



IN DEFENSE OF PRESIDENT HARDING'S SUPREME COURT APPOINTEES

*By Prof. Erving Beauregard**

President Warren G. Harding has received vituperation from many scholars who have steadfastly refused to acknowledge his accomplishments. His great successes in foreign affairs and notable achievements in domestic matters have been ignored by many writers. Particularly, his appointments to the Supreme Court Bench have not received the credit they deserve. These four appointees deserve, indeed demand, a fair trial. The first, Taft, was a very capable administrator under whose leadership the administrative functions of the federal judiciary dramatically improved. Derided by the popular press of their time as two of the "Four Horsemen," many scholars have failed to look beyond the cases that concerned

New Deal legislation to consider the other decisions of Pierce Butler and George Sutherland. Study of the entire careers of Sutherland and Butler give a far different picture of their contributions. The fourth individual, Edward Sanford was a highly educated, capable member of the Court whose service on the Bench was also of great merit, but short duration. The brevity of his service was probably a factor in his performance being undervalued.

In 1921, Harding appointed ex-President William Howard Taft Chief Justice. Taft had been a state and federal judge, and later a professor of constitutional law at Yale. He headed the Supreme Court until ill health forced his resignation February 3, 1930. He died one month later.

Taft served admirably. His administrative and technical leadership placed him at the top of the Chief Justices. He directed "the most thorough reform of the Court system since Oliver Ellsworth had drafted the Judiciary Act of 1789," as David H. Burton observed. Taft streamlined the federal judiciary from the district level to the Supreme Court. Alpheus Thomas Mason opined that "Probably no man had as much influence on the choice of judicial personnel as William Howard Taft." He made certain that only well-qualified persons became federal judges. Taft decreased the number of cases heard on appeal by the Supreme Court to relieve the workload. Among the Chief Justices, only John Marshall, and to a lesser extent, Taft has carried their Courts with them. As David H. Burton observed in his book *Taft, Holmes and the 1920s Court: An Appraisal*, "Taft made it a point to encourage his colleagues, especially the narrow-minded Justice James C. McReynolds [President Wilson's appointee], to adopt a tolerant attitude toward Brandeis, the first Jewish member of the Supreme Court." Perhaps his most tangible legacy, however, is the Supreme Court Building itself, for it was Taft's persistent pleas and political maneuvering that ultimately resulted in the construction of the building.

During his term of service on the Bench, Taft wrote 253 of the Supreme Court's 1596 opinions; a number that summons attention. David H. Burton asserted that in *Ex Parte*

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Bureau of Engraving and Printing

Warren G. Harding was elected President of the United States in 1920, the first election in which women were allowed to vote. His less than one-term Presidency was marred by the "Teapot Dome" and other scandals, overshadowing his accomplishments.

A Letter from the President



Most members by now are probably aware that the Society is conducting a membership survey. Membership renewal requests over the past several months have been accompanied by rather comprehensive questionnaires that afford members an opportunity to make their views known about the Society's various programs and publications, and to provide input on many aspects of how the Society operates. If you have not received a survey form as yet, rest assured that you will receive it along with your next invitation to renew your membership, and once the survey is complete we will publish a synopsis of the results in the *Quarterly*. However, response to date has been quite strong, with over 500 completed surveys already in hand, and rather than wait for that data to become stale, the Society has already begun to make use of members' recommendations where clear trends are apparent.

Some of these trends require no immediate action. I note with some gratification that members on the whole have voiced broad and fervent support for the Society's many educational and research programs. Although the Program Committee, chaired by Phil Lacovara, is a relatively small group, their collective abilities to evaluate existing programs and to anticipate what new projects the Society should undertake to do appear perspicacious in light of members' approval ratings. I might well say the same of Barrett Prettyman's Publications Committee in light of the high member approval ratings for all of the Society's publishing efforts.

Members have a particularly high regard for such programs as the Summer Institute for Teachers, in which the Society works closely with Street Law to bring secondary school teachers to Washington each summer to study the Court first-hand. And the Society should be grateful to the Park Foundation for its generous and continuing support to this program.

Equally well regarded is the Society's Documentary History Project under the aegis of its Editor, Maeva Marcus. This, frankly, surprised me—not because it is not a worthwhile project—but rather that it lacks the universal appeal that training high school teachers holds. Reconstructing the documentary record of the Court's founding decade is an important service to this and future generations of scholars. But it is also a long and tedious process that yields no immediate satisfaction. I regard it as a testament to the quality and dedication of the Society's members that they possess an appreciation for what some might see as an archaic scholarly endeavor. I am also grateful to the National Historical Publications and Records Commission and the William Nelson

Cromwell Foundation for their persistent resolve to see the Project through.

A few of the dozen or so projects members were asked to evaluate appear to be less well known among members than the Summer Institute and the Documentary History Project. Among these were the Society's oral histories of retired Justices and former Solicitors and Attorneys General, the Landmark Cases Project and the Undergraduate History Conference. Members possessing a familiarity with these programs tended to rate them highly. However, in a number of cases members indicated that they lacked sufficient information to evaluate these programs which seems to suggest that the Society should be publishing more articles about these activities in the *Quarterly*.

To this end, please note the article on page 5 discussing in some depth, the Institute for Constitutional Studies. One of our newer, and perhaps most ambitious, programs. The Institute hopes to develop a variety of educational opportunities in the field.

With regard to the Society's publications, members have so far indicated a high degree of satisfaction with the content and the frequency of publication of the *Journal of Supreme Court History* under the editorship of Mel Urofsky and the *Quarterly Newsletter*. Most members feel the quality of the articles is excellent and that the frequency of publication is about right—three Journals a year and four newsletters. However, a vast majority of members have indicated that the *Annual Report*, while it contains useful information, would better serve the membership if it were placed on-line instead of in a published format. This, they felt, would allow the Society to reallocate the funds used to print and mail this publication for other books or programs more directly in keeping with the Society's historical purposes. Accordingly, this year we are going to experiment with placing the *Annual Report* on-line at the Society's website, [supremecourthistory.org](http://www.supremecourthistory.org). As it will be a first for us, I would appreciate member feedback once we have posted the various reports, to see if the reality conforms to the perceived value of this approach.

In tandem with this move, I also anticipate that we will begin having at least occasional reports from various of the

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Managing Editor
Assistant Editor

Kathleen Shurtleff
James B. O'Hara

Society's standing and ad hoc committees posted on the website to keep members better informed of the Society's activities in a timely fashion. It seems to me that one of the reasons some members did not feel well enough informed about some of the Society's programs to evaluate them on the survey is that we have only offered information on those programs once a year in the *Annual Report*. With more regular reporting in the *Quarterly*, and by updating status reports on the website, I think the Society can do a better job of keeping everyone informed, which will make for a stronger Society in the long run.

In closing, I urge those of you who have not yet received surveys, or have received them but not responded, to fill out your questionnaires at your first opportunity. As I hope I have made clear, your Society wants your input, and it is making a difference in how the organization fulfills its mission.

