



Brennan Memorials

The career and contributions of Associate Justice William Joseph Brennan, Jr. were memorialized in a special session of the Supreme Court Bar held in the Supreme Court of the United States on May 22, 1998. As is customary, the Bar of the Supreme Court of the United States met to review the life of Justice Brennan and to consider a formal tribute to the Justice. The Resolutions Committee was charged with researching and writing an appropriate tribute to the Justice to be presented to the members of the Supreme Court Bar for adop-

tion later in the day. The Committee was comprised of Floyd Abrams, Norman Dorsen, Owen Fiss, Gerard E. Lynch, Frank I. Michelman, Robert C. Post, Geoffrey R. Stone and Peter L. Strauss.

The opening paragraph of the resolution set the tone for the tribute: "William Joseph Brennan, Jr., graced the Supreme Court of the United States for thirty-four extraordinary years. Appointed to the Court on October 15, 1956, by President Dwight D. Eisenhower, Justice Brennan's years of Supreme Court service spanned eight Presidencies, seventeen Congresses, and one hundred forty-six volumes of the United States Reports. Ill-health forced Justice Brennan to retire from the Court on July 20, 1990, but not before his unique qualities of mind and heart had touched the lives of twenty-two Supreme Court colleagues—one-fifth of the Justices to have served on the Supreme Court; one hundred-twelve law clerks, each of whom became part of Justice

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Collection of the Supreme Court of the United States

Justice William J. Brennan, Jr.

Teachers Attend Supreme Court Summer School

by Jen Fordyce

The fourth annual Supreme Court Summer Institute took place in Washington, DC from June 18 through June 30. The Institute, cosponsored by the Supreme Court Historical Society and Street Law, Inc., took place at the Georgetown University Law Center.

Participants came from all over the continental U.S., as well as one American high school in Germany. With only sixty spots available and applications pouring in from high school teachers around the country, the selection process was quite difficult this year. Applicants wrote essays or short answers to questions regarding their teaching experience, extracurricular activities, opportunities to train other teachers, and included written recommendations from their colleagues.

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Justice O'Connor and Supreme Court Summer Institute participant Nancy Marshall of California.

A Letter From the President



Recently Judge Damon Keith of the Sixth Circuit sent me a touching memorial which he had delivered on the occasion of William T. Gossett's funeral on July 27th of this year. It reminded me what a giant in the law Bill Gossett was, and caused me to reflect upon where the Society might be had he not been so devoted to the Society's success.

Bill's first wife, Elizabeth, was of course, a former President and Chair of the Society—a fitting role for the daughter of former Chief Justice Charles Evans Hughes. But Elizabeth's interest in the Society transcended her familial relationship with the Court's history. In that she mirrored Bill's devotion to improving the public weal.

About the time I became actively involved in the Society, then President Justin Stanley was working with Bill to establish the Society's endowment. Bill eventually founded the endowment with a personal seed grant of Ford Motor Company stock that I suspect he yet held from his days as Ford's General Counsel and Vice President.

That Bill was a lawyer's lawyer is an assessment that is inescapable upon even the briefest of overviews of his career. As Judge Damon noted in his memorial, Bill Gossett served as General Counsel and Vice President for the Bendix Corporation, as well as of Ford. He was Chairman of 20th Century Fox. He was a name partner in the renowned Detroit firm of Dykema, Gossett. He also served as President of the American Bar Association and National Chairman of the United Negro College Fund.

Following his first wife's death, Bill remarried in 1984 and new wife Kathryn lent her vigor to Bill's devotion to the law, and to serving the Supreme Court. As Bill's health began to fail, the Society was determined that he should be honored for his work on its behalf. Ultimately it was decided that the Society would name its annual scholarly prizes for contributions to the *Journal of Supreme Court History* after Bill, Kathryn and Elizabeth, and the Hughes-Gossett Prize for Historical Excellence was born.

Now that Bill has passed away, there is some consolation to be found in knowing that the Society honored him while he was still alive, and that the legacy he built by ensuring the Society's future will live on for many years to come.

Indeed, by nearly every measure the Society is forging ahead with marked success. The endowment which Bill founded with his initial gift now exceeds \$3,000,000 including accrued interest. The *Journal of Supreme Court History*,

from whose contributors the Hughes-Gossett Prize-winners are selected is about to be expanded to three issues a year.

Our recent lecture series on African-American Civil Rights was among the most successful the Society has ever sponsored. Some of the lectures drew nearly 300 guests, and all were televised on CSPAN.

The Documentary History Project, long the gem in the Society's historical research crown, has just published its sixth of eight anticipated volumes—a milestone in the development of that project and the Society. Yet, despite the demands this accomplishment has placed on the Project's staff, DHP Director Maeva Marcus has been devoting additional hours to a pilot program examining the potential and the need to create a graduate school consortium focusing on constitutional history.

The Society is also moving ahead with its web-site, which can be located at www.supremecourthistory.org. Our goal is to add 10 to 20 new full-text books to our on-line digital library during the coming year. Members who visit the site will notice a number of our past Journals have already been posted, as has the first increment of the Society's popular gift shop catalogue.

Plans to occupy the Society's new headquarters are also proceeding apace. While we yet have before us a considerable funding gap between gifts on hand and pledged and the overall budget, we have several promising possibilities to bridge that gap. In the meantime, our need for additional space has become so critical as to be impacting on the Society's programs. Accordingly, the Executive Committee has authorized construction to begin in late November of this year, with a completion date projected for mid-summer 1999.

The new building will enable the Society to more properly house and display items in its collection in addition to those on display in the Court itself. It will also serve as home to the Society's growing library. And, I would be remiss if I did not mention in this connection the continuing efforts of Professor James O'Hara, the product of whose labor as unof-

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ficial acquisitions librarian has so increased this valuable resource.

Professor O'Hara is indicative of a cadre of contemporary volunteer supporters who are ushering the Society forward from one success to the next. Until his death last July, Bill Gossett was another. The Society is thankful for its past and current friends whose efforts ensure its bright future.

