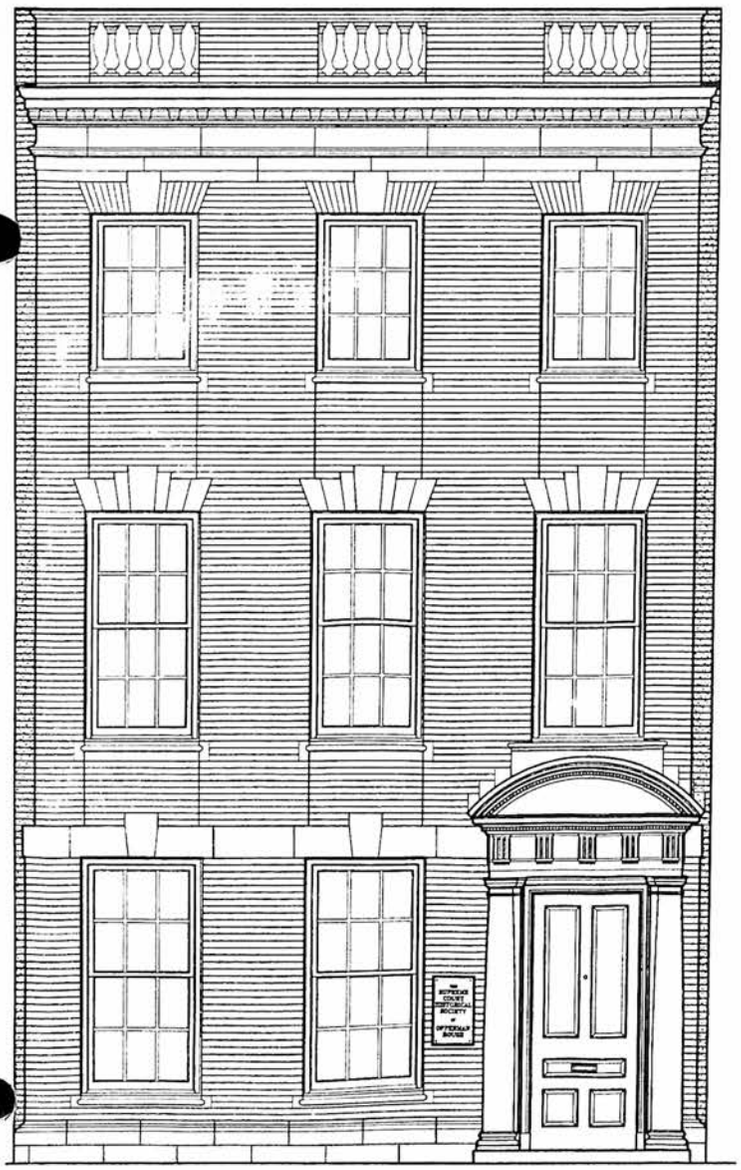
THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME XX NUMBER 4, 1999

The Society Moves into Opperman House

An Open House was held on November 18, 1999 honoring the completion of Opperman House, the Society's new headquarters building located on Capitol Hill. The ceremony coincided almost perfectly with the twenty-fifth anniversary of the Society's incorporation on November 24, 1974.



As a special honor, most of the members of the Supreme Court were present for the occasion. The Chief Justice and Associate Justices Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer were present for the occasion along with Society Officers and Trustees and other individuals who have provided assistance with the work of the Society.

Chief Justice William H. Rehnquist offered remarks that afternoon and the text follows:

It is a pleasure to be here with you today to celebrate this milestone in the Society's history. Opperman House is surely a handsome new home for the Historical Society, and one that I am sure will serve it well for many years to come.

In one of Sir Walter Scott's novels, he says that "A lawyer without history or literature is a mechanic, a mere working mason. . . ." So too, in a sense, is a Court. In the law, of course, we are bound to history by precedent—in the course of writing opinions in current cases, we constantly pull volumes off the shelves in order to read an opinion that was handed down 25-50—perhaps 100 years ago. And of course, the fountainhead of all American constitutional law is the opinion of Chief Justice John Marshall in *Marbury v. Madison*, decided 196 years ago.

But this is not the only kind of history that is important to a Court, and to those who would try to understand the Court. These opinions of 25, 50 and 100 years ago were written by human beings who preceded us on the Court, with all the strengths and weaknesses that such human beings have. Knowing something about them, and about their lives, greatly advances our understanding of their jurisprudence and of the era in which they lived.

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A Letter From the President

One of the Society's primary missions is to broaden public understanding of Supreme Court history. This manifests itself in a variety of programs. The Society sponsors lectures in the Supreme Court. It funds teacher-training programs to improve public education on the Court's history. It supports colloquia for scholars to meet and discuss means of expanding undergraduate education on the Court's history. The Society is currently exploring the possibility of establishing a graduate studies program in constitutional history to increase the number of scholars in a field where the number of active academics is surprisingly small given that we live in a constitutional democracy.

One of the most implacable audiences the Society has tried to reach over the years, however, is that comprised of secondary school students who appear to be disinterested in the history of the Court. The Society seeks to reach this audience with teacher training in constitutional history that better prepares instructors to include the subject in secondary school curricula.

One such program is the Society's Summer Institute for Teachers which it cosponsors with StreetLaw, Inc. Each summer the Summer Institute brings sixty teachers to Washington to study the Court firsthand, and to design lesson plans for later use in their respective schools. Through sharing of resources developed in the Summer Institute, this program is estimated to have reached over 16,000 students.

The Society also funds a similar pilot program known as the D. C. School Initiative which, as the name implies, is aimed at improving the study of Supreme Court and constitutional history in the District of Columbia Public School System. The goal of this program is to eventually provide training for history instructors at every secondary school in the District.

Despite these efforts many students find the subject overly complex, mired in legalism, and well-distanced from their day-to-day world. So it was with great interest that the Society approached an invitation last year by constitutional scholar Jamin Raskin to cosponsor a book aimed at precisely this audience. Professor Raskin, propelled by his own keen interest in the subject, had developed a manuscript discussing Supreme Court cases affecting high school students. He asked if the Society might be willing to participate in preparing the book for publication by providing editorial assistance, fact checking and photo research. Although the Society is generally reluctant to lend its name to outside projects, the Publications Committee was impressed with the quality of Professor Raskin's work, and was convinced that the Society's participation in the project could make a real difference in the quality of the final product.

I am pleased to say that as a result of the efforts of the Publications Committee, Professor Raskin's manuscript has been delivered to the publisher and is expected to go to press in the Spring of 2000.

Currently the Society's Publications Committee and staff are applying the finishing touches on a manuscript examining the Court's role in the evolution of women's rights and gender law. Edited by Publications Director Clare Cushman, the book encompasses everything from struggles to secure individual standing before the law and voting rights, to more recent battles to attain equality in education and the workplace.

As comprehensive as its treatment of this complex subject is, the book remains an eminently readable, fascinating account as it examines this tidal change in the law. The reader is drawn quickly into the work by the use of sidebar articles that give specific emphasis to participants in the sometimes dramatic, but more frequently incremental, evolution of women's rights.

Among the pioneers discussed in the volume is Myra Bradwell, who despite her law degree and status as publisher of one of her era's most respected legal publications struggled much of her life to gain admission to the Illinois State and Supreme Court Bars. The book also examines early women suffragists, like Susan B. Anthony, whose arrest for voting illegally brought her before Circuit-riding Justice Ward Hunt. Hunt's role in finding Anthony guilty was perhaps the most memorable act in the career of one of the Court's least-remembered Justices.

The story reveals that even well into the twentieth century, these inequalities persisted. Women were largely denied voting rights. Married women required their husbands' permission to enter into contracts. Women were routinely precluded from serving on juries, holding a wide variety of jobs, and were denied a plethora of other rights that in many cases, have only recently become secure.

Aimed at high school and undergraduate readers, the book delves into issues that will appeal to non-lawyers as well as students of the law. For example, how was it that a widower could not collect survivor benefits under Social Security to allow him to stay home and care for his child when a widow was entitled to such benefits? What was the Court's rationale when it eliminated height and weight requirements for prison guards? Why, in this climate of expanded equality are women still exempted from draft registration, yet deemed eligible to attend a previously all-male military academy?

These and other issues are discussed in a cogent and detailed approach to the subject that both intrigues and informs. As such, the Society hopes that the volume will gain broad academic use and contribute substantially to informing the general public of this important facet of the Court's history.

The public at large will have to wait until an anticipated Fall publication date to enjoy this scholarly endeavor. Members, however, can enjoy a sample of some of the extensive research that the manuscript encompasses in this issue of the *Quarterly* by reading the article *Women Advocates Before the Bar,* which appears on page 8. I hope that you enjoy it, and would be grateful to receive any comments you may have regarding this latest of the Society's publications efforts.

Leon Silverman

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Memorial to the Honorable Harry A. Blackmun

Under the direction of the Honorable Seth P. Waxman, Solicitor General of the United States, members of the Supreme Court Bar met on the afternoon of Wednesday, October 27, 1999 to commemorate the career and legacy of the late Harry A. Blackmun. Speakers for the afternoon were drawn primarily from individuals who had clerked for the Justice. The Honorable Harold Hongju Koh, Chairman of the Meeting, introduced the speakers which included the Honorable Drew S. Days III, The Honorable Richard K. Willard, Alice H. Henkin, Esquire, The Honorable Karen Nelson Moore, and Professor Pamela S. Karlan, as well as Mr. Koh.

Relating experiences and memorable moments with Justice Blackmun, the speakers explored the personal, as well as the public side of the Justice. At the conclusion of the program, a motion was made to adopt written Resolutions prepared to memorialize the career of the Justice. These resolutions were prepared by a special committee chaired by Pamela S. Karlan. Upon a motion from the Solicitor General in a special session of the Court, the resolutions were presented for inclusion in the permanent records of the Supreme Court.

Excerpts from the resolutions follow:

Collection of the Supreme Court of the United States.

