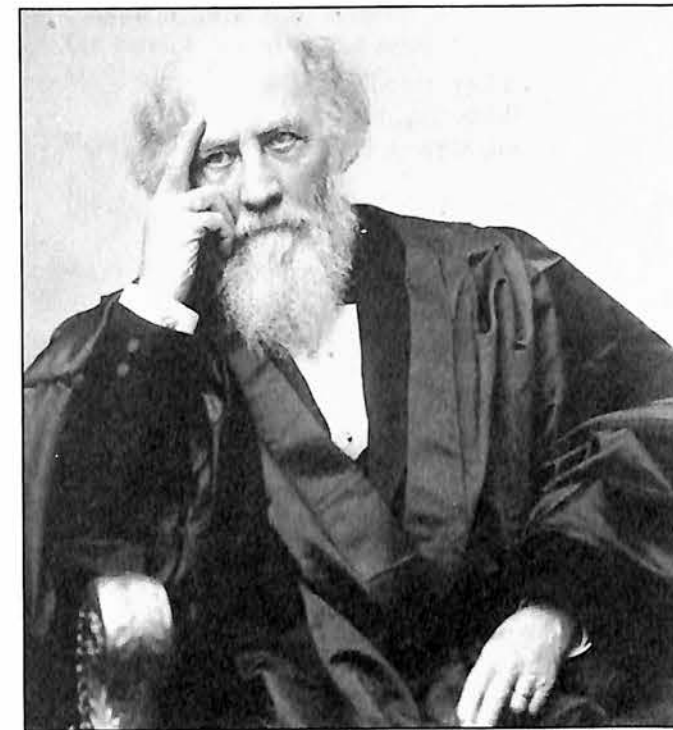
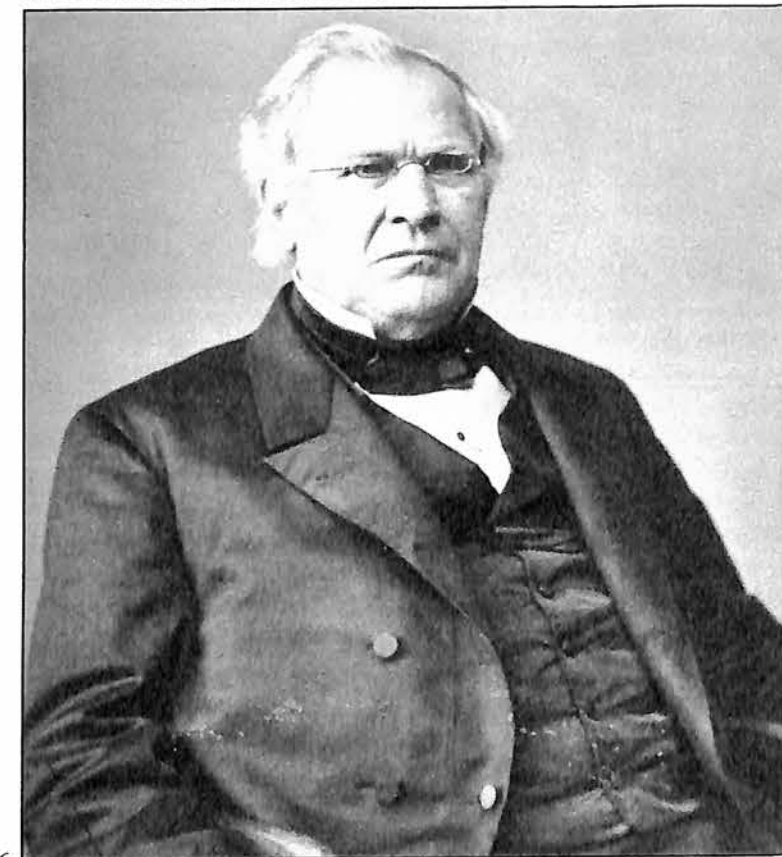
what had been said to Justice Grier on that occasion. The old man listened, gradually became alert and finally, with his eyes blazing with the old fire of youth, he burst

"Yes! And a dirtier day's work I never did in my life!" That was the end of the effort of the brethren of the Court to induce Justice Field's retirement; he did resign not long after.

Hughes, *The Supreme Court and the United States* 76 (1928; reprinted 1937).