Leon Silverman

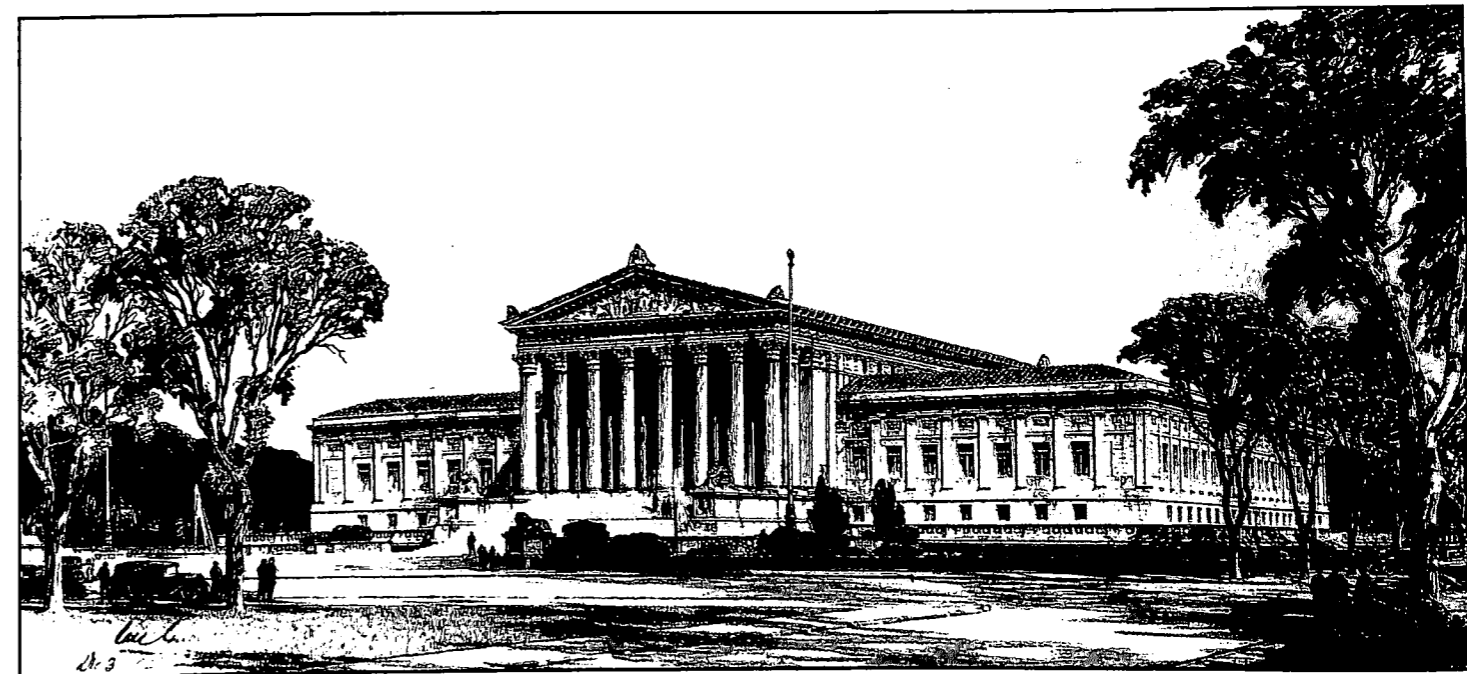
As Pure in Style as I can Make It

A special exhibit prepared by the Office of the Curator recently opened in New York City, "As Pure In Style as I Can Make It: Cass Gilbert's Supreme Court Building." The exhibit is located in the building that houses the Smithsonian's National Museum of the American Indian in lower Manhattan. Originally New York's Custom House, it was built at the turn of the century by Gilbert, and was his first major building on the east coast.

This exhibit on the Court is one of five celebrating Cass Gilbert's contributions to American architecture currently on view in New York. The Curator was invited to be a member of the Committee on Cass Gilbert Projects (a sub-committee of the U.S. Court of Appeals for the Second Circuit's Committee on History and Commemorative Events), which

Attention Federal Employees!

Once again, the Supreme Court Historical Society is a participant in the Combined Federal Campaign (CFC) of the National Capital Area. The Society's 1998 designation number is 7656. Gifts made through the CFC support the Society's work in preserving and disseminating the history of the Supreme Court through public programs, workshops for teachers, publications, and our website. Please consider the Society when you review the list of Local Voluntary Agencies in the campaign catalog.



West and South facades of the Supreme Court of the United States as drawn by Schell Lewis from the offices of Cass Gilbert.

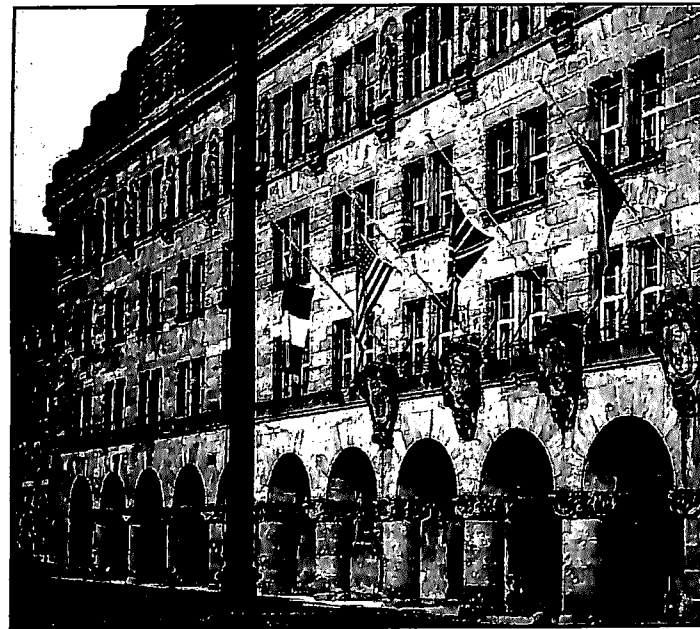
Collection of the Supreme Court of the United States

The Flags at Nuremburg

A Memoir by Alan Y. Cole

In 1949, I had the privilege of serving a one-year term as a law clerk to Supreme Court Justice Robert H. Jackson who had been the American (and chief) prosecutor at the War Crimes Trial in Nuremberg, Germany after World War II. This was the trial of the major Nazis when the war was over. The trial itself was held in the Palace of Justice in Nuremberg from which flew the flags of the four nations who were participating in the trial: The United States, England, France and the Soviet Union.

One day I was chatting casually with the Justice in his chambers at the Court and mentioned in passing, "when the flags at Nuremburg were at half staff." Justice Jackson interrupted and said flatly, "The flags at Nuremburg never flew at half staff." I explained that they had been so flown to mark the untimely death of General George S. Patton. The Justice was not persuaded. "The flags at Nuremburg never flew at half staff," he repeated. "The Russians would never have lowered their flag to honor an American general," he asserted. I was certain he was incorrect. Indeed, I had a vague recollection that somewhere I had a photograph of the Palace of Justice with the flags at half staff.



Courtesy of Gloria Cole

noticed that the framed photograph had been hung on the wall above his shoulder, near his desk, in his personal office at the Court. I later learned from his secretary that he had hung the picture as a reminder to himself that he was not always correct, and that even he—a Supreme Court Justice and Nuremberg prosecutor—was fallible and could make a mistake like anyone else.

