



THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## Announcement of Summer Seminar 2001 For the Institute for Constitutional Studies

The Supreme Court Historical Society is pleased to announce the third annual seminar for college teachers and advanced doctoral students, a program associated with the Institute for Constitutional Studies (see *Quarterly* #2, 2000). This year the topic for discussion will be "The Modern American Presidency and its Constitutional Transformation." The seminar will be led by William E. Leuchtenburg of the University of North Carolina and Richard Pious of Barnard College of Columbia University.

Professor Leuchtenburg is the author of, among many other books, *In the Shadow of F.D.R.* and *The Supreme Court Reborn*. Professor Pious is the author of several works on the chief executive, including *The Presidency*.

The seminar will focus broadly on constitutional issues regarding the transformation of the American presidency from Franklin D. Roosevelt through Bill Clinton. Seminar leaders will guide discussion around assigned readings, topics of participants' interest, share their own research, and organize guest lectures and other activities to take advantage

of the unique riches of the Washington area for research on these subjects. They will also advise the participants regarding archival research and use of other primary resources.

Participants will be required to identify their topics of research interests in advance and provide a short bibliography of reading materials for other seminar members to read. Each regular meeting will concentrate on one of these research topics. Times outside the scheduled meetings will be reserved for special events as well as for individual consultation with seminar leaders. Participants will be expected, as a result of the seminar, to produce a draft of some significant part of their projects.

The seminar will meet in Washington, DC for three weeks, June 11-29, 2001, and daily sessions will be held at Opperman House, the new headquarters building of the Supreme Court Historical Society, near the Supreme Court and the Library of Congress. Participants may be housed in near-by university residence halls or make other arrangements.

Enrollment will be limited to fifteen participants, each of whom will be awarded a stipend adequate to cover costs of travel, room, and board.

Applicants for the seminar should send a copy of the curriculum vitae, a brief description (three to five pages) of the research project to be pursued in the seminar, and a short statement of how this seminar will be useful to them in their research, teaching, or professional development.

Requests for information and materials may be sent either by regular mail or electronically. CONTACT INFORMATION can be found on inside (pg. 3).



Library of Congress

Participants in the Institute for Constitutional Studies will focus their research and discussion of the transformation of the American presidency from Frank D. Roosevelt (shown above) through Bill Clinton.

## A Letter from the President



During the latter half of 2000 the Society took a reflective look at itself, initially with the aid of an independent consultant, and subsequently by holding a retreat to which we invited a number of Board members, major donors, long-time members and scholars.

Some of the conclusions we arrived at as a result of these reviews were startling.

While the organization, by most accounts, was seen as flourishing, and far more productive than it was just a decade ago in terms of programs, publications and nearly every other measure of its success, the Society was yet far short of realizing its full potential. The primary reason for this was that, beyond a couple of hundred members who have consistently played an active role in the Society's various standing committees, we have not effectively engaged the skills and resources of a vast majority of the remaining 5,000+ members for the betterment of what is, after all, a membership organization.

We have not been sufficiently proactive in asking our member scholars to contribute articles for the Journal and the Quarterly. We have made no thorough effort to ask members with corporate or foundation contacts to identify themselves to bolster needed support the Society's programs. We have made ourselves comfortable by relying on a relative handful of distinguished scholars to develop new ideas for programs and publications when, with some extra effort, the Society could involve a much larger cross-section of its members in suggesting and reviewing new and existing initiatives.

Understand that I by no means fault the enthusiasm and devotion of those who have carried the Society on their shoulders so long and so faithfully. But with each new success the Society has gained a greater appreciation for what it can truly accomplish if its membership becomes more involved.

Toward that end the Society will be conducting a survey of its entire membership in the coming months. Questionnaires will be mailed along with dues renewal notices throughout the year.

We are using this approach because your views are so important that if we do not hear from you in the first mailing you'll get a second chance, a third, and in fact six

opportunities to speak your mind before we surrender to your desire for anonymity. (If, in fact, you really would prefer to remain unheard, simply say so on any of the questionnaires you receive and return it in the postage-paid envelope provided.)

As the Society has a great deal to learn from you, I'm afraid the questionnaire is fairly long. It includes brief descriptions of all the Society's programs and publications and invites you to give your opinions of each. It also asks for your ideas for new projects to be forwarded to the Program and Publications Committees for their consideration.

We are also quite interested in developing a better understanding of the composition of the Society's member audience. Would you be interested in being involved on a committee, or in contributing an article for publication consideration? Do you have an email address, and if so, would you like to receive updates from the Society via email? Would you be willing to assist the Society's fund-raising efforts by putting the Development Committee in contact with potential donors—corporate, foundation or private? Of course, if there are any questions you would rather not answer, simply leave them blank. We will be grateful for whatever information you feel comfortable volunteering.

There may also be some issues that you would care to address that are not contemplated in the survey form you will receive. Please do not stand on ceremony waiting for us to ask the right questions. You can call the Society anytime at (202) 543-0400, or fax us at (202) 547-7730. We want to hear from you, and I hope you will take the opportunity to tell us what's on your mind. After all, it is your Society.

Before I close this letter, I should like to thank all of you

### The Supreme Court Historical Society

## Quarterly

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**Managing Editor**  
Kathleen Shurtleff

**Assistant Editor**  
James B. O'Hara

who participated in making gifts to the Annual Fund this winter. For the first time in the history of the Society, a letter was sent to each member requesting support for this vital fund. Many of you responded to this request, giving generously above and beyond any membership obligations. The response was most gratifying and the next issue of the Quarterly will contain more information about this campaign.

Frankly, we were a bit unprepared for the strong response as we had no previous experience with such a campaign. Your generosity and enthusiasm were very reassuring, and with your help, the Annual Fund goal for the year is close to being realized. Such support indicates your strong commitment to the Society and its important educational objectives.

In addition to monetary gifts, we also received many comments and suggestions made by individuals who took the opportunity to fill out the comment portion on the return form. These comments ranged from brief to several paragraphs in length. The information is being reviewed, and your suggestions will be given to the appropriate Committees for consideration and/or implementation.

Many of you provided email addresses on that form as well, or address change information. All of that information was passed on the Membership Department so that our records could be amended.

As I noted earlier in this letter, much of the past success of the Society can be attributed to the dedication and participation of volunteers. While some of these "volunteers" are Officers or members of the Board of Trustees, many are "rank and file" members, with commitment to and enthusiasm for the Supreme Court of the United States. We hope that by providing an easy way to convey directly your suggestions and concerns, the number of individual members involved in the actual work of the Society will increase dramatically.

So it is with great anticipation that we prepare this survey to provide a vehicle for better communication with you. Working together we have achieved much. With your continued involvement, we can achieve even more.

*Leon Silverman*

### SEMINAR CONTACT

Hard copy should be sent to  
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For further information,  
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## WANTED

In the interest of preserving the valuable history of the 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 and any other materials related to the history of the Court and its members. These items are often used in exhibits by the Court Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisition's Committee at the Society's headquarters, 224 East Capitol Street, N.E. Washington, D.C. 20003 or call (202) 543-0400. You may also reach the Society through its website at [www.supremecourthistory.org](http://www.supremecourthistory.org).



