



THE SUPREME COURT
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Quarterly

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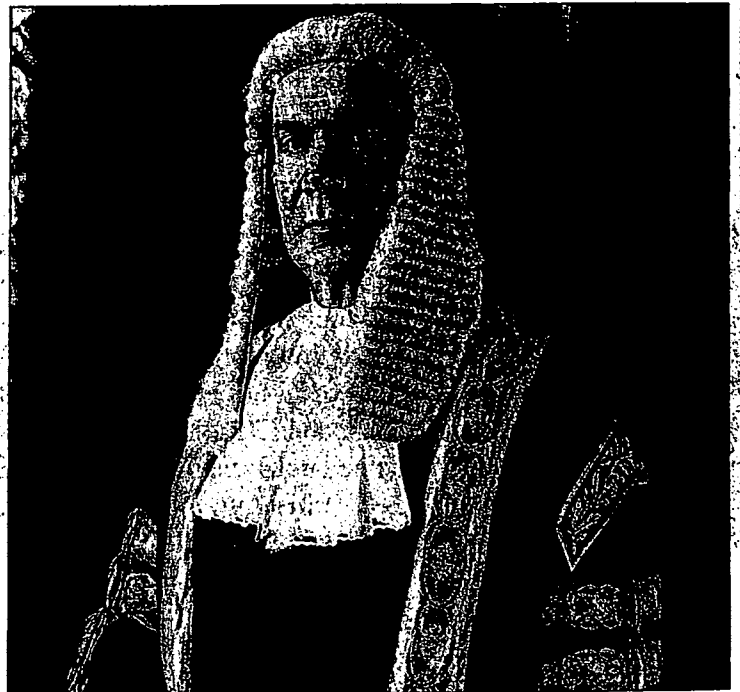
Lord Chancellor Speaks at National Heritage Lecture

On Monday, May 11, 1998 The Lord High Chancellor of Great Britain addressed an audience comprised of members of the Supreme Court Historical Society, the U.S. Capitol Historical Society and the White House Historical Association. The Right Honourable the Lord Irvine of Lairg spoke on the occasion of the Seventh National Heritage Lecture. The Lecture was presented in the Supreme Court Chamber at 6 PM. The Lord Chancellor's topic was "*Constitutional change in the United Kingdom: British solutions to universal problems.*"

The Right Honourable the Lord Irvine of Lairg was invited to become Lord High Chancellor of Great Britain by the Prime Minister, Tony Blair, on May 2, 1997. He was born Alexander Andrew Mackay Irvine in Inverness in Scotland on June 23, 1940.

Lord Irvine was educated at Inverness Academy and at Hutchesons' Boys' Grammar School in Glasgow before going to Glasgow University (where he joined the

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British Information Services

Baron Irvine of Lairg, Lord High Chancellor of Great Britain.

Civil Rights And The Supreme Court: The African-American Journey 1998 Lecture Series Commences April 8, 1998

The 1998 Lecture Series considers the development of African-American Civil Rights from the Reconstruction Amendments to the *Brown* decision. Beginning with the extension of Constitutional protections to African-Americans with the passage of the 12th, 14th and 15th amendments, the series explores the journey from the Reconstruction period through the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. Spanning approximately a one hundred-year period, the series features noted scholars from around the country.

■ April 8 – *Reconstruction to Plessy*, Presented by Professor William Van Alstyne, this program examined

the passage of the Reconstruction Amendments and some early cases, such as *Strauder v. Virginia* and *Blyew v. United States*, which gave definition to the meaning of those Amendments as antecedents to *Plessy v. Ferguson*. The latter half of the lecture examined the case which established "separate but equal" as a constitutional doctrine. Professor Van Alstyne has written extensively on equal protection, federalism and the First Amendment. He is the William R. and Thomas C. Perkins Professor of Law at Duke University. Professor Van Alstyne was introduced by Chief Justice Rehnquist.

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A Letter from the President



Leon Silverman

On February 20, 1998 the Society became the proud owner of a building that will eventually become its new headquarters. The current headquarters is a 1500 square foot townhouse the Society has occupied since 1983. Renovated under the supervision of noted historical architect Nicholas Pappas (who later became the architect for Colonial

Williamsburg), the building served the organization well for a number of years. However, the Society's continuing growth has overburdened the limited space.

Since 1983 the Society's membership and full-time staff have more than doubled. The Society now routinely publishes several books each year and sponsors a number of lectures and other educational programs.

In addition to the space requirements these expanding activities entail, the Executive Committee hopes the new building will allow the Society to improve its member services. Under the direction of the Headquarters Committee, the building will undergo a substantial renovation and will hopefully be ready for occupancy in approximately eighteen months. The Committee, chaired by John Risher, has compiled an inventory of Society functions it hopes can be accommodated in the new building. A substantially expanded library and conference room are anticipated. The Committee is also investigating the possibility of including an office in the building that can be made available for the convenience of members visiting Washington. Other issues being contemplated in the design are handicapped accessibility, fire safety, a flexible environment conducive to upgrading technology and storage and archival storage as required.

Calling it a "new" building, of course, is somewhat misleading. The prospective headquarters, which is located at 224 East Capitol Street, N.E. in Washington, was built in 1891, making it one year newer than the current headquarters. It has undergone a number of renovations during the intervening century. A photograph taken in 1956 (see right column), prior to major renovation of the facade closely matches the description of the building's appearance during the 1890s. Notably the building had a storefront shop and the upper floors were apparently used for residen-

tial purposes. Typical of the period, the property bore a distinctly Victorian influence as evidenced by the large muttonless windows. In the later 1950s the building was renovated for use by the Brylawski law firm and the facade was altered to a more Federal style.