After awhile I became accustomed to the print on the wall in his chambers. When my clerkship was over, I left the Court and opened my own law office in downtown Washington and forgot all about the salon print. I had many other things on my mind.

Sometime after Justice Jackson's death in 1954, a messenger from the Supreme Court appeared at my office with a package for me. It was the Nuremberg photograph. The Justice had left instructions, that upon his death, the picture was to be returned to me. I have hung the photograph on my law office wall, above my shoulder, near my desk, which is where it hangs now.

In 1953, in the case of *Brown v. Allen*, Justice Jackson pungently wrote: "We are not final because we are infallible, but we are infallible because we are final." Justice Jackson had a way with words. This was a cogent way to say the Supreme Court was not the highest court because

it was always right, but rather because there was no higher court to say that it had made a mistake. I have always thought that when the Justice wrote those marvelous words, he was looking at the picture on his wall of the Palace of Justice at Nuremberg with the flags at half staff.

Alan Y. Cole, was a name partner of the firm Cole and Groner, P.C. in Washington, D.C. He clerked for Justice Jackson for one year before commencing private practice. A graduate of Yale Law School, Mr. Cole served as chairman of the Criminal Justice Section of the ABA. He died on September 25, 1984.

New Literature on the Court

by James B. O'Hara

Five significant volumes on the Supreme Court have been published recently, all of special interest to members of the Society.

Books by Chief Justices are not rare. John Jay was one of the authors of *The Federalist Papers* and John Marshall wrote his five volume life of George Washington. Taft and Hughes wrote books before assuming the center chair, and Earl Warren and Warren Burger both wrote several books while in retirement. What is rare is a book on the work of the Court by a sitting Chief Justice.

Chief Justice William H. Rehnquist had already written two books about judicial history before his latest offering, *All the Laws But One: Civil Liberties in Wartime* (Knopf, 1998). The title is descriptively accurate; the Chief Justice traces the tension between the American tradition of civil liberties and the exigencies of wartime. Much of the book centers on the greatest challenge of all: The Civil War. Lincoln's suspension of *habeas corpus* occurred in the early days of the War without Congressional authority. Constitutional authority to suspend the writ seemed to suggest that Congress alone had the power to do so (and indeed Congress later expressly gave the power to the President), but Lincoln's action was tested in the Courts, and Chief Justice Roger Taney

ruled against the President. The Chief Justice also held that civilians—even civilians suspected or charged with treason—could not be tried in military courts. Lincoln ignored Taney's order. A constitutional crisis might have ensued in ordinary times, but the impasse between the executive and judicial branches was lost in the overwhelmingly more pressing issue of the War itself.

Similar issues were raised in the course of the War as Union forces occupied territory formerly under Confederate control, or which were hotbeds of Southern sympathy. Free speech issues were raised whenever some expression of support for the rebel cause was uttered. Northern generals invariably, and not without cause, saw treason everywhere. At issue once again was the trial of civilians before military courts, essentially with military judges and procedures. Ultimately, after the war, in *Ex Parte Milligan*, the Supreme Court unanimously condemned the conviction of Milligan, a civilian, by military courts, and rejected the government's argument that civil war suspended the Bill of Rights.

Chief Justice Rehnquist then turns to the legal issues surrounding the trials of the ex-conspirators of John Wilkes Booth in the assassination of Lincoln, and the free speech

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Trivia Quiz: Famous Children

by Prof. James B. O'Hara

Many Justices have been fathers of sons and daughters who themselves achieved distinction or notoriety. Can you identify the jurists and their progeny?

1. This Justice's son was a distinguished photographer of birds and wildlife.
2. This Justice's daughter was a well known economist.
3. This Justice resigned from the Court when his son was appointed Attorney General of the United States.
4. This Justice's son was the sculptor of the massive statue of John Marshall which is now displayed in the Supreme Court Building.
5. This Justice had a son who was a prominent Senator and Presidential candidate.
6. This Justice was father of a well known abolitionist author.
7. This Justice's son was Governor of North Carolina.
8. This Justice's son was Solicitor General.
9. This Justice's son was a reform candidate for Mayor of Chicago.
10. This Justice's daughter was the scandalous trendsetter of her day.

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New Literature (continued)

issues arising out of opposition to World War I. The final chapters are devoted to World War II and to the controversies surrounding internment of Japanese citizens and non-citizens as they were raised before the Court in the *Hirabayashi* and *Korematsu* cases.

All the Laws But One is a balanced, clearly focused, wonderfully written book. It is based on the latest research, yet directed to a popular audience, and is completely devoid of technical legal language. It is, as booksellers might say, "a good read."

For years, both scholars and the interested reading public have complained about the absence of a definitive biography of Justice Benjamin N. Cardozo. For years also, Professor Andrew L. Kaufman of the Harvard Law School has been assembling material and reading cases for a Cardozo biography. His efforts have now borne fruit in *Cardozo* (Harvard University Press, 1998).

"This must surely be the last book that owes its beginning to Felix Frankfurter," the author begins, noting that the ebullient Justice had first suggested that Friedman undertake the project in 1957. Is the result worth the forty year wait? This reviewer believes that it is.

Benjamin Cardozo is surely one of the great figures in the pantheon of American

law. For much of his adult life, Cardozo was first a judge, then chief judge, of New York's highest court. New York's central importance as the nation's commercial hub brought to Cardozo and his court issues of the highest importance and complexity, particularly in the areas of tort and contract law. Long before his appointment to the Supreme Court by President Hoover in 1932—to replace Oliver Wendell Holmes, Jr.—Cardozo was already recognized as one of America's greatest judges. Law students to this day are still introduced to Cardozo's sophisticated literary style and subtle reasoning in cases like *Martin v. Herzog*, *Palsgraf v. Long Island Railroad*, and *MacPherson v. Buick Motor Company*, all written while the Justice was still serving in New York.

Unfortunately, Cardozo came to the Supreme Court at the age of 61 and he lived only six more years. Despite failing health, his impact was far from limited. Early on, he joined the progressive minority of Brandeis and Stone, often in dissent as the New Deal's liberal agenda ran into the obstacle of the "Four Horsemen" of opposition—Van Devanter, McReynolds, Sutherland and Butler. Cardozo also anticipated the later debate, led by Black, about the incorporation of the Bill of Rights by the Fourteenth Amendment, and the application of those guarantees to the States. In *Palko v. Connecticut*, Cardozo concluded that some of the provisions of the Bill of Rights were "of the very essence of a scheme of ordered liberty," a theme later replayed and extended by the Warren Court.

