



Learned in the Law The Role of the Solicitor General of the United States

Three distinguished former Solicitors General of the United States joined the Counselor to the Chief Justice and a leading scholar to provide a fascinating and insightful program on the Office of Solicitor General. The program was held in mid-town Manhattan on October 25, 2013, and was the most recent program in a series cosponsored by the Supreme Court Historical Society and the Historical Society of the New York Courts under the general theme “Nominated From New York: The Empire State’s Contributions to the Supreme Court.”

The program for the evening included introductory remarks by Chief Judge Jonathan Lippman of the New York Court of Appeals and former Chief Judge Judith Kaye. Prof. John Q. Barrett of St. John’s University, a noted Robert H. Jackson and Supreme Court scholar, then provided an overview of the Office of the Solicitor General, highlighting individuals with New York connections who have held that office. By Prof. Barrett’s measure, New York has provided thirteen Solicitors General including the incumbent Donald B. Verrilli, and his predecessor, Associate Justice Elena Kagan.

The Office of the Solicitor General was created by Congress in 1870 during the administration of President Ulysses S. Grant. The Solicitor General has a unique role in the federal government. Former Solicitor General Seth

Waxman described the office in an article titled “Presenting the Case of the United States as it Should Be: The Solicitor General in Historical Context” as follows: “[P]erhaps more than any other position in government, the Solicitor General has important traditions of deference to all three branches. The Solicitor General is of course an Executive Branch officer, reporting to the President, in whom our Constitution vests all of the Executive power of the United States. Yet as the officer charged with, among other things, representing the interests of the United States in the Supreme Court, the Solicitor General has important responsibilities to the other branches of government as well.”

Prof. Barrett’s presentation started with an overview of the thirteen Solicitors General from or connected to New York. He included brief biographical sketches and displayed a photo or drawing of each person. He focused the remainder of his lecture on three of these individuals through whom the development of the Office of Solicitor

General itself can be traced: Benjamin Bristow, the first Solicitor General of the United States who subsequently moved to New York where he practiced law for the rest of his life; John W. Davis, a one-time U.S. Representative from West Virginia who later moved to New York and established the leading law firm that carries his name, Davis Polk &



Courtesy Rick Konstein, New York Law Journal

Members of the Judiciary joined Justice Kagan for a photograph prior to the program. Pictured left to right are Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, Justice Elena Kagan, Chief Judge Judith Kaye, and Chief Judge Jonathan Lippman, Chief Judge of the State of New York.

A Letter from the President



The Society has finalized 2014 plans for many of its educational programs, and the programs look stimulating. The 2014 Leon Silverman Lecture Series focuses on a topic of perennial interest, *The Supreme Court and the Civil War*. The series will comprise four programs, two in the Spring and two in

the Fall. The fateful *Dred Scott* case is the subject of the first lecture on May 1, 2014. Professor Lea VanderVelde will speak about the decision's importance as part of her insightful analysis of the incendiary issues that culminated in the great conflict. *Dred Scott* is widely considered the most regrettable decision ever issued by the Court, and the fact that every Justice who voted in the majority felt compelled to write a separate opinion is striking, reflecting perhaps, among other things, the lack of agreement even among the majority. The highly interesting Justice Oliver Wendell Holmes, Jr., is the subject of the second program on May 8, 2014 — his experiences as an officer in the Civil War significantly affected the rest of his life, including his work on the Court. This program will take the form of a panel discussion among award-winning Professors James McPherson and G. Edward White, moderated by Professor Brad Snyder, the author of two critically acclaimed books who lectured in the Silverman series in May of 2013. On October 16, 2014, Professor Tim Huebner, the author of books about the Taney Court and the Southern judicial tradition, will speak about Chief Justice Roger B. Taney. While Taney is, of course, known best for his role in *Dred Scott*, his interactions with President Lincoln during the War were often less than cordial. The final presentation on November 13, 2014, will explore the relationship between the Court and the Chief Executive from the President's side, with Professor Lucas Morel lecturing about President Lincoln and his interactions with the Supreme Court.

On May 22, 2014 the Society will host the National Heritage Lecture in partnership with the White House Historical Association and the United States Capitol Historical Society. Each of the three historical societies serves as host on a rotating basis. Another award-winning author, James Swanson, will speak about the creation and work of the Warren Commission appointed by President Lyndon Johnson to investigate the assassination of President John F. Kennedy. 2014 marks the 50th anniversary of the publication of the Warren Commission Report, and its

findings are still a topic of speculation and discussion.