Leaders in the Capitol Hill community have asked the Society to consider modifying the facade toward a design more in keeping with the neighborhood's residential character. Because the exterior has already been substantially modified over the years, historical preservation of the existing facade plays a lesser role in determining how the building should look once it is completed. Still, the Headquarters Committee wants the finished product to have a coherent architectural theme. Toward that end the Committee interviewed a number of prospective architects in the past few months who are thought to be qualified to address the aesthetic requirements and the program needs the Committee has identified.



The original building at 224 E. Capitol Street, N.E., was built with a storefront at street level. This picture was taken circa 1955, before a renovation of the building.

The Supreme Court Historical Society

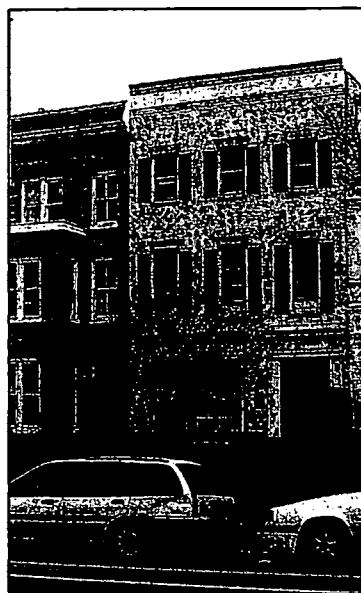
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Managing Editor

Kathleen Shurtleff

Budget will be the most important determinant in calculating the extent to which the new building can be made to fulfill the Society's aspirations for it. Purchase of the building was made possible through a generous gift from Society Chairman Dwight Opperman, who has also donated some of the funds necessary to renovate the new headquarters. Clearly, more will be required but the extent of the potential cost will not be known for a few more months. What is assured, however, is that the new building will allow the Society to expand membership services to members who visit Washington. The much-needed space will also improve the staff's efficiency in responding to member requests nationwide. This is a monumental achievement in the Society's short history and we can all look forward to its completion.



When the building was renovated, the bay windows on the upper floors were eliminated, leaving a flat-faced building. Architectural studies will be made prior to determining a new design for the exterior of the building.

Leon Silverman

MEMBERSHIP UPDATE

The following joined the Society between January 1, 1998 and March 31, 1998.

Arizona

Robert E.B. Allen, Phoenix
John J. Bouma, Phoenix
Robert A. Fortuno, Tucson
Ms. Athia Hardt, Phoenix
The Honorable Barbara R. Mundell, Mesa
James B. Reed, Phoenix
Geoffrey M.T. Sturr, Phoenix

Arkansas

Paul B. Benham, Little Rock
Elizabeth R. Murray, Little Rock
Michael Rainwater, Little Rock
Louis L. Ramsay, Pine Bluff
Gordon S. Rather Jr., Little Rock
William A. Waddell Jr., Little Rock

California

Bernie Bernheim, Los Angeles
Robert H. Bretz, Marina del Rey
Thomas A. Campbell, Santa Rosa
Clinton H. Coddington, Redwood City
Rickie Cortez, San Francisco
Eugene Dong MD JD, Palo Alto
Andrew N. Eshoo, Modesto
Victor John Gianunzio, Oakland
Gerard J. Glass, Walnut Creek
Richard Hamlish, Westlake Village

Stephen S. Harper, Orinda
Chyong-Yao Ho, Alhambra
James R. Homola, Fresno
B.J. Jack, South San Francisco
Robert P. Kahn, Atherton
Pamela Z. Karger, Irvine
Thomas F. Keating Jr., San Rafael
Daniel J. Lananhan, Santa Rosa
Felix E. Leatherwood, Los Angeles
Ms. Faye Lee, San Francisco
Hugh Geoffrey Major, San Francisco
The Honorable James J. Marchiano, Martinez
Michelle Matti, Glendale
William L. Nagle, Burlingame
Robert J. Popelka, San Jose
Peggy A. Propper, Pasadena
Charles G. Warner, Monterey
Richard C. Watters, Fresno
James M. Wood, Oakland
Weldon S. Wood, San Jose
Michael F. Wright, Los Angeles

Colorado

Scott M. Browning, Denver
Michael A. Williams, Denver

Connecticut

Alfred R. Belinke, Bridgeport
John P. Collins Jr., New Haven
Charles G. Schott, New Canaan

Delaware

James P. Hughes Jr., Wilmington
Jack Markell, Wilmington
Raymond Michael Ripple, Hockessin
Natalie Wolf, Wilmington
Donald J. Wolfe Jr., Wilmington

District of Columbia

M. Miller Baker
Mr. Montague A. Buck
Ms. Mary L. Clark
Dr. & Mrs. Ahmad Esfandiary
Terence J. Fortune
Elizabeth Runyan Geise
Ms. Betty Beale Graeber
Holly Hagen
Mr. Richard Helms
Mr. and Mrs. Joseph W. Henderson
Ms. Ellen A. Hennessy
Ms. Olga Hirshhorn
Mr. & Mrs. Wallace F. Holladay
Laurie A. Holmes
Thomas C. Jensen
Mr. Douglas Jordan
Dr. & Mrs. LaSalle D. Leffall Jr.
Mr. and Mrs. Rufus S. Lusk
The Honorable & Mrs. G. William Miller
Craig A. Nalen
Robert P. Parker
Kurt M. Rylander

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STATE CHAIRS HOLD ORGANIZATIONAL MEETING, DINNER

Members of the 1997-98 team of state membership chairs attended an organizational meeting and dinner at the Supreme Court last fall to get to know each other and to share ideas on running a successful recruitment campaign. The November 4 function marked a departure from the traditional format of state chairs' dinners which have in the past been held at the end of the membership campaign in the spring and have been occasions to recognize those who achieved their membership recruitment goals.

