THE SUPREME COURT HISTORICAL SOCIETY

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INVESTITURE CEREMONY FOR JUSTICE KAGAN

Photos by Steve Petteway, Collection of the Supreme Court of the United States

Justice Kagan and Chief Justice Roberts greet the press following the investiture ceremony.

The formal investiture ceremony for Justice Elena Kagan was held on Friday, October 1, 2010, during a special session of the Court. Just prior to the ceremony, Justice Kagan was escorted into the well of the Courtroom where she sat while the session of Court was opened. The Justice wore a judicial robe presented to her by her former colleagues at the Harvard Law School where she had served as Dean. The chair used for the ceremony belonged to Chief Justice John Marshall and has been used in the investiture ceremonies of most of the Justices for almost forty years.

Following the Marshal's traditional call to order, Chief Justice Roberts called upon Attorney General Eric Holder to read the official commission of office signed by the President. The commission was then presented to the Clerk of the Court for recordation. Justice Kagan was escorted to the Bench where the Chief Justice again administered the judicial oath of office to her. She shook hands with colleagues and then took her place on the Bench. Seating at the Bench is dictated by seniority, with the Chief Justice occupying the center chair. The two most senior Associate Justices sit on the left and right sides of the Chief Justice, and the other Justices are seated in the same alternating pattern with the newest Justice seated at the extreme right end of the bench as the Justices face the Courtroom. The Chief Justice made brief remarks welcoming Justice Kagan to the Court after which the session was adjourned.

This administration of the oath was ceremonial in character. Justice Kagan had previously taken both oaths required for service on the Court in August so that she could begin preparing for the opening of the Term in October. As the Court was in recess at the time of her appointment, her Investiture Ceremony was delayed until a more convenient time.

President Obama attended the ceremony and was seated in the front of the well in the place reserved for the Court's most distinguished guests. Also seated in that section were the Court's retired Justices, John Paul Stevens, Sandra Day O'Connor and David Souter. Other distinguished guests included former Attorney General John Ashcroft, former acting Solicitor General Walter Dellinger, and acting Solicitor General Neal Katyal. Before leaving the chamber, President Obama exchanged brief remarks with the retired Justices. The

Photos by Steve Petteway, Collection of the Supreme Court of the United States

The four women who have been appointed to the Supreme Court to date, were photographed prior to the Investiture Ceremony. They are (left to right): Retired Justice Sandra Day O'Connor, Associate Justices Sonia Sotomayor, Ruth Bader Ginsburg and Elena Kagan.

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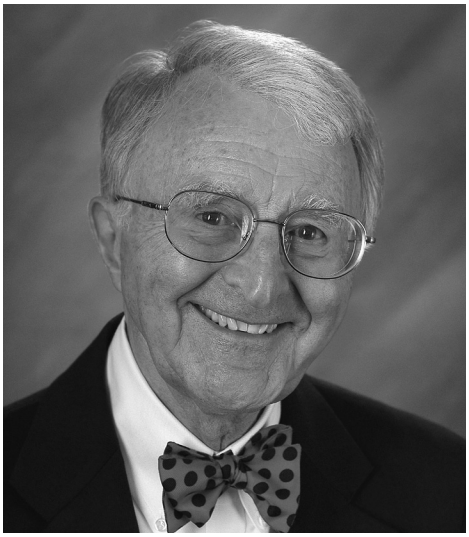
A Letter from the President



The ever vigilant Kathy Shurtleff brought to my attention two books in which daughters of Supreme Court Justices play a pivotal role which were published in this calendar year. As this is an unusual circumstance and both "daughters" have long and close associations with the Society and the history of the Court itself, I would like to bring them to your attention.

The first book is a critically acclaimed biography of Associate Justice Tom C. Clark written by his daughter Mimi Clark Gronlund. In the second book, Elizabeth Hughes Gossett, daughter of Chief Justice Charles Evans Hughes, is the subject in large part of a book that relates to the discovery of insulin. You may remember that I discussed Mrs. Gossett's role in the creation and operation of the Supreme Court Historical Society in its formative years in an earlier article. The stories relating to these "daughters" of the Court provide unique glimpses into diverse aspects of the history of the Court and the difficulty of living one's life in the public eye.

Supreme Court Justice Tom C. Clark, a Life of Service written by Mimi Clark Gronlund, with a Foreword by her brother Ramsey Clark, is the first full-length biography of the Justice to be published. In the interest of full disclosure, I note that long-time member of the Society, Evan Young, wrote a short biography of Clark while he was yet a student in high school. That book, the ambitious product of a class assignment, was one of the longest works on Clark written prior to the publication of Mrs. Gronlund's work. The new biography chronicles Clark's career and service on the Court as an Associate Justice from 1949-1967, as well as his other professional accomplishments. Clark, to date the only Texan to be appointed to the Supreme Court, came to that position from service as Attorney General of the United States from 1945-1949. As Attorney General, Clark handled matters concerning the aftermath of World War II, and the build-up of the Cold War, among other issues. As part of the "Warren Court" Clark ruled on important, and often controversial cases, many of which changed the judicial landscape of the country for years to come. One such was the landmark case, *Brown* v. *Board of Education,* ending segregation in public schools.

The book is the product of many years of work. Mrs. Gronlund researched archival materials, and added the more personal to that by conducting interviews with many of Clark's judicial colleagues, including Justices with whom Clark had served, as well as friends and other family members. The product is more than a memoir, providing a well-rounded picture of a lawyer and judge who dealt with difficult issues: segregation; the rights of the accused; school prayer; and censorship/pornography. Mrs. Gronlund traces his early life experiences in an attempt to show how they shaped his judicial philosophy and decisions, bringing an added dimension to the work. The book is a welcome addition to the biographical material on Justice Clark and gives a more complete picture of Clark than had been available previously. The book may be purchased through the Society's website or gift shop.

Breakthrough: Elizabeth Hughes, the Discovery of Insulin, and the Making of a Medical Miracle by Thea Cooper and Arthur Ainsberg recounts the story of the development of insulin utilizing a narrative approach. The struggle to develop insulin as an effective treatment for diabetes is told "through the prism of the fragile life of a young girl. . . . In 1918 Elizabeth Hughes stands in the kitchen of her family's elegant townhouse in New York City, fiercely gulping water from a glass. She is the daughter of Charles Evans Hughes, one of the city's most highly respected and recognizable citizens. Although Elizabeth doesn't yet know it, she has what was then an unerringly fatal disease—juvenile diabetes mellitus. In a few short months, what had been a happy, active childhood will be eclipsed by the mounting symptoms of a ravenous hunger and insatiable thirst."

Elizabeth's health failed with frightening rapidity. Diagnosed with the disease at age 11, she had dwindled to 45 pounds by age 14 because of the "starvation diet" approach used by traditional medicine—a process that had kept her alive, unlike many other diabetics. Her mother, Antoinette Hughes, learned of the pioneering research being conducted by Canadian doctors and, drawing on her husband's name and notoriety (by 1922 Hughes had served as Governor of the state of New York and as an Associate Justice of the Supreme Court of the United States), she was able to get Elizabeth into the experimental treatments. In Toronto she began to receive the insulin injections which would ultimately save and prolong her life (she died at age 74). Because of her father's prominent position, Elizabeth's treatment received a great deal of attention which helped to publicize the new treatment. Ultimately,

