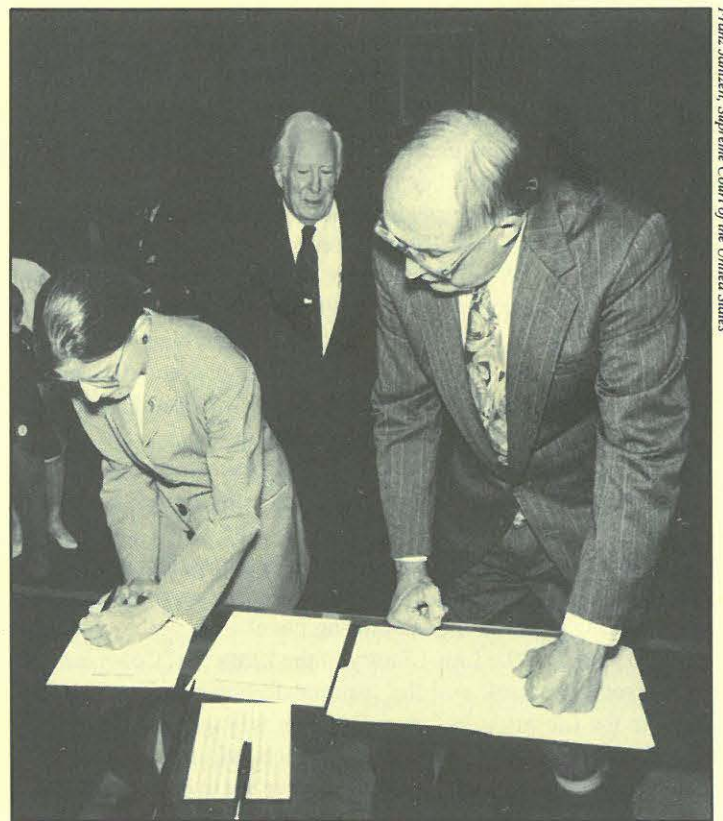


## Ruth Bader Ginsburg Joins Court Takes Oath as 107th Justice

On August 10, 1993, Ruth Bader Ginsburg took the judicial oath of office to become the 107th Justice of the Supreme Court of the United States. A small ceremony was held on this occasion in the oak-paneled Justices Conference Room of the Court building. During the ceremony, Martin Ginsburg, the Justice's husband, held a Bible belonging to Chief Justice Rehnquist while she pronounced the words of the judicial oath. In the oath, Justice Ginsburg promised to "administer justice without respect to persons and do equal right to the poor and rich. . . ." Chief Justice William H. Rehnquist administered the oath to Justice Ginsburg with members of the Ginsburg family, Associate Justice John Paul Stevens and Retired Chief Justice Warren E. Burger, in attendance. President Clinton nominated Justice Ginsburg to the Supreme Court on June 14, 1993 to succeed Justice Byron R. White, who announced his retirement from the Court on March 19, 1993.



Franz Jantzen, Supreme Court of the United States

Retired Chief Justice Warren Burger (center) and Chief Justice William H. Rehnquist (right) look on as Justice Ruth Bader Ginsburg signs her oath of office.

Justice Ginsburg is the eleventh individual born in the state of New York, the second woman and the sixth person of the Jewish faith to serve on the Supreme Court. She came to the Court after serving for 13 years as a Circuit Court Judge for the D.C. Circuit where she was praised as a consensus builder and a dedicated judge. During her service on the Circuit Court, Justice Ginsburg served with Justice Scalia, Justice Thomas, Robert Bork and Kenneth Starr, among others. She was appointed to that Court in 1980 by President Carter.

--continued on page nine



Chief Justice William H. Rehnquist (left) administers the judicial oath to Ruth Bader Ginsburg on August 10, 1993. Her husband, Martin Ginsburg (right) is holding a Bible owned by Chief Justice Rehnquist.

Franz Jantzen, Supreme Court of the United States



## A Letter From the President



Leon Silverman

Building upon the success of last Spring's lecture series on the Court's Jewish Justices, the Program Committee is now completing plans for a six-part series of lectures and panel discussions on the Supreme Court during the Civil War.

Our experience with last Spring's program was very good. The lectures attracted leading biographers in the field

who addressed approximately 1,000 attendees at the five events. The Society also plans to publish the lectures in a volume that will be made available to members sometime next year.

The Supreme Court in the Civil War looks equally promising. Although plans have not been completed, we have commitments from some of the most respected scholars on constitutional history and the Civil War period: Herman Belz (University of Maryland); Ludwell Johnson (William & Mary College); Larry Kramer (New York University Law School); Philip Paludan (University of Kansas); G. Edward White (University of Virginia); Mark Neely (St. Louis University); Harold Hyman (Rice University); Randal Kennedy (Harvard University); Michael Less Benedict (Ohio State University); and Earl Maltz (Rutgers University School of Law).

Professor Belz is taking the lead in organizing the program, and will serve as a moderator on the two panel discussions which are planned to open and close the series. The Chief Justice has consented to introduce the first event in the series, and we hope to persuade other members of the Court to participate in introducing the remaining lectures and the closing panel.

The Friends of the Law Library of the Library of Congress will co-sponsor the series, and the restored Representatives Reading Room in the Library's Jefferson Building will serve as the site for two of the lectures. The other four events will take place in the Supreme Court. Although ticket costs have yet to be determined, it is hoped that adequate outside support can be attracted to keep ticket prices at a modest level.

The series will begin sometime in March with an introductory panel discussion. That will be followed every week or two by individual lectures, and the series will conclude with a panel discussion, probably in mid- to late May. Each evening's program will last between 60 and 90 minutes, and will be followed by a reception where members can meet and talk with the speakers.

The first event in the series is a panel discussion which will focus on the constitutional conflicts that preceded the outbreak of hostilities. Professor Belz plans to provide some historical background on the period, to be followed by a discussion from divergent viewpoints on the legal and constitutional controversies of the day.

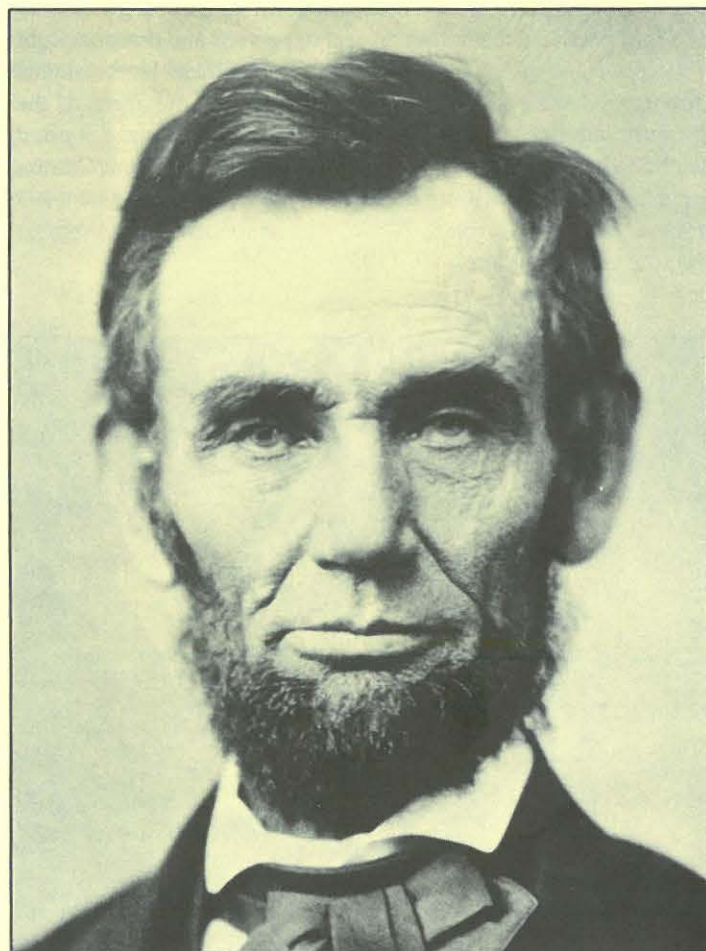
Slavery, fugitive slave laws, and the now infamous *Dred Scott*

decision will be among the topics covered. But the panel also hopes to devote some time to such matters as the Southern States' claimed rights of secession and nullification, which were hotly contested issues in the Ante-bellum era.

In subsequent weeks, individual lectures will focus on the personalities who occupied the Taney and Chase Courts—Roger Taney, whose rejection of the Lincoln Administration's suspension of habeas corpus placed the Executive and Judicial Branches on a collision course; John Campbell, who resigned from the Court to join the Confederate government; Stephen Field, whose unprecedented appointment to a newly created tenth seat was motivated in part by a Union desire to cement the loyalty of Field's home state of California; and Salmon P. Chase, who sought to replace Lincoln as the Republican nominee for President in 1864—to name but a few.

The fourth event scheduled is an address on the Court's operation during the Civil War, which will touch upon the war's impact on the various circuits. Judicial circuit duties bore a whole new dimension of risk during the war, particularly in border states where a traveling Justice had no way of knowing where sympathies lay in the next town on his rounds. This lecture will also seek to examine the Confederacy's judicial experience during the war years.

The fifth lecture will cover the Supreme Court's docket during the Civil War. The suspension of habeas corpus, as I have already



Library of Congress

President Abraham Lincoln named five Justices to the Supreme Court during the Civil War. The Civil War lecture series will examine the impact of Justice Stephen Field and Chief Justice Salmon P. Chase in particular.



mentioned, was one issue that came before the Court. *The Prize Cases* brought before the Justices the constitutionality of the Union blockade of southern ports and seizures of ships in the absence of a declaration of war. Jurisdictional disputes between civilian and military courts were yet another controversy which the Court addressed during the period. All of these issues will be examined in this lecture.

The series will close with a panel discussion on the Civil War's constitutional aftermath. It will examine Chief Justice Chase's participation in the impeachment trial of President Andrew Johnson—a trial brought on in part by Johnson's break with fellow Republicans over Reconstruction. A great deal of emphasis is expected to be placed on the Court's early role in interpreting the Thirteenth, Fourteenth and Fifteenth Amendments—the so-called Civil War Amendments. Did the Court aid or impede the progress of civil rights? Scholars of disparate perspectives on this issue will offer their views.

It will be the overall goal of the series to explore the constitutional conflicts which helped precipitate the Civil War, additional conflicts which ensued as a result of the conflagration, and the effect the war's outcome had on the resolution of these issues.

As I have said, much of the planning for this series remains before us in terms of dates, ticket costs, and other details. But those who are involved in the planning are excited about the prospects the program offers, and the progress which has already been made.

Our next issue of the *Quarterly* will discuss the series in greater detail, and you can expect to receive your invitation sometime next January. If the attendance at our last series is any gauge, I would urge those of you who wish to attend to respond promptly upon receiving your notice, as these programs have proven to be very popular and seating will be limited.