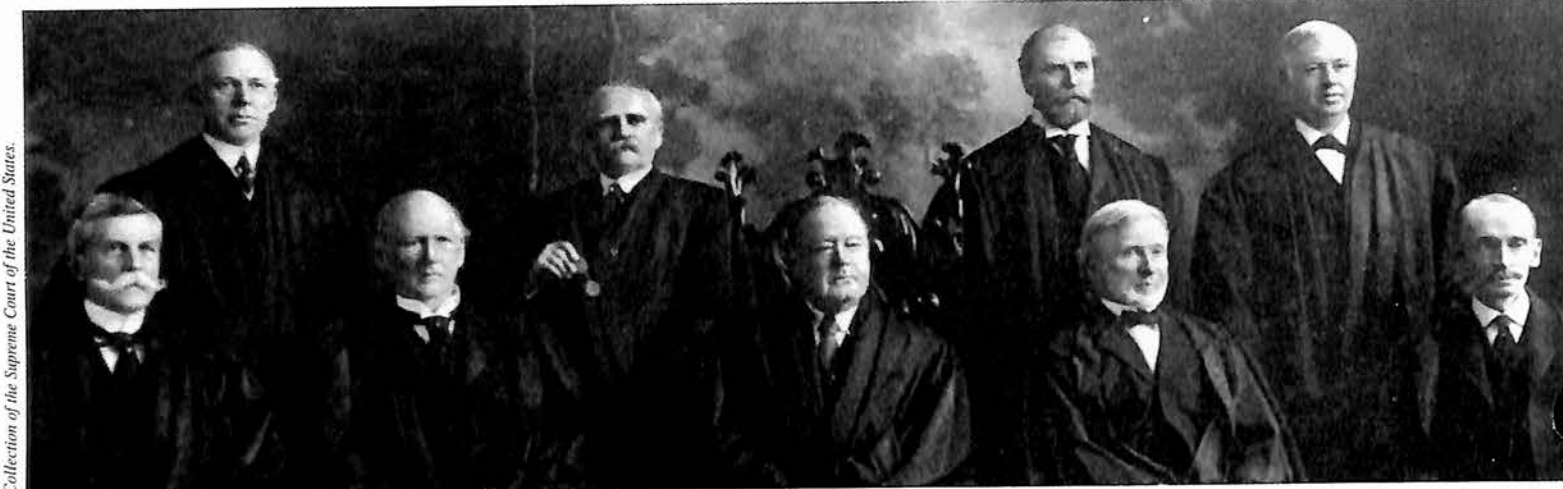
# Civil War Veterans on the Supreme Court

By Charles A. Earp\*

*Editors' Note: When the Supreme Court sat for a group photograph in 1910 and 1911, four of its members were veterans of the Civil War. Two, Justices John Marshall Harlan and Oliver Wendell Holmes, Jr., fought for the North; Justice Horace Harmon Lurton and Chief Justice Edward Douglass White fought for the South. In 1861, the oldest, Harlan was 28; the youngest, White, was just 16. All were officers, holding ranks from second lieutenant to colonel. The profiles of the four individuals were originally published in the Washington Times in two parts, "From solid-*

*Navy campaign under Gen. Ulysses S. Grant and Adm. Andrew Foote to open vital waterways as invasion routes into the South and to force the Confederates from their position in Kentucky. Fort Henry was attacked first and easily taken. Confederate reinforcements were sent to Fort Donelson, but Grant invested it in turn with his larger force.*

*About 3,000 Rebel troops escaped, leaving Gen. Simon Buckner in command. Grant issued his famous unconditional surrender ultimatum and Buckner surrendered the remaining Donelson forces on Feb. 16, 1862. (Gen. Nathan*



A picture of reconciliation, the Supreme Court of 1910 brought together four veterans of the Civil War. Ironically, three of the veterans are pictured side by side on the front row of the picture. Front row from left: Oliver Wendell Holmes, Jr., John Marshall Harlan, Chief Justice Edward Douglass White, Joseph McKenna and William Rufus Day. Back row, from left: Willis Van Devanter, Horace Harmon Lurton, Charles Evans Hughes, and Joseph Rucker Lamar.

*ers to justices" and "Former Adversaries serve side by side on Court." The previous issue of the Quarterly contained the profile of Justice Oliver Wendell Holmes, while the remaining three Justices' profiles appear in this issue. The articles originally appeared on October 28 and November 4, 2000 and are reprinted here with permission.*

Horace Harmon Lurton was a 17-year-old student at the University of Chicago when the Civil War began. Born in Kentucky, the son of a physician turned clergyman, he was filled with patriotic ardor. Lurton returned home to Clarksville, Tenn., enlisted in the Confederate 5th Tennessee Infantry on April 20, 1861, and rose to the rank of sergeant major.

In early February 1862, he was discharged for a disability, but promptly re-enlisted in the 2nd Kentucky Infantry as a first-lieutenant, just in time to be present at the Union assaults on forts Henry and Donelson.

The Confederate works on the Tennessee and Cumberland rivers were the objectives of a joint Union Army-

\*Charles A. Earp is a member of the Baltimore Civil War Round Table and lives in Lutherville, MD.

Bedford Forrest escaped with his cavalry and some infantry and, like Grant, came to the public's attention for the first time.) The 2nd Kentucky, to which Lurton belonged, was in Buckner's division, now among the prisoners.

Lurton wrote to his mother, telling her that he was fine except for a minor leg wound and that he expected to be sent to Illinois. On Feb. 25, he wrote to Union authorities from on board the steamer Nebraska, asking for parole. The request was not granted. He was sent to the military prison at Camp Chase near Columbus, Ohio.

According to secondary sources, Lurton escaped. Records show that on Aug. 25, 1862, he enlisted at Keysburg, Ky., in the 7th Kentucky Cavalry, in the brigade of the legendary Gen. John Hunt Morgan. Lurton was with the cavalry unit for about a year, during which Morgan made frequent raids.

In October, Morgan captured Lexington, Ky., and several other places and destroyed a number of bridges. At year's end, Morgan raided the Union's line of communications in Kentucky, took nearly 2,000 prisoners and did \$2 million in property damage—with the loss of only 25 men.

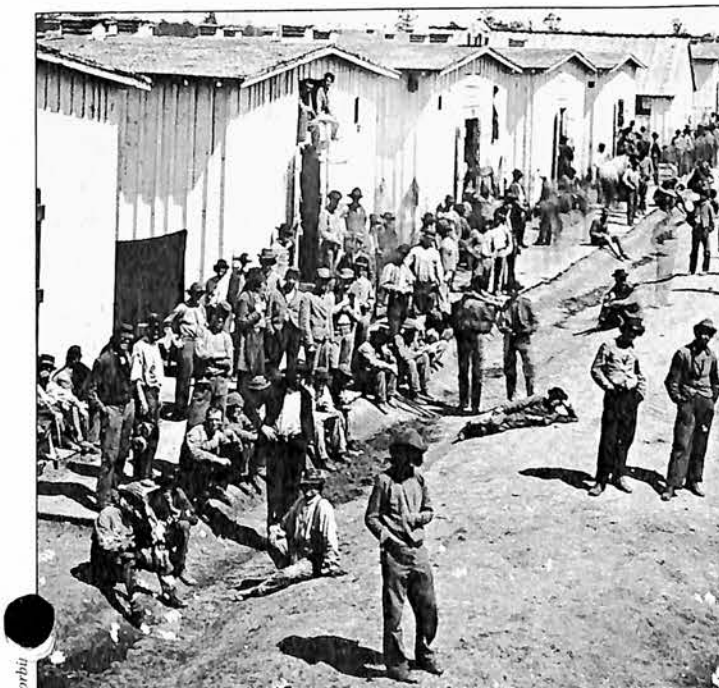
In May 1863, Morgan and his command received the



A slaveholder who twice voted against Abraham Lincoln, John Marshall Harlan was nonetheless loyal to the Union. He joined the 10th Kentucky Infantry as a Colonel in 1861.

thanks of the Confederate Congress for heroic and invaluable service. During a July 1863 raid, however, Morgan's luck ran out. On July 19, in a fight at Buffington Island, where he had intended to withdraw from Ohio, he suffered a major defeat and 700 of his men were captured—including Lurton, who was again sent to Camp Chase. A week later, Morgan surrendered with the remnant of his command.

Counting Lurton's time as a prisoner of war after his capture at Fort Donelson, he was imprisoned about two years at Camp Chase and Johnson's Island in Lake Erie near Sandusky, Ohio. He suffered increasing periods of poor



Lurton was imprisoned at Camp Chase twice. Camp Chase was a fairly civilized prison camp and even had a restaurant where prisoners with money could obtain a good meal.

health. Initially, he was without clothing or money. Still, he had a relatively easy time of it.

He worked for a time in the hospital pharmacy at Camp Chase and was allowed money and packages from home. Lurton gave Camp Chase good marks in July 1864, describing the prisoner's opportunities to engage in various activities such as glee clubs, debating societies and religious gatherings.

Surprisingly, there was a restaurant where a prisoner with money could get a good meal. There also was a store selling musical instruments. A library was available, and Lurton urged patriotic Southerners to supply books. He did note that many prisoners without money or friends suffered during the winter, and he pleaded for donations of clothing for them.

Throughout his confinement, Lurton frequently complained about his health, suffering from chronic respiratory problems. As his health worsened during the severe winter of 1864-65, it was believed he had tuberculosis. His family urged him to take the oath of allegiance and come home, but he hesitated. His mother finally took matters into her own hands. A letter to Secretary of War Edwin Stanton brought no results. So she went to Washington and was granted an interview with the president, Abraham Lincoln.

