THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

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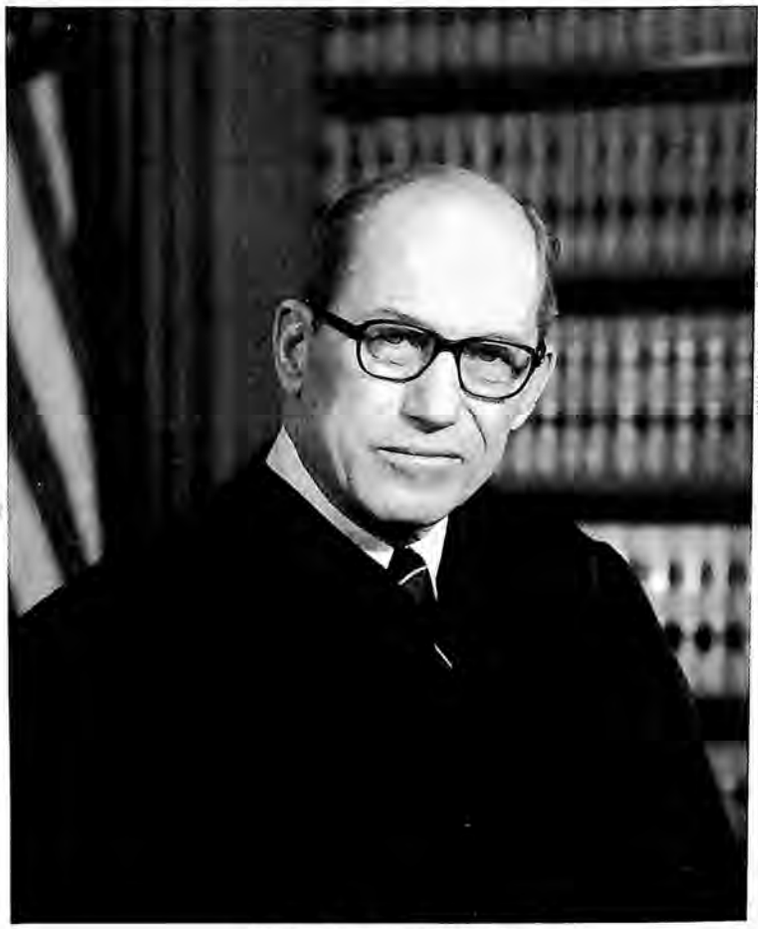
RETIRED JUSTICE BYRON R. WHITE DIES



Collection of the Curator, Supreme Court of The United States.

Justice Byron R. White

Byron R. White, the first individual to have served as a Supreme Court clerk and subsequently receive an appointment to the Court, died on April 15, 2002 in his home state of Colorado. A man of many talents, White was appointed to the Supreme Court in 1962 by President John F. Kennedy and served 31 years on that bench, one of the longest terms of service on the Court to date, retiring in 1993. For most of the years following his retirement, White maintained chambers in the Thurgood Marshall Federal Judiciary Building, taking an active role in judicial duties at the circuit level. Eventually, failing health dictated that his schedule be curtailed, and about a year ago he returned to his native state of Colorado. His death leaves no living retired members of the Supreme Court.

St. John's Cathedral in Denver was the setting for a memorial service held on April 22, 2002. Approximately 700 mourners met to remember and celebrate the life and many accomplishments and contributions of Justice White. Five Supreme Court Justices, John Paul Stevens, Antonin Scalia, Clarence Thomas, David Souter and Stephen Breyer, attended the service. A cadre of almost 50 former law clerks to the Justice filed into the church in the order in which they had worked for him. Other notables included Ethel Kennedy, widow of Robert F. Kennedy, and Sen. Edward Kennedy. Rev. Eaton, who conducted the service, recalled that Mrs. Kennedy had accompanied Byron White to his confirmation hearings. White's family issued a brief statement observing that "[t]hrough his quiet influence, love and companionship, we learned the importance of working hard and of balancing that hard work with exercise and good humor. We came to appreciate the value of friendship, responsibility, the right fishing knots and a long spiral pass."

The family statement gives some indication of the diversity of White's interests and pursuits in the course of his lifetime. An able and talented scholar, he was also an exceptional athlete, at one point concurrently attending Yale University while playing professional football on the weekends. He served in the U.S. Navy during World War II, and after returning to civilian life, clerked for the Chief Justice of the United States before entering private practice. His public service also included an appointment to the Justice Department prior to his nomination to the Supreme Court.

The breadth of his career is also reflected in comments made by current members of the Court. All nine sitting Justices issued statements concerning Justice White and the significance of his service. The Chief Justice made his statement from the bench on the morning of April 16, 2002 prior to the commencement of regularly scheduled business. Only two of the current members of the Court, Justices Ginsburg and Breyer, did not serve with Justice White on the Court. Indeed, Justice Ginsburg was appointed to the Court to fill the vacancy created by White's retirement. Accordingly, many of the comments made by the Justices reflect personal associations and memories. The text of the statements issued by each member of the Court appears below.

Continued on page 8

A Letter from the President

June of 2002 marks a time of transition for the Supreme Court Historical Society, the end of one era, and the commencement of another. On June 3, Leon Silverman, President of the Society for twelve years, resigned his office and was elected Chairman of the Board of Trustees. Frank C. Jones, a Vice President of the Society for more than ten years, was nominated to become the next President. Therefore, in this issue of the Quarterly, this column will provide communication from the outgoing President, and a brief sketch of our incoming President.

This, as most of you know, has been a difficult year for the country and for the Society. We began the year with a strong first quarter, only to face significant problems stemming from the acts of terrorism committed on September 11th and throughout the fall.

Like every other institution possessed of endowment funds, the Society suffered a serious financial setback in the post 9-11 economic environment. However, thanks to prudent investment strategies we achieved a level of equilibrium by the end of the third quarter, even posting some modest growth.

Membership too has been affected, as much of the Nation's charitable focus was redirected toward relief efforts for the victims of the World Trade Center and Pentagon tragedies, creating a very difficult environment for recruiting new members as well as for securing outside contributions.

Still, I am gratified to report that our existing membership has answered the call repeatedly throughout the year, and it appears that our renewal income goal is within reach.