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Managing Editor Kathleen Shurtleff
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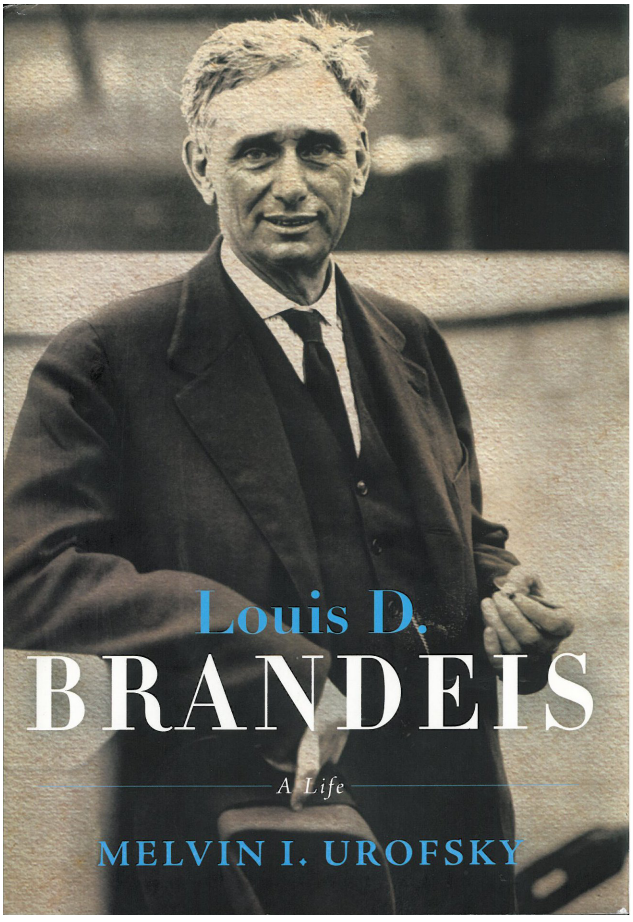
Hughes himself would play a fairly critical role in the story. Knowing first-hand the efficacy of insulin therapy, he wrote on behalf of Dr. Banting to the patent office to urge them to reconsider their ruling after Banting's initial request for a patent for insulin was denied. Obtaining that patent was a key factor in the ultimate availability of insulin to millions of Americans.

In telling Elizabeth's story, the authors had access to a number of personal letters and materials, including detailed journals of her food consumption. In later life, Elizabeth was very private about her diabetic condition and many of her friends and colleagues did not learn of it, or of the part she played in the development of insulin therapy, until after her death. The normal desire for privacy was increased because "w[h]en Elizabeth was treated with insulin, she became the most famous patient. Her treatment and remarkable recovery made headlines. So now, even in her recovery, she was inextricably linked to diabetes. . . . Instead of Elizabeth Hughes the face of diabetes, she [became] just Elizabeth Hughes."

The stories associated with these two Supreme Court "daughters" provide interesting insight into the larger tapestry of Supreme Court History. Elizabeth Hughes Gossett continued her role of pioneering in the Society where her leadership and support were of great importance both in the founding, and in the operation, of the Society in its first years. (I discussed her leadership in my Letter to the Members *in Quarterly Vol. XXXI, Number 1, 2009*.) Mrs. Gronlund, a longtime and active member of the Society, has shared some of her experiences as the daughter of a Supreme Court Justice in an article published in 1999 to mark the Centennial of Clark's birthday (*Quarterly Vol. XX, No. 3, 1999)*. Their stories and contributions to the history of the Society and the Supreme Court have made a lasting impact and add greatly to the history of the "Highest Court in the Land."



MELVIN UROFSKY'S BIOGRAPHY RECEIVES GRISWOLD PRIZE PRIZE LECTURE SCHEDULED FOR FEBRUARY 22, 2011

The Supreme Court Historical Society Publications Committee recently announced its selection of Professor Melvin I. Urofsky's new biography of Justice Brandeis, *Louis D. Brandeis*: *A Life,* as the recipient of the Erwin Griswold Prize. The prize is awarded on an occasional basis to the best book published in the field of Supreme Court History. The Griswold Prize honors the legacy of Erwin Griswold and his distinguished career in the law. In his long career he served as the Dean of Harvard Law School from 1946–1967, Solicitor General of the United States from 1967 to 1973, followed by the practice of law in the law firm Jones Day Reavis and Pogue. The book is a full-length biography of the famous Justice Brandeis and is the result of 40 years of research.

Associate Justice Elena Kagan will introduce Professor Urofsky's lecture on Louis Brandeis. The event will take place on Tuesday February 22, 2011 at 6 PM in the Supreme Court Chamber, with a reception to follow. Invitations to the event will be mailed to all members of the Society. Tickets are $30 each. Seating is limited and reservations must be made in advance. Please contact the Society if you have questions by calling (202) 543-0400.

JUSTICE O'CONNOR SPEAKS AT MT. VERNON

Courtesy of Mount Vernon, Photos by Russ Flint

Justice O'Connor (center) shakes hands with guests on the porch of Mt. Vernon prior to delivering her lecture on Justice Bushrod Washington.

In October, the Society partnered with the Mount Vernon Ladies Association (MVLA), the organization which manages and cares for the Mount Vernon estate, to sponsor two events. The first program was held on October 5 at Mount Vernon where Retired Justice Sandra Day O'Connor delivered a lecture on Associate Justice Bushrod Washington. Later in the month, on October 21, the Frank C. Jones Reenactment of the 18th century case *Ware v. Hylton* took place in the Supreme Court Building. The first event was hosted by MVLA with Society co-sponsorship. The Jones Reenactment was a regular presentation of the Society with MVLA co-sponsorship. These partnership events were created at the suggestion of Mrs. Martha Ann Alito who thought the interests of both organizations would be well served through cooperative programming.

In the early evening of October 5, guests gathered for a reception on the back porch of the Mount Vernon mansion. The rooms on the ground floor were candlelit and the view over the river was largely comparable to the one which guests of President Washington would have enjoyed. Following the reception, guests followed a lantern-lighted path to the Robert H. and Clarice Smith Theater where Justice Sandra Day O'Connor spoke about the life and career of Associate Justice Bushrod Washington. Mrs. Boyd Ainsley, MVLA Regent, introduced the Justice and gave a short presentation about the estate and its preservation, highlighting Bushrod Washington's experiences.

Justice O'Connor considered Justice Washington's life and service on the Supreme Court and his management of Mount Vernon. As the "favorite nephew" of the childless President Washington, Bushrod enjoyed the special interest and advice of his uncle not only as a child but throughout his active career. He studied the classics with Richard Henry Lee, a noted figure in Virginia history and later attended William and Mary from which he graduated at the age of 16. He took legal courses there under George Wythe, himself a distinguished early teacher of the law and a signer of the Declaration of Independence. John Marshall was a fellow student with the future Justice and their friendship and collegiality endured for the lifetimes of both. Washington's legal training was interrupted by service in the Continental Army during the final stages of the War for Independence.

Following the War, he commenced the practice of law and tutored many students in the law. At his Uncle's suggestion, he ran for and was elected to a seat in the Virginia House of Delegates where he served with his old classmate, John Marshall. He also served as one of the delegates at the Virginia

Collection of the Supreme Court of the United States

Bushrod Washington inherited Mount Vernon from his uncle, George Washington.

Photos Courtesy of Mount Vernon, Photos by Russ Flint

Justice O'Connor spoke about Justice Washington's career and his difficulties managing the estate of Mount Vernon.

Convention for ratifying the Constitution. Physically he was a small, rather unprepossessing figure, somewhat unkempt in his appearance. He shared that latter trait with his friend John Marshall who was frequently reported as being carelessly dressed. Washington suffered poor health most of his adult life and lost the sight in one eye. But his appearance and health belied his capabilities and determination, as he was respected for his legal acumen.