Associate Justice Harry A. Blackmun

Justice Harry A. Blackmun often joked that he came to the Supreme Court as "Old Number Three," having been the third nominee proposed by President Richard M. Nixon for the fabled seat once held by Justices Joseph Story, Oliver Wendell Holmes, Jr., Benjamin Cardozo, and Felix Frankfurter. At his confirmation hearings, he was asked by Senator James Eastland, the chairman of the Senate Judiciary Committee, whether he thought judges ought to be required to take senior status at the age of seventy. He replied that he was concerned that '[a]n arbitrary age limit can lead to some unfortunate consequences. I think of Mr. Justice Holmes and many others who have performed great service for the country after age 70. So much depends on the individual. I think some of us are old at a younger age than others are.'

The Justice was prescient. When he left the seat twenty-four years later he was "Old Number Three" in a different sense: the third oldest Justice ever to serve on the Court. And much of his legacy is the product of his years on the Court after he turned 70: his opinions for the Court in *Santosky v. Kramer*, *Garcia v. San Antonio Metropolitan Transit Authority*, *Daubert v. Merrell Dow Pharmaceuticals*, and *J.E.B. v. Alabama*; and his dissents in *Bowers v. Hardwick*, *McCleskey v. Kemp*, 481, and *Callins v. Collins.* If some men are old at a younger age than others, Justice Blackmun remained young to an older age, retaining until he died the intellectual curiosity, passion for hard work, and openness to new ideas and people that had been the hallmarks of his life.

The future Justice was born in Nashville, Illinois, on November 12, 1908. His family soon moved to St. Paul, Minnesota, where his father owned a grocery and hardware store in a blue-collar neighborhood. The Justice's early life, during which he experienced or observed economic, social, and familial hardships, proved a source of empathy in recognizing that "[t]here is another world 'out there,'" (*Beal v. Doe)* (Blackmun, J., dissenting), a world inhabited by the poor, the powerless, and the oppressed, the "frightened and forlorn," (*Ohio v. Akron Center for Reproductive Health).*

In 1925, one of his high school teachers, who recognized an intellectual spark in her pupil, persuaded Blackmun to seek his fortunes in the wider world, and he won a scholarship from the Minnesota Harvard Club to Harvard College. But because the scholarship paid only his tuition, the future Justice worked as a janitor and a milkman, painted handball courts, ran a motor launch for the coach of the Harvard crew team, and graded math papers to make ends meet. Despite this grueling schedule, he received his A.B. summa cum laude in mathematics in 1929. Although he had long planned on going to medical school, he decided instead to attend Harvard Law School. At the law school, his future colleague William J. Brennan, Jr., was a class ahead of him, and he counted his predecessor [on the Supreme Court bench] Felix Frankfurter among his professors. During his final year at law school, his team won the prestigious Ames Moot Court competition.

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Blackmun Memorial *(continued from page three)*

After graduation, Blackmun returned to Minnesota to clerk for Judge John B. Sanborn of the United States Court of Appeals for the Eighth Circuit. His year and a half with Judge Sanborn gave him a model for his own career as an appellate judge, and also gave him exposure to some of the problems that occupied his judicial career.

In 1934, . . .Blackmun joined the prestigious firm of Dorsey, Colman, Barker, Scott & Barber in Minneapolis. Fortuitously, the new associate was assigned to the firm's tax department, where he soon found his niche and had his first brush with the institution where he would spend more than a quarter century.

On October 14, 1935, this Court convened for the first time to hear oral argument in the magnificent building where it now sits. The first case on the docket was *Douglas v. Willcuts*. . . .Down in the lower left-hand corner of the taxpayer's reply brief was the name of a new associate, who had apparently joined the litigation team after the opening merits brief had been filed. It was Harry Blackmun. Less than a month after the argument—and on the day before the future Justice's twenty-seventh birthday—Chief Justice Hughes delivered a unanimous opinion rejecting the position taken by Blackmun's client.

On Midsummer's Day 1941, Blackmun married "Miss Clark," his beloved wife Dottie. They had three daughters: Nancy, Sally, and Susie. Blackmun's sixteen years at the Dorsey firm ended when he was named the first resident counsel of the famed Mayo Clinic in Rochester, Minnesota. He remembers his time there as the happiest decade of his life. Not only was he able to make connections between law and medicine but he and Mrs. Blackmun also cemented friendships that were to last for a lifetime.

In 1959, when Judge Sanborn decided to take senior status, he decided that his former law clerk, Harry Blackmun should succeed him. He then wrote to Deputy Attorney General Lawrence E. Walsh, saying, "I sincerely hope, as I know you do, that political considerations will not offensively enter into the selection of a successor. If they should, there might be no vacancy to fill." According to Judge Richard S. Arnold of the Eighth Circuit, "[t]he story is that Judge Sanborn really meant this: 'Appoint Harry Blackmun, or there will be no appointment to make.'" The hint worked and President Eisenhower appointed Blackmun to fill Judge Sanborn's seat. Judge Blackmun took office on November 4, 1959.

Judge Blackmun wrote over 200 signed opinions during his time on the Eighth Circuit. In light of his experience in practice, it is hardly surprising that over a quarter were tax-related; his taste for, and expertise in, intricate questions involving the Internal Revenue Code were well known. But the opinion he later described as the one of which he was the proudest, *Jackson v. Bishop,* reflected a very different side of the judge's temperament. The case harkened back to his time clerking, . . . when he brought a petition from an inmate protesting cruel prison conditions to his judge's attention. "I know, Harry," Judge Sanborn said, "but we can't do anything about it." This time, Judge Blackmun *could* do something about the problem: *Jackson* was one of the first appellate opinions to hold prison practices unconstitutional under the Eighth Amendment. . . . In one of the first, if not *the* first, appellate opinions applying the Eighth Amendment to state

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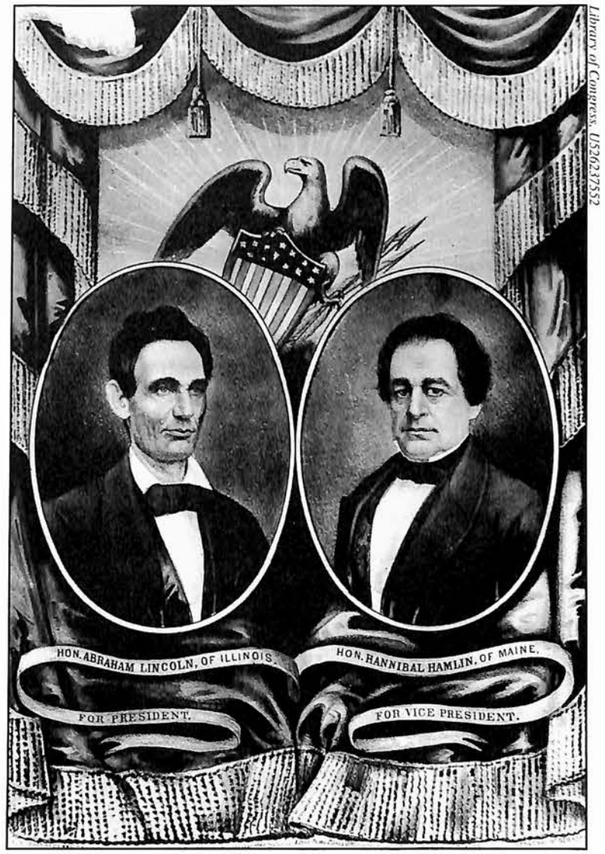
Harry Blackmun, flanked by Senators Walter Mondale (left) and Eugene McCarthy (right) at his confirmation hearing.

Lessons from Lincoln: What the Voter of 2000 Can Learn From 1860

*by William Bushong**

On September 29, 1999, the renowned Lincoln scholar David Herbert Donald delivered the 8th Annual Heritage Lecture, "Lessons from Lincoln: What the Voter of 2000 Can Learn From 1860." It was a memorable contribution to the annual series established in 1991 by the White House Historical Association, United States Capitol Historical Society, and Supreme Court Historical Society. Twice the recipient of the Pulitzer Prize in biography for his works, *Charles Sumner and the Coming of the Civil War* (1960) and *Look Homeward: A Life of Thomas Wolfe* (1987), Dr. Donald is the Charles Warren Professor of American History, Emeritus and Professor of American Civilization, Emeritus at Harvard University. He is a native of Mississippi and is the author of numerous major books related to Lincoln and the Civil War period, including *Lincoln's Herndon (1948)*, *Lincoln Reconsidered: Essays on the Civil War (1956)*, *The Civil War and Reconstruction* [with J.G. Randall] *(1961)*, and *Lincoln* (1995). His Lincoln biography won the Lincoln Prize and was on the *New York Times* bestseller list for 14 weeks. It is considered by many scholars to be the best one-volume study of Lincoln available today.



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A campaign poster featuring Abraham Lincoln (pre-beard) and Hannibal Hamlin, his running mate in 1860.

Dr. Donald opened the lecture with a story concerning his numerous appearances on television and radio to promote his 1995 Lincoln biography. Dr. Donald recalled that to his astonishment, listeners most frequently asked if Lincoln was gay? After that came questions on where Abraham Lincoln would stand on abortion or on the right to life? Affirmative action? Equal rights? The women's movement? Would he be a feminist? How would he stand on campaign finance? On international free trade? Questions that "continue a long-standing practice of cloaking whatever party or cause we are advocating in the shroud of Abraham Lincoln." Dr. Donald then reviewed recent statements invoking Lincoln's authority from Democrats (President Bill Clinton, Vice-President Al Gore and Senator Bill Bradley), Republicans (Senator John McCain and publisher Steve Forbes) and even Reform Party leader Governor Jesse Ventura who noted: "I see myself closest to Abraham Lincoln. We are both alike in many ways. We were both wrestlers and we're both six foot four inches." Dr. Donald then said, "Well, as Senator Everett Dirksen remarked a number of years ago, 'It does seem that the task of an American politician is first to get right with Lincoln.'"