Cardozo's gentle and courtly manner, his simplicity of spirit, his subtlety of expression, present grave problems to the biographer. Cardozo has been depicted by some of his admirers as a secular saint, but the biographer must make critical judgments, sometimes even harsh. Kaufman's *Cardozo* is no saint; the author knows how to separate reality from fantasy. While obviously admiring Cardozo deeply, and even loving him, Professor Kaufman dares to criticize, and he knows the difference between biography and hagiography. *Cardozo* is wonderfully written, and a great Justice now has a "life" worthy of his life. It is no surprise that the Supreme Court Historical Society has bestowed the Erwin N. Griswold Prize on Professor Kaufman for this work.

A second judicial biography, very different in scope and style, is Dennis J. Hutchinson's *The Man Who Once was Whizzer White: A Portrait of Justice Byron R. White* (Free Press, 1998). The author, a former clerk to the Justice, makes clear that this is no "authorized" biography in the sense of active cooperation or encouragement by the subject, but the result is a coherent, accurate and sympathetic portrait.

Byron White has lived an almost legendary life. He was a brilliant student, a nationally known collegiate athlete, a National Football League star, a Rhodes Scholar, a Naval officer, a Supreme Court clerk under Fred Vinson, a respected lawyer, Deputy Attorney General of the United States under Robert Kennedy, and, for thirty years, a Supreme Court Justice. The resulting story is like the Justice's life, full of interest. While this reviewer thought that the football years could have been summarized more succinctly, it is nonetheless true that Byron White was, after all, a legitimate All-American hero who finished second in the Heisman Trophy vote and who subsequently was elected to the Collegiate Football Hall of Fame. The work of Deputy Attorney General White in the 1960's struggle for civil rights is convincingly and movingly told. Hutchinson is faced with a quandary when assessing Justice White's thirty years on the Court. First, Byron White's judicial philosophy defies easy "liberal/conservative" classification. He was independent and practical, given to a kind

of non-dogmatic common sense. While this view of a judge's role works quite well in fact, it makes a critical biographer's task more complex. It is easier to define dogma than it is to compartmentalize good judgment.

A second difficulty is the sheer volume of material to be analyzed. Justice White wrote more than a thousand decisions, concurrences and dissents, and voted in thousands of other cases where he did not write. He served with three Chief Justices and seventeen other Associate Justices. It defies a biographer's ability to set down a complete record of all of the temporary alliances, all the correspondence and communications, or even all of the issues over so long a time.

Yet Hutchinson succeeds remarkably well by focusing on three particularly important terms. This focus allows a detailed look at Justice White's approach to cases, and sets out in broad strokes his unique jurisprudence. Members of the Society will welcome this fine book.

Until recently, the work of the Supreme Court in its first decade has been severely neglected. In common perception, the Court was a cypher prior to the appointment of John Marshall in 1801, and this may in part account for a lack of scholarly activity. In addition, important early Court records were destroyed when the British burned the Capitol during the attack on Washington in the War of 1812. The Supreme Court Historical Society has provided a service of enormous importance in its ongoing *Documentary History of the Supreme Court of the United States: 1789-1800*. A wonderful new book challenges the idea that the Court did nothing of importance prior to Marshall's appointment. *Seriatim: The Supreme Court Before John Marshall* (New York University Press, 1998) is edited by Scott Douglas Gerber of Florida Coastal School of Law, and consists of eleven interpretive essays, ten of which treat of individual Justices who were active on the Court before 1800.

Seriatim is a Latin word meaning "serially", and is a term of art to describe the practice of the early Court, following English procedure, where each Justice wrote a brief opinion in each case. This practice, as is well known, was abandoned during the Marshall era in favor of an "opinion of the Court" written by one Justice in the name of all of the Justices in the majority. (The practice lingers in the occasional concurrences still used in modern times.)

The Justices highlighted are Jay, Rutledge, Cushing, Wilson, Blair, Iredell, Paterson, Chase, Ellsworth and Washington. Each individual author succinctly summarizes the Justice's work, philosophy and contributions—often from a point of view which challenges the accepted wisdom. Some essays might quite accurately be called "revisionist," and they are so usually in the Justice's favor.

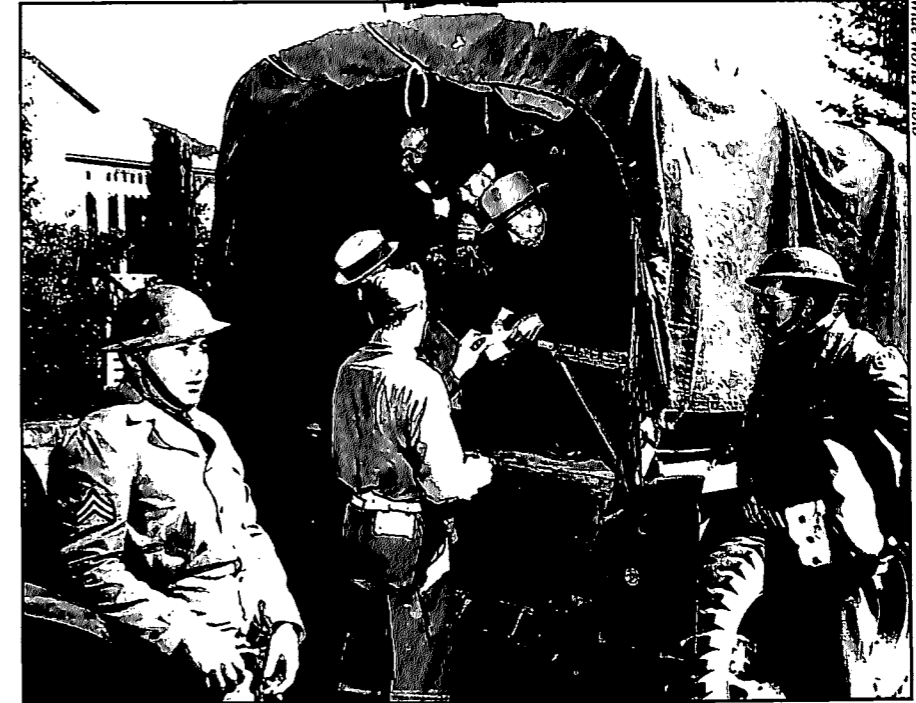
The tendency of judicial historians to lump together the pre-Marshall Justices as "cyphers" col-

lapses under the weight of the evidence found in these essays. Particularly impressive are the chapters on James Iredell, written by Justice Willis P. Whichard of the Supreme Court of North Carolina, on John Blair by Wythe Holt of the University of Alabama School of Law, and on William Cushing by the editor, Professor Gerber.

Iredell is regarded by many observers as the most philosophical and technically proficient member of the pre-Marshall era. His early death (at 49) deprived the Court of an able and eloquent voice during this formative period in American law. Justice Whichard is now completing a full length biography of Iredell, to be published next summer.

