

THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME XIV

NUMBER 4, 1993

Society to Co-Sponsor Series on the Civil War

Mention the Civil War and it conjures up visions of violent clashes between northern and southern armies. Names such as Antietam, Gettysburg, Chickamauga and Cold Harbor are etched in America's collective memory as sites of horrific carnage.

A great number of amateur and professional historians can

recount the military campaigns and their associated death tolls in great detail. Ironically, many Civil War buffs are hard-pressed to explain what brought hundreds of thousands of Americans out onto the battlefield.

Commencing March 9, 1994, the Supreme Court Historical Society and the Friends of the Law Library of Congress will present a six-part lecture series entitled, "The Supreme Court in the Civil War"—a program designed to explore the causes of the Civil War, and to explain the war's impact on our constitutional evolution. The series will include panel discussions and lectures by some of the nation's most respected Civil War and constitutional scholars. Adding to the historic significance of this series, each of the six parts of the program will be introduced by a Justice of the Supreme Court, and will take place in an historic setting—four in the Supreme Court Chamber, and two in the Great Hall of the Library of Congress.

The two co-sponsors' interest in mounting a series on the Civil War is immediately apparent upon reviewing the program. The Civil War was, after all, a constitutional conflict. It is the only time in our history when a majority of Americans has taken up arms over philosophical differences about the government's organization and the limits of its power. Not surprisingly, the Supreme Court played a central role in the constitutional debates over slavery, state sovereignty, the first real application of war powers, and the civil rights questions which followed passage of the three 'Civil War Amendments.'

In an attempt to examine the complex issues which propelled the nation to war, the Historical Society and the Friends of the Law Library have made a concerted effort to approach the topic from diverse perspectives. Among the most hotly debated historical issues arising from the antebellum period, for example, is whether slavery or state sovereignty should be cited as the primary cause of the war—a question which has its roots in the early foundations of the Constitution.

The Constitution recognized slavery, albeit in passing, by adopting a "three-fifths" rule allowing slave-holding states to include slaves in their calculations for purposes of Congressional representation on a three-fifths to one basis. It also set a specific date for terminating the importation of slaves, opening the question of whether the Constitution was a pro-slavery or anti-slavery document. Inclusion of these controversial passages opened a debate

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Library of Congress

CAUTION!!
COLORED PEOPLE
OF BOSTON, ONE & ALL,
You are hereby respectfully CAUTIONED and
advised, to avoid conversing with the
Watchmen and Police Officers
of Boston,
For since the recent **ORDER OF THE MAYOR &**
ALDERMEN, they are empowered to act as
KIDNAPPERS
AND
Slave Catchers,
And they have already been actually employed in
KIDNAPPING, CATCHING, AND KEEPING
SLAVES. Therefore, if you value your **LIBERTY,**
and the *Welfare of the Fugitives* among you, *Shun*
them in every possible manner, as so many **HOUNDS**
on the track of the most unfortunate of your race.
Keep a Sharp Look Out for
KIDNAPPERS, and have
TOP EYE open.
APRIL 24, 1851.

The Fugitive Slave Act of 1850 incensed abolitionists in the North and contributed to the antebellum crisis. The March 9, 1994 panel discussion will focus on the antebellum crises leading up to the Civil War.

A Letter From the President



Leon Silverman

The product of a year of planning, "The Supreme Court in the Civil War" lecture series will commence on March 9, 1994. This is a program you should not miss.

"The Supreme Court in the Civil War" is the most ambitious lecture series ever mounted by the Society. Like last year's highly successful series on the Court's Jewish Jus-

trices, the speakers for this program were selected from among our nation's most prominent scholars. Building on last year's success, "The Supreme Court in the Civil War" will be presented in six parts, including for the first time, two panel discussions: the first designed to introduce to the audience the constitutional crises facing the nation in the antebellum period; and the second to examine the war's ultimate impact on constitutional development.

Was secession constitutional? What role did slavery play in polarizing the factions in the constitutional drama of the pre-war era? Program advisor Herman Belz, who helped organize this series, promises the audience will enjoy a lively exchange over these controversial issues in the March 9 panel discussion.