Dr. Donald reflected that although it would be easy to poke fun at politicians and the callers, he realized that many people have a strong desire to draw on history for guidance in a troubled present. He said, "What was wrong with the questions was not so much the objective of the callers but the nature of the connection they sought to make with history. We cannot learn from leaders in the past how they would act in response to specific problems in the present. But perhaps we can draw from that experience some meaningful generalizations about patterns of behavior." Donald presented as the theme of his talk three general lessons derived from his study of the life of Abraham Lincoln that might be useful in the evaluation and selection of a president in 2000.

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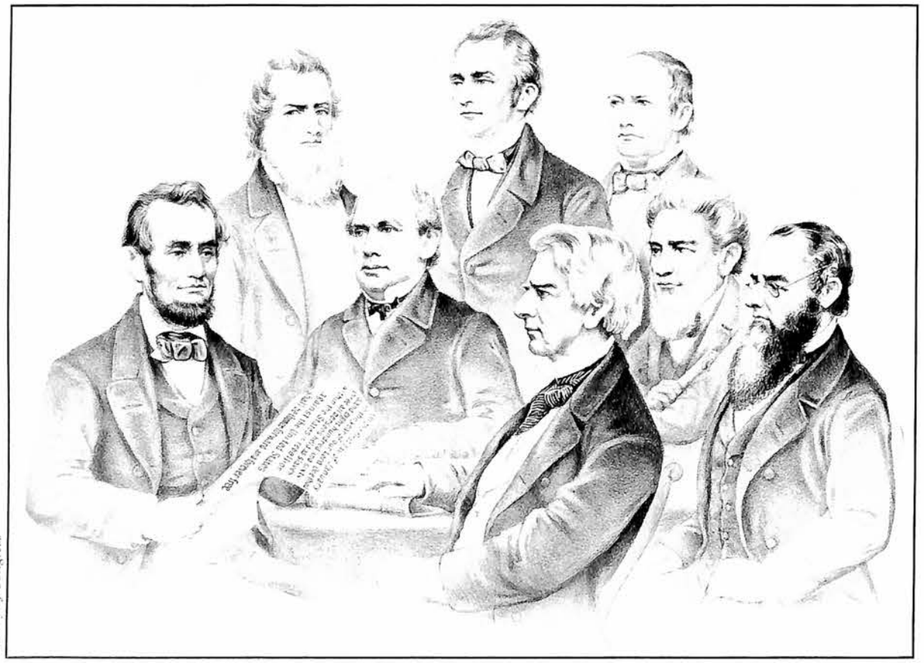
Lessons from Lincoln *(continued from page five)*

The first lesson was that it was "vitally important for a president to have one intimate trusted friend in whom he can confide freely." Dr. Donald believed that many of our presidents had such trusted advisers, citing the examples of Woodrow Wilson and Colonel Edward M. House, Franklin D. Roosevelt and Harry Hopkins, Dwight Eisenhower and his brother Milton, and John F. Kennedy and his brother Robert. He also noted that those presidents that did not have these alter egos, such as Richard Nixon or Jimmy Carter, after Bert Lance left Washington, suffered in their deliberations.

Lincoln had hoped to bring close friend Joshua Speed with him to Washington, but arrived in the capital for his inauguration without a single, trusted intimate in whom to confide. Soon the pressures of office, shared with no one, brought on debilitating migraine headaches. In the summer of 1861 the Lincolns welcomed the arrival of Orville Hickman Browning, appointed to fill a Senate seat left vacant by the death of Stephen A. Douglas. Friends and political allies since Lincoln had known Browning in the Illinois State legislature in the 1830s, two more dissimilar men would have been hard to find. Browning, vain and a dandy, was the son of a wealthy Kentucky planter with a privileged childhood and a strong formal education. Self-educated, tall, awkward and carelessly dressed, Lincoln contrasted sharply in speech, manner and looks with his friend. Dr. Donald explained that for the next eighteen months, Browning became the president's confidante and an almost daily visitor at the White House with access to the President at any hour of the day or night. The senator insisted that Lincoln take breaks for carriage rides in the open air. Dr. Donald said, "They talked about everything: about Lincoln's decision to resupply Fort Sumter, about his role in nudging General Winfield Scott against his better judgment to fight the disastrous battle at First Bull Run, about the danger of war with Great Britain over the Trent Affair, about George B. McClellan's incurable slowness. Browning made such frankness easier because he was genuinely concerned for Lincoln's well being."

Their bond eventually frayed. Browning desired a Supreme Court appointment and on three occasions Lincoln passed on the opportunity to nominate him. They also disagreed sharply over federal intervention into the issue of slavery and Lincoln's plan to issue the Emancipation Proclamation. Browning's disaffection left Lincoln once more without a close friend in Washington. In his isolation, he shared more and more confidences with his young and inexperienced secretaries John G. Nicolay and John Hay. Yet, in the critical later years of his presidency, Lincoln carried the heavy burden of his office alone.

This observation led to the next lesson, the subject of a president's health. Dr. Donald took issue with two widely held myths about Lincoln's health-that he suffered from a unipolar clinical depression or the genetic disorder Marfan's Syndrome. He cited the lack of evidence to support these theories. Dr. Donald explained that Lincoln by temperament was a melancholy man, but he was never incapacitated-a key to the diagnosis of a clinical depression. He also noted that Lincoln's physical features, often cited as proof of Marfan's Syndrome, were not unusual for a tall, thin man of six feet four inches and 180 pounds. Far from being weak or sickly, there was abundant evidence to show that Lincoln possessed remarkable strength and stamina. Dr. Donald related a famous incident during the Civil War when Lincoln on a visit with Union troops chopped a log vigorously with a heavy axe and then held it extended with his right arm for a number of seconds. After he left some of the young soldiers tried the same thing with the axe and none could do it. Donald also noted that despite exhaustive research, proponents of the theory claimed only two cases of Marfan's Syndrome in generations of Lincolns. Lincoln himself was one case and the other was a seven-year-old boy whose relationship to Lincoln has not been established.



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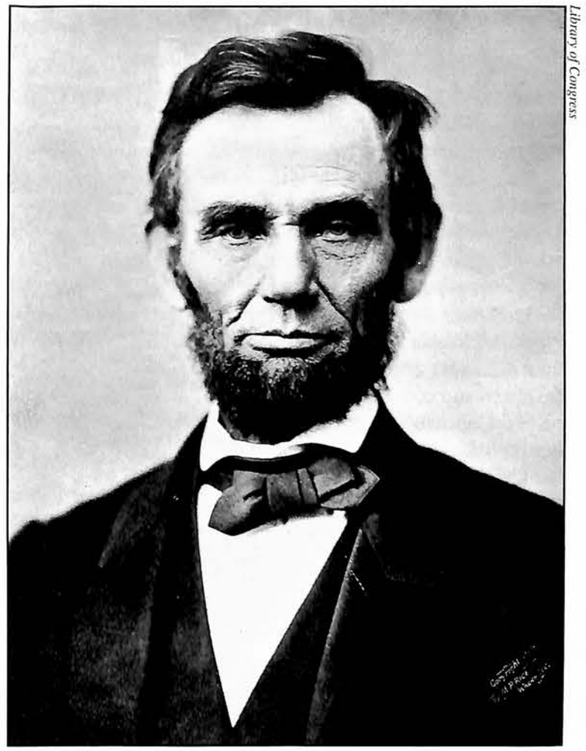
President Lincoln and his cabinet in council, September 22, 1862. Back row, left to right: Gideon Welles, Secretary of the Navy, Montgomery Blair, P.M. Gen'l., and Caleb B. Smith, Secretary of the Interior. Middle row, left to right: Abraham Lincoln, Salmon P. Chase, Secretary of the Treasury and Edward Bates, Attorney General. Front row, left to right: William H. Seward, Secretary of State and Edwin M. Stanton, Secretary of War.

Lincoln began his term of office unusually young at fifty-one with vitality and vigor. Regular twelve-hour days and the endless stresses of a war marked with defeat after defeat drained his energy. Although he was seriously ill only once during his presidency, the strain of anxiety and overwork between 1860 and 1865 progressively was etched on Lincoln's face captured in the photographs of the time. Donald noted that the presidency is "an exhausting job, nerve-racking, gut wrenching even for a very strong man." In the year 2000 he thought we should carefully consider a candidate's health. Not just the report of a physical examination, "but what his past record has been of dealing with enormous physical and mental strain."

The final lesson proposed was whether a candidate's experience fitted him to deal with high office. Dr. Donald stated, "On this score, Lincoln's pre-1860 record would have raised a number of warning flags . . . . After four years in the Illinois State Legislature, he served two undistinguished years in the House of Representatives. Leaving Washington in 1849, he did not return until he was elected president. He was manifestly out of touch and had scant personal acquaintance with the leaders of his own party." He observed that Lincoln's inexperience was costly and led to some early egregious mistakes in his first administration, including an attempt to create a Bureau of Militia without congressional authorization and to issue orders to naval vessels without consulting the Secretary of the Navy.

Despite his weakness as an administrator, Dr. Donald explained that Lincoln's success as a leader was remarkable and can be traced to his mastery of political management. The image of Lincoln as a political babe in the woods was one that Lincoln carefully cultivated. Despite his public persona as frank, guileless and unsophisticated, Lincoln, in fact, was an "astute and dexterous operator of political machinery." He had shown great skill in organizing the Republican and Whig Party in Illinois and maneuvered himself into a position in 1860 where he controlled the party machinery, platform, and the candidates in a pivotal state of the Union. Dr. Donald commented that these maneuvers were merely "finger exercises when compared to Lincoln's virtuosity in the White House" and that a well-informed voter in 1860 looking closely at the candidate's public record might have predicted his success as president.



Library of Congress

Abraham Lincoln in the latter part of his term. The strain of a war-time presidency is etched in his face.