There are two major errors in Hughes's account (or in Harlan's account, as recalled and reported by Hughes). It is said that the other members "recalled" that Field had served on the committee that waited on Grier. Neither that nor the wonderful remark about "a dirtier day's work" makes sense unless Field participated in the pronouncement of the doom to Grier. But if we accept the letter of Mrs. Beck, quoted above, Field was not one of those who waited on Grier. Mrs. Beck closes her letter by saying "Excuse this rapid scribble," but I do not think it can be said that it was an informal letter or that Mrs. Beck was not writing for the record. It was written to George Harding, who is described in Fairman's volume of the *Holmes Devise History* as "an able Philadelphia lawyer with excellent political connections." Fairman, *Reconstruction and Reunion 1864-1888* 725 (1971). As Harding's letter of November 17th to Joseph Bradley, quoted at page 728 of that Fairman book, shows, Harding had just made a special trip to Washington and met with Grier

According to a letter written by his daughter, Justice Robert Grier (below) was waited on by Chief Justice Salmon P. Chase and senior Associate Justice Samuel Nelson, not, as is commonly believed, by Justice Stephen Field.



The author does not share the view that Justice Stephen Field (above) was motivated to stay on the Court beyond his prime by a personal hatred of Grover Cleveland.

and Mrs. Beck for over an hour to discuss the possibility of Grier's resigning. When three weeks later a delegation from the Court waited on Grier to ask him to resign, Mrs. Beck immediately wrote Harding asking him what her father should do. In such a letter the writer would be careful to include such important details as the names of all those who waited upon the Justice.

Nor can I accept the suggestion that Grier, through senility, might have failed to tell Mrs. Beck about the third visitor. The probability is that Mrs. Beck was present and greeted the visitors. She participated in her father's meeting with Harding a few weeks earlier and there is reason to think that Grier lived with her. He was physically feeble. In a letter to the Chief Justice as early as 1866, quoted in the 1938 Fairman article (51 *Harv.L.Rev.* at 417), Grier said that he could hardly walk and that he "can write with difficulty, even with a pencil." My belief that he lived with his daughter is supported also by Harding's letter to Bradley of November 17, 1869. After telling of his meeting with Grier and Mrs. Beck, Harding says: "They are moving to Capitol Hill."

As against what I regard as the positive contemporaneous evidence of Mrs. Beck, the only evidence that Field was a member of the delegation is hearsay on hearsay. We have Charles Evans Hughes, writing in 1928, telling what he heard from Justice Harlan. Harlan died in 1911 and it would seem probable that Harlan told this story to Hughes during the one year that they served together on the Court, 1910 to 1911. Hughes, therefore, is repeating something that he heard at least 17 years earlier from Harlan. Harlan had been describing an incident that supposedly occurred in the early 90s, some 20 years before, and it in turn relates to something that happened in 1869. I do not doubt the credibility of Justice Harlan or Chief Justice

Hughes, but all experience teaches that memories fail over the years and that stories tend to get better as time passes.

The statement in Hughes's book that Field "did resign not long after" is misleading, at least in appearance and probably also in substance. In Goff, "Old Age and the Supreme Court," 4 *Am. J.Leg.Hist.* 95 (1960), no source is cited for this explanation.:

"Field for various reasons, at least partially explained by his personal hatred of Grover Cleveland, determined that Cleveland would never have the opportunity to appoint his successor. Then too, Field was about to set a record for tenure, one that would eventually surpass that of Marshall. By the middle of the Harrison administration the situation had deteriorated to a point where Field's colleagues felt they must take some action."

Goff then gives the story, as reported by Hughes. Goff continues:

"There the matter ended for the time being. It was not until April of 1897 that the long awaited retirement was announced and then not to take effect until December 1897. Field had achieved his goals. His tenure record stands today, and McKinley, not Cleveland, appointed his successor." (Goff, *supra*, at 100-101.)

Since Field's resignation did not take effect until eight months after it was announced, I would not have said "not long after." Hughes might defend that the resignation was submitted soon but did not take effect for eight months. This would be an unusual use of words. But if we accept Goff's version that this happened during the Harrison administration, that would have been not later than March 1893 and Field would have lingered on for more than four years. If Field hated Cleveland so much, why did he not resign while Harrison was still in office, rather than take the chance that he would live through the whole second term of Cleveland until McKinley took over?