He listened sympathetically to her story about the boy's health, then cut the red tape and wrote a note, "Let the boy go home with his mother."

About 40 officers, mostly of Morgan's command, signed a testimonial to his character and to the high esteem in which he was held, approving his release on the advice of an attending physician. On Feb. 11, 1865, Lurton took the oath, was released and regained his health at home.

After the war, he pursued a legal career, served on the Tennessee Supreme Bench and as chief justice of the state. He also served as a federal judge, the presiding officer of the Sixth Judicial District. In addition, he taught constitutional law at Vanderbilt University in Nashville, Tenn.

A Democrat, he was appointed to the Supreme Court by President William Howard Taft, a Republican with whom he had served on the federal bench. Lurton served on the high court from 1909 until his death in 1914.

## John Marshall Harlan: Loyal to the Union

John Marshall Harlan was born in 1833 into a prominent Kentucky family. His father was a successful lawyer and politician who served as Kentucky secretary of state, attorney general and a state legislator. Young Harlan attended Centre College and Transylvania University, then entered the practice of law. Although a slave owner who voted twice against Abraham Lincoln, Harlan was a staunch Unionist in the sharply divided state. During the turbulent months before the war, he saved the *Louisville Journal* from





When Lurton joined the Supreme Court in early 1910, he became the fourth Civil War Veteran to serve in that group. His appointment at age sixty-five made him the oldest jurist to that date to ascend to the Supreme Court.

report the incident to Grant, who was on board at the time. Touring the battlefield the following day, Harlan encountered Sherman, who took him aboard the steamer and introduced him to Grant. Nothing was said about the previous night.

After Shiloh, the 10th Kentucky participated in the siege of Corinth, Miss., Buell's campaign in northern Alabama and the pursuit of Gen. Braxton Bragg's Confederates, which involved little if any combat. In September 1862, Harlan was made an acting brigade commander in the Army of the Ohio. During the battle of Perryville, Ky., his brigade was posted at Buell's headquarters and was not in the fight, which was fought on part of the plantation owned by his grandfather.

Harlan mentioned in his recollections of the war that there occurred one of those rare physical phenomena known as acoustic shadows, where the sound of battle heard miles away is inaudible to those nearby. Though less than three miles from the heaviest fighting at Perryville, Buell and two of his three corps commanders did not hear it.

There was great dissatisfaction with Buell within the army, and after Perryville, a meeting was held by officers, in which Harlan actively participated. The future Associate Justice was delegated to prepare a telegram to President Lincoln requesting Buell's removal, which was signed by all present. Before it could be sent, word came that Buell had been relieved of command.

Harlan, still a colonel, subsequently was promoted to lead a brigade in Thomas' division in the Army of the Cumberland. His command numbered nearly 10,000 men at full strength. In December 1862, they were pitted against the legendary cavalryman Gen. John Hunt Morgan. The brigade was stationed in Castalian Springs, guarding the approach to Nashville, when Morgan attacked and captured a Union force at Hartsville, about 10 miles distant.

Harlan arrived just as the Rebels were disappearing on the other side of the Cumberland River. He observed a Confederate supply wagon crossing the river and ordered it fired upon. In the wagon's escort was Pvt. Horace Lurton,



After his escape from a Union prison camp, Lurton joined General John Hunt Morgan's daredevil marauders. On July 19, 1863, Morgan's unit suffered a major defeat resulting in 700 men being captured by the Union Army.

secessionist control.

He became a captain in the Crittenden Union Guard and was instrumental in arming it against the pro-Southern state militia. In September 1861, his company, known as Harlan's Zouaves, served briefly under Gen. William T. Sherman near Louisville.

It was his first field service and produced a good Sherman story: The Zouaves were assigned to headquarters, and Harlan often saw Sherman. A chain smoker whose cigar frequently went out, Sherman would borrow Harlan's cigar to relight his own—then throw Harlan's away, talking nonstop all the time.

Harlan would meet Sherman again at Shiloh. Harlan then took a major role in forming the 10th Kentucky Infantry and was mustered in as colonel of the regiment in November 1861. His troops were largely German, and when Harlan addressed them in English, they applauded vigorously, sometimes in his mid-sentence, obviously understanding little or nothing of what was said.

In active service with the armies of the Ohio and Cumberland, though, Harlan's command saw practically no combat. The Battle of Shiloh, the first major battle in the West, lasted two days. On April 6, 1862, Gen. Ulysses S. Grant's Army of the Tennessee fought alone. The next day, it was reinforced by Gen. Don Carlos Buell's Army of the Ohio, but Gen. George Thomas' division, to which the 10th Kentucky belonged, was the last to arrive and was not engaged.

That night, Harlan's men camped in an open field without tents. It began to rain. He noticed a steamboat nearby with few occupants and decided to shelter his men there. When he was challenged, he took the regiment aboard behind fixed bayonets of the lead company. The men slept the rest of the night on deck next to the boilers and quietly withdrew the next morning. The boat was Grant's headquarters and, fortunately for Harlan, the guard did not

The redoubtable Brigadier General John Hunt Morgan (shown in 1864) and his cavalry unit performed numerous acts of guerilla warfare behind Union lines. Morgan's attack on Hartsville, Tennessee brought future Justices Harlan and Lurton within firing distance of one another.



who would later serve with Harlan on the Supreme Court.

Harlan's brigade again almost clashed with Morgan at the end of December during the Rebel cavalryman's third raid into Kentucky. After destroying two important bridges on the rail line to Louisville, Morgan withdrew. Harlan, then in Tennessee, pursued and caught up at Rolling Fork, where a rear-guard action occurred. Harlan did not pursue further and rejoined the Army of the Cumberland, but he was too late to participate in the Battle of Murfreesboro.

In February 1863, Harlan declined promotion to brigadier general and then resigned on March 6 because of the death of his father. Needing to support the large Harlan family, he took over his father's law practice in Louisville, became active in politics and was elected attorney general of Kentucky. He ran unsuccessfully on the pro-Union ticket for public office in the state and also was considered as a vice presidential candidate in the 1872 national election.

In the hotly contested Republican convention of 1876, Harlan played a key role in securing the nomination for Rutherford B. Hayes, who had participated in the capture of Morgan. Hayes was elected and later nominated Harlan to the Supreme Court, though his only judicial experience had been a one-year term as a county judge in Kentucky.

Harlan served on the court for nearly 34 years, one of the Court's longest tenures. His grandson, another John Marshall Harlan, also became a member of the Supreme Court.

## Records Sparse on Edward White

The Civil War service of Louisianian Edward Douglass White is the most difficult of the Supreme Court's Civil War veterans to describe because of a lack of records.

His name does not appear in either the Confederate files in the National Archives or the roster of Louisiana soldiers

compiled by the state. Both list an Edward D. White, but the details of that man's service make it clear he is not the Chief Justice. Nor do the Civil War records of the parish (Louisiana's equivalent of a county) where he lived bear his name.

Thus, the account of his military service is based on oral history, most of which probably was supplied by White himself and never questioned.

He was born in 1845 in LaFourche Parish, the son of a wealthy plantation owner who served in Congress and as governor of Louisiana.

Young White received a Jesuit education at Mount Saint Mary's College in Emmitsburg, Md., and at Georgetown College near Washington, where he was a member of the cadet corps. His education in the North was interrupted by the war, although he briefly continued his studies in New Orleans before joining the Confederate army.

Commissioned a second lieutenant, White served on the staff of Gen. William Beall, who commanded the post of Port Hudson, La. Beall was succeeded by Gen. Franklin Gardner in early 1863 but retained command of a brigade at Port Hudson. Accounts differ on White's staff assignment.

Port Hudson and Vicksburg were two key bastions on the Mississippi, denying the North full use of the river and thwarting its efforts to split the Confederacy.

Port Hudson near Baton Rouge, also protected the entrance to the Red River, which was a vital waterway into the trans-Mississippi area. It was garrisoned strongly and subject to strenuous efforts by Federal forces to reduce it in 1863. In the first such effort, Adm. David Farragut's fleet fought its way past the Rebel batteries to proceed north to Vicksburg. In a second naval thrust, the port's batteries



John Marshall Harlan was captain of a unit known as Harlan's Zouaves. Many American militia units modeled their uniforms after the French Algerian troops by wearing uniforms of bright colors with baggy trousers and an open short jacket. The wounded soldier pictured above wears a Zouave style uniform.



were bombarded and silenced. Then three unsuccessful attempts were made by the army to take Port Hudson. A siege of about six weeks, longer than the siege of Vicksburg, followed, and the post finally surrendered on July 9, 1863, five days after the fall of Vicksburg.