Professor Donald closed his lecture by concluding that a serious study of history and biography can only help formulate meaningful questions with present-day relevance. By reading and thinking about biography, a voter in 2000 could learn from the past. In sharing the three general lessons that he summarized from the life of Lincoln, the audience had been given food for thought. A question and answer session followed the lecture with questions concerning photographs of Lincoln, Vinnie Ream's sculpture in the Capitol, his interest in music, his enemies in Washington, and many, many more. A reception was held and each person who had attended the lecture received a copy of Donald's latest book, *Lincoln at Home: Two Glimpses of Abraham Lincoln's Domestic Life* (1999) as a commemorative gift. This book, produced earlier in the year as a handcrafted limited edition by Thornwillow Press, has been reprinted by the White House Historical Association as a 120 page deluxe paperback edition. Copies of the book are still available from the Association ($12.95 plus shipping and handling).

*Mr. Bushong works at the White House Historical Association.

Women Advocates Before the Supreme Court

This is an excerpt from the forthcoming publication on Women and the Supreme Court. (*See page 2 for further information.*)

by Clare Cushman

Legend has it that when Dolley Madison and a group of the First Lady's friends arrived one day at the Supreme Court in the middle of an oral argument, the great advocate Daniel Webster stopped his oration, bowed to the ladies, and started again from the beginning. Although such excessive gallantry was not standard practice in the early 19th century, it was customary for wives of Washington dignitaries to dress up in the latest fashions and come to the Supreme Court to observe oral arguments.

The passive, decorative role women then played in the life of the Court contrasts sharply with the professional one they assume today. This gradual transformation did not begin until 1880, ninety-one years after the Court's inception, when a woman was finally permitted to leave the spectator ranks and join the show.

That was the year that Belva A. Lockwood became the first female attorney to argue a case before the Supreme Court. The previous year she had forced the Court, through congressional intervention, to admit her to practice before it. In doing so Lockwood opened the doors for successive women attorneys to file petitions and briefs at the Supreme Court, to join its bar and to motion for the admission of other attorneys, and to argue cases before the bench.

Courtesy of Louise Minks

"Lucy" Terry Prince probably appeared before Samuel Chase when he presided over a Circuit Court in Vermont.

Before examining the contributions of the women advocates who followed in Lockwood's footsteps, however, it is necessary to refute the claims that have been made that two earlier women, Lucy Terry Prince and Myra Clark Gaines, neither of whom were lawyers, personally pleaded their own land dispute cases before the Supreme Court. [(The practice of presenting one's own case without the intermediary of an attorney is called arguing *pro se.)]* No official court documents have been discovered to support these claims.

Lucy Terry Prince (c. 1725-1821)

Lucy Terry Prince, an African-American, is usually hailed in reference books as the first woman to address the Supreme Court of the United States. The popularizer of this legend is Massachusetts historian George Sheldon, who described the event in his 1893 article "Negro Slavery in Old Deerfield," which was published in the *New England Magazine* and widely circulated. He wrote that she was permitted to argue her land claim suit in 1796 before the "Supreme Court of the United States... presided over by [Justice] Samuel Chase of Maryland." Apparently, Chase was so impressed by Prince's eloquence that he complimented her on making "a better argument than he had heard from any lawyer at the Vermont bar."

Her performance would have been all the more extraordinary considering her background. She was taken from Africa as a child in 1730 and eventually sold to a Deerfield, Massachusetts, innkeeper named Ebenezer Wells. She purchased her freedom in 1756 after her marriage to Abijah Prince, a free black. In 1762 a wealthy Deerfield landowner deeded Mr. Prince 100 acres of land in the newly-opened territory of Guilford, Vermont. The Princes and their six children took up residence there in the 1780s. Hungry for land, Mr. Prince had also obtained a grant of 300 acres of wilderness tract in nearby Sunderland.

The predatory behavior of a wealthy Sunderland neighbor, Colonel Eli Bronson, is the basis for the legendary suit.

He set up a claim to the Princes' property and, according to Sunderland historian Giles B. Bacon, "by repeated law suits obtained about one-half of the home lot, and had not the town interposed they would have lost the whole." A prominent citizen, Bronson allegedly hired Royall Tyler, a future chief justice of the Vermont Supreme Court, and Stephen R. Bradley, a future Vermont Senator, as his counsel. The Princes were said to have engaged Isaac Tichenor, a future governor of the state, to defend their claim.

In his article, Sheldon wrote that Prince argued before "the Supreme Court of the United States," although there is no evidence to suggest that she made the trip to Philadelphia where the Court was then lodged, to do so. Sheldon based his assumption on a letter written by a Guilford historian named Rodney Field—who was neither an eyewitness to the event nor a contemporary of the Princes—that simply stated that she appeared before a "United States Court."

Library of Congress, USZ62-68175

According to legend, the gallant Daniel Webster restarted his oration before the Supreme Court for the benefit of Dolley Madison.

A more likely scenario, given Chase's favorable comparison of Prince to other Vermont lawyers, would be that she argued before Justice Chase when he was riding circuit in Vermont. In those days Circuit Courts were presided over by one Supreme Court Justice and one District Court Judge. Justice Chase did sit at one session of court in Vermont while on circuit, at Bennington in May 1796, which coincides with the time that the litigation would have taken place. But the court records simply show no cases in which Prince or Bronson were associated. Perhaps she was a principal or a witness in a federal District Court or the state superior or supreme court.

There is no doubt that Prince, an eloquent storyteller renowned for her keen memory, must have been an effective oral advocate before whatever court she did appear. In fact, she merits a place in history regardless of whether or not she argued before Justice Chase. Her lyrical thirty-line doggerel, "The Bars Fight," which accurately recounts the dramatic events surrounding an Indian raid on Deerfield that she witnessed in 1746, was printed in 1855. This accomplishment distinguishes her as one of the first published African-American poets.

Myra Clark Gaines (1803-1885)

The other woman mistakenly reported to have pleaded her case before the Supreme Court is perpetual litigant Myra Clark Gaines. The gallant orator Daniel Webster is alleged to have been the opposing advocate.

This myth probably arose because Gaines brought her land claim case before the Supreme Court an astonishing twenty-one times (her heirs pursued it thrice posthumously) between 1836 and 1891, and before some thirty different Justices. Passionate and dogged in her pursuit of her inheritance claim to valuable New Orleans properties, Gaines was wealthy and shrewd enough to employ the most seasoned oral advocates including Webster, to argue on her behalf. Over a period of five decades she employed more than thirty lawyers, seventeen of whom died in her service. There is no evidence, however, that she pleaded her own case against Webster or any other advocate. But she did present her own argument in a state court trial, stepping in after her counsel, infuriated by the judge's bias, stormed out. Gaines was also active in helping her lawyers prepare briefs.

At issue was the mysterious disappearance of a will drafted by her Irish immigrant father, Daniel Clark, when he died in 1813. In the will, Clark named Myra his legitimate daughter and heir to the large fortune he had accumulated. Her Creole mother, Zulime Carriere, held no record of her marriage to Clark, which they had kept secret because she had not obtained an annulment from her first husband, a French wine merchant and bigamist. Upon Clark's death the will disappeared, and his sisters and business partners claimed that Myra was illegitimate and therefore ineligible to inherit from her father under Louisiana's unique civil code. Because hundreds of New Orleans residents stood to lose their land if she won her claim, she was forced to keep appealing to federal courts to obtain the fair trial that hostile local courts did not always provide. Although the Supreme Court agreed to hear the case on technicalities arising from friction between federal and Louisiana law, it also passed judgment on the merits of the case. Myra Clark Gaines was pronounced her father's legitimate heir shortly before she died in 1885, deeply in debt from a lifetime of legal expenses. It took a few more lawsuits for her grandchildren to force the city of New Orleans to pay them their due.

Pioneers of the Bar

Lockwood thus remains unchallenged as the first woman either to file a brief or present oral argument at the Supreme Court. Yet subsequent female advocates also qualify as pioneers in various ways.

Opposing the proposed sale by Congress of her tribe's sacred burial ground in Kansas City, Lyda Burton Conley (1874-

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Kansas City Star

Lyda Burton Conley, guardian of the Huron Cemetery.

1946), of Wyandot and English ancestry, became the first Native-American woman to argue before the Supreme Court in 1910. (The first Native American was probably Elias C. Boudinot, a Cherokee, in 1870). Along with her sisters Helena and Ida, Conley protested Congress's proposal in 1906 to transfer the bodies and sell off the Huron Cemetery, which would have violated the government's treaty with her tribe. The Conley sisters padlocked themselves in the cemetery, built a fortified shack to dwell in, and fended off government officials and realtors (but not other Wyandottes) with their father's shotgun for seven years.

Conley had long realized the value of the coveted piece of real estate where her parents and a sister were buried and had equipped herself with a law degree from Kansas City School of Law in 1902 to defend it by peaceful means. She filed a permanent injunction in District Court against the Secretary of the Interior and then left her sisters to man the fort in 1909 while she travelled to Washington to argue before the Supreme Court. Conley presented her case *pro se*; she did not become a member of the Supreme Court bar until 1915. A draft of the argument she presented at the Supreme Court, written in her own hand, reveals that she used biblical imagery to enhance her plea. "Like Jacob of old I too, when I shall be gathered unto my people, desire that they bury me with my fathers in Huron Cemetery, the most sacred and hallowed spot on earth to me," she wrote. " I cannot believe" she added, "that this is superstitious reverence any more than I can believe that the reverence every true American has for the grave of Washington at Mount Vernon is a superstitious reverence."

In *Conley v. Ballinger, Secretary of the Interior* (1910), the Court held that in making the treaty the United States had "bound itself only by honor, not by law" and that the Wyandot tribe had no legal right to the cemetery. However, the Conley sisters' tenacious defense of their ancestors' graves so swayed public opinion that Congress repealed the sale. The three sisters are buried in the Huron Cemetery, which is now a green oasis in downtown Kansas City, Kansas.

