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CHANGES ON THE SUPREME COURT

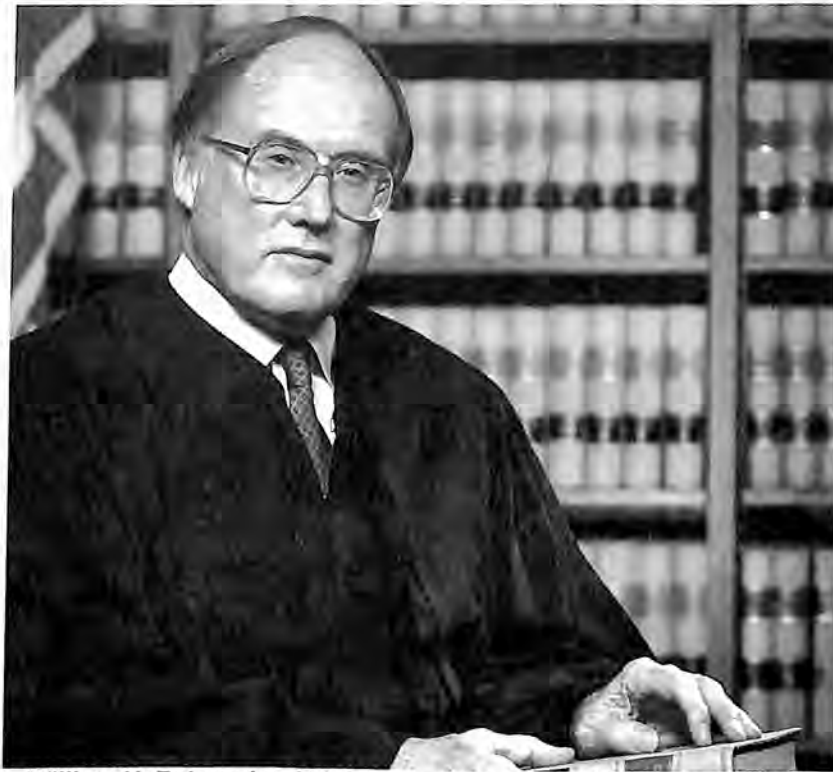
After more than a decade with no change in the membership of the Supreme Court, the end of the 2005 Term brought a retirement. On Friday, July 1, 2005, Associate Justice Sandra Day O'Connor announced she would retire from the Court effective upon the confirmation of her successor. While many had anticipated a retirement at the end of the Term, most had assumed that Chief Justice Rehnquist, battling cancer, would be the one to leave the Bench. A little over two weeks later, on July 19, 2005, President Bush announced his intention to nominate Judge John G. Roberts, Jr. to succeed Justice O'Connor on the Supreme Court Bench. Before Judge Roberts' scheduled confirmation hearings before the Senate Judiciary Committee could take place, Chief Justice William H. Rehnquist died on September 3, 2005 at his Virginia home succumbing to his battle with thyroid cancer.

Given the change of circumstances and expressing a desire to confirm a new Chief Justice prior to the opening of Court in October, President Bush announced on September 5, 2005 that he would nominate Judge John G. Roberts, Jr. to succeed Chief Justice Rehnquist as Chief Justice of the United States. After hearings before the Senate Judiciary Committee, Judge Roberts' nomination moved to the floor of the Senate where he was confirmed by a vote of 78-22 on September 29. Roberts took the oath of office at the White House later the same day, administered by senior Associate Justice John Paul Stevens. On the opening day of the October Term, Monday,

October 3, 2005, a brief ceremony was held to conduct the investiture of Judge Roberts as Chief Justice of the United States. Approximately one hour later, the Court convened at 10:30 AM for the opening session of the Term with Chief Justice Roberts presiding.

When Justice O'Connor announced her retirement, she believed that there would be only one change on the Court for the year, as Chief Justice Rehnquist had anticipated being able

to continue his service on the Court in the 2005-06 Term. Indeed, in July he announced his intention to serve for the coming Term. Appointed to the Court as an Associate Justice in 1972 by President Richard Nixon, Rehnquist was named Chief Justice in 1986 by President Reagan following the resignation of Chief Justice Warren E. Burger. His thirty-four year tenure on the bench is one of the longest in the history of the Court. He was the third sitting Associate Justice to be elevated from Associate status to the center chair.