Gift Shop revenues were also affected by the terrorism last fall, which necessitated that the Court be closed from time to time for security reasons as a consequence of the discovery of anthrax in the building. Indeed, the entire staff of the Society had to take antibiotics as a precautionary measure against possible exposure, but fortunately no one at the Court or at the Society was diagnosed with having been exposed to anthrax spores. Court building closures and the associated mail disruptions coupled with a dramatic diminution of tourism in Washington during the fall cost the Society something in excess of $100,000 in lost sales.

That is the bad news.

The good news is that the Society's members and loyal donors have been stepping up to the plate in an extraordinary display of generosity to help the Society through these difficulties. As a consequence, despite the calamites of last fall, it appears likely the society will close its books on fiscal year 2002 at the end of June at or near budget and with some modest growth in the endowment.

Those of you who are associated with other non-profits will recognize this for the Herculean task that it is under these very trying circumstances.

At the same time, I am pleased to report that we have accomplished this with no diminution of the Society's program commitments. Indeed, to the contrary, we have redoubled our efforts to streamline our existing operations, hold down costs, and actually expand program commitments in some areas.

Our premier research endeavor, the Documentary History Project, has just completed the proofreading stage on the seventh volume in an eight-volume series, and volume seven is expected to be published later this year or early in 2003.

Dr. Marcus and her staff are now turning their attention to the Project's eighth and final volume, the completion of which will be a landmark in the Society's history—and without doubt the most significant of its accomplishments to date is collecting and preserving the history of the Court.

This past year the Society also published in a special issue of the *Journal of Supreme Court History*, the memoirs of Malvina Shanklin Harlan, wife of the first Justice John Marshall Harlan. The original manuscript had languished with little notice in the Library of Congress for a half century, but was brought to the Society's attention by Justice Ginsburg, who championed its publication.

The special issue of the *Journal* containing the memoir received very favorable reviews and as a result, several major publishers became interested in republication of the work for a popular audience. Modern Library, a division of Random House, approached the Society and the Harlan family last fall seeking permission to reprint the work, and a few weeks ago it was released with considerable fanfare in bookstores across the country.

During the fall of 2001, the eighth annual lecture series was completed, with several of the programs rebroadcast by C-Span. The series commemorated the service of the Great Chief Justice, John Marshall. Other ongoing programs include the Summer Institute for Teachers, an intensive summer program for secondary school teachers. This summer, sixty teachers will gather in Washington to learn about the Court at first-hand. The third summer session of the Institute for Constitutional Studies also convenes this summer. The seminar has been extremely helpful in providing junior faculty members and graduate students an opportunity to study with some of the most accomplished scholars in the field.

I could go on at much greater length about the activities of the program, but I will desist. As my term comes to a close, I want to thank you all from the bottom of my heart for according me the honor of serving such a long productive term as President of this distinguished organization. Together we have accomplished much, and I think laid a foundation on which we can build a Society that is even more productive than it has been to date. As I turn over the mantle to Frank, I believe it is not an overstatement to say the Society is on a firm financial footing.

Further, the Society is conducting the kinds of programs, and producing the quality of publications, that fulfill and possibly even exceed the aspirations of Chief Justice Burger when he created the Society in 1974.

I would like to say a few words about my successor. Frank Jones has been involved with the Society for many years. In the mid-1980s he conducted the most successful membership campaign in the Society's history, and in 1986 was elected to the Board of Trustees.

Subsequently, in 1990, Frank joined the Executive Committee on his election as Vice President—an office he has held for twelve years. Throughout that time he has undertaken a wide variety of committee assignments, including his current position as Chair of the Development Committee.

Some of you may know that earlier this year Frank suffered a life-threatening health problem that restricted his activities for several months. Nevertheless, it is a measure of his mettle that despite his own difficulties, and the challenges facing many charitable organizations in the post 9-11 giving environment, the Society's development efforts are meeting and in some cases exceeding their goals for fiscal year 2002.

Frank's ability to expand membership support and his fundraising skills alone would recommend him as your next President. In addition, as I have counted him among my close friends for many years in the American College of Trial Lawyers, I can tell you he is a man of honor and diplomacy, possessed of an insightful mind and an energetic spirit. The Society could do not better than Frank Jones for its next President.

Leon Silverman

The Supreme Court Historical Society

Quarterly

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Managing Editor Kathleen Shurtleff
Assistant Editor James B. O'Hara

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 Acquisitions 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.

Important recent acquisitions in the Society's collection include this original carte-de-visite photograph of Justice Nathan Clifford taken by Brady's National Portrait Studio. The handwritten signature of the Justice appears on a small card underneath the photograph. These items were part of a collection of photographs and autographed materials donated by Dorothy Tapper Goldman.

Nathan Clifford
Appo. Jus. Sup. Court U.S.

ASSESSING JUSTICE MCREYNOLDS

*By Prof. Robert Langran**

When scholars attempt to assess or rank the Justices of the Supreme Court of the United States, it is difficult to be completely objective. Just as Justices at times inject their personal values into their decisions, so do scholars when making their evaluations. I first became interested in the topic when I read *The First One Hundred Justices: Statistical Studies on the Supreme Court of the United States* (Hamden, Conn.: Shoe String Press [Archon Books, 1978] by Albert P. Blaustein and Roy M. Mersky). They looked at Justices who had served on the Court from 1789 to 1969, and grouped them into five categories: great (12 Justices); near great (15); average (55), below average (6), and failures (8). Sixty-five reputable academicians in the area of judicial process supplied the ratings. I questioned the validity of listing the eight as failures in an article in *Yearbook 1985* published by the Supreme Court Historical Society. My interest in the topic was renewed when I was recently asked to participate in a survey of judicial scholars. We were asked to rate the twentieth century Justices as excellent, good, average, poor or failures.

One of the eight listed as a failure in the 1978 book was James C. McReynolds, and my "knee-jerk" reaction in the recent survey was to call him poor, but not a failure. Then I noticed when the results came back that out of fifty-two Justices he finished fifty-first in the mean rating, above only Justice Whittaker. That led me to question why McReynolds always seems to fare so poorly in this type of exercise. I decided to look at his major opinions and dissents during his twenty-seven years on the Court to see if the assessment of him is based solely upon those, or if perhaps scholars are injecting too much personal bias when they rank him.