As a staff officer, White undoubtedly suffered hardship during the attacks and siege, during which the garrison was reduced to eating mules, dogs and rats.

Taken prisoner, White related the circumstances of his release on parole: He was called from confinement in his shirt sleeves by a Federal officer who told White to get his coat and come with him. When White replied that he had no coat, the officer lent his own, and White left wearing Yankee blue. Apparently his mother had managed to arrange his release; he returned home on parole and took no further part in the war. He was only 17 when paroled.

Long after the war, an interesting comment on White's Port Hudson service came to light. Adm. John Dewey of Manila Bay fame in the Spanish-American war was an officer on the USS Mississippi, which was destroyed by a Confederate battery during Farragut's passage of Port Hudson in 1863. In his biography, Dewey said, "One of my Washington friends, Chief Justice White, was a boyish aid[e] to the commanding general of the Port Hudson defenses. He tells me that the Confederates got the better of us that night, and I must say that I have to agree with him."

After the war, White studied law and developed a pros-

Edward Douglass White joined the Confederate Army when he was only 16 years of age. He served his first eighteen months behind the lines as an aide-de-camp, but in July 1863 he and thousands of other rebel troops were trapped in the siege of Port Hudson, Louisiana.



Collection of the Supreme Court of the United States

perous practice. Like his father, he entered Louisiana politics. He served in the state Senate and, while still in his early 30s, was appointed to the Louisiana Supreme Court.

In 1893, while serving in the U.S. Senate, he was appointed to the Supreme Court by President Grover Cleveland. President William Howard Taft elevated him to Chief Justice in 1910, making him the first Associate Justice to be so promoted in the history of the Court. Taft succeeded White as Chief Justice when White died in 1921 at the age of 75.



Port Hudson protected the entrance to the Red River, an integral part of the trans-Mississippi waterways. Of extreme strategic importance, it was heavily garrisoned with confederate troops. After a siege lasting roughly six weeks, the post surrendered on July 9, 1863. Eighteen-year-old Edward Douglas White was one of 5,000 Confederate soldiers taken prisoner after the surrender.

## Touched with Fire: Civil War Letters, Diary of Oliver Wendell Holmes, Jr.

Reviewed by Richard H. Wagner\*

Editors' Note: This article first appeared in the New York Law Journal and is reprinted here with permission.

Mark DeWolfe Howe, editor, Fordham University Press (April 2000) New York, N.Y. 152 pages.

Justice Oliver Wendell Holmes was a prolific writer. In addition to 2,000 judicial opinions in the U.S. Supreme Court and the Massachusetts Supreme Judicial Court, Justice Holmes wrote a book *The Common Law*, and over 100 articles, speeches and notes. On top of this he wrote thousands of letters.

Justice Holmes' correspondence is interesting because it reveals the working of a first-class mind. He did not confine his letters to legal topics but wrote on philosophy, art, literature, famous people and on life in general. He did not write just to lawyers or only to people who agreed with his point of view. Indeed, the published volumes of his letters reveal that he wrote on a regular basis to a wide range of people including: the socialist intellectual Harold Laski; the Irish cleric, Patrick Sheehan; the young Felix Frankfurter; the English jurist Sir Fredrick Pollack; the American diplomat, Lewis Einstein; and to a rather obscure idealist named Franklin Ford. The letters are eloquent and reflect Holmes' joy in writing. It is small wonder that so many of them have been preserved.

Justice Holmes' Civil War correspondence and diaries were for many years thought lost. However, a decade after his death in 1935 a number of letters to his parents were discovered at the bottom of a box in which the Justice's personal papers had been kept. The gaps in the correspondence and Justice Holmes' notations on the envelopes indicate that he destroyed an appreciable number as well as all but a few loose pages of the first volume of his diary. The surviving materials have recently been reissued by Fordham University Press along with an excellent introductory essay by David H. Burton.

Following his graduation from Harvard College in 1861, Holmes was commissioned First Lieutenant in the 20th Regiment Massachusetts Volunteers. He spent the next three years in the various unsuccessful campaigns in which the Union forces attempted to capture the Confederate capital at Richmond, Va. The bulk of this time was as a captain in the front lines. Later, Justice Holmes was appointed an aide to one of the division commanders and given the rank of brevet major.

Justice Holmes did not have to fight in the Civil War. He was from an upper class Boston family and while many of his Harvard classmates volunteered, many did not. However, to the young Holmes, the war was a noble "cru-

\*Richard H. Wagner is an attorney in the litigation department of Bell Atlantic in New York.



September 16-17, 1862 General George McClellan's 75,000 Union soldiers made five assaults on Gen. Robert E. Lee's 40,000 Confederate troops. Each side lost more than 12,000 men in the bloody fight which did not result in a clear victory for either side. Captain Holmes was wounded in the neck in this ferocious battle.

sade" to end slavery. His old New England sense of duty propelled him to volunteer.

Once he experienced combat, Justice Holmes began to lose his boyish romanticism. While he never showed "any wavering in my belief in the right of our cause," he bristled at the jingoistic reporting and sentimental expressed in Northern newspapers. "I was glad to see that cheerful sheet didn't regard the late attempt in light of a reverse," he wrote sarcastically about one newspaper account of a battle. "It was an infamous butchery in a ridiculous attempt in which I've no doubt our loss doubled or tripled that of the Reb." He went on to despair that if "we represent civilization... and if civilization and progress are better things...they will conquer in the long run and will stand a better chance in their proper province—peace—than in war, the brother of slavery..."

He was severely wounded three times during the war. Naturally, his letters and diaries speak of his thoughts and the peculiar circumstances of war. At the battle of Antietam, he was shot through the neck and left in a small shack with several other wounded men. The shack was overrun by the Confederates. A rebel soldier put his head through the window and asked "Wounded? Yankees? Want water?" Receiving positive answers to each of his questions, the rebel tossed his canteen through the window and returned to shooting at the retreating Union forces. Shortly thereafter, the Union forces counterattacked forcing the rebel to retreat. The same face appeared at the window: "Can I have my canteen back?" The Union soldiers tossed their friendly enemy his canteen and he disappeared.

Later in the war, the young Holmes was entrusted with





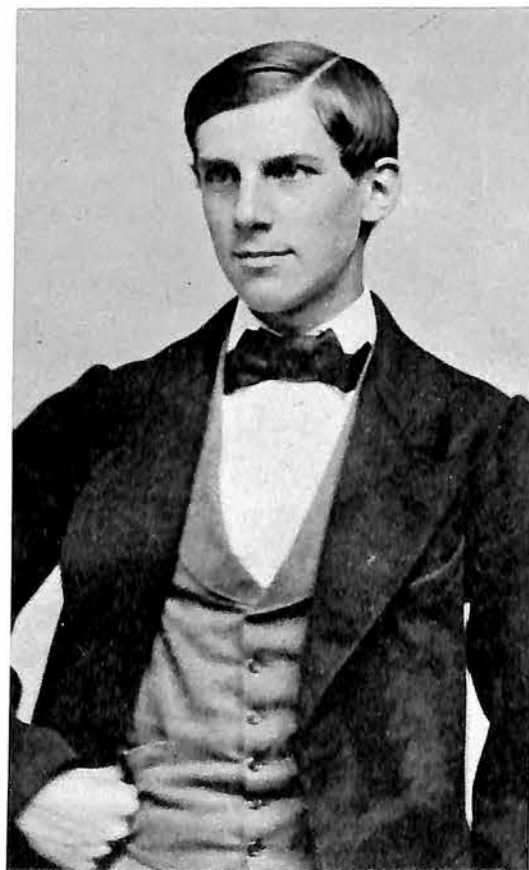
During the Battle of Antietam hundreds of Confederate died along the Hagerstown Pike. Oliver Wendell Holmes was wounded at Antietam, but recovered to rejoin his unit. Holmes' memoirs reflected the horror, boredom and confusion he experienced in the war.

carrying an important order to another unit. Riding on a road through a wood, he came upon a boy who told him that there was rebel cavalry further up the road. Holmes recruited three Union cavalry men he found foraging nearby and the small band proceeded up the road. Coming upon a clearing, they were fired upon by 20 mounted men in dark uniforms. At first, Holmes thought that it must be a mistake and tried to signal that they were friends. Then he realized that their uniforms were not faded blue but rather dirt-covered gray uniforms. He spurred his horse onward with the rebels in pursuit. Eventually, Holmes and his men were cornered and the rebel leader approached ordering them to surrender. As the rebel raised his carbine, Holmes drew a pistol and pressed it to the man's chest. It misfired. However, the rebels were startled enough to allow Holmes and two of his men to ride past "Comanche-style" hanging onto the sides of their horses as the rebels fired.

