

THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

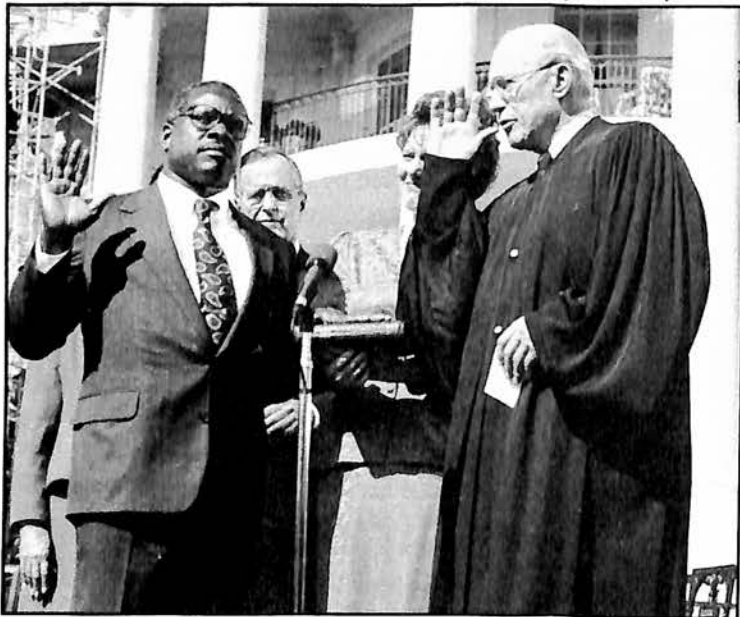
VOLUME XII

NUMBER 4, 1991

## Clarence Thomas Takes Oath as Court's 106th Justice

In a ceremony held on the South Lawn of the White House on October 18, 1991, Judge Clarence Thomas took the official oath of a federal government official prior to becoming the 106th member of the Supreme Court of the United States. Justice Byron R. White administered this oath. The judicial oath was administered by Chief Justice William H. Rehnquist at a private ceremony on October 23, 1991 so that he might commence his work on the Court. A more traditional ceremony was held in the Supreme Court Chamber on November 1, 1991 in which Chief Justice Rehnquist readministered the oath to Justice Thomas who then assumed his seat on the Bench.

*Courtesy Lois Long, Office of the Curator of the Court*



At a White House ceremony, Judge Clarence Thomas (left foreground) takes the official oath of office required of all government officials. This was administered by Justice Byron R. White (right, foreground). Immediately behind Judge Thomas and Justice White, observing the ceremony, are President Bush and Mrs. Thomas.

*Courtesy Lois Long, Office of the Curator of the Court*



The Chief Justice looks on as Justice Thomas signs his judicial oath of office as part of the ceremony held at the Supreme Court on November 1, 1991. Justice Thomas was sworn in at a public ceremony held in the Supreme Court Chamber.

Justice Thomas fills the seat vacated by the retirement of Justice Thurgood Marshall. Justice Thomas was born on June 23, 1948, in Pin Point, Georgia. His early childhood years were spent in Georgia where he attended parochial school much of the time. After briefly attending Immaculate Conception Seminary in Missouri, Justice Thomas entered Holy Cross College in Worcester, Massachusetts. He graduated from Holy Cross with honors, finishing ninth in his class and then entered Yale Law School, graduating in 1974.

His professional life commenced with a position as an assistant attorney general for the state of Missouri from 1974-1977 where

*--continued on page five*

## A Letter from the President

I will devote much of my column in this issue of the *Quarterly* to report on some exciting advances the Society is making in the area of program development and to outline some areas of continuing need.

Although an article elsewhere in this issue describes the first National Heritage Lecture in more detail, I would be remiss in not mentioning this highly successful event. Justice Anthony M. Kennedy, the inaugural speaker for this annual series, established a very high standard with his presentation on the Roosevelt Court Plan of 1937. Your Society, and those of our two co-sponsors, the White House Historical Association and the U.S. Capitol Historical Society, are deeply in his debt. I take this opportunity to thank him once again.

Another program which is progressing well is the oral history project being developed in cooperation with the Federal Judicial Center. The pilot project, which is being funded through a \$21,000 grant from the

Society, will initially focus upon interviewing the Court's retired Justices. I am delighted to report that all four of the Court's retired Justices, Chief Justice Warren E. Burger, and Associate Justices William J. Brennan, Jr., Thurgood Marshall and Lewis F. Powell, Jr. have graciously consented to be interviewed.

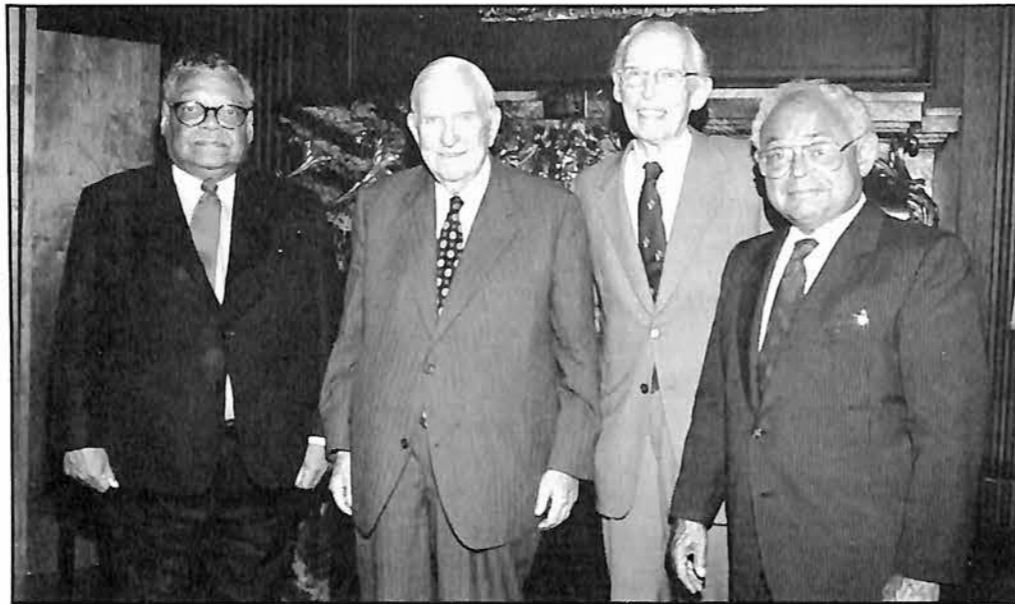
The Society is also continuing its ambitious publications program. We intend to mail the 1991 *Journal of Supreme Court History* and the 1991 Annual Report by the end of December.

The Society will deliver the manuscript for the collection of illustrated biographies to Congressional Quarterly, Inc. by June 30, 1992. This important new reference work should be printed and available for sale by the end of 1992. We are also eagerly awaiting publication of Volume IV of the Documentary History this coming Spring.

Unfortunately, all the news relating to the Documentary History is not so encouraging. Due to budget constraints, the Court anticipates that its support for the Project is likely to be curtailed by the end of 1993. The Program Committee has actively pursued alternative housing for the Project, and has received a commitment from the Administrative Offices of the U.S. Courts to provide space through 1998 in a new building it plans to occupy in late 1992.