The Silverman and National Heritage lectures have been Society mainstays for many years. The Society is pleased to co-host a new program on April 9, 2014, with the Supreme Court Fellows Program Alumni Association. Supreme Court Fellows each serve a one-year appointment in one of four judicially-related functions of the federal government — one at the Supreme Court, another at the Administrative Office of the United States Courts, the third at the Federal Judicial Center, and the fourth at the United States Sentencing Commission. Each Fellow is immersed in the daily work of judicial administration, policy development, and education. The Society has sponsored the Fellows program for many years, and it is delighted to cosponsor with the Alumni a panel discussion on *Judging Judges: Writing Judicial Biography in the Modern Age*. The panelists are authors of judicial biographies — Clare Cushman, the Society's Director of Publications and the author and editor of many books published by the Society, including *THE SUPREME COURT: ILLUSTRATED BIOGRAPHIES*; Stephen Wermeil, author of a biography of Justice Brennan (*JUSTICE BRENNAN: LIBERAL CHAMPION*); and Alexander Wohl, author of a biography of Justice Tom Clark and his son Attorney General Ramsey Clark (*FATHER, SON & CONSTITUTION*). The moderator will be Judge John M. Ferren, a Senior Judge on the District of Columbia Court of Appeals and the author of a biography of Justice Wiley Rutledge (*SALT OF THE EARTH, CONSCIENCE OF THE COURT: THE STORY OF JUSTICE WILEY RUTLEDGE*).

I encourage you to attend these events, and they are just the beginning. Others will be scheduled during the year and as details are finalized, information will be published on the Society's website, www.supremecourthistory.org. We continue to explore the feasibility of presenting programs in partnership with court-related state historical societies in areas outside of Washington, DC. Our Assistant Director, Kathleen Shurtleff, traveled recently to Jefferson City to meet with the Missouri Supreme Court Historical Society to attend their annual meeting and explore the possibility of producing a program in Missouri. In the Spring of 2015 we will once again cosponsor another program in partnership with the Historical Society of the New York Courts (see the article on page one of this issue for a report of the successful October 2013 event). If you have ideas and suggestions for creating programs in your area, please contact a member of the staff through the website, or by calling the office at (202) 543-0400.

On behalf of my fellow Officers and Trustees of the Society, please accept our thanks for the vital support each of you provides to the Society. Your assistance and participation is essential as we work together to further our goals.

Craig P. Joseph

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Wardwell; and Robert H. Jackson, who lived most of his early life in New York State and served as Solicitor General, Attorney General, a Justice of the Supreme Court, and as U.S. chief prosecutor for Nazi war criminals at Nuremberg following World War II. Each of these men made significant and lasting contributions to the Office of Solicitor General.

Prof. Barrett's lecture was followed by a panel discussion among three recent former Solicitors General. The panelists were Drew S. Days III, the 40th Solicitor General of the United States, 1993-1996; Paul D. Clement, the 43rd Solicitor General, 2005-2008; and Justice Elena Kagan, the 45th



Elena Kagan served as the 45th Solicitor General of the United States from March 2009-August 2010. She left that office following her appointment to the Supreme Court of the United States as an Associate Justice. She took her seat on the Court on August 7, 2010.

Solicitor General, 2009-2010. Jeffrey P. Minear, Counselor to the Chief Justice, moderated the panel. Mr. Minear became Counselor in 2006 after working many years in the Office of the Solicitor General.

Mr. Minear posed questions designed to help audience members understand the complexity of the tasks assigned to the Solicitor General. He first asked each participant, "If Professor Barrett were giving a lecture on the cases you have argued, which case would you hope he would highlight—and which case would you hope he would avoid mentioning?" Mr. Days responded that the case for which he would like to be remembered was *U.S. Term Limits, Inc. vs. Thornton*. The case concerned the constitutionality of Amendment 73 to the Arkansas constitution, "The Term

Limit Amendment." The amendment denied ballot access to any person who had served three or more terms as a member of the U.S. House of Representatives, or two or more terms as a member of the U.S. Senate. Mr. Days said the amendment had been designed as a way to keep unpopular figures off the ballot. The case was extremely important nationally because it addressed the ability of states to alter requirements for prospective candidates for federal office that are imposed by the U.S. Constitution. Mr. Days stated that, on the day of oral argument, he sensed that the Justices were fully engaged as they considered principles set forth by Founding Fathers Hamilton, Madison and Jay. The Supreme Court ruled that the amendment was unconstitutional because the Constitution expressly prohibits states from setting limitations for candidates beyond those outlined in the Constitution itself and further observed that it would "likely have the effect of handicapping a class of candidates with the sole purpose of creating additional qualifications indirectly." Further, the opinion stated, "allowing individual States to craft their own congressional qualifications would erode the structure designed by the Framers[.]" Mr. Days said that he was particularly proud of the role the Office of the Solicitor General plays in assisting the Court in its work and thought that this case in particular exemplified that role.

When he asked the same question of Mr. Clement, Mr. Minear noted that Mr. Clement argued approximately 70 cases before the Supreme Court and continues to appear before the Court regularly. Mr. Clement chose a case he argued as Deputy Solicitor General of the United States, *McConnell v. Federal Election Commission*. The case concerned the McCain-Feingold Act, which its proponents had championed as a means to prevent corruption in politics. Opponents characterized it as criminalizing free speech and the rights of groups to associate with the government. Mr. Clement explained that, most often, cases set for argument before the Supreme Court address only one or two major issues, but in this instance there were many. When Congress passed the legislation, it anticipated challenges and provided for expedited review by a three-judge panel. The case involved 11 different challenges concerning some 18

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Quarterly

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provisions in the law, with a vast number of pages in the filings and related documents. Mr. Clement explained that the three-judge panel issued four opinions with very little consensus on any of the points addressed. The panel's ruling covered some 1,000 pages in the federal reports. Following that ruling, eleven separate parties appealed the decision to the Supreme Court.