William H. Rehnquist, Chief Justice of the United States 1986-2005

Edward Douglass White and Harlan Fiske Stone are the only others to date to be so elevated.

On Tuesday, September 6, 2005, Rehnquist's body was carried up the steps of the Supreme Court to lie in repose in the Great Hall. The coffin was carried by former Rehnquist Clerks who had volunteered for that honor. The official portrait of the Chief Justice, painted by Thomas Loepp, was displayed on an easel at the end of the Great Hall near the bier on which the casket rested. During the hours the body lay in repose,

A Letter from the President



Since my last letter to you, a number of momentous events have transpired. These form the basis of the first story in this issue of the magazine but I would like to add some personal comments.

First, I know that all of you share my feeling of great sadness on the death of Chief Justice

William H. Rehnquist. His combined tenure as an Associate Justice and as the Chief Justice approaches the record for the longest service on the Supreme Court. While that is in and of itself a significant accomplishment, the very high quality of his service is of greater importance. It is widely recognized that he carried out his many duties with great distinction and fidelity. On a more personal basis, his leadership as Honorary Chairman of the Board of Trustees of the Society coincided with a period of unprecedented accomplishment in this organization, and his interest in and support of those activities was an essential element of that success.

His funeral service was held on Wednesday September 7 at St. Matthew's Cathedral in Washington. The Lutheran church of which he was a member was of inadequate size, and St. Matthew's Cathedral, a Catholic church, graciously extended an invitation to hold the service there. It seats approximately 2,000 persons. The funeral services for President John F. Kennedy and Associate Justice William J. Brennan, Jr., and Chief Justice Edward Douglass White were also held at St. Matthew's.

Music was an important and unifying element of the service, and the choir, instrumentalists and soloists were outstanding in every way. When the congregation stood and sang "America the Beautiful," I recalled vividly being at annual dinners in the Great Hall of the Supreme Court Building during which the Chief Justice sang patriotic songs with great enthusiasm. Indeed, at the beginning of the service, the Minister advised the congregation that we would sing every verse of the songs and expressed his hope that we would sing with the kind of vigor and joy that Chief Justice Rehnquist had exhibited in singing.

The service included remembrances by President George W. Bush and Justice Sandra Day O'Connor. President Bush made an eloquent tribute in which he expressed appreciation to the Chief Justice for his leadership of the judicial branch and his contributions to our nation. Justice O'Connor spoke movingly of her friendship with Chief Justice Rehnquist

beginning in the late 1940's at Stanford and told of the affection and respect of all of his colleagues for the Chief Justice.

His son, James Cornell Rehnquist; his daughter, Nancy Rehnquist Spears; and his granddaughter, Natalie Ann Rehnquist Lynch (named for the Chief Justice's deceased wife), followed with remembrances that highlighted the Chief Justice's devotion to his family and that portrayed vividly the warm and loving relationship that existed among the family members, as well as his keen sense of humor and competitiveness. James Rehnquist observed that his father's interest in geography equaled his interest in the law. When meeting people for the first time, Chief Justice Rehnquist frequently inquired where they were from, following up the inquiry with questions or observations about that region. Many of the speakers made reference to his love of reading and to his prodigious memory. All paid tribute to his devotion to his family and country.

Chief Justice Rehnquist has been a faithful and devoted supporter of the Society throughout his career, and particularly since he became Chief Justice in 1986. To the best of my knowledge, he presided over every annual dinner since 1986 with the exception of the one this past June when illness precluded his attendance. In the last two years of his service on the Court, the Chief Justice provided unprecedented support to the Society by his advocacy of the John Marshall Coin legislation. Writing for the Court as a whole, he penned a letter urging passage of the bill, and later in an extraordinary gesture, appeared in person before a House Committee to testify on its behalf. When the hard-won coin was due to be unveiled this spring, he authorized the use of the Upper Great Hall of the Supreme Court Building for a ceremony marking its official launch. (See page 4 of this issue for an article about the coin launch event.) His title as Honorary Chairman does not adequately describe his work for the Society, as his interest in our organization has far surpassed the level of involvement usually associated with an honorific title, and his loss will be keenly felt by all of us.

In keeping with our past practices, more lengthy articles, reminiscences and memorials will be published hereafter in the *Journal of Supreme Court History*, examining his judicial service, and focusing particularly on his leadership as Chief

Justice. In this letter, let me simply express my profound personal appreciation – and I am sure the gratitude of all other trustees – for the life of this great and good man and for all that he did for the Society and for our nation.