I can also report that we have secured commitments from the William Nelson Cromwell Foundation to provide a \$25,000 grant to the Society before the end of 1991, which will be earmarked to support the Project, and a grant of \$50,000 from the Foundation, also for this purpose, which will be paid sometime during the coming year. I am greatly encouraged and gratified by the Foundation's new level of commitment for 1992. I hope that it will be instrumental in helping to encourage other donors to support this worthwhile project.

However, at current funding levels, the Documentary History



Pictured above (left to right) are Society Trustee William T. Coleman, Jr., Dean Erwin N. Griswold, the Society's Chairman, retired Justice Lewis F. Powell, Jr., and Society President Leon Silverman, each of whom gathered for a luncheon held this September to promote the endowment. The endowment campaign, to date, has yielded over \$2.6 million in gross revenues.

Project will experience an annual shortfall somewhat exceeding \$100,000 after 1993. An ongoing commitment by the William Nelson Cromwell Foundation would help to offset a major portion of that shortfall, but obviously, other long-term funding sources will be needed as well.

Some of these funds may have to come from the Society's membership revenues. Thanks to the efforts of Membership Committee Chairman Frank Jones, and a large group of motivated volunteers, the Society's membership and associated membership revenues have increased dramatically in the past few years.

One of the milestones of 1991 was the volunteer membership recruitment campaign conducted by Judge John Brown and Mrs. Vera Brown in Houston, Texas. Members of the Society since 1976, Judge and Mrs. Brown determined to help the Society's membership grow in the Houston area. Working with state chairman, Wayne Fisher, the Browns identified current and recent members of the Society. They then asked friends to serve as captains at prominent Houston law firms to recruit members within their firms. With a network in place, the Browns sought and obtained contributions from several local law firms. These donations enabled them to fund a party in honor of new members, and to further promote the Society.

Stephen Susman, a former law clerk to Justice Hugo Black and a Society member since 1981, and his wife Karen, hosted the party at their home. The evening's program included short speeches by Judge Brown and Wayne Fisher. Champagne and hors d'oeuvres were served and entertainment was provided by the Texas Barflies, a country and western band comprised of judges and attorneys. A table was set up in the entryway with membership and

---continued on page 15

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In the interest of preserving the valuable history of our highest court, the Supreme Court Historical Society is seeking to contact relatives, associates, or any others who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature or any other 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's headquarters, 111 Second Street, N.E., Washington, D.C. 20002 or call (202) 543-0400

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## Justice Anthony Kennedy Delivers First National Heritage Lecture 200 Guests Attend Post-Lecture Reception



The Supreme Court Chamber was the setting for the First National Heritage Lecture delivered by Justice Anthony M. Kennedy. Justice Kennedy dazzled the audience on the evening of November 7, 1991 with an intriguing lecture entitled, "Roosevelt's Court Plan of 1937: The Executive Check, The Legislative Balance and Judicial Independence".

Speaking without notes for nearly one hour, Justice Kennedy described the story of the political struggle between FDR and the Supreme Court, frequently referred to as the "Court packing" plan. Friction between the President and the Supreme Court was the result of Supreme Court rulings which struck down as unconstitutional many of President Roosevelt's New Deal programs. In an effort to counteract this, President Roosevelt proposed to enlarge the Court, adding a new Justice for each member of the Bench 70 years of age or older. This formula would have enabled him to add six Justices to the Bench and hopefully change the voting pattern of the Court.

In describing the difficulties and complexities of the political interests and personalities involved, Justice Kennedy gave a short biographical sketch of each member of the Supreme Court. He also discussed the important Cabinet members and advisors who worked with President Roosevelt to devise the plan, and described the political maneuvering that was involved in trying to obtain support for the plan in Congress. Photographs of the Supreme Court Justices circa 1937 were displayed at the Bench in the appropriate places they occupied at that time.

Justice Kennedy's personal interest in and study of the era was apparent in the presentation, which was a virtual *tour de force*. The audience was delighted with the presentation and gave Justice Kennedy a standing ovation.

Above: Justice Anthony M. Kennedy delivers the first annual National Heritage Lecture in the Supreme Court Chamber.

Among the prominent guests attending the Lecture was (below, at right) Robert L. Breeden, who is Chairman of the White House Historical Association, a member of the Executive Committee of the U.S. Capitol Historical Society, and a Trustee of the Supreme Court Historical Society.

Next to Mr. Breeden is Donald J. Crump, another officer of the White House Historical Association.



At left: Justice Kennedy (left) speaks with U.S. Capitol Historical Society Chairman Fred Schwengel (center) and Supreme Court Historical Society Chairman Erwin N. Griswold (right).

At right are Mr. and Mrs. Gordon O. Pehrson, Jr. Mr. Pehrson served as the Society's representative to the joint steering committee which conceived and planned the first annual National Heritage Lecture.



After the lecture was concluded, participants attended a reception in the East and West Conference Rooms, where a buffet was served. Guests had the opportunity to mingle with Justices Kennedy, Powell and Souter, as well as Officers and Trustees and members from each of the three historical societies.

The First National Heritage Lecture was indeed a great success and Justice Kennedy has set a high standard for future events.

Next year's program will be under the auspices of the White House Historical Society and will focus on the Bicentennial of the White House. We hope you will plan now to attend this event which will take place next Fall.



Following the lecture Justice Kennedy (second from right) posed with (from left to right) Society President Leon Silverman, retired Justice Lewis F. Powell, Jr., Mrs. Powell, Society Chairman Erwin N. Griswold, and retired Senator Roman Hruska.

Courtesy Lois Long, Office of the Curator of the Court

### Justice Thomas (continued from page one)

he worked for Senator John Danforth, who was then Attorney General of Missouri. The Justice's specialty was tax law. After Senator Danforth's election to the Senate in 1977, Justice Thomas went to work for the Monsanto Co. in St. Louis where he worked for 2 1/2 years. In 1979, the Justice went to Washington to work for Senator Danforth as a legislative assistant. His areas of emphasis were energy and environmental issues. He remained on Senator Danforth's staff until 1981 when he became assistant secretary for civil rights in the U.S. Department of Education. In 1982, Justice Thomas became chairman of the Equal Employment Opportunity Commission, a position he held until 1990 when he was nominated to the U.S. Court of Appeals for the District of Columbia Circuit. He served on that Court from March, 1990 until his confirmation to the Supreme Court of the United States.

Appointed at the age of forty-three, Justice Thomas is one of the younger appointees to the bench. In this century, Justice William O. Douglas, appointed at the age of forty, was the youngest but two individuals, Justices Joseph Story and William Johnson, share the record for being the youngest at the time of appointment; each of them was thirty-two years old. Of the current members of the Court, Justice Byron R. White was forty-four at the time of his appointment to the Bench, while Chief Justice Rehnquist was only forty-seven when he was appointed an Associate Justice of the Court.

Justice Thomas married Virginia Lamp in 1987. The Justice has a son from a previous marriage, Jamal, aged eighteen. The family resides in Alexandria, Virginia.

Justice Thomas is the 106th member of the Supreme Court,



Justice Thomas and Mrs. Thomas following the swearing in ceremony at the Supreme Court on November 1st.

and the second African American to serve on the Court. He is the second individual appointed to the Supreme Court by President Bush and the fifth individual born in the state of Georgia to serve on the Court.