By 1864, the young Holmes had had enough. He refused further promotion and decided to leave the army when his enlistment ended. "I find myself too weak from previous campaigns to do the duties of an officer of the line properly." More importantly to him, "I honestly think the duty of fighting has ceased for me—ceased because I have laboriously and with much suffering of mind and body earned the right...to decide for myself how I can best do my duty to myself, to the country, and, if you choose, to God." Accordingly, in July 1864, when the 20th Massachusetts was disbanded, Holmes returned to Boston.

Justice Holmes' Civil War letters and diaries generally are not as sophisticated or as intellectual as his later correspondence. Given his youth and the conditions under which they were written, this is hardly surprising. However, in them one can see much of the horror, boredom and confusion of war. One can also see the enthusiastic boy grow into

a complex man. The war affected him for the rest of his life. As he told a reunion of the 20th Massachusetts in 1897: "As I look into your eyes, I feel as I always do that a great trial in your youth made you different—made all of us different from what we could have been without it. It makes us feel the brotherhood of man. It made us citizens of the world and not of a little town. And best of all it made us believe in something besides doing the best for ourselves and getting all the loaves and the fishes we could."



Courtesy of the Harvard Law School Library Collection

When he was wounded at the Battle of Antietam, Oliver Wendell Holmes' father traveled from Boston in search of his son. A medical doctor and a noted writer, the senior Holmes chronicled his search for his namesake in a popular magazine.

## The Die is Cast Texas Disciplinary System: Lawyer Regulation in Texas—2000 Style Austin, Texas—November 16, 2000

By Judge Royal Ferguson\*

On January 24, 1991, the Deans from the nine Texas law schools met with the Professionalism Committee of the State Bar of Texas to discuss our concerns about the deteriorating nature of lawyer conduct. We believed that the law schools could help in the effort to reverse the trend. I made the initial presentation by explaining that our profession faced problems best described by five "M" words. In no particular order, the five "M" words were and continue to be mechanics, money, mentoring, morality and mass.

First, the mechanics of the practice have greatly impacted how we relate to each other. Things are much more impersonal and move much faster today because of fax machines, e-mail, word processors, video conferencing and the like. Second, money has changed the face of the practice. First year lawyers now make more money than the Chief Justice of the Texas Supreme Court. Third, mentoring, once performed by all lawyers, almost as a matter of course, is becoming a thing of the past, even in the large firms. Fourth, all practice was once local. It is now at least regional, if not national and international, changing the morality of how we react to each other. And, fifth, the sheer mass or number of lawyers both in America and in Texas creates difficult problems for self-discipline and self-regulation.

I explained to the Deans that it was our view on the Committee that these 5 "M" word problems were seeping across the face of our profession, causing upheavals of historic proportions, uprooting our traditions and adversely affecting our conduct. I concluded by expressing our hope that the law schools could help. A silence fell over the room. Eventually, one Dean broke the stillness. There was very little, he said, that the law schools could do to address the problem because, by the time the students got there, the die was cast. With one notable exception, this was the view of the Deans.

At best, it was a tepid response. Indeed, as far as I know, the law schools continue to believe, again with notable exceptions, that they have little responsibility to address the professionalism concerns of judges and lawyers. Still, academic inertia aside, there is, of course, no doubt that teaching both good conduct and obedience to the Rule of Law starts well before law school. Only

\* Judge Royal Ferguson serves on the United States District Court for the Western District of Texas.

whether it can be reinforced in law school remains in doubt.

For three-plus years, I have reflected on the "die is cast" comment. It was used at the time to explain the reason for inaction. Tonight I propose that it be used as a reason to promote action. Let me share a recent event in my court.

Not long ago, a young woman refused to report before me for jury duty. I entered an order for her to show cause why she should not be fined or put in jail, as provided by federal law. It took several orders, served by summons, before she finally appeared. When she did, I asked her if she knew where the following sentences came from:

1. "When in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

2. "We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States."



We the Students: Supreme Court Cases for and About Students is the focal point of a new program proposed by Judge Royal Ferguson and the State Bar of Texas. Written by Professor Jamin Raskin (shown here) the book has garnered praise from many educators and legal experts across the country.





Linda Brown, aged nine in 1952, was the Brown in the landmark case *Brown v. the Board of Education*. Judge Ferguson suggests that in reviewing and teaching about pivotal decisions such as this, members of the Bar will be able to... "renew our commitment not merely to be successful lawyers and judges, but more firmly to be upright and decent lawyers and judges."

3. "Four score and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."

My recalcitrant juror paused for the longest time. Finally, she said that she had no idea where any of the sentences came from. I was not totally surprised by her response. After all, it took several orders to force her to do her Constitutional duty. But, the incident made one thing finally clear to me: it is time to cast some die.

Now, we are not starting from scratch here. Good lawyers and judges throughout this state, individually and in association with others, are doing remarkable things to cast die across a wide spectrum of our people, from the youngest to the oldest. Those efforts should and must continue. My concern, however, is with focus, especially with our young people, who are our future.

To be a responsible citizen in this remarkable country of ours, it matters not what your race is, what your ethnicity is, not what your religious faith is, not what your gender is, not what your sexual orientation is, not what your wealth or power is, not who your family is and not where you came from. It does matter, however, what you assent to. You must "hold these truths to be self-evident: that all men [and women] are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness." You must assent to these principles and you must know the sacred texts that delineate these principles. In addition, for all of this to work, you must understand that there is the precondition of a well-ordered society, as John Rawls has observed. Where do we learn this? To begin with, in our high schools. And that is where I propose the die be cast.

Several months ago, I read about a remarkable pro-

gram in the Washington, D.C. schools sponsored by a grant from the United States Supreme Court Historical Society. High school government teachers, judges and lawyers had joined together to teach our Constitution in a focused, thoughtful and creative way using a textbook of profound insight and exceptional pedagogical design titled *We the Students: Supreme Court Cases For and About Students* written by Professor Jamin Raskin of the American University Law School. Marian Wright Edelman, President of the Children's Defense Fund, has said that *We the Students* shows young people that their rights, their way of life, and indeed sometimes their very life, can depend on one very remarkable document: the Constitution of the United States. Ken Starr, former Solicitor General of the United States, has said that *We the Students* has performed what many educators thought impossible, which is to give a dynamic, riveting introduction to a sorely neglected but fundamental dimension of our constitutional democracy.

I purchased the book and read it. I was impressed. Finally, something had been done in Washington, D.C. that we could all agree with.

So how does this fit together? Our democracy depends upon assent to some fundamental principles. If that assent frays, we have an enormous problem.

Assent works best when it is built on a foundation of reason and voluntary acceptance. Such a foundation can best be secured through insightful instruction. We now have a text, *We the Students*, that can provide such instruction. All we then need to do is get started. And how does this happen?

Since I am this year's chair of the Judicial Relations Committee of the State Bar of Texas, I thought I should ask the Committee to brainstorm about the possibilities. We have done just that. Now, to quote a famous Texan, here's the deal.

To begin with, our Committee has scheduled a meeting (most appropriately for January 25, 2001, four years and one day after the fateful meeting with the Deans) to join with other State Bar organizations to map out a plan for the coordination and implementation of a program to put *We the Students* in Texas High Schools. Those invited include the Texas Young Lawyers, the Texas Center for Legal Ethics, the Committee on Law Related Education and the Law Students Division of the State Bar.

We envision that, as a part of this program, local bar associations will provide every Social Studies, Government and History teacher in their community high schools (both public and private) with a copy of *We the Students*. We also envision coordination and cooperation with the Texas Education Agency, in order to keep everyone on the same page.

In addition, we believe that it will be very important to create a pool of volunteer lawyers and judges at the local level to work with each individual teacher as a resource and

partner. Law students should also be enlisted in this effort in any community where there is a law school.

Our plan is to present this program to the Board of Directors of the State Bar of Texas at their April meeting for approval. With luck we can kick it off in the 2001-2002 school year. To do so appropriately, we would hope to convince the Chief Justice of the Texas Supreme Court, the Chief Judge of the Fifth Circuit, the President of the State Bar of Texas and the President of the Texas Young Lawyers to appear in a classroom setting on the cover of the *Texas Bar Journal* in September or October of 2001 to announce the beginning of the program.