As is the nature of national institutions, while we mark with regret and appreciation the passing of one Chief Justice, we also welcome the opportunity to work with his successor, Chief Justice John Roberts. I am pleased to report that he has agreed to serve as Honorary Chairman of the Society. The new Chief Justice is no stranger to the Society. He has been a member for many years, and over the last decade has frequently taken time from his arduous professional schedule to serve as a lecturer and facilitator in the Summer Institute for High School Teachers. In 2004, Chief Justice Roberts delivered the Annual Lecture and he has published articles in the *Journal of Supreme Court History*. It is with great anticipation that we look forward to working with him in the coming years.

Of course, the third notable change I would like to mention is the impending retirement of Justice Sandra Day O'Connor. A dedicated and loyal friend to the Society, she has been actively involved in our activities throughout her service on the Court. Justice O'Connor almost adopted the Summer Institute for teachers. Her annual presence and warm welcome to the high school teachers from across the United States attending the program each year was a highlight of the

experience in Washington. She has hosted activities of the Society ranging from receptions to the Silverman Lectures. Indeed, in the absence of Chief Justice Rehnquist this past June, Justice O'Connor hosted the Society's Annual Meeting. At her suggestion, the Society commissioned scale models of the Supreme Court Chamber and the Restored Supreme Court Chamber in the Capitol Building, providing visitors to the Court a unique view of these chambers in one place, and even when the current chamber is in use. It has been a privilege to work with her so closely and the Society has benefited greatly from her support and advice. She graciously accepted our invitation to become an Honorary Trustee as of the date on which her retirement becomes effective.

These changes in the makeup of the Supreme Court underscore the evolving and living nature of the Court and its work. Chronicling and preserving its history and the history of the eminent jurists who serve, and have served thereon, seems especially important and meaningful at such a juncture. With the support of our members and public minded donors, the Society is committed to continue to do its best to provide educational programming and publications that will appropriately celebrate this great American institution.

Frank Jones

This new book by Justice Stephen G. Breyer, and many other outstanding titles, can be purchased through the Society's Gift Shop by calling (202) 554-8300, toll free (888) 539-4438, or by visiting the gift shop component of the Society's website at www.supremecourthistory.org.

Active Liberty : Interpreting Our Democratic Constitution

By Stephen Breyer

This book by Justice Stephen Breyer defines the term "active liberty" as a sharing of the nation's sovereign authority with its citizens. Regarding the Constitution as a guide for the application of basic American principles to a living and changing society rather than as an arsenal of rigid legal means for binding and restricting it, he argues that the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems. He also insists that the people, through participation in community life, can and must develop the experience necessary to govern their own affairs. With a fine appreciation for complexity, Breyer reminds all Americans that Congress, rather than the courts, is the place to resolve policy disputes. Hardcover. Item # 263131 \$21.00

Members \$16.80

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STEPHEN
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ACTIVE
LIBERTY

INTERPRETING
OUR DEMOCRATIC
CONSTITUTION

COIN LAUNCH EVENT MARKS JOHN MARSHALL COMMEMORATIVE SILVER DOLLAR



Justice Stephen G. Breyer hosted an event commemorating the production of the John Marshall Silver Dollar, joined by Director of the Mint, Henrietta Holsman Fore (left) and Frank C. Jones (right)

Similar past events have included hot air balloons and brass bands, but in keeping with the dignity of the Supreme Court, the ceremony celebrating the minting of the Chief Justice John Marshall Commemorative Silver Dollar was more restrained. Held in The Great Hall of the Supreme Court, the open doors to the Courtroom provided a backdrop for the ceremony. Justice Stephen G. Breyer hosted the event and was joined by Society President Frank Jones and Director of the Mint Henrietta Holsman Fore for a brief program celebrating the production of the coin. Justices Ginsburg and Souter and several officers of the Court also attended.

Photographs of the obverse and reverse of the coin flanked the speaker's platform so that Marshall appeared to oversee the proceedings. The new silver dollar marks the 250th anniversary of the Chief Justice's birth on September 24, 1755, and pays tribute to his long and distinguished service on the Supreme Court. It is the first coin ever produced by the US Mint to honor the Supreme Court or the federal judiciary.