Leon Silverman

STUART SHANOR BECOMES 52ND PRESIDENT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS

October 20, 2001, Stuart D. Shanor, a senior partner in the Roswell, New Mexico law office of the Hinkle, Hensley, Shanor & Martin firm was installed as the President of the American College of Trial Lawyers at the group's annual meeting in New Orleans.

The American College of Trial Lawyers is an honorary professional association of lawyers from the United States, Canada and Great Britain. The College was founded in 1950 and is composed of the best of the trial bar. Fellowship is extended by invitation only and only after careful investigation of the lawyer's qualifications. The College is dedicated to improving the standards of trial practice, the administration of justice and ethics of the trial profession.

Mr. Shanor received his B.A. Degree from Wittenberg University in Springfield, Ohio, and his J.D. Degree from the University of Michigan Law School. Mr. Shanor joined the Cleveland, Ohio law firm of Thompson, Hine & Flory and was affiliated with this firm for several years after which he relocated to New Mexico and joined the predecessor firm to Hinkle, Hensley, Shanor & Martin.

In addition to membership in his local bar association, Mr. Shanor is a member of the American Bar Association and is admitted to practice before the United States Supreme Court of Claims, the United States District Court for the District of New Mexico, and the New Mexico Supreme Court. He is a member of the American Judicature Society, a fellow of the American Bar Foundation, a member of the Board of Visitors of the University of New Mexico School of Law, and a member and regional Chairman for the United States Supreme Court Historical Society.

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. Donations to the Acquisitions fund would be welcomed. You may also reach the Society through its website at www.supremecourthistory.org.

Mr. Shanor joins a distinguished group of lawyers who have served in this capacity in the American College of Trial Lawyers. Several of the current Officers and Trustees of the Supreme Court Historical Society are former Presidents of the College of Trial Lawyers. These include: Leon Silverman, Gene W. Lafitte, Ralph I. Lancaster, Jr., Frank C. Jones, Lively M. Wilson, Charles B. Renfrew, Andrew M. Coats, and E. Osborne Ayscue, Jr.



Stuart Shanor was elected President of the American College of Trial Lawyers at their October meeting.

"ADVERTISING" THE SUPREME COURT OF THE UNITED STATES

By Timothy G. Crowley*

Throughout the latter half of the 19th Century it became quite common for the images of prominent persons to appear in newspaper engravings, political cartoons and photographic cartes-de-visite and cabinet cards. Political candidates' accomplishments were the subject of campaign biographies and their supporters wore metal tokens, printed ribbons and (after 1896) celluloid campaign buttons with pin-backs. However, although the various Justices of the Supreme Court of the United States were often the subject of news accounts and sometimes even strong criticism, their images were usually inserted only in a portrait fashion for identification or illustration purposes. From the time of the Salmon P. Chase Court until the present, the formal "team photo" of all members of the Supreme Court, seated and standing in order of rank and tenure, has been a popular image for the public as well as historians. During the 20th Century, with the advent of wide-distribution magazines, a Supreme Court member (particularly Chief Justices) might appear on the cover of *Time* or *Life* or other periodical publications.

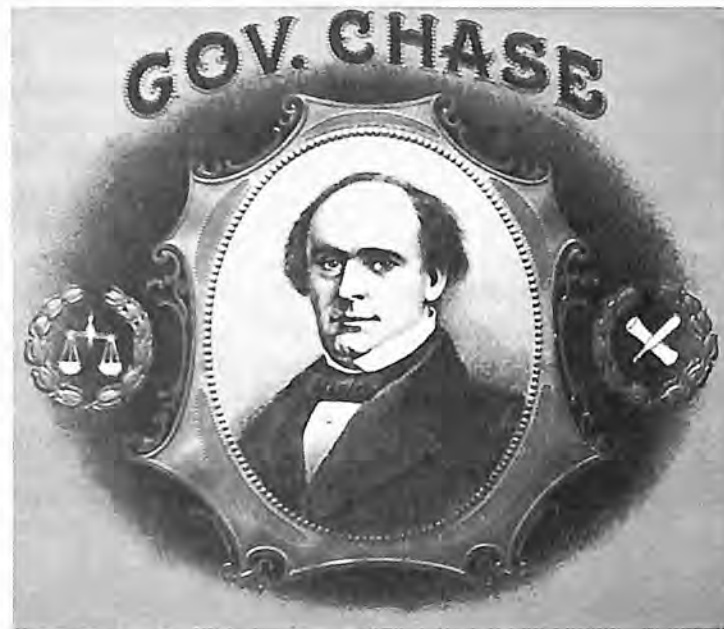
A rather odd and little-known aspect of advertising and marketing during the late 19th Century and early to mid-20th Century is the appropriation of Justices' names and images to promote products, particularly including, but not limited to, tobacco. During the golden years of cigar sales, ornate color lithograph images appeared on both cigar bands and cigar box labels. In the years prior to World War I, smokers were offered brands with names such as "**Gov. Chase**" (Salmon P. Chase) and "**Judge Taft**" (William Howard Taft). The entire nine-member 1892 Court appeared on the inside lid of the **U.S. Supreme Justice** cigar box. Chief Justice Melville W. Fuller was depicted on both the outside lid and sides, as well as below the inside group portrait, of the box containing cigars made by Joseph Weinreich of Dayton, Ohio.

Chief Justice Fuller was included among twenty-five 1888 trade cards depicting "Presidential Possibilities" packaged in Honest Long Cut Tobacco for smoking and chewing. (Other "possibilities" included Grover Cleveland, Benjamin Harrison, Robert T. Lincoln and William McKinley.)

The formal 1910 group portrait of the **Edward D. White Court** (including Charles Evans Hughes and three of President Taft's other recent appointees) was used in a dignified large format advertisement for The American Law Book Co.'s **Cyclopedia**, complete with quoted endorsements of the "CYC" by Justices Day, Brewer, Lurton and McKenna.

However, in earlier times (probably prior to 1880), a cartoonish image of "Fat Baby" **David Davis** (Associate Justice from 1862 to 1877, who resigned from the Court when he was elected to the United States Senate by the Illinois State Legislature) appeared on printed trade cards as advertising for such merchants as S. F. Willard, a druggist in Lynn, Massachusetts.

Images of the current and previous Chief Justices appeared for decades on ink blotters advertising the fine me-



dicinal products of Philadelphia's Henry K. Wampole & Company, Inc. The pre-1910 blotter promotion boasted that "Eminent Among The Justices Of The Medical Reconstructive and Tissue Builder and WAMPOLE'S CREO-TERPIN COMPOUND In congested or inflammatory conditions of the respiratory tract." The 1934 blotter promoting "Wampole's Perfected And Palatable Preparation" bore the portraits of the eleven Chief Justices from John Jay through Charles Evans Hughes.