# Reluctant Justice: Thomas Johnson of Maryland

by James O'Hara

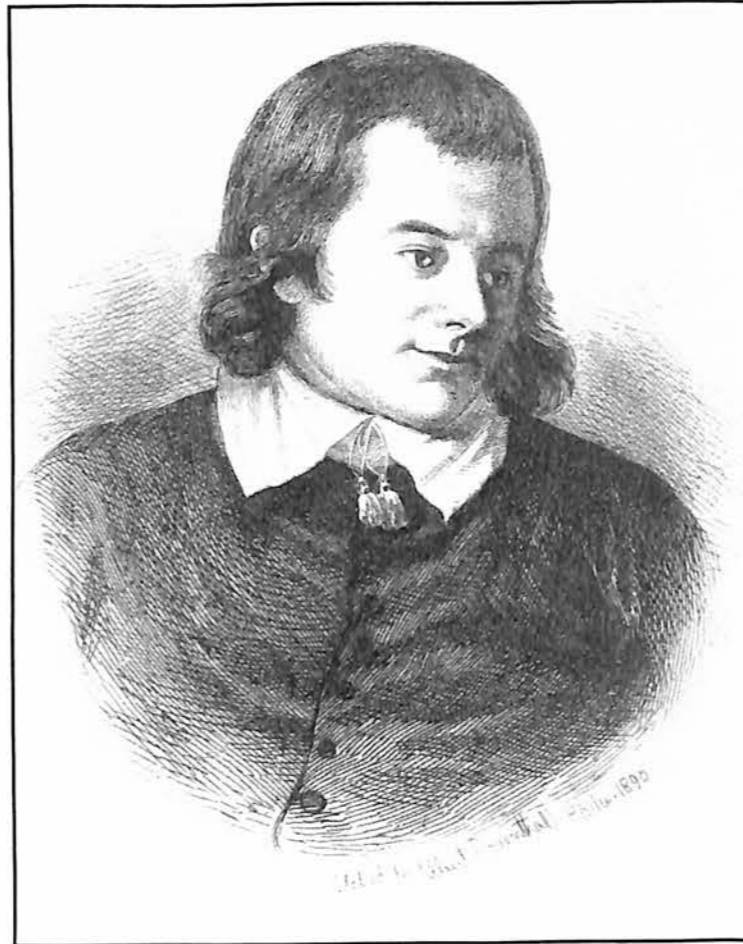
Thomas Johnson was born on November 4, 1732, in Calvert County on the Chesapeake Bay in southern Maryland. His grandfather Johnson had come to America fifty years before from Yarmouth, a port town on the North Sea northeast of London, where his forebears had been successful and politically active for more than a century. Johnson's father--also named Thomas--was a gentleman farmer and country squire who served in the Maryland Assembly. His mother, Dorcas Sedgwick, was from a Puritan family which had sought refuge in Maryland.

While the Johnson's circumstances were financially comfortable, there were twelve children to support. Thomas' early education therefore was privately conducted at home rather than in the prestigious but very expensive European schools. As a young man, he went to Annapolis, the colonial capital, to take employment as a court clerk and to read law under the supervision of Stephen Bordley, a distinguished former Attorney General of the province. Johnson subsequently began his own legal career in Annapolis and by the age of 29, when he was elected to the Provincial Assembly, he was already a leading member of the Bar.

Even while young, Johnson was involved in land acquisition and development. In 1761 he bought land in Frederick County, Maryland as an investment, and quickly became fascinated by the potential of the Potomac River as a commercial waterway, not only for transporting mineral and agricultural products to markets on the Atlantic coast, but also as a transportation link between East and West. A decade earlier, the young surveyor George Washington had himself recognized that potential, and he too had seen that the problems--rapids, shoals, and falls--were surmountable if clearing, dredging, and canal construction could be financed and engineered. This shared vision brought the two men together. In 1770 or thereabouts, they began a correspondence about river navigation. Their acquaintance ripened into warm friendship and respect, becoming a profound influence on Johnson's life. Johnson also established an ironware foundry at Frederick, giving him a vested interest in obtaining a cheap, convenient mode of transportation for his foundry's products.

The years prior to the Revolution witnessed the young man's continued growth in prestige. His legal practice prospered; he assumed ever greater legislative responsibility in the lower house of the Assembly. He promoted a colonial lottery, and served on the council overseeing construction of the Maryland State House. In 1766, Johnson married Ann Jennings, daughter of his first employer, Thomas Jennings, clerk of the Maryland Provincial Court. As one of his biographers notes: "the fact that Johnson married the daughter of a lawyer should serve as strong persuasive evidence that he was a good lawyer." The marriage was happy, and they were parents of eight children, five girls and three boys. All of the children, except for one daughter, survived childhood. A portrait painted about this time reveals Johnson as a man of medium stature, with reddish brown hair, not handsome, but with pleasing features, his eyes intelligent and gentle. A contemporary found him "a most pleasant, joyous, companionable man."

The period beginning with the passage of the Stamp Act in



Thomas Johnson at the age of thirty-six, from a painting by John Hesselius.

1765 was momentous, and Johnson was completely caught up in the political maelstrom, leading the Maryland opposition to the Act. His law office became a meeting place for many activists and intellectuals, but his chief associates were William Paca, Samuel Chase, and Charles Carroll of Carrollton, all of them later signers of the Declaration of Independence. Johnson was particularly close to Chase, a business associate in land speculation who would himself serve on the Supreme Court, and to Carroll, one of the richest men in America, who became his client.

The Stamp Act was promptly, if reluctantly, repealed only a year after its passage, but Parliament insisted on its right to raise monies in the colonies. This struggle between the mother country and its colonies intensified through the next decade, with political sentiment in Maryland echoing that of Massachusetts and Virginia. And whenever there was patriotic activity in Maryland, Johnson and his friends were in the thick of it. When Governor Sir Robert Eden, brother-in-law of the Proprietor, Frederick Calvert (the sixth and last Lord Baltimore), unilaterally imposed duties on tea, glass, paper, and other imports, Johnson led the fight to rescind. When Massachusetts pleaded for help from the other colonies after the Boston Tea Party, Johnson helped to form Maryland's Committee of Correspon-

dence. When Maryland chose its delegates to the First Continental Congress, not surprisingly, Johnson was one of them.

The Continental Congresses provided a new and larger stage for the Marylander. He was already a friend of Washington, and he came to know John Jay, Benjamin Franklin, John and Samuel Adams and the other pre-revolutionary leaders. John Adams recorded in his diary in October 1774 that "Johnson of Maryland has a clear and a cool Head, an extensive Knowledge of Trade as well as Law. He is a deliberating Man, but not a shining orator--His Passions and Imagination dont appear enough for an orator. His Reason and Penetration appear, but not his Rhetoric." In both the First and Second Continental Congress, Johnson served on a number of major committees, but his most important activity was his nomination of his friend Washington to be commander-in-chief of the Continental Army. Though he did not sign the Declaration of Independence, Johnson was a virtual whirlwind at home. He was a participant when on July 6, 1776, Maryland declared its own independence.