The Office of the Solicitor General has a duty to present the government's side of a case to the Supreme Court. Mr. Clement said he was particularly proud that his office decided to streamline the case to make it more manageable. The staff made the conscious choice to work closely with and for the benefit of the Court to reduce the issues to their essential elements. In addition to the substantive importance of the case, his office worked to avoid affecting pending elections. The Supreme Court scheduled the case for argument well before the next federal elections took place, and the Solicitor General's Office was also sensitive to this issue. In an extremely unusual move, the Court convened a special session in September prior to its normal Term opening in October.

Mr. Clement commented that his office could have filed eleven separate briefs in response to the eleven appeals and could have chosen to submit more than 500 pages of argument through those multiple filings. Instead, he and his colleagues submitted a single brief 140 pages in length. Working with the Court to make it as manageable as possible, oral argument was limited to four hours. Mr. Clement shared argument time with Solicitor General Ted Olson. Mr. Olson addressed the soft money issues, while Mr. Clement addressed electioneering and many other issues. This was very daunting, as the wide range of issues made it virtually impossible to ensure he was fully prepared for every possible issue that might be raised during the argument. Mr. Clement added that responding to a question in oral argument with, "I don't know your Honor, I haven't really thought about that," is never satisfactory to either the questioner or the respondent.

Responding to the same question posed by Mr. Minear, Justice Kagan said that she had served as the Solicitor General for only one year during which she argued six cases before the Supreme Court. She said she had never argued before the Court, or indeed before any other appellate court, prior to her service as Solicitor General. Therefore, she did not have an extensive number of cases from which to choose. Unlike her



Drew S. Days III, the 40th Solicitor General of the United States.

Yale Law School

co-panelists, she addressed the second part of the question and gamely recounted a case that she hoped she could have avoided discussing. She described it as a case no one had ever heard of, and probably never would. The Court invited the government, through a process known as "Calling for the Views of the Solicitor General," to address whether the case warranted review. She advised against review, but the Court decided to hear the case.

Justice Kagan argued the case, and at one point in the argument, she felt overwhelmed by the questions. Justice Scalia, "who asks very hard and extremely good questions," asked a question she simply could not answer, so she turned the question back on the Justice, asking, "What do you think Justice Scalia?" "I remember it as if were yesterday, the Chief Justice who handles oral argument in such a polite and dignified manner, leaned over and said, 'We usually think it works better if we ask the questions.'" In spite of the setbacks, Justice Kagan explained that in the end, "the Court

dismissed the case as improvidently granted which in the Solicitor General's Office we thought of as a great victory."

These exchanges were the opening portion of a wonderful and engaging forum. Audience members received a booklet with articles about the Office of the Solicitor General written by program presenters and others, which furnished rich resource material. C-SPAN



Paul D. Clement 43rd Solicitor General of the United States was a panelist on October 25.

Photo Courtesy Paul D. Clement

filmed the panel presentation, and it is available by accessing the Society's website, www.supremecourthistory.org and tabbing to the Recent Events page, New York Program 2013. It provides a direct link to the C-SPAN website where the video is available on demand.

The Society expresses gratitude to the participants for their willingness to share their experiences and expertise. Programs produced with these two historical societies have been extremely successful and popular, attracting audiences of more than 350 to each event, and they provide an opportunity for those in the New York City area to enjoy Society activities of the highest caliber. A fourth program in the series is under development and will likely be held in the spring of 2015. Information concerning all Supreme Court Historical Society programs is posted on the Society's website.

CASS GILBERT'S MARBLE TEMPLE OF JUSTICE: DESIGNING THE SUPREME COURT'S BUILDING AND IMAGE

By Thomas R. Yarborough*

On a gray, blustery 7th day of October, 1935, unusually large throngs of Washington tourists and spectators gathered in front of a gleaming-white Corinthian marble temple on the corner of Maryland Avenue and First Street, Northeast, to gaze in wonder at the Supreme Court's new ten million dollar home. Most in the crowd viewed the new structure just

unanimously struck down as unconstitutional Section 3 of the National Industrial Recovery Act (NIRA), the linchpin of the statute.² Somewhat derisively referred to as the "sick chicken case," the Schechter decision plucked vital feathers from the NRA's omnipresent symbol, the Blue Eagle. For many on both sides of that issue, however, the Court's new temple symbolized the power and prestige behind the depلمing. Moreover, it seemed remarkably ironic to astute political observers that the very institution that killed the NIRA, the institution that Franklin Roosevelt would attack after his 1936 reelection, had never had a home of its own until two years into the New Deal---October 7, 1935.