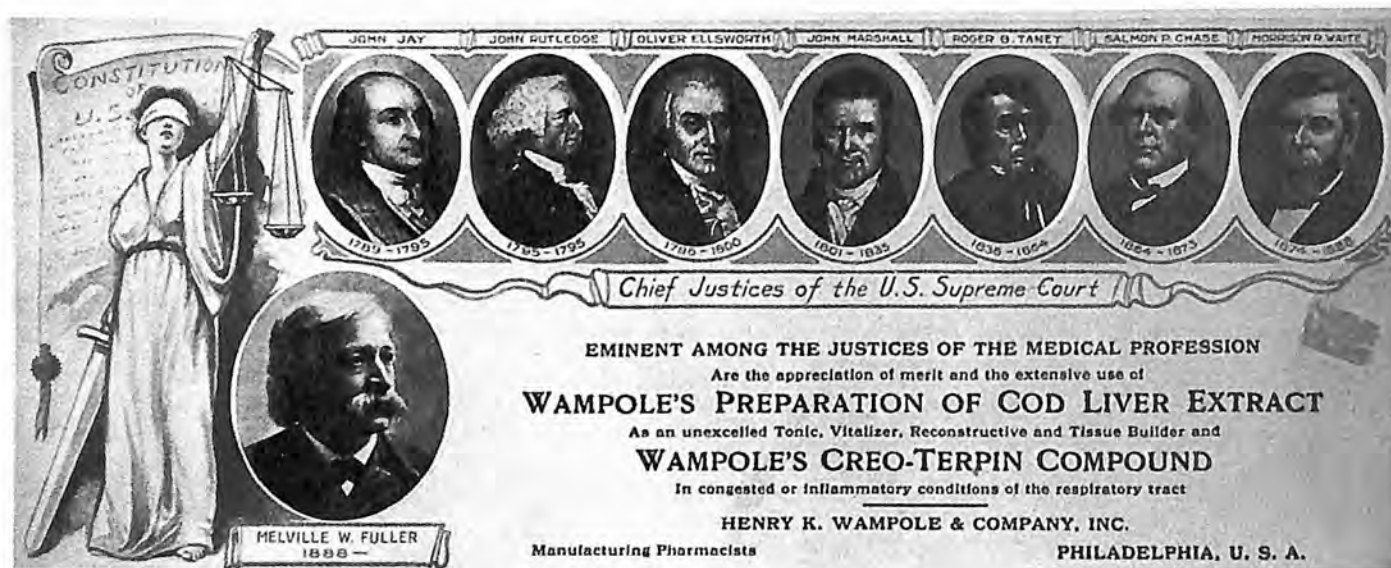
PRESIDENTIAL POSSIBILITIES
MELVILLE W. FULLER.
OF ILLINOIS.



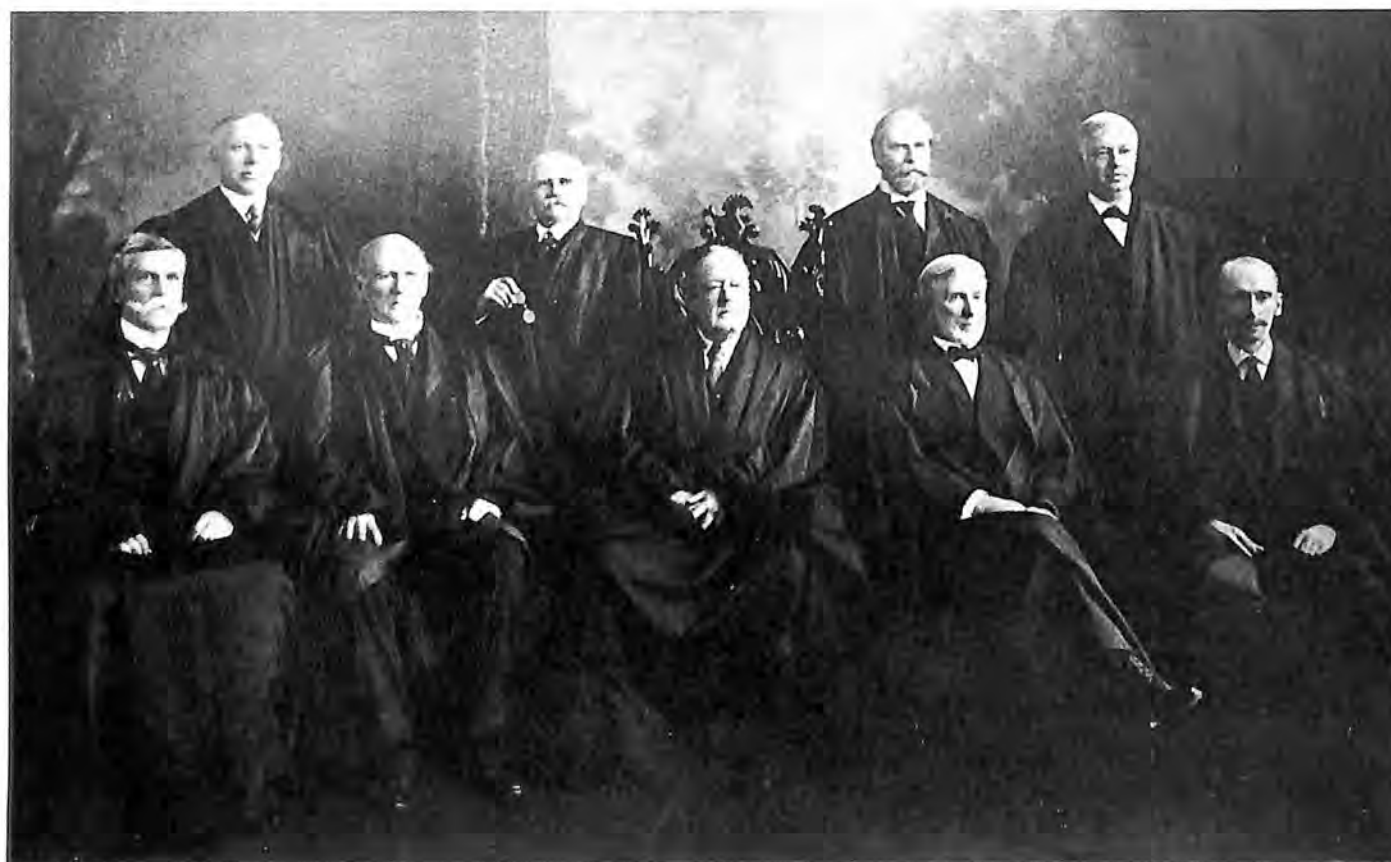
The likenesses of Supreme Court Justices became popular with advertisers during the late 19th century and into the early 20th century. Many, but not all, of the products were tobacco products. Examples are: Chief Justice Salmon P. Chase (top of page 4), a perennial unsuccessful candidate for President, appeared with tokens of his judicial role; Chief Justice Melville Fuller (bottom of page 4) was listed as a "Presidential Possibility" in a series of tobacco trading cards; Chief Justice William Howard Taft appeared on the cigar band (above); Associate Justice David W. Davis was caricatured as "Fat Baby" (top right) on a card for a druggist; while the entire Melville Fuller Court of 1892 appeared in the lid of a cigar box for a brand called "U.S. Supreme Judge."

Photos courtesy of Timothy G. Crowley





Wampole's Preparation of Cod Liver Extract (above) used an image of Lady Justice holding the Sword of Justice and the Scales defending the Constitution, with portraits of the eight individuals who had served as Chief Justice until that time. Edward Douglass White's Court of 1911 (below) was pictured in an advertisement for the "Cyclopedia," a legal reference work.