Professor Belz also anticipates a fascinating exploration of the post-war constitutional landscape in the concluding panel discussion on May 25. Were, for example, the consequences of passing the Reconstruction Amendments the fulfillment of Founding Fathers' hopes for equality in the Declaration of Independence and the Constitution? Or, as some scholars have argued, should the Thirteenth, Fourteenth, and Fifteenth Amendments be regarded as the beginning of a new constitutional era?

The four intervening lectures will explore interesting topics which have received surprisingly little public attention. These will include examinations of the Taney Court, the Chase Court, the operations of the Union and Confederate judiciaries and the Supreme Court's Civil War docket. Collectively, these lectures will offer an uncommon and insightful look at how law operates in a country at war with itself.

The lectures and panel discussions will take place in two of Washington's most elegant and august chambers, the Court Room of the Supreme Court and the Main Hall of the Library of Congress' Jefferson Building. This latter forum is being made available through the Friends of the Law Library of Congress, and the Society deeply appreciates the Friends' co-sponsorship of this program.

I will also take this opportunity to thank the Chief Justice and Associate Justices Harry A. Blackmun, Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter and Clarence Thomas, each of whom have consented to introduce one of the six parts of "The Supreme Court in the Civil War." Their participation underlines the

significance of this excursion into a little-known, but most important period in the expansion of constitutional doctrine.

One of the aspects of our lecture series on the Court's Jewish Justices which proved popular were the receptions which we scheduled following each event. They afforded members and their guests an opportunity to meet and talk with the program participants in a relaxed and cordial environment. Accordingly, we have included receptions in the Supreme Court Building and the Library of Congress following each event in this year's series as well.

Some of the costs for these receptions, and for the program as a whole, are being underwritten through generous donations from some of the Society's loyal friends: Mr. and Mrs. Hugo L. Black, Jr., and the law firms of Hunton & Williams; Morgan, Lewis & Bockius; Sutherland, Asbill & Brennan; Dickstein, Shapiro & Morin; Lord Day & Lord, Barrett Smith; Arent Fox Kintner Plotkin & Kahn; and Milbank, Tweed Hadley & McCloy.

The Society is also grateful to the Friends of the Law Library of Congress, our co-sponsor for this event. The Friends are underwriting the costs of the two lectures which are scheduled to take place in the Library of Congress on March 30 and April 6.

As a result of this support, we are able to make the entire program available at a very modest cost. Members and guests can reserve series tickets for all six programs and receptions for only \$100, or individual events in the series for only \$20.

If there is any bad news, it is that seating is limited, and I must urge you to make your reservations as soon as possible. The Court and the Library of Congress can only accommodate 200-250 attendees, and since the Society has mailed nearly 5,000 invitations to our members alone, we anticipate a capacity crowd.

More information on "The Supreme Court in the Civil War" appears in an article elsewhere in this issue of the *Quarterly*. If you have any questions regarding reservations, call the Society's headquarters at (202) 543-0400.

A handwritten signature in dark ink that reads "Leon Silverman". The signature is fluid and cursive, with the first name "Leon" written in a slightly larger, more prominent script than the last name.