A POOR RELATIVE: THE EARLY COURT

Part of the Supreme Court's image as the least visible of the government's three coordinate branches stemmed from its early nomadic existence. During its first 145 years, the Court literally had no permanent home. In many ways "the Court was like a poor relation, with meeting space arranged almost as an afterthought."³ In its first session in 1790, for example, the Court met on the second floor of the Royal Exchange Building in New York City; the ground floor housed a bustling open air market. In Philadelphia the Court fared no better, meeting in single rooms belonging to various city offices and courts. And with the government's permanent move to Washington D.C., the Court sank, at least figuratively, to a second-rate status accentuated by a mansion for the president and a capitol building for the Congress--but nothing for the Supreme Court. The third branch of government ended up in a small chamber in the Capitol's basement. Then in 1814, British troops invaded Washington and burned the Capitol. Ironically, the British ignited the fire in the Supreme Court chamber using the Court's own law books and papers as tender.⁴



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Noted architect Cass Gilbert (above) had already designed the Minnesota State Capitol Building and the Woolworth Building in New York prior to his selection as the architect of the Supreme Court Building in Washington, D.C. Below is a picture of the gargoyle on the Woolworth Building portraying Gilbert holding a scale model of that building. Built in the Gothic Revival style, it was the world's tallest building when it was built in 1913.

across the street from the Capitol with unabashed awe and admiration. One admirer referred to the Court's magnificent new home as "America's Acropolis," noting that the massive marble building and imposing sculptured figures "produce a reverence that lifts the chin." The only audible criticism came from an architect in the crowd who volunteered that while the building was beautifully done, it was cold and superhuman. The pristine white marble made him think of "millions of ice cubes."¹

Without question the new Supreme Court building, designed by master architect Cass Gilbert, conveyed powerful images and symbols from the first day of its official existence. Indeed, for many New Deal Democrats the Supreme Court's new home served as a vivid reminder of a recent clash of wills and symbols embodied in the Court's May 1935 decision in *Schechter Poultry v. United States*. In that ruling the Court



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With the restoration of the Capitol in 1819, the Supreme Court returned to its basement chamber, but by 1859 the Court's quarters had become an obvious embarrassment. The House of Representatives declared that "this Congress will not allow the Supreme Court of a Government like ours to sit in the cellar of the Capitol, and have strangers, when they come here and ask to be shown the greatest judicial tribunal of the country, to be taken down [into the] cellar."⁵ Finally in 1860 the Court moved upstairs. This new home was remodeled for the Court when the Senate moved to its own wing of the Capitol. Yet even with the move out of the basement, there was no room in the Capitol for Justices to



Soon after William Howard Taft became Chief Justice in 1921, he began a campaign to seek legislation to authorize the construction of a new and separate building for the Court.

have their own offices; therefore, they worked at home.

The earliest public rumblings about a separate building for the Court apparently occurred in 1899 when a Delaware newspaper threw down the gauntlet. Arguing in favor of such a building, the editor submitted that "There is no sound reason why the court should be cooped up in a six-by-nine room in the Capitol. Let the court have a handsome home of its own."⁶

That sentiment lay dormant until William Howard Taft became Chief Justice in 1921. He was appalled by the inadequate and outdated space allotted to the Court. "In our conference room," Taft complained bitterly, "the shelves have to be so high that it takes an aeroplane to reach them."⁷ When Taft's efforts to gain additional space failed, he pressed his argument from a different direction. Rather than

Collection of the Supreme Court



This is an architectural sketch of the design for one of the Conference Rooms in the Court building.

beg Congress for extra borrowed space within the Capitol, "why not relocate completely into a building by ourselves... and under our control?"⁸

Through personal involvement and intelligent persistence, Chief Justice Taft provided the impetus for two important pieces of legislation that forever changed the perceived image of the Supreme Court. On December 21, 1928, Congress passed the public law authorizing the creation of the United States Supreme Court Building Commission. A year later Congress passed Public Law 26 to provide for the construction of the building. Remarkably, in both laws the Republican-controlled Congress excluded the Treasury Department, traditional administrator of federal building projects, from the process. Instead, by law the Supreme Court Building Commission enjoyed the exclusive right "to procure, by contract or otherwise, plans and estimates for the construction of a suitable building."⁹ The Building Commission's selection of the Chief Justice as its chairman further enhanced the Court's supervisory control and left little doubt as to who would choose the architect for the new Supreme Court building. This arrangement was destined to put the Commission at odds with the Roosevelt administration.