A particularly peculiar (and one would think rather insensitive) commercial endorsement was that posthumously given by (or perhaps taken from) Chief Justice **William Howard Taft** in 1930. A pamphlet printed by the Union Central Life Insurance Co. of Cincinnati quoted "An 'Opinion' from the late Chief Justice" over his signature that "Life insurance is a wonderful aid, especially to those of us who are dependent upon salaries and professional incomes. It is the only way by which we can make our lives happy in the thought that we are putting by something so that those who are near and dear to us may live on after us and not feel pinched when the bread-winner is gone." Upon unfolding the pamphlet there appears not only a facsimile of the \$10,242.24 check to his widow and beneficiary, Helen H. Taft, but a full accounting of all dividends paid on the policy since it was taken out in 1900. It declares that "William Howard Taft's policy history shows the soundness of his advice." However, the pamphlet does not indicate whether Mrs. Taft felt "pinched" before the check arrived.

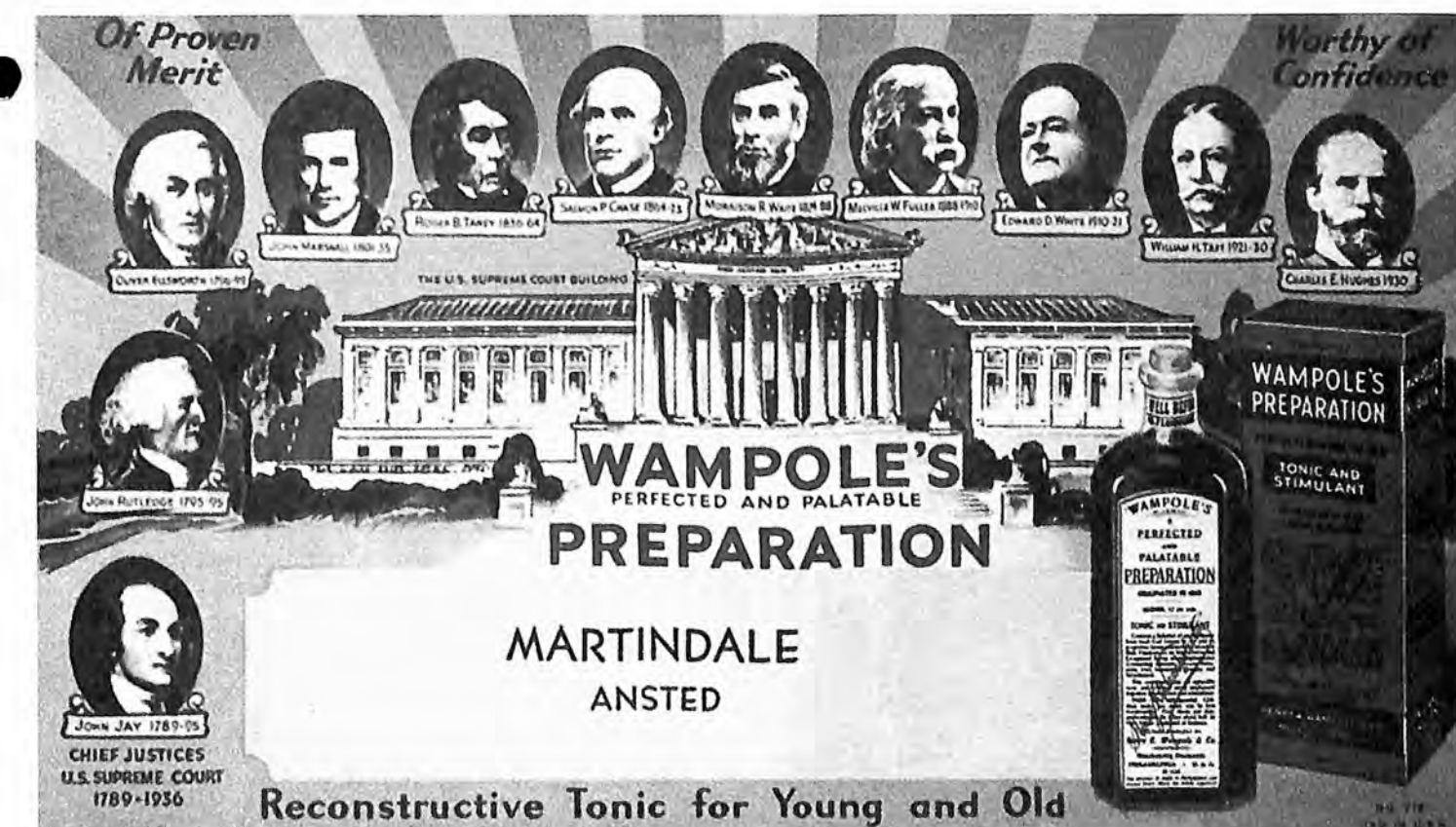
With there having been so many beards and mustaches appearing on the faces of Justices from Stephen J. Field and Morrison R. Waite to George Sutherland and Charles Evans Hughes, one must wonder if there existed any Supreme Court

advertising material for mustache wax and beard grooming products that still might be found.

While this is not an exhaustive survey of the field, the variety of products carrying the likenesses of past Justices is rather surprising. Some of the products seem to have a loose association with successful gentlemen of professional status in general, while other seem to have no logical connection of any kind.

With a heightened sense of the need for members of the judiciary to avoid even the appearance of possible conflicts of interest, it is hard to believe that current manufacturers would have a positive reaction using representations of recent members of the Court to sell their products. Indeed, one assumes that litigation would be the by-product of such commercial ventures in today's world. But a survey of the commercial ventures of the past, reveal some very interesting uses of "judicial authority."

*Timothy G. Crowley is an attorney in private practice in Worthington, Ohio. His collecting interests include United States Supreme Court historical documents, books and ephemera, and Presidential political campaign items.



In this advertisement, the collective merits of both the individual Chief Justices of the Court, as well as the institution itself seemed to be called into play. The legends "Of Proven Merit", and "Worthy of Confidence" by implication seem to apply to the individuals, the Court itself, as well as the product. This advertisement bears the familiar image of the Court building itself, indicating that it was developed some time after 1935.