In reviewing the cases there were choices to be made. Should my examination be topical or chronological? In the dissents, should I look at those where he joined others, or only at those he wrote? I opted for a straight chronology from his first major opinion to his last, with his dissents included in the chronology, but only those dissents he actually wrote. I chose this approach because I find that one is able to get a better feel for a Justice when one sees how that person develops over time. The times change, but does the person? In the case of McReynolds one is predisposed to say no.

Collection of the Curator, Supreme Court of The United States

In 1937, Roosevelt devised a plan aimed at neutralizing "The Four Horsemen," McReynolds, Van Devanter, Butler and Sutherland who voted consistently to negate New Deal legislation. The members of the Court at the time were (front row, left to right): Associate Justices Louis Brandeis, Willis Van Devanter, Chief Justice Charles Evans Hughes, James McReynolds, George Sutherland. Back row, left to right: Associate Justices Owen Roberts, Pierce Butler, Harlan Fiske Stone and Benjamin Cardozo.

Early Years: Business Cases

The Court in general and McReynolds in particular had a demonstrable business focus often involving cases where business challenged government restriction or regulation. McReynolds was always wary of such governmental action. For example, in *Adams v. Tanner* (1917), the Court, speaking through McReynolds, struck down a Washington law prohibiting employment agencies from charging fees. Manifestly, that would put them out of business without adequate social justification for the restriction, a Fourteenth Amendment due process violation. He also wrote the opinion for a unanimous Court in *United States v. Colgate* (1919). This opinion upheld resale price maintenance agreements made by a company with its dealers, and the Court found no monopolistic intent. Thus, a company may decide with whom to deal, and may announce the circumstances under which it will refuse to sell. In like manner, writing the opinion in *FTC v. Gratz* (1920) he again ruled against the government in its attempt to stop a company from refusing to sell a product unless prospective purchasers bought with it another of the company's products. He expressed his opinion that it was up to the courts to decide what is unfair competition. The ruling found that since the company sold at fair prices to those willing to take the terms, the public did not suffer injury.

McReynolds showed his usual anti-government tendencies when he cast the lone dissent in a case upholding the Packers and Stockyard Act (1921), giving the Secretary of Agriculture the power to prescribe rates for the meat packing industry. The case was *Stafford v. Wallace* (1922). He came back to the majority immediately, however, in *FTC v. Curtis Publishing Company* (1923). This case ruled against the government's attempt to stop a consignment contract between a publisher and a distributor requiring the distributor to act as an exclusive agent, carrying no other publisher's materials. He found instead an orderly development of business without an unlawful motive, said again that the courts are the ultimate determiners of unfair competition, and concluded that courts could look at the record of a case to see if there were any material facts not reported by the Federal Trade Commission. McReynolds even wrote a unanimous opinion upholding the right of four gasoline manufacturers to lease underground tanks with pumps to retailers, but only to be used with gasoline supplied by them. In *FTC v. Sinclair Refining* (1923), he wrote that those who give time, skill, and capital should expect to have a large degree of latitude in the conduct of their affairs. Finally, in 1923 he wrote another unanimous opinion in *United States v. American Linseed Oil Company*, this time finding in favor of the government. He ruled against twelve corporations who had entered into agreements to suppress competition in trade. Each company had to reveal to all the others the intimate details of its business affairs. McReynolds stated this was not bona fide competition; rather it was destroying the kind of competition to which the public had long looked for protection.

As should be apparent from these cases, McReynolds was leery of all government regulation of business. He ruled against a state once and the federal government five times, upholding the latter only once and that when the companies involved had done something blatantly in violation of anti-trust law. Only once did he dissent; he was very much in step with the thinking of the other members of the Court. His views were not extreme for the period. Indeed, he was very much in the mainstream.

Courtesy of the Curator, Supreme Court of The United States

Future Justice Howell E. Jackson served as a U.S. Senator for five years. During that time, recent law school graduate James McReynolds served as an assistant to the Tennessee Democrat. Jackson was appointed to the Supreme Court in 1893, but served only briefly. McReynolds received an appointment to the same Bench in 1914.

Non-business Issues

In non-business cases, McReynolds is most remembered for his majority decisions applying the Due Process Clause. In the first, *Meyer v. Nebraska* (1923), McReynolds, writing for the majority, struck down a state law banning the teaching of any language in the elementary schools other than English, and providing that English was to be the language of instruction for all subjects. The state (Nebraska) had many people of German origin, and the law was a reaction to the negative feelings against Germans engendered by World War I. Since the law was applicable to all schools, the German-language schools were effectively put out of business. McReynolds reasoned that the law took away liberty without due process, namely the liberty of parents to send their children to the school of their choice. He also thought it took away the property of teachers who would be without jobs. Both made for a Fourteenth Amendment violation.

In the second case, *Pierce v. Society of Sisters* (1925), the

Continued on page 10

A VISIT TO THE LAZY B RANCH

**By. Professor James B. O'Hara*

As visitors to bookstores and viewers of C-Span television already know, there is a new and most unusual book by a sitting Justice of the Supreme Court. Justice Sandra Day O'Connor has joined with her brother, H. Alan Day, in the writing of *Lazy B—Growing up on a Cattle Ranch in the American Southwest* (Random House, 2002).

Apart from the interest guaranteed because of its author, *Lazy B* will be for most of its readers a fascinating introduction to a bit of Americana generally known only through not-so-accurate Western films. Here, in these pages, the reader will find a taste of the ordinary daily hardships of a cattle ranch: the searing heat of the days, the constant concern for water, the long working hours, the primitive living conditions. *Lazy B*, located on the Arizona-New Mexico border, with about half of its acreage in each state, was founded in 1880 by the Justice's grandfather, H. C. Day. The entire ranch was within the territory purchased by the United States from Mexico in 1853 and known as the Gadsden Purchase. With subsequently acquired and leased additions, the *Lazy B Ranch* approximated 160,000 acres. While such an area seems huge to any modern city dweller, size was not to be confused with affluence.

H. C. Day and his wife lived at the *Lazy B* for more than a decade before moving to California, leaving operations of the ranch to a resident manager. After H.C.'s death, his son, Harry, called "DA," returned to attempt saving the investment. Debts had been incurred and conditions had deteriorated. What was to have been a relatively brief stay became a lifetime. DA had married a wife, Ada Mae Wilkey, called "Mo," and together they were the head and the heart of ranch life. There, three children were born and raised.