Justice Breyer told the audience, "Oliver Wendell Holmes once said, 'If American law were to be represented by a single figure, skeptic and worshiper alike would agree without dispute that the figure could be one alone, and that one would be John Marshall.' This commemorative coin will, I hope, provide an opportunity to educate all Americans about 'the Great Chief Justice.'"

Frank Jones commented that the "remarkable, larger-than-life statue of John Marshall located on the ground floor of the building betokens his 'larger-than-life impact upon this great nation and the Supreme Court that he so admirably served

for 34 years. Anticipating what would be the 250th anniversary of the chief justice's birth in 2005, two years ago the Society decided to request that Congress pay homage to Marshall in the form of a commemorative coin. The coin we are unveiling today represents the culmination of that dream."

"This historic commemorative silver dollar will raise public awareness of the life and work of John Marshall, an outstanding citizen, soldier, legislator, Secretary of State and Supreme Court Chief Justice in the crucial formative years of the American republic," United States Mint Director Henrietta Holsman Fore told the guests. "And the reverse of the coin draws us into the Chief Justice's world in the Old Supreme Court Chamber."

Designed by United States Mint sculptor/engraver John Mercanti, the obverse of the Chief Justice John Marshall Silver Dollar features a portrait of John Marshall based on a painting executed by French painter Charles-Balthazar-Julien Fevret de St-Memim completed in March of 1808. The sketch depicts Marshall in profile, his hair tied with a ribbon. The reverse, designed by United States Mint sculptor/engraver Donna Weaver, features a view of the distinctive Restored Supreme Court Chamber in the Senate wing of the US Capitol Building. That chamber was designed by noted American architect Benjamin Henry Latrobe. Construction began in November 1806, and the first session of Court held in that chamber was in February 1819, with John Marshall presiding.

Marshall is a unique and iconoclastic figure in American



Director Fore displays a John Marshall coin during the ceremony held in the Great Hall of the Supreme Court Building on May 4, 2005.



President Jones, Director Fore (left) and Justice Breyer all made comments concerning the significance of the coin in the commemoration of the 200th anniversary of the birth of Marshall.

history, but outside the legal community many Americans are unaware of his contributions to the development of the country. In his testimony before Congress the late Chief Justice William Rehnquist said: "While people all over the country are familiar with the likes of George Washington, Thomas Jefferson and Benjamin Franklin, significantly fewer know about the remarkable contributions of the Chief Justice. A commemorative coin could provide an opportunity to educate all Americans about the man known as 'the Great Chief Justice.'"



Donna Weaver stands beside a photographic depiction of her artwork of the Restored Supreme Court Chamber. Her work appears on the reverse of the John Marshall coin.

Following the ceremony, Director Fore signed certificates of authenticity for the coin. Ms. Fore was joined by Donna Weaver, the designer of the reverse of the coin, who countersigned certificates. The coins were minted at the Philadelphia Mint, the nation's first mint and are available for purchase through the Society's Gift Shop. A portion of the sales price for each coin devolves to the Supreme Court Historical Society and the proceeds will be used to support the Society's educational programs. (See page 16 for information about ordering coins.)



Ad Hoc Coin Committee Chairman Ralph Lancaster (second from left) poses with Society Trustees and Ad Hoc Coin Committee members James Morris III (left) and Philip A. Lacovara (second from right) and Society Trustee and Treasurer, Sheldon S. Cohen (right).

two Rehnquist law clerks stood watch on either side of the casket, rotating every hour. On the afternoon of Wednesday, September 7, 2005, a private funeral service was held at St. Matthew's Cathedral in Washington, D.C. Speakers included Justice Sandra Day O'Connor, not only a Supreme Court colleague but also a longtime friend and classmate at Stanford University Law School. Her talk was followed by a tribute from President Bush. Several family members, including Rehnquist children James and Nancy, spoke at the service. Later in the day, the Chief Justice was interred in Arlington Cemetery in a private ceremony.

In accordance with Court tradition, Chief Justice Rehnquist's Bench Chair and the Bench directly in front of it were draped with black wool crepe. This drapery was added in addition to the black drape hung over the Courtroom doors. The tradition dates back at least as far as the death of Chief Justice Salmon P. Chase in 1873, and is believed to have been followed for every sitting Justice who has died since, the last being Associate Justice Robert H. Jackson in 1954. The drapery is traditionally left in place for the thirty day mourning period or until a successor joins the Court.