The change was suggested by Connecticut State Chair Daniel J. Brennan Jr. Brennan ran one of the most successful efforts in the previous year's campaign, exceeding his goal and raising the Society's visibility through participation in state bar meetings and seminars. Brennan's success was recognized by Justice Scalia at the awards dinner on April 14, 1997. After accepting National Chairman Lively Wilson's offer to serve another term as Connecticut's chair, Brennan proposed changing the timing and the format of the state chairs' main event. "Last year's campaign was my first, and I would occasionally talk on the phone to my counterparts in other states to get practical tips and moral support. I had been thinking for a while that it would be helpful for everyone to meet at the beginning of the new campaign, if only to have faces to put with the names. Then when Lively told me how many first-time chairs were coming on board, we figured we could combine a get-acquainted social function with some workshops and war stories."

Brennan himself moderated a discussion focusing on the specifics of running a campaign, covering topics including the fine points of writing and placing press releases; identifying and qualifying prospective members; writing effective cover letters; the critical importance of follow-up phone calls . . . and how to make sure you still have some friends left when the campaign's over.

Many of the incumbents were able to reassure the newcomers on that score. Jim Falk, a two-term veteran, says, "It's true that there are a lot of worthy causes out there and people do sometimes get exasperated, myself included. But the Supreme Court Historical Society is unique because the Supreme Court is unique. The chance to attend social functions and lectures at the

Court, especially events the Justices attend themselves, would appeal to anyone. And the programs and publications that the Society produces are top rate. People may join because you importune them, but they end up thanking you for it because the Society does such fine work."



Justice John Paul Stevens hosted the fall dinner in honor of State Membership Chairs and Donors to the Society. Justice Stevens is the Senior Associate Justice of the Supreme Court and commenced his service in 1975 having been confirmed by a Senate vote of 98-0.



National Membership Chair for the FY 1998 Campaign and a Trustee of the Society, Lively Wilson has been an active member of the Society for many years. An afternoon workshop conducted by Mr. Wilson and Dan Brennan of Connecticut, provided new State Chairs an opportunity to learn about effective means of carrying out their assignments.

Some of that work was outlined in a short presentation by Executive Director David Pride who briefed the participants on the Society's history and its ongoing projects. Lively Wilson, who served for years as the Circuit Chair for the Sixth Circuit before becoming National Chairman, spoke about his own experiences recruiting new members in his home state of Kentucky, and stressed the importance of membership revenue to the Society's programs and general operations.

The participants were also treated to a private guided tour of the Court conducted by Dale E. Bosley, the Marshal of the Court, before repairing to the East Con-



Sheldon Cohen, Treasurer of the Society, hosted a table which included Richard Bernstein, State Chair for Pennsylvania; Christina Falk, wife of DC Membership Chair James Falk, and Benjamin (Terry) White of Rhode Island. Both Mr. Falk and Mr. White have served as Membership Chairs for several years and have been highly effective in their efforts.

Justice Stevens. I got some good ideas in the workshop, and I enjoyed the company and the great dinner.”

The state chairs were joined for dinner and the preceding cocktail hour by members of the Society’s board of trustees and major donors. In brief after-dinner remarks, Lively Wilson noted the vital importance both of philanthropic corporations and of individual grass-roots support in carrying out the Society’s work. □

ference Room for a cocktail reception featuring informal remarks by Justice Stevens.

The senior Associate Justice reminisced about his long career on the Court and noted some of the ways it’s changed since he joined the bench in 1975. He acknowledged the important role the Society plays in preserving the Court’s history and thanked the state chairs for their role in advancing that mission.

“Justice Stevens’s presence was the highlight for me of a completely inspiring evening,” remarked Thomas Kilbane, a first-year chair from Ohio. “You always feel the history and importance of the Supreme Court on any trip to the building, but I really appreciated the rare chance to be part of a select group being addressed by



Dwight D. Opperman, (left) Chairman of the Board of Trustees and a benefactor to the Society, visits with Justice Stevens at the November dinner held to honor the State Chairs and Donors to the Society.

Twenty-third Annual Meeting Planned for June 1, 1998

The Twenty-third Annual Meeting of the Society will be held on Monday, June 1, 1998. The Annual Lecture will be delivered by The Honorable Seth Waxman, The Solicitor General of the United States. His speech will be delivered at 2 PM in the Supreme Court Chamber. The Annual Meetings of the Board of Trustees and the General Membership of the Society will commence at 6 PM in the Supreme Court Chamber. The traditional black tie reception and dinner will start at 7 PM. The reception will be held in the East and West

Conference Rooms, and the dinner will be held in the Great Hall at 8 PM. Reservations for the Reception and Dinner are limited, but every effort will be made to accommodate requests. Reservations will be taken for the lecture as well. The lecture and the general meetings are open to all members without charge, but a fee is attached to the reception and dinner. Current members should receive an invitation to the Annual Meeting 30-45 days prior to the event. Questions should be directed to the Society’s office at (202) 543-0400.