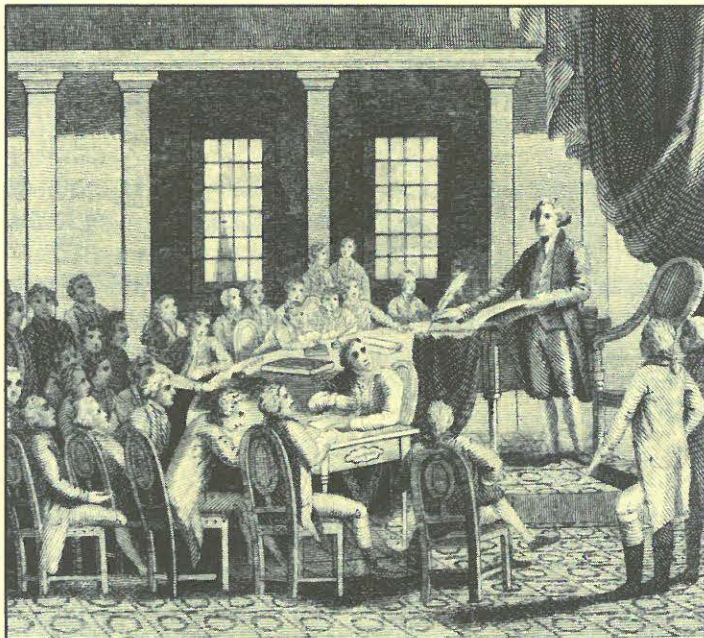
Leon Silverman

## The Supreme Court Historical Society Quarterly

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<b>Managing Editor</b>	Kathleen Shurtleff
<b>Assistant Editor</b>	Jennifer M. Lowe
<b>Consulting Editor</b>	Kenneth S. Geller

## Society Publishes Biographies of Justices



The Constitutional Convention of 1787 in Pennsylvania is just one of the historical illustrations in *Supreme Court Justices: Illustrated Biographies, 1789-1993*. Several future Supreme Court Justices participated in the convention, including James Wilson and William Paterson.

The Society is pleased to announce the publication of an unique reference work, *The Supreme Court Justices: Illustrated Biographies, 1789-1993* edited by Clare Cushman with a foreword by Chief Justice William H. Rehnquist. The book is published in conjunction with Congressional Quarterly, Inc. Many of the biographies that have appeared in the *Quarterly* were originally written for this book, so Society members have already previewed the quality of the writing in this volume.

Much has been written about the decisions of the Supreme Court, but what about the personalities of those who have served on the bench and shaped the Court during its 200-year history? *The Supreme Court Justices* is the first single-volume reference to provide in-depth biographies of each of the first 106 Justices who have served on the Court. Each biography describes the Justice's background, formative experiences, career, interests, and legal philosophy. It also presents the major issues on which the Justice passed judgment. Lively anecdotes, details from Justices's lives, plus more than 300 illustrations reveal the human side of the Justices and make for a colorful, fascinating reference work. Produced under the direction of the Historical Society, the biographies were researched and written by top scholars, former law clerks to the Justices, and eminent historians. Drawing on the latest scholarship to produce accurate, even-handed and up-to-date biographies, the profiles are written for a general audience. The volume includes an extensive bibliography and is indexed for easy research access.

*The Supreme Court Justices: Illustrated Biographies, 1789-1993*, is normally priced at \$23.95. Members of the Supreme Court Historical Society can purchase it for only \$19.16. An order form and postage-paid envelope are enclosed for your ordering convenience.



# **Climbing Justices: Holmes and Hughes in the Alps**

**John Nesbitt**

Courts and camps are the only places to learn the world in.  
*Philip Dormer Stanhope, Earl of Chesterfield, Letter to his son, October 1747*

This is not the place for squirts.  
*Oliver Wendell Holmes, Diary entry dated July 3, 1866 after his first view of the Alps*

[A] reinvigoration in body and spirit, [alpine climbing] gave me what perhaps has been my only hobby. Of course, I was never a mountaineer, but I did all that a sedentary man, with a young family dependent upon him, should attempt.

*Charles Evans Hughes, Autobiographical Notes*

## **An Introductory Warning to Hikers**

**David H. Souter**

**Associate Justice, Supreme Court of the United States**

A recent essay in a mountaineering magazine puts Moses among the great hikers of the ages, and there may have been a hint of the busman's holiday when the lawyers Holmes and Hughes took to the summits. But neither of them went to the mountains to divine more law, and we may not only view them in the Alps as just hikers and climbers, but even imagine walking next to them on a mountain path without attacks of disproportion. If this is your fantasy (as it was mine), you may wish to avoid embarrassment by skipping the following article, in which John Nesbitt gives us two climbers far and away beyond the range of those hikers (like me) known as "goofers" to the hut crews of the Appalachian Mountain Club in my native White Mountains.

Great leveler though mountaineering may be, in Nesbitt's graceful paradox, the author's two subjects earned no discredit worse than Holmes did after a mule ride for feet battered too much too soon, and neither had a thing to fear from the Bostonian's judgment on setting out with Leslie Stephen, that "This is no place for squirts." Like Henry Adams's archangel, Nesbitt's two climbers loved the heights.

But even if your boots are my size, read on. We all love the heights we know, and no hiker will read this story of summer climbs without fellow feelings for two forerunners who went to the mountains for friendship and relief, and lost themselves in the grandeur of high places.



Library of Congress

The beauty of the Alps, coupled with the physical challenge of climbing them, has made the Swiss mountains a tantalizing objective for many hikers through the years. Two Supreme Court Justices, Oliver Wendell Holmes and Charles Evans Hughes, are among the many who have ascended the Alps.



*Author's Note: The retracing of the Holmes and Hughes climbs was only possible with the assistance of several individuals. Mrs. Judith Mellins of the Harvard Law School Library culled and duplicated Holmes' diary of his alpine climbs as well as Holmes' later correspondence on the subject. Mr. Theodore Waddell, grandson of Chief Justice Hughes, graciously provided me with copies of the unpublished letters from Hughes to his wife written during Hughes' five solo alpine trips in the 1890s. My guide, Robert Aschenbrunner of the Grindelwald Bergsteigerzentrum, expertly lead me on the Holmes and Hughes treks and assisted with historical research on Swiss alpinism during the applicable periods.*

## Introduction

The appointment of David H. Souter to the United States Supreme Court continues the tradition of climbing Justices. Justice Souter's peak-bagging occurs mainly in the White Mountains of his native New Hampshire, climbing by 1979 all forty-eight of the four thousand footers, and later traversing in one day the Presidential Range from Madison through Pierce.<sup>1</sup> Appropriately, Justice Souter occupies the chambers of the late Justice William O. Douglas, whose hiking and climbing defined, in large measure, his public persona. Douglas wrote several books and articles detailing his travels throughout the world's mountain ranges, manifesting a lifelong fascination with nature.<sup>2</sup> As a young boy, he used hiking and climbing to overcome the lingering effects of polio.<sup>3</sup> Douglas developed into a strong outdoorsman, hiking mountain trails with a pack up to forty miles a day.<sup>4</sup> For Douglas, this was necessary "to stay alive; a lifetime diet of the law alone turns most judges into dull, dry husks."<sup>5</sup>

The mountaineering interests of Supreme Court Justices did not begin with Douglas and Souter. Justice Oliver Wendell Holmes and Chief Justice Charles Evans Hughes were intense lovers of mountains, and as young men accomplished some notable climbs in the Swiss Alps, albeit independently. Sometime ago, I decided to reconstruct and repeat the alpine climbs of Holmes and Hughes. The project started out as a mere retracing of routes and ascents, but developed into a study of who these Justices were as individuals. Mountaineering is a great leveler; it strips to the raw, exposes the depth of one's character and creates in that crucible of experience bonds, strengths, and emotions that remain a lifetime. The Justices' diaries and letters chronicle this in unique ways.

## Holmes in the Alps

Oliver Wendell Holmes was one of the greatest jurists and legal scholars ever to grace the Supreme Court. His judicial and scholarly accomplishments have been extensively documented and debated

since his death over fifty years ago. The quintessential man of letters, his legacy flows from more than two thousand judicial opinions as well as thousands of letters and about a hundred articles, speeches, and notes.<sup>6</sup> His book, *The Common Law*, worked a near Copernican revolution in legal thinking.<sup>7</sup> But Holmes was no arid intellectual. To his correspondents and law clerks, he would say that "the great emotions" he had known came from "the Swiss mountains, a storm at sea, battle, and a total eclipse of the sun." These "all stir the mind at the bottom of one's brain."<sup>8</sup>

The inclusion of the Swiss mountains stemmed from his "brief but vivid" experience in the Bernese Oberland, the central Swiss Alps.<sup>9</sup> This adventure occurred in 1866 at the age of 24 when Holmes visited Europe after his Civil War service and completion of his legal training at Harvard. Holmes arrived well known as the scion of the famous Dr. Holmes, poet, author, and leader of the Boston intelligentsia. Young Holmes spent his first few weeks in England, hobnobbing with the rich, aristocratic, and royal, and engaging in some harmless debauchery. It was during a June 7 dinner in London with the Stephen brothers that Holmes' thoughts turned to the Alps.

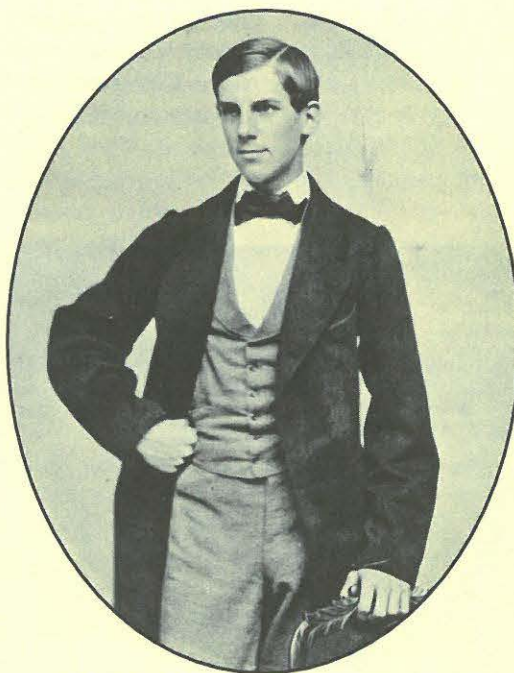
Holmes enjoyed a warm relationship with both Stephens. Fitzjames, the eldest and then in his late thirties, was a successful barrister and a well-known London journalist. Holmes had spent an evening with Fitzjames at the London Political Economy Club. After the meeting, Holmes and Fitzjames walked the streets of London in animated philosophical and political discussion until almost midnight. The next morning, Fitzjames sent Holmes a copy of his *Essays by a Barrister*.<sup>10</sup> In later years, Holmes would borrow greatly from this prolific English jurist in developing his own legal theories.<sup>11</sup>

But at their June 7 dinner, it was the younger brother, Leslie, who galvanized Holmes with his talk of mountain climbing.