The biography of Field in 3 *Dictionary of American Biography* 371-375 (1930; reprinted 1959) has this to say:

"Field had the misfortune to tarry on the bench over long. In the 1895 term he spoke for the Court in only four brief opinions and in the 1896 term he delivered no opinions. Eventually Justice Harlan was designated by the other justices to convey a hint to Justice Field that he should resign [citing Hughes]. Field himself had been of a committee which had waited on Justice Grier years earlier on a like errand. In April 1897 he did resign, the resignation to take effect the following Dec. 1, a stipulation which enabled him to exceed Marshall's incumbency by two months!"

This is a wonderful example of how myths are built. Either Harlan or Hughes misremembers and makes a story better than it was, particularly by clearly implying that Field had been on the delegation that visited Grier. This is then picked up in a highly reputable and authoritative collection of biographical information in an essay written by a respected authority, namely Edward S. Corwin. This shows what a perilous business judicial biography is.

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## JOHN JAY: FIRST CHIEF JUSTICE

by Clare Cushman

John Jay, the first and youngest Chief Justice of the United States, had an extraordinary career of public service that spanned three decades. He held important elective and appointive offices in the Revolutionary, Confederation and Federal governments, and was among the Founders to receive electoral votes for president in the 1788 election. An ardent Federalist, Jay was instrumental in getting the Constitution ratified, securing recognition for the supremacy of treaties, and helping to assert the power of the federal government over the states. During his five years on the Court, Chief Justice Jay laid the essential groundwork for a powerful, independent judiciary.

Jay was unusual among the Founding Fathers in that his ancestors were of non-British stock. His mother was a member of an illustrious New York family of Dutch origin. His father, a prosperous merchant, was descended from French Huguenot refugees. The youngest of eight children, John Jay was born in New York City on December 12, 1745, but grew up on a farm in Rye, N.Y. His mother taught him English and Latin grammar until he left home for three years of formal tutoring at the French Huguenot Church School in New Rochelle. At fourteen he entered King's College (later named Columbia University), and received his diploma in 1764. He was admitted to the bar four years later, after clerking in the law office of Benjamin Kissam, a prominent New York attorney.

Handsome, cultivated Jay married Sarah Van Brugh Livingston in 1774; her father, William Livingston, would later serve as Governor of New Jersey during the Revolutionary War. Although politically conservative, Jay quickly supported the Revolution, giving up private practice to devote himself to multifarious public duties. At the time Jay assumed that he would resume his practice after the war, but it was to be a quarter century before he returned to private life.

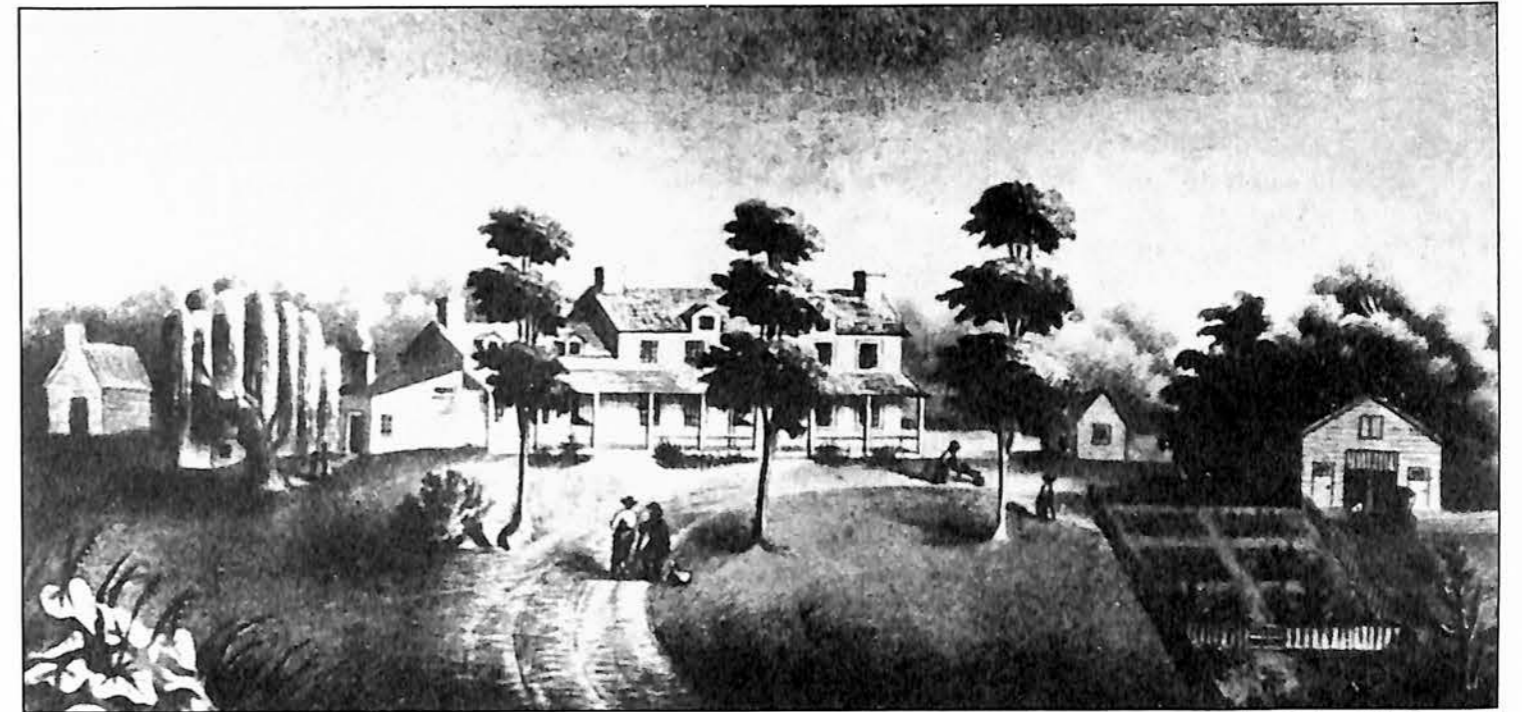
Jay represented his state in both the First and Second Continental Congresses. He was not, however, among the signers of the Declaration of Independence because at that time he was serving as a delegate to the New York Provincial Congress, helping to draft and then ratify the state's constitution. In 1777 he was appointed Chief Justice of the Supreme Court of