The Supreme Court Historical Society

Quarterly

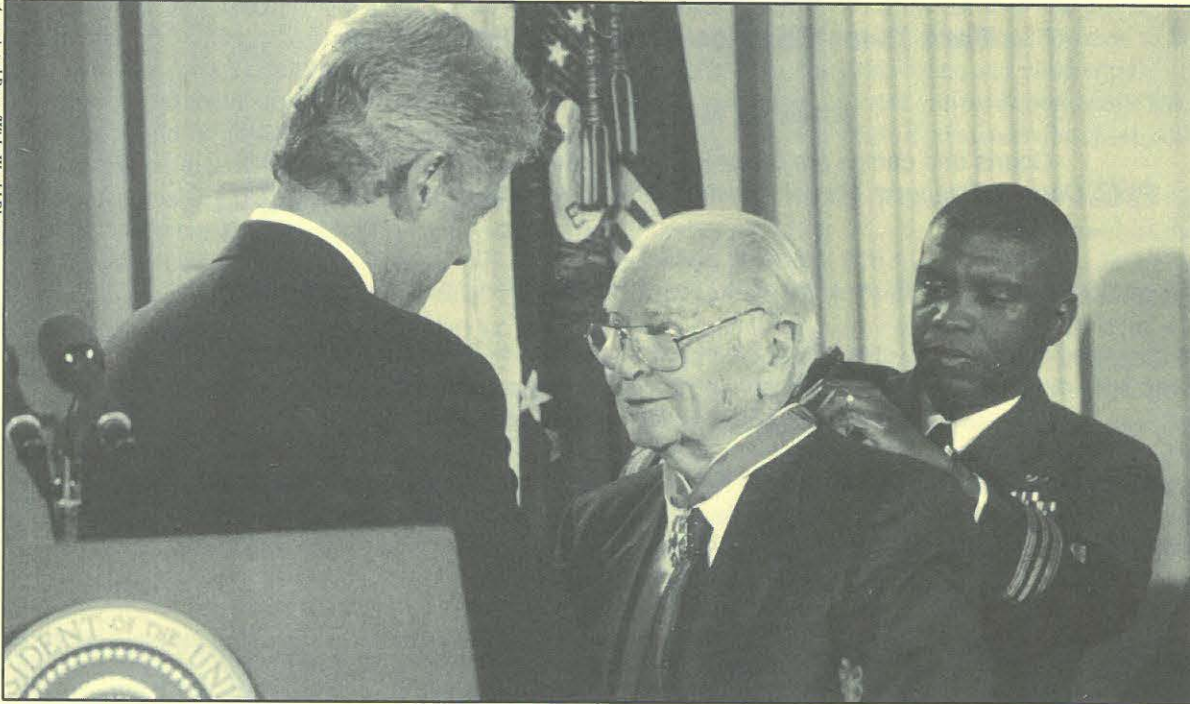
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Justice William J. Brennan, Jr., Awarded Medal of Freedom

Associated Press/Wide World Photos



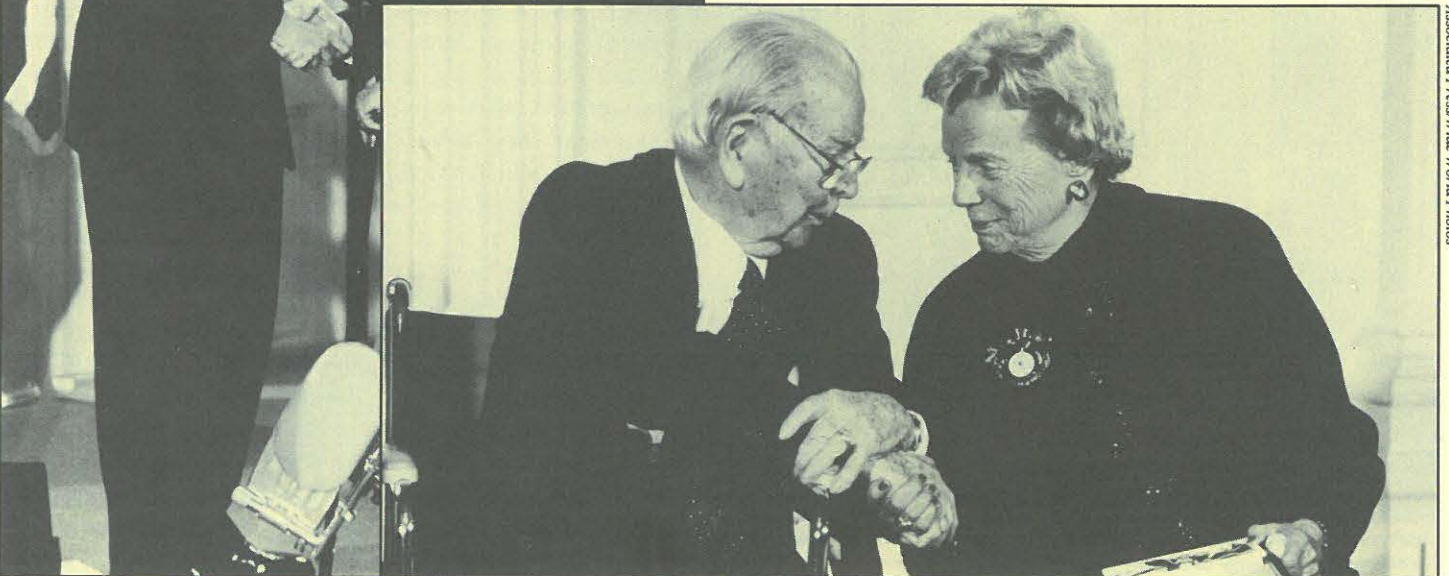
President Bill Clinton presents retired Associate Justice William J. Brennan, Jr., with the Medal of Freedom in a White House ceremony on November 30, 1993. Justice Thurgood Marshall was awarded the Medal of Freedom posthumously that day. Justices Brennan and Marshall became only the fifth and sixth Supreme Court Justices to be awarded the Medal of Freedom, the highest honor awarded to civilians in the United States.