Leslie was then thirty-three years old and at the peak of his physical powers.<sup>12</sup> He studied theology at Cambridge and in 1859 took Holy Orders in the Church of England. By 1862, however, his theological views had so changed that he resigned his fellowship,<sup>13</sup> becoming a passionate skeptic and a solitary, intense thinker. To the British public, Leslie symbolized the relatively new sport of the upper class, the conquest of the Alps. Holmes had met Leslie in 1863 in Boston when Leslie came to see Dr. Holmes.<sup>14</sup> To young Holmes, then home nursing his Civil War wounds, Leslie suggested a climb in the Alps to aid Holmes' recovery.<sup>15</sup> Now in London, Leslie renewed the challenge, drawing up a possible itinerary for Holmes, tailored to the novice alpinist.<sup>16</sup>

Holmes could have found no better advisor. Leslie Stephen was a leading figure of the first wave of English alpinists. From the early 1850s on, the Alps fell one by one to these mountain enthusiasts; Monte Rosa in 1855, the Monch in 1857, the Eiger in 1858, and the Matterhorn in 1865. In all, the decade between 1855 and 1865, known as alpinism's

—continued on next page



Oliver Wendell Holmes, Jr. as a young man.  
Photo Courtesy of Harvard Law Art Collection



## Alps (continued from previous page)

Golden Age, saw sixty major peaks conquered.<sup>17</sup>

Leslie started serious climbing in 1858 and made extended annual trips to the Alps thereafter.<sup>18</sup> His single greatest achievement was the first ascent of the Schreckhorn in 1861, a 13,379 foot peak in the Bernese Alps.<sup>19</sup> In climbing, Leslie escaped the shadow of his elder brother. Only once did Leslie climb with Fitzjames – the Jungfrau in 1860 – an event never repeated because of Leslie's indignation with Fitzjames' incessant political chatter up and down the mountain.<sup>20</sup> Leslie insisted on climbing in silence to allow the scenery and physical challenge to salve his continual intellectual struggles.<sup>21</sup>

Leslie invited Holmes to join him at an Alpine Club dinner on June 12. In typical English fashion, this club was formed in 1857 as a forum for the alpine enthusiasts to discuss and advance their favorite sport. Leslie became a member in 1858 and was elected President in 1865. Totally devoted to the group, Leslie once walked the fifty miles from Cambridge to London in twelve hours to attend an Alpine Club dinner.<sup>22</sup> The membership was definitely elite; the 281 joining before 1864 were barristers, solicitors, clergymen, dons, schoolmasters, landed gentry, civil servants, professionals and

businessmen.<sup>23</sup> Membership was conditioned upon significant mountaineering achievement.<sup>24</sup>

1866 was a critical time for the club, and Stephen may have shared this fact with Holmes. The Matterhorn accident of the prior year, where three Englishmen and a guide fell to their deaths after the first successful ascent, cast a dark shadow over alpinism.<sup>25</sup> Stephen must have been particularly pained by the apostasy of his friend John Ruskin, the famous writer and painter, who spent many seasons in the Alps and probably did more than any Englishman to draw the public's attention to the beauty of the mountains. In the 1850s Ruskin's references to the climbers were entirely benevolent. But by 1865, Ruskin was denouncing the Alpine Club members as treating the Alps "as soaped poles in a bear-garden, which [they] climb, and slide down again, with 'shrieks of delight'... and rush home, red with cutaneous eruption of conceit, and voluble with convulsive hiccough of self-satisfaction."<sup>26</sup> Shortly after the publication of this now celebrated denunciation, the Matterhorn tragedy occurred, emboldening Ruskin to reissue his charge that the Alpine Club promoted vanity, boastfulness, and a spirit of undue competition.<sup>27</sup> Stephen is credited with bringing respectability back

—continued on page sixteen



Bradford Washburn

The Swiss Alps have been captured in the photographs of Bradford Washburn. Mr. Washburn has kindly allowed the *Quarterly* to reprint one of his majestic views.



# Membership Update

The following members joined the Society between June 16, 1993 and September 15, 1993.

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Patrick Schmidt, Baltimore  
Ralph H. Sullivan, Silver Spring

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## Membership Update *(continued from previous page)*

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### Canada

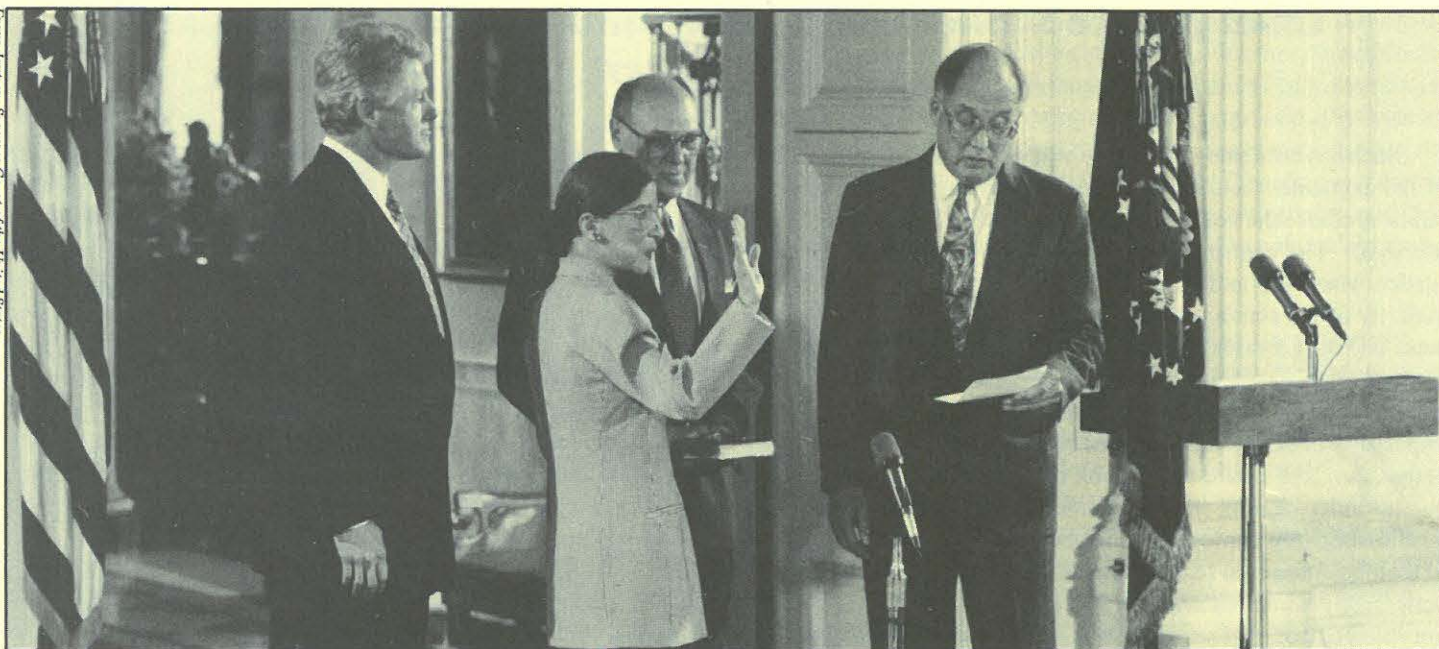
The Hon. John W. McClung, Edmonton, Alberta

## NOTICE

The Publications Committee is seeking original articles on the Court's history to be published in the 1994 *Journal of Supreme Court History* or in the Society's *Quarterly* newsletter. The *Quarterly's* staff is also seeking photographs and artwork of historical interest to illustrate articles, and to be used in a proposed series of photographic montages planned for subsequent issues of the *Quarterly*. Of particular interest are photographs of the past Justices and their families, clerks' reunions, famous litigants, and attorneys who have appeared before the Court on historic cases. For further information contact Director of Publications Jennifer M. Lowe at (202) 543-0400.



Franz Janzen, Supreme Court of the United States



President Bill Clinton (left) looks on as Chief Justice William H. Rehnquist delivers the Constitutional Oath to Justice Ruth Bader Ginsburg on August 10, 1993. Justice Ginsburg is the first Justice in twenty-six years to be nominated by a Democratic president. President Lyndon Johnson's nomination of Thurgood Marshall was the last.

Prior to her service on the Circuit Court, Justice Ginsburg was director of the ACLU's Women's Rights Project, arguing six cases before the Supreme Court. These cases challenged government policies that discriminated against individuals on the basis of gender. She had a very successful record, winning five out of six cases. Many American legal scholars believe that Ginsburg was to

issues of gender what Thurgood Marshall was to issues of race. In fact, former Solicitor General Erwin Griswold, speaking at the Fiftieth Anniversary of the Supreme Court Building in 1985, fostered this idea when he said that "in modern times two appellate advocates altered the nation's course . . . Thurgood Marshall and Ruth Ginsburg."

Ruth Bader was born to Nathan and Cecilia Bader on March 15, 1933 in Brooklyn. She grew up in the Flatbush area of Brooklyn and attended Cornell University from 1950-54 where she studied government. While attending Cornell, Ruth met fellow student Martin Ginsburg. Ruth was elected Phi Beta Kappa in 1954. Shortly after her graduation, she and Martin were married. The Ginsburgs then took a two-year break in their studies while Martin served in the Army at Fort Sill, Oklahoma. During this period, Ruth worked first on the post, and later as a Social Security claims adjuster. While they were living in Oklahoma, their first child, Jane Carol, was born.

In 1956, the Ginsburgs both enrolled in the Harvard Law School, where Martin had already completed one year of study. One of nine women in a class of 400, Ginsburg's academic performance won her a place on the *Harvard Law Review*. Following Martin's graduation in 1958, he accepted a job in New York as a tax lawyer, and Ruth transferred to Columbia University where she continued her legal training, ultimately receiving an LL.B. in 1958, and a J.D. in 1959. Justice Ginsburg joined the *Columbia Law Review*. When she completed her work in 1959, she was tied for first in her class.

After graduation, Justice Ginsburg took a job as a law clerk to Judge Edmund L. Palmieri, U.S. District Court, Southern District of New York from 1959-1961. She subsequently worked on the Columbia Law School Project on International Procedure. In 1963,

Franz Janzen, Supreme Court of the United States



Justice Ruth Bader Ginsburg (left) is congratulated by Senator Daniel Patrick Moynihan (right), D-New York, at a reception in the State Dining Room at the White House. Justice Ginsburg and President Clinton (center) greeted guests after the August 10, 1993 ceremony marking Justice Ginsburg's taking of the Constitutional Oath.

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# A Justice's Papers:

## Chief Justice Stone's Biographer and The Saboteurs' Case

Bennett Boskey\*

Much has been said—and some of it very harshly—in the course of the excitement and furor engendered by the granting of early public access to the voluminous papers of the late Justice Thurgood Marshall. The controversy has roused the family and friends of Justice Marshall, and Chief Justice Rehnquist speaking for “a majority of the active Justices” of the Supreme Court, on the one hand, and the Librarian of Congress and many journalists as well as some scholars on the other. We have accordingly benefited from a spirited discussion of issues ranging all the way from (i) the importance of a chronological zone of confidentiality to the integrity of the Court’s internal deliberations, to (ii) the importance of a better public understanding of how seriously the Court goes about its business and how earnestly the Justices seek to accommodate views of their colleagues to reach a consensus when that is possible.<sup>1</sup> In between are issues such as how free a Justice should be in exercising sole control over the conditions of the donation of his or her papers without fuller consultation with colleagues, how free a donee library should be in exercising any reposed discretion “responsibly” and even how free a journalist or other researcher should feel in publishing or otherwise utilizing some hitherto-secret information unearthed during examination of the Justice’s papers.

These are issues of significance to the history and the functioning of the Court and of our Government. It is not my purpose to seek to resolve them here. But it is worth noting that the problems are not new ones. Throughout the Court’s lifetime there has been an intermittent tension between the claims of history and the claims of confidentiality.<sup>2</sup>

The Marshall episode provoked me into dusting off an old file<sup>3</sup> and its accompanying recollections. For two terms—October Term 1941 and October Term 1942—I served as the senior law clerk (of two law clerks—not four, as much later became the norm) to Harlan F. Stone during the first two years of his Chief Justiceship. During this period, in the hot Washington summer of 1942, the Court found itself convened in a July Special Term to hear habeas corpus applications in the Saboteurs’ Case, *Ex parte Quirin*, 317 U.S. 1, involving petitions by seven of eight German saboteurs who had been trained in the technical aspects of sabotage at a sabotage school near Berlin, Germany.<sup>4</sup> Four of the eight had been landed from a German submarine on isolated Amagansett Beach, Long Island; the other four had been landed from another German submarine at Ponte Verde Beach, Florida. Upon landing, all had buried their German Marine Infantry uniforms as well as explosives and other related devices, and had proceeded in civilian dress. Mirabile dictu, all eight were apprehended before they had the opportunity to carry out their missions.