Guests enjoyed the unspoiled view over the Potomac during the reception prior to the lecture. (above photo and below)

Even though President Washington took a keen interest in his nephew's life and career, he did not believe in nepotism. At one point, the President denied Bushrod's request to be appointed United States Attorney for Virginia, and it is unlikely that he would have been comfortable elevating Bushrod to the Bench. John Adams, the second President, appointed Bushrod Washington to the Supreme Court following the death of James Wilson. It was Adams' first appointment to the High Court. Justice Washington served ably and well for 31 years. Most of his tenure fell under the leadership of Chief Justice John Marshall who was appointed in 1801. Like most of his colleagues who served under Marshall, he was somewhat overshadowed by the dominating presence of the Great Chief Justice. But some legal scholars maintain that since Marshall and Washington were near neighbors in Richmond and saw each other on an almost daily basis, that the lesser known Washington actually played a major role in the sharpening of Marshall's legal philosophy and expression.

Although physically frail, Washington exhibited great courage as he defied threats against his life during his service on the Pennsylvania Circuit. In the course of those duties, he sentenced a Pennsylvania militia general to jail for obstruction of federal process, and became an expert in the area of admiralty law. Marshall frequently relied upon Washington's expertise in that field when drafting opinions. In his 29 years of service with Marshall, Washington disagreed with him only three times, but that result was not achieved by sacrificing his own viewpoints. Indeed, it was Washington who forced Marshall into his only dissenting role on a constitutional question in the landmark opinion of *Ogden v. Saunders.* In that instance, Washington broke a tie within the Court by voting in favor of state insolvency laws.

Washington and his wife assumed the ownership of Mount Vernon following the death of Martha Washington. When Bushrod inherited the estate, it was already in need of repair and was for many years unprofitable. Unfortunately, his ability to operate the farm and estate did not match his legal acuity. He had no farming experience and managing the estate was expensive and time-consuming. The extensive travel required to perform his circuit duties made management even more difficult.

Coincidentally, Bushrod Washington also died childless and ownership of the estate moved to one of his nephews. The estate became all but derelict prior to the Civil War. A group of concerned and patriotic ladies worked together to raise funds to purchase and begin renovations and from that time, MVLA has worked tirelessly to preserve and improve the estate.

FRANK C. JONES REENACTMENT

Justice Samuel Alito served as the Court during the 2010 Frank C. Jones Reenactment, presiding over the reenactment of the 18th century case, *Ware v. Hylton.* Society Trustees Philip Lacovara and Richard (Doc) Schneider appeared as the legal advocates in the argument. *Ware v. Hylton* dates from the 18th century and is often referred to as the "British debt case." Professor Melvin Urofksy provided an introduction to the case, putting it in the context of the time period. The text of his introduction appears on page 7 and 8.

After Prof. Urofsky's presentation, Mr. Lancaster introduced the participants, giving a brief biographical sketch of each. The session was "officially opened" when Marshal Pamela Talkin called the Court to order using the traditional "oyez, oyez" call with which all official sessions of the Court are opened. Justice Alito prefaced the arguments by providing the audience background about the Court's membership at the time of the argument. During the formative years of the Court, there were only six members. However, at the time *Ware v. Hylton* was argued, there were only five members of the Court, and the position of Chief Justice was temporarily vacant. This vacancy had been created when the Senate refused to confirm the recess appointment of John Rutledge, nominated to succeed John Jay. Oliver Ellsworth was appointed to fill the vacancy, but did not join the Court until March, 1796, approximately a month after the case was heard and decided.

Justice Alito "introduced" the Justices who comprised the Court in February 1796 when the case was heard. They were: James Iredell of North Carolina, Samuel Chase of Maryland, James Wilson of Pennsylvania, William Paterson of New Jersey, and William Cushing of Massachusetts. The Justice quipped that he had originally thought he would "be" Samuel Chase for the evening as they both shared the same first name, but discounted that idea after remembering that Chase had come close to removal from office after impeachment. Instead, he said he would "be" William Paterson, as they were both from New Jersey. He commented that in addition to the unusual circumstance of the absence of a Chief Justice, was the fact that the case was actually decided by only four of the five Justices serving at the time. James Iredell had heard the case while on Circuit duty, and thought it inappropriate to participate at the Supreme Court level. He did, however, enter a written opinion on the case subsequently.

Trustees Richard (Doc) Schneider and Philip Lacovara presented oral argument in the reenactment.

Photos courtesy Steve Petteway

Justice Alito acted as the Court during oral argument for the case, providing background about the make-up of the Court at the time of the argument.

Messrs. Schneider and Lacovara provided thoughtful and lively arguments supporting their respective sides. Justice Alito asked probing questions from the Bench, engaging the advocates in discourse. Each advocate was limited to 20 minutes per side, and the red and white lights were utilized on the podium to signal the time. In 1796, there were no time limitations on advocates.

At the conclusion of the argument, Justice Alito "announced" the opinion of the Court, informing the audience of the actual outcome in the case. The case was decided against the defendant, thus overturning the Virginia law which was in conflict with the Treaty ending the Revolutionary War. The Court found that the Treaty trumped the Virginia law and that debts incurred prior to the War were valid debts still owed to creditors. This decision was an early example of the Court's declaration of the unconstitutionality of a state law.

It might be noted that *Ware v. Hylton* was the only case argued by John Marshall before the Court. He argued the case some five years before he was appointed Chief Justice of the United States. Interestingly enough, he lost the case.

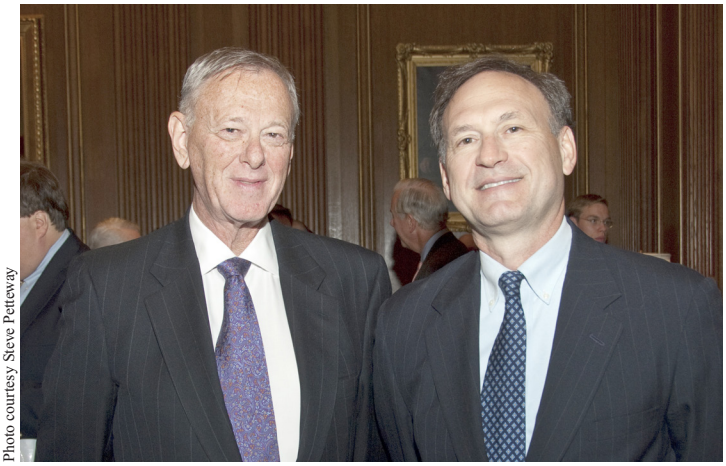


Photo courtesy Steve Petteway

Professor Urofsky and Justice Alito enjoy the reception following the reenactment.

Although the honorable judge and learned counsel will not be wearing periwigs tonight, I would ask you to try to imagine yourself back in 1796, on the morning of February 6, to be exact, in the handsome Georgian room in the Philadelphia city hall where the Supreme Court of the United States holds it sessions.

It is only two decades since the Continental Congress met in this city across the square and drafted the declaration declaring our independence from Great Britain. It is only thirteen years since we signed the Treaty of Paris ending our war with the mother country.

Only nine years ago another group of men met in the same hall and drafted the document now known as our Constitution, and seven since George Washington became our president and Congress met and established the Supreme Court.

That Court will today hear argument in what one of its members, Justice James Iredell, calls "the greatest Cause which ever came before a Judicial Court in the World." While a little hyperbolic, it is a view shared by many of our citizens, especially those who live in Virginia, because the outcome of this case will affect them, for better or for ill, more than those in any other state.