In the beginning there was no running water or electricity. Life was hard and the days were long. The small crew of cowboys needed direction, and the family pitched in for all of the back-breaking work ("chores" is much too weak a word).

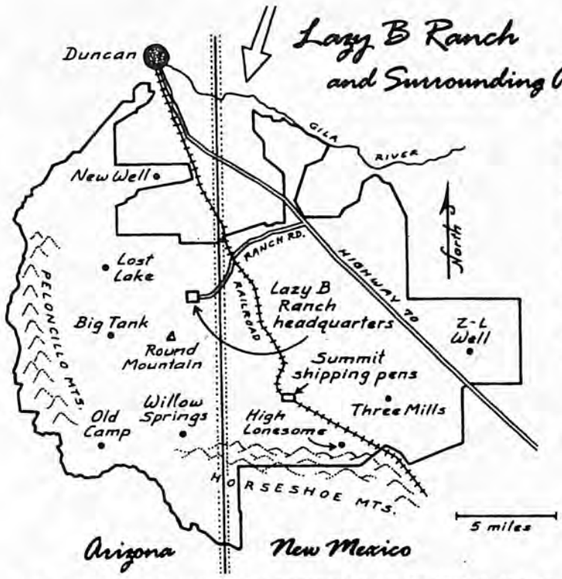
This remarkable book is the story of life on the ranch, with chapters devoted to sketches of the extended family—Roastus, the crippled ranch hand who could not read or write or drive a car; Jim Brister, the rodeo rider; Bug Quinn, whose drinking got him into trouble but who always survived his adventures to return to the Lazy B; and Claude Tippets, the toothless hand whose cowboy skills were legendary.

There are vignettes of ranch life like riding the trail to Mexico, making the rounds, the pets, the roundup, and a chapter on the future Justice's school days, and her wedding ceremony at the ranch.

This book is an easy read. There are pictures and maps and each chapter begins with a wonderfully apt quotation, sometimes from a family letter, often from an earlier book about western life, even one from an ode by Shelley. Readers will enjoy a book filled with such nostalgia and charm, wonderfully written, and surely the most unusual memoir ever authored by a Supreme Court Justice!

Autobiographical books by Justices are rare. John Marshall, at the request of Justice Story, wrote a brief sketch of his life in 1827. For more than a hundred years, the manuscript remained in the Story family until it came to light in 1932. It was finally edited by John Stoker Adams and published by the University of Michigan Press in 1937. The first chapter of Samuel Tyler's memoir of Chief Justice Taney, published in 1872, was written by Taney himself. Justice Stephen Field wrote *Reminiscences of Early Days in California*, initially printed in 1877, and subsequently re-issued. Charles A. Kent's 1915 *Memoir of Henry Billings Brown* includes an autobiographical sketch, and Hugo Black began his memoirs, but they were never completed. Some eighty pages were later published, along with the diaries of his second wife, Elizabeth, under the title *Mr. Justice and Mrs. Black*.

Justice O'Connor's recent book, *The Lazy B*, is a charming autobiographical remembrance of her life growing up on a ranch in Arizona. The future Justice was an accomplished horsewoman. This picture was taken when she was in the third grade.



The Lazy B ranch eventually approximated 160,000 acres in size spread over the states of Arizona and New Mexico. The map above describes the property.

In modern times only Charles Evans Hughes (*The Autobiographical Notes of Charles Evans Hughes*, edited by David J. Danelski and Joseph S. Tulchin, 1973), James F. Byrnes (*All in One Lifetime*, 1958, and *Speaking Frankly*, 1947) William O. Douglas (*Go East Young Man*, 1974, *The Court Years*, 1980) and Earl Warren (*The Memoirs of Earl Warren,* 1977) have contributed full autobiographies.

Interestingly, four wives of Justices have written accounts of their husbands' careers. Mrs. William Howard Taft wrote a gossipy *Recollections of Full Years*, published in 1914, before Taft became Chief Justice. Clarinda Pendleton Lamar wrote a rather hagiographic *The Life of Joseph Rucker Lamar,* published in 1926. Dorothy Goldberg wrote an interesting memoir, *A Private View of a Public Life* (1975), detailing her husband Arthur's career as Secretary of Labor, Supreme Court Justice and Ambassador. Malvina Shanklin Harlan, wife of the first Justice John Marshall Harlan, composed a memoir after his death that remained unpublished until its recent discovery and subsequent publication by the Supreme Court Historical Society. The memoir was published as an issue of the *Journal of Supreme Court History, (Volume 26, Issue 2)*. Republication by a division of Random House Books occurred in May 2002.

Autobiographical works by Justices are therefore rare, making Justice O'Connor's delightful story of her growing up all the more welcome.

Copies of the Lazy B *can be purchased through the gift shop by calling the toll-free number, 1-888-539-4438, or by visiting the website: www.supremecourthistory.org Other books are available, as well as a variety of gift items.*

**Professor O'Hara is a retired college administrator, professor of law and a member of the Maryland Bar. He has authored several Trivia Quizzes that have appeared in previous issues of this magazine as well as several feature articles.*

Photos in the article Courtesy of Justice Sandra Day O'Connor.

Real life cowboys had a far less glamorous life than that depicted in Hollywood movies. The account written by Justice O'Connor and her brother H. Alan Day gives a penetrating view of the difficulties and challenges of daily life on a ranch.

White, continued from page 1

Comments of Chief Justice Rehnquist, made from the Bench

Before we begin this morning, I want to pay tribute to our friend and colleague Byron R. White, a retired Justice of this Court, who died yesterday morning in Colorado. Byron White was nominated to the Court by President Kennedy on April 3, 1962, and was confirmed by the Senate eight days later. He took the oath of office 40 years ago today, on April 16, 1962. He was the 93rd Justice to serve on this Court.

Justice White was born and raised in Colorado. He was a rare combination of brilliant scholar and gifted athlete. He attended the University of Colorado, earning 10 varsity letters and winning a Rhodes scholarship to Oxford. Before attending Oxford, Justice White played professional football for the old Pittsburgh Pirates. When he returned from Oxford, Justice White attended Yale Law School while playing football for the Detroit Lions on weekends. He served as an intelligence officer for the Navy during WW II.