President Roosevelt, acting on carefully crafted legal advice, decided that the saboteurs should be tried not in the civilian courts, but before a specially constituted military commission of seven Army generals, for various offenses in violation of the Articles of War and of the laws of war. Such proceedings were begun before the military commission, with the saboteurs being represented by

eminent counsel assigned with the obligation to assist in their defense.<sup>5</sup> Not unnaturally and not unexpectedly, their assigned counsel sought by petitions for writs of habeas corpus to challenge the constitutional and other asserted bases of the military commission proceedings. Before the military commission proceedings were completed, the petitions were extensively argued before the Supreme Court on July 29 and 30, 1942.

On July 31, 1942, the Supreme Court issued an unanimous Per Curiam opinion sustaining the validity of the military commission proceeding. Specifically, the Court held that the charges against the petitioners alleged an offense or offenses which the President was authorized to order tried before a military commission, that the military commission was lawfully constituted, and that the petitioners were in lawful custody for trial before the military commission. The Per Curiam stated that the Court announced its decision and entered judgment “in advance of the preparation of a full opinion which necessarily will require a considerable period of time for its preparation and which, when prepared, will be filed with the Clerk.” Justice Murphy took no part in the consideration or decision of the case, leaving eight Justices participating—a fact which raised the possibility of an equal division, or the absence of a majority of the full Court, on some point or points when the full opinion was



Chief Justice Harlan Fiske Stone (left) with Bennett Boskey. Chief Justice Stone had a close relationship with his clerks and Mr. Boskey is shown here driving the Chief Justice to the Court on the first day of the Fall Term 1941.

Courtesy of Bennett Boskey





Justice Frank Murphy joined the Army Reserve as a Lieutenant Colonel in 1942. He recused himself from the *Saboteurs' Case* feeling his military status might present a conflict of interest.

prepared.<sup>6</sup>

With this fundamental challenge to its jurisdiction and procedures out of the way, the military commission convicted all eight saboteurs, and six of them were promptly executed in an electric chair in the District of Columbia Jail.<sup>7</sup>

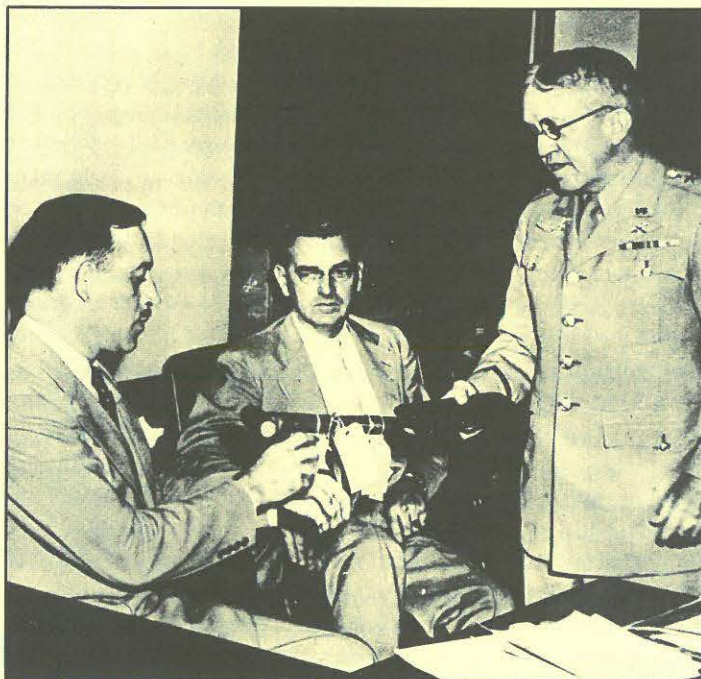
Apart from his unanticipated sojourn in Washington to preside over the Special Term, Chief Justice Stone was spending the summer of 1942 at Peckett's on Sugar Hill, New Hampshire. Having assigned to himself the arduous task of preparing for the Court the full opinion in this case, he was working on it as the summer wore on, despite being largely incapacitated for three weeks by a lame back. The books and other materials which he might wish to refer to were, essentially, in Washington not in Peckett's—though they could be shipped as requested—and as a result, he and I had a stream of correspondence about the opinion until he returned to Washington on September 14. His letters and notes to me were handwritten—in his customary scrawl which was notoriously close to illegibility for those not accustomed to deciphering it;<sup>8</sup> my transmittals to him at least had the benefit of a typewriter.

In any event, on October 29, 1942, after the October Term was under way, the full opinion for the Court was filed. It was a single opinion with Chief Justice Stone as the author; none of the other

seven participating Justices filed any separate opinion or observations. But toward its end the opinion made apparent that some major diversity of views had developed among Justices who all came to the same conclusion. The question at issue was whether the petitioners had a legitimate grievance on the ground that the military commission proceedings did not fully comply with the Congressionally-enacted Articles of War—in other words, whether Congress in the Articles of War had validly restricted the power of the President to prescribe the procedures to be followed by the military commission, and if so, whether those restrictions had been violated. The opinion's response to this question was (317 U.S. at 47–48):

We need not inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents. For the Court is unanimous in its conclusion that the Articles in question could not at any stage of the proceedings afford any basis for issuing the writ. But a majority of the full Court are not agreed on the appropriate grounds for decision. Some members of the Court are of opinion that Congress did not intend the Articles of War to govern a Presidential military commission convened for the determination of questions relating to admitted enemy invaders and that the context of the Articles makes clear that they should not be construed to apply in that class of cases. Others are of the view that—even though this trial is subject to whatever provisions of the Articles of War Congress has in terms made applicable to "commissions"—the particular Articles in question, rightly construed, do not foreclose the procedure prescribed by the President or that shown to have been employed by the Commission, in

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Judge Myron C. Cramer, Judge Advocate General of the War Department, holds a shovel found by the Coast Guard and used as evidence in the *Saboteurs'* trial.



## Saboteurs' Case *(continued from previous page)*

a trial of offenses against the law of war and the 81st and 82d Articles of War, by a military commission appointed by the President.

It would not take a clairvoyant to make an educated guess that this low-key, and perhaps exceptionally cryptic, statement of differences, had been preceded by much discussion, and even vigorous exchanges of memoranda, among the Justices, and that ultimately all of them had decided that no useful purpose would be served by elaborating on the differences of approach since all eight of the participating Justices had reached the same conclusion, no matter how divergent their routes.

There the matter rested for a number of years. Chief Justice Stone was stricken on the bench and died on April 22, 1946. The war had ended; the nation was beset by new problems that demanded attention; the Saboteurs' Case had passed into a realm of history unlikely to be frequently examined.

But other factors were at work. The Stone family was interested in finding a competent biographer for the Justice. This interest was shared by the Justice's wife Agnes and by his two sons, Lauson H. Stone, the lawyer (see note 5, *supra*), and Marshall Stone, an eminent mathematician who had combined academic distinction with notable service to the Government during World War II. Ultimately, it was determined that the biographer's mantle would be assumed by Professor Alpheus T. Mason of Princeton University, who had previously completed a well-received biography of Justice Brandeis and had acquired a reputation as a constitutional scholar. The papers of Stone, both as Justice and Chief Justice, had been largely deposited with the Library of Congress, though subject to various restrictions, and Professor Mason was assured he would be given full and unrestricted access. Accordingly, he set to work in the summer of 1950 and those of us who had significant papers or recollections concerning Stone were urged to cooperate with Professor Mason—an assignment which was happily accepted.

Experience makes it clear that serious judicial biography is a hard and time-consuming undertaking. Professor Mason went at it with admirable diligence, enthusiasm and perseverance.<sup>9</sup> To facilitate his labors, the Library of Congress placed the Stone papers on temporary loan at the Firestone Library, Princeton University. As biographers are wont to do, Mason decided that at least several subjects might be suitable for publication as independent articles before the work as a whole was completed. One of these, dealing with Stone's views on extracurricular (that is, extrajudicial) activities by federal judges, appeared in the December 1953 issue of the *Harvard Law Review*,<sup>10</sup> and on reading it I had sent off to Mason a letter with a few comments of my own which I hoped might shed some supplemental light on what Mason had written.<sup>11</sup> Partly as a result, in the early fall of 1955 I received from Mason a letter informing me that those suggestions "have already been incorporated in the chapter as it will appear in the book," and that he was enclosing another chapter which he was thinking of publishing independently and on which he would like to have my comment before it appeared in print.<sup>12</sup>

I read Mason's new draft article with some astonishment. It was about the Saboteurs' Case, *Ex parte Quirin*, and there was no doubt

that what he set forth would be of considerable interest to scholars and others concerned with how the Court performed its functions and what the various Justices may have thought about the limits, if any, on the powers of the President as Commander in Chief. Mason had found in the Stone papers—and was quoting extensively in the article—a variety of preliminary memoranda and draft opinions and comments among the Justices, most of which had never seen the light of day, and, so far as known, had never previously been available for inspection.

These included a detailed memorandum by Stone concerning what he then thought to be the two available alternative approaches, which he called "alternative (a)" and "alternative (b)." Mason quoted several pages from the memorandum and stated, correctly, that alternative draft opinions labeled "A" and "B" accompanied the memorandum in Stone's circulation to the Justices. Alternative (a) would be to decline to pass upon the meaning of the Articles of War, on the ground that the question had been premature and had not been properly before the Court when the case was argued on July 29 and 30. Stone's memorandum referred to the fact that such a ground had been included in the draft of the Per Curiam which he had initially circulated, but had been deleted at the direction of the Court. He went on to write that it would be an "embarrassment" arising "from the fact that the announcement that we have left the construction of Articles 46 and 50½ undecided is now made for the first time after six of the petitioners have been executed and when it is too late to raise the question in their behalf." As to alternative (b), which would involve construing the Articles of War against the petitioners' contentions, Stone's memorandum suggested the Court would be



Princeton University

Alpheus Thomas Mason was selected by Chief Justice Stone's family to write his biography. Professor Mason wrote judicial biographies of Louis Brandeis, Stone, and William Howard Taft.





Felix Frankfurter expressed his concern over the publication of Mason's article to Paul Freund and Paul Bator of Harvard University. Justice Frankfurter, shown here in his Harvard office in 1939, maintained close ties to Harvard after joining the Court.

"deciding a proposition of law which is not free from doubt upon a record which does not raise it. In short, we are rendering an advisory opinion." It is not surprising that, as Mason's article showed, the Chief Justice's statement of such a possible dilemma led to much further deliberation among the Justices and a search for some way to achieve unanimity of expression. Mason did not have access to all the internal exchanges, but he was making full use of what was available to him.

It was true that thirteen years had passed since *Quirin* had been decided. But it was also true that of the eight Justices who had participated in *Quirin*, four—Justices Black, Douglas, Reed and Frankfurter—were still active Justices sitting on the Court. My own sense of propriety was deeply offended. I felt then—far more strongly than I might feel today—that under the particular circumstances the lapse of time had not been sufficient to warrant the disclosures, particularly in view of the fundamental nature of the issues in the case and the manner in which the Court had unanimously decided not to enlarge upon the basic differences of views among the Justices.

In this mood, I telephoned Lauson Stone to tell him of my misgivings and to inquire about the extent to which Mason had been assured a free hand to make whatever use of the Stone papers Mason thought appropriate. Lauson told me that no restrictions whatever had been placed on Mason; nevertheless he encouraged me to communicate to Mason whatever personal views I had on the subject.