The first female African-American lawyer to join the Supreme Court bar—Chicago Law School-trained Violette N. Anderson—did so 11 years after Conley. She was admitted in 1926 on motion of James A. Cobb, a local black judge in the District of Columbia. The first black woman to petition the Court *pro se* was Jama A. White, who contested her expulsion from Portia Law School. She was expelled for neglecting to tell a coal and groceries dealer that she was separated from her husband and for refusing to pay for the merchandise herself once her marital status was discovered. (She had billed her husband's account despite their separation because a court had ordered her husband to pay her expenses.) The Massachusetts Supreme Court rejected White's claim against the law school, and, acting as her own attorney, she petitioned the Supreme Court of the United States unsuccessfully in 1933.

It is not known which black woman lawyer filed the first brief or argued the first case in the Supreme Court. (The first African-American to argue was probably J. Alexander Chiles in 1910). One possibility is Constance Baker Motley, who deserves singling out anyway as the greatest black woman advocate. As associate counsel for the NAACP Legal Defense and Education Fund, Inc. from 1945-1966, Motley argued ten desegregation cases, winning nine. She helped prepare the briefs in the landmark case of *Brown v. Board of Education,* which found segregated schools unconstitutional. She also argued James Meredith's suit for admission to the University of Mississippi, and Charlayne Hunter-Gault's case that forced the University of Georgia to open its doors to black students. Impressed with the brilliance of her oral arguments before the Supreme Court, Attorney General Ramsey Clark persuaded President Lyndon B. Johnson to appoint Motley to be the first black woman federal judge in 1966.

The first women to argue against each other in the Supreme Court were Elizabeth R. Rindskopf and Dorothy Toth Beasley, the attorneys in *Paul J. Bell, Jr. v. R.H. Burson, Director, Georgia Department of Public Safety* (1971). Beasley, an assistant attorney general of Georgia, again opposed a woman advocate two years later in *Doe v. Bolton*. Her opponent, Margie Hames, representing abortion-seeker Mary Doe, succeeded in persuading the Court to strike down a Georgia law that allowed only residents of the state to obtain abortions. "She didn't get it simply because she was female," later explained Attorney General Arthur Bolton on why Beasley, the only female out of a staff of some twenty-six deputies, was given the task of defending Georgia's 1968 abortion law. Beasley, who had briefly worked with Hames in private practice, was simply considered the best advocate for the job.

Doe was argued the same day as *Roe v. Wade*, its companion case. Jay Floyd, who defended the Texas anti-abortion statute in *Roe,* argued against Sarah Weddington and her co-counsel, Linda N. Coffee. "Its an old joke," chided Floyd when he began his *Roe* presentation, "but when a man argues against two beautiful ladies like this, they are going to have the last word." His misplaced humor did not go over well. Hames remembers finding Floyd's comment "very chauvinistic." She "thought [Chief Justice] Burger was going to come right off the bench at him. He glared him down. He got the point right away that this was not appropriate in court."

There was no place for gallantry in the 1977 case of *Danielle Gandy et. al. v. Organization of Foster Families for Equality and Reform et. al.*, which marked the first time four women collectively argued one case. The counsel tables had never before been so "female" as when Louise Gruner Gans, Helen L. Buttenwieser, and Maria L. Marcus successfully represented individual foster families and an organization of foster parents when they sought an injunction against New York City's procedures for removing foster children. Attorney Marcia Robinson Lowry argued the city's case.

Women of the Office of Solicitor General

The best source of women advocates has been the Office of the Solicitor General (OSG), the elite government legal department that handles federal cases. The OSG has supplied a steady trickle of women to argue the government's position since 1972, when Harriet Sturtevant Shapiro was hired as the first regular woman attorney. There was at least one earlier instance, however, of a woman on the Solicitor General's staff appearing before the Supreme Court, although that episode seems to be a fluke. In 1949 Patricia Collins Andretta successfully argued *Johnson v. Shaughnessy*, an immigration case, when she was a lawyer in the Office of the Assistant Solicitor General, which was subsequently renamed the Office of Legal Counsel.

The reason she got the assignment is revealing. When Robert Ginnane, an associate in the OSG who had been assigned the case, was called suddenly to France on business, Andretta's husband, Assistant Attorney General Sal Andretta, prevailed on Solicitor General Phil Pearlman to select his wife to step in and argue the government's case. Andretta (now Patricia Dwinnell Butler) recalls that the bailiff of the Supreme Court complimented her on her performance: "with that [stentorian] voice of yours, you can come back any time." But Justice Felix Frankfurter's needling did not compel her to request to be assigned further oral arguments.

Twenty-three years after that episode, Harriet Shapiro joined the staff as an assistant solicitor general and paved the way for other women attorneys at OSG. In 1999, five out of twenty lawyers on the staff were women. Now more than 70, Shapiro is a seasoned advocate who holds the record–17—among women staffers for most arguments. [In terms of gender law cases, Shapiro argued the government's position in *Schlesinger v. Ballard* (1975) and *Newport News Shipbuilding & Drydock Co.v. Equal Employment Opportunity Commission** (1988).] Shapiro's record puts her just ahead of Amy L. Wax, who argued 15 cases for the government when she was at the OSG from 1987 to 1994 and is now a law professor. They may both soon be overtaken by assistant solicitor general Beth S. Brinkmann, who, as of 1999 had argued 13 cases since joining OSG in 1993.

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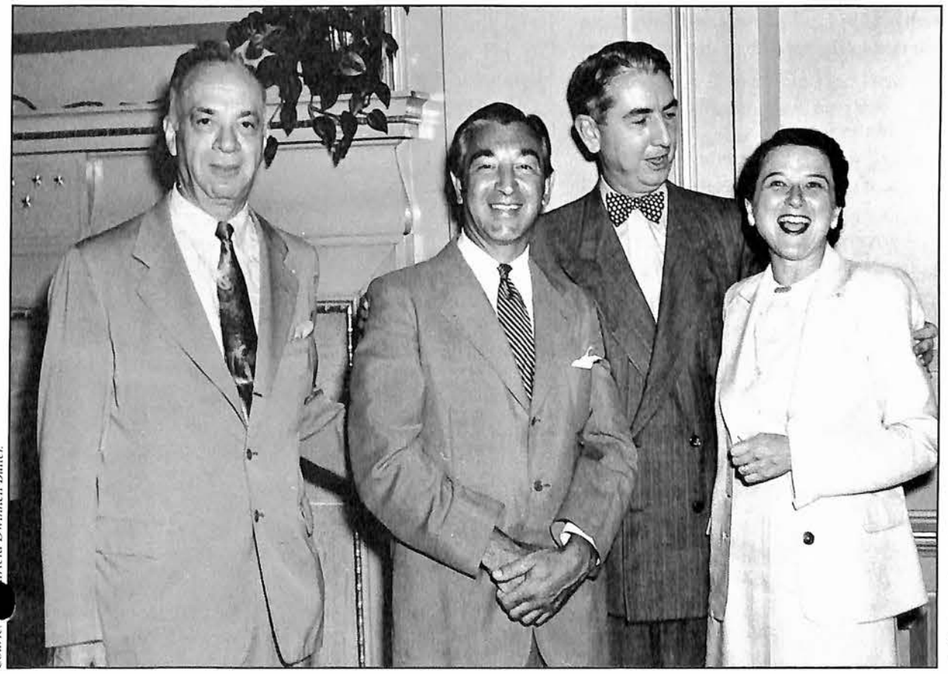

Courtesy Patricia Dwinnell Butler

Left to right: Solicitor General Philip Pearlman, Asst. Attorney General Sal Andretta, Attorney General Tom C. Clark, and Patricia Andretta (Butler) In 1949, Patricia Collins Andretta (now Butler) worked in the Office of the Solicitor General (OSG). Her opportunity to argue a case came when the associate who had been assigned to argue in *Johnson v. Shaughnessy* was called out of the country.

Women Advocates *(continued from page eleven)*

A few former OSG staffers continue to practice appellate work and appear before the Supreme Court. Kathryn A. Oberly, who argued 10 cases in her four year stint at OSG from 1982 to 1986, specializes in representing tax accounting firms. In 1989 she argued Price Waterhouse's high profile case in the Supreme Court against Ann Hopkins, who successfully claimed she had been denied partnership because of her gender. Maureen E. Mahoney argued eight times when she served as a deputy solicitor general; she has returned to argue two more cases before the Supreme Court since leaving OSG in 1993 to join a private practice. Mahoney had also argued one case before joining OSG, having been invited by the Supreme Court through a special appointment to present argument. She was probably the first woman invited by the Court to appear as an advocate.

The Post, March 5, 1882

Cartoon showing Belva Lockwood on her way to court.

There has yet to be a female Solicitor General, but the first female Attorney General, Janet Reno, has argued once before the Supreme Court. In 1996 she chose to present the government's case herself in *Maryland v. Jerry Lee Wilson*, three years after being appointed to the top job at the Justice Department.

Most Appearances Before the Court

But these contemporary women advocates do not compete, in terms of numbers of cases argued, with a handful of pioneers who worked as appellate lawyers for various branches of the federal government. The earliest of these professional advocates was Mabel Walker Willebrandt (1889-1963), who served as assistant attorney general in the 1920s, and prosecuted scores of violators of the National Prohibition Act. Because the Act was difficult to enforce, she spearheaded the use of tax laws to prosecute illegal distributors of liquor. "Prohibition Portia," as she was nicknamed, argued 21 times before the Supreme Court, all prohibition or tax related cases, before retiring from the Justice Department in 1929.

Willebrandt's service at the Department of Justice overlapped for one year with that of Helen R. Carloss (1890-1948), another female public servant who conducted extensive business before the Supreme Court. She had left her native Mississippi to attend law school at George Washington University and then was hired to handle tax litigation for the federal government from 1928 to 1947. Carloss argued 16 times before the Supreme Court and filed numerous briefs–including 5 tax cases that were jointly prepared with Willebrandt (among others) in 1929. The May 13, 1929, brief they filed for the Commissioner of Internal Revenue (along with Attorney General William D. Mitchell and special assistant attorney general Alfred A. Wheat) is likely the first instance of two women's names appearing on the same brief.