Neither Blair nor Cushing has ever been the subject of a full biography. Yet both were very significant figures in their day. Blair was a delegate to the Constitutional Convention, and a signer of the final document; Cushing a major figure in the Massachusetts Convention which ratified the Constitu-

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Issues of personal liberty dominated the work of the Court in the early 1940s. The Court conceded the odious nature of ethnic distinctions, but found them justified in the case of Japanese internment cases. The picture above shows people of Japanese ancestry on their way to an internment facility. Chief Justice Rehnquist discusses the difficulties of trying to safeguard fundamental rights in times of turmoil in his book *All the Laws But One: Civil Liberties in Wartime*

Benjamin N. Cardozo is the subject of a new book-length biography by Andrew L. Kaufman. One of the great figures of American law, Cardozo served only six years on the Supreme Court of the United States, but his influence greatly exceeded the number of years of his service

Brennan Memorial (continued)

Brennan's extended family; the full complement of the Supreme Court's support personnel—from guards to gardeners—all of whom Justice Brennan regarded, and treated, as valued friends; and countless members of the Supreme Court bar who recall with pride and affection their interaction with Justice Brennan in search for justice.

“... The sweep and power of Justice Brennan's contributions to American law challenges our collective imaginations. As Justice Souter has noted, the sheer mass of the Brennan legal legacy exerts an intense gravitational pull on our jurisprudence. In the course of a remarkable tenure that fell short of Chief Justice Marshall's by a matter of months, Justice Brennan authored 1,573 opinions: 533 opinions for the Court, 694 dissents, and 346 concurrences. Justice Brennan's opinions shaped our nation. . . . Our ideal of democracy flows from Justice Brennan's historic opinion for the Court in *Baker v. Carr*. The ability of all Americans to participate equally in the democratic process was safeguarded and advanced by Justice Brennan's opinions in *Katzenbach v. Morgan* and *Thornburgh v. Gingles*. Our modern conception of free speech was articulated and defended by Justice



Collection of the Supreme Court of the United States

Devoted to his family, Brennan is shown here with his son, William Joseph Brennan, III. When he came to the Supreme Court, the Justice went home every night for dinner. However, his daughter recalled that after dinner he would set up a table surrounded by piles of papers and work until he was too tired to continue.

Brennan's opinions in *New York Times v. Sullivan* and *Texas v. Johnson*. . . .

“But it would be shortsighted to purport to measure what Justice Brennan has meant, and will mean, to American law merely by cataloguing his immense substantive contribution. A fuller assessment of the Brennan legacy calls for a celebration of the happy confluence of intelligence, legal acumen, political sophistication, and empathy that combined in Justice Brennan to forge the archetype of a Supreme Court Justice intensely committed to the protection of constitutional rights. Justice Brennan's life was the embodiment of the American dream. His judicial career was a sustained effort to allow others to share in that dream.”

The son of poor Irish immigrants, Brennan experienced prejudice and difficulty in his life. Speaking of his early life, Brennan once said, “I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we were never without. We always had something to eat, we always had something to wear. But others in the neighborhood had a harder time.” These experiences helped shape his philosophy and outlook on life. Brennan graduated from Barring High School where he received many academic honors. He went on to study at the University of Pennsylvania's Wharton School of Finance and Commerce where he graduated with honors in economics. Just before graduation, he married Marjorie Leonard. They would become the parents of three children, William Brennan III, Hugh and Nancy. Brennan went to Harvard Law School where his academic performance earned him a position with Harvard's Legal Aid Society. “It was at the Legal Aid Society that he experienced firsthand the power of the law to affect the lives of the weak.”

Brennan's first job after graduation from Harvard was with the law firm of Pitney, Hardin & Skinner, “the most prestigious law firm in Newark. . . . Brennan was the first Catholic lawyer hired by the firm. He was assigned to practice labor law, cast in what must have initially seemed the incongruous role of representing management. . . . He distinguished himself as a talented labor negotiator, and became the firm's first Catholic partner in 1937.”

After service in the Army during the Second World War, Brennan returned to his old law firm where he built “his labor law practice at a time when labor strife was mounting. . . . Throughout his rapid rise to prominence as a leader of the private bar, Brennan developed a reputation as impeccably fair and gracious. He once asked a judge to postpone a hearing upon learning that his opponent's father had died. . . . Brennan carried this fair-mindedness into the public arena. Though his livelihood depended upon his management-side labor work, he spoke out in support of the right to strike and in favor of legislation to prohibit employer intimidation of union members. . . .”

“With his prestige within the bar growing, in 1946, Brennan championed the cause of court reform, a charge led by Arthur T. Vanderbilt, who was at the time a prominent

Newark lawyer and the Dean of New York University School of Law. Brennan fought hard to develop, and pass into law, a variety of reforms. . . . The procedural reforms brought startling results, including a cleanup of the massive backlog of cases, an increase in settlements, and most importantly to Brennan, a system ‘assuring that right and justice shall have the most favorable opportunity of prevailing in cases that are tried.’”



Collection of the Supreme Court of the United States

Justice Brennan and his Mother. The Justice said that “[w]hat got me interested in people's rights and liberties, was the kind of neighborhood I was brought up in. I saw all kinds of suffering—people had to struggle. I saw the suffering of my mother, even though we were never without.”

In 1949 Brennan was appointed to the trial court in the state of New Jersey, largely at the recommendation of Vanderbilt. “The Justice's rise through the New Jersey courts was meteoric. Shortly after Brennan took the bench, he was appointed assignment judge for Hudson County. Within a year and a half, he was elevated to the Appellate Division of the Superior

Court, the state's intermediate court. Two years later, in March, 1952, Governor Driscoll appointed Brennan to the New Jersey Supreme Court.

It was there that the Justice began to construct his judicial legacy. He dissented in one criminal case when a defendant was denied the right to review his written confession before trial. . . . saying that this right “is not his privilege but his absolute right. . . .” This would presage many statements during his career, proclaiming the rights of all men under the guarantees and ideals outlined in the Constitution.

“In one of the extraordinary strokes of fortune that shape our lives, Brennan attended a 1955 conference on court reform hosted by Attorney General Herbert Brownell. His lucid presentation so impressed Brownell that he marked Brennan for future high office. In 1956, upon the resignation of Justice Sherman Minton, President Dwight D. Eisenhower, influenced by Vanderbilt's strong endorsement, and Brownell's favorable assessment, appointed William J. Brennan, Jr., to the Supreme Court. At a press conference announcing his recess appointment, Brennan gave a characteristically modest reply to a reporter's question about how he would fare as a Supreme Court Justice. Brennan predicted that he would be like ‘the mule that was entered in the Ken-

tucky Derby. I don't expect to distinguish myself, but I do expect to benefit from the association.”