I think I possessed sufficient humility to understand that I ought not, and could not, try to assume the role of a censor on this matter. I telephoned Mason and raised with him the question whether or not the proprieties would be observed by publication of the article in the form in which his draft was cast, and the further question whether as a minimum he had an obligation to find out from the four still-sitting Justices if they had any views on the matter. Mason told me that he would consider these questions and would plan to visit me when he was next in Washington. He followed this up with a letter saying,

among other things:

I realized, of course that the question you raise presented a barrier that I would have to clear sooner or later with the Justices involved before publication. But previous experience with Jackson and Frankfurter on the earlier *Harvard* article led me to think that I might get the approval of all those involved, except possibly Reed. Your reaction makes me wonder. I am encouraged, however, by your thought that much of the substance of the piece might be retained even if the memo had to go.<sup>13</sup>

Later in October Professor Mason did visit me in Washington and we spent a few hours together discussing his draft page by page. From what he told me I understood that the manuscript was already in the hands of the *Harvard Law Review*, but that ample time remained for any modifications which should prove either necessary or desirable. I made a number of suggestions to him, both as to substance and as to style. On the substantive side, I felt that the tone of the draft was unduly hostile to the opinion and was in some respects undeniably erroneous. He said that when he returned to Princeton he would talk further with Professor Corwin about this. I did not retain a copy of his draft, but my impression is that ultimately he made at least some changes along the lines I suggested. Another matter we discussed was Mason's use of quotations from Chief Justice Stone's letters to me about the drafts of the opinion. Particularly since these were not letters which I had originated, I did not feel I was in any position to interpose a formal objection to their use, and for the most part there was nothing in them which would have called for such objection. I did clarify at least one point in a letter where Mason had clearly misunderstood Stone's meaning, and Mason made a suitable correction. I declined to give permission for any direct quotation of anything I had written to Stone, although I was far from sure that such permission was mine to withhold.

But more than this, I again emphasized to Professor Mason my own misgivings as to the propriety of using in a published article all the internal Court material. I said that while the material would certainly make the article more interesting, this did not seem to me to be the proper test. I mentioned the further difficulty that, even with all Mason's proposed disclosure, his presentation of the development of the opinion was very fragmentary. I also suggested how the article could be revised to avoid these disclosures. I did acknowledge to Professor Mason that different people would entertain different views as to the proprieties, and I urged Mason to discuss the problem with the members of the Supreme Court—and particularly with the four still-sitting Justices who had participated in *Ex parte Quirin*. Mason indicated he would do this.<sup>14</sup> When he left my office we were on fully cordial terms; his parting words to me, as I recall them, were that he had never in his life done a harder day's work.

Professor Mason did not afterwards tell me directly whether he actually discussed the matter with the Justices. But other sources, particularly Justice Frankfurter, told me that he did. I was told that Justice Black had affirmatively stated he had no objection to Mason's publishing, and that Justices Douglas and Reed apparently had expressed no objection.<sup>15</sup> Justice Frankfurter, who, it turned out,

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## Saboteurs' Case *(continued from previous page)*

had some of the same misgivings I had voiced, told me that he himself had not wanted to say to Mason flatly that the material should not be published at that time, but instead had emphasized to Mason the heavy responsibility which rested on a biographer to make the delicate judgments as to what should or should not be published. Justice Frankfurter had thought this would discourage Mason from going ahead with publishing the internal Court documents, but Mason had taken it as a green light to proceed if in his own judgment he determined that publishing was the better course.

And go ahead he did. The article was featured in the March 1956 issue of the *Harvard Law Review*, which seems to have gotten into print in the early part of February.<sup>16</sup> As published, the article included not only the various Stone internal documents and extensive references to Stone's letters to me, but a number of quotations from Justice Frankfurter's communications to Stone and even one reference (though not a direct quotation) to what I had written to Stone. Justice Frankfurter quickly expressed his dismay to Paul Bator, the President of the *Harvard Law Review*. Bator responded with a letter which should serve as a model for editors who find themselves defending precarious positions not entirely of their own making. His response to Justice Frankfurter began:

As you can imagine, we are all somewhat shaken by the events of yesterday. I am, of course, appalled that we have perhaps gone beyond the boundaries of discretion and good taste in accepting the Mason article. Needless to say, we would not have done so if we had had any doubt that you and Mr. Boskey concurred in the publication of the quotations from your letters. Mr. Mason left us in no doubt as to this—especially in the case of Mr. Boskey, with whom, according to Mason, the article was checked page by page.

The letter continued with a description of the discussion Bator had had with Professor Paul Freund:<sup>17</sup>

I have gone over the article with Professor Freund. His feeling is that the "A & B" memorandum can be published without over-stepping the boundaries of discretion. He emphasized that the memorandum does not engage in personalities of any kind, that a long time has passed, and that in general it was 'innocuous'. He did feel that there was one quotation from a letter which might be subject to misinterpretation; he suggested we take that out, and we have, of course, done so.

And it concluded on a note of true regret:

All this does not, however, dispel my unhappiness over this incident. It is not a good thought that the *Review* will have published, this year, an article which may stand in the future as an impeachment of our sense of discretion and our feelings of propriety as regards the Court. I can't imagine that this will assuage your own feelings in

this matter, but I wanted to assure you at least that we have not taken this lightly and are deeply sorry about the whole matter.<sup>18</sup>

Paul Bator also sent me a letter which included the following:

I was considerably chagrined about the confusion in regards the Mason article. The author left us in no doubt as to your permission to use your materials, and this was the basis on which we went ahead on it. As to the famous "A & B" memo, there is a good deal of difference of opinion about it. We contented ourselves with Professor Freund's judgment that it was "innocuous." But perhaps it's all an enormous mistake. And we are terribly sorry that you and Justice Frankfurter are unhappy about it.<sup>19</sup>

Justice Frankfurter was generous in his reply to Bator:

Your comments on the situation created by the Mason article have, if I may say so, the moral and literary qualities that I have come to appreciate in my experience with you as President of the *Harvard Law Review*. They are not the less admirable in that they are, I think, innate. What is done is done. I was brought up by Mr. Stimson not to waste time over spilt milk, except to



Library of Congress

Justice William O. Douglas was one of four Justices remaining on the Court from the Saboteurs' case. Justices Frankfurter, Black and Reed were the others.



derive from the manner of its spilling the important lesson of not having milk spilt the same way the next time.<sup>20</sup>

At the same time, Justice Frankfurter sent to Paul Freund a copy of the Justice's letter to Bator, and added the following observations:

He reports you as indicating, about the "A&B" memorandum that "a long time has passed, and that in general it was 'innocuous'." (The words except 'innocuous', are his, not yours.) I should like to make two comments. In the first place, when a time is a long time is a fair subject for differences of opinion. Suffice it to say, it makes a difference to me that you are planning not to publish any of Brandeis's unpublished opinions later than a quarter-century ago. The Stone memorandum is less than fifteen years ago and, unlike the Brandeis materials, touches four colleagues of Stone who are still sitting. And when you say "innocuous," is it quite innocuous to allow people to make use of the fact the Court was considering a mode of disposition that the Chief Justice himself felt "embarrassing," considering that lives had been taken before an embarrassing explanation was contemplated? . . . But my objection to the Mason performance, over and beyond any particular item of it, is that the *Quirin* opinion was the result[ant] of an uncommonly extensive interchange on paper of views among the various Justices. Stone's correspondence—selectively printed—is only a part of it. There is considerable correspondence between Jackson and me, between Roberts and me, between Reed and others, etc., etc. There were circulations by some of us which are both pertinent and illuminating to the final outcome. It is far less than what I call scholarship to print such an essentially mutilated account of the course of events that begot *Ex parte Quirin*, 317 U.S. 1.<sup>21</sup>

Nearly four more decades have now gone by. If any lessons can be learned from this episode, they must seem rather blurred. From a long-range standpoint, surely the Court's integrity has not been impaired. Almost equally surely, disclosures of the Court's subsequent inner deliberations on a wide variety of subjects—including those emerging from the Marshall papers—make clear that there is no ground for concluding that Justices of a later period who must be aware of Mason's work have accordingly hesitated to communicate fully and frankly with each other. There likewise exists the question of the accuracy of the historical record. Justice Frankfurter was understandably concerned that Mason's account was marred by the sin of incompleteness because Mason did not have access to the papers of other Justices who participated in the case. But even if a revisit today by a new chronicler might serve some useful purpose, is that a persuasive ground for deciding that Mason's work in the 1950s should have been deferred or curtailed when so much material was unconditionally turned over to him to prepare the authorized life of Harlan F. Stone?

## Endnotes

\*Bennett Boskey is a practicing attorney in Washington, D.C., and has written extensively on matters relating to practice before the Supreme Court. He is a member of the Council and the Treasurer of The American Law Institute, and is a member of this Society.

<sup>1</sup> The controversy burst into public attention when *The Washington Post* initiated a series of three articles based on its reporters' inspection of the Marshall papers at the Library of Congress. *The Washington Post*, May 23, 24 and 25, 1993. The full text of Chief Justice Rehnquist's letter of rebuke dated May 25, 1993, to the Librarian of Congress, James H. Billington, will be found in *The New York Times*, May 26, 1993, p. D21. Mr. Billington's responses to such criticism are in *The Washington Post*, May 27, 1993, p. A20 and May 31, 1993, p. A18, and are fortified by a letter to *The New York Times* for June 11, 1993, p. A30, from two of his Library of Congress colleagues, David Wigdor and Debra Newman Ham, who accompanied him to the meeting with Justice Marshall at which Justice Marshall made known his intentions; they stated that Justice Marshall "flatly instructed us to make his papers available without restrictions after his death." For a summary of the controversy, see H. J. Reske, "A Court's Deliberations Revealed," (1993) 79 *ABA Journal* 26.

<sup>2</sup> Chief Justice Rehnquist's letter (note 1, *supra*) recognizes the historical importance of Justice Marshall's papers and raises no objection if their disclosure had been deferred until "after the passage of a certain amount of time." Illustrative of such uses of Justices' papers in the past are Charles Fairman's *Mr. Justice Miller and the Supreme Court, (1862-1890)* (1939) and Fairman's various articles on Justice Bradley—which appeared about fifty years after those Justices' deaths; or A. M. Bickel's *The Unpublished Opinions of Justice Brandeis* (1957)—which came out eighteen years after Justice Brandeis' retirement from the Court; or the second volume of Richard Kluger's intensive study of the School Desegregation Cases, *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955), in *Simple Justice* (1976); or Chief Justice Rehnquist's account of the *Steel Seizure Case* in the Supreme Court, *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which was published in 1987 in his *The Supreme Court: How It Was, How It Is* at 61-98.

<sup>3</sup> To avoid any misunderstanding—or indeed any suspicion that I may have built up and kept a personal file of internal Court documents—I hasten to add that this file of mine does not contain any copy of any document or draft initiated by a Justice, except for the handwritten letters from Chief Justice Stone to me which I refer to in this article.

<sup>4</sup> The eighth, Dasch, who had exposed the sabotage plot to the FBI and furnished information and testimony helpful to the prosecution before the military commission, did not join in the court proceedings.

<sup>5</sup> Counsel assigned to the defense before the military commission included, among others, Colonel Kenneth C. Royall (Royall later, 1947-1949, served as Secretary of War) who also in the Supreme Court presented a dignified and eloquent oral argument on behalf of the petitioners, and Major Lauson H. Stone, a well-known New York lawyer who was a son of the Chief Justice. The Supreme Court's *Journal* for July 29, 1942, includes the following entry:

In response to the inquiry of the Chief Justice, the Attorney General stated to the Court that the Chief Justice's son, Major Lauson H. Stone, an officer in the United States Army, assisted defense counsel, under orders, in the presentation before the Military Commission of the case, in relation to which the Special Term of the Court had been called, but that he in no way had connection with the proceeding before this Court and, therefore, counsel for all parties join in urging the Chief Justice to participate in the consideration and decision of the case. Colonel Kenneth C. Royall, of counsel for the petitioners, concurred in the statement and request of the Attorney General.