Johnson left the Constitutional Convention in order to attend the Maryland Constitutional Convention, and took his seat on Monday, October 7, 1776. During the debates Johnson was an active participant, and showed himself to be a conscientious public servant; he not only voted against (or in one case abstained from voting) pay increases for constitutional delegates, but also made a motion aimed at curbing rising absences which required "every member who asks for leave of absence shall give his reasons for asking such leave, and they be entered on the journal." One of the most significant contributions Johnson made to the convention came about when the delegates considered the report on the Declaration of Rights. Johnson made a motion on behalf of religious sects whose teachings prevented them swearing oaths in legal proceedings. Johnson proposed that an article be added to the Declaration of Rights to solve this problem. The proposed article read:

*That the manner of administering an oath to any person ought to be such, as those of the religious persuasion, profession or denomination, of which such person is one, generally esteem the most effectual confirmation by the attestation of the Divine Being. And that the people called Quakers, those called Dunkers, and those called Menonists, holding it unlawful to take an oath on any occasion, ought to be allowed to make their solemn affirmation in the manner that Quakers have been heretofore allowed to affirm; and to be of the same avail as an oath in all such cases as the affirmation of Quakers hath been allowed and accepted within this State, instead of an oath, And further, on such affirmation, warrants to search for stolen goods, or the apprehension or commitments of offenders, ought to be granted, or security for the peace awarded; and Quakers, Dunkers or Menonists ought also, on their solemn affirmation as aforesaid, to be admitted as witnesses in all criminal cases not capital.*

After discussion and some revision, the proposed article was adopted on Sunday, November 3, 1776 and has remained a part of the Bill of Rights of Maryland since that time. The Article, known as Article XXXIX reads: "That the manner of administer-

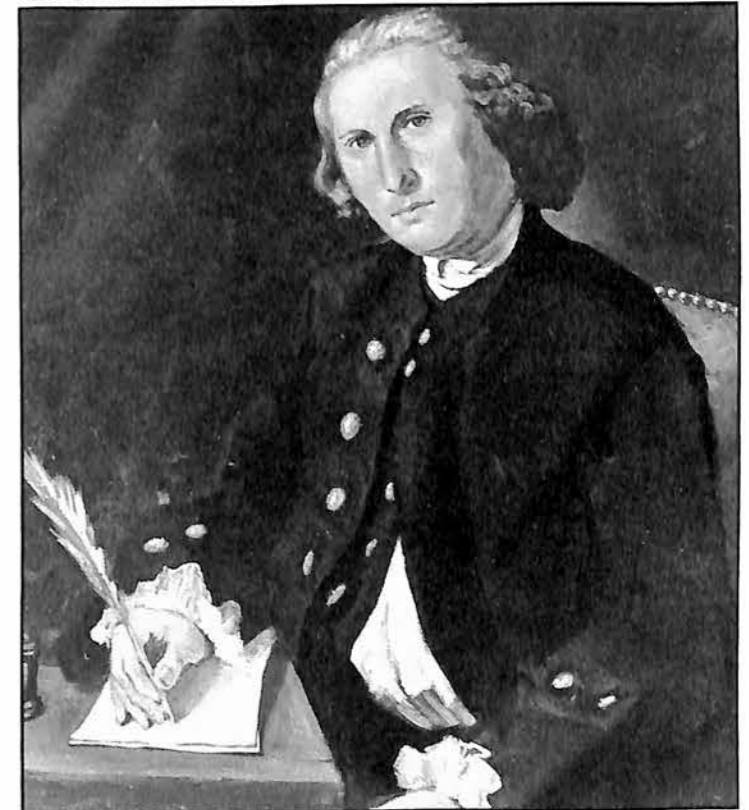
ing the oath or affirmation to any person ought to be such as those of the religious persuasion, profession, or denomination, of which he is a member, generally esteem the most effectual confirmation by the attestation of the Divine Being."

On November 6, the Convention considered the Article which prescribed the oath to be taken by every public servant in the State. The proposed oath was rather cumbersome involving pledges to disclose any information about treasons or conspiracies or attempts against the State government. Johnson proposed that the oath be shortened to read: "I, \_\_\_\_\_, do swear that I do not hold myself bound in allegiance to the King of Great Britain, and that I will be faithful and bear true allegiance to the State of Maryland." Johnson's proposal was accepted and the current Constitution of the state of Maryland still contains the last phrase "that I will be faithful and bear true allegiance to the State of Maryland."

After the adoption of the Constitution, Johnson served as a member of the Council of Safety. He became a broker of supplies and arms and raised a regiment of 1800 men which he headed personally with the rank of Brigadier General. Eventually he took charge of all the Maryland troops that comprised the "Flying Camp," as the battallion from Maryland was named. He corresponded regularly with the Committee of Safety and other government agencies, requesting supplies and provisions. A letter written on the eve of his departure renewed his request for supplies: I cannot but repeat my request that you'd send 1000 pairs of shoes to Philadelphia. Many poor fellows will want shoes by the time they get there, and I wish you'd give me a conditional

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Office of the Curator, Supreme Court



Samuel Chase, one of Johnson's close associates and business partners, would himself be named to the Supreme Court in 1796.

## Thomas Johnson (continued)

credit for blankets, if to be got, for a good many march without 'em. . . indeed I fear that their scanty cloathing will subject them to severe pleurisies."

In January 1777 Johnson finally arrived at Washington's camp leading his troops who would serve as reinforcements for the campaign. As one author tells the story, he arrived "splattered with mud from the march, and diminutive of stature, Johnson looked anything but a brigadier general of militia." The sentinel told Johnson that Washington had given orders not be disturbed. "After Johnson's explosion of words, the man reported to General Washington that there was a filthy red-headed little man who demanded to see him and that the general's orders could be damned but he intended to see him. The Commander-in-Chief exclaimed, 'Oh! It is Johnson-of-Maryland! Admit him at once!'"

When the new and independent Maryland state legislature met for the first time in February 1777, its first constitutional task was to choose a governor: Johnson was overwhelmingly elected. The times were so abnormal that his administration was hard pressed to attend to the usual duties of government. Twice, the young state was threatened by British invasion, once by land and once when a flotilla of English ships entered the Chesapeake; there were also pockets of Tory disloyalty and insurrection. The greatest problem of all, though, was finding the arms, powder, food, clothing, and bedding for his own militia and in response to

the incessant requests of the War Office and the Board of Treasury of the federal government. Later the pleas came from Washington himself at Valley Forge, not far from Maryland's northern boundary. The Governor appointed collectors, with instructions to fan out through the state, gathering and purchasing shoes, cloth, clothing, blankets, hats, and food for the troops suffering from hunger and exposure.

The letters between General Washington and Governor Johnson continued during the war; the general begging for help and the governor frantically striving to supply it. Washington's letter of April 11, 1777 is representative of their correspondence:

*The Campaign is therefore opening, and our present situation, weaker than when you left us, forces me to entreat your utmost attention to the raising and equipping the Continental Troops allotted to be raised in your State . . . Let me therefore, in the most earnest terms, beg that they may be forwarded to the Army without loss of time.*

Again in November of 1777, Washington wrote: "The approaching season, and the scanty supplies of cloathing in public store, without an immediate prospect of their being increased, have induced me, to send Lt. Col Adams of your State to procure, if possible Quantity for the Troops which come from thence. The distress of the Army in this instance I am sorry to inform you, is now considerable, and it will become greater and greater every day if some relief should not be had."