As events have unfolded, Justice O'Connor is currently serving on the Court awaiting confirmation of her successor. President Reagan nominated Sandra Day O'Connor to serve on the Supreme Court in 1981. Her appointment as the first woman to join the Court was only one of a series of "firsts" in her career in which she has overcome gender barriers repeatedly. Her long and distinguished service will continue into the current Term. She was present on the Bench for the opening session of the 2006 Term with Chief Justice Roberts presiding.

As is customary, tributes to and reminiscences of Chief Justice Rehnquist and Justice O'Connor will appear in upcoming issues of the *Journal of Supreme Court History*. Their many contributions to the Court and the development of its jurisprudence will also be considered in that publication. A biographical article about Chief Justice Roberts will appear in a future issue of the *Quarterly*.

In addition to their outstanding service on the Bench, Chief Justice Rehnquist and Justice O'Connor have provided



President Reagan introduced his nominee to the Supreme Court, Sandra Day O'Connor, in a press conference in the Rose Garden in 1981.

vital and enthusiastic support to the Society. Chief Justice Rehnquist has served as the Honorary Chairman of the Board since his appointment as Chief Justice, providing important assistance and direction to the Society. Both prepared and delivered an Annual Lecture at the Society's Annual Meeting and hosted lecture programs, meetings, dinners and other special events.

Acting on behalf of all the members of the Court, the Chief Justice wrote to Congress urging support of the Society's John Marshall Coin Bill. In a remarkable show of support, he personally appeared before a Congressional Committee to testify on behalf of the Bill, providing invaluable and persuasive support for the legislation.

Justice O'Connor has also exhibited strong support of the Society throughout her service on the Bench. One of her most notable activities on behalf of the Society has been her participation in the Summer Institute for Teachers. A firm believer in the importance of education and the valuable and essential contributions made by educators, she has taken time every year since the program's inception to host a reception for Institute participants at the Court. At these receptions, she has spoken to the teachers collectively, and in many cases, individually, taking additional time to pose for photographs with them.

The Society is fortunate to have a relationship with the new Chief Justice. Chief Justice Roberts has been a member for many years. He too has already demonstrated an interest in and enthusiasm for Society activities. He delivered the Annual Lecture in 2004 and has been actively involved in the Summer Institute program as an instructor and facilitator. Indeed, he highlighted these activities during the Senate Judiciary Committee hearings prior to his confirmation.

All three have given generously of their time to support and further the work of the Society, and their influence has been profound and will be long-lasting. The Society is grateful for the many contributions made by these three distinguished members of the Supreme Court.



Justice O'Connor delivered the Society's Annual Lecture in 1988. The late Justin A. Stanley, a past President of the Society, introduced her on that occasion.



The Chief Justice's Chair and the Bench in front of it was draped in observance of the death of Chief Justice Rehnquist.



Former clerks to Chief Justice Rehnquist carry the casket up the front steps of the Court past the members of the Court standing on the steps in order of seniority.



The portrait of Chief Justice William H. Rehnquist, painted by Thomas Loepp, was completed in 1994. The globe in the background was presented to him by his clerks in recognition of his great love of geography.

Photographs by Steve Petterway, Collection of the Supreme Court of the United States



The flag draped casket of Chief Justice Rehnquist lay in repose in the Great Hall from Sept. 6 through mid-day Sept. 7, 2005.



Chief Justice Rehnquist's portrait was displayed at one end of the Great Hall while he lay in repose.

LONGEVITY ON THE BENCH: THE EXAMPLE OF JOHN MARSHALL

By Professor James B. O'Hara

Editors' Note:

On April 21, 2005, the Supreme Court Historical Society was a cosponsor of an Annual Gala under the auspices of the Historical Society of the United States District Court for the District of New Jersey. The event, held in the Federal Courthouse in Camden, commemorated Judge Stanley S. Brotman's thirty years of service on the Federal Bench. The Society was represented by Executive Director David Pride, and the keynote speaker was Society Trustee and Publications Chairman, James B. O'Hara. Professor O'Hara's topic, appropriate to the occasion was "Longevity on the Federal Bench—The Example of John Marshall." In light of the long service of Chief Justice Rehnquist and retiring Associate Justice Sandra Day O'Connor, the subject seems especially relevant to this issue of the *Quarterly*.