<sup>6</sup> Justice Murphy disqualified himself because he had on June 10, 1942, taken the oath as a lieutenant colonel in the Army reserve and though technically he remained on inactive status he went on maneuvers and his picture had appeared on the front page of *The New York Times* in full uniform in a prone position practicing firing a machine gun. Apparently he concluded that this foray might create an appearance of lack of impartiality if he sat in the case. Justice Murphy had not brought to the attention of Chief Justice Stone or of the Court his intention to seek a commission in the Army, and Stone was greatly displeased. See Mason, "Extra-Judicial Work For Judges: The Views of Chief Justice Stone," (1953) 67 *Harvard L. Rev.* 193, 200-201; Mason, *Harlan Fiske Stone: Pillar of the Law* (1956) at 708-709. Stone regarded Murphy's action as an ill-considered grandstand gesture which

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to mountaineering as an ennobling pursuit rather than a series of foolhardy pranks.

Holmes dined with Stephen and other Alpine Club members on June 12. Besides Stephen, the Holmes' diary reveals the presence of "one of those who tumbled down the Matterhorn," a reference to Edward Whymper, the only English survivor of the first successful ascent of the prior year.<sup>28</sup> From the familiarity with which Holmes later wrote, and from their alpine histories, it is likely that Holmes also met, among others, James Kent and William Conway. In 1860, Kent became the first American elected to the Club after a whirlwind record of formidable climbs, including the first ascent of the Blumlisalp with Leslie Stephen.<sup>29</sup> Already an accomplished climber, William Conway would go on to become one of the earliest and greatest Himalayan explorers.<sup>30</sup>

After dinner, the Alpine Club members repaired to their usual meeting venue at St. Martin's Place, where T. S. Kennedy read a paper on "Alpine Gear."<sup>31</sup> Holmes, however, did not follow, foregoing the lecture for an all-nighter with a couple of "fair ones."<sup>32</sup> Stephen and Holmes agreed to rendezvous in Paris in early July, from where they would go to Switzerland for some climbing. Holmes reached Paris three days later, followed by a letter from Stephen to meet him at the Paris train station on the evening of July 2nd, where Holmes would recognize him as the "slight but commanding figure, with a singularly handsome face surmounted by a wideawake – an Alpenstock in one hand & a knapsack in the other, parading the Eastern Railway Station and surveying Frenchmen with a contemptuous smile."<sup>33</sup>

Meeting as arranged, Stephen and Holmes caught the night train for Basel, arriving the following morning. At Basel, Holmes first glimpsed the famous trinity of the Bernese Alps – the Jungfrau, Monch, and Eiger. Obviously awed, Holmes wrote in his diary: "This is not the place for squirts."<sup>34</sup> Continuing by train to Kandersteg, Stephen and Holmes secured accommodations early enough to enjoy time for "a pleasant pull up hill" to the Oeschinensee, a stunning turquoise lake set below towering sheer rock walls and hanging glaciers.<sup>35</sup> From this spot, six years earlier, Stephen, with a party of five others, did the first ascent to the summit of the Blumlisalphorn (12,022 ft), the highest peak of the mighty Blumlisalp.<sup>36</sup> Holmes was captivated by the "fine view" of the Blumlisalp and its neighbor, the Doldenhorn: "When one first sees an Alp in the distance there is something very human or rather diabolic in the gleaming reaches of snow – esp. if the top is hidden so that one doesn't realize that it is only a single mountain – At sunset the peaks were almost rose color."<sup>37</sup>

Stephen's choice for Holmes' first climb was not the Blumlisalp or the Doldenhorn, however, but the Balmhorn (12,136 ft). The next day Stephen and Holmes left Kandersteg and climbed up the Gemmi Pass to the Schwarenbach Hotel. Stephen was no stranger at the Schwarenbach, which still serves today after 250 years as the primary climbing base for the Balmhorn, Altels, Rinderhorn, and Wildstrubel.<sup>38</sup> After lunch, Stephen and Holmes strolled to the summit of Gemmi Pass and viewed the path down to Leuderbad, which a modern guide book describes as a "bridle-path (made in 1740) along a rock face which plunges precipitously down for almost 1969 feet [and] recommended only to those with a good head for heights."<sup>39</sup> Holmes' diary description is consistent: "There was

a stiffish drop – sheer down to the valley . . . Picked flowers from edge of yawning gulf – but felt unpleasant creeping in my backbone."<sup>40</sup> Returning to the Schwarenbach, Stephen and Holmes dined and readied themselves for the next day's climb of the Balmhorn.

Stephen had climbed the Balmhorn's sister peak, the Altels, in 1860, and thus was familiar with the route.<sup>41</sup> Stephen was always the general of his expeditions, autocratic and demanding.<sup>42</sup> Once, when one of his party loudly grumbled as they started a long ascent at 2:00 a.m. in a cold mist, Stephen announced: "I hope no one's such a fool as to suppose I'm in a good temper at this hour in the morning."<sup>43</sup> While Stephen as a leader was not a hand-holder and did not suffer complainers, his mastery of alpine terrain and sanguine temperament more than compensated for any lack of sensitivity. For his guide, Holmes could have done no better.

Holmes' diary entry of July 6 records his climb of the Balmhorn as follows:

Today have been up the Balmhorn – the higher peak of the Altels or rather the bigger twin – I've just written Mrs. Weston about it & am not going to begin again – Rose at 4. Weather uncertain & very windy – Started 5. At first stones of the nastiest sort – then foot of Glacier – Then rope put on – steep ascent – grub & rum – Then along edge of such a precipice as yesterday's except frozen over & you could tumble either way – (Safe side like roof of a house) for an hour or two – like going along the edge of an oyster shell – Oh wasn't I scared? Top a little before 10. Bottom 12:40. When we were nearly up the finest sight I ever saw burst upon us – beyond the precipice – vast rolling masses of cloud and above & beyond that a panorama of the greatest alpine peaks – Mischabel – Monte Rosa – Weisshorn – Rothhorn – Gabelhorn – Matterhorn – Dent Blanche – Grand Cornier – Combin – Mont Blanc. Stephen said he never'd seen the like Mem. slide downhill sitting – bully –<sup>44</sup>

The exuberance of Holmes' diary entry is magnificent given the rigor of the climb. The standard guide book estimate for a climb of the Balmhorn is six to seven hours.<sup>45</sup> The Kandersteg guides say that a strong party can do it in five and one-half hours. Stephen and Holmes did it in less than five, and descended down to Schwarenbach in about two and one-half hours more. The proprietors of the Schwarenbach will tell you that only the strongest and best climbers have ever done the Balmhorn in such a time. It is, of course, no surprise that Leslie Stephen falls in that category, but for Holmes to have done so on his first alpine climb bespeaks an iron constitution worthy of the thrice-wounded Civil War veteran.

The day after the Balmhorn climb, Holmes and Stephen left the Schwarenbach for Lauterbrunnen, a twenty mile traverse east through the Gastern Valley, up the Kander Glacier, and over the Tschingel Pass, involving a net altitude gain of about 3,000 feet. Holmes records this second day in the mountains as follows:

Rose and left Schwarenbach at 4 1/2. I was out of order & couldn't eat any breakfast but a bit of bread. We made a short cut down to the Gastern Mal thence a grind up hill til we struck the foot of the Tschingel Glacier. Then up moraines – grass – rocks – etc. till we reached the top



– & then, oh then, the length of the Glacier – passed through a drizzle but it was burning on top – I thought I would die before I passed the glacier. I had eaten nothing and after several vain attempts signalized the top by departing with the little I had summarily. After that & getting below the snow where I was burning with a slow fever, I felt better – downhill same as up – in a drenching air – Then along lofty cliffs – looking through mist over pine forests waterfalls and valleys and at last awfully used up but feeling better after 13 1/2 hours to Lauterbrunnen. Saw Chamois tracks on snow – awful effect when high up of seeing suddenly through mist peaks vastly high.<sup>46</sup>

In their travels, Stephen kept to his usual, unrelenting pace, Holmes struggling to follow. But a strong comradeship developed. Still referring to his companion as “Mr. Stephen,” Holmes limped behind, muttering all the profanities he knew.<sup>47</sup> At the top of the Tschingel pass, vomiting the little food he had been able to ingest, Holmes, in Stephen’s words, “let go” with “great effect” several bursts of the “bad word in frequent use among the army of the Potomac.”<sup>48</sup> Stephen, calling him “Yank” and shouting at him from ahead, “Can you come up Yank,” admired Holmes’ fortitude.<sup>49</sup>

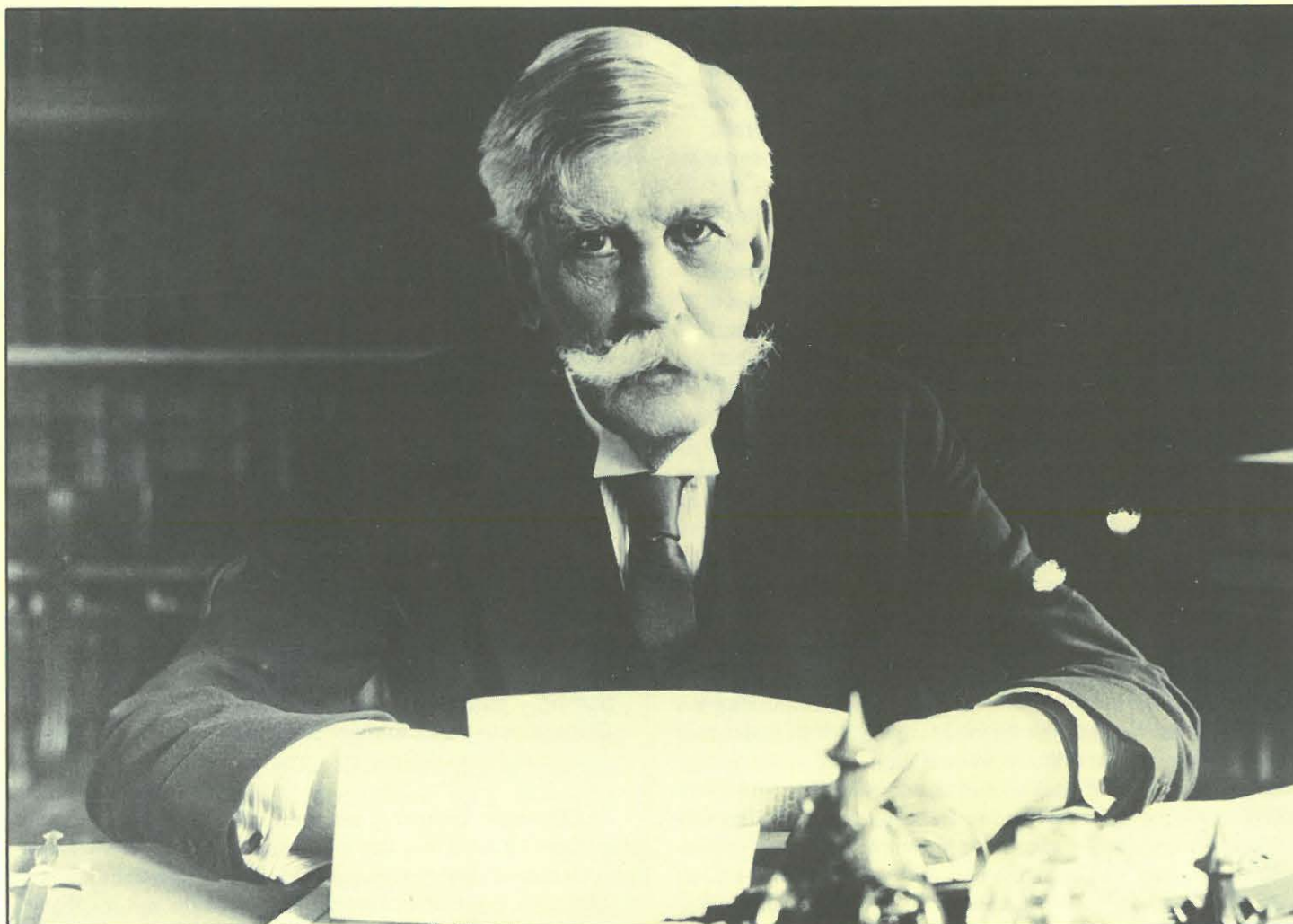
Afterwards a mutual friend wrote Holmes of Stephen’s account of Holmes’ performance.