Continued from page 1

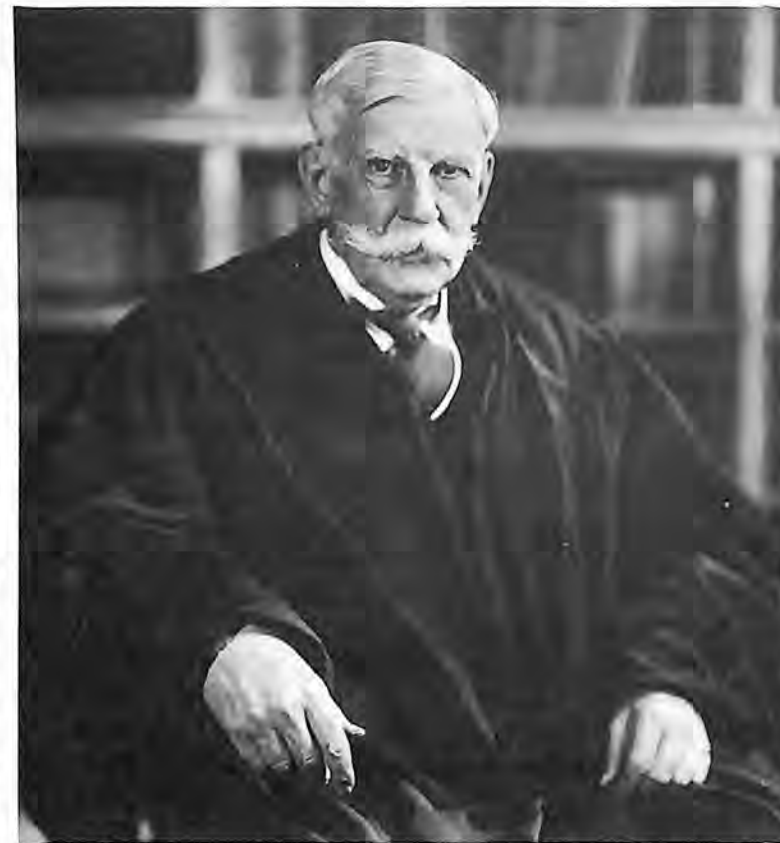
Grossman (1924) "Taft wrote an erudite opinion in which he defended the pardoning power of the president." In *Myers v. United States* (1926) Taft wrote the majority opinion invalidating the Tenure of Office Act of 1867. In *United States v. Sullivan* (1927) Taft spoke for a unanimous Supreme Court when it upheld the protections in the Fifth Amendment. Burton observed "Taft's broad interpretation of the commerce clause provided a constitutional justification for much of the New Deal and after."

Interestingly, the conservative Taft and the liberal Oliver Wendell Holmes voted together in several crucial cases. In *American Steel Foundries v. Tri-City Central Trades Council* (1921) they, along with six other justices, including Brandeis, partially upheld an injunction against a labor union. In *Bailey v. Drexel Furniture Co.* (1922) Taft and Holmes dissented by upholding the minimum wage law for the District of Columbia. In *Pennsylvania Coal Co. v. Mahon* (1922) Taft and Holmes voted to strike down the law, insisting on the rights of the corporation, but in *Stafford v. Wallace* (1922) they upheld the right of federal legislative authority to regulate meatpackers. Burton concluded: "Taft and Holmes . . . had combined to help render the Supreme Court more relevant and therefore a more recognizably vital part of American government."

In 1922, Harding nominated George Sutherland, ex-president of the American Bar Association, to the Supreme Court. In the Senate Sutherland had led the fight for the woman's suffrage amendment and had gained praise from leaders of organized labor. The Senate confirmed Sutherland on the very day of his nomination—"a speed record still extant in the



Ex-President William Howard Taft was Harding's first appointee to the Supreme Court Bench. The Chief Justiceship was a position Taft loved and he wrote in 1925: "The truth is that in my present life I don't remember that I ever was president."



Although frequently on opposite ends of the political spectrum, Taft voted with Oliver Wendell Holmes (above) in several crucial cases, including *Stafford v. Wallace* voting to uphold the right of the federal government to regulate meatpackers.

appointment process," an observation made by Professor Henry Abraham in his book *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton*.

Sutherland's biographer, Joel Francis Paschal observed of Sutherland:

Sutherland was indeed the voice of one [sic] Constitution. While he was on the Court, no other justice spoke for the majority in so many great cases. He sketched the limits of executive and judicial power, as well as that of the legislature. His influence extended to every sphere of government. If the Constitution is what the judges say it is, Sutherland was its chief author during his incumbency [1922-38]. Accordingly, he can be regarded as a representative figure in a sense applicable to but few of the justices who have served on the Court. As such, he stands as one of the major landmarks in American constitutional law, the landmark from which the new departure was taken in 1937.

Hadley Arkes, a scholar of Supreme Court history observed: "On matters of the First Amendment Sutherland was an 'absolutist' who could be rivaled only by [Hugo] Black." Turning to examine some of Sutherland's other opinions, we can observe other aspects of Sutherland's jurisprudence. In *Carroll v. United States* (1925) Sutherland dissented from the decision that a suspicious officer could stop an automobile to search its interior for alcoholic beverages and, upon finding

them, arrest the driver. In *Associated Press v. National Labor Relations Board* (1937) Sutherland "offered the most categorical bar to any [sic] legislation restricting the freedom of the press." Moreover, in *Massachusetts v. Mellon* (1923) Sutherland struck the most powerful blow against the idea of limited government and dual federalism; his decision liberated the spending power of the government from the threat of effective challenge. In *Euclid v. Ambler* (1926) Sutherland "recognized the basic constitutionality of zoning ordinances. . . ." In *Utah Power and Light Co. v. Pfof* (1932) Sutherland upheld the power of the state to levy taxes on the production of electricity, even though such electricity would travel immediately into interstate commerce. In *Snyder v. Massachusetts* (1934) Sutherland "protested when the majority deferred to state practice and refused to find that the defendant's absence during a viewing of the scene of crime abridged his right to due process." Writing in *Grosjean v. American Press Co.* (1936) Sutherland was the Court's spokesman in overthrowing a Huey Long imposed license tax on Louisiana newspapers of circulation over 20,000 copies. In *United States v. Curtis-Wright Export Corporation* (1936) and *United States v. Belmont* (1937) Sutherland triumphed; he spoke for the Supreme Court, stating that in foreign affairs the president is the "sole organ of that [national] government."

Still other Sutherland opinions stand out as examples that his judgments were more progressive than many scholars have acknowledged. In *Powell v. Alabama* (1932) he voted to overthrow the convictions of the "Scottsboro boys," the young African Americans sentenced to death for an alleged sexual assault on two white women; "Sutherland had established the ground for vindicating a right to the assistance of coun-



George Sutherland's nomination to the Supreme Court was confirmed by a vote in the Senate on the very day of his nomination, thereby setting a record for speed that remains unbroken.



In *Powell v. Alabama* (1932) Justice Sutherland voted to overthrow the convictions of the "Scottsboro boys" (shown above) who had been sentenced to death for the alleged sexual assault on two white women.

sel, even if that right had never been mentioned in the Sixth Amendment or in any other part of the Constitution [sic]." In *Stromberg v. California* (1931) Sutherland voted with the Supreme Court to invalidate a clause in the Penal Code making it a felony to display a flag as a symbol of opposition to organized government. In *Liggett v. Baldridge* (1928) Sutherland wrote for the Supreme Court that drugs prescribed by a physician could be dispensed safely by pharmacists in establishments owned by people who were not themselves pharmacists. In doing that, Sutherland "removed the barrier to a way of shopping or marketing that has been woven into the customs of American life. . . ." In *New State Ice Co. v. Liebmann* (1932) Sutherland ruled against the state of Oklahoma when it "sought to 'protect' the existing ice companies from the turbulence of competition." His opinion in *Adkins v. Children's Hospital* (1923) put the Supreme Court "on the side of equal rights, irrespective of gender, and picturing a society in which sex is largely legally irrelevant."