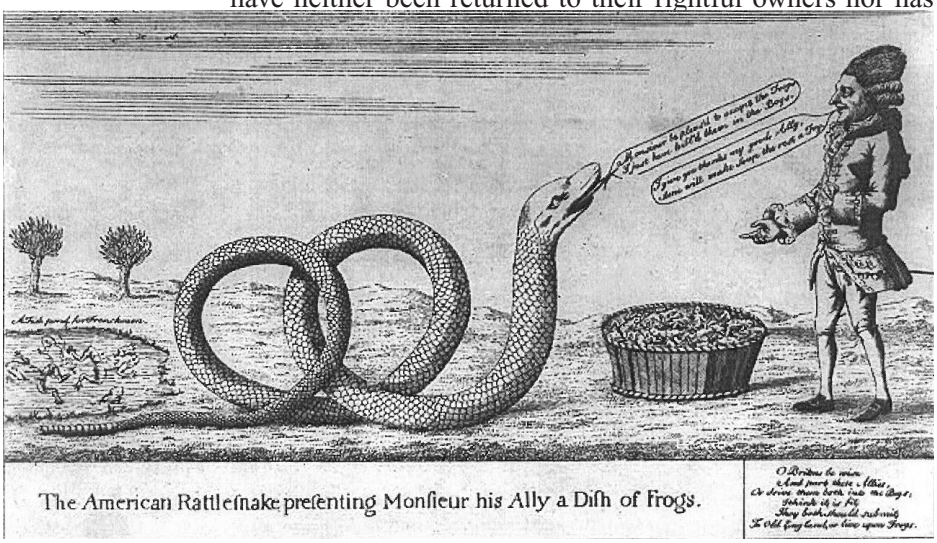
As you well know, the mercantile system that was at the heart of the British imperial economy had us folk in the colonies growing or otherwise providing raw materials to England, and then we bought finished goods from England. But this arrangement always favored Great Britain, and so the only way we could pay for those goods was to borrow money.

In the southern colonies planters borrowed against their crops of flax or tobacco, and then paid down some of their debt when they sold those crops. Over the years, however, many planters, especially the large plantation owners in Virginia, ran up substantial debts to British merchants, who made money not only by handling the sale and distribution of the crops, but on interest as well. By the time of the Revolution, Americans owed hundreds of thousands of pounds to British creditors.

During the war for independence, many states passed laws that allowed those of us who owed money to English creditors to pay these debts, not in pounds sterling, but in the depreciated paper currency that circulated during the war and which was such a burden on all of us afterwards. In Virginia a special office was set up in 1777 by the so-called Sequestration Act, in which the state confiscated all debts owed to British citizens, and allowed Virginians to discharge their debt in paper currency issued by the state. The General Assembly went even further in 1782 and actually suspended enforcement of many debts. Naturally, British creditors demanded payment of debts owed to them, and they wanted payment not in what they considered worthless continental paper, but in real money, the British pound. Article 4 of the Peace Treaty, after all, explicitly provided that "Creditors on either Side shall meet with no lawful Impediments to the Recovery of the full Value in Sterling Money of all bona fide Debts heretofore contracted."

In the 1780s, however, British creditors found it impossible to collect prewar debts. State courts in many instances refused to hear their suits, or else allowed the defendant debtors to delay and delay. Our litigant tonight, for example, once just did not show up at a scheduled hearing, and the judge very compassionately carried the suit over for several months.

I should note that many people—legislators, debtors, and just plain patriotic folk—believe that Article 4 can and indeed should be ignored because Great Britain has not carried out the terms of the Paris Treaty. The Crown was supposed to abandon the forts in the western territories, in areas now claimed by our states. British soldiers also carried off an untold number of slaves during and at the end of the war, and those slaves have neither been returned to their rightful owners nor has



Library of Congress, LC-USZ62-1536

In addition to their concerns about debt collection from the United States, the British were concerned about the growing friendship between the United States and France. This cartoon portrays the United States as a rattlesnake offering frogs to their French allies.

restitution been made.

After our Congress passed the Judiciary Act in 1789 and set up the federal court system, British creditors flocked in, believing they would get fairer treatment than they had obtained in state courts. Some British folk I have spoken to say that has not been the case, and they point to this suit to make their point.

It began more than six years ago, in 1790, when William Jones, a British merchant, sued Daniel Hylton and other Virginians to recover debts dating from 1774 and amounting to a little under 3000 pounds. (My friend Benjamin Franklin tells me that in two hundred years that amount will be worth about a half-million dollars. Can you imagine that!) And that £3000 is just Mr. Hylton's debt; all told Virginians owe British creditors some three million pounds. You can certainly understand why they don't want to pay.

The case has been bogged down by many things. Sometimes the circuit courts had only two judges present, and if they differed the case had to be carried over to another term. Mr. Hylton's lawyers are pretty sharp, and they keep coming up with all these arcane writs and motions to delay. They delayed so much, in fact, that Mr. Jones passed away, God rest his soul, with the case unresolved. His family is still interested, though, and in these proceedings Mr. Ware is representing Mr. Jones's estate.

Then to complicate things President Washington sent Chief Justice John Jay off to England to see if perhaps our two countries could resolve things through diplomacy rather than go through another war. Well, Mr. Jay got a treaty alright, but there are a lot of people who think he gave away the farm to get it, and President Washington had to do a lot of arm-twisting to get the Senate to ratify it. One provision on that treaty reaffirms Article 4 of the Paris agreement, and gives British creditors even greater assurances that they can collect what they claim is owed to them.

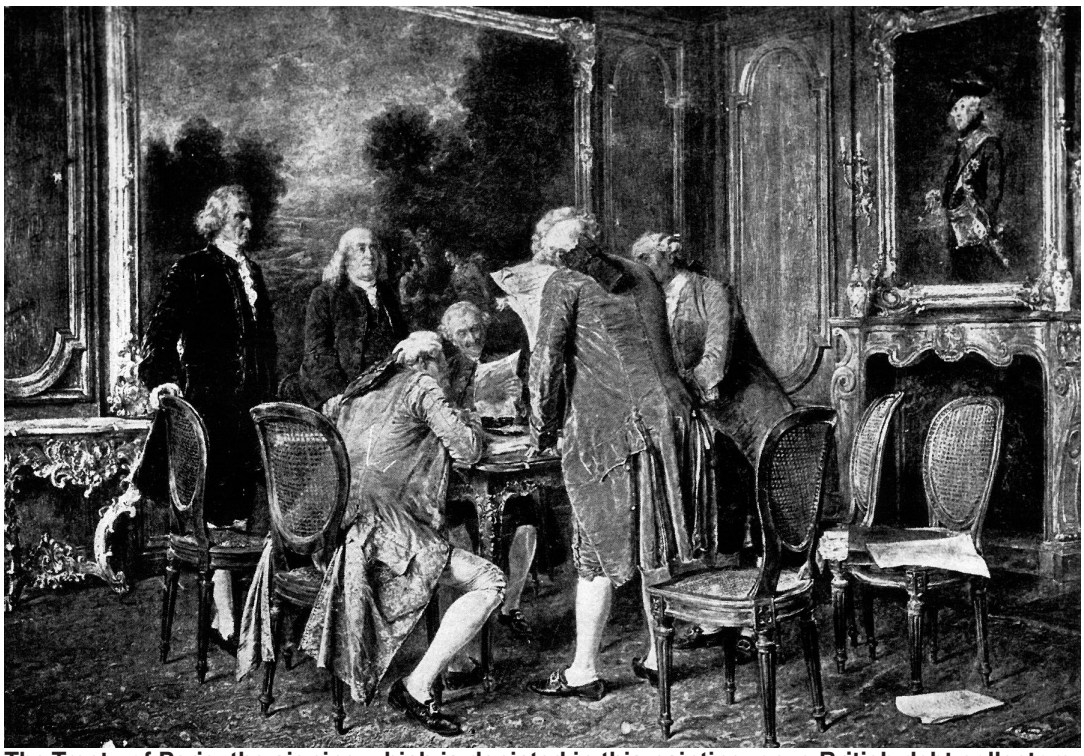
So what we have is an interesting question for our learned judges, a question that has never come up under our Constitution, but which might come up again and again—which takes precedence, state law or a treaty? Under the laws of Virginia, Mr. Hylton's debt has been satisfied. He paid it off to the state under terms of a law duly passed by the Commonwealth. And while Virginians happen to owe more than the citizens of other states, during the war sequestration laws were passed in several states.