Brennan and his wife Marjorie and their daughter Nancy, moved to Washington after his appointment to the Bench. “A devoted family man, the Justice would come home for dinner every night. But then, as Nancy recalled, he would ‘set up a green card table in the middle of the living room and spread all these piles of papers within arm's reach on the rug. He'd work until he was just too tired.’ For the next twenty-five years, Brennan's life revolved around his family and his intense dedication to the Court.

“So devoted was Brennan to his family that his legendary energy level waned only once in his tenure, when Marjorie lost a sustained battle with cancer in 1982. Brennan himself had conquered throat cancer, which almost cost him his voice, but it was Marjorie's death that sent his morale plummeting. The Justice loved Marjorie so deeply that her death was a terrible blow. His zest for life began to return in 1983 when, after wryly obtaining his daughter Nancy's consent, he married Mary Fowler, his secretary of twenty-six years. He had



Friendship was a characteristic trait described by all of Justice Brennan's associates. Justice David H. Souter, who succeeded Justice Brennan, became a close friend and visited the Retired Justice on an-almost- daily basis. Brennan often described those visits as the high point of his day. From left to right, Justice Souter, Justice Brennan and Mrs. Mary Brennan enjoy a function at the Supreme Court.

a new spring in his walk, renewed energy. Brennan and Mary shared a special love—and a lot of history.

“Justice Brennan's years of retirement were enriched by the kindness of his colleagues. While his health permitted it, Justice Brennan visited the Court every day. Many of his colleagues, especially his successor, Justice Souter, provided continuing personal warmth and friendship. Justice Souter found time to visit with Brennan almost every day, an event

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Court Summer School (continued)

When the selection process was completed, Street Law extended invitations to sixty outstanding teachers from different locales, backgrounds, and levels of seniority, creating a group of teachers with enough diversity of experience that they would learn from one another as well as the presenters.



Presenter Lori Asseo of the Associated Press with Justice Ginsburg.

Participants included high school teachers of law, history, government, advanced placement government teachers, mock trial coaches, and teen court advisors.

The institute was conducted in two consecutive five-day (Thursday to Tuesday) sessions

with a group of thirty teachers participating each week. The goal of the program was twofold: to give teachers in-depth knowledge about the workings of the Court, and to provide innovative methods for the teachers to convey this information to both their students and fellow educators. Street Law and the Supreme Court Historical Society ask participants to conduct workshops for other teachers when they return to their home states, ensuring that the program has a multiplier effect, reaching as many teachers and students as possible.

In addition to the Law Center facilities, sessions were conducted in a hearing room in the Dirksen Senate building and the lawyer's lounge of the U.S. Supreme Court. Other "off campus" highlights included tours of both the old Supreme Court Chamber in the Capitol building, and the current Supreme Court building and receptions with Justice O'Connor (week one) and Justice Ginsburg (week two) in the West Conference room of the U.S. Supreme Court.

John Roberts, an attorney for the law firm of Hogan & Hartson, opened the program on Thursday evening by giving an insider's introduction to Supreme Court practice. Roberts painted a vivid picture of the operations of the Court for the attendees. As a former clerk for Chief Jus-

tice Rehnquist, and as someone who has argued numerous cases before the U.S. Supreme Court, he was able to describe many aspects of the entire process involved in deciding a case, from granting *certiorari* to oral argument, and on through the decision itself.

For day two of the institute, the entire group went to the Dirksen Senate building to learn about the process of nominating a justice. Staged in a Senate hearing room, this session featured panelists from diverse perspectives. One panelist, Alex Acosta, from The Project on the Judiciary, said of the session, "I do think it's great to explore these issues with teachers because they will go back and pass that information on to students." Nan Aron, executive director of the Alliance for Justice, is a regular participant in this panel. According to Aron, "Teachers are the most gratifying audience to speak to because of the quality of questions and insights. They are among the most interested and most expert in the area of the courts at all levels. They really know what's going on."

The rest of the afternoon saw the teachers touring both the old and the new court rooms, and hearing some "insiders" knowledge of the Court during a talk with Dale Bosley, Marshal of the Court, and Dr. Barbara Perry, a former Judicial Fellow at the Court.

Having familiarized themselves with the Court's structures, processes, and traditions, the teachers were ready to spend Saturday looking at cases from the 1997-1998 term. In the morning, teachers discussed *Abbott v. Bragdon* (the ADA case) and *Clinton v. City of New York* (Line Item Veto Act) with counsel involved in those cases. Laura Flegel, Director of Legal Services for the Whitman-Walker Clinic participated in the *amicus* brief for the *Abbott* case and took the time to share her experience with the group. "I was reminded



Week two participants on the steps of the Supreme Court Building.

of how technical the law is. The challenge is getting people to understand the link between real life stories and technical legal concepts." Flegel felt that using an interesting and current case was a great way to make that connection. "I absolutely loved doing the session!" she said.

In order to take a more in-depth look at a case (as well as learn an interactive teaching method) participants conducted a moot court based on the *Finley v. National Endowment for the Arts* case. Hope O'Keefe, Deputy General Counsel for the NEA, was on hand to discuss the case in depth with both sides, and to help them develop their arguments. "It was extraordinary!" remarked O'Keefe, "It was a wonderful experience for me, as a lawyer, to see these bright lay people begin to understand in just two hours what I've been working on for years. It was very humbling."

The efforts of these resource people did not go unnoticed. Rosemarie Kuntz, a high school teacher from Indiana, noted, "I was impressed by the intellectual level of partnership between the legal community and the educators." She said that the sessions inspired her to develop contacts with legal resource people for her own classes.

For yet another angle on the Court and its role in America, the teachers took part in an informal Sunday evening discussion with a member of the press who covers the Court. Frank Murray of the *Washington Times* and Laurie Asseo of the *Associated Press* each took the time to discuss "The Supreme Court, Values, and American Life" and how the press fits into the equation. Murray, who has addressed the institute each year, said that he enjoyed doing the session because, "It's one of the few times I get to talk over the Court with people from around the country, ordinary people. It helps me do my job. Their questions give me perspective [on what people want to know when they read the newspaper]."

The culmination of the week's work and studying took place on Monday, when the groups went to the Supreme Court

to hear decisions announced, including some of the cases they studied during the institute. Undoubtedly, the highlight of the day was the evening reception with the Supreme Court Justice.

At the first reception, Justice O'Connor spoke enthusiastically of the cooperation between the Supreme Court Historical Society and Street Law, Inc., and encouraged the teachers with a few words about their ability to inspire their students. Justice Ginsburg thoughtfully addressed the second group, answering questions and talking a bit about the experience of being a woman on the bench in the highest court of the land.