We also plan to apprise the Supreme Court Historical Society of our efforts to be the first State to propose such an ambitious program. Moreover, as soon as we put things into place, we hope that they might announce our effort as one of their lead stories in their *Quarterly* newsletter, to encourage others to follow suit. Preliminary indications are that they would be interested to hear from us.

One last thing. You remember that I began this speech talking about professionalism. Is there any connection between the proposal from our Committee and the concept or professionalism? I submit that there is.

Professionalism can be pursued in many ways, both directly and indirectly.

Sometimes however, I think that we emphasize only its direct pursuit. This is a mistake. Professionalism is, in some ways, like happiness and success. All are by-products of other things. You cannot be happy without gratitude. You cannot be successful without hard work. You cannot be a professional without submitting yourself to a shared vision.

How then does professionalism and our Committee's proposal fit together? In this way. Lawyers, and judges too, are terribly burdened by the press of their work. We seldom get a chance to lift our eyes and reflect on the stunning achievements of our past and how those achievements now shape our present and influence our future. This enterprise will do just that. As we prepare to work with teachers and students, we will recall *Brown v. Board of Education of Topeka*; *West Virginia State Board of Education v. Barnette*; *Tinker v. Des Moines Independent Community School District*; *Wisconsin v. Yoder* and many, many more. I submit that not a one of us can go through such a process and not be reminded of why we became lawyers in the first place. In doing so, I believe that we will renew our commitment not merely to be successful lawyers and judges, but more firmly to be upright and decent lawyers and judges. We will cast some die with young people while, at the same time, we also re-cast some die with ourselves.

Stay tuned.

### Twenty-sixth Annual Meeting To be held on June 4, 2001

The twenty-sixth Annual Meeting of the Supreme Court Historical Society will take place on Monday, June 4, 2001. The day's events are outlined below:

**Annual Lecture—delivered by Chief Justice William H. Rehnquist in the Supreme Court Chamber.**

**Tours of the Supreme Court Building—given immediately following the lecture.** The tours will be conducted by staff members of the Office of the Curator of the Supreme Court of the United States.

**Annual Business Meetings of the General Membership and the Board of Trustees.** These meetings will follow one another and will start at 6 PM in the Supreme Court Chamber.

**Annual Reception and Dinner –** The reception will start at 7 PM, with dinner to be served at 8 PM. These events are by reservation only and are the only events of the day requiring payment.

Invitations will be mailed to all active members of the Society between thirty and forty-five days before the meeting. Attendance is limited at the Annual Reception and Dinner, but every effort will be made to accommodate requests.



## Symposium to examine Role of Women in the Legal Community

Coordinating with the recent publication of the Society's book *Supreme Court Decisions and Women's Rights*, a symposium cosponsored by the Supreme Court Historical Society, the South Carolina Supreme Court Historical Society and the South Carolina Bar Association will examine the entry of women into the legal profession in the 20th century. The symposium will be held in Columbia, South Carolina and members of the state bars of North and South Carolina as well as Georgia qualify to receive CLE credits for the symposium (see notice of the meeting below for details.) Through a special agreement between state bar associations, members of the New York state bar are also eligible to receive CLE credits for attendance at the symposium. Other state bar associations may be willing to provide credit for the symposium and should be contacted directly by individuals interested in attending the symposium.

### The Great Sea Change:

*Women and the Law in the Twentieth Century*  
April 19-20, Adam's Mark Hotel, Columbia

The South Carolina Supreme Court Historical Society and the South Carolina Women Lawyers Association will present a two-day program entitled "The Great Sea Change: Women and the Law in the Twentieth Century" April 19-20 in Columbia.

This special event features renowned scholars in the development of women's rights and gender justice from both national and local perspectives.

The conference will begin on Thursday, April 19 with a cocktail reception at the Columbia Museum of Art. The reception will include the presentation of the Jean Galloway Bissell Award to a lawyer who has excelled in opening doors for women lawyers.

Immediately following the reception, participants will gather at the Adam's Mark Hotel for the conference dinner program, featuring a keynote address by Dr. Jane M. Friedman, professor of law at Wayne State University Law School and author of *America's First Woman Lawyer: The Biography of Myra Bradwell*.



Library of Congress

Myra Bradwell was the subject of Professor Jane M. Friedman's outstanding biography. Professor Friedman will be the keynote speaker at the symposium, *The Great Sea Change: Women and the Law in the Twentieth Century* on April 19, 2001.

*The seminar will also feature a book sale along with book signings by the distinguished faculty.*

*The seminar registration fee includes the South Carolina Women Lawyers Networking Luncheon on Friday at the Adam's Mark Hotel.*

*Package registration, including the reception, dinner and seminar with lunch, is \$200. The Friday seminar only is \$175 for Bar members and \$35 for those not seeking CLE credit.*

For additional information, please contact

Beth Baldauf  
beth.baldauf@scbar.org  
(803) 771-0333  
or 1-800-768-7787

Friday's Continuing Legal Education seminar will examine the changing status of women in society and in the law, as well as the rise of women to the bar and bench in South Carolina and the nation. The seminar will be held at the Adam's Mark Hotel and has been certified for 6.0 hours of MCLE credit.

Seminar highlights include:

- "The Rise of Women in Politics and in the Legal and Other Professions" by one of America's preeminent women's historians, Dr. Carol Ellen DuBois. State Supreme Court Chief Justice Jean H. Toal and Richard M. Gergel will serve as moderators.
- A discussion on the rise of women to the bar and bench led by Professor Jane M. Friedman.
- An examination of "The Rise of African-American

Female Attorneys" from Howard University School of Law Professor J. Clay Smith Jr.

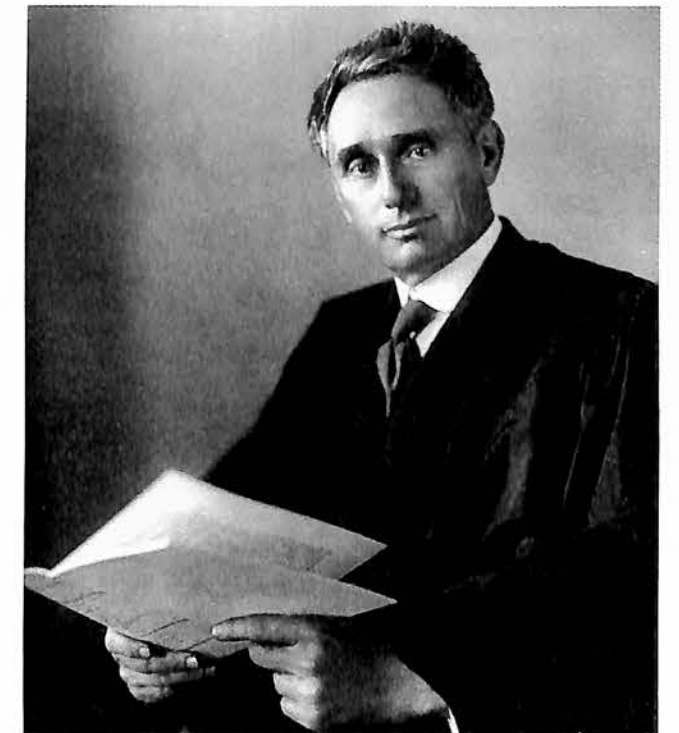
- An afternoon session on "Gender Justice in Antebellum South Carolina" by University of Florida Professor of U.S. Legal History Elizabeth Dale.
- A review of "Early Women Lawyers in South Carolina" with an emphasis in the first hundred women lawyers in the state by Belinda Gergel, department chair of history and political science at Columbia College, and Charleston attorney Ruth Cupp.
- A review of the "Significance of South Carolina Cases in Gender Justice" by Chief Justice Toal, followed by a panel discussion featuring women judges from various jurisdictions.

### Erwin N. Griswold Prize Lecture

On Wednesday, May 23, 2001 Professor Edward Purcell will deliver a lecture based on his recent publication *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in 20th Century America*. This book was chosen by a special committee to receive the Society's Erwin N. Griswold Prize, a prize given in recognition of the most outstanding recent book-length work published in the field of Supreme Court History. The prize was named for the late Dean Erwin N. Griswold, and carries a cash award, as well as recognition by the Society. By custom, the Society's prize Committee is chaired by the past recipient of the prize, in this case Professor Andrew L. Kaufman who received recognition for his book *Cardozo*.