THE SEQUEL TO MILLIGAN: THE CIVIL LAW SUIT

by *The Hon. Allen Sharp**

When he visited the United States during the time of Andrew Jackson, Alexis De Tocqueville opined that in the United States every political question ended up a law suit. Although the Supreme Court's docket is replete with examples to support DeTocqueville's observations, few rival *Ex Parte Milligan* for political implications. The case involved the exercise of broad presidential powers during wartime. In 1864, Lambin P. Milligan, a civilian, was tried and convicted of conspiracy and sentenced to die for his part in a plot to release and arm Confederate prisoners for an invasion of Indiana. The trial was conducted by a Military Commission during the waning days of the Civil War. An old friend, now Secretary of War, Henry M. Stanton, intervened on Milligan's behalf to prevent his execution. Additional pleas were made by the Speaker of the Indiana House who made a mercy mission to Washington seeking to save Milligan's life. President Andrew Johnson eventually commuted the sentence to life in prison, but Milligan appealed his case to the Supreme Court of the United States.

Oral argument at the Supreme Court involved notable attorneys: David Dudley Field, one of the great lawyers of the 19th century and brother to Associate Justice Stephen Field; and Jeremiah Black, a former Attorney General of the United States. Writing for the Court, Justice David Davis, held that:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Gov-

ernment. . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.

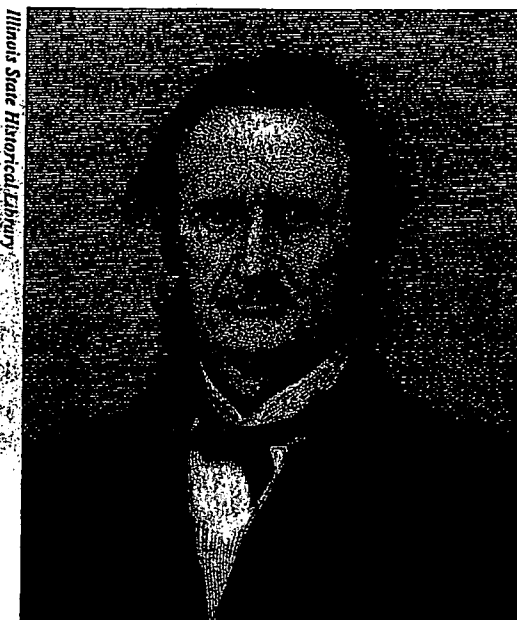
The Court found Milligan to be both a civilian, and to be living outside the war zone. Upon release from the State Penitentiary in Ohio where he had been held prisoner most recently, Milligan returned to Huntington, Indiana to a hero's welcome, the recipient of a Supreme Court ruling which had vindicated him.

But almost two years later, Milligan filed a civil law suit in the local courts of Huntington County where he sought common law damages against twenty-two different defendants he claimed to be responsible for his illegal incarceration. Not satisfied with the Supreme Court verdict, Milligan renewed his legal battles.

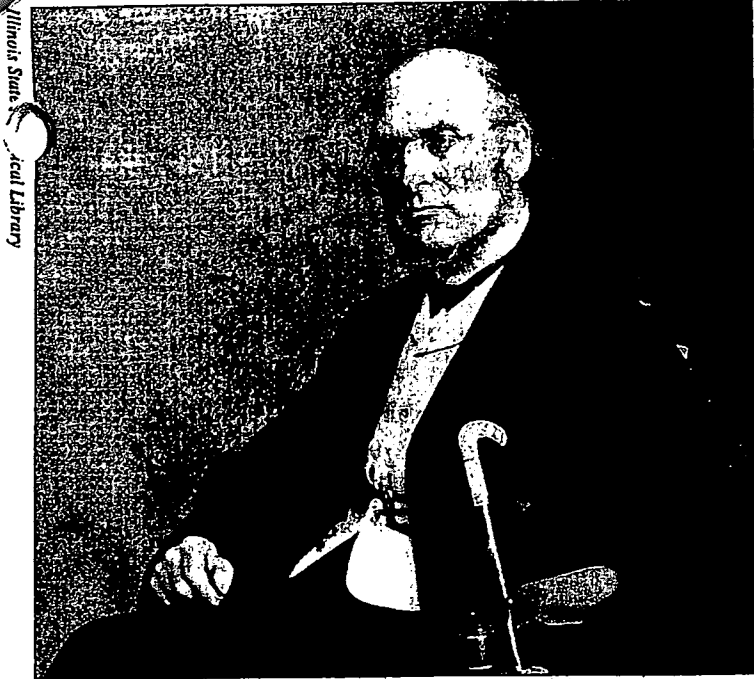
At the insistence of the defendants, Milligan's civil trial was transferred to the United States Circuit Court which sat regularly at Indianapolis. The case went through a long series of procedural machinations. The original suit had been filed

pro se, but when the case moved to the Federal Court in Indianapolis, Milligan decided to employ a lawyer, Thomas A. Hendricks. Hendricks was a litigator of some standing and he argued at least a dozen cases before the Supreme Court of the United States and made many appearances in lower federal and state courts.

Hendricks was also an accomplished politician. By the time of the Milligan case, Hendricks had been elected to and had served in both houses of the Indiana General Assembly, and had served as the Administrator of the Federal Land Office in the administration of James Buchanan. Hendricks had also served in both houses of the U.S. Congress and had been an unsuccessful Demo-



After his successful civil suit, Lambdin P. Milligan had difficulty collecting the "court costs" awarded him by the jury. There is in fact, no conclusive evidence that he ever collected any remuneration beyond the \$5 "pain and suffering" award the jury stipulated.