Leslie Stephen . . . made me laugh horribly by his description of the pluck with which you grounded on behind him, limping like the pilgrim who forgot to boil his peas & swearing quietly to yourself all the profane oaths which you had ever heard in the war, but still getting through each day’s march & coming up in time for the next.<sup>50</sup>

Holmes and Stephen celebrated their arrival at Lauterbrunnen’s Capricorn Inn by killing a bottle of good champagne and sleeping in the next day. In the afternoon, they took “a sharp uphill pull at a rapid pace” to the little inn at the top of the Wengern Alp. From that vantage point, Holmes enjoyed the twilight alpenglow from the peaks of the Jungfrau, Monch, Eiger, and Wetterhorn. The avalanches from the Jungfrau sounded “for all the world like the mountain waterfalls with thunder.”<sup>51</sup>

The next morning Stephen and Holmes strolled downwards to Grindelwald “talking comfortably of metaphysics,” reaching the

*—continued on next page*



Justice Oliver Wendell Holmes treasured his Alps experiences all of his life. One of his clerks noted that the arrival of the Justice’s Alpine Club magazine filled the Justice with delight.



Hotel de l'Aigle Noir "where Stephen is a great hero." Holmes bathed his aching legs in a mountain brook and bought "a regular Alpenstock with axe" in anticipation of the next day's ascent of the Monch.<sup>52</sup>

At mid-afternoon of the next day, with two guides, Stephen and Holmes did the four hour climb to the Eiger Hohle "at a rattling pace," pausing to refresh themselves "by milking a couple of goats – a legitimate robbery in these parts."<sup>53</sup> Following the "hard pull" to the Eiger Hohle, Stephen and Holmes enjoyed over hot coffee "a first class sunset" on the peaks above with "the glacier lying below dark & cold like a slain dragon." The Eiger Hohle – a cave in the south side of the Eiger – was the base used in the days before huts to begin several of the larger climbs from Grindelwald. The Grindelwald guides improved habitation in the cave by rough stone work for their guests eating and sleeping comfort. A spring deep in the cave provided a water source. After construction of the first Bergli Hut in 1868 higher up the Eiger, and especially after the opening of the cograilway to Kleine Scheidegg and the Jungfrau jock around the turn of the century, the Eiger Hohle became a site of historical interest only, rarely visited.<sup>54</sup>

Holmes recorded his next day's climb of the Monch in his diary:

A beautiful morning & we started at 3 1/2 – Snow in fine condition. Up steep of snow & rock we went which were like the side of a house until at about 6 1/2 or 7 we reached the foot of the peak – the Monch – which we were to ascend – grub, & then to work – up a pull of rock then along interminable ridges of ice covered with snow – a precipice on either side – guides cutting steps – and at 10.10 the top – Saw a wilderness of mountain tops mostly below us – and vast meadows of clouds which we also looked down upon. Far below on the other side we saw the house on the Wengern Alp – where we stayed the 8th. Left a bottle with a paper in it, and descended . . . Then after grub down the Aletsch Glacier which was covered with snow in the nastiest manner to the very bottom – We didn't leave the snow till 5 1/2 P. M. 14 hours – and got to Eggishorn at 8 – burned – stiff – exhausted – There is nothing to say about that horrible grind – it almost recalled an army march. The beginning of the glacier was impressive from the vast imminent ice precipices – & at bottom was a glacier lake with the snow crumpling & curling into it in antediluvian shapes.<sup>55</sup>

The Aletsch Glacier is the longest in Europe – almost ten miles – and to navigate its rugged terrain and then ascend the moraine to the Eggishorn hotel after a climb of the Monch certainly constitutes a grind of the first order. Holmes rose the next morning at 9:30, with a face badly burned, notwithstanding the creams applied the prior evening.

From the Eggishorn, Stephen and Holmes made the two day trip to Zermatt on foot. After the first day, Holmes, lame and his face still "in horrible condition," rode a mule to complete the journey with Stephen walking comfortably beside.<sup>56</sup> At Zermatt, Holmes "signalized [his] arrival by tumbling off [his] mule" and "made merry" at the Monte Rosa Hotel with Stephen, "who has been the best of fellows & companions all through and hasn't he lamed me."<sup>57</sup>

Holmes did not do any significant climbing at Zermatt, but did touch alpine history by witnessing the first attempt on the Matterhorn after the prior year's tragedy. John Birkbeck, a young Englishman with perhaps more money and enthusiasm than experience, hired several guides and porters for the climb. The party embarked after kneeling before the local church and being crossed with holy water. The party got only part way up the mountain before retreating. Holmes wrote in his diary that the "guides funk"<sup>58</sup> and the newspapers later wrote that "since last year's accident the Zermatt guides have demonstrated a genuine fear of undertaking enterprises of this sort."<sup>59</sup> A young Zermatt apprentice guide on that climb was Peter Kneubel, who in 1868 would do the second ascent of the Matterhorn and would go on to become one of the first modern specialist guides, climbing the Matterhorn over 50 times, "a great craftsman on the limited stage which family circumstances probably made him prefer."<sup>60</sup>

Holmes enjoyed the day hikes and evening activities at Zermatt notwithstanding his lameness. At the Monte Rosa Hotel, the proprietor "furnished punch ad libitum in the evening to everyone and I [Holmes] gave to Stephen's health in a neat and appropriate speech to which he responded and we gave three cheers to the Landlord."<sup>61</sup>

After a few days at Zermatt, Stephen and Holmes started to work their way to Chamonix via the Theodule Pass, where they rested and "mulled wine and company" at the Hut.<sup>62</sup> On the Italian side of the Pass at Gandegg, the friends separated, Stephen to join a party of English friends, including his future wife, and Holmes to continue by mule to Courmayeur. At Courmayeur, Holmes joined a young Englishman with two guides for a crossing of the Mt. Blanc massif via the Col du Geant, which Stephen had told him was "the most beautiful of Alpine passes."<sup>63</sup>

Holmes described this last alpine adventure in vivid terms:

Up at 1 1/2 started about 2 1/2 – walked for a while in darkness – leaving the town we saw before us the Italian side of Mt. Blanc by starlight – pale and unearthly – as we wound on it grew gradually more and more real as the morning began to break and at last flushed rosy red in the first rays of the rising sun – like the genie of the bottle – a cloud becoming a giant – I cannot describe the gradual lighting of the peaks by which we were now surrounded while the valley was still dark below – Now begun the work – fresh snow had fallen so we left the path and went straight up by the rocks – the thin earth wet with the snow making the way slippery and not quite safe – and the precipitous descent and rolling mists below us making it seem more venturesome than it was. At last by a short arrete the top – then down the snow which was bad and the sun burning – past a party going to Courmayeur – Mer de Glace at last – nearly tumbled into a cravass – Montanvert – downhill came to Hotel d'Angleterre.<sup>64</sup>

At Chamonix, Holmes found some of his Boston friends and joined them for some easy day hikes on the west side of Mt. Blanc. From Chamonix, Holmes returned to England, then home.

After this burst of mountaineering, Holmes never climbed again.<sup>65</sup> Indeed, except for his regular daily walks and a brief experiment with bicycling, Holmes would lead a sedentary life.<sup>66</sup> But



Holmes forever retained his deep interest in the mountains. He was made a member of the Alpine Club in November of 1866, being proposed by Leslie Stephen, and maintained his membership until he died in 1935.<sup>67</sup> Mark DeWolfe Howe, a Holmes law clerk and later his biographer, noted an episode near the end of Holmes' long life:

When Holmes' Alpine Club periodical came to him this morning he seized it with delight. He apparently has the greatest feeling about mountaineering – feeling its value as an experience. He started to list the half dozen greatest experiences which a man can have and named, a battle, a storm at sea, and climbing a Swiss mountain.<sup>68</sup>

Holmes came to romanticize the mountains as he did his Civil War experience. It was not the long grinds, the lameness, or the burned skin that Holmes would remember, but “the silence of the snow,”<sup>69</sup> “the passion of the return to life when one first hears running water on the descent,”<sup>70</sup> for “the romance of the mountains is in my soul forever.”<sup>71</sup> Years after the experience, Holmes would write:

I have seen just enough of mountaineering to be appreciative. The silence of the peaks is one of the greatest sensations of life.<sup>72</sup>  
[In the mountains, one can get] behind the scenes into the workshop of creation – where behemoth was made – where man was not expected and it was a sacrilege to go.<sup>73</sup>

Holmes now chose to live his adventures vicariously through his alpine journal and by devouring the stories of the great polar and African explorers, including William Conway and his climbs and explorations in the High Himalayas.<sup>74</sup> The early experience with Leslie Stephen allowed Holmes to connect with these great adventurers, and sparked the fast friendship that developed with Charles Evans Hughes when Hughes joined the Supreme Court in 1910.

*Editor's Note: Part Two, on Justice Hughes, will appear in the Winter Issue of the Quarterly.*

## Endnotes

\*John Nesbitt is a partner in the firm of Nesbitt & Williams and practices law in the upstate New York village of Palmyra. He is a graduate of St. Lawrence University (1974) and the Syracuse University College of Law (1977). He has climbed in the American and Canadian Rockies and summited Mt. McKinley in Alaska in May of 1993.

<sup>1</sup> Letter from Hon. David H. Souter to John B. Nesbitt, November 27, 1991.

<sup>2</sup> See W. Douglas, *Go East Young Man* (1974); M. Urofsky, *The Douglas Letters* ix – xxii (1987).

<sup>3</sup> See W. Douglas, *supra* note 2, at 31–40.

<sup>4</sup> See W. Douglas, *supra* note 2, at 54. This puts Douglas in the class of Bob Marshall, a founder of the Wilderness Society, who died at age thirty-eight, and who hiked thirty or more miles a day some 250 times. See Edward, “A Short Hike with Bob Marshall,” *National Geographic*, May 1985, at 664.

<sup>5</sup> See W. Douglas, *supra* note 2, at 469.

<sup>6</sup> R. Posner, *The Essential Holmes* xxvi (1992).

<sup>7</sup> O. W. Holmes, *The Common Law* (1881).

<sup>8</sup> M. Howe, *Justice Oliver Wendell Holmes: The Shaping Years*, 238 (1957).

<sup>9</sup> Letter from O. W. H. to Clare Castletown, August 9, 1897 (Oliver Wendell Holmes, Jr., Papers, Harvard Law School Library) (herein “OWH Papers, HLSL”).

<sup>10</sup> S. Novick, *Honorable Justice: The Life of Oliver Wendell Holmes*, 105 (1989).

<sup>11</sup> R. Posner, *supra* note 6, at xxi.

<sup>12</sup> Letter from Dr. J. Monroe Thorington to Catherine Drinker Bowen, June 2,

1942 (Bowen Papers, Library of Congress).

<sup>13</sup> A. L. Munn, *The Alpine Club Register 1857–63*, 304 (1925).

<sup>14</sup> L. Baker, *The Justice From Beacon Hill*, 182 (1991).

<sup>15</sup> *Id.*

<sup>16</sup> Notes by Leslie Stephen, (OWH Papers, HLSL).

<sup>17</sup> *The Alps*, 68 (1973).

<sup>18</sup> A. L. Munn, *supra* note 13, at 304–312.