For me, a legal historian with special interest in the Supreme Court of the United States, the topic of longevity of service on the federal courts is timely, especially if we use John Marshall's life as a point of departure. This year marks the 250th anniversary of Marshall's birth. To commemorate that birthday, Congress has authorized the United States Mint to strike a special one dollar silver coin, introduced in May in special ceremonies at the Court.

The point of this presentation is that the great contribution to the Constitutional development of the American tradition which John Marshall made would not have been possible had his service been of short duration, and that indeed, had he served only a short time, the early federal Courts might well have plunged into incurable disorder.

To this audience, John Marshall needs little introduction. Born in Virginia, he served as an officer in the Revolutionary Army, seeing combat at Brandywine and Germantown in Pennsylvania, and here in New Jersey at Monmouth. During the wretched winter of 1777, he was with Washington at Valley Forge. The war over, Marshall studied law at William and Mary in the days before formal law schools.

His legal training consisted of only one semester of lectures given by the great Virginia lawyer, George Wythe, signer of the Declaration of Independence, one of the great

transition figures of history. As a young man, Wythe had taught Thomas Jefferson. In his later years, he was mentor to Henry Clay.

Marshall was admitted to the Bar in 1780, and for the next 15 years, he gradually built his practice in Richmond to the point where it was substantive and lucrative. Initially, deep involvement in public life did not interest him.

He was over 40 when President John Adams appointed him a member of a special three-person mission to France—a position which everyone believed would be of short duration. But this embroiled him in the so-called "XYZ" affair, occasioned when bribes were solicited for high officers of the thoroughly corrupt revolutionary French Government.

Marshall's principled response to this incident made him an overnight celebrity in the United States. Within a year, he was a Congressman from Virginia, and before he had even served a full two-year term, he was Secretary of State for John Adams. Before yet another year had elapsed, he was Chief Justice.

This is, perhaps, the appropriate place to discuss the confusion and chaos surrounding the Supreme Court in its earliest days. In George Washington's first term, the Court had only six Justices—a Chief and five Associates. But the position of Supreme Court Justice was not really coveted; Washington had to appoint three Chief Justices in his eight years as President. Premature deaths and ill health took a regular toll. One Justice resigned to become Chief Justice of his home state court, another to become Governor. Morale among the Justices was very low.

The reasons for all this can be enumerated simply:

1. The Supreme Court had not yet become a constitutional court. Many of the cases were routine, hum-drum, involving tedious admiralty analysis.
2. The Supreme Court is an appellate Court. In these early days, the lower Federal Courts were not yet generating a sufficient number of appeals to make the higher court interesting.
3. The Justices followed the English practice of *seriatim* opinions: each Justice wrote a one-or-two

paragraph rationale for his vote. Writings so brief could hardly flesh out deep insights into the law, or give much direction to lower Courts, nor could they facilitate real discussion among the Justices or offer any opportunity for a judge to acquire reputation or distinction.

4. The pay of Federal judges was poor. Then as now, a judge earned far less than could be made in a high level private practice.

5. But the fifth and final reason for the low morale and prestige of the Supreme Court was the tedious requirement of Circuit riding: traveling from place to place in assigned districts to hear trials.

Under the terms of the original Judiciary Act, the Justices were given trial and appellate duties at lower level courts, apparently because Congress believed they would not be busy enough otherwise. This arduous travel would have been difficult even for younger judges, but for Supreme Court Justices of middle age or greater, it was drudgery.

Roads were unpaved, dusty in hot weather, muddy in the rain, frozen in winter. Inns along the way were not always reputable. They were noisy and unsanitary, often overcrowded with strangers sharing a room, or even a bed. Coach travel was dangerous, with frequent breakdowns and accidents. Justice Samuel Chase, a Washington appointee, was once thrown from a barge during a winter storm, and had to be fished out of the Susquehanna River while traveling from Maryland to Delaware.

It is not surprising that able lawyers and judges found it easy to decline a Supreme Court appointment. At least two Justices, Thomas Johnson and Alfred Moore, resigned because of the sheer physical rigor.

The Justices met as a body to consider appeals in the capital city—originally New York, then Philadelphia, finally Washington—for only a few weeks each year. So when Oliver



Alfred Moore resigned from the Court complaining of the rigors of riding circuit.