Judge Thomas Drummond presided over the Milligan civil trial. He served more than thirty years in the federal judiciary. There is some evidence to suggest that he was on the "short list" compiled by President Lincoln for possible appointment to the Supreme Court bench.

cratic candidate for governor in 1860 and 1868.

Most of the defendants Milligan sued, were themselves well-known. They included Oliver Morton, a powerful member of the United States Senate and the dominant figure in the Republican party in Indiana, Alvin P. Hovey, Commander of the Union Army in Indiana and a future governor of the State, and General Ben Spooner, a Union Officer who had lost an arm at the battle at Kenesaw Mountain.

Counsel on the opposing side of the case was Benjamin Harrison, grandson of President William Henry Harrison and direct descendant and namesake of the Governor of Virginia who signed the Declaration of Independence. Harrison was an early adherent of the newly-formed Republican Party. He was elected as a Reporter to the Supreme Court of Indiana in 1860, a position which was a political plum for lawyer-politicians. After service in the Civil War as a general in the Union Army, Harrison was again elected Reporter of the Supreme Court in 1864. Harrison was in great demand as an orator at Union Army reunions and was a leader in the formation of the Grand Army of the Republic in Indianapolis. Some surmise that Harrison was selected personally by Ulysses S. Grant to defend the array of defendants brought into federal court to answer in damages to the claims of mistreatment made by Milligan.

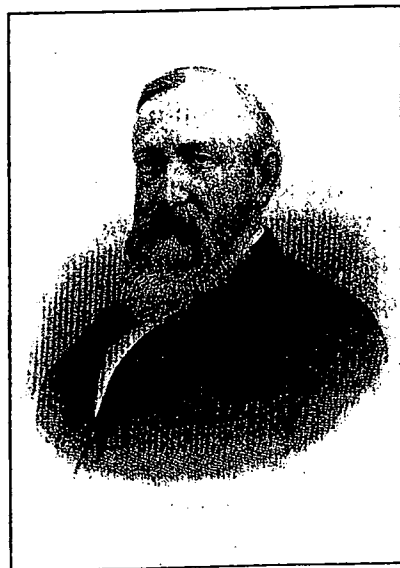
Harrison had a connection with Milligan from earlier days for he had been involved in the case of Andrew Humphrey who had been tried with Milligan before the same military commission in Indianapolis. After the ruling by the Supreme Court in 1866 in *Ex Parte Milligan* case, Humphrey had sued for false imprisonment damages in Sullivan County, Indiana and secured a \$25,000 judgment. Harrison succeeded in having the decision reversed in the Supreme Court of Indiana.

The presiding Judge for the "new" Milligan trial was Thomas Drummond, a federal judge from Illinois. Drummond had served with Abraham Lincoln in the Illinois legislature and later was considered by Lincoln for possible appointment to the Supreme Court. Jury selection for the trial resulted in commentary from the Democratic press organ in Indianapolis that at least ten of the twelve jurors were known Republicans.

The adversarial dynamic of the trial is interesting to analyze. Hendricks attempted to keep the trial narrowly focused on common law claims for so-called "trespassing" damages to the person of and indignities suffered by Milligan during his illegal incarceration. Harrison was able early in the trial to obtain a judicial ruling that all but a small slice of Milligan's claims were foreclosed by a congressionally enacted statute of limitations. Winning that victory proved to be a highly significant tactical victory for Harrison.

Although framed in terms of common law trespass, false arrest and false imprisonment, the case was, in reality, a claim for money damages in a jury trial for a violation of Constitutional rights. The evidence offered

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Illinois State Historical Library

After his participation in the Milligan case, Harrison ran for governor of Indiana in 1876, but lost. He was later elected to a term in the US Senate from Indiana, falling reelection by a single legislative vote. Two years later, he was narrowly elected President of the United States.

The Sequel to Milligan (continued from page seven)

by Milligan about his health and the conditions of his confinement in Indiana and later in the Ohio Penitentiary has an altogether modern ring. Milligan claimed specific physical injuries as well as emotional pain and suffering. Originally, he sued for \$500,000 in compensatory damages. But by the time the case went to trial the prayer for damages was reduced to \$100,000, and at least seven defendants were dismissed for one reason or another. According to one historian, the case as originally conceived had included twenty-three defendants, and that "a dozen" were dropped before the case went to trial.

It might surprise modern civil rights litigators that Milligan's attorney **did not** seek any punitive damages. The approach taken by Hendricks would fit well into the modern mold of civil rights advocates. He claimed damages for physical and emotional injuries from unconstitutional confinement. In a lengthy two-day presentation, Hendricks led Milligan through a long list of alleged inhumane treatment and personal indignities sustained by him while held in custody from September 1864 to April 1866. Hendricks clearly had the advantage of the law of the case decided by the Supreme Court in *Ex Parte Milligan*, and carefully constructed his factual case around that decision. His tactics were thus simple and straightforward.

Early in the trial Judge Drummond reinforced the application of the *Milligan* precedent by taking judicial notice that the civil courts, both state and federal, were open and operative in Indiana throughout the Civil War. This quashed Harrison's efforts to show that Milligan was in fact subject to military jurisdiction. The Harrison defense tactics were complex as he had to guide around the heart of the *Milligan* decision. He had to accept the Supreme Court's pronouncement in the majority opinion of Justice Davis. Harrison, always an able technical lawyer, launched a procedural barrage even while conced-

ing *Milligan's* validity. His basic tack was to question the *amount* of any damages. He made at least three technical attacks. Most importantly, he sought and secured a favorable ruling based on the 1863 Habeas Corpus Act enacted by Congress, involving a two-year statute of limitations.