Throughout his three-year tenure as governor, Johnson received similar missives from Washington, pleading for help and sometimes warning of possible impending invasions by British soldiers. Johnson was also concerned with suppressing the activities of Tories within the state. To that end, the Legislature enacted a provision imposing the death penalty upon any person "guilty of burning any Maryland or United States magazine or of destroying or delivering to the enemy any State or United States vessel." The Governor and the Council were also given extensive "war powers" to enable them to contend with the unusual circumstances necessary in governing during perilous conditions.

Maryland's Constitution provided for a one-year gubernatorial term, with no more than three consecutive terms. Johnson was elected unanimously for each of the next two years. He left office at the end of 1779. The war was not yet over, but Yorktown was less than two years away. Johnson decided not to return to Annapolis, but to settle on his Frederick land. He built "Richfield," a large colonial home, and settled down to what he undoubtedly hoped would be serene retirement. He declined a seat in Congress, but did agree to return to the legislature where he urged Maryland's ratification of the Articles of Confederation.

After ratification, Johnson returned to legal practice and began also to pursue his old pre-war interest in the Potomac River. With Washington, he organized the "Potowmack" Company to engage in financing and construction of a canal to skirt the rapids and falls. Their project failed until--at a later date and by someone else--the Chesapeake and Ohio Canal was ultimately built.

Johnson faded from public view for a short time in the late 1780s. He did join in the successful efforts to ratify the Constitution, and after the ratification was a reality, to work for



President Washington held Johnson in high regard, the consequence of which, were offers to serve in numerous government posts, culminating in his Supreme Court nomination in 1791.



Thomas Johnson with his wife, Ann Jennings, and three of their eight children, as taken from a portrait by Charles Willson Peale.

Washington's election as President. Once again in 1790 he attempted to settle down to the private life he truly sought. He had declined to serve again as governor when the office was offered two years before. He declined now to serve in the Electoral College which selected Washington, and he declined to serve when Washington asked him to become the first United States District Judge for Maryland. He did agree to become Chief Judge of the General Court, the highest state court under the Constitution of 1776, perhaps because the duties, while requiring detailed understanding of state law and a willingness to interpret the new Federal Constitution, were not onerous. The court met only briefly each year to consider the few appeals which came before it. Johnson believed, no doubt, that his family and business interests would not suffer.

Once again, however, there was an intrusion, this time from the President. In early 1791, Washington asked Johnson to chair the Board of Commissioners of the Federal City, a body established by Congress to purchase the land and provide the buildings

for the new District of Columbia. Johnson agreed. The new capital was not far from home and located on his beloved Potomac. Moreover, Daniel Carroll, an old Maryland friend and signer of the Constitution, was one of the other commissioners. Johnson even looked forward, as a labor of love, to the design of the new city and of its principal buildings.

But a few months later on July 14, 1791, Washington wrote again, asking "with frankness, and in the fullness of friendship" if the former Governor would agree to an appointment as Associate Justice of the Supreme Court, succeeding John Rutledge who had resigned. Johnson was very reluctant. He was almost 60 and did not want the responsibilities of circuit travel particularly in Rutledge's Southern Circuit. So his initial reply to Washington on July 27 was non-committal, mentioning his concern about the travel. A second response written three days later still did not agree to the appointment; this time he mentioned specifically his concern that he would be assigned circuit duty in the Southern

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## Thomas Johnson (continued)

Circuit. At that time the southern circuit was comprised of all the territorial area of the United States south of the Potomac River and was by far the largest circuit of the three original circuits created by the Judiciary Act of 1789. Johnson said he supposed "the next Southern Circuit would fall to me; if it would, I neither expect or desire any Alteration to accomodate me but my weak Frame and the Interest my Family have in me forbid my engaging in it: Let this single Circumstance, if you please, determine the one way or the other for my Answer. . . . I feel real Unesiness that my Embarrassment should occasion delay in your filling up this Office as the Time is now so short; impute it to the true occasion and believe me that whether I receive the Commission or not the Manner in which you have been pleased to offer it is the greater part of it's Value and will with the many other Instances of your Confidence and Friendship be remembered with pleasure . . ."

Washington rather nonchalantly sent the temporary commission anyway, saying that he had conferred with Chief Justice Jay. The circuit problems could be worked out, Washington said, and besides, he continued, the next Congress would be reviewing "alterations" in the judicial system, "among which this (the circuit duty) may be one." When the Congress met later that year, the nomination was forwarded to the Senate, and Johnson was confirmed on November 7, 1791.

Just as he had feared, Johnson was assigned to the Southern Circuit. His first official duty was to sit with the circuit court at Richmond in November and December of 1791 where he heard an important British debt case, *Ware vs. Hylton*. This was a test case, the ultimate decision of which would involve large sums of money and which would set a precedent in dealing with other claims. Johnson sat with Associate Justice John Blair of Virginia and Judge Griffin, the Federal Judge for the region. Arguing for the defendant, were James Innis, Attorney General of the Commonwealth of Virginia, Patrick Henry, John Marshall and Alexander Campbell. Patrick Henry commenced his argument on November 25th, continuing for three days. This trial proved to be a reputation-building experience for the young John Marshall. But Johnson did not render a final opinion in this case, which indeed, was not resolved until 1794. Johnson did have the distinction, however, of writing one of the first official opinions in the Reports of the Supreme Court of the United States for while the Court had conducted business since February of 1790, it did not issue an official written opinion until 1792.

Commencing with his assignment to the Southern Circuit, all of Johnson's anxieties were realized. His health deteriorated and he was ill and unable to attend when the full Supreme Court met in Philadelphia for its 1792 February term. His health prevented his hearing of cases in the Spring Circuit of 1792, but he did attend the August term of the full Court in Philadelphia where his commission was read and he was duly qualified. During the Fall Circuit that year, he became ill in Charleston in October, but in November was able to preside for a few days in Augusta, Georgia. He was a conscientious man, and would not retain the office if he could not perform its duties. On January 16, 1793, he sent his resignation to the President. He enclosed two letters, the first a personal letter explaining his reasons for his decision to his personal friend, the second a very brief formal letter of resigna-

tion. In his cover letter he explained his concerns rather poignantly:

*On my first reading the Judiciary Act it appeared to me rather an Essay and I had no Doubt but that there would have been an Alteration as soon as the Attention of Congress could be again drawn to the Subject. The Experience we have had of the little that has been or could be done under the present System though excessively fatiguing to the Judges would I thought have insured their Discharge from Circuit Duty—I am not conscious of being greedy of the Profits of Office and would voluntarily have given up part of the Salary as I believe all my Brethren would have done But I am informed the Judges of the supreme Court are still to go the Circuits with an Increase of power to one eventually.*

*. . . I have measured Things however and find the Office and the Man do not fit—I cannot resolve to spend six Months in the Year of the few I may have left from my Family, on Roads at Taverns chiefly and often in Situations where the most moderate Desires are disappointed: My Time of Life Temper and other Circumstances forbid it.*

Johnson's service on the Court was so brief--only 14 months from confirmation to resignation--that analysis of his judicial philosophy is impossible. Most of his judicial record involved only routine business. He did sit at a preliminary stage of *Ware v. Hylton*, but the trial was continued until the next session. He also took part in the first Supreme Court case in which written opinions were filed--*Georgia v. Brailsford*. But this case was also in a procedural stage, and was not argued until later. Like all of Washington's appointments to the bench, Johnson was a Federalist--if it is accurate to speak of a party so early in national history. Johnson seems to have been moderate, rational, temperate, not unlike Justice Paterson who succeeded him.