Had William Paterson (above) been appointed to serve as Chief Justice by Adams, John Marshall might not have sat on the Supreme Court.

Ellsworth, the third Chief Justice resigned, the President had no great plum to offer a follower. Moreover, the reelection campaign of 1800 had been a disaster for John Adams personally, and for his fellow Federalists generally. Not only did he lose, but the election also saw the defeat of many of his stalwart Federalist supporters in the Senate. Ellsworth's tender of resignation to the lame duck President meant that the position would have to be filled at once, before Jefferson's inauguration and before the new Senate was sworn in.

John Marshall was not Adams' first choice. One prospective appointee with considerable support was already an Associate Justice. William Paterson—like the President of strong Federalist sentiment—had originally been chosen for the high bench by George Washington. A former Governor of New Jersey (the city of Paterson is named for him) Associate Justice Paterson was the right age at 55, and was well connected with leading Federalists. That strength, however, was also a drawback. Paterson was aligned with Alexander Hamilton's faction of the Federalist party at a time when Hamilton's open break with Adams was perceived to have contributed to Adams' defeat. So the President resolved to go outside the ranks of sitting Justices.

He nominated John Jay, who had already served as Chief Justice from 1789 until 1795. Jay had left the Court to become Governor of New York. As a seasoned diplomat, Secretary of Foreign Relations under the Articles of Confederation, confidante of Washington, co-author of the *Federalist Papers*, Jay was respected and perhaps more importantly, unaligned with any Federalist faction. He was quickly confirmed by the Senate without difficulty, and credentials were then sent to the nominee in New York. Adams had, in the haste required



Former Chief Justice John Jay absolutely refused to accept a second nomination to serve on the Court.

by the circumstances, presumed that Jay would accept. It was not to be. Jay refused the commission, making clear in his reply that he did not believe the Supreme Court had achieved, or would ever achieve, the importance of an equal branch of government. As he wrote to Adams:

I left the bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.

Hence I am induced to doubt both the propriety and the expediency of my returning to the bench under the present system.

Marshall was with Adams when Jay's refusal arrived. The President wondered about who the new nominee might be. Marshall's later autobiographical sketch records the President's next words: "I believe I must nominate you." His nomination was sent to the Senate on January 20. A week later, after some grumbling by Paterson's friends in the Senate, he was confirmed. He was only forty-four years old, and he was now Chief Justice. A few weeks later, on March 4, 1801, he administered the presidential oath of office to his old adversary and distant relative, Thomas Jefferson. The Jefferson Era of the American presidency had begun; so had the Marshall Era of the Supreme Court.

Everyone here is aware that Marshall's great contribution is in the area of constitutional interpretation. It must be remembered that the Constitution was still very new; it had been ratified in 1788, and the first meeting of the Supreme Court had taken place in 1790. The Constitution was created by compromise. The ultimate meaning of many of its clauses would be determined by subsequent use. The first serious constitutional questions were faced by the Marshall Court. *Marbury v. Madison* (1803) was decided in his early years as Chief Justice. It is arguably the most important legal decision ever rendered by an American Court, for in it, Marshall convincingly and conclusively decides that the Supreme Court

is empowered to exercise judicial review, that is, that the Supreme Court can declare an act of Congress unconstitutional. In *McCulloch v. Maryland* (1819), he wrote an opinion affirming the implied powers granted to the federal government under the Constitution.

The *Dartmouth College Case* (1819) insisted on the binding nature of contracts; *Cohens v. Virginia* (1821) claimed Supreme Court jurisdiction over the judicial findings of state courts; *Gibbons v. Ogden* (1824) was the first important case endorsing federal authority over interstate commerce; *Fletcher v. Peck* (1810) substantiated the power of federal courts to declare state laws unconstitutional.

Yet it can be persuasively argued that many of these results might well have been obtained in any event—if not by Marshall, then by someone else; if not in the early 1800's, then sometime, for the inexorable march of history would ultimately have demanded them.

Indeed, it might well be argued that John Marshall's greatest contribution to the Supreme Court was not his decisions, however lucidly and convincingly he wrote them, nor was it yet the Hamiltonian, Federalist vision he brought to his constitutional *corpus*, however much that view ultimately has triumphed. Marshall's great contribution was that he served so long. That length of service had three effects:

1). Tenure brings stability, a truth perhaps understood and underlined by the Constitutional Fathers who made judicial appointments lifetime.