Judge Drummond ruled that the statute was applicable in the case and instructed accordingly, thus limiting the damages sustained by Milligan solely to a narrow slice of time between March 13 and April 10, 1866, a period of less than a month. This was a devastating legal defeat for Milligan.

Contemporary court observers indicated that Harrison was able to wring very little in the way of damaging admissions from Milligan, but much effort was expended trying to establish Milligan's affiliation with and participation in such seditious groups as the Sons of Liberty and Knights of the Golden Circle. As Harrison could not get Milligan to implicate himself in testimony, Harrison was forced to rely on third parties to try and document Milligan's participation.

Witnesses such as Felix Grundy Stidger, a self-promoting Kentuckian who had infiltrated the Sons of Liberty and Knights of the Golden Circle, were called to try and establish Milligan's active participation in the groups. Stidger provided pointed testimony against Milligan.

I met the plaintiff Lambdin P. Milligan in the city of Indianapolis, Indiana at a meeting of what was termed the Grand Council of the State of Indiana of an organization known as the "Sons of Liberty," in the month of June 1864. He was there known as an officer of the organization with the rank and title of Major General. His name was read in the meeting of the Council in his presence as such officer. . . . There was considerable discussion had on that day by the said Council in regard to the purposes and objects of the said order. . . . The

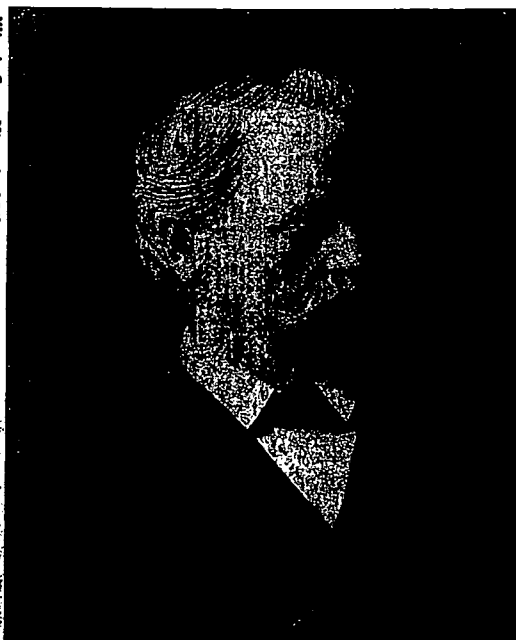
Illinois State Historical Library



Thomas A. Hendricks was elected governor of Indiana in 1872, and prior to that had served in both houses of the U.S. Congress. He missed becoming Vice President of the United States on the Samuel J. Tilden ticket by a single electoral vote in the highly contested election of 1876. In 1884 he was elected Vice President under Grover Cleveland.

said organization was exclusively a secret organization. None were allowed to be present at its meetings except known members thereof. The objects of the said organization as discussed in said Council on that day was: The supposed tyranny of the Federal Government and the means to be used to remedy the evils complained of. A part of the program then discussed as aforesaid was: The releasing of rebel-prisoners at Indianapolis and Rock Island and other points; Seizing United States Arms and Supplies, and arming and supplying said Rebel Prisoners and such citizens of the State as could be induced to join them and to operate as might be thought best for the assistance of the Rebel Army.

Illinois State Historical Library



General Alvin P. Hovey's military career commenced in 1846 when he fought in the war with Mexico. His judicial career included service as a district judge and a judge of the state supreme court of Indiana. He was elected to the Fiftieth Congress of the United States, and was elected Governor of the state of Indiana in 1888.

Members of the audience in the courtroom stated that Sudger gave an impressive performance on the witness stand. . . . He also stood up well under a searching cross examination. While most of Harrison's testimonial ammunition hit the target, there was an occasional miss. Another spy witness, Edmund Klamroth, did not fare so well when cross-examined by Hendricks who trapped him in falsehoods and literally drove him from the witness chair in disgrace.

Harrison concluded his argument on the eve of Memorial Day in 1871. Flamboyant and patriotic rhetoric framed his appeal to the jury not to penalize the defendants who had fought and nearly died for their country. Referring specifically to Spooner he told the jury that ". . . on the bloody sides of Kenesaw, he gave an arm, almost a life, for the country which he, and these his comrades, loved so well. While he lay upon the field, bleeding, almost dying, here in Grand Council in the State of Indiana Milligan and his associates were plotting treason; and now they seek to rob him of the little savings from the office which a grateful country . . . conferred upon him, in order to enrich the traitors."

Most of Hendricks' response was restrained in contrast to this melodramatic summation. His argument appealed calmly to the reasonable and responsible nature of the jurors:

"The dignity and importance of the questions involved in this case you can estimate somewhat when you consider the language of the Supreme Court thus used in respect to them. They are not whether Mr. Milligan is a good or bad man, nor whether the defendants were gallant soldiers and able officers, but

whether a man can be arrested without authority of law; held month after month in prison; put on trial before a tribunal having no jurisdiction or authority over him, and sentenced to ignominious death; and for all to be denied the ancient remedy and redress of the law. The struggle today is to maintain some of our cherished Constitutional rights; the right to trial by jury; freedom from unlawful arrest and imprisonment; and exemption from all trial and condemnation except in accordance with the usages of the courts.