The final session and wrap-up on Tuesday gave participants a chance to reflect upon the experiences of the week and to consider how the institute will help prepare them to teach students and other teachers about the U.S. Supreme Court. Martha Henderson, of Maryland, said, "The more I learn about the Supreme Court, the more confidence and respect I gain for democracy. This institute did an outstanding job of making me feel like I am an important part of [the process] by...teaching about the Supreme Court."

Theresa Gantous of Ohio, new to teaching about the law, came to the institute with a fresh perspective. "When I came to the Summer Institute, I had only taught government for one year and needed content information and teaching techniques," remarked Gantous. "Street Law succeeded in giving me a...wealth of information and techniques that I will be able to use with various class levels."

Letters continue to arrive at Street Law thanking the program staff and the Supreme Court Historical Society for providing teachers with this educational opportunity. But the effects of these efforts will be far-reaching. Students and teachers all over the country will learn from this group and benefit from their firsthand experience at the U.S. Supreme Court. As Jeanette Douglas of Michigan put it, "This institute was an educational experience of a lifetime!"

WANTED

In the interest of preserving the valuable history of our highest court, the Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature or any other materials related to the history of the Court and its members. These items are often used in exhibits by the Curator's Office. 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. www.supremecourthistory.org

Brennan Memorial (continued)

that the retired Justice often described as the high-point of his day. Justice Brennan particularly savored his ninetieth birthday celebration in the Supreme Court chamber, the first such celebration since Oliver Wendell Holmes, Jr., held a similar birthday celebration in 1931. In his parting conversations with friends and admirers that day, Justice Brennan recalled his love for the Court, and his gratitude for a life well lived. Justice Brennan died peacefully in his ninety-second year.

"The Brennan personal traits that will be most remembered were the Justice's love of people and his ability to put himself into their shoes. Virtually everyone who encountered Justice Brennan has a story of his kindness. The bus driver who rear-ended Brennan's car in Georgetown on a drizzly day and did not realize that the gentle victim—who assured him that this kind of thing 'happens every time there's a rain, and it's nobody's fault at all'—was a Supreme Court Justice. The police officer who took Brennan and his son, Bill III, into custody when he found them in the predawn hours, hopelessly lost, wandering on the streets, and was treated to a hearty breakfast of bacon and eggs when they finally convinced him they were who they said they were. Every law clerk, each of whom can tell countless stories of how Brennan could reassure with the characteristic grip on the arm, twinkling eyes, and the word, 'Okay, pal'; and how Brennan always asked about the clerk's spouse or latest romance. Every colleague and friend who, in Justice Souter's words, cherished 'the man who made us out to be better than we were, and threw his arms around us in Brennan bear hugs, and who simply gave his love to us as the friends he'd chosen us to be.' Every Supreme Court employee who was amazed that Brennan would retain the details of their latest conversation and stop in the halls to ask about this problem or that joyous event. As author David Halberstam has put it, 'He has been in our lifetime, perhaps more than anyone else . . . , the common man as uncommon man. . . . He is a man defined by his own innate decency and kindness. . . . Bill Brennan has never forgotten the most elemental truth of social relations—in order to gain dignity it is important to bestow it on others.'

The Justice's many contributions to the development of the Court's jurisprudence were discussed in four subsections labeled **Justice Brennan and the First Amendment**, **Justice Brennan and Equality**, **Justice Brennan and Procedural Fairness**, and **Justice Brennan and the Federal**



Justice Brennan's thirty-four years of service on the Supreme Court was only a few months short of Chief Justice John Marshall's tenure. He is shown here at his retirement party with his wife, Mary. Applauding in the background are Retired Chief Justice Burger, Chief Justice Rehnquist, Justice John P. Stevens, and Justice Thurgood Marshall.

Courts. These sections cited numerous important opinions of the Court written by Justice Brennan on such principles as free speech protection, religious freedom and equality under the law. Minority opinions wherein the Justice expressed a profoundly held personal view differing from those of his Associates on the Bench were also discussed.

The underlying principle evidenced in all his decisions was Justice Brennan's fundamental belief in the rights of the individual. "At the heart of Justice Brennan's jurisprudence is a profound commitment to the law's obligation to treat each person equally. . . . Justice Brennan's lifetime of passionate effort to deploy a modern, purposive reading of the Bill of Rights in defense of the innate dignity of the individual, not as an alienated island, but as a participant in a democracy of equals, has immensely enriched our conception of judging. If Justice Holmes reminds us of our duty to democracy, Justice Brennan reminds us that true democracy requires us to fulfil our duty to the individual. Healthy debate will continue over the precise role of a constitutional judge in a vibrant democracy. But time and healthy debate can only enhance Justice Brennan's status as the archetype of a Justice passionately devoted to the enforcement of individual constitutional rights. He taught us that constitutional law, brilliantly conceived and courageously enforced, can lift the human spirit."

The final paragraphs of the resolution also reflect the devotion and respect of the Brennan clerks and colleagues who drafted them. They call not only for an expression of sadness at the death of the Justice and condolences to the Brennan family, but also express "profound admiration for Justice Brennan's matchless contributions to the cause of human dignity . . ."

At the conclusion of the special meeting of the Supreme Court Bar, a vote was taken and the resolutions were adopted with a request that the "Solicitor General be asked to present the resolutions to the Supreme Court, and that the Attorney General be asked to move that they be inscribed on the Court's permanent records."

A special session of the Supreme Court was convened immediately following the meeting of the Supreme Court Bar, at which time Solicitor General Waxman presented the adopted resolutions. After his presentation, Attorney General Reno presented an additional tribute to the Court commemorating the career and contributions of Justice Brennan. On behalf of the Court, the Chief Justice accepted the tributes and directed that they be made part of the Court's permanent record.

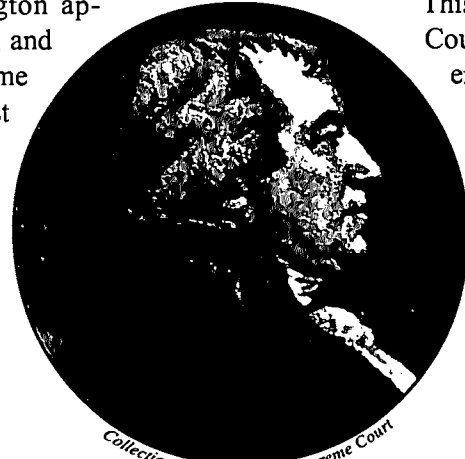
New Literature (continued)

tion. Both were experienced judges with long experience on state tribunals when George Washington appointed them to the first Supreme Court, and both served with great distinction at a time when Supreme Court Justices spent most of their time on circuit, hearing cases.

Seriatim is a readable and very useful book; it seems destined to become a staple source for the Court's first decade.