Justice White was graduated from Yale Law School, earning the Cullen Prize for high academic grades. He clerked for Chief Justice Vinson and then returned home to Colorado where he practiced law for 14 years, before joining the Justice Department as deputy attorney general to Robert Kennedy. Less than a year later, President Kennedy named Justice White to the Court.

Justice White was an able colleague and a good friend. He came as close as any of us to meriting Matthew Arnold's encomium: he "saw life steadily and saw it whole." All of us who served with him feel a sense of personal loss. Our condolences go out to his wife, Marion, his two children and their families.

At an appropriate time in the fall, the traditional memorial observance of the Court and the Bar will be held in this Courtroom.

Justice John Paul Stevens

Byron White was already a national hero to sports fans when I first met him in Pearl Harbor during World War II. I knew immediately that he was the kind of person that I would want as a friend. One of the greatest blessings of my appointment to this Court was the fruition of that wish. His friendship is one of the treasures of this tour of duty. He was the kind of person for whom respect, admiration and affection continue to increase as you learn more about him. He was a true hero during his naval service, a brilliant student and law clerk, an outstanding member of the profession, both in private practice and as a public servant, and a great judge. He was also blessed with an exceptionally loving bride and a fine family of which he was justly proud. I will miss him.

Justice Antonin Scalia

Anyone who ever met Byron White will recall his painfully firm handshake: you had to squeeze back hard or he would hurt you. I always thought that was an apt symbol for his role on the Court: he worked hard and well, and by doing so forced you to do the same. If there is one adjective that never could, never would, be applied to Byron White, it was wishy-washy. You always knew where he stood; knew that he was not likely to be moved; and hoped he was lining up on your side of scrimmage. His former colleagues have missed him since his retirement nine years ago; we will miss him more now. May he rest in peace.

Courtesy of the Curator, Supreme Court of The United States.

As Justice Stevens observed, "Byron White was already a national hero to sports fans when I first met him in Pearl Harbor during World War II." White played professional football for the Pittsburgh Pirates and the Detroit Lions. He later served as an intelligence officer in the Pacific Theater during World War II, receiving a Bronze Star.

Justice Anthony Kennedy

The Court must strive in all it is and all it does to reflect the integrity and the strength of a Nation dedicated to the cause of freedom. Byron White was himself a remarkable personification of these values and this purpose. His physical strength and stature were powerful reminders of an even greater strength of character, character marked even from his youth by an unyielding dedication to America and its historic mission. Byron White honored the Court and the law by his service here. He honored the United States and its people by his splendid, vibrant human spirit.

Justice David Souter

Justice White was a welcoming colleague and a solid friend. Like the others here, I will miss him.

Justice Clarence Thomas

I am deeply saddened to learn of the death of Justice White. He was a great man, an outstanding member of the Court, and a wonderful friend. Virginia and I extend our heartfelt sympathy to Marion and her family. We will keep them in our thoughts and in our prayers.

Justice Ruth Bader Ginsburg

At the hearings on my nomination in July 1993, a senator asked: "In what ways do you think you might be like or different from Justice White? I answered: "The differences are obvious; he is very tall and I am rather small and surely I do not have his athletic prowess." But "I hope I am like him in dedication to the job and readiness to work hard at it." I hold that hope high to this very day.

I have a special fondness for and appreciation of Justice White for another reason. In my days as an advocate of equal rights for men and women, I argued six cases in the Supreme Court and prevailed in five. If it had been up to Justice White, I would have prevailed in all six. He voted for the precise position I advocated every time. He was the only Justice who did.

Justice Stephen Breyer

I was lucky to have come to know Justice White in his later years. Justice White was a great judge and a thoroughly decent man—forceful, engaging and strongly committed to public service.

As noted in the remarks made by the Chief Justice, some time in the fall, a special session of the Bar will commemorate the Justice's career and contributions to the legal community and the jurisprudence of the Court. Following that session, a special session of Court will be convened at which time the Court will hear formal resolutions memorializing his life and work. Traditionally, the Solicitor General of the United States is charged with planning and organizing such a memorial. Under the direction of the Solicitor General, the former clerks to Justice White will select speakers and draft resolutions commemorating the Justice's career and life. After adoption and presentation to the Court, these resolutions will become a permanent part of the records of the Court.

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

Justice White addresses the audience on the occasion of the unveiling of his official portrait. White was the first individual to have served as a Supreme Court clerk to become a Supreme Court Justice himself.

McReynolds, continued from page 5

Court struck down another state law that required that all children between the ages of eight and sixteen must attend public schools, effectively closing parochial and private schools. McReynolds wrote that the law took away liberty and property without due process in violation of the Fourteenth Amendment. The liberty involved was once again that of parents to send their children to an approved school of their choice, and the property was that of the persons who owned the schools that were being forced out of business.

It would be difficult to find fault with these two decisions, and surely they would not count toward giving McReynolds a low evaluation as a Justice. Even the dissent in his next case would seem legitimate; the other dissenters were Holmes and Brandeis. The case, *Myers v. United States* (1926), was one in which the majority upheld the President's right to remove presidentially appointed persons in the executive branch without having to seek Senate permission.

New Deal Era

It seems, therefore, that it must be McReynolds' opinions from the New Deal era that have caused scholars to hold him in such disrepute. McReynolds was in regular opposition to key New Deal legislation. His opposition actually began with a state case, *Nebbia v. New York* (1934), wherein the Court upheld a state law designed to aid its dairy farmers. Calling the dairy industry a public interest one, the law created a milk control board to fix maximum and minimum retail prices of milk. The majority opinion found that any business at any time could be considered in the public interest and subject to regulation if conditions so warranted. The courts could only intervene if there were arbitrariness on the part of the state imposing the regulation. McReynolds, speaking for himself and three others (Van Devanter, Sutherland and Butler) in dissent, objected to the broadening of the public interest concept. McReynolds, Van Devanter, Sutherland and Butler held similar views and frequently voted together against the New Deal statutes. The press dubbed them "The Four Horsemen," likening them to the famous defensive players on the Notre Dame football team who were noted for not allowing anything to get past them on the field.