In his memoir, *The Court Years, 1939-1975*, Justice William O. Douglas described Carloss as "a gray-haired lady from Mississippi." "If seen by a stranger," he mused,

> She would doubtless be identified as a housewife. But she was an advocate *par excellence*– brief, lucid, relevant and powerful. Typical of the complex and important questions which she presented is *Kirby Petroleum Co. v. Commissioner* (326 U.S. 599) concerning the right of the lessor of oil and gas land to the depletion allowance where the lease is for a cash bonus, a royalty and a share of the net profits.

Another outstanding appellate lawyer and dedicated public servant, Bessie Margolin (1909-1996) is best remembered for her talent for oral argument. She joined the Department of Labor shortly after passage of the 1938 Fair Labor Standards Act, and specialized in interpreting that New Deal law, which spelled out federal wage and hour policy. Margolin rose to become assistant solicitor in charge of Supreme Court litigation, and then, in 1963, was promoted to associate solicitor for the Division of Fair Labor Standards. As such, she was responsible for all litigation under the Fair Labor Standards Act, the Equal Pay Act, and the Age Discrimination in Employment Act. Margolin argued twenty seven cases before the Supreme Court.

The daughter of Russian Jewish immigrants, Margolin was born in New York City but was sent to New Orleans after her mother died to live in a Jewish Children's Home. She attended Tulane University and graduated from its law school. She then pursued a doctorate in law at Yale University.


Library of Congress.

Constance Baker Motley is widely recognized as the greatest black woman advocate in the history of the Nation

Margolin started her career working on the legal staff at the Tennessee Valley Authority, a New Deal project intended to bring electricity to rural communities.

In *The Court Years*, Justice William O. Douglas remembered Margolin as

> crisp in her speech and penetrating in her analyses, reducing complex factual situations to simple, orderly problems. Typical perhaps of the worrisome but important issues which she argued was *Phillips Co. v. Walling* (324 U.S. 490), holding that an exemption from the Fair Labor Standards Act of employees "engaged in any retail ... establishment" does not include warehouse and central office employees of an interstate retail-chain-store system. As [Chief Justice] Earl Warren said at a dinner honoring her retirement, she helped put flesh on the bare bones of the Fair Labor Standards Act and made it a viable statutory scheme.

The women's all-time record for having argued the most frequently before the Supreme Court belongs to Beatrice Rosenberg (1908-1989), a low-profile but brilliant government attorney who, as an authority on search and seizure, argued more than thirty cases before the high court. (The men's all-time record belongs to Walter Jones, with 317 oral arguments,with 169 appearances in 1815-1835 alone.) In his autobiography, Douglas remembers Rosenberg as being superior to many better-known appellate lawyers with grand reputations. "[L]esser lights and lawyers not well known brought greater distinction to advocacy at the appellate level," he wrote, "Oscar Davis (later to serve on the Court of Claims), Daniel Friedman and Beatrice Rosenberg (all of the Department of Justice) made more enduring contributions to the art of advocacy before us than most of the `big-name' lawyers."

Born in Newark, New Jersey, Rosenberg was a high school classmate of William J. Brennan, Jr., She herself was reportedly considered for a Supreme Court nomination by Richard M. Nixon in 1971. Rosenberg then graduated from Wellesley College and New York University Law School. She began her government career as a lawyer in the Justice Department's criminal division in 1943. When she left in 1972, Rosenberg had worked her way up to becoming chief of the Criminal Division's appellate section. The government chose her in 1946 to present its case in *Ballard v. United States*, in which she unsuccessfully defended the practice of excluding women from jury pools. As an appellate lawyer, Rosenberg quietly earned accolades from her peers. In 1970 she became the first woman to win the Tom C. Clark Award, which is given by the Bar Association of the District of Columbia for outstanding government service by a federal or local lawyer.

Rosenberg spent the last seven years of her career before she retired in 1979 hearing job discrimination cases–including sexual harassment cases on the appeals board of the Equal Employment Opportunity Commission. She also litigated appeals and helped persuade the Justice Department that sexual harassment was a form of gender discrimination. Practical and quick-witted, she served at the EEOC as a masterful mentor to a pride of appellate lawyers tackling employment discrimination cases. When she died in 1989, the D.C. bar inaugurated the Beatrice Rosenberg Award "for outstanding government service by a bar member whose career contributions to the government exemplifies the highest order of public service."


Courtesy of Charles Reichel and Nancy Stanley.

Holder of the women's record for the most oral arguments before the Supreme Court, Beatrice Rosenberg was a low-profile, but brilliant government attorney.

Although she does not come close to Rosenberg in terms of quantity, Ruth Bader Ginsburg deserves singling out as an advocate for the quality of the arguments she used to persuade the Supreme Court to strike down laws that treat men and women differently. As a co-founder of the Women's Rights Project at the ACLU, Ginsburg was the architect of a comprehensive litigating strategy designed to end sex discrimination in the law. She litigated five times before the Court, winning all but one case, *Kahn v. Shevin* (1974). Initiated by an ACLU affiliate in Florida, that case had not been selected to go before the Court by Ginsburg who, presciently, felt the timing was wrong.

The cases that Ginsburg won read like a list of landmarks in a gender law textbook: *Reed v. Reed* (1971) (which she did not argue but for which she was the main author of the brief), *Frontiero v. Richardson* (1973), *Weinberger v. Weisenfeld* (1975), *Craig v. Boren* (1976), *Califano v. Goldfarb* (1977). She went on to be appointed a federal judge in 1980 and then, in 1993, to the Supreme Court.

Getting the Assignment

Working as an appellate lawyer for the federal government is, of course, the most direct route to gaining the opportunity to argue a case before the Supreme Court. Most of the 90 or so cases heard in recent terms are between the federal government and an individual or other private party. Attorneys seeking to represent private parties must participate in so-called "beauty contests" to peddle their services. Prospective clients make the rounds of a handful of top lawyers

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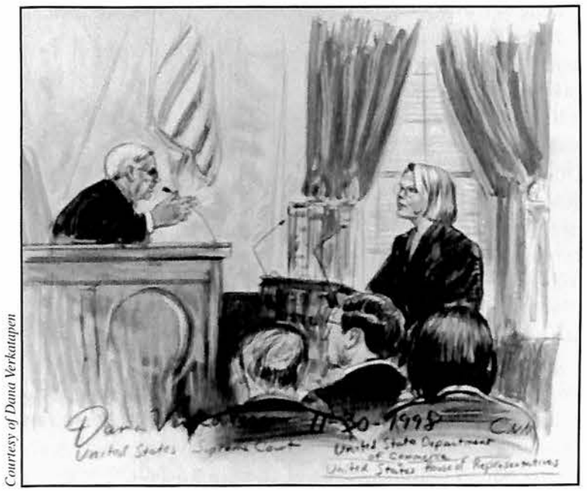
Women Advocates *(continued from page thirteen)*

who specialize in appellate work—where the number of women is traditionally low–and ask questions about how each



Courtesy of Dana Verkouteren

Maureen Mahoney arguing before the United States Supreme Court in *U. S. Department of Commerce v. U.S. House of Representatives.*

candidate would handle the case and how experienced that attorney is at arguing before the Justices. The prestige of arguing a case before the Supreme Court, and the reduction over the past decade in the number of cases the Court agrees to hear each term, make the competition for assignments correspondingly stiff.

However, many women (and men) simply wind up arguing before the Supreme Court not because they were selected to jump in at the appeals level and lend their expertise, but because they have ridden the case from the local level. In other words, clients often stick with the attorney who filed their original suit regardless of whether he or she is an experienced appellate lawyer. These advocates generally do not return a second time unless they are lucky enough to be hired by another client whose case is reviewed by the Supreme Court.

How many women argue before the Supreme Court each term? Only 14% of the lawyers who argued before the Supreme Court in the 1996 Term, and 10% in the 1986 Term, were women. This is a big improvement from the 1966 Term, when that figure was barely 1%, and from the 1976 Term, when it was a mere 5%. But these figures do not keep pace with the increasing numbers of women entering the legal profession or joining the Supreme Court bar.

Admission to the bar requires being proposed by two nonrelated members of the Supreme Court Bar who swear that the applicant has been a member in good standing of the bar of the highest court in the state for at least three years. Once admitted, members are qualified to file motions and briefs and to argue before the bench, although most join simply for the prestige of being a member of an elite bar. In 1996 nearly a quarter of the attorneys admitted to the Supreme Court bar were women. That figure is up from 18% in 1986 and 5% in 1976. Perhaps a good indicator of the swelling female ranks of the Supreme Court bar occurred on March 2, 1998. On that day Susan Orr Henderson, Karen Orr McClure, and Joanne Orr, attorneys from Indiana, became the first three sisters to be sworn in simultaneously.

Do women advocates have a harder time getting clients? Legal experts, and the advocates themselves, generally say the answer is no. Former Deputy Solicitor General Mahoney, who is now carving out her own practice specializing in Supreme Court work, told the *Washington Post* in 1997: "I've always been convinced that when I lost a client, I lost for a ... legitimate reason," not because of gender. "There are credentials you need," she emphasized, "and right now a lot more men have those credentials." Like Mahoney, who clerked for Chief Justice William H. Rehnquist, those credentials often include a clerkship for a Justice and a stint at the OSG arguing government cases.

One way to get regular appellate work in the Supreme Court is to specialize in a particular area of law. Betty Jo Christian, a partner at the Washington firm of Steptoe & Johnson is the best example of this tactic. Having served as Commissioner of the Interstate Commerce Commission in the 1970s, she is considered a top expert on transportation and railroad law. Combining this expertise with appellate skills has made her an attractive choice for railroad companies in suits interpreting the government's transportation and interstate commerce laws, many of which Christian helped formulate. She has argued four times before the Supreme Court and has prepared regular and amicus briefs for countless other cases.