Article VI of the Constitution, however, holds that "this Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

While that seems clear, we are still tinkering with that Constitution. Mr. Madison wrote up some amendments that are being called a bill of rights, and those are now part of the Constitution. Then after Mr. Chisholm sued Georgia in a federal court, the states got all persnickety, and did not want to allow citizens of other states to sue them in federal courts. So they got Congress to pass another amendment to prohibit that, and folks tell me it is just a matter of time until this so-called Eleventh Amendment is ratified. The states are arguing that if American citizens from other states cannot sue them in federal courts, then neither should people who are not even Americans be allowed to do so.

So there is quite a bit of important stuff at stake here. Mr. Hylton won the first round three years ago when Mr. Justice Iredell upheld the Virginia law and declared the debt discharged. But now we have Mr. Jay's treaty, and a lot of people are really interested in how the Court is going to decide. Not only is there a lot of money at stake, but my friend Mr. Hamilton says that it will also decide whether or not we have a strong federal government, or whether the Constitution will go the way of the Articles of Confederation, in which the states proved more powerful than the Congress.

Maybe Justice Iredell is correct, and this is "the greatest Cause which ever came before a judicial court in the world." We shall see.



Library of Congress, LOC, USZ62-279

The Treaty of Paris, the signing which is depicted in this painting, gave British debt collectors greater assurance that they could recoup their debts from citizens of the new nation.

2010 SUPREME COURT SUMMER INSTITUTE

By: Ethan Kennedy, Program Coordinator of Street Law, Inc.

Courtesy StreetLaw, Inc.

Serving as a Justice for the day, teacher Taja Henderson asks questions of the respondent during the Institute's moot court.

At 3:15 pm on Saturday, June 19, the Court was called to order to hear arguments in case number 08-7412, *Graham v. Florida*. While the actual United States Supreme Court does not convene to hear oral arguments on Saturdays, ten teachers-turned-justices on their summer vacation took their seats on the bench in Georgetown University Law Center's Supreme Court Institute Moot Courtroom as part of the Supreme Court Summer Institute for Teachers.

Over the past 16 years, the Supreme Court Historical Society has cooperated with Street Law, Inc. to bring more than 800 of the nation's top educators to Washington, D.C. for a six-day Summer Institute. More than 300 additional teachers in several cities have also participated in three-day regional Supreme Court Seminars since 2004, as a group of 22 did in Atlanta this past school year. The Summer Institute and regional seminars are designed to expand and strengthen instruction about the history, operation, and cases of the Supreme Court of the United States through participatory education.

Sessions cover topics ranging from the process by which cases are granted to how Supreme Court cases are covered in the news media to key constitutional concepts. Participants also visit the Court, meet with Deputy Clerks and hear a non-argument session. New to the Institute this summer was a session on the Commerce Clause, facilitated by John Brittian, Professor at the University of the District of Columbia School of Law.

The Moot Court ranked among the favorite sessions at this year's Institute. In preparation, teachers are trained by Supreme Court practitioners to take on the roles of petitioners, respondents, and justices. One participant remarked that "having people who knew and argued the cases we studied was invaluable."

In addition to the other expert guest speakers who instruct teachers throughout the Institute, participants also had the opportunity to hear from Chief Justice John Roberts at the Institute's culminating reception at the Supreme Court. As in years past, this reception was the teachers' favorite event. This year's teachers were thrilled to meet members of the Historical Society's Board of Directors: Ralph Lancaster, President; Mrs. Thurgood Marshall, Vice-President, and Robb Jones, trustee and member of the Program Committee.

Even after six days of intense instruction and extreme D.C. heat, teachers left the Institute anticipating the upcoming school year. One participant expressed the reaction of many of his colleagues when he said: "I am excited about revamping the curriculum and teaching methods in my government class because I know my students will like the activities." In order to provide support to teachers, new resources and updated versions of materials from previous years are made available on Street Law's website, StreeLaw.org. An active online community also helps teachers stay connected to each other and Street Law staff.

After teachers return home, they not only share what they learned with their students, but are also encouraged to do so with fellow colleagues. Over the past four years, Institute participants have trained over 1600 of their colleagues to use the interactive strategies and resources they learned at the Summer Institute to teach about the Court and its cases. Together, these educators help expand the impact of the Institute by affecting approximately 120,000 students every year.

The partnership between the Supreme Court Historical Society with Street Law has produced a strong and vital program which continues to enjoy popularity as one of the premier professional development seminars in the country. Applications for the Institute routinely outnumber available spots, indicative of the interest educators have in the program. Even as the number of teachers who have participated in the training increases with each passing year, so too does the network of resource experts who provide their time and expertise to make the program work. The Society and Street Law are grateful to these experts for their willingness to share some of their time working with the teachers who educate tomorrow's leaders.

Photo by Steve Petteway

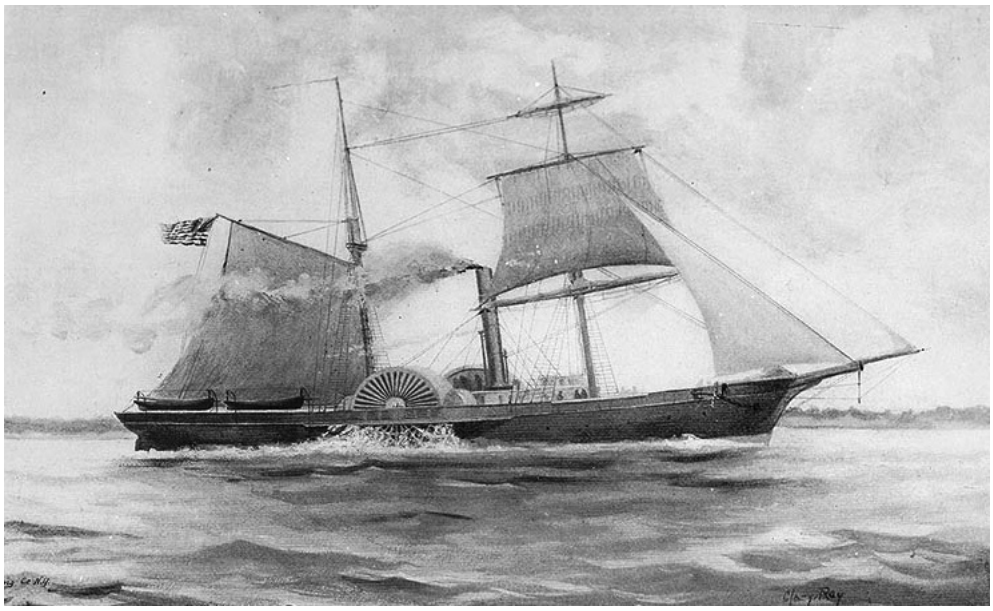
Teachers Dennis Henderson, Adele Dalesandro, Julie Hershenberg and Jill Harry visit with Society Vice President Mrs. Thurgood Marshall at the reception.

FIFTH CIRCUIT JUSTICE JOHN A. CAMPBELL TAKES ON THE "FILIBUSTERS" ON THE GULF COAST 150 YEARS AGO

*By David A. Bagwell**

Editors Note: This is part two of this article. The first half appeared in the previous issue of the Quarterly. The article was originally printed in the 11th Circuit Historical Society's magazine. Text of the article with end notes will be posted on the Society's website.