Judicature of New York State, but his activity on the bench was curtailed by his patriotic duties during the war. Sent by his state to the Second Continental Congress in 1778, Jay was eventually elected president of that body--the highest civilian post in the rebellious colonies.

Within the year, however, his colleagues had elected him Minister Plenipotentiary to Spain in order to secure diplomatic recognition and economic aid from the Spanish government. Although the mission met with only modest success, it gave Jay his first taste of what would become a distinguished career in international affairs and negotiation. Shortly thereafter, Jay was summoned to Paris by fellow peace commissioner Benjamin Franklin to help negotiate the 1783 Treaty of Paris, which ended the Revolutionary War upon favorable terms for the United States. When Jay returned from Europe he found he had been elected Secretary for Foreign Affairs for the Confederation, a position he held until the new government, under the federal Constitution, was established in 1789.

Once the Constitution had been drafted, Jay used his training as a lawyer, judge, and diplomat to contribute five essays to the widely influential *Federalist Papers* in order to convince the citizens of New York State to ratify the document. He also penned an unsigned polemic, "Address to the People of the State of New York," which persuasively summarized the case for ratification by exposing the inadequacies of the Confederation both at home and abroad. Jay's international experience gave particular conviction to his arguments on the necessity of the controversial constitutional clause establishing the supremacy of treaties. "[Jay] had as much influence in the preparatory measures in digesting the Constitution, and obtaining its adoption, as any man in the nation," John Adams later claimed.

Although newly-elected President Washington was reportedly willing to consider Jay for any number of high posts in the new government, he ultimately nominated the 44-year-old New Yorker to be the nation's first Chief Justice. On September 26, 1789, the United States Senate confirmed him. The first session of the Court was convened by Jay, along with two of his five brethren, on February 1, 1790, at the Merchants Exchange



Although he was born in New York City, Jay grew up on a farm outside the city in Rye, New York. This early nineteenth century drawing depicts "The Locusts," his childhood home. Jay's son replaced the building in 1838 with a Greek Revival Mansion.

(Photo courtesy of Rye Historical Society)

Building in New York City. The required quorum was reached with the arrival of a fourth Justice on the second day. Nine days later, the Court adjourned because there were as yet no cases to decide.

As Chief Justice of the United States, Jay led the Court in voiding acts passed by the Congress and by state legislatures, and laid the foundation for a strong judiciary. His first major Court case, *Chisholm v. Georgia* (1793), established the right of citizens of one state to sue another state in federal court. Many states feared economic ruin and a loss of sovereignty would result. Responding to these fears, Congress quickly proposed, and by 1798 the states ratified, the Eleventh Amendment. This amendment, the first since the Bill of Rights, seriously damaged the Supreme Court's prestige. It reversed the Court's decision to bar such suits unless the defendant state consented. Ranking with *Chisholm* as a landmark case in Jay's career on the High Court, the 1794 *Glass v. The Sloop Betsey* decision questioned whether foreign consuls stationed in the U.S. had authority on American soil. Jay's opinion held that admiralty jurisdiction exercised by foreign powers on United States soil was neither warranted nor right, a decision which fortified the sovereignty of the United States in international eyes.