Associated Press/Wide World Photos



(Left) President Clinton shakes Justice Brennan's hand after presenting him the Medal of Freedom Award. Thurgood Marshall, Jr., noted that his father would have been pleased to receive the Medal of Freedom with Justice Brennan, his friend and colleague throughout his tenure on the Court.

(Below) Justice Brennan congratulates Mrs. Joseph L. Rauh, Jr., after the Medal of Freedom was presented posthumously to her husband, Joseph L. Rauh, Jr. for his outstanding work in civil rights litigation. During his career Mr. Rauh served as general counsel to the Leadership Conference on Civil Rights, National Chairman of Americans for Democratic Action, was the author of many articles on civil rights and liberties, and was recognized with numerous special awards. Mr. Rauh served as a clerk to Justices Cardozo and Frankfurter from 1936 until 1939.



Associated Press/Wide World Photos

Climbing Justices: Holmes and Hughes in the Alps

Part Two: Charles Evans Hughes

John B. 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

One climbs and one sees. One descends and no longer sees, but has seen. So why bother? Just this: What is above knows what lies below. But what is below knows not what lies above. There is an art to conducting oneself in the lower regions by what one has learned higher up. When one can no longer climb, one can still know.

Rene Daumal, Mount Analogue (1952)

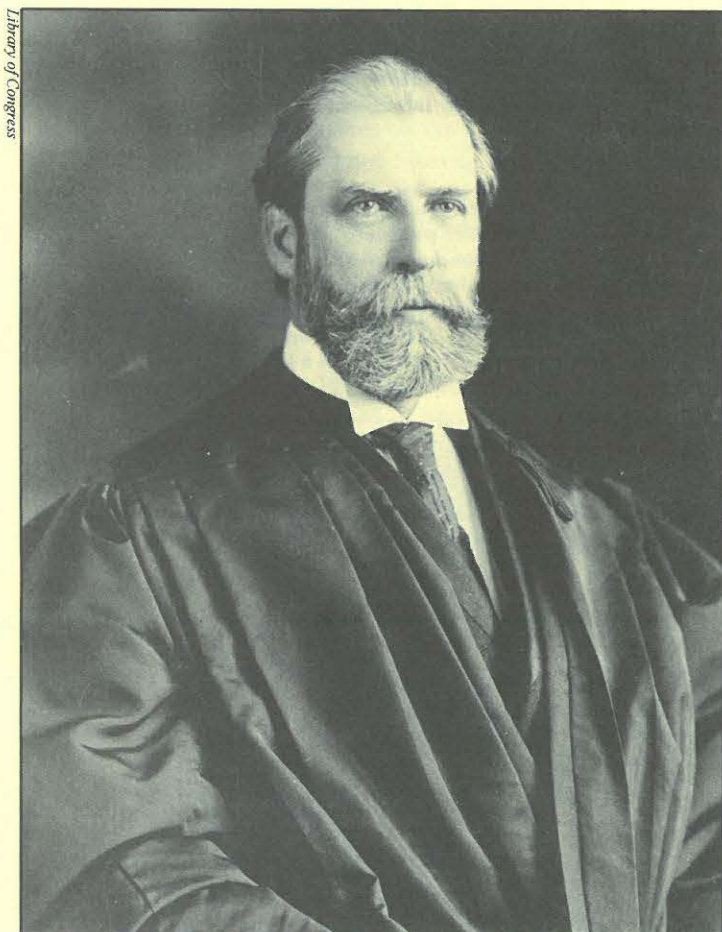
Born in 1862, a generation after Holmes, Charles Evans Hughes enjoyed an amazing public career: Governor of New York, Associate Justice of the Supreme Court, Republican Presidential Candi-