It was later that same year, in December of 1858, that Justice Campbell and the Filibusters Maury and Walker collided. December 8, 1858 was a "perfect storm" in Mobile politics. First, Filibuster William Walker, having survived Campbell's trial, was mounting a new expedition to leave Mobile that day for Nicaragua via-Honduras, on his ship The ALICE TAINTER, and Harry Maury was going with him as Captain of The Schooner SUSAN. Second, on that day there was a hot mayoral election in which former Know-Nothing Mayor Jones Withers ran for Mayor as a newly-reminted pro-slavery Democrat. Third, Justice John Archibald Campbell [after whom Mobile's Federal Courthouse is now named[17]] was in Mobile, presiding over a specially called local Federal Grand Jury which he hoped would indict Walker and Maury for violation of the Neutrality Act, a serious federal crime. In addition there was "a spy" in Mobile in connection with the Grand Jury, General Wilson of Ohio, who was snooping around the port of Mobile for evidence. The political embers were glowing red and the local paper *The Mobile Register* was a bellows blowing the embers into flame, with highly-charged editorials on all these subjects at once. Jones Withers won the Mayor's race; Justice Campbell's Grand Jury refused to indict anybody and the highly and increasingly unpopular Campbell left town in a stagecoach. Gen. Wilson left separately on a steamboat. William Walker, "the Gray-Eyed Man of Destiny", backed down and did not leave port, perhaps cowed by the "peace bond" that Justice Campbell put him under, in a fit of what the Register deemed arrant judicial activism [even though the legal concept was perfectly respectable in the law and fully recognized by Blackstone's *Commentaries,* which has probably formed the basis of more American law than any other single source].



Revenue Cutters such as the one shown were charged with intercepting ships engaged in filibustering activities.

Library of Congress, LOC USZ62-88091

But Harry Maury on The SUSAN was made of more brazen stuff than Walker. The Revenue Cutter ROBERT McCLELLAND claimed The SUSAN as a prize for violation of the Neutrality Act, and sought to bring her to Mobile to prize court and forfeiture. Harry Maury the ex-lawyer denied he was guilty of any crime and refused to be taken. As a temporary compromise the revenue cutter put a young officer and a few men on board Maury's SUSAN and sailed to Mobile for instructions, leaving Maury at the mouth of Dog River with the threat that if he sailed anyway, the SUSAN would be caught and sunk. In the middle of the night Maury set a spar into the mud bottom and hung his anchor light on it, slipped the anchor and drifted out with the North wind. On the way out, all of the regular sailing crew but two jumped ship rather than defy the United States. With the Revenue officer helpless or asleep or both, The SUSAN was in the Gulf by dawn of December 9th, high-tailing it for the Straits of Yucatan and thence to Honduras. His sailors gone and only rowdy "soldiers" to sail the ship, Maury is said to have pinned a playing card to each rope sheet and yard on the ship, giving commands like "let out the Jack o' Diamonds!" instead of "overhaul the main sheets!" But the crew's lack of nautical experience and terminology was their undoing; at 3 AM off Belize Maury saw breaking waves over a reef to leeward; Maury yelled the already antiquated "put the helm down!", a term from tiller-steering days, which would have brought the ship up into the wind to stop it. Instead, the landsman "put the helm down" by turning the ship's wheel "down" to the lee, with the opposite result: the ship hit the reef at a full eight knots, grounding on a reef near Glover's Cay off Belize. After a fearful night sunk on the reef, the first officer and another sailed away in a gig and found Belizean turtle fishermen in a boat big enough to take them to one of the Isles, where they enjoyed an island Christmas.

Captain Maury and another set out for Belize in the Captain's gig. After two days and nights with no food or water, they were befriended by Christopher Manwaring Hempstead, former U.S. envoy to Belize until the post was abolished in 1853. Hempstead introduced Maury to the British Governor of the Islands, Seymore. Faced with a shipload

of armed revolutionaries looking for a country to conquer, Seymore promptly offered them a free ride back to Mobile as guests of Her Majesty on the second class paddle (steam) frigate HMS BASILISK. The ship dropped them off in Mobile just in time for the New Year's Day parade of 1858.

What finally happened to these men, Walker, Maury, the Baron, and the Circuit Justice?

Walker is the easiest case. Hounded by the Commodore's puppet forces, the U.S. Navy, and the locals, Walker was finally executed by the locals in 1860. Walker is mostly forgotten here, but in Central America his exploits left a lingering bad taste for U.S. intervention in Central America.

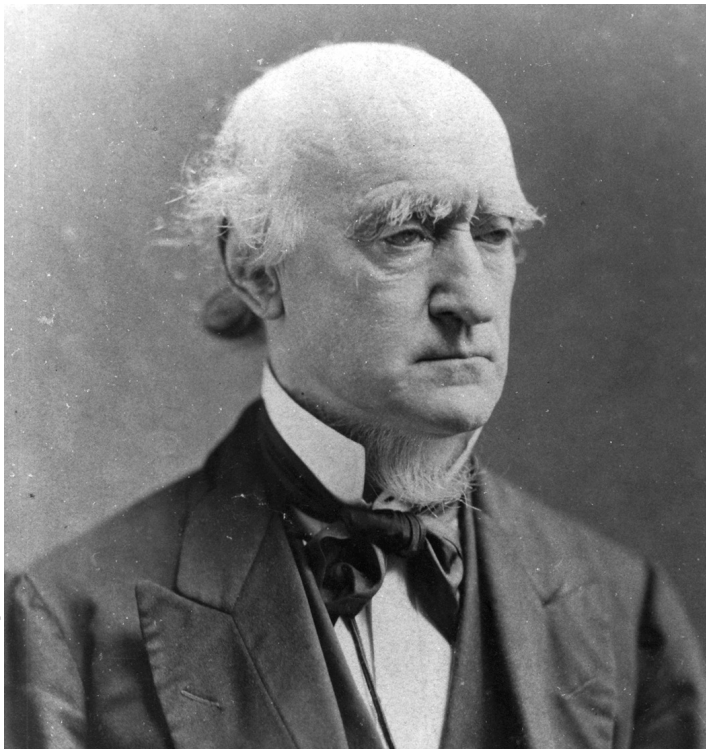
The Baron? Young Emily married the Baron in Paris in 1869. He continued his travel and shady commercial escapades until his death in 1909. She died in Mobile, broke. The *Mobile Register* of May 25, 1906 reported that "Baron de Riviere left yesterday for Kentucky to Join a Trappist monastery", and he "whose life history had been closely interwoven with that of the gulf City, now turns his back upon the world and all its pomp and vanities".

Harry Maury? After the collapse of the Filibusters– Justice Campbell said in significant part ***because*** of them–the Civil War followed. Harry Maury became a Confederate Army Colonel and commander of Fort Morgan at the bottom of Mobile Bay. Gen. Braxton Bragg wrote of Maury that he was "very competent, but sadly addicted to drinking, and therefore unsafe for that exalted position". Maury was imprisoned for a time there, and court-martialed for drinking. In contrast, another officer, Julian Whiting, described Maury as a delightfully funny man, who could speak, recite poetry endlessly, and generally beloved by men and women; a natural leader. Maury was acquitted in the Court Martial and afterward commanded troops at Pollard in Escambia County, Alabama, and chased "Southern Yankees" into South Mississippi. He was wounded at least twice; maybe more. Maury's cousin General Dabney Maury wrote in his memoirs that at the end of the war Harry was promoted to General; some correspondence between Dabney Maury and Jefferson Davis has been found dealing with the issue—Davis was not too sure of doing it—but there is no confirmation of the promotion.

Maury was standing on the corner of Dauphin and Royal Streets in Mobile one morning during Reconstruction when Scalawag Democrat U.S. Attorney Lucian Van Buren Martin shot carpetbagger Republican U.S. District Judge and renowned crook Richard Busteed (who, oddly enough, had appeared as a lawyer for the Baron in the New York litigation to get Emily back from the Baron after the duel with Maury). Maury went and got the doctor—who was, of course, Dr. Josiah Nott the famous duel doctor. He patched up Judge Busteed so that he could hold court in the Battle House until a near-impeachment scandal drove him back north. Maury's wartime wounds left him in ill health. He lived a few years after The War in the Bay house he had bought with his winnings from the Havana Lottery, and died at the age of 40 on February 23, 1869 of "acute gastritis". He was buried in an unmarked grave in Magnolia Cemetery until just a couple of years ago when The Sons of Confederate Veterans marked his grave.