Following the laying of the cornerstone of the Capitol in September 1793, Johnson resigned from the Board of the Federal City. But he was not to enjoy his longed-for tranquility at "Richfield"; Ann Jennings Johnson died on November 22, 1794, after 28 years of marriage. The retired Governor, now in his 60's, moved to nearby Rose Hill, the estate of his daughter, Ann Grahame. He remained active in his business ventures, but determined not to accept any public office--even declining Washington's offer of serve as Secretary of State. The old statesman's last public activity was his delivery of a "Solemn Panegyric" at a memorial service held in Frederick for Washington in February, 1800, a few months after the first President's death.

Thomas Johnson's last years were uneventful. His niece Louisa Catherine married John Quincy Adams. He befriended a young lawyer named Roger Brooke Taney, who had opened a Frederick office; Taney indeed was a witness to Johnson's will. But most of all, he delighted in his grandchildren, and was active in service to All Saints Episcopal Church. He died peacefully at Rose Hill on October 26, 1819, only ten days before his eighty-seventh birthday. Initially buried in the family vault at All Saints cemetery, his remains were transferred in 1913 to Mount Olivet Cemetery in Frederick.

## Membership Update

The following members have joined the Society between September 1, 1991 and November 30, 1991. Names and honorifics appear as they do on membership applications.

### Alabama

Harry L. Hopkins, Esq., Birmingham  
Mr. James E. Simpson, Birmingham

### Arizona

G.T. Tom Choules Esq., Yuma  
Mr. William A. Holohan, Phoenix

### California

James J. Brosnahan Esq., San Francisco  
Mr. Stephen A. McEwen, Irvine  
The Honorable Leland C. Nielsen,  
San Diego  
Mr. Robert J. Nissenbaum, Los Angeles  
Darryl Snider Esq., Los Angeles

### Connecticut

Raymond B. Green Esq., Hartford  
Sally S. King Esq., Hartford  
John Merchant Esq., Fairfield  
Dr. Harold Silver, Westport  
Joseph T. Sweeney Esq., Hartford  
Mr. Herman H. Tarnow, Westport

### District of Columbia

Mr. George Adams  
Robert C. Bernius Esq.  
Mr. Robert J. Harvie Jr.  
John M. Nannes Esq.  
Mr. Robert Pear  
The Honorable S. Jay Plager  
Mr. & Mrs. John Stuart Smith

### Delaware

Mr. Thomas S. Lodge, New Castle

### Florida

Thomas C. MacDonald Jr. Esq., Tampa

### Georgia

William S. Goodman Esq., Atlanta

### Louisiana

Harry Case Stansbury Esq., New Orleans

### Michigan

John C. Buchanan Esq., Grand Rapids  
J. Michael Fordney Esq., Saginaw  
William M. Saxton Esq., Detroit  
Mr. Brian T. Stevens, Coldwater  
Mr. Larry C. Willey, Grand Rapids  
Sharon M. Woods Esq., Detroit

### Minnesota

Mr. G. L. Cafesjian, St. Paul  
Mr. Lawrence J. Culligan, St. Paul  
Mr. John M. Nasseff, St. Paul  
Mr. Robert J. Owens, St. Paul  
Mr. Michael J. Whetstone, St. Paul

### Montana

Richard Cebull Esq., Billings

### New Hampshire

Ms Ann Marie Cashman, Nashua

### New Jersey

A. Michael Barker Esq., Atlantic City  
John J. Barry Esq., Newark  
Albert G. Besser Esq., Roseland  
Matthias D. Dileo Esq., Woodbridge  
Joseph J. Fleischman Esq., Roseland  
Eugene M. Haring Esq., Newark  
Edward R. Knight Esq., Atlantic City  
Tom Pryor Esq., Princeton  
William W. Robertson Esq., Roseland  
Edward F. Ryan Esq., Newark  
Agnes I. Rymer Esq., Newark  
James J. Shrager Esq., Roseland  
Arnel Stark Esq., Princeton  
Thomas L. Weisenbeck Esq., Roseland

### New Mexico

Ms Margaret Caffey-Morvan,  
Albuquerque

### New York

Myron Beldock Esq., New York  
The Hon. Conrad B. Duberstein, Brooklyn  
Kalman Finkel Esq., New York  
Frank W. Ford Jr. Esq., New York  
The Hon. I. Leo Glasser, Brooklyn

Elihu Inselbuch Esq., New York  
Charles L. Jaffin Esq., New York  
Sanford Krieger Esq., New York  
Professor Jeffrey B. Morris, Bayside  
Ms Eleanor M. O'Keefe, New York  
Mr. Kenneth A. Payment, Rochester  
Guy Miller Struve Esq., New York  
David R. Tillinghast Esq., New York  
John E. Tobin Esq., New York  
James D. Zirin Esq., New York

### South Carolina

Terrell L. Glenn Esq., Columbia

### South Dakota

Anthony Peter Fuller Esq., Lead  
Gene N. Lebrun Esq., Rapid City

### Tennessee

Donald F. Paine Esq., Knoxville

### Texas

Ms Nancy Friedman Atlas, Houston  
Ms Karen Blomstrom, Houston  
Ms Joan Dalton Cain, Sugar Land  
Edward S. Hubbard Esq., Houston  
The Honorable Edith H. Jones, Houston  
Mr. Mark S. Kloster, Houston  
Ms Marianne Walder Malouf, Dallas  
Kevin R. Michaels Esq., Houston  
Benjamin H. Schleider Jr. Esq., Houston

### Utah

Ms. Allison Volcic, Salt Lake City

### Virginia

Mr. Donald R. Campbell, Harrisonburg  
Preston B. Mayson Jr. Esq., Roanoke  
Ms Krissy Weisenfels, Harrisonburg

### Washington

Thomas J. Greenan Esq., Seattle

### Wisconsin

Professor John W. Stevens, Racine

## Justice William J. Brennan, Jr.'s Portrait Presented to Supreme Court

An oil portrait of Retired Associate Justice William J. Brennan, Jr. was presented to the Supreme Court at a special ceremony held in the Supreme Court building on Monday, October 21, 1991. The program was sponsored by the Society in conjunction with the Court and Justice Brennan's law clerks. The Justice's clerks, colleagues and special guests convened in the Great Hall of the building for a presentation ceremony.

The oil portrait was painted by Paul C. Burns and was completed in 1981. Through the generosity of the Justice's law clerks, donations were collected by the Society to pay for the portrait. The clerks held a small party in 1981 to celebrate the completion of the portrait, but as Justice Brennan was still on the Bench, it was not appropriate to officially present the portrait to the Court at that time.

Leon Silverman, the Society's President, presided at the ceremony, making opening remarks and introducing the participants. He briefly outlined the landmarks of Justice Brennan's distinguished career.

"On behalf of the Chief Justice, the Associate Justices of the Supreme Court and the Supreme Court Historical Society I am delighted to welcome you to this historic event--the presentation of a portrait of Justice William J. Brennan, Jr. to the Chief Justice of the United States on behalf of the Court.

It would not be inappropriate to eulogize Justice Brennan on this occasion. However, it would trespass on the Justice's modesty and would in essence be preaching to the converted. I will therefore, content myself with the brief highlights of an extraordinary and rewarding professional and judicial career.