Next, McReynolds took aim at Franklin Roosevelt's financial policies, commencing with two cases dealing with the gold standard. Roosevelt had taken the country off the gold standard, and Congress passed a joint resolution that cancelled any clause in any private contracts or government bonds that called for payment in gold. In the same five-four split occurring in the previous case, the Court sustained the resolution. The Court justified the section dealing with private contracts on the grounds that Congress had the power to regulate the currency. Accordingly, it had the right to define what constituted legal tender (*Norman v. Baltimore and Ohio Railroad Company* 1935). In upholding the section dealing with government bonds, the Court actually expressed the opinion that the government had acted unconstitutionally when

Library of Congress USZ62-14057

McReynolds was a harsh critic of President Roosevelt, and opposed most of the New Deal legislation. His dissents often contained personal attacks on his political adversaries, and on one occasion, McReynolds went so far as to describe FDR as "an utter incompetent."

it had pledged to pay in gold when the bonds were sold. However, it disallowed the suit because the difference in the amount the plaintiff would have received in gold and what he would actually receive from the bond was so negligible that he suffered no real damages and thus had no legal standing (*Perry v. United States* 1935). McReynolds, in dissent, expressed his belief that the sanctity of contractual obligations must be maintained. Indeed, he felt so strongly about it that he wrote, "shame and humiliation are upon us."

McReynolds was able to write one majority opinion invalidating a New Deal law. In the ruling in *Ashton v. Cameron County Water* (1936), he struck down the 1934 federal Municipal Bankruptcy Act that had allowed subdivisions of states to file voluntary bankruptcy petitions. McReynolds reasoned that the law invaded the areas of state finances and state sovereignty. However, he found himself dissenting again in *United States v. Curtiss-Wright Export Corporation* (1936), when the Court upheld a 1934 joint resolution giving the President the right to place an embargo on the sale of weapons to two warring countries if he thought such an action would help bring about peace. Congress had given specific enforcement power to the President in its resolution. The Court, in a sweeping decision written by Justice Sutherland, not only found the Congressional resolution valid, but ruled that in foreign policy the President alone exercised the sovereign power of

the United States. McReynolds was the lone dissenter in that decision.

McReynolds' philosophical differences with the New Deal surfaced again when the Court, in a five-to-four ruling, upheld the National Labor Relations Act in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937). The statute declared that all firms engaged in interstate commerce must participate in collective bargaining with its employees when the latter requested such action. It further prohibited these firms from engaging in unfair labor practices. To enforce the law, the National Labor Relations Board was created. The NLRB was further charged with conducting elections in instances where employees wished to unionize. In its ruling, the majority of the Court revived the "stream of commerce" theory to justify Congress's passing a law in the field of labor-management relations, and in this particular case upheld the use of the law against a company because of the interstate nature of that company. McReynolds, once more speaking for the so-called "Four Horsemen," thought there was no interstate commerce involved and therefore the act infringed upon the reserved powers of the states expressed in the Tenth Amendment. He dissented likewise in a companion case, *National Labor Relations Board v. Friedman-Harry Marks Clothing Company*, where the same five-to-four majority upheld the use of the statute against a small clothing manufacturer who himself did not engage in interstate commerce, but who by extension belonged to an interstate industry, the clothing industry.

Library of Congress USZ62-107383

McReynolds' poor social skills left him a lonely man. He did have a small group of friends with whom he dined on occasion, and he enjoyed golf and duck hunting.

The zenith of McReynolds' opposition to the New Deal occurred when he once again dissented, this time in two cases upholding the 1935 Social Security Act. The Court's ruling in the first case, *Stewart Machine Company v. Davis* (1937), upheld the unemployment compensation part of the statute. Under it, the bulk of a tax levied on employers was forgiven if a state developed its own program approved by the federal government. The majority ruled that unemployment was such a serious problem it had to be attacked by the federal and state governments cooperating with one another. The states were not coerced into entering the program and therefore it was a legally acceptable action. The Court's ruling in the second case, *Helvering v. Davis* (1937), upheld the old-age benefits portion of the statute. Under the statute, employees paid into a program which would give them money at age sixty-five. The majority found that Article I, Section 8 of the Constitution gave Congress the right to provide for the general welfare of the United States. As the Depression was a national problem, the federal government had the right to take measures to tackle the problem.

Last Years

McReynolds' opposition to so many New Deal initiatives is probably partly responsible for his low ratings, but some scholars have rated Sutherland and Van Devanter much higher, their similar votes and philosophies notwithstanding. Even though the other three reliable anti-New Deal Justices had died or retired before him, McReynolds was able to garner majority support in one more notable opinion before his retirement. In *McCarroll v. Dixie Greyhound Lines* (1940), McReynolds, writing for the Court, struck down a state law which provided that any vehicle coming into the state with more than twenty gallons of gasoline had to pay the state gas tax on the excess. He found this was a tax on interstate commerce, and therefore unallowable.

Personality

Were his opinions enough to warrant the low assessment given him in scholarly polling? That is an arguable point, and there may be a reasonable difference of opinion. However, it does appear that his rating is based not on his votes but on his abrasive, imperious, unattractive personality. He was an anti-Semite, and would leave the room when Justice Brandeis spoke in conference. There was no group picture of the Court taken in 1924 when Cardozo joined the Court because McReynolds refused to sit next to Cardozo for such a photograph. McReynolds also exhibited arrogance by refusing to speak with Justice Clarke, whom he thought was unequal to the tasks of a Supreme Court Justice. To compound

(continued on page 12)

matters, McReynolds was sexist in his attitude toward women advocates appearing before the Court and to women employed by the Court. In a recent article, *Women Advocates Before the Supreme Court,* published in the *Journal of Supreme Court History 26:1 (2001),* a story is recounted of a female employee who worked in the office of the Clerk of the Court who would hide each time McReynolds approached the office, rather than suffer his insults.

These acts of incivility on the part of McReynolds may indeed have helped earn his low rating, but McReynolds had another, softer side, as some biographers have pointed out. For example, he supported thirty-three young children who were victims of the Nazi Blitzkrieg in World War II, and his pledge of $10,000 was the initial pledge to the "Save the Children Campaign." His will provided that the bulk of his estate be distributed to charities, including Children's Hospital and the Salvation Army.

Since his acts of kindness were often concealed, is it fair to include in a balanced assessment of McReynolds these acts of his better nature? One might argue that the better known acts of incivility related to his service as a Justice and thus should be weighted. That is perhaps a valid argument, and is analogous to Pete Rose's exclusion from the Hall of Fame for his alleged betting on sporting events, despite his having the most hits in the history of baseball. Admittedly, McReynolds' record on the Court did not match Rose's record on the diamond, but there is a similarity. In each case, the assessment combines the elements of personal and professional life.