CASS GILBERT'S DESIGN FOR THE MARBLE TEMPLE

On April 10, 1929, the Commission entered into its first personal service contract with Cass Gilbert, ardent Taft supporter and personal friend, conservative Republican, and prominent architect who had achieved national acclaim for his designs of the Minnesota State Capitol, the Woolworth Building, and the Department of Commerce Building. Taking on the Court's design as his last major project at age 70, Gilbert clearly viewed the new venture as his most symbolic endeavor, as revealed when he noted in his diary that "I am now to undertake...the most important and notable work of my life. I have built other buildings that are larger and more costly..but none in which the same monumental qualities are required."¹⁰ Gilbert's choice of a design based

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on the Corinthian marble temple was no accident, for he saw himself as the guardian of the neoclassical tradition. To a friend he wrote that “it [Supreme Court] is to be built of white marble and is as pure in style as I can make it. I hope it will cause some reaction against the silly modernistic movement that has had such a hold here for the last few years.”¹¹

With the election of FDR just three weeks after the laying

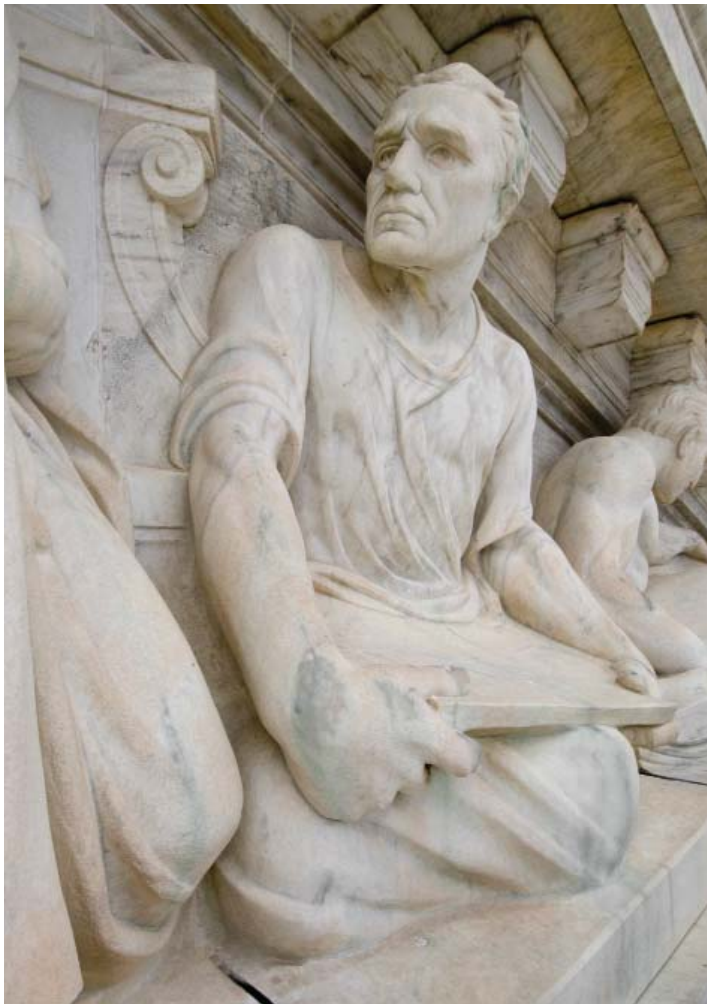


Photo: Steve Peteway

Gilbert chose prominent New York sculptor Robert I. Aitken to design the West Portico of the Court. Aitken incorporated sculptural portraits of persons influential in the creation of the building, including a portrait of himself as shown above.

of the Court’s cornerstone, Gilbert was heartbroken by the ballot results. His low opinion of Democrats in general and FDR in particular had been developing for years. Perceiving radicalism, socialism, and communism everywhere on the rise, he was especially alarmed by the “wild financial propositions advanced by the Democratic nominee and his backers, Hearst, Huey Long, Garner, and the rest.” Devastated by the thought of the Democrats coming to power Gilbert wrote, “I shall look for everything to shut down.”¹² His despair was especially evident in a diary entry on the date of FDR’s inauguration. “This country and city,” Gilbert wrote, “does not yet realize that we are in the throes of a revolution. His speech [inauguration address] was a great

disappointment. A shallow work. May God help America.”¹³

Throwing himself into his work, Gilbert was determined to make his marble temple a counter balance to the liberal subterfuge of the New Deal. He surrounded the building’s exterior and filled the edifice’s interior with dozens of allegorical symbols, all transmitting a traditional conservative message of power and righteousness from the glorious past. The West Portico, or main front, incorporated Gilbert’s strongest political, cultural, and architectural statements.

Determined to infuse the West Portico with his own time-honored views, Gilbert hired prominent New York sculptor Robert Aitken for the project. Aitken’s design, in close collaboration with Gilbert, included a large, triangular pediment supported by sixteen Corinthian columns. Within the pediment, Aitken’s classical sculpture incorporated nine allegorical figures, including Liberty Enthroned, Justice, Order, Authority, Council, and Research Past and Present. Aitken impishly included the faces of prominent Americans and colleagues in the final figures of the pediment. The figure of “Research Present” bears the likeness of Chief Justice Taft, while the face of “Research Past” is that of John Marshall. Other faces on the pediment are Elihu Root, Cass Gilbert, Charles Evans Hughes, and the sculptor himself.