Finally, a new book from Bernard Schwartz has been published posthumously: *The Burger Court: Counter-Revolution or Confirmation* (Oxford University Press, 1998). Professor Schwartz, of the University of Tulsa College of Law, was killed in a traffic accident in December, 1997. At the time of his death, this book was substantially complete. All the essays had been written, and he had finished his editing.

The Burger Court is a series of essays, by judges, historians and legal scholars, on the work of the Court during Warren Burger's tenure as Chief Justice. Schwartz as editor scrupulously avoided partisanship in his choice of contribu-



The early years of the Court are the subject of a new book, *Seriatim*. The Justices highlighted are Jay, Rutledge, Cushing, Wilson, Blair, Iredell (James Iredell is shown above), Paterson, Chase, Ellsworth and Washington.

tors, some are liberal, some conservative, some of no recognizable point of view or doctrinal bias. All are well informed, with real insight into the jurisprudence of the era.

This volume arises from a conference on the Court held in Tulsa in October, 1996. Readers of the *Quarterly* may recall a full report written at the time.

It is always difficult to single out individual contributions in a book of essays, but three do stand out. "The Players and the Play," an opening chapter by Judge Robert Henry, is an especially penetrating both for its depth of scholarship (247 footnotes!) and for its lively wit. Pulitzer Prize historian David J. Garrow brings his usual penetrating analysis and encyclopedic knowledge to his essay on "Liberty and Sexuality," and Chief Justice Shirely Abrahamson of the Supreme Court of Wisconsin has written (with the assistance of Thomas N. Hibink) a

spritely, well-constructed piece on "Federalism."

In his lifetime, Bernard Schwartz wrote or edited more than sixty books. *The Burger Court* is a worthy addition.

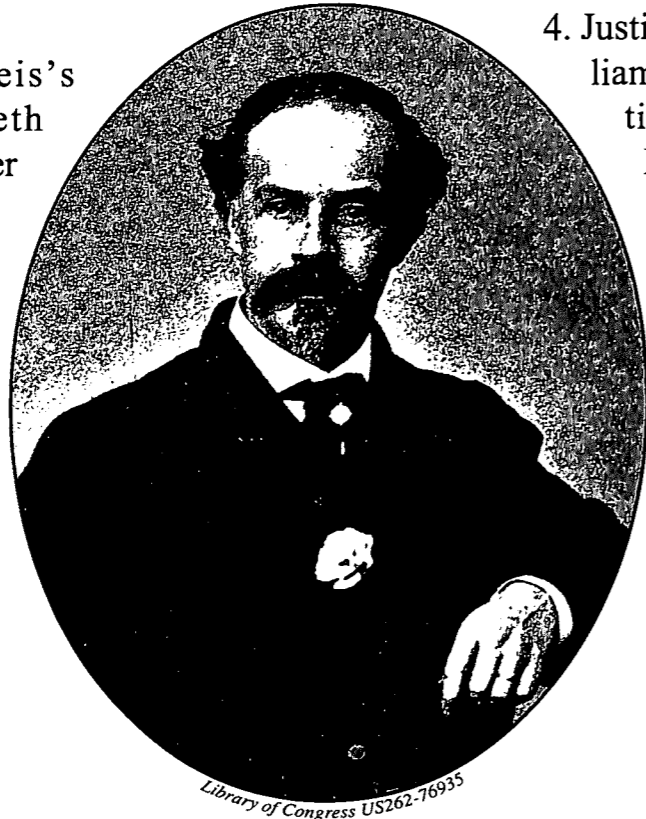


Whizzer White, number 24 in the photo above, is the subject of a biography by Dennis Hutchinson. White is shown above during a University of Colorado football game against Texas A&M. While a student at Colorado, White won a Rhodes Scholarship.

Trivia Quiz Answers

1. Justice George Shiras, Jr., had a son, George Shiras III, whose radically new method of lighting for night photography made him one of the outstanding nature photographers of his day. His books, published by National Geographic Society, are still collector's items.

2. Justice Louis Brandeis's daughter, Elizabeth Raushenbush, was a member of the economics faculty at the University of Wisconsin. Her particular area of competence was unemployment compensation and employment economics.



Originally trained as a lawyer, William Wetmore Story (above) wrote some impressive works on substantive aspects of the law. He pursued painting and sculpture as a hobby, but was offered a commission to sculpt a memorial for his father, Joseph Story. He traveled to Europe and studied there and "[a]t last found my heart had gone over from Law to Art..."

5. Chief Justice William Howard Taft's son Robert A. Taft, longtime Senator from Ohio, lost the Republican nomination to Dwight D. Eisenhower in 1952.



Elizabeth Brandeis Raushenbush was a member of economics faculty at the University of Wisconsin. She is shown in the photograph above walking with her father, Justice Louis D. Brandeis, on his eightieth birthday, November 13, 1936.

3. Justice Tom C. Clark resigned from the Court in 1967 when his son Ramsey was named Attorney General by President Lyndon Johnson. The Justice himself had served as Attorney General from 1945 to 1949 under President Truman.

4. Justice Joseph Story's son, William Wetmore Story, was a distinguished artist and poet. His Marshall sculpture was displayed for many years on the grounds of the Capitol before being moved inside the Supreme Court building during the Reagan Administration.



Senator Robert Taft, son of William Howard Taft, was a Senator from Ohio. "Mr. Republican," Senator Taft lost the Republican presidential nomination to political newcomer, General Dwight D. Eisenhower.

6. Chief Justice John Jay's son, William, was a persistent advocate of abolition, whose anti-slavery writings continued until his death in 1858, just before the Civil War.

7. Justice James Iredell's son, also named James, was Governor of North Carolina in the early 1800s. Iredell County in North Carolina is named after the Justice, not his son.

8. When Charles Evans Hughes became Chief Justice in 1930, his son, Charles, Jr., resigned as Solicitor General, a position he had held for less than a year.

9. John Marshall Harlan I had a son John Maynard Harlan, who was a reform candidate for Mayor of Chicago in 1905. John Maynard was the father of Justice John M. Harlan II.



Charles Evans Hughes, Jr. (above) had served as Solicitor General for less than a year when his father was appointed to the Supreme Court in 1930, necessitating his resignation from the Department of Justice.



Kate Chase, the daughter of Salmon Portland Chase, was a famous Washington socialite. She married millionaire Senator William Sprague but created a scandal when she divorced him.

10. Chief Justice Salmon Chase's daughter was constantly in the Washington limelight. A fashionable hostess, Kate Chase Sprague became involved in scandal when she divorced her alcoholic millionaire husband, Senator William Sprague of Rhode Island. The scandal intensified when she was linked romantically with New York Senator Roscoe Conkling, a married man.

Membership Update July 1 - September 30, 1998

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