Upon his death, many were surprised to learn that McReynolds had left the bulk of his estate to charity. His charitable interests included support of the Save the Children Campaign. Indeed, he was one of the original contributors to this charity. The drawing above is the original logo of the foundation.

Conclusion

I would argue that Justice McReynolds has been rated lower that his performance would dictate. He was a person who espoused a conservative point of view and held on to it, even though he surely realized that his viewpoints did not coincide with the changing times of the New Deal. Were his decisions good ones? I personally do not agree with many of them, but that should not cause me to rank him at or near the bottom of all those who have served on the Court. It would seem that scholars who disagree with his decisions inject into their assessment his personal failings which when factored in with his unfashionable judicial philosophy, result in a very low assessment. I contend that one's personal life should not be taken into account when a scholar is asked to evaluate a person's professional career. If that standard were to be applied to McReynolds, even though it would not put him into the Supreme Court elite, it would also not rank him where he seems to have been mired. A reevaluation would seem to be in order.

**Professor Robert W. Langran is a professor in the Department of Political Science at Villanova University. He has been a member of the Society since its inception, and contributed several articles published in the Yearbook/Journal of Supreme Court History.*

SUPREME COURT FELLOWS PROGRAM

The Supreme Court Fellows Commission invites applications for the 2003-2004 Fellows Program. Fellows spend one calendar year in Washington, D.C., based at the Supreme Court of the United States, the Federal Judicial Center, the Aministrative Office of the United States Courts, or the United States Sentencing Commission, working on projects related to the federal court system and the administration of justice.

Chief Justice Burger established the Supreme Court Fellows Program in 1973 seeking to offer a highly select group of individuals a unique opportunity to contribute to the federal judiciary. For almost thirty years, the program has provided fellows a rare look at the inner workings of the federal judiciary and the dynamics of inter-branch relations by bringing them face to face with major issues confronting the federal courts.

A variety of opportunities enhance the fellowship experience. Fellows have access to educational resources and programs offered by the federal judiciary. They also attend luncheon seminars sponsored by the administrative assistant to the Chief Justice, a Supreme Court Historical lecture series, and special activities with the White House Fellows.

The application deadline is **November 11, 2002**. Additional information, an online application and complete instructions are available at **www.fellows.supremecourtus.gov.** or by contacting the Administrative Director, Supreme Court Fellows Program, Supreme Court of the United States, Washington, D.C. 20543, or by telephoning (202) 479-3415

SETH P. WAXMAN RECEIVES JEFFERSON MEDAL IN LAW

On March 27, 2002, the University of Virginia announced that the Honorable Seth Waxman, former Solicitor General of the United States, would receive the Thomas Jefferson Medal in Law. The medal is the highest outside award offered by the University of Virginia, which grants no honorary degrees. The medal is "conferred upon recipients who, like Mr. Jefferson, have combined legal distinction with public service." Sponsored jointly by the University and the Thomas Jefferson Foundation Inc., the award is conferred as part of the University's Founder Day celebration, and was presented on April 12, 2002. Traditionally, award winners present a public lecture, and Mr. Waxman spoke on April 11 on the topic "On Ruby Ridge: Federalism, Law Enforcement and the Supremacy Clause."

Mr. Waxman, currently a partner in the law firm Wilmer, Cutler & Pickering, served as the 41st Solicitor General of the United States under President Clinton. He has also held several other senior positions in the United States government, including service as acting attorney general.

In describing Waxman's performance as Solicitor General of the United States, John C. Jeffries, Dean of the University of Virginia School of Law, commented that Mr. Waxman ". . .discharged that responsibility with skill, integrity and dedication."

Mr. Waxman was elected to the Board of Trustees of the Supreme Court Historical Society immediately following his service in the Department of Justice. During his tenure as Solicitor General, he presented the Annual Lecture in 1998, introduced speakers in lecture series programs, and graciously provided other important assistance to the Society.

His career as an advocate includes more than 30 appearances before the Supreme Court of the United States, in addition to which he has participated in and argued dozens of high-profile civil and criminal cases in federal and state courts throughout the country. Previous recognition of Mr. Waxman's work includes awards such as the Edmund J. Randolph Award conferred by the Department of Justice, and the Pro Bono Publico Award given by the American Bar Association.

During his career, Waxman has represented a variety of individuals and entities ranging from international corporations and corporate officers, to senior federal and state government officials, including former President Richard M. Nixon.

Mr. Waxman joins a prestigious group of individuals who are previous recipients of the award, including: Dean Erwin N. Griswold, Justice Lewis F. Powell, Jr., Judge Griffin Bell, Chief Justice Warren E. Burger, Justice Sandra Day O'Connor, Chief Justice William H. Rehnquist, Judge Richard A. Posner, Dean Rex E. Lee and Justice Ruth Bader Ginsburg.

Society Acquires Letter from William Howard Taft

In March of this year, Chief Justice Rehnquist donated to the Society's collection a unique and important letter. The letter, written on October 30, 1926, is in the handwriting of its author, William Howard Taft, who was Chief Justice of the United States at the time, and is written on official Court letterhead. The letter had been sealed in a time capsule opened in accordance with the intent of the designers in January 2000, at which time the letter was delivered to Chief Justice Rehnquist.

To The Chief Justice of the United States
January 1st A.D. 2000

My dear Sir
I sincerely hope that when this letter is presented to you, the Constitution will still be maintaining the Ship of State on an even keel, and securing the blessings of individual liberty to all the people of the United States under a government of law and order.

Respectfully yours,
Wm H. Taft
Oct. 30th 1926

This poignant reminder of the dedication and service of members of the Court will be preserved for future generations.

A Justice at Work: 1940 Style

*By Bennett Boskey**

Collection of the Curator, Supreme Court of The United States

Stanley F. Reed
Associate Justice 1938–1957

Recently, the District of Columbia Circuit sustained the Federal Energy Regulatory Commission's assertion of jurisdiction over licensing a hydroelectric project in Maine on the ground that FERC had lawfully determined the Messalonskee Stream to be "navigable."[1] Reading the opinion on how the question of navigability is to be assessed reminded me of events during my earliest days in Washington.