Since Robert Aitken was a respected artist and was considered by most to be apolitical, a question arises concerning Gilbert’s influence on Aitken’s choice of allegorical figures. Although some historians maintain that Aitken had a free hand in the choice, there is some evidence to the contrary. In his detailed diary, Gilbert mentioned visiting Aitken’s studio eleven times, double the number of times he visited the studios of other sculptors working on various projects for the building. On one visit Gilbert wrote, “I called at Robert Aitken’s studio at 11:20 am and went over the plans of Sculptures, West Pediment. I revised the plans he had indicated, in which he concurred.”¹⁴ Although short on specifics, the entry nevertheless confirms Gilbert’s active role in the creative process and clearly suggests his influence in selecting symbols sympathetic to his own image for the Court.

Within Gilbert’s elaborate program of symbolic messages, the huge bronze doors at the West Portico’s entrance were didactic, and in the broadest sense, political statements. Cast with sculptured reliefs of scenes depicting the growth of law from ancient Greece and Rome to the early United States, and designed by Gilbert and John Donnelly, Jr., the Court’s doors were in all probability inspired by Lorenzo Ghiberti’s “Gates of Paradise” on the Baptistery in Florence, Italy.¹⁵

Although Cass Gilbert fashioned fewer political statements within the interior of his marble temple, his conservative imprint nevertheless became part of the Court’s inside image and transmitted message. Designed by Gilbert, the impressive “Great Hall” dramatized “the approach to the courtroom of the highest tribunal in the land.” Doric columns

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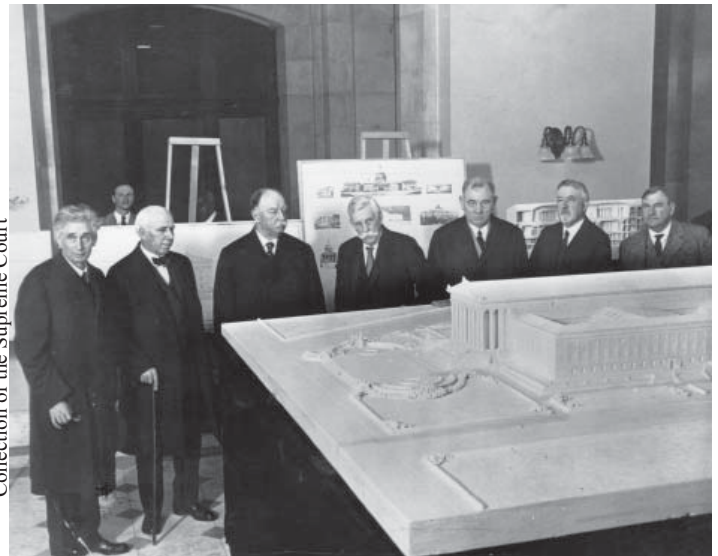
accentuated the route to “Massive wooden doors, carved with symbolic figures,” gracing the entrance to the Court chamber.¹⁶ In two instances, however, Gilbert’s views earned him criticism and brought him into direct confrontation with the Roosevelt administration.

Gilbert’s plan for the Court chamber included a series of columns carved from muted yellow and ivory marble mined from a specific quarry near Siena, Italy. To insure that only the best marble was selected, Gilbert travelled to Rome to seek Fascist dictator Benito Mussolini’s personal involvement. At the audience several observers were shocked to see Gilbert greet Mussolini with what appeared to be a Nazi salute. He also generated stinging criticism from the Administration and others with his open praise of Il Duce. “My impression of Mussolini,” he wrote to a friend, “is that he is not only a very great man, but that he is a very charming and fascinating man. I have never met anyone who made quite the same impression on me.”¹⁷ Gilbert’s admiration for the Italian leader notwithstanding, Mussolini’s involvement with the Supreme Court’s construction was never publicized, probably because the opening of the building overlapped the brutal Italian invasion of Ethiopia.

Gilbert’s other snub to the New Deal involved an inquiry from Treasury’s Section of Painting and Sculpture regarding decorative painting opportunities within the building. Gilbert, visiting London when he received word, was incensed by the “meddling of those people.” He instructed his assistant, John Rockart, to withhold information from the Section while quietly putting the contracts out for private bid, an obvious ploy supported by the Supreme Court Building Commission.¹⁸ Before the Section had time to pursue the case, a contract was signed with Mack, Jenney, Tyler, and Associates, political conservatives and old friends of Gilbert’s firm. A cry of foul by the Section to the Supreme Court Building Commission only resulted in a gentle reminder that, unlike other federal building projects, the Treasury Department had no jurisdiction in the award of contracts for the Court.¹⁹

In spite of perceived political indiscretions in Italy and bureaucratic contract disputes in Washington, Cass Gilbert was able to channel his giant talent into a project filled with symbolic, even metaphorical qualities. His marble temple was designed to be a shrine, a judicial sanctuary with two social dimensions of institutional significance. First, the embodiment of the Court in its own building reinforced an image of the Court as a neoclassical legal temple. Second, and perhaps more important to Gilbert, the symbolism represented a declaration of his own professional, cultural, and politically conservative views in the turbulent New Deal era.²⁰