date, Secretary of State, Judge on the International Court of Justice, and Chief Justice of the United States. As a practicing lawyer, Hughes had few equals. His powerful intellect and personality lead Judge Cardozo to follow a rule of waiting twenty-four hours to decide any case argued by Hughes,¹ and caused Judge Learned Hand to brace and tell himself: "He isn't necessarily right."² When Hughes argued, "his logic fell with the driving power of a sledgehammer, relentless, crushing, pulverizing."³ In the 1920s, when a dollar was a dollar and income tax minimal, Hughes commanded \$25,000 for handling an appeal⁴ and generated annual fees of \$400,000.⁵ Yet, Hughes was no hired gun; he carefully chose the causes he championed: "A capable lawyer has in his own office scales of truth which he uses before he resorts to the public weighing station."⁶

In public service, Hughes followed the rule laid down by Benjamin Franklin, never seek public office and never refuse one when offered.⁷ When Hughes was appointed to the Supreme Court in 1910, he personified the public image of a Justice: tall, ramrod-straight, a resolute step, and a well-brushed graying beard. Combining these characteristics with his impeccable tailoring and reputation for rectitude, he conveyed a commanding presence, embodying dignity and authority. As Justice Jackson remarked, Hughes "looked like God and talked like God."⁸

Hughes was sometimes portrayed as aloof, cerebral, humorless, and as dramatic "as an adding machine."⁹ This austere image stemmed in part from early attacks by the Hearst papers, describing Hughes as "hard, cold, and flinty" with a suitable recreation of "climbing icy crags."¹⁰ Even President Theodore Roosevelt, a Hughes admirer, once called Hughes the "bearded iceberg."¹¹

Hughes, indeed, was an enthusiastic climber of "icy crags," the best climbs taking place during five solo trips to the Alps in the 1890s. A first hand record of these treks exists by virtue of Hughes' Autobiographical Notes in the Library of Congress and twenty-four letters from Hughes to his wife Antoinette, in the possession of their grandson, Theodore Hughes Waddell, of New Mexico.¹² Unlike



Charles Evans Hughes joined the Supreme Court in 1910, sixteen years after he discovered the challenge of climbing the Swiss Alps.

Holmes, it was more than a simple sense of adventure and comradeship that brought Hughes to the Alps. He was raised with a strong sense of duty and thoroughness - do worthy things and do them well.¹³ As Hughes told his biographer, Merlo Pusey: "I inherited a continuing ambition to excel in good work and to do my job as well as it could be done. I couldn't bear the thought of leaving undone anything which could be done or of not doing my particular work as well as it could be done within my limitations."¹⁴ This work ethic caused Hughes to push himself to the brink of nervous and physical exhaustion, making Hughes realize that "I needed more than exercise to overcome the fits of depression which often followed exertions in difficult cases. A good deal of my professional work seemed to be unrequited drudgery and I needed periods of complete freedom with joyous and uplifting experiences. These I got in frequent trips abroad."¹⁵

It was the summer of 1894 that Hughes discovered the Alps. Prior to this trip, Hughes' encounter with the mountains had been the Adirondacks of New York and perhaps the Whites of New Hampshire. The decision to leave his wife and two toddlers for a month was a difficult one, but with his wife's encouragement, Hughes boarded the Dutch steamer in New York bound for Europe in the hope he

would return with renewed strength, restored nerves, and peace of mind.

Hughes' letters from his several trips to the Alps in the 1890s, before he exploded upon the public scene, say much about the private man, his complete devotion to his wife and young family, and his exhilaration and vivid emotion in climbing the Alps. The letters contrast with the austere public image of Hughes, and provide a glimpse into a great man who chose not to make his private life an open book.