My wife and I had come to Washington in August 1940, about a month after our marriage, so that I could serve (with an avowed intention of staying in Washington for about one year) as Justice Stanley F. Reed's law clerk during October Term 1940. Justice Reed at that point had met me exactly twice. In the spring of 1940, while I was Judge Learned Hand's law clerk, I had been recommended to Justice Reed by Justice Frankfurter and by Philip L. Graham, who was then the Reed law clerk (and the next term became the Frankfurter law clerk), and Justice Reed had nevertheless taken the precaution of asking me to come down to be interviewed. And later, I think in early summer, I had briefly encountered the Justice at a massive Long Island country club party celebrating the wedding of one of my law school classmates to the daughter of one of the Justice's friends. Essentially, the Justice and I were still strangers to each other until after he had returned to Washington, probably in early or mid-September. By then the rhythm of working on the smothering inventory of summer petitions for certiorari was well under way. I had begun to get an understanding of what the Justice hoped for and expected from his law clerks—to whom, I should add, over his long judicial and post-judicial career he was generously and affectionately devoted.

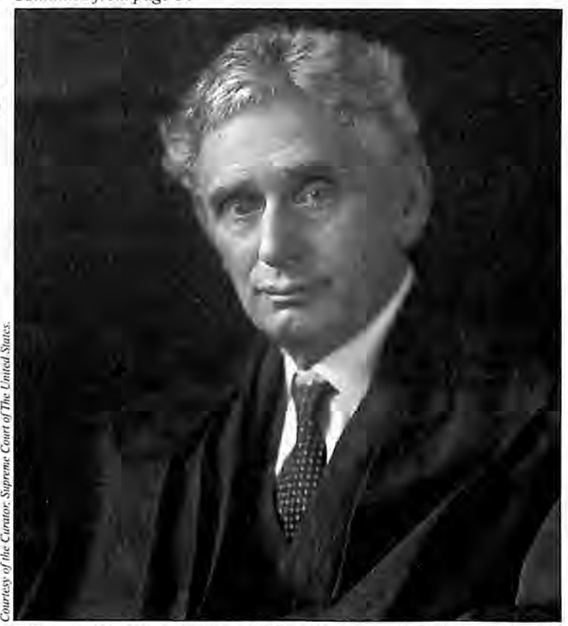
The 1940 Term had its formal statutory opening on the first Monday in October. On the first two days scheduled for oral argument (October 14 and 15), extensive argument was heard in a case which was widely regarded as testing the reach of federal power under the Commerce Clause and the Federal Water Power Act—*United States* v. *Appalachian Electric Power Co.*, later reported at 311 U.S. 377. The case turned on whether the New River, a cranky and rocky river in Virginia and West Virginia, was or was not navigable, and hence whether a proposed hydroelectric project was or was not subject to licensing by the Federal Power Commission. Two courts below had held the river to be not navigable. On writ of certiorari six of the eight participating Justices came to the opposite conclusion. Chief Justice Hughes, who normally assigned opinions except when he was not in the majority, had recused himself, and Justices McReynolds and Roberts had voted in dissent to uphold the lower courts. Hence the assignment of the opinion to Justice Reed was made by Justice Stone as the senior Associate Justice in the majority. Justice Reed knew it was a formidable assignment, as did his law clerk.

Justice Reed's extensive opinion for the Court was delivered on December 16—a gestation period of only about two months in the early portion of a busy term. The opinion fully reflects the hard work underlying its preparation. It covers the range of the Court's precedents in the development of doctrines as to navigability; the historical and up-to-date facts concerning New River; clarification of the criteria to be followed which would result in reversing the non-navigable conclusion of the two courts below; and the refutation of a number of attacks made by the power company on proposed license conditions.

In all of these aspects of the case, Justice Reed was deeply and almost continuously involved. The books were brought off the shelves and he read them. The voluminous record which had been amassed below was ransacked to be sure that nothing was missed or distorted. The drafts of segments of the opinion were caressed and refined. The Justice, I discovered to my delight, genuinely enjoyed discussing with his law clerk the contours as well as the details of the case, and also the struggle to sharpen and improve the text as the opinion was developing.

Justice Reed did not write with the easy fluency or stylistic brilliance of a Holmes or a Cardozo or a Learned Hand or a Bob Jackson. For Reed the written word emerged with much more difficulty, sometimes with almost a stutter, but he was perfectly willing to put in the time and the energy to make it come out right in the end. This he did, with whatever laboriousness was required. If, as happened on occasion, he

Continued from page 14



Courtesy of the Curator, Supreme Court of The United States.

When asked why he thought the Supreme Court commanded more respect than any other institution in Washington, Justice Louis Brandeis responded: "Because we do our own work."

stayed in his chambers late into the evening, his law clerk was glad to stay with the Justice and be of such help as he could. Yet anyone close to the process would be sure that the opinion as a final product was truly the Justice's and not merely a creation of the law clerk.

For himself and Justice McReynolds, Justice Roberts published a dissenting opinion—well-crafted, somewhat caustic, and entirely unpersuasive. An amusing aside for some of the Justices (and their law clerks) was when they learned the outvoted Roberts had muttered to one of his brethren that he thought the Court's standard for navigability had sunk so low that "if it flushes, it's navigable."

For me, New River's strenuous introduction into opinion-writing at the Supreme Court provided a first-hand education of lasting benefit. And it buttressed the truth of the response attributed to Justice Brandeis when he had been asked why it was that the Supreme Court was the institution in Washington that commanded the most respect. Brandeis is said to have replied: "Because we do our own work."[2]

Notes:

[1] *FPL Energy Maine Hydr LLC v. Federal Energy Regulatory Commission, D.C. Circuit No. 99-1397, decided May 3, 2002.*

[2] *For information concerning Justice Reed's life and judicial career, see particularly the Supreme Court Memorial Proceedings on December 15, 1980, partially reproduced in 449 U.S. beginning at xxxvii; the biography by one of my successors as a Reed law clerk, John D. Fassett, titled "New Deal Justice: The Life of Stanley Reed of Kentucky" (1994); and the issue of the Kentucky Law Journal (Volume 69, Number 4, 1980-81) dedicated to Justice Reed and published not long after he died on April 3, 1980, at the age of 95.*

**Mr. Boskey is a member of the District of Columbia and Supreme Court Bars; Treasurer of the American Law Institute; and author of various books and articles relating to the Supreme Court.*

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Continued on page 16

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