Academic jobs at prestigious law schools are also steppingstones to landing a Supreme Court case. Kathleen M. Sullivan, a professor at Stanford Law School, is perhaps the most high-profile woman in this category. She has written briefs for several Supreme Court cases and has filed numerous amicus curiae briefs. Notably, Professor Sullivan helped prepare the brief challenging Georgia's anti-sodomy statute in *Bowers v. Hardwick* (1986), and was on the briefs representing abortion clinics in *Rust v. Sullivan* (1991).

A good indication that women advocates are making progress and becoming true contenders was the selection in 1998 of Mahoney, over stiff competition from leading male advocates, to represent the House of Representatives in a suit against the Commerce Department challenging the Census Bureau's proposal to use a new method for conducting the population count. This action marked the first time that the House had ever brought a case in the U.S. courts and was probably the most highly prized assignment for the Supreme Court bar that term.

Opperman House *(continued from page one)*

This is why the work of the Supreme Court Historical Society is so valuable, first of all to the public, but second and not at all far behind, to the members of the Court itself. The Society has sponsored at least a dozen lectures on the Court's history, well attended and generally well done. These have thrown light on the Justices on the times which they covered, and helped us to understand that constitutional law is not a series of discrete decisions, but an ever-flowing stream fed by new waters so that the old waters do not become stagnant. These are major contributions to our understanding of the Court and its role in our history. Of similar importance is the Society's effort to acquire portraits and other historical memorabilia for the Court's permanent collection. I am a great portrait fan, myself. I looked through the work of perhaps a dozen portrait painters before choosing one to paint my own portrait and if I find a biography at the library which I think I would like to read, I first examine it to see whether it has pictures in it; if it doesn't, I tend to put it aside.

That is why I think it is important for our Court to have portraits of as many past Justices as possible—it enhances one's understanding of a person to know what that person looked like. And so I commend the Society for its efforts in this regard.

On still another front the Society has funded and organized a summer educational program for secondary school teachers to increase Supreme Court-related educational content in the public schools. Considering the rather large gaps in much secondary school education today, this project seems bound to benefit thousands of high school students throughout the country. It is a very worthwhile undertaking.

So I commend the work of the Society and congratulate its Board of Trustees on a successful quarter-century of service to the Court and to the Nation. I commend Dwight Opperman and Leon Silverman for their generous donation of money and time to the Society. We at the Court look forward

Associate Justice Sandra Day O'Connor and Carol Risher at the opening of Opperman House.

Dorothy Tapper Goldman, Leon Silverman and Jim O'Hara at the opening ceremony.

to the contribution of the Society. You have now acquired a splendid facility in which to perform.

Thank you for inviting me, I have enjoyed the afternoon.

Following the remarks of the Chief Justice, Mr. Silverman thanked many of the individuals who have been essential to the acquisition and renovation of the building.

It is gratifying, I think that we hold this celebration on the very eve of this organization's twenty-fifth anniversary and in the company of so many of the Society's friends and supporters. I am particularly grateful for the presence of the Chief Justice and Associate Justices Sandra Day O'Connor, Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer.

Approximately three years ago, after assessing staff space needs necessitated by a growing number of programs, publications and expanded membership services, the Executive Committee determined a need to replace the 1500 square foot townhouse that had been its headquarters since 1982. Reluctant to commit funds to the purchase of a building when the existing funds were committed to program objectives, it was determined that a separate building fund should be created to raise enough money to acquire another property. Our honored Chairman, Dwight Opperman, as always, volunteered to help by making an extraordinary seed donation to found a building fund.

As the project developed, and the cost of acquiring adequate space on Capitol Hill became more apparent, Dwight added to that substantial gift to ensure the Society's needs would be fully met. The Executive Committee cannot fully express the Society's gratitude for his generosity to this and its many other efforts. As a token of our respect and admiration, we have chosen to honor him by naming the new headquarters Opperman House.

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Blackmun Memorial *(continued from page four)*

prison conditions (rather than simply to the types of punishment for crime), Judge Blackmun declared that the prisoners were entitled to an injunction barring further use of corporal punishment. His scholarly and measured opinion powerfully conveyed Judge Blackmun's commitment to the inherent dignity of all people.

. . . At the same time, although he was prepared for bold doctrinal innovation when he saw support in the existing Supreme Court precedent, Judge Blackmun understood the constrained role of court of appeals judges. At the 1968 investiture of his colleague, Judge Myron H. Bright, Judge Blackmun reflected:

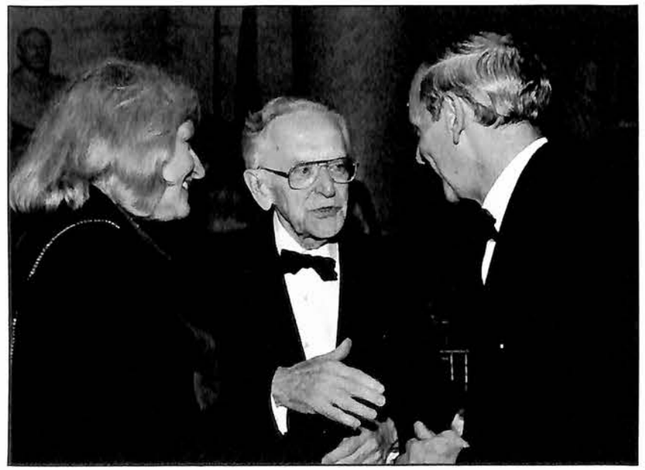
> The concern [of a judge] is with what is proper law and with what is the proper result for each case. . . . There's always some uncertainty in the law and for you, . . . there will be period of uncertainty in your work. There will be moments of struggle in trying to ascertain the correct from the incorrect . . . There will be the awareness of the awfulness of judicial power, and although you will be on a multiple-judge court, you will experience the loneliness of decision. . . . But there also will be—and I say this genuinely and sincerely—the inner satisfaction and the inner reward which one possesses in being permitted to work on matters of real substance, in feeling that one's decision, at least in his own conscience, is right, and in knowing that hard work and hard thought and practical and positive scholarship are about all and about the best that anyone can offer. I'm certain that no part of the legal field is capable of providing any higher sense of satisfaction in its work and in its spirit than is the federal bench.

This combination of humility and insight is illustrated by *Jones v. Alfred H. Mayer*, which was later reversed by this Court. The case concerned the question whether 42 U.S.C.§1982 outlawed private racial discrimination in the sale of real property. The existing Supreme Court precedent, Judge Blackmun felt, barred using Section 1982 to reach purely private conduct: "It is not for our court, as an inferior one, to give full expression to any personal inclination any of us might have and to take the lead in expanding constitutional precepts when we are faced with a limiting Supreme Court decision which, so far as we are told directly, remains good law." Nonetheless, Judge Blackmun essentially invited the Supreme Court to revisit the question—"It would not be too surprising if the Supreme Court one day were to hold that a court errs when it dismisses a complain of this kind," and he laid out the different analyses that might support such a result. . . .

The meticulousness and modesty of Judge Blackmun's approach to difficult questions made him an appealing prospect for elevation to the Supreme Court when President Nixon's first two attempts to fill the seat left vacant by Justice Abe Fortas's resignation failed in the Senate.

The most striking thing about the future Justice's confirmation hearings—which lasted only one day and at which he was the only witness—was the virtual absence of pointed consideration of any of the issues with which he would become most closely identified during his time on the Court, save for a few questions about whether he could apply the death penalty given his personal opposition.

Nonetheless, the reported comments presaged some significant characteristics of Justice Blackmun's approach to his work. The Report of the Senate Judiciary Committee, which unanimously recommended his confirmation, described him as a "man of learning and humility." And the letter from the American Bar Association's Standing Committee on the Federal Judiciary, which also unanimously endorsed Blackmun's nomination, described him as "one who conscientiously and with open mind weighs every reasonable argument with careful knowledge of the record, the arguments and the law." It also reported the comments of a district court judge from the Eighth Circuit that Blackmun was "a gifted, scholarly judge who has an unusual capacity for the production of opinions. . .which present learned treatises of the factual and legal questions involved. And coupled with all of his erudition, he is unassuming, kind and considerate in all of his associations with the Bar and the public." The Senate unanimously confirmed the nomination on May 12, 1970, and Justice Blackmun took the oath of office on June 9, 1970.



Harry Blackmun speaking with his successor, Associate Justice Stephen Breyer and Judith Richards Hope, at a function in the Supreme Court.

Justice Blackmun served on this Court for twenty-four years. Perhaps more than any other Justice in modern times, he became identified in the popular mind with a single decision: his opinion for the Court in *Roe v. Wade*. In *Roe*, this Court held that the due process clause of the Fourteenth Amendment protects, under certain circumstances, a woman's decision whether to carry a pregnancy to term. Throughout his service on the Court, the Justice vigorously defended the principles laid out in *Roe*. His last opinion for the Court in an abortion case, *Thornburgh v. American College of Obstetricians and Gynecologists*, offered a particularly eloquent expression of this commitment to individual freedom. . . .

Justice Blackmun and his family paid a heavy price for his commitment to a constitutionally protected zone of privacy for others: he was the subject of fierce protests, hate mail, repeated picketing, death threats, and a bullet fired through his living room window into a chair in which his wife had recently been sitting.

The Justice often referred to *Roe* as a landmark in the emancipation of women. . . .Near the beginning of his opinion for the Court in *Roe*, Justice Blackmun quoted Justice Holmes' statement that the Constitution "is made for people of fundamentally differing views. . . ." That imaginative empathy informed far more than the Justice's abortion jurisprudence. . . . In his dissent in *Bowers v. Hardwick* . . . he maintained that "depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. . . ."