Although some past scholars tended to discount Sutherland's contributions because of his opposition to many of the New Deal issues, his peer, Chief Justice Harlan F. Stone rendered a far different judgment of his colleague. In fact, he thought Sutherland "fought stoutly for the constitutional guarantees of liberty of the individual." Several recent scholars who have looked at Sutherland's work as a whole, view his performance and accomplishments as very substantive and



Collection of the Curator of the Supreme Court of the United States

The four Harding Appointees appear in this group photograph taken in 1925. The Court as then constituted consisted of: (front row, left to right) Associate Justices James C. McReynolds, Oliver Wendell Holmes, Jr., Chief Justice Taft, Willis Van Devanter and Louis D. Brandeis; (back front left to right) Edward T. Sanford, George Sutherland, Pierce Butler and Harlan F. Stone.

meaningful. Hadley Arkes observed: "Both liberals and conservatives in our politics depend on him every year in their jurisprudence, but neither side happens to recall, at any moment, that it is drawing its understanding from a man it has chosen to deride or ignore."

In 1922, Harding named Pierce Butler, a Grover Cleveland Democrat and Roman Catholic, to the Supreme Court. The nomination resulted in political maneuvering and provoked opposition from the Ku Klux Klan, but the Senate approved the nomination with only eight nays. Professor Daniel Danielski observed that, "[b]y and large the press was gratified with Butler's confirmation."

Until his death in 1939, Butler wrote 323 majority opinions and dissented 140 times. Butler believed that "the individual should be free to be master of his own affairs." Opposed to prohibition, he criticized federal agents several times for violating the Fourth Amendment in their searches and seizures. Butler wrote a dissenting opinion in *Olmstead v. United States* (1928), arguing that law enforcement wiretapping constituted an illegal search for evidence. In *Aldridge v. United States* (1931) he voted that an African American tried for murdering a white man was entitled to have the prospective jurors polled to determine if they had a racial prejudice

that would prevent a fair trial. In *Snyder v. Massachusetts* (1934) Butler sided with Sutherland in voting against the majority for what he considered to be a violation of the defendant's right to due process.

Indeed, during the years 1923-29 Butler was the Supreme Court's champion of procedural due process. Prof. Danielski observed:

In the sixteen non-unanimous criminal cases during that period, Butler voted for the defendant 75 percent of the time, compared with the majority's score of 44 percent. Voting in the same sixteen cases, Brandeis scored 69 percent . . .

In several instances, Butler courageously held forth alone. Danielski pointed out that:

In *Palko v. Connecticut* [1937] for instance, he stood alone in dissent, while eight of his colleagues—including Black, Brandeis, Cardozo and Stone—held that a state could try a man twice for the same offense and then execute him without violating the due-process clause of the Fourteenth Amendment.

Other Butler opinions can be noted to give the reader a more complete sense of his work. In *Buck V. Bell* (1927)⁹ Butler cast the single dissenting vote in the Supreme Court's

decision upholding Virginia's authority to sterilize a second-generation, feeble-minded young woman. However, in *Ashwander v. Tennessee Valley Authority* (1936) Butler concurred in the decision allowing the government to create the Tennessee Valley Authority and in *Missouri Pacific R. Co. v. Norwood* (1931) he stated that railroads must abide by the state's full crew laws. Of note is the fact that it was Butler who wrote the opinion (8 to 0) in *Pan American Petroleum and Transport Co. v. United States* (1927) against Edward L. Doheny's Elk Hills contract. He also wrote the opinion of the Court (7 to 0) in *Mammoth Oil Co. v. United States* (1927) denouncing Harry Sinclair's Teapot Dome lease.

Concerning the usually conservative Sutherland and Butler a scholar observed: "In restraining overzealous reformers, defending rights of property, privacy, and equitable procedure, and in diligently laboring to preserve a stable and legal system, the Conservatives [sic] received the sanction and expressed the beliefs of a large segment of the American public."

In 1923, Harding appointed Edward T. Sanford to the Supreme Court. Sanford was highly educated, having an A.B. and a Ph. B. from the University of Tennessee; an A.B. and an M.A. and an LL.B. magna cum laude from Harvard; as well as a postgraduate year in Germany and France. He also had substantial judicial experience on federal courts prior to joining the Supreme Court. Sanford, who served until his death in 1930, wrote 130 opinions, addressing issues related to business, government, and especially bankruptcy. Perhaps the



Butler concurred in *Ashwander v. Tennessee Valley Authority* (1936) which allowed the government to implement the project.

brevity of his service has caused Sanford's career to be overlooked or discounted by some scholars. But Sanford made some significant contributions. Concerning civil liberties, Sanford made a major contribution by helping to develop the so-called Incorporation Doctrine; this is the Supreme Court's view that the Bill of Rights applies not only to the federal government but also, in large part, to the states.

Several of Sanford's other opinions also merit recalling. In *Gitlow v. New York* (1925) Sanford wrote that the First Amendment applied to the states through the Fourteenth Amendment. Henry Abraham observed: "It was a pronouncement that would prove of monumental significance as a judicial tool in the years to come." In *Fiske v. Kansas* (1927) Sanford triumphed in invalidating a state law that had led to the conviction of a person for seeking members for the Industrial Workers of the World, an organization alleged to be illegal under the Criminal Syndicalism Act of Kansas. It "was the first case in which the Supreme Court actually invalidated a state law as infringing the new liberty now protected by the Fourteenth Amendment."

President Harding's appointments to the Supreme Court produced profound impacts. Objective review and assessment of the opinions of these four Justices reveal their decision-making to be of a far more varied nature than that with which they are usually credited. When their total performance is considered, their service and contributions to the law add luster to their own reputations, as well as Harding's unfortunately short term of service.

**Professor Erving Beauregard is Professor Emeritus of History at University of Dayton, Dayton, Ohio.*



Collection of the Curator of the Supreme Court of the United States

Pierce Butler joined the Court in 1922. He was the lone dissenter in 1937 in *Palko v. Connecticut*, holding that a man could not be tried twice for the same offense and executed without violating the due-process clause of the Fourteenth Amendment.

TEACHERS ATTEND SEVENTH ANNUAL SUPREME COURT SUMMER INSTITUTE

By Caitlin MacAlpine*

This past June, 60 secondary school teachers traveled to the nation's capital to attend the seventh annual Supreme Court Summer Institute—two consecutive, six-day workshops for 30 teachers each, on the history and operations of the Supreme Court of the United States. The Institute offered the teachers, who came from the United States, the Marshall Islands, and Korea, a chance to meet professionals in government, journalism, and law; tour the Supreme Court with Marshal Dale Bosley; and attend a reception with a Supreme Court Justice.

Full-time Supreme Court reporters from *USA Today* and the Associated Press discussed the media's coverage of the Supreme Court in a session called "Meet the Press." Barbara Perry, author of *The Priestly Tribe* and professor of political science at Sweet Briar College, worked with appellate litigators to help teachers conduct a moot court based on *Good News v. Milford Central School*, one of the cases from the 2000-2001 term. Other sessions during the Institute featured lawyers who argued cases before the Court this term or who wrote briefs for cases heard during the term. Diana Hess, professor of education at the University of Wisconsin, and Lee Arbetman, director of U.S. programs for Street Law, directed the Institute.