Justice Campbell? Campbell tried to thwart the Civil War by striking a deal at Fort Sumter, but he was apparently double-crossed by Secretary Seward. The South blamed Campbell as a traitor. He was a minor bureaucratic functionary in the Confederate government during the Civil War, but at the end, was one of the Commissioners of the Confederacy at the Hampton Roads Conference to try to end the war. He met personally with President Lincoln on a steamboat in Virginia, but Jefferson Davis' intransigence prevented him from brokering a deal. Subsequently he was captured and imprisoned in Fort Pulaski. He was finally released pursuant to the pleas of his former fellow Supreme Court colleague, Benjamin Robbins Curtis who wrote President Johnson on his behalf. "Judge Campbell, as you . . . know, was not only cleared of all connection with the conspiracy to destroy the government, but incurred great odium in the South, especially in his own state, by his opposition to it. . . ." Johnson freed Campbell from prison. Campbell moved to New Orleans and

During the Civil War, Harry Maury served as the commander of Fort Morgan which was located at the bottom of Mobile Bay. This drawing shows the fort after its surrender to Union troops.



Collection of the Supreme Court of the United States

At the end of the Civil War, former Associate Justice John Archibald Campbell was imprisoned at Fort Pulaski on charges of treason against the United States.

resumed practice, the way he loved to do it: six U.S. Supreme Court cases in a year, with plenty of time to prepare. He argued (and lost) the famous *Slaughterhouse Cases.* In New Orleans Campbell was elected Chairman of the Bar of the U.S. Supreme Court. In his old age he moved to Baltimore to be near his daughters, but continued his practice. In 1889 the Supreme Court sent the Marshal of the Court to extend a personal invitation to attend the Centennial Celebration of the U.S. Judiciary. He declined because of his health, but sent back via the Marshal this message echoing the prayerful words repeated by the Marshal at the opening of each session of Court: "Tell the Court that I join daily in the prayer, 'God Save the United States and bless this Honorable Court'". Justice Campbell died in 1889, and was buried in Baltimore.

Commodore Vanderbilt? In the 1870s his Mobile wife, Frank Crawford Vanderbilt, persuaded him to donate a million dollars to found a new college to salve the wounds of the war and reconcile the sections. It became Vanderbilt University and is located cater-cornered[18] across West End Boulevard in Nashville from the boyhood home of Vanderbilt's old nemesis William Walker, which is marked with a modest historical sign.

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EXCERPTS FROM THE JURY CHARGE BY CIRCUIT JUSTICE JOHN A. CAMPBELL UNITED STATES VS WILLIAM WALKER

United States Circuit Court for the Eastern District of Louisiana
Case Number 9,318, 1858 Docket

Gentlemen of the Jury:

It is my duty to deliver the opinion of the Court, upon the questions of law which are involved in this prosecution.

The charge against the defendants is, that they have begun, or set on foot, or performed or provided the means, to carry on a military expedition against the State of Nicaragua from this judicial district, within the year 1857.

The defendants came before this court under a charge from Grand Jurors of the United States elected, empaneled & sworn to inquire for the body of this district". There was no authority within the United States competent to bring them before this court on this charge in this form, but the confirming opinion of twelve men of this district, charged upon their oaths, to make a "true presentment".

Neither, the Navy, nor Army, nor Congress, nor the Executive nor judicial departments, without these, could effect such an object.

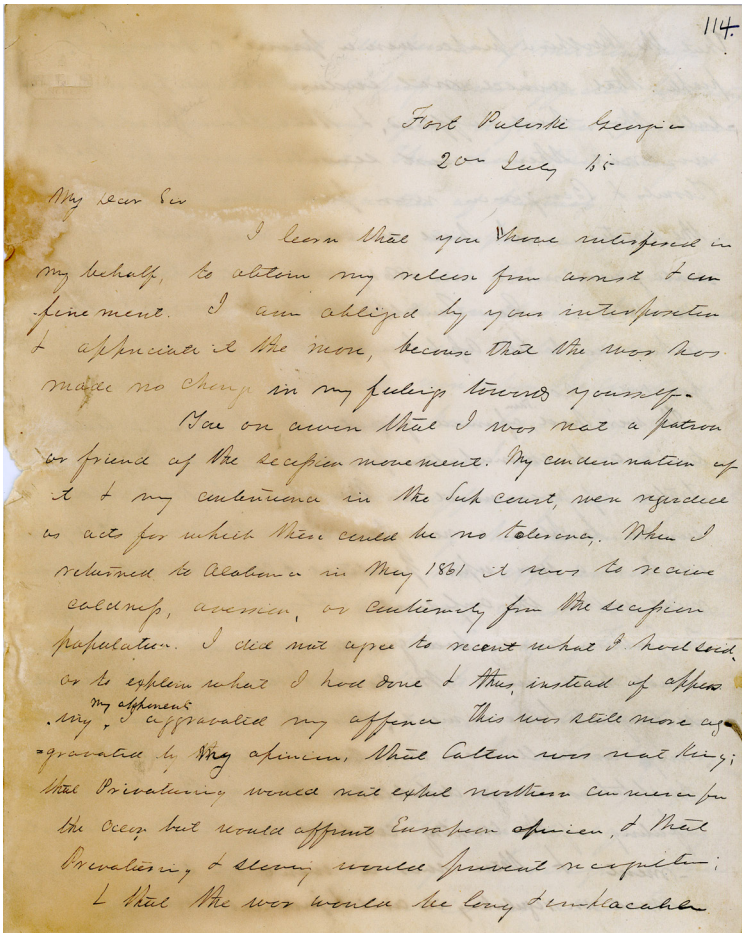
Nor can a hair of their heads be touched in the way of punishment, without a like concurrence of another twelve men, summoned like yourselves, as a jury.

We instruct you therefore as a matter of law, that if these men were combined in the United States & in this district to go to Nicaragua [to] replace the defendant Walker in the Presidency, as to Americans Nicaragua to secure money & time for them-selves by opposing the existing government as president or occupants of Nicaragua, or to take the country, & that the measures and movements in this district & after the defendants in this district have those objects, or any of them, in view, that the steamboat FASHION her equipment and cargo were provided or furnished then in the whole or in part that object, the expedition or enterprise was a military expedition & enterprise & was begun & set on foot here contrary to the act of congress & that the provisions & preparations here were also in violation of the same act.

There are some decisions to the effect that jurors shall be judges of the law & fact in criminal cases; some of the states have adopted it as a rule, by statute[.] But in our judgment the rule has no rational foundation & that the authority on which it rests is wholly inadequate to its support–The opinion of Justice Story has been read to you & to that authority that of his learned successor Justice Curtis is to be added–The opinion of the later is before me. I know of no judge of the Supreme Court of the United States who recognizes or acts upon the doctrine–In the states the great preponderance of the authority is contrary to it–This doctrine has never been accepted in this court and is now repudiated–We cannot under any view we have taken of our duty transfer to you the obligation of discharging any part of it & we have neither the inclination nor the right to assume any part of yours.

SOCIETY PURCHASES LETTER FROM JOHN A. CAMPBELL TO BENJAMIN ROBBINS CURTIS

As part of its effort to commemorate the role of the Supreme Court and its Justices during the sesquicentennial of the Civil War, the Supreme Court Historical Society recently acquired an important letter from the period. The correspondents are two former Justices who were perhaps most affected by the events leading up to the war, Benjamin R. Curtis, who served from 1851-1857, and John A. Campbell, who served from 1853-1861. Curtis had resigned following the *Dred Scott* decision and Campbell had done so at the outbreak of the War. Although the men had little contact over the years, Campbell wrote to his former colleague to seek assistance in obtaining his release from prison.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Fort Pulaski Georgia
20th July 65

My dear Sir

I learn that you have interposed in my behalf, to obtain my release from arrest & confinement. I am obliged by your interposition & appreciate it the more, because that the war has made no change in my feelings towards yourself.