Professor Purcell teaches at the New York Law School. His lecture will take place at 6 PM on Wednesday, May 23, 2001 in the Supreme Court Chamber. A Justice of the Supreme Court of the United States will introduce Professor Purcell. A reception will be held immediately following the lecture program to which all present for the lecture will be invited. Members of the Society will receive an invitation to the event in the mail. Queries about the event

should be directed to Marianne Harding, Program Director of the Society. Additional information will be posted on the Society's website, [www.supremecourthistory.org](http://www.supremecourthistory.org).



Woodrow Wilson nominated Louis D. Brandeis to the Supreme Court on January 28, 1916, setting off a four-month confirmation battle. Although anti-Semitism played a role, conservative forces in the business sector were opposed to a progressive on the Court.



## Fred Vinson takes Centre Chair at the Vice Presidential Debates

*Editor's Note: The portrait of Fred Vinson joined the audience for the Vice Presidential debate between Joe Lieberman and Dick Cheney held on October 5, 2000 at Centre College. Logistical requirements for the event included 565 feet of temporary carpet, 648 work stations in the media center, 650 or more student, alumni and community volunteers, 900 rented office chairs, 1,100 linear feet of "pipe and drape" to build temporary offices, 1,500 temporary phone lines, 9,700 feet of temporary fencing, and 300,000 feet of wiring for phones, computers, television and electricity. Formidable tasks under any circumstances, but with a student body of only 1,050 the requirements seem even greater. 1,800 members of the media converged upon the community of 17,000 for the historic debate.*

*This article was published in the magazine*



Fraternity president Erik Downen and other members of the Phi Delta legal fraternity at Centre University escort the photograph of Fred Vinson to Newlin Hall.

"Centrepiece" a publication of Centre College at Danville, Kentucky under the title "Dead Fred goes to the Debate" and is republished here with permission. Diane Johnson, editor of the magazine, noted that members of the national and international press picked up on the story and reported the presence of Chief Justice Vinson in the "Centre" chair for this unique occasion.

A second famous alumna of Centre College was John Marshall Harlan, the first of that name to serve on the Supreme Court. A short article about his Civil War experiences appears in this issue of the Quarterly.

He had to take his own chair, but Dead Fred made it to the vice presidential debate.

With 600 seats removed from the 1,500-seat Newlin Hall to make room for the TV cameras, tickets to the debate were the hottest commodity in town. Most of Centre's 200 tickets went to students, with a few reserved for major debate donors and community members who helped bring the debate to Danville.

Yet as a regular at football and basketball games since 1953, it would have been a shame if Dead Fred had missed the biggest thing to happen to Centre since C6-HO.

Thus, the brothers of Phi Delta Theta escorted their portrait of Supreme Court Justice Fred Vinson '09 (law '11)—known affectionately as Dead Fred—to the debate hall a couple of days before the debate and placed him out of the way on a ledge. (Little did they know then that the Supreme Court would end up ruling on the 2000 election.)

Fred Vinson, the man, was perhaps the most famous Phi Delt in 150 years of the fraternity at Centre. A brilliant student who could have had a career in professional baseball, Vinson went on to serve in all three branches of the Federal government. President Truman appointed him Chief Justice of the Supreme Court in 1946, a position he held until his death in 1953.



Ensclosed in his "elevated" chair, Chief Justice Vinson gazed serenely out over the audience for the Vice Presidential Debate.

## New Membership

### California

Mary Mack Adu, Alameda  
John S. Cramer, Carlsbad  
David J. Porras, Riverside  
Hirbod Rashidi, Los Angeles  
Susan Smith, Walnut Creek

### Connecticut

Austin J. McGuigan, Hartford

### District of Columbia

Noel Brennan  
Edward Timothy Keable  
Dwight D. Murray  
Kannon Shanmugam  
Tony Stanco

### Florida

Frank Finizia, Palm Beach Gardens  
Noel Flasterstein, Tampa

### Georgia

Constance Fore Dotzenrod, Atlanta  
Ben F. Easterlin, IV Atlanta  
Troy L. Harris Abbott, Atlanta  
John W. Hinchey, Atlanta  
William A. Holby, Atlanta  
Joseph Shaw, Atlanta

### Illinois

Michael M. Mihm, Peoria  
Debra A. Seaton, South Holland

### Indiana

Suzanne L. Abram, New Albany  
Aaron D. Spurling, New Albany

### Kansas

Deanell R. Tacha, Lawrence

### Massachusetts

Stan Zoll, Stoughton

### Maryland

Carter Phillip Ferrington,  
Boonsboro

### Michigan

Norene Redmond, East Point

### Minnesota

Mark Alcorn, Avon  
Donald L. Hoeft, Eagan

### Missouri

Joseph F. Benson, Jefferson  
City

### North Carolina

Lance P. Martin, Greenville

### New Jersey

Mike Cronin, Colts Neck

### New York

Rudolph Carmenaty, Brooklyn  
David J. Dominick, West Point  
Kevin M. Dowd, Sherburn  
Robert D. Schultz, Chappaqua  
Philip Snyder, Sea Cliff

### Oregon

Ron Johnson, Lake Oswego  
Diane L. Polsker, Portland

### Pennsylvania

Neil W. Bohnert, Meadville

### South Carolina

John F. and Susan Quinn,  
Columbia

### Tennessee

Mark Arnold, Nashville  
Price Carney, Nashville

### Utah

Michael D. Murphy, Salt Lake  
City

### Virginia

Anna Maria Farias, Alexandria  
Hunter Olds Ferguson,  
Arlington  
Mary Hartnett, Arlington  
Edward McLaughlin, Arlington  
David E. Nagle, Richmond  
Emily E. Tuck, Fairfax



## Founding Members Celebrate 25<sup>th</sup> Year of Membership

The year 2000 marked the Society's twenty-fifth full year of operation. While incorporation papers were filed on November 24, 1974, it was early in the following year before the membership program was implemented. Therefore, the first memberships date to 1975. According to membership records, a number of individuals who joined as Founding Members in 1975 have maintained active membership for the duration of the twenty-five year period. We would like to pay tribute to these stellar members:

Russell G. Allen  
Mrs. Maxine W. Andreae  
The Honorable James E. Barrett  
Patricia A. Behlar  
The Honorable James A. Belson  
Eugene L. Bernard  
The Honorable  
Dudley B. Bonsal  
Ted Boswell  
Joseph M. Bristow  
Myron J. Bromberg  
Vincent C. Burke, Jr.  
Patricia Dwinell Butler  
John D. Butzner  
Richard P. Claude  
Edwin S. Cohen  
Sheldon S. Cohen  
Sherman L. Cohn  
Charles D. Cole  
Larry A. Colston  
Richard C. Cortner  
Kenneth W. Dam  
Jane P. Donlon  
C. B. Dutton  
Timothy B. Dyk  
Thomas E. Fairchild  
Oscar Fendler  
Andrew L. Frey  
Daniel M. Friedman  
William M. Fumich  
Barry Garfinkel  
Gerhard A. Gesell  
Alfred Leland Gleghorn  
Daniel L. Griffen  
Professor Gerald Gunther  
M. Shad Hanna  
Don V. Harris  
The Honorable A. Andrew Hauk  
Edward R. Hayes  
Paul T. Heffron  
Douglas B. Henderson  
Charles Hieken

The Honorable Linwood Holton  
J. Woodford Howard  
Mrs. Marjory Hughes Johnson  
Hugh E. Jones  
The Honorable Shiro Kashiwa  
The Honorable  
Cornelia G. Kennedy  
John F. Kozeletz  
John A. Krsul, Jr.  
The Honorable Arthur S. Lane  
Professor Robert W. Langran  
Edward J. Lawler  
A. Leo Levin  
David M. Levitan  
Sol M. Linowitz  
The Honorable Pierce Lively  
Francis J. Lorson  
Dennis G. Lyons  
Robert MacCrate  
Donald M. Malone  
Abraham E. Margolin  
The Honorable Howard T. Markey  
James M. Marsh  
Alan J. Martin  
The Honorable  
Vincent L. McKusick  
Mary McNamara  
The Honorable  
Robert R. Merhige, Jr.  
Professor Roy M. Mersky  
Joan T. Miller  
Samuel H. Moerman  
Marvin C. Mood  
The Honorable John D. Morgan  
Joseph W. Morris  
Professor Earl Finbar Murphy  
Sara Najjar-Wilson  
The Honorable James Noel  
Bert Padell  
Charles E. Parker  
The Honorable  
Lawrence W. Pierce