Hendricks could not resist, however, responding to some of the high-flown oration of General Harrison. The General had closed his remarks with the image of honoring the soldier's graves for Memorial Day. Hendricks responded with a description of his own visit to Arlington Cemetery:

Fame's eternal camping ground is the resting place of the dead soldier, and glory guards that resting place. And do these gentlemen ask you on tomorrow to decide that which is contrary to your sacred pledge and carry with you a burden through life that will stand your stooping shoulders down to the grave—a false verdict? Can you visit the graves of the true and the brave and cast flowers upon them, because they fought for the integrity of the Union; to maintain the authority of the government. . . . Can you go there tomorrow, with the consciousness of having failed to discharge one of the highest duties that a citizen is ever called upon to perform. The ceremony will be no honor to the dead soldier, and the flowers no ornament to his grave if strewn by hands that have defiled the law in court. It may

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THERE IS NO "HOW TO DO IT MANUAL" AT THE SUPREME COURT

by John A. Stookey*

There is no 'How to do it manual' at the Supreme Court." This was Justice Sandra Day O'Connor's response to a question concerning how things had changed for her at the Supreme Court during her seventeen-year tenure on the High Court. The question was one of many addressed to her by two of her former clerks, Scott Bales (now an Assistant United States Attorney), and Justice Ruth McGregor (recently appointed to the Arizona Supreme Court), at the 1998 meeting of the Arizona members of the Supreme Court Historical Society. Justice O'Connor went on to explain that Ruth McGregor was the first clerk she hired and together they had to figure out how things worked at the Court. "We did not know how opinions were circulated; we did not know how the cert pool worked; we didn't know how anything worked," Justice O'Connor explained. This led the Justice into a wonderful story about Justice Lewis Powell. Affectionately imitating Powell's southern Virginia accent, O'Connor recounted how Powell must have understood that she needed help when he offered to let her hire his second secretary, Linda Blandford. O'Connor jok-

ingly said that this was the key to her survival, because without Linda Blandford, she would probably still not understand how things worked at the Court.

Justice O'Connor also recounted her great admiration for Justice Powell. She particularly recalled how much she had enjoyed talking and debating with him and how she had wondered on his retirement how she would survive at the Court without him as her friend and confidant. This story was particularly appropriate because Larry Hammond, an attorney at the Phoenix Law firm of Osborn Maledon and a former Powell clerk, had introduced Justice O'Connor. In that introduction, Hammond recalled that Justice Powell had an article clipped from the "Style" section of the *Washington Post* which reported that by dancing with Justice O'Connor at a function celebrating her appointment to the Bench, Powell had apparently become the first Supreme Court Justice to dance with another Justice.

Attended this year by more than 100 lawyers, scholars, and judges, the annual meeting of the Arizona members of the Supreme Court Historical Society has become a much anticipated event. Last year former Arizona resident Chief Justice Rehnquist visited with guests in Tucson. (see Vol. XVIII, No. 1) This year, members met in Phoenix and were treated to an Arizona native as a speaker. In her opening remarks, Justice O'Connor observed that Arizona was not such an unusual place for a meeting of the Supreme Court Historical Society. She noted that many recent Supreme Court cases have come to the Court from Arizona as well as several contemporary landmark cases such as *Miranda* and *Gault*. Her point was clear. Supreme Court history does not just happen in Washington, but is national; cases and justices come from all parts of the country.

To many of the guests the most moving comments by the Justice concerned Justice Thurgood Marshall. When asked to talk about some of the Justices with whom she has served, O'Connor immediately named Justice Marshall . . . "he is the only true American hero I have gotten to know personally." She traced Marshall's life from his rejection at the University of Maryland law school because of his color, to his life at Howard' then-struggling law school, to his work at the NAACP Legal Defense Fund, to his appointment as Solicitor General and finally to the Court. She spoke with deep

Courtesy: The Washington Post



On August 19, 1981, President Ronald Reagan announced the nomination of Judge Sandra Day O'Connor to the Supreme Court of the United States. In this photograph, President Reagan and then-Judge O'Connor visit in the Rose Garden at the White House following the announcement of her nomination to the Supreme Court.



Well known for his courtesy and genteel Southern manners, Justice Lewis F. Powell, Jr. was particularly solicitous of his new colleague, Sandra Day O'Connor, providing assistance in helping her learn the "ways" of the Court. An article in the *Washington Post* suggested that when they danced with one another at an event celebrating her appointment to the Bench, it was the first time two United States Supreme Court Justices had danced together.

fondness and admiration for a person that she said had truly helped to shape 20th Century American for the better. She ended by saying with astonishment that Marshall did not seem to realize what he had done; that he would always discount compliments for his accomplishments, by saying that there was so much more to do.

Justice O'Connor also recalled Justice William J. Brennan, Jr., his outgoing personality, "twinkling eyes," and his impact upon every area of law. O'Connor recalled Justice Byron White as "another kind of hero"—a superb college and professional athlete, who became a brilliant attorney and Justice. For Court watchers, O'Connor's first recollection about Byron White was quite interesting. She said that unlike any other Justice she has known, White had a great interest in the Court's original jurisdiction cases. White would shepherd these cases and ensure that they were fully and fairly decided. Justice O'Connor speculated that this interest at least partially reflected the subject matter of many such cases—water rights. She suggested that as a fellow

Westerner, White understood in ways that could not be fully appreciated by those from other parts of the country how water rights issues were of vital and fundamental importance.