Just before the completion of Cass Gilbert’s masterpiece, the *New York Times* ran an article more revealing in its



Collection of the Supreme Court

In 1929 members of the Court viewed a model of the proposed Supreme Court and plaza area. Pictured left to right are Justices Louis Brandeis, Willis Van Devanter, Chief Justice William Howard Taft, Justices Oliver Wendell Holmes, Jr., Pierce Butler, George Sutherland and Harlan Fiske Stone.

symbolism that in its words. Framed above a likeness of the Preamble to the Constitution was a picture of the new Supreme Court building’s west pediment. Superimposed on the right was a picture of Chief Justice Hughes; on the left, President Roosevelt.²¹ All suggested powerful icons, but the image of the Court’s new home linked to the nation’s founding document suggested much more. The Court’s symbols and images, interpreted by Cass Gilbert’s architectural and political vision and received by a public with simplistic but ardent reverence, hint at an underlying traditionalist response of the American people to the Depression experience. The new Supreme Court’s home undoubtedly represented a range of meaning beyond itself that tapped into ideas people wanted to believe in as true. The image---the marble temple on the corner of Maryland Avenue and First Street, Northeast---indeed captured the essence of an America firmly rooted in tradition and mythical older values. For Cass Gilbert, his last great commission proved to be a final affirmation of his values and a ringing statement against modernity.

Colonel Thomas R. Yarborough served as an Air Force pilot for twenty-eight years and holds a doctorate in history. A former professor and department chair at Indiana University, he now lives in West Springfield, Virginia, where he maintains ties to the academic community by writing articles for various scholarly journals and periodicals. He is the author of the critically acclaimed book, **Da Nang Diary.*

Footnotes for this article are available on the publications portion of our website. in the Quarterly section Please visit www.supremecourthistory.org to view online.

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“Simple and Cheap” My Father Said

By Josephine Black Pesaresi*

My father, Hugo L. Black, died in 1971. At that time he was 85 years old and the second longest sitting Associate Justice in the history of the United States Supreme Court, having sat on the Court for nearly 35 years. An avid tennis player, he served on his two beloved courts—the Supreme Court and the tennis court—until a few months before his death. He gave up both reluctantly, but died at peace with his life and his death.

He was buried in Arlington National Cemetery, not as a Supreme Court Justice but as a Captain in the Cavalry during the First World War. His grave is next to my mother, Josephine, who died in 1951 and had been a Yeomanette in the Navy during the same war. Their grave markers are standard government issue, and they note only the dates of birth, death, and service in the armed forces.

A funeral service was held for my father at the National Cathedral in Washington, D. C. Over 1,000 people attended, including the President of the United States, judges, and many Congressmen and Senators. The Bishop of the Cathedral, Dean Francis Sayre, oversaw the arrangements and delivered the eulogy.

In making the funeral arrangements, we had only three directives from my father: 1) simple, 2) cheap, 3) no open casket.

These were not last minute orders. Our family had heard my father’s views about funerals for many years. Appalled by the high costs, he felt that “funeral merchants” often took advantage of grieving families when they were at their most vulnerable. Coming from a humble background, he had seen families spend themselves into debt. He was equally appalled by any person who wished an elaborate and expensive funeral, seeing this as evidence that the person was “puffed up about his own importance in the scheme of things.”

With my father’s directives firmly in mind, we planned our trip to the funeral parlor to pick out a coffin. We had chosen

a funeral home in Washington, DC recommended as a place used by many government officials. Our group included three family members—my brother, my stepbrother, and myself—and two Supreme Court Justices—Byron White and William Brennan.

The casket room was elegantly appointed. The carpeting, wall paneling and piped in music set a tone for coffin shopping in undisputed good taste. On entering, one’s eye was immediately drawn to the extreme left wall where a superbly crafted dark wood coffin, softly spotlighted to show the fine wood grain, was perched high on a velvet-draped dais. It looked like a throne coffin. However, we were steered counter clockwise, starting our search at the right. The caskets were arranged head to toe in a semi-circle leading up to the throne coffin, and it was obvious that we were going from least to most expensive.

The first coffin we came to—the cheapest—was covered with pink organza, pink satin bows, with a pink ruffled skirt around the bottom. Tasteless and frilly, it seemed totally out of place. The next ones were also cloth-covered, but the cloth looked increasingly more expensive. Our salesman was surprised that we even glanced at these, let alone asked their prices, and indirectly dismissed these as a final resting-place for a man of importance. He began to hurry us on until we came to the throne coffin.

We stood in front of this masterpiece of craftsmanship with heads slightly bowed reverently. “This,” the coffin salesman said, “is the worthy resting place for a Justice of the United States Supreme Court.” When we asked the cost of the throne coffin, he did not immediately give a dollar amount. He noted that while it was the most expensive, he knew that the price was not our main concern when burying a man of father’s stature. Cost considerations would be unworthy. This response was a big mistake and backfired immediately.