The Justice was born in New Jersey in 1906. He received a B.S. degree from the University of Pennsylvania in 1928 and an LL.B. degree from Harvard in 1931. He also received an LL.D. from Harvard. He received an LL.D. degree from Notre Dame in 1968. He was admitted to the Bar of New Jersey in 1931. He practiced with the firm of Pitney, Hardin, Ward & Brennan for 18 years from 1931-1949.

His practice was interrupted during the Second World War--when he served as a Colonel with the Army's General Staff Corp and was awarded the Legion of Merit.

He became a Superior Court Judge in 1949, an Appellate Division Judge in 1950 and a Justice of the Supreme Court of New Jersey in 1952. He served on that Court until 1956 when President Eisenhower gave him a recess appointment as an Associate Justice of the Supreme Court to succeed Justice Sherman Minton.

He was nominated by President Eisenhower as an Associate Justice in January, 1957 and was confirmed by a voice vote of the Senate in March of that year. He served on the Court for 34 terms and on July 20, 1990 informed the President of his intention to retire.

The Justice's law clerks commissioned a portrait of the Justice and since he is no longer a sitting Justice, it is fitting that the portrait should now be presented to the Chief Justice and that it be hung with those of his illustrious predecessors which grace the halls of this great building.

To present the portrait to the Chief Justice I will call upon

*Courtesy Lois Long, Office of the Curator of the Court*



Retired Justice William J. Brennan, Jr. and Mrs. Brennan pose with the Justice's portrait at the unveiling ceremony.

*Courtesy Lois Long, Office of the Curator of the Court*



Society President Leon Silverman escorts Justice Brennan and Mrs. Brennan to their seats in the Court's Great Hall where the installation ceremony was held. Mr. Silverman later presented the portrait to the Chief Justice for inclusion in the Court's permanent collection.

Dennis Lyons who served as Justice Brennan's law clerk during the 1958-1959 terms and who will speak for all of the Justice's law clerks.

Mr. Lyons was graduated from the Harvard Law School in 1955 where he served as President of the Law Review. He then went to the Washington law firm of Arnold & Porter where he has been a partner since 1963. He has served as a Visiting Professor of Law at the University of Virginia and, if you will forgive a more personal self-interested note, has been a member of the Supreme Court Historical Society for at least 10 years."

Mr. Lyons commenced his remarks, noting that "almost exactly ten years ago, in this place, his law clerks presented Justice Brennan with the portrait of him which is draped before us today. It is said that he who gives early, gives twice; and following that, his law clerks today are giving that same portrait to the Court. We give the same thing twice as by some suspension of the laws of property, possible only in this place, and only on an occasion like this."

Mr. Lyons continued his remarks noting that "our impression of historical figures--as the Justice is and will be--are shaped only incidentally by the tangible artifacts of representations of their persons. They are formed mainly by their intangible product--by the impressions their thoughts, words and acts have made upon their nations and upon humankind, not by the impressions of their persons recorded in marble, on canvas, or on the photographer's plate. For what could be more intangible than--opinions? But this physical portrait survives for the rest of the 150 years to be seen on what will be the three hundred and fortieth anniversary of the Bill of Rights, we venture to say that the Justice's intangible artifacts--his opinions and the decisions of the Court that he authored or influenced--will give a much clearer picture of the man.

"As she looks at that picture, the historian of the Twenty-Second Century will see in the Justice's time on the Court the resolution of many paradoxes and contradictions:

"When the Justice came to the Court, the historian will note, the guarantee of freedom of the press co-existed uneasily with the principle that "whatever a man publishes"--even about a public

*Courtesy Lois Long, Office of the Curator of the Court*



The Chief Justice accepted the portrait of Justice Brennan on the Court's behalf.

official--"he publishes at his peril"--the undiluted peril of the law of libel. But the Justice's opinion for the Court in *New York Times v. Sullivan* came, and it made a giant step in the resolution of that paradox, and toward the development of a constitutional law of libel seeking to harmonize those warring principles.

"The historian will note that at the start of the Justice's tenure on the Court, many provisions of the Constitution existed as ideals without sanction or enforcement. Paradoxes abounded: the Constitutional command against unreasonable searches and seizures was held applicable to the States, but no effective sanction existed for its violation. Grave tension existed between the Equal Protection Clause and legislative malapportionment; but the matter was then called a "political question," and the legislative patient was required to heal himself, although the nature of the disease itself made this unlikely. Official gender discrimination was common and Constitutional jurisprudence to deal with it was undeveloped.

"The Justice's opinions went far in reducing many of these paradoxes. His opinion in *Baker v. Carr* sounded the death-knell of the "political question" objection to federal court jurisdiction to enforce the Equal Protection Clause in state legislative apportionment cases. Gender discrimination by the states in the face of the Equal Protection Clause of the Fourteenth Amendment, and by the Federal Government in the face of the Due Process Clause of the Fifth Amendment, had a long history. But the Justice's opinions in *Frontiero v. Richardson* and in *Craig v. Boren* taught an entirely different way of approaching gender discrimination without the stereotypes of the past--stereotypes that were themselves the fruit of discrimination as well as its seeds.

"Resolution of the paradox of Constitutional provisions without sanctions was also sought by the Justice through his belief in the efficacy of process, judicial or administrative. *Baker v. Carr* was an example of this, as was his recognition of a right to sue for a "constitutional tort" under the Fourth Amendment in *Bivens v. Six Agents*, and his brilliant insistence on the importance of administrative process, and its timing, in *Goldberg v. Kelly*.

"The historian of the day we imagine will note the greatest paradox of our Constitution--that for seventy-two years the majesty of the Bill of Rights co-existed with the awful, 'peculiar institution,' whose name the Constitution dared not speak, which for some purposes made some people worth three-fifths as much as others, and for most purposes worth not at all.

"The vestiges of that institution were still strong when the Justice came to the Court, only two years after *Brown v. Board of Education*. To the reduction of those vestiges the Justice contributed greatly, from the 1958 opinion in *Cooper v. Aaron*, signed by the entire Court, but according to some scholars, primarily written by him, through *Green v. County School Board*, where the Court, 14 years after *Brown* and 10 years after *Cooper*, stopped saying "with all deliberate speed and started saying "now." After the *Green* case came the *Keyes* case, involving segregation in the North, and the *Bakke* case, involving affirmative action.

"The taking of human life by the state as a

--continued on next page

## Brennan Portrait (continued)

punishment has seemed a paradox to philosophers. In the Justice's first years on the Court, his constitutional philosophy toward the death penalty and its consistency with the Bill of Rights was not much distinguishable from that of the rest of the Court. But his position evolved over the years. His opinion in *McGautha v. California* addressed the process by which the penalty could or could not be imposed by the courts. And at about the midpoint of his service on the Court, in *Furman v. Georgia*, he embraced the view that the penalty constituted in any and all circumstances cruel and unusual punishment, forbidden by the Eighth and Fourteenth Amendments. He remained steadfast in that position the rest of his tenure. What the historical resolution of this question will be, is not given us to know, though I suspect the Justice may himself be confident of the outcome.