Each educator expressed excitement in taking the lessons they learned back to the classroom. "The most helpful part of the institute for me as a teacher was having access to people with first-hand knowledge and first-hand experience; it was wonderful," said Carlen Floyd, a Texas law-related education teacher. Law teacher and mock trial coach Pamela Kelly, of Tennessee, agreed, saying, "The most useful thing I learned in regards to teaching in the future was Landmark Cases and the exercises on <http://www.landmarkcases.org>. It's really



Brian White (left) and Raymond Fraser posed with Justice Sandra Day O'Connor at a reception she hosted at the Supreme Court. Justice O'Connor has been an active supporter of the Summer Institute.

easy to display cases on a screen from one computer. My kids are going to love that—they'll be fighting to control the mouse!"

The teachers had rave reviews about the program. "Of all the institutes nationwide, this is the most prestigious. It's in D.C. It's at the Supreme Court. Where else would law teachers want to be?" said Peggy Jackson of New Mexico, a teacher of U.S. History and Law. Yet all the teachers agreed that the highlight of the trip was the once-in-a-lifetime experience of meeting Justice Sandra Day O'Connor (week one) and Justice Ruth Bader Ginsburg (week two).

During the first week's reception, Judge Kenneth Starr, accompanied by his daughter Cynthia, thanked the teachers for being among the handful nationwide to teach the history and cases of the Supreme Court. Justice O'Connor fondly recalled teachers from her school days and inspired the Street Law teachers by telling them, "You really are making a difference. Kids today are interested in being cool, not the Supreme Court. But you change that. You are not born knowing [Supreme Court history]. It must be taught."

"To be honest, I almost quit teaching at the end of this year. But Justice O'Connor's taking time out of her busy schedule to give such a motivational speech to us teachers was truly inspiring to me," Betsy Gonzales of Texas said at the reception.

Justice Ginsburg greeted teachers the second week, and noted that the "most exhilarating" part of her career was seeing the increase of women entering law school and the law profession. She thanked the female educators at the reception for being strong enough to attend male-dominated schools. Both Justices completed their busy days by greeting each teacher individually and posing for pictures.

At the conclusion of the first institute, the teachers were

encouraged to write letters to share with second week participants. Many of the letters cited the importance of being able to network and share lesson plans with other professionals. Said Fred Kleckowski, of Connecticut, "This is one of the most rewarding and enlightening educational experiences in my 26 years of teaching. You'll be amazed at all you'll learn from each other!" Stephanie Kaufman, of South Dakota, informed her successors, "You will be treated as the professional that you are.... Networking with other educators from across the country is one of the greatest parts of the institute." And an anonymous letter noted, "This institute mixes substance with teaching methodologies in a unique way, and exposes you to truly the cream of the crop in law-related education.... It is such an unbelievable week!"

The Supreme Court Summer Institute is sponsored by the Supreme Court Historical Society <http://www.supremecourthistory.org>. For more information on the Supreme Court Summer Institute, contact Lee Arbetman at larbetman@streetlaw.org or 202.293-0088x230 or visit <http://www.streetlaw.org/scipage.html>.

*Caitlin MacAlpine was an intern at the Street Law Offices in Washington, D.C. this summer.

Photos Courtesy of Street Law



Several instructors visited with Society Trustee Ken Starr at the reception. They are: (left to right) Susan Wright, Mary Gerst, Stephanie Kaufman and Beth Plummer.



Institute participants (from left) Mary Gerst, Fred Kleckowski, Susan Wright work with Professor Barbara Perry to prepare for a moot court based on *Good News v. Milford Central School*.



(Left to right) Pat Basler, Daniel Martin, Peggy Jackson, Leon Patterson, Susie Grosvenor and Darlene Jones participate in a moot court session during the Institute

NEW MEMBERSHIPS AUGUST 1, 2001 THROUGH SEPTEMBER 31, 2001

Alabama

Samuel H. Franklin, Birmingham

California

Deborah Haase, Santa Monica
T. Dea Robertson-Gutierrez,
San Francisco
Marguerite Roth, Sacramento
Lynne Wasserman, Beverly Hills
David R. Weinstein, Los Angeles

Colorado

Charles E. Norton, Denver

Connecticut

Joyce Krutick Craig, Torrington

District of Columbia

Ann Y. Bauersfeld
Raymond D. Cotton
Joan C. Culver
Michael J. Fanelli
Harry Groves
Marianne Harding
Robin Meige
Joan Logan Murray
Lance L. Shea
Michael D. Trager
Craig M. Wolff

Florida

Richard H. Davidson, Ormond
Beach
John R. Hamilton, Orlando
Danielle Hollar, Hollywood
Cheryl J. Levin, Sunrise
Andrew D. Litinsky, Boca Raton
Joe Wirth, Gainesville
Edward L. Wotitzky, Punta
Gorda

Georgia

Joseph B. Atkins, Atlanta

Idaho

Patrick Grace, Boise

Illinois

Steven L. Bashwiner, Chicago
Julian Berman, Glencoe

Kentucky

Thomas C. Mackey, Louisville
Cecile L. Schubert, Richmond

Massachusetts

Brad P. Bennion, Quincy
Wayne F. Holmes, Nantucket
Patricia A. Petow, Belmont
Brian T. Salisbury, Somerville
Mike Stevens, Lexington
Paul T. Tetrault, Beverly

Maryland

Christopher A. Anzalone,
Germantown
Michael Beland, Baltimore
Margaret de Lisser, Chevy Chase
James C. Strouse, Columbia
John N. Washburn, Baltimore
Henry N. Williams, Silver Spring

Missouri

Linda Rockwell, St. Louis
Robert J. Scudieri, St. Louis

New Jersey

Jessika Rovell, Voorhees
Jennifer Saal, Teaneck
Deborah Cummis Sandlaufer,
Roseland
Casey Woodruff, Fanwood

New York

Linda Barbato, Staten Island
Ursula B. Day, New York
Jeffrey D. Fields, Jericho
Charles J. Groppe, New York
Nick Hays, New York
Marjorie G. Jones, Bronxville
Sanford Krieger, Port Washington
Sam M. Mazen, Piermont
Christian Vergonis, New York
David A. Walden, New York

Ohio

Stephen S. Shanor, Springfield

Pennsylvania

Jeanne Cloud, Sinking Spring
Elias S. Cohen, Wynnwood
Roan J. Confer Jr., Trout Run
William Hronis, Allentown
Bruce Allen Murphy, Easton

Tennessee

J. D. Lee, Knoxville

Texas

Justin B. Adams, Austin
S. Arif Ali, Houston
John L. Estes, Dallas
Debbie Kearns, Houston
Lee B. Liggett, Houston
Daniel M. McClure, Houston
Laurance C. Mosher Jr., Houston
Michael W. O'Donnell, San Antonio
Scott M. Rawdin, Dallas
Guy Rodgers, Cleburne
Harry L. Scarborough, Houston
Charles Henry Still, Houston
Richard W. Timkovich, Austin
Kevin W. Yankowsky, Houston

Virginia

Alice A. Booher, Arlington
Riddhi Dasgupta, Centreville
Daniel S. Fiore II, Arlington
Mark F. Grady, Arlington
Kurt Hohenstein, Charlottesville
Mark F. Leep, Richmond
John H. McClanahan, Alexandria
Takayuki Sato, Charlottesville
Louise Wagner, Arlington

Washington

Rick Nagel, Mercer Island

West Virginia

J. H. Mahaney, Huntington

THE INSTITUTE FOR CONSTITUTIONAL STUDIES

The mission of the Supreme Court Historical Society is in large part educational, and many of its programs are aimed at furthering knowledge about the Supreme Court and about the Constitution of the United States. Toward this end, the Society is now engaged in a challenging project to help develop the next generation of constitutional history teachers.