You are aware that I was not a patron or friend of the secession movement. My condemnation of it & my conference in the Sub Court, were regarded as acts for which there could be no tolerance. When I returned to Alabama in May 1861 it was to secure calmness, quiescence, or continuity from the secession population. I did not agree to recant what I had said or to explain what I had done & thus, instead of appeasing my opponents aggravated my offence this was still more aggravated by my opinion, that Lincoln was not king; that Privateering would not expel northern commerce from the ocean but would appeal European opinion, & that Privateering & slavery would prevent reconquest: & that the war would be long & unbeatable

Writing from federal prison at Fort Pulaski, Georgia on July 20, 1865, Campbell chronicles his activities during the Civil War, including his service in the Confederate government. Although Campbell had firmly resisted the idea of secession prior to the War, he felt obligated to resign from the Court and return to his home in Alabama when hostilities began. In October 1862, he was asked to serve as Assistant Secretary of War for the Confederacy, a position he accepted reluctantly but one in which he hoped "to be of use in mitigating the evils that were upon the country."

Campbell goes on to describe the conditions in the South during the Civil War, including the disarray of Confederate finances, the lack of support for troops, and conflict within the Confederate leadership. Campbell became increasingly convinced of the need to end the war on the best possible terms for the Southern States. Featured in the letter is Campbell's description of the failed peace conference at Hampton Roads in February 1865, during which time he met with President Abraham Lincoln hoping to discuss terms of peace and Reconstruction. It was during the period following Lincoln's assassination on April 14, 1865, that Campbell was arrested on May 30, 1865.

Interestingly, Campbell claims to not know why he had been imprisoned, writing, "I should be glad to know why I am arrested and detained." Only later would he learn that it was on suspicion of conspiracy in President Lincoln's assassination. Eventually, Campbell was released from prison in October 1865, largely due to efforts on the part of his family and friends, including former Justice Curtis.

This letter was first published as "A View of the Confederacy From the Inside" in *Century Illustrated Monthly Magazine* (Volume 38, October 1889). Since that time, it has served as a valuable resource for historians in understanding the activities of the Confederate government during the Civil War. At its new home at the Supreme Court, the letter will be preserved while continuing to be a source for understanding the long-lasting bond that often forms between Justices, transcending distance, time, and even war.

An annotated transcript of the letter is planned for a future volume of the Society's *Journal*. The first page of which is printed above.

*Information based on transcript and the book "John A. Campbell: Southern Moderate" by Robert Saunders, Jr.

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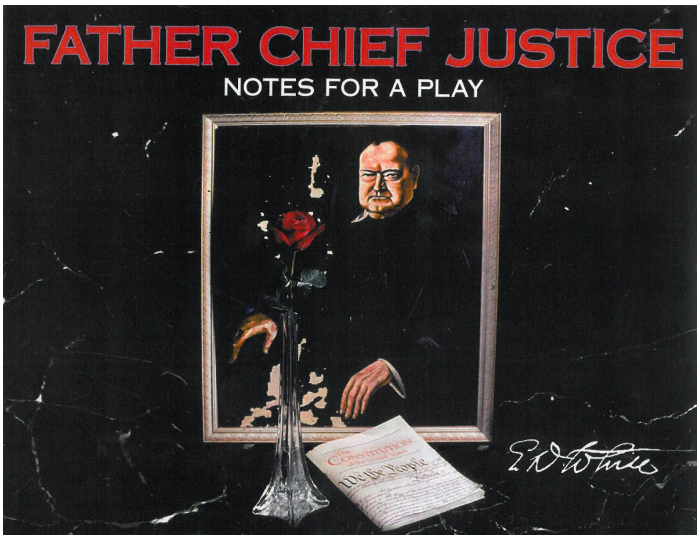
LIBRARY OF CONGRESS TO HOST PLAY ABOUT CHIEF JUSTICE EDWARD D. WHITE ON MARCH 8, 2011



"Father Chief Justice" is a play about the life of Chief Justice Edward Douglass White.

"FATHER CHIEF JUSTICE"

"Father Chief Justice": Edward Douglass White and the Constitution, a play by Paul R. Baier, is scheduled for a preview production at Jefferson Building, Library of Congress, in the Coolidge Auditorium, on March 8 (Holmes's birthday), 2011, at 4 p.m. All members of the Supreme Court Historical Society are cordially invited. The play, written and directed by Professor Paul R. Baier of the Law Center, Louisiana State University, Judicial Fellow, U.S. Supreme Court, 1975-76, has been in production for fourteen years since its "World Premiere" in Thibodaux, Louisiana, March 8, 1997. "Thibodaux is about as far 'off-broadway' as you can get,'" says playwright Baier. Most recently, Aspen Publishers sponsored a preview of the play in the Louisiana Supreme Court chamber on Twelfth Night, January 6, 2010, in connection with the annual meeting of the Association of American Law Schools. The play is a New Orleans Jazz funeral rekindling Chief Justice White's Spirit of the Fireside and of the Hearth. His life is magically portrayed through scenes that invite you into his boyhood home to climb its "staircase to the Supreme Court," place you in the Valley of Antietam facing death with Captain Oliver Wendell Holmes, Jr., and seat you at Holmes' elbow with Fanny Holmes and Justice Brandeis at 1720 I. Street, during World War I, when freedom of speech was at risk in the "Campaign of the Constitution." Holmes and White—"The Blue and the Gray as One"—sit side by side as Brothers on the Supreme Court in the *Selective Draft Law Cases* and Chief Justice White voices his immortal "Rule of Reason" under the Sherman Act, while Harlan, J., erupts like a volcano. "I think you know that I support you in all your endeavors," said Justice William J. Brennan, Jr., of Professor Baier's play, "but none more so than when you are illuminating the history of a great institution to which I have devoted 40 years of my life."

For the Coolidge preview, Roberta Shaffer, Law Librarian of Congress, will play Fanny Holmes; Jacob A. Stein, Esq., will play Justice Holmes, and Ronald S. Flagg, President of the D.C. Bar Association, will portray Justice Harlan in the *Standard Oil* Octopus scene, Tom Goldstein will play Justice Brandeis and Society Trustee Charles Cooper will portray Chief Justice White. Chief Justice White appears "live and in person" via Library of Congress digital images and Holmes's voice is broadcast via the radio, courtesy of National Archives sound recordings.

Supreme Court Historical Society
224 East Capitol Street, N.E.
Washington, D.C. 20003
www.supremecourthistory.org

Investiture Ceremony—continued from page 1

President reportedly leaned over to Justice O'Connor, and referring to the increased number of women serving on the Court whispered, "Now there are three of you." O'Connor smiled and later told friends that the women "looked pretty good sitting up there."

Elena Kagan is the 112th Justice to serve on the Court. During his remarks at the ceremony, Chief Justice Roberts noted that she is the 100th person to serve as an Associate Justice. Justice Kagan was also the first woman to serve as Solicitor General, the position she held at the time of her appointment.

The Court at the opening of October Term 2010: (left to right first row) Associate Justices Clarence Thomas, Antonin Scalia, Chief Justice John G. Roberts, Jr., Associate Justices Anthony M. Kennedy and Ruth Bader Ginsburg.
Back Row (left to right): Associate Justices Sonia Sotomayor, Stephen G. Breyer, Samuel A. Alito, Jr. and Elena Kagan.