This recognition that the true measure of the Constitution lies "in the way we treat those who are not exactly like us, in the way we treat those who do not behave as we do, in the way we treat each other," was a hallmark of the Justice's thinking. In the Justice's first Term on the Court, he wrote the pathbreaking opinion in *Graham v. Richardson*. The case involved challenges to several state welfare programs that either excluded aliens altogether or severely restricted their eligibility for benefits. Justice Blackmun, [quoting from the 1938 opinion in *United States v. Carolene Products Co.*,] saw that aliens presented a "prime example of a 'discrete and insular' minority for whom. . .heightened judicial solicitude is appropriate. The Justice's opinion for the Court was the first to invoke the now-famous and influential, but then obscure, "footnote four" from *Carolene Products* to explain the reason for heightened judicial scrutiny of discrete and insular groups. But just as significant as the Justice's recognition of aliens' need for judicial protection was his celebration of the special contributions aliens can make to American life. . . .

Similarly, the Justice's many opinions regarding the rights of Native Americans illustrate his view that judgment requires both knowledge and empathy. Perhaps in no other area did the Justice's long-standing interest in American history intersect so completely with his judicial approach. . . . [I]n *United States v. Sioux Nation of Indians* . . . [he] set out in scrupulous detail how the Sioux had been stripped of the Black Hills of South Dakota and of their way of life. Strictly speaking, the detail might have been unnecessary to resolving the technical issues . . . [b]ut it was critical to the Justice's central mission: grounding the judgment for the Sioux in the "moral debt" arising out of dependence to which the United States had reduced a proud and self-reliant people. . . .

Courtesy of Richard Koh

Associate Justice Blackmun with Harold Hongju Koh, one of his clerks. The Honorable Harold Koh served as chairman for the special meeting of the Supreme Court Bar.

The Justice's concerns with prison conditions continued along the path on which he first set out as law clerk and then as a judge on the court of appeals. . . . The Justice's jurisprudential sense of connection with and responsibility towards prisoners was accompanied . . . by a personal sense of connection as well. He regularly received, and read a prison newspaper—the Stillwater, Minn. *Prison Mirror* . . . .

Finally, the Justice was a pioneer in thinking about the constitutional rights of the mentally ill and mentally disabled. In *Jackson v. Indiana*, his opinion for the Court advanced the proposition that "[a]t the least, due process requires that the nature and duration of [an involuntary] commitment [to a mental institution] bear some reasonable relation to the purpose for which the individual is committed."

. . . One of the Justice's most widely quoted images evoked the presence of "another world out there," that an overly comfortable Court might either "ignore or fea[r] to recognize." . . . While he used this precise phrase only in his dissents in abortion rights cases, it reflected a broader commitment to learning about, and facing, facts in the world. For example, in his separate opinion in *Regents of the Univ. of California v. Bakke*, the Justice expressed his support for race-conscious affirmative higher education with these words: "The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene."

. . . The Justice had a special wisdom and sensitivity about the relationship among history, race and gender. He knew when the law ought to take account of race or gender . . . but he also knew when the continued use of race or gender would serve only to "ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.

. . . No account of the Justice's time on the Supreme Court would be complete without a discussion of his tax opinions.

continued on page nineteen

Opperman House *(continued from page fifteen)*

Other generous benefactors to the completion of the house include Dorothy Tapper Goldman, who along with her late husband, Howard Goldman, have generously supported almost every program and activity the Society has undertaken in the last decade. To acknowledge this continuing generosity, the Society has named its library on the first floor in Howard and Dorothy's honor. Professor James O'Hara of Loyola College in Baltimore made a valuable and unique contribution by donating his personal collection of rare books to the Society. This library is now housed in the beautiful new facility. The collection includes a wide variety of biographical studies of the Justices as well as books written by Justices on varying subjects. Many of the volumes are out of print, and some are copies of unpublished theses that would be very difficult to obtain in any other setting. This collection is the culmination of a life-long effort by Professor O'Hara and represents a unique and virtually irreplaceable contribution.

Another of our substantial donors is Agnes Williams. She not only made a generous contribution to the building fund, but has also served with Dorothy on what we have come to term the 'Committee of Two' which was responsible for developing and implementing the interior design and landscaping plan for the building. Those are detailed, time-consuming tasks Agnes and Dorothy have carried out with élan, patience and grace.

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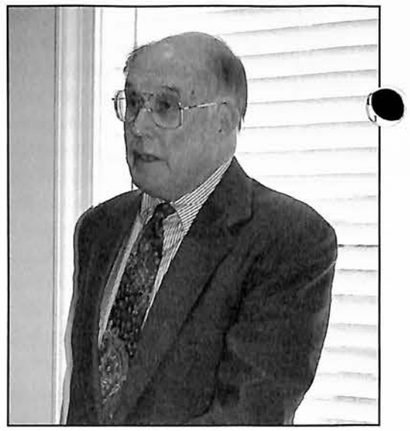
Associate Justice David Souter speaking with Society Chairman Dwight Opperman and Vice President Frank Jones.



Chief Justice William Rehnquist speaking at the opening of Opperman House.

The Society has been blessed by selfless commitment and devotion on the part of dedicated Trustees, members and supporters. One of these is the late John R. Risher who chaired the Society's Headquarters Search Committee. This Committee was tasked to survey Capitol Hill for potential sites for a new location, eventually identifying this as the building we should acquire. That survey was exceptionally thorough and John made it a personal mission. He followed up his initial efforts by negotiating the purchase of the building at a very favorable price, and further by pursuing the necessary zoning changes over a year of public hearings and neighborhood meetings. Throughout this process he was the Society's front-line advocate giving tireless service and careful attention to every detail.

When it was time to select an architect John displayed equally strong convictions, and it was largely at his insistence that the firm of Alan Greenberg was selected from a host of qualified candidates. I think the elegance of Mr. Greenberg's design speaks for itself as a testament to John's advocacy. We shall always be grateful to Mr. Risher for his vision, commitment and service.

The architectural firm of Alan Greenberg has produced a beautiful and elegant product. While this project is not on the scale of most of Mr. Greenberg's project, he took the job in deference to the Society's unique nature and mission. The elements of design of the building took into account features that relate the building sometimes subtly, and sometimes more directly, to the institution the Society serves. In the front parlor on the first floor the fireplace design incorporates marble from the Supreme Court building. Large paneled doors and extensive dental moldings grace both the front parlor and the library, lending an air of elegance and dignity to these rooms reminiscent of the Court, and the front brick face includes vertical elements that hint at the columns on the façade of the Supreme Court Building. While achieving a classical design, Mr. Greenberg has also successfully incorporated full handicapped accessibility and such modernities as climate control and a modern kitchen in this well integrated space.

The firm of Gibson and Associates served as contractors for the project, and it is difficult to adequately extol their virtues. Throughout the project their craftsmen have anticipated problems before they arose, on numerous occasions, avoiding needless work stoppages and saving the cost of duplicative construction to address the many hidden conditions that presented themselves in refurbishing a century-old building.

Equally professional and successful in their various commissions were John Tremaine, the lighting designer, who incorporated an innovative system of recessed lighting with more traditional forms to create an even and adjustable source of light that is also extremely attractive. The interior design created by John Peters Irelan provided the finishing touch to pull all the elements of the interior of the building together into a beautiful whole. Landscape Designer Michael Bartlett provided landscaping that both complements, and completes the exterior design.

Associate Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer and other guests look on as Chief Justice Rehnquist speaks.

To all who have given of their time, means and talents to make this building a reality, we salute you for your commitment and generosity. Working together we are all committed to a new quarter century of service and excellence.

Blackmun Memorial *(continued from page four)*

Many observers, including the Justice himself, remarked on the large number of tax cases he was assigned. The Justice sometimes joked that these opinions were the result of his being "in the doghouse with the Chief," but in fact he retained both an interest and an expertise in taxation throughout his judicial tenure.

One recent study concluded that during his time on the Court Justice Blackmun wrote majority opinions in thirty-three federal tax cases and concurring or dissenting opinions in an additional twenty-six federal tax cases. . . . His opinions reflected a pragmatic, yet economically sophisticated, approach to the issue and drew on a broad range of sources: the text of the Code provisions involved and their legislative history, the broader legislative purpose of the Code, post-enactment developments, including the Internal Revenue Service's interpretations, and the practical effects different decisions would have. . . .[H]is approach to tax law was beautifully summarized in the eulogy delivered at his memorial service by his former minister, the Reverend William Holmes:

Harry Blackmun excelled at math, and he knew the difference between mathematics and the law. What he brought to both the law and Scripture was neither an absolute subjectivism nor an absolute relativism, but creative fidelity marked by humility, with a twinkle in his eye.

That twinkle in the Justice's eye occasionally made its way into the pages of the United States Reports. For example, in his opinion for the Court in *Flood v. Kuhn*, the Justice took his readers for a tour through his beloved game of baseball, complete with a list of notable players—he apparently forgot to include Mel Ott, for which his clerks repeatedly teased him. But the twinkle was especially familiar to the many people whose lives he touched personally: his colleagues on the Eighth Circuit, . . . his law clerks, who became members of his family and whose professional lives were forever changed by their year with the Justice; the police officers, staff in the clerk's office, and other Court personnel, . . . his secretaries and messengers, who became close professional and personal companions, and, most of all, his family—

Justice Blackmun had a deep and abiding passion for American history. Above his desk, he kept a copy of a statement by his hero, Abraham Lincoln:

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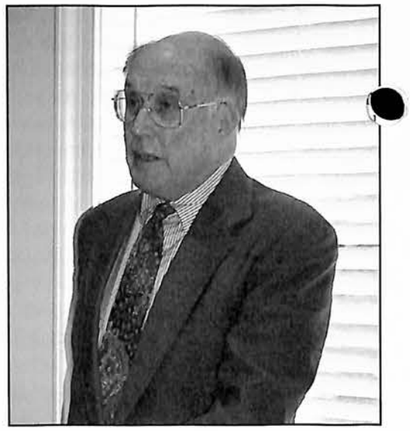

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