Stephen W. Pogson  
Dudley Porter  
E. Barrett Prettyman, Jr.  
Bryce Rea  
Harry M. Reasoner  
Robert Newton Reid  
The Honorable  
William Bradford Reynolds  
Charles S. Rhyne  
Nicholas A. Robinson  
Ronald S. Rolfe  
Sidney S. Rosdeitcher  
Sol Rosen  
Stuart Philip Ross  
Curtis L. Roy  
Ernest Rubenstein  
The Honorable F. S. Ruddy  
Henry S. Ruth, Jr.  
John T. Sapienza  
Jacque Schlenger  
Connor F. Schmid  
Professor Robert G. Seddig  
Ashley Sellers  
Chesterfield Smith  
Daniel C. Smith  
The Honorable Arthur J. Stanley  
Isidore Starr  
Robert H. Stevenson  
McNeill Stokes  
The Honorable W. C. Stuart  
Homer Surbeck  
R. B. Throckmorton  
Randolph W. Thrower  
Professor Kenneth S. Tollett  
Lyman M. Tondel  
Herbert Wechsler  
Melvin C. Williams  
William E. Willis  
J. Philip Zand

## Supreme Court Justice Without a College Degree

By James M. Marsh\*

In my second interview with Justice Jackson for a possible clerkship, he said, "You give me a problem. I have no doubt that you can handle the job. But if I hire you as my law clerk we will be operating these chambers without even one college degree. I do not have a degree; my secretary doesn't have a degree; and you do not have a degree. I have always felt that my writing has suffered because of my lack of formal education. So I would be compounding a weakness. What do you have to say about that?"

That is the challenge he gave me, without any warning, testing my ability as an advocate for myself. Now, since I wanted that clerkship more than anything else in the world, I quickly decided that I had better meet the Justice's point head-on. So I responded: "Mr. Justice, every lawyer and every judge in the country knows that you are the best writer on this Court, college degree or not. And if there is anything that I can do well, it is write, rewrite and edit. I am sure you can find lots of lawyers who know more about the law than I do, but I don't think any of them could do the writing and critiquing part of the job as well as I can. So if you want someone with that kind of talent, and a flair for ideas and people and politics, who would be fiercely loyal to you, I'm your man."

The Justice did give me the job, and I have always felt that this exchange was the clincher. Of course that is not all there was to it—there was the night law school factor, the Roosevelt factor, and the all-important Nuremberg factor. I had gotten my first interview shortly after the Justice returned from Nuremberg because of my interest in the prosecution of the infamous Nazi war criminals. As an editor of the Temple University Law School law review, I had written to the Justice at Nuremberg and told him that I thought most American legal publications were not paying enough attention to the Nuremberg trial and that if he would make the material available to us we would publish the pleadings and speeches before the Tribunal. He readily agreed and as a result we published the Indictment, his opening speech, his speech against the Nazi organizations, his closing address, and the judgment of the Tribunal. So the Nuremberg factor had produced my opportunity to sell myself.

The Justice was apparently satisfied with my performance, because he asked me to stay for a second term. As I have written in other places, that clerkship was the most satisfying and productive experience of my life, both personally and professionally. But it was also demanding and sometimes hectic. The Justice's writing was so good because he worked at it, day and night. Certainly he had a gift, he knew the law, and he had a wealth of legal experience both in and out of government; but one of the principal ingredients of his clear, concise and understandable judicial opinions was plain hard work. For example, when the Justice gave me a draft of an opinion to critique, I gave it back to him with my suggestions at the end of the day. I knew that the next version would be back on my desk as soon as he arrived at the office the next morning. He did not waste any time; he just bore down constantly to produce clear language and compelling reasoning. I doubt that there is any opinion reported during those two terms that matches his opinions for clarity in the reasoning under-

lying the conclusion. See, for example, *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541, a decision of continuing practical importance to lawyers and judges alike, and *International Salt Company v. United States*, 332 U.S. 392.

So, although the Justice often said that he was the last vestige of the system under which a person could qualify for admission to the Bar by "reading law," no one could seriously say that his lack of formal education affected the quality of his judicial opinions. His keen intellect, his deep insight into human nature, his life-long study of the classics, his thirst for real justice, and his working habits, were reflected in those opinions and in other writings as well. Indeed, his opening and closing speeches at Nuremberg are universally recognized as classics. In that dramatic situation, his passion for justice, his revulsion for the deeds of the Nazi regime, and his eloquence in expounding both, stirred not only the Tribunal but anyone fortunate enough to hear them or become familiar with them. Who would not be stirred by the first paragraph of his opening:

The privilege of opening the first trial in history for crimes against the peace of the world imposes grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law, is one of the most significant tributes that Power has ever paid to Reason.

And in his closing, after summarizing the horrendous crimes which had been proved in large part by the defendants' own records, the Justice concluded:

It is against this background that these defendants ask this Tribunal to say that they are not guilty of planning, executing and conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as blood-stained Gloucester stood by the body of the slain king. He begged the widow, as they beg of you. "Say I slew them not." And the Queen replied "Then say they were not slain. But dead they are. . . ." If you were to say of these men that they are not guilty, it would be as true to say there has been no war, there are no slain, there has been no crime."

All this, and more, from the Justice without a college degree.

\*James M. Marsh clerked two terms for Justice Jackson. He then practiced law in Philadelphia until his retirement a few years ago.



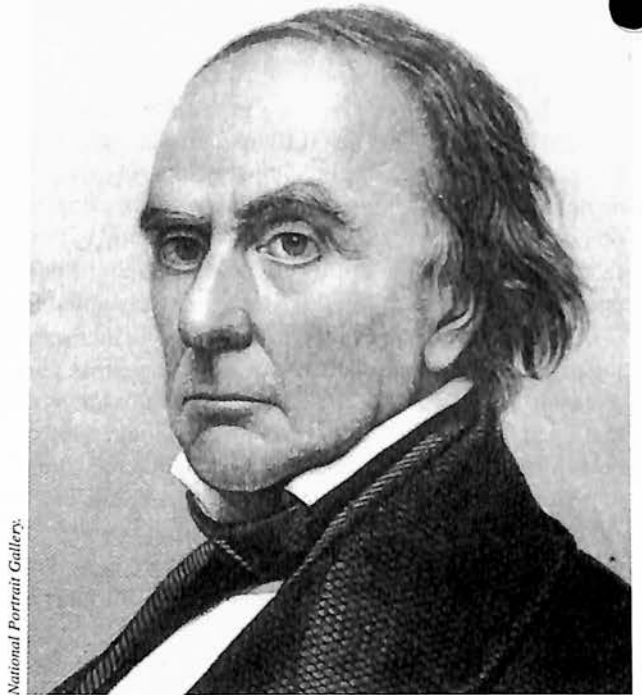
## Celebration of Daniel Webster

The year 2001 marks the 200th anniversary of the graduation of Daniel Webster from Dartmouth College. In addition to his service as a United States Senator from Massachusetts, Webster argued hundreds of cases before the Supreme Court of the United States and participated in many of the major constitutional debates of his time. One of his most famous cases involved his alma mater, Dartmouth College.

Webster presented a four-hour argument in this important case, styled *Trustees of Dartmouth College v. Woodward*. Webster challenged a New Hampshire statute which altered the charter and governance of the College. Perhaps the most memorable line from his tour-de-force presentation was "It is Sir, as I have said, a small college. And yet there are those who love it..."

Members of the Supreme Court Historical Society along with members of alumni groups will have the opportunity to attend a lecture commemorating Webster's graduation from Dartmouth. The lecture/luncheon program will be held on Friday, April 27, 2001, at the law offices of Hale and Dorr, 60 State Street in Boston. The group will meet from 12:30 to 2 p.m. and will hear a lecture presented by Kenneth Shewmaker, Professor of History at Dartmouth College, the editor of *Daniel Webster: "The Completest Man."*

Members of the Supreme Court Historical Society residing in the New England area should have already received a letter of invitation to this event. Others interested in the event may contact Salome Fung at Hale and Dorr at (617) 526-6848 for further information.



Sometimes referred to as "Black Dan," Daniel Webster (above) was an accomplished orator, on the floor of the U.S. Senate and the Supreme Court of the United States.

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