Unlike Holmes, Hughes went to the Alps a total unknown, without a Leslie Stephen to show him the way. Characteristically, Hughes had researched the possibilities thoroughly, and devised a trip that would take him to all three centers of mountaineering: Chamonix, Grindelwald, and Zermatt. Hughes' expectations were only heightened when on the train to Lausanne, "the Alps rose before us en masse - peak above peak - dark, rugged, snow-capped."¹⁶ Writing home from Lausanne on August 8, Hughes exclaimed: "Oh! my love - if you could share this with me. You would have been [in] ecstasy today." Already a little homesick, he

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Charles Evans Hughes hiked through the Swiss Alps to relax from the stress and vigors of his busy law practice in New York. In later years he would return to the mountains with his family to vacation. This photo of the Alps is provided courtesy of Bradford Washburn.

wrote of his mental picture of "the little family waving their adieux" and the "short-time, dearest, when we shall be together once more." In what would be characteristic of his letters to his wife from the Alps, Hughes expressed the love that always sustained him: "But I must add it in words - my love - you are my idol - and the wealth of this beautiful world is nothing in comparison with my darling's true heart." Hughes' itinerary was prearranged so that he knew when and where he could expect a letter from home.

Traveling by carriage to Chamonix, Hughes sat next to the driver, so not to escape a single feature of the scenery - "the bold mountains rose on either side, and our way lay along rock precipices, over swift mountain streams." At Chamonix, Hughes recorded his impression in his August 10 letter to his wife:

Well, at last - I am in the Alps and my vacation seems to be just beginning - that is, I feel that sense of freedom, that exhilaration - which is borne to one on the cool mountain breezes. Here I am at Chamonix, with the great peaks of the Mont Blanc range towering above me - Mont Blanc itself - monarch of all European mountains - rising to a height of 15,730 feet. Even this valley is 3,445 feet above sea level. The great glaciers are close at hand, stretching out their icy arms toward the valley . . . It is such a contrast - grim death and verdant life - side by side.

Hughes did not waste a minute of time getting ready for the next day's traverse of Mt. Blanc. He sent his luggage on to Interlaken except for a "few encumbrances," secured an alpenstock, had his feet "shod" in proper boots, and interviewed guides. Before dinner that evening, Hughes took a three mile walk, exploring the valley, absorbing the "cool, bracing, and clear" air. On the way to Chamonix, Hughes had met a Londoner of his own age, and they decided to join forces for the first days of their holiday in the mountains. The next day with Mt. Blanc hidden by clouds, Hughes and his companion walked up to Montanvert, and began their climb at the same spot Holmes had ended his alpine trek twenty-eight years earlier - the glacial snout of the Mer de Glace. Traversing the length of the mighty glacier over the Mt. Blanc massif to the valley on the other side, the travellers stayed overnight at a little inn. A thick fog had obscured the views the previous day, but upon rising the next morning at 5:00, Hughes was treated to a stunning view of the Mt. Blanc range in radiant sunshine. Hughes and his friend returned to



Charles Evans Hughes with his wife Antoinette Carter Hughes. He wrote many letters to his wife during his Alps expeditions, detailing his experiences and his recovery from the stresses of his law practice.

Chamonix via the Mer de Glace, and made their way by foot to Martigny, walking over the Col de Balme, a high alpine pass north of Chamonix.¹⁷

After a night at Martigny, the travellers went by rail to Zermatt, the second center of mountaineering on Hughes' itinerary. In 1894, Zermatt was still a quaint mountain village, not the glitzy ski center it is today. Hughes did not tarry in Zermatt, but climbed with his friend the easy 7,300 foot Riffelhorn, overnighing as did Holmes at the Hotel Riffelberg, high above Zermatt. The next day Hughes ascended the rocky ridge of the Gornergrat to its 10,300 foot summit for an astounding view - "surrounded by glaciers and snowtops - the grandest spectacle I have ever had - and I never expect to see anything grander."¹⁸ After lunch at the hotel, Hughes left his companion of five days and caught the late train for Leuk. The next day Hughes engaged a guide and did the strenuous climb from Leukerbad up the crags to the summit of the Gemmi Pass, a route Holmes had viewed the evening before his climb of the Balmhorn and described as one up a "yawning gulf" that caused an "unpleasant

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Membership Update

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

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 Jeffrey S. Bakerink Esq., Santa Ana
 Amanda Crunk, Garden Grove
 Tricia M. Egan, Los Angeles
 John B. Gibson, Wrightwood
 Elizabeth G. Hammond, Santa Barbara
 Antonia Hernandez Esq., Los Angeles
 Kelli Ketring, Canoga Park
 Nathan Lee, Campbell
 Maurice Lewitt, Encino
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 Steven B. Sebastian, Pacific Palisades
 Michael Soden, San Francisco