The project began several years ago in discussion between Dr. Maeva Marcus, the editor of the Society's major publication project, *The Documentary History of the Supreme Court of the United States, 1789-1800*, and scholars in the fields of history, political science, and law. All agreed that, although one can find numerous courses on various aspects of constitutional studies, there was no single program at any university in the nation that focused on turning out people trained to teach constitutional history.

With a planning grant from the National Endowment for the Humanities, Dr. Marcus, along with Dr. Melvin I. Urofsky, the editor of the Society's *Journal of Supreme Court History* and professor of history at Virginia Commonwealth University, and Dr. Milton Greenberg, the former provost of American University, began a series of exploratory meetings in an effort to develop a plan for a national institute that will train increasing numbers of academics, educators, and others in constitutional studies. Results of their work were presented to the American Society for Legal History in 1998, and the response led them to continue. The following year they applied to, and received, a three-year grant from the NEH to get the project off the ground.

The Institute will consist of several components. One element, just begun, is the development of a novel experiment in graduate education. The Supreme Court Historical Society, working with the Consortium of Universities of the Washington Metropolitan Area, created a new, interdisciplinary Ph.D. field of concentration in constitutional studies, which calls for the sharing of resources, including faculty, by the member universities. The Consortium already had experience in sharing courses but primarily at an undergraduate level. That cooperation will be extended to the graduate level. Students will still apply to individual schools and will have to meet the graduation requirements of the Ph.D. programs at those schools. But as part of their training they will be able to take courses at other schools in subjects relevant to the constitutional studies field of concentration courses that their own universities do not offer. For the current academic year, the Society awarded a number of fellowships to encourage graduate students to enter the field of constitutional studies.

A second feature of the Institute is the summer seminar, which the Society began by supplementing money in the original NEH planning grant. Each year, fifteen graduate students or junior faculty in history and political science are chosen to attend a three-week seminar in Washington at the Society's headquarters, Opperman House. There they have a chance to present their research and to have it critiqued by some of the leading scholars in the nation.

The first year William Wiecek of Syracuse University and Dennis Hutchinson of the University of Chicago led a seminar focused on constitutional problems in twentieth-century America. The following year the subject of the seminar was the founding era, and it was led by the Pulitzer prize winning historian, Jack Rakove of Stanford University, and by Akhil Reed Amar of the Yale Law School. In 2001 Professor William E. Leuchtenburg, one of the nation's most eminent historians, and Richard Pious of Barnard College, an authority on executive power, directed a seminar on The American Presidency since FDR. This coming June the seminar topic will be Federalism, and its leaders will be Charles McCurdy of the University of Virginia, Harry Scheiber of the University of California, and Vicki Jackson of the Georgetown University Law Center.

The most visible of the Institute's endeavors thus far, the summer seminar each year received rave reviews by both the participants and the leaders. In the evaluations of their experiences, the participants' most common comment has been the best experience I have ever had in this kind of seminar. The teachers offered equally enthusiastic assessments.

This past fall work began on another part of the Institute, a research colloquium. Despite the geographical proximity of consortium schools, as well as the presence of other academic centers such as the Library of Congress, it became clear that many scholars were unaware of what colleagues at other schools were doing in terms of current research. Now once a month people can gather to hear a presentation of a work in progress in the field of constitutional studies, discuss it, and then meet faculty and graduate students from other schools who have a similar interest.

Two components of the Institute are still in the planning phase. With the availability of sufficient funding, the Institute hopes to sponsor a series of programs and seminars, all run by outstanding scholars in the field of constitutional studies and directed to different audiences. While emphasis will be given to highly specialized training for graduate students and post-graduate scholars, some seminars will be open to lawyers, judges, journalists, high school teachers, and anyone else who has a strong interest in learning more about the Constitution. Negotiations are currently in progress with Johns Hopkins University concerning joint sponsorship of some of the Institute's educational programming. Another feature of the Institute being developed is a Scholar-in-Residence program. Washington, D.C. is a natural center for research in constitutional studies, with the Library of Congress, the National Archives, and other important libraries nearby. The Institute hopes to attract scholars to come for periods of time both to do research and to take part in the related programs of the Institute. The Scholar-in-Residence program will get started as soon as funds can be raised.

All parts of the Institute are inter-related, and all serve to help carry out the broader mission of the Supreme Court Historical Society.

TEMPORARY "RELOCATION" OF THE SUPREME COURT

On Monday, October 29, 2001 the Supreme Court of the United States held Court outside its customary courtroom for the first time in more than a century. Alternative courtroom space was found in the ceremonial chamber of the D. C. Circuit Court building, where the Supreme Court heard oral arguments on October 29, 30 and 31. The relocation was necessitated when the basement mailroom of the Supreme Court tested positive for traces of anthrax, a finding prompting the evacuation of the building for a brief period.

When the Justices heard argument in the D. C. Circuit Court they appeared wearing their customary robes, and the familiar red and white lights monitoring argument time for advocates were also relocated to the temporary home. But the imposing red velvet draperies and ornate ceiling patterns and friezes were absent in the temporary quarters. A further change was the height of the bench itself in the borrowed chamber; it was virtually at eye level with advocates.

At the session on October 29, the Chief Justice confirmed from the bench that it was indeed the first time the Court had met outside the Supreme Court building since its completion

in 1935. But it was not the first time since a relocation had taken place. An earlier tragedy forced displacement when the U.S. Capitol Building was burned during the War of 1812. Temporary quarters available at that time were not as felicitous as those available in 2001: the Court found space in a rented house later converted to a tavern. Indeed, prior to occupying its current quarters, the Court had met in places like the Royal Exchange in New York, and in temporary quarters in and near the Capitol Building.

While "business as much as usual" was the theme of the week, there were many changes. Justices, clerks and staff members were forced to relocate during the week while the building was tested and cleaned. No admissions to the Bar were moved on Monday as they would have been under normal circumstances, and filing deadlines had to be pushed back. But in many ways, the work continued without interruption. Tony Mauro, writing a column for the *Legal Times*, quoted a frequent practitioner before the Court who observed: "It was a reminder to all of us. The Court is where its justices are, not in any one building."

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