Marshall led the Court for a period three times longer than the three Chief Justices before him, combined. The



John Adams (above) considered his appointment of John Marshall as Chief Justice his "proudest" act as President.

turnover of Associate Justices likewise lessened. Bushrod Washington, appointed shortly before Marshall, served thirty years; William Johnson, thirty; Brockholst Livingston, sixteen; Thomas Todd, nineteen; Joseph Story, thirty-three; Gabriel Duvall, twenty-four.

With longer terms on the Bench, an opportunity for the development of individual judicial philosophies was offered. Justices got to know each other, and we begin to see the healthy clash of these philosophies in dissents. Friendships formed; the Supreme Court became a kind of brotherhood. Although Marshall was never able to convince a parade of hostile administrations to abolish circuit riding, he was able to institute another practice which advanced the collegiality and morale of the Court. During their regular visits to Washington to hear appeals, he insisted they stay at the same boarding house and gather regularly for meals to discuss not only the oral arguments of the day, but also to exchange views on other subjects. Fast friendships were formed even among Justices of differing political parties and philosophies.

2). Marshall's long service gives us the opportunity to reflect on a second aspect of longevity: It invites a dialogue with the past. Oliver Wendell Holmes reminds us that in many respects, law is history. It is not a cold, rational logic. It is a response to the way human beings are, to the cultures and governments and civilizations they have created. It is not by accident that the first question the law asks in the resolution of disputes is precisely: "How have we always dealt with this" or to put it in more lawyerly fashion, "What is the precedent?"

The long serving judge is always asking: "Where do these facts, where do these issues, fit? What precedents apply? And how? And why? Where does this case belong in a long stream of similar, but not quite identical cases?" The inexperienced new lawyer may find these answers only after long hours in a law library. (But I betray my age—I meant to say only after long hours in front of a PC). Longevity—long service—answers these questions more deftly, as Marshall did, with an instinct for the jugular, with an ability to put fact and law together into a context that makes sense.



Bushrod Washington, nephew and heir of George Washington, served thirty years on the Court.

3). Finally, longevity invites a dialogue with the future. John Marshall's name is now revered not because he decided cases, but because he got them right.

It is characteristic of the judge with long tenure that a kind of wisdom sets in. This becomes, over time, an uncanny instinct to sense where the law is going, to be able to sort out the things that are only fad and fashion. Marshall did this surprisingly well, so well indeed that he ultimately won over his political foes. When he died, the whole country mourned. He had not only outlasted his enemies; his sweet reason had converted many of them.

Late in his life, John Adams confided to his diary that his "proudest" act as President was the appointment of John Marshall. We may once again, and with a wry smile, thank the President for appointing a Chief Justice who would live so long.

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 welcome. You may also reach the Society through its website at www.supremecourthistory.org.

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The 2005 Chief Justice John Marshall Silver Dollar commemorates the 250th anniversary of the birth of the Great Chief Justice. The coins will only be minted through the end of calendar year 2005.

You can support the Society and be a part of history by purchasing coins. The Society will receive a portion of the sales price for every coin sold. Coins can be purchased through the US Mint at 800-USA-Mint, or through their website www.usmint.org.

Alternatively, you can purchase the coins through the Society's Gift shop. Pricing was set by the Mint in conformance with their requirements, and as a result, the customary member discount is not available. However, members can still purchase coins through the Society at a savings of approximately \$4 per coin. To place an order at the member price call the Gift Shop at (202) 554-8300, or toll free at (888) 539-4438, by fax at (202) 554-8619 or by visiting the website at www.supremecourthistory.org.



John Marshall Coin & Chronicle Set

In addition to the single coin options in both proof and uncirculated condition, this commemorative coin is also available as part of this *limited edition set*, which includes a **Chief Justice John Marshall Uncirculated Silver Dollar**, a Bureau of Engraving & Printing intaglio print of William Wetmore Story's 1884 sculpture depicting the Chief Justice seated in the robes of the Court and a revealing booklet on the life of Chief Justice John Marshall, written by the Supreme Court Historical Society. The slipcase includes **Certificates of Authenticity** from both **Henrietta Holsman Fore, Director of the United States Mint**, and **Tom Ferguson, Director of the Bureau of Engraving & Printing**. *This product is limited to 25,000 units.*
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