In 1793, the year of the *Chisholm* decision, Jay led the Court in establishing an important principle of constitutional law and of federal judicial power. Secretary of State Jefferson wrote to the Court asking, for himself and for President Washington, that it give advice as to the constitutionality of measures the Washington administration proposed to take with respect to the European wars. Jay and the other Justices respectfully declined their request, pointing out that the Constitution limited federal judicial power to the decision of actual cases and controversies. In their view, the Court therefore had no authority to render advisory opinions. But Jay and his colleagues apparently distinguished between formal requests to the Court for advisory

opinions, which they could not grant, and informal requests to individual Justices for advice, with which they complied. Indeed Jay, throughout his term as Chief Justice, was an unofficial advisor to the Washington administration, and even helped the President draft the 1793 Neutrality Proclamation.

In addition to serving on the Supreme Court, the Justices were also required to ride circuit and hold semi-annual court sessions in three districts (eastern, middle, and southern) created by the 1789 Judiciary Act. Jay complained bitterly of the poor food, uncomfortable accommodations, long distances and loneliness of circuit riding. He nonetheless used circuit cases as an opportunity to establish the supremacy of the Constitution, federal laws, and the federal judiciary. But, finding his circuit-riding duties increasingly "intolerable," Jay did not object to his nomination, in 1792, by the New York Federalists as a candidate for governor. Aided by unfair balloting, longtime incumbent George Clinton narrowly won reelection.

Two years later, President Washington appointed Jay, while still Chief Justice, to a diplomatic mission to England in order to ease lingering hostilities between the two nations. Southern Senators opposed Jay taking on this dual role, partly because of his proven British sympathies. A Philadelphia political group denounced the assignment as "degrading the Chief Justiceship to partisan uses." The result of the mission was the 1794 Treaty of Amity, Commerce, and Navigation, known as the Jay Treaty, which was widely condemned at home for not extracting enough concessions from the British.

Upon his return from Britain, Jay found that he had been nominated for governor of New York. This time, he was elected. His immediate resignation from the Court proved fortuitous for the High Court's fragile authority, for when news of the Jay Treaty concessions arrived home the former Chief Justice was burned or hung in effigy in several cities. Jay went on to serve as governor of the most populous state for two three-year terms

marked by high standards. He revised the state's criminal code, called for the construction of a model penitentiary, implemented a career civil service cadre, reduced the number of crimes carrying the death penalty, and signed a bill to gradually free New York slaves.

When Chief Justice Oliver Ellsworth resigned from the Court in 1800, President Adams sent Jay's name, without his knowledge, to the Senate in hopes of reappointing him Chief Justice. Quickly confirmed by the Senate, Jay declined the position because of his poor health and aversion to circuit riding. Jay explained his reluctance in a letter to President Adams:

"...[T]he efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system."

Although Jay's plans for retirement were marred by the death of his beloved wife in 1802, he did spend his unusually long retirement, which lasted from 1801 until his death in 1829, at his 800-acre estate in Westchester county in the company of several

of his five children. There he pursued his interest in agriculture, kept up an extensive correspondence with friends, and proffered legal advice. He voiced his opposition to slavery and, as part of a Federalist peace group, opposed the War of 1812. Active in the Episcopalian church, Jay also helped establish the American Bible Society, serving as its president in 1821.

The aristocratic and cultured Jay was more famous for his illustrious career as a statesman, and for the wide-ranging extrajudicial activities he carried out while serving the Court, than for his judicial record. His biographer, Richard B. Morris, summed up his tenure on the Court with these words:

"He was active neither as a court reformer nor as an expositor of technical branches of law. Indeed, some of his controversial opinions carried scant legal research to bolster them. Instead, he is remembered as a creative statesman and activist Chief Justice whose concepts of the broad purposes of the Constitution were to be upheld and spelled out with vigor by John Marshall. In bringing the states into subordination to the federal government, in securing from the states and the people reluctant recognition of the supremacy of treaties, and in laying the foundation for the later exercise by the Supreme Court of the power to declare acts of Congress unconstitutional, Jay gave bold directions to the new constitutional regime."

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