Suddenly, almost simultaneously, we looked at each other,



Photo by AP

Justice Black’s family members stand at the top of the stairs as the pall bearers carry Justice Black’s coffin down the stairs of the National Cathedral. Current and past members of the Court stand in a line on either side of the steps. Justice White, who helped select the coffin, is third from the bottom on the left side.

smiling as my father's directive hit us full force—cheap. We moved to another emotional dimension—common at wakes—going from a deep grieving sadness to almost playful mood. Right there, in that elegant room, we knew that together we could do one last thing for my father. No one was going to talk us out of cheap! When pressed, the coffin salesman allowed that the throne coffin cost thousands of dollars. That settled that.

We dispersed, zig-zagging around the room, separately appraising the caskets and asking prices down to the penny. All of the polished wood caskets were soon dismissed as too expensive. It had to be a cloth-covered one. To the salesman's horror, Justice White began to scrutinize the first pink organza coffin and then asked what was under the frills. The salesman said it was just a plain, unfinished pine box. Then someone asked about the most expensive cloth-covered casket. That, too, was a plain pine box. When asked the difference between the boxes the salesman—now completely befuddled—whispered that the more expensive had a “better shape.” We looked and thought the shapes were identical.

Huddling for a final conference, someone asked “Shall we get the pink, the cheapest?” and we all gave a resounding “YES.” We said we would buy the pink for \$165 with the cloth stripped off. The salesman said that was impossible, it would look terrible. We, however, wanted to see for ourselves since this was our coffin of choice. First one of us pulled away a little cloth to take a peek, then another ripped more forcefully, and finally we all started ripping off the fabric with careless abandon. Off came the bows, the coffin skirt, and all but a few patches of stubbornly glued pink organza. There stood a perfectly fine plain pine box. The debris littered the elegant carpet, but we were practically euphoric. We had followed my father's directive almost to a tee, with the added bonus of deflating pretensions in this very

pretentious room (though my father would have felt some compassion for the poor coffin salesman.)

When we went into the office to settle the bill, the funeral home director, now understanding our zeal for cheap, asked timidly about filling in the nail holes and sanding down the glue spots. With a closed casket visitation at the funeral home and display at the cathedral, they felt their reputation was at stake. We agreed, if nothing was added to the bill, and were assured nothing would be.

Dean Sayre,** Dean of the National Cathedral made a final request in the spirit of my father's wishes. He asked that at the funeral we have the casket displayed without the American flag or flowers on top of it. He, as my father, had long been concerned

about the excessive cost of burying the dead and the financial burden this put on living loved ones. He wanted people to see that the cost of a coffin did not symbolize the abiding love of the living for the dead, nor did it reflect the stature of a man.

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**Josephine Black Pesaresi is the daughter of Hugo L. Black. She was a psychiatric social worker and a consultant on suicide prevention.*

***Francis Bowes Sayre was elected the Dean of the National Cathedral in 1951. He was born in the White House in 1915, the grandson of Woodrow Wilson and bore a strong resemblance to his maternal grandfather.*



UPI/BettmanCorbis

Members of an honor guard hold the flag over the plain pine casket at Arlington Cemetery. Standing just behind the casket are The Rev. Duncan Howell, former Justice Arthur Goldberg and Justice Thurgood Marshall.



Harvard Law Library

Oliver Wendell Holmes, Jr. served as a First Lieutenant in the 20th Massachusetts Infantry Regiment and as an aide-de-camp to General Horatio Wright during the Civil War. Speaking to other veterans of the war, he said: “[w]e have shared the incommunicable experience of war, we have felt, we still feel, the passion of life to its top. In our youth our hearts were touched with fire.”

THE SUPREME COURT AND THE CIVIL WAR REVISITED

2014 LEON SILVERMAN SERIES

The 2014 series will consider the national conflict through an examination of some of the most significant people involved in the war. The Society first explored the topic of the Civil War in a lecture series given in 1994. Twenty years later, in the midst of the observance of the 150th anniversary of the War, this new series will explore themes of the Court and the origins of the war, and its immediate and long-term impact on the country. The 2014 series consists of four programs, two presented in the Spring, and the remaining two in the Fall of the year. On May 1, 2014 Professor Lea VanderVelde will discuss *The Dred Scott Family and the Roots of the Civil War*. On May 8, 2014 Professors James McPherson and G. Edward White will conduct a discussion moderated by Prof. Brad Snyder. Their presentation is titled *Touched with Fire: Justice Holmes and the Civil War*. On October 16 Timothy Huebner will speak about Roger B. Taney, *The Slave Power and the Meaning of Emancipation*. The concluding program in the series will be given by Prof. Lucas Morel who will discuss *President Lincoln, the Supreme Court and the Civil War*. Printed invitations for the series will be mailed to all current members of the Society and information about the series is also available on the Society’s website, www.supremecourthistory.org.