<sup>19</sup> *Id.* at 309.

<sup>20</sup> *Id.* at 308, N. Annan, *Leslie Stephen – The Godless Victorian*, 91 (1984).

<sup>21</sup> N. Annan, *supra* note 19, at 91.

<sup>22</sup> R. Clark, *supra* note 17, at 43.

<sup>23</sup> *Id.* at 70.

<sup>24</sup> *Id.* at 78.

<sup>25</sup> R. Clark, *supra* note 17, at 251.

<sup>26</sup> M. Howe, *supra* note 8, at 236.

<sup>27</sup> A. L. Munn, *The Alpine Club Register 1864–1876*, 293 (1925).

<sup>28</sup> Holmes Diary, June 12, 1866 (OWH Papers, HLSL).

<sup>29</sup> R. Clark, *supra* note 17, at 65.

<sup>30</sup> See W. Conway, *Climbing and Exploration in the Karakoram Himalayas* (1894).

<sup>31</sup> Letter from Archivist, London Alpine Club, to John B. Nesbitt, March 17, 1992.

<sup>32</sup> Holmes Diary, June 12, 1866 (OWH Papers, HLSL).

<sup>33</sup> Letter from Leslie Stephen to O. W. Holmes, June 28, 1866 (OWH Papers, HLSL).

<sup>34</sup> Holmes Diary, July 3, 1866 (OWH Papers, HLSL).

<sup>35</sup> Holmes Diary, July 4, 1866 (OWH Papers, HLSL).

<sup>36</sup> A. L. Munn, *supra* note 13, at 308.

<sup>37</sup> Holmes Diary, July 4, 1866 (OWH Papers, HLSL).

<sup>38</sup> *Baedeker's Switzerland*, 243 (1991).

<sup>39</sup> *Id.* at 244.

<sup>40</sup> Holmes Diary, July 5, 1866 (OWH Papers, HLSL).

<sup>41</sup> A. L. Munn, *supra* note 13, at 308.

<sup>42</sup> N. Anna, *supra* note 19, at 98.

<sup>43</sup> *Id.* at 92.

<sup>44</sup> Holmes Diary, July 6, 1866 (OWH Papers, HLSL).

<sup>45</sup> *Baedeker, supra* note 38, at 243.

<sup>46</sup> Holmes Diary, July 7, 1866 (OWH Papers, HLSL).

<sup>47</sup> S. Novick, *supra* note 10, at 108.

<sup>48</sup> F. Maitland, *The Life and Letters of Leslie Stephen*, 186 (1904).

<sup>49</sup> S. Novick, *supra* note 10, at 108.

<sup>50</sup> Letter from Thomas Hughes to O. W. Holmes, December 31, 1866 (OWH Papers, HLSL).

<sup>51</sup> Holmes Diary, July 8, 1866 (OWH Papers, HLSL).

<sup>52</sup> Holmes Diary, July 9, 1866 (OWH Papers, HLSL).

<sup>53</sup> Holmes Diary, July 10, 1866 (OWH Papers, HLSL).

<sup>54</sup> R. Rubi, *Verlag Sutter Druck AF. Grindelwald*, 224–25 (1986).

<sup>55</sup> Holmes Diary, July 12, 1866 (OWH Papers, HLSL).

<sup>56</sup> Holmes Diary, July 13, 1866 (OWH Papers, HLSL).

<sup>57</sup> Holmes Diary, July 14, 1866 (OWH Papers, HLSL).

<sup>58</sup> *Id.*

<sup>59</sup> London Alpine Journal, Vol. XXXII, at 108 – 109.

<sup>60</sup> *Id.*

<sup>61</sup> Holmes Diary, July 15, 1866 (OWH Papers, HLSL).

<sup>62</sup> Holmes Diary, July 18, 1866 (OWH Papers, HLSL).

<sup>63</sup> See note 16 *supra*.

<sup>64</sup> Holmes Diary, July 21, 1866 (OWH Papers, HLSL).

<sup>65</sup> S. Novick, *supra* note 10, at 111.

<sup>66</sup> J. Monagan, *The Grand Panjandrum: The Mellow Years of Justice Holmes*, 24 (1988).

<sup>67</sup> See note 31 *supra*.

<sup>68</sup> Howe Diary, December 7, 1933 (Mark DeWolfe Howe Papers, Harvard Law School Library).

<sup>69</sup> Letter of O. W. Holmes to Clare Castletown, August 9, 1897 (OWH Papers, HLSL).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Letter of O. W. Holmes to Clare Castletown, June 24, 1897 (OWH Papers, HLSL).

<sup>73</sup> Letter of O. W. Holmes to Clare Castletown, February 2, 1897 (OWH Papers, HLSL).

<sup>74</sup> See note 72 *supra*.



Ginsburg began teaching at Rutgers University School of Law, where she worked from 1963-1972. While she was teaching at Rutgers, her second child James was born. Justice Ginsburg became the first woman law professor at Columbia Law School when she joined the faculty in 1972. She received several awards for her work as a law professor, and was named in 1977 by *Time* magazine as one of the ten outstanding law professors. Ginsburg received the Annual Outstanding Teacher of Law Award from the Society of American Law Teachers in 1979. She is also the recipient of many honorary degrees.

Justice Ginsburg's family joined her on the afternoon of August 10th at 2:30 PM for a ceremony held in the East Room of the White House in which she took the constitutional oath. Accompanying her for this ceremony and for the earlier ceremony at the Court, were her husband, daughter Jane Ginsburg, son-in-law George T. Spera, their children Paul and Clara, son James, and Mr. Ginsburg's mother, Evelyn.

A formal courtroom investiture ceremony took place on October 1, 1993. President Bill Clinton attended the brief ceremony. Attorney General Janet Reno moved to have Justice Ginsburg's

commission read by the Clerk of the Court, William K. Suter. After the reading of the commission, Justice Ginsburg took the judicial oath for the second time. She assumed her place on the Bench beside Justice Souter. Marshal Alfred Wong then adjourned the special session of the Court. Justice Ginsburg heard her first arguments as a Supreme Court Justice the following Monday, the traditional opening day of the Court.



From Jontzen, *Supreme Court of the United States*

Justice Ginsburg with her mother-in-law Evelyn (left) and Justice and Mrs. William Brennan at the White House Reception on August 10, 1993.

## Saboteurs' Case (continued from page fifteen)

might easily impair the Court's important role as an independent branch during the stressful wartime period. For a more benign assessment of Justice Murphy's efforts to renew his World War I military career, see S. Fine, *Frank Murphy: The Washington Years* (1984) at 216-220; J. W. Howard, Jr., *Mr. Justice Murphy* (1968) at 272-274.

<sup>7</sup> Dasch's sentence, reflecting his helpfulness to the prosecution (see note 4, *supra*), was thirty years imprisonment. Another of the saboteurs, Burger, who likewise had exposed the plot to the FBI and had helped the prosecution, received a sentence of life imprisonment. See M. A. Harrell, *Equal Justice Under Law: The Supreme Court In American Life* (3rd ed. 1975) at 100-101.

<sup>8</sup> For this reason, much later, in connection with Professor Mason's work in the Stone biography, Mrs. Stone asked me to deliver to her a photostatic copy of the letters so that she could "translate" them into more legible form and she then sent the translations off to Mason. As Justice Douglas subsequently wrote: "Stone had the worst handwriting on the Court, except possibly for me. There were no vowels or consonants, only many lines. It was a standing joke that if one dipped a fly in ink and let him crawl across a page, one had a fair replica of Stone's handwriting." Douglas, *The Court Years 1939-1975* (1980) at 224.

<sup>9</sup> In an apparently unpublished Appel Lecture delivered on November 8, 1977, at Franklin & Marshall College, "Vicarious Living: A Biographer's Reward," based largely on his adventures with the Brandeis and Stone biographies, Mason said "Biographical artistry consists in presenting not only what happened but also the subtle interplay of people and events in the subject's life," and

The biographer follows vicariously wherever the subject leads—into foreign lands, foreign fields, unfamiliar subjects. Stone's life was especially fruitful in this respect. I traveled with him abroad, to France, Belgium, Holland, Switzerland, Germany. Art galleries, curio shops, concerts, opera, gourmet banquets enlivened my itinerary. I stood with him in Saint Peter's Cathedral before Michelangelo's poignant statue of *La Pietà* and felt the sharp stabbing pain of Stone's reaction."

(This Mason lecture has been made available to me through the kindness of Professor D. Grier Stephenson, Jr., of Franklin & Marshall College, whose footnote in his thoughtful survey of biographical writings relating to a number of Justices, "The Judicial Bookshelf," in the 1992 *Journal of Supreme Court History* at 133 note 12, called to my attention that he possessed a copy of the manuscript.)

<sup>10</sup> Mason, "Extra-Judicial Work For Judges: The Views of Chief Justice Stone," (1953) 67 *Harvard L. Rev.* 193. The completed biography, *Harlan Fiske Stone:*

*Pillar of the Law*, did not appear until the fall of 1956.

<sup>11</sup> Letter, BB to Mason, December 18, 1953.

<sup>12</sup> Letter, Mason to BB, September 30, 1955.

<sup>13</sup> Letter, Mason to BB, October 7, 1955.

<sup>14</sup> For this account of Mason's visit with me, I am not relying solely on my current recollection. Only a few months afterward, I wrote to Paul Bator, then the President of the *Harvard Law Review* (see note 18, *infra*) summarizing what had occurred at Mason's meeting with me. Letter, BB to Paul M. Bator, February 28, 1956.

<sup>15</sup> There may be some doubt as to how clear it was that Justice Douglas voiced no objection to Mason. In a letter to a friend after the Stone biography appeared, Douglas wrote: "I have been looking over Mason's biography of Harlan Fiske Stone. I am shocked to find freely used in the book inter-office memos that those of us on the Court with Stone wrote each other concerning the cases under argument and up for decision. This struck me as being quite improper unless our permission was obtained, which it was not." Letter, Douglas to Chester Collins Maxey, President of Whitman College, November 5, 1956, reproduced in M. I. Urofsky (ed.), *The Douglas Letters* (1987) at 57-58. Mason's account of *Ex parte Quirin* does not quote anything written by Douglas; Mason did not even specifically mention a memo from Douglas to Stone dated October 17, 1942 (reproduced in Urofsky, *ibid.*, at 102-103), requesting the deletion of a sentence in the proposed opinion.

<sup>16</sup> "Inter Arma Silent Leges: Chief Justice Stone's Views," (1956) 69 *Harvard L. Rev.* 806. The substance of this article became Chapter XXXIX of the biography.

<sup>17</sup> With the possible exception of Felix Frankfurter, Paul Freund has been the twentieth century's most eminent Supreme Court scholar. See the tributes in "In Memoriam: Paul A. Freund," (1992) 106 *Harvard L. Rev.* 1-18. Among many other accomplishments, Freund served as the General Editor of *The History of the Supreme Court of the United States*, the series of volumes prepared pursuant to the Oliver Wendell Holmes Devise.

<sup>18</sup> Letter, Paul M. Bator to Frankfurter, February 16, 1956. Copies of this letter, and of the letters referred to in notes 20 and 21, *infra*, were made available to me by Justice Frankfurter, with a request for my comments. Apart from discussing the matter with Justice Frankfurter, I sent off to him copies of Bator's letter to me, referred to in note 19, *infra*, and of my letter to Bator referred to in note 14, *supra*. Letter, BB to Frankfurter, February 28, 1956.

<sup>19</sup> Letter, Bator to BB, February 24, 1956.

<sup>20</sup> Letter, Frankfurter to Bator, February 20, 1956.

<sup>21</sup> Letter, Frankfurter to Freund, February 20, 1956.