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 Camille Loui, Lakewood
 E. Gregory Martin Esq., Denver
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 Patrice A. Talisman Esq., Coconut Grove
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 Thomas Fryman Esq., Lexington
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 Kenneth Vuylsteke Esq., St. Louis
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 John P. McGee Jr. Esq., Portsmouth
 Matthias J. Reynolds Esq., Manchester

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Lisa L. Bugbee, Moorestown
 William E. Cabane, Harrison
 Richard R. Howe, Short Hills

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Bruce Hall Esq., Albuquerque

New York

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 Chris Au, Brooklyn
 Abraham A. Baker, Staten Island
 Thomas D. Barr Esq., New York
 Jeffrey M. Baumgardner, New York

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Membership Update *(continued from previous page)*

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Richard E. Carlton Esq., New York
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West Virginia

Thomas G. Freeman II Esq., Charleston

National Heritage Lecture Set for March 3, 1994

"Changing Congress" will be the subject of the Third National Heritage Lecture scheduled for 7 p.m. on Thursday, March 3, 1994 in the Russell Senate Caucus Room, SR-325 of the Russell Senate Office Building. Retired Representative Corinne "Lindy" Boggs will moderate a panel discussion with Washington commentators Bob Schieffer and Morton Kondrake. A reception will follow the panel discussion.

The panel participants are all well acquainted with Congress but from different vantage points. Representative Boggs served nine terms in Congress representing Louisiana's Second District. During that time she served on the Appropriations Committee and on three subcommittees: Energy and Water Development, Legislative Branch, and V.A./H.U.D.-Independent Agencies. Bob Schieffer is chief Washington correspondent and congressional correspondent for CBS News. Mr. Schieffer is also the anchor and moderator of *Face The Nation*. He has reported on Washington for twenty-five years and has covered all four major beats in the nation's capital—Capitol Hill, the White House, the Pentagon, and the State Department. Morton M. Kondrake is the Senior Editor of *The New Republic* and

a Senior Editor and Columnist for *Roll Call*. In addition he writes a nationally syndicated column on national politics. He is a regular panelist on *The McLaughlin Group* and is the moderator of *American Interests* on PBS.

The lecture is co-sponsored by the Society, the White House Historical Association and the Capitol Historical Society. The lecture is sponsored on a rotating basis, and the Capitol Historical Society serves as this year's sponsor. The first National Heritage Lecture was hosted by the Supreme Court Historical Society. Associate Justice Anthony M. Kennedy delivered a lecture on President Roosevelt's 1937 Court-packing plan. Last year the White House Historical Association sponsored a lecture by David McCollough, author of the Pulitzer Prize winning biography of President Harry S. Truman.

Invitations will be mailed to Society members one month prior to the lecture. The cost of the event will be \$55 per person, and reservations will be made through the Capitol Historical Society. Space will be limited so prompt response is encouraged. Please contact the Capitol Historical Society at 202-543-8919 with any questions.

Alps (continued from page six)

creeping in my backbone.”¹⁹ Hughes then proceeded down to Kandersteg on the same path used by Holmes and Stephen, passing the Schwarenbach Hotel. Hughes took pleasure in writing that he had won the “undying affection” of his guide by reciting several lines from Schiller’s *William Tell*.²⁰

At Kandersteg, Hughes followed the Holmes tonic of bathing his legs to prevent lameness. It was then on to Interlaken, “a ‘swell place’, with its gardens - or rather ‘commons’, its fashionable patrons, etc.” Hughes felt “like one entering Saratoga after roughing it in the Adirondacks.” Hughes did not tarry, as he wanted “to get out of Interlaken and back to the mountains, away from the fashion and the ‘tenderfeet.’”²¹ Gathering his belongings he had sent ahead from Chamonix, Hughes headed for Grindelwald, the third center of mountaineering. Here Hughes met the ubiquitous Edward Whymper, the famous Matterhorn climber Holmes had met in London in 1866. Hughes attended Whymper’s lecture on mountaineering the evening before Hughes’ intended traverse from Grindelwald over the Great Scheidegg Pass to Meiringen. Bad weather forced Hughes to abandon this trek, and he went to Meiringen by train instead.²²