"The last paradox the historian at the end of our hundred and fifth year span will find, she will have greater difficulty resolving because of her distance from our scene. There was a Justice who was in fact "the great dissenter" and whose dissenting votes were in number a quantum leap ahead of those of any other Justice ever to sit on the Court. Yet it is recorded that he was a great builder of consensus; a great maker of compromises; and a Justice whose personal relations with his colleagues were unsurpassed. For once, it will be easier for us who have known him and known the force of his personality and his humanity to resolve this paradox than it will be for our historian.

"The intangible portrait that the historian will see will have certain clear features. I venture to say that they will be:

"Here was a Justice who saw that our Constitution and our institutions of liberty ought to be an example to other nations, rather than our institutions be copied from other nations or shaped by fear of them;

"Here was a Justice who saw that while liberty may be dependent for its existence upon the presence of its spirit in the human mind and heart, process and access to the courts are its guardians at least as much;

"Here was a Justice who saw that compelled reverence to the tangible symbols of liberty can be the enemy of liberty;

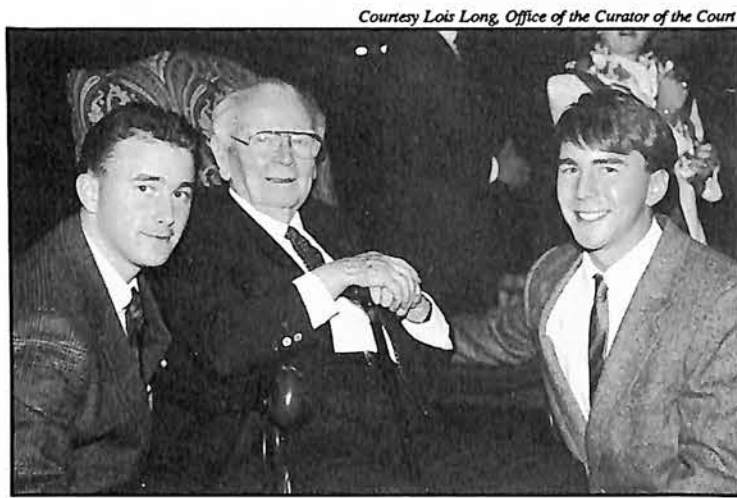
"Here was a Justice who saw that just as humankind was not made for the state but the state for humankind, the citizen was not made for federalism, but federalism for the protection of the citizen;

"Here was a Justice who saw that constitutional commands are not abstract norms but are imperatives--are the law of the land--available through judicial and administrative remedies to their beneficiaries; and

"Here was a Justice who saw that collegiality is the path to consensus, where consensus can be fairly obtained, but that dissent is the duty where it cannot.

"Since this portrait is intangible, and is one in our mind's eye, we may all see it differently, and so may our historians in the twenty-first and twenty-second centuries. The Justice has presented that intangible practice to us and to them, and they and we must make of it what we will, or can. As a tangible and far poorer representation of the man, we now present his canvas portrait to this Court."

Accepting the portrait on behalf of the Court, Chief Justice Rehnquist made remarks about his long-time friend and col-



Justice Brennan with his grandsons Michael Brennan (L) and James Brennan (R) at the reception following the ceremony.

league. The Chief Justice said that the "portrait, which aptly captures both the brilliance and the humanity of our honoree, will soon hang on the ground floor of this building. There it will be placed among the portraits of others who have honorably served this Court over its two hundred year history. It is a great privilege for me, having worked with Justice Brennan for 19 of his nearly 34 years on the Supreme Court, to participate in this dedication ceremony."

Chief Justice Rehnquist further noted that Justice Brennan's tenure on the Court was of considerable duration, and that while it did not set a record, it was close to the record for longevity. He noted, however, that he had never thought that Justice Brennan was trying for a record on length of service, but simply was dedicated to serving as long as he was able to do so effectively.

Coincidentally, the Chief Justice good-naturedly mentioned that Justice Brennan had set a record while serving on the Bench:



Justice David Souter (left) poses with Justice Brennan and Mrs. Brennan at the reception following the portrait installation ceremony.

a record for employing the most clerks during his tenure, for a total of 107. While admitting that the 19th century Justices could not really compete in this field as they had no clerks at all, the Chief Justice noted that Justice Brennan always hired the maximum number of clerks allowable under the law.

The Chief Justice continued his remarks by outlining some of Justice Brennan's achievements and background. He then noted that "Justice Brennan's legacy of significant contributions to this Court is well known. Indeed, he has been described as an 'architect of freedom' and 'a guardian of individual liberties' whose influence can be felt in nearly every area of the law decided by the Court. One important aspect of the Brennan legacy is the many landmark opinions he has authored, included *Baker v. Carr*, *New York Times v. Sullivan*, *Greenberg v. County School Board*, *Goldberg v. Kelly* and most recently *Texas v. Johnson*. A common thread connecting these cases and numerous others is Justice Brennan's unwav-

## President's Letter (continued from page two)

other Society materials and a number of individuals enrolled that evening.

As a result of the Browns' novel enterprise, the Society has gained 70 members, with new applications still being received. "My goal for Houston is 200 new members," Mrs. Brown commented, adding that she is considering making this an annual event. She further noted that "our guests were very enthusiastic and felt very patriotic about the opportunity to preserve Supreme Court history."

Frank Jones praised the Browns for their generosity and commitment to the Society. "It is probable that Texas will have the most new members in the current national campaign," reflected Mr. Jones. "This great accomplishment furnishes a model that can be followed in other states."

In conjunction with our membership activities, plans are underway now for a special dinner to be held in the Supreme Court building on the evening of January 15, 1992. The purpose of the dinner is to pay tribute to Membership Chairs and Major Leadership Donors to the Endowment Fund. Justice Clarence Thomas has graciously consented to join us for this occasion and to present awards to State Membership Chairs who have achieved their annual goals, and to Endowment Leadership Donors who have made contributions or pledges in the past few months.

This latter campaign also has been progressing well throughout 1991, having achieved a gross income figure exceeding \$2.6 million.



Justice Brennan extending his thanks to all of those who attended the ceremony.

ering commitment to human dignity and individual liberty. For our honoree these concepts are not just abstract maxims, but concrete manifestations of deep personal beliefs.

"Those of us here at the Court have been the direct beneficiaries of his gifted understanding of the law, his pragmatism, and his personal charm. For that extraordinary contribution and for that great legacy, we are indeed grateful."

The Chief Justice concluded his remarks by offering his heartiest congratulations and by introducing Justice Brennan.

Justice Brennan received a standing ovation after which he made a few brief remarks of thanks. He expressed his appreciation and commented that since his retirement he had added two more

clerks to his total: the maximum number he was allowed to have in retirement.

The afternoon was concluded with a reception where guests had the opportunity to greet the Justice personally.

Although we yet have some \$220,000 to raise to meet our net goal of \$2.5 million, the principle on deposit in the Endowment is now sufficient to yield an anticipated \$100,000 in annual interest income. As this grows, it too will better enable the Society to sustain not only the Documentary History Project, but the Society's many other programs.

My best-wishes to you all for this holiday season, and for a happy New Year.

Leon Silverman



Entertainment was provided at the Texas membership party by the country and western band, the Barflies. The group is composed of lawyers and judges who perform in their spare time. Pictured are: (left to right, front row) Diann Marshall, Judge John R. Brown and Mrs. Vera Brown, and (left to right, back row) Judge David Hitner and David Crump.



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