When asked to compare her experiences as an appellate judge in Arizona with her experiences at the Supreme Court of the United States, Justice O'Connor said that the biggest difference was that the Supreme Court really functions as nine separate law firms. The Justices seldom interact or discuss issues. She pointed out that this is even true at conference. She said that it is a misperception to say that cases are really "discussed" at conference. Rather, each Justice typically summarizes the opinion he or she has reached, and then an opinion writer is assigned. O'Connor said that the lack of conversation is both a function of the workload and the personalities of the Justices. She did name one current exception, however. She said that Justice Breyer, like Justices Powell and Brennan before him, likes to talk about cases and will often seek out other Justices to discuss a particular issue or fact or law.

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In her remarks, Justice O'Connor said that Justice Thurgood Marshall was the first "true American hero" she had ever known personally.

Lord Chancellor To Speak at National Heritage Lecture (continued from page one)

Labour Party). He graduated MA, LLB there. He then went on to Christ's College, Cambridge, where he graduated BA with 1st class Honours with distinction in Law, and LLB with 1st class Honours. He was a Scholar of his College, and won the University Prize in Jurisprudence. He is an Honorary Fellow of Christ's College.

He lectured in law at the London School of Economics from 1966 to 1969 and was called to the Bar by the Inner Temple in 1967. He has been head of chambers at 11 King's Bench Walk since 1981. He became a Queen's Counsel in 1978 and served as a Recorder from 1985 to 1988. He was appointed a Deputy High Court Judge in 1987.

Lord Irvine, who was created a Life Peer in 1987, married Alison McNair in 1974, and they are the parents of two sons, David and Alastair. Lord Irvine's title comes from the village of Lairg in the District of Sutherland in the North East of Scotland. He chose Lairg as a title because of his family associations with Lairg.

Lord Irvine is uniquely qualified to present the National Heritage Lecture not only by virtue of his credentials and accomplishments, but also by virtue of the fact that The Lord High Chancellor is the only member of the British government to serve simultaneously as a member of all three branches of the government: executive, judicial and legislative. Indeed, the office of Lord High Chancellor may be the only office in western government for which this distinction can be claimed.

The Lord High Chancellor was introduced by Justice Stephen Breyer. Following the program, a reception was held in the Conference Rooms. The speech will be printed in a forthcoming volume of the *Journal*. Questions about Society events may be directed to the Society's office at (202) 543-0400. Information about lectures are also posted on the Society's website at www.supremecourthistory.org. □

The Sequel to Milligan (continued from page nine)

be you have to maintain a fight in this case against prejudice and popular opinion. I neither know nor care anything about that. You have to maintain the laws—the laws which stand by you in every right you possess.

After this closing oration, the jury recessed to consider a verdict.

Jury deliberation lasted throughout the night, and on Memorial Day morning at approximately 11:00 o'clock, the jury returned a damage verdict of \$5.00 in favor of Milligan after a bruising, extensive two-week legal battle. The jury also awarded costs to Milligan. But according to the papers retained in the Federal Archives, he was again *pro se* trying without success to collect his fees late in the 1870s.

The size of the jury verdict certainly did not forecast the eventual recognition of the participants in the case. In the following year, 1872, Thomas A. Hendricks was elected the sixteenth Governor of Indiana and served one term. Although he lost a bid to become Vice President on the Tilden ticket in 1876, Hendricks was eventually elected Vice President with Grover Cleveland. Benjamin Harrison was elected to a single term in the United States Senate from Indiana, and by a narrow margin, was elected the twenty-third President of the United States. Alvin P. Hovey was elected the twentieth Governor of Indiana. Only Milligan himself seemed to diminish in historic importance in the succeeding years.

The present Chief Justice of the United States has asserted that the *Milligan* trial was the first great civil rights case decided by the Supreme Court. He is supported in that assertion by one of his predecessors, Chief Justice Earl Warren. It can also be said that this celebrity-laden trial in the Federal Court in Indianapolis in 1871 was the first great civil rights jury trial. The second *Milligan* case seems to bear out de Tocqueville's assertion that most, if not all, major political questions do find their way into a law suit in the United States of America. □

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*Judge Sharp was appointed to the U.S. District Court for the Northern District of Indiana in 1973 and served as Chief Judge from 1981-1996. He is an Adjunct Professor at two universities.

No "How To Do It Manual" (continued from page eleven)

In response to a question about the decreasing number of formal opinions by the Court, Justice O'Connor indicated that the decrease was probably at least partially a function of the decrease in the mandatory jurisdiction of the Court. She noted, however, that she is the "person responsible for keeping track of such matters" and that she thinks that the decrease has bottomed out and in fact, that there is a slight increase.

Justice O'Connor was also asked about technology at the Court and recalled that when she arrived the cases were still printed by a "hot lead" process. She then talked about the sophisticated computer system that has since been installed. Feigning confusion, she laughed and said that the Court is currently changing the word processing to "something called Microsoft Word" and that as a result the computer people have become part of her office staff.

Although not specifically discussed that morning the Conference Center tucked between Camelback Mountain and Mummy Mountain, the picture that will remain in the minds of many of us lucky enough to be there will be of the first woman appointed to the Supreme Court of the United States sitting next to her first clerk, who is only the second woman ever to serve on the Arizona Supreme Court. That picture, combined with Justice O'Connor's moving tribute to her former colleague and friend, Thurgood Marshall, reminded us that only recently has the judiciary in the United States begun to reflect the rich diversity of our citizenry. Most of the guests were fully cognizant of the place in history that Justice O'Connor will share with Justice Marshall. □

**Mr. Stookey is a member of the law firm Osborn Maledon in Phoenix, Arizona.*

Membership Update (continued from page three)

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Membership Update (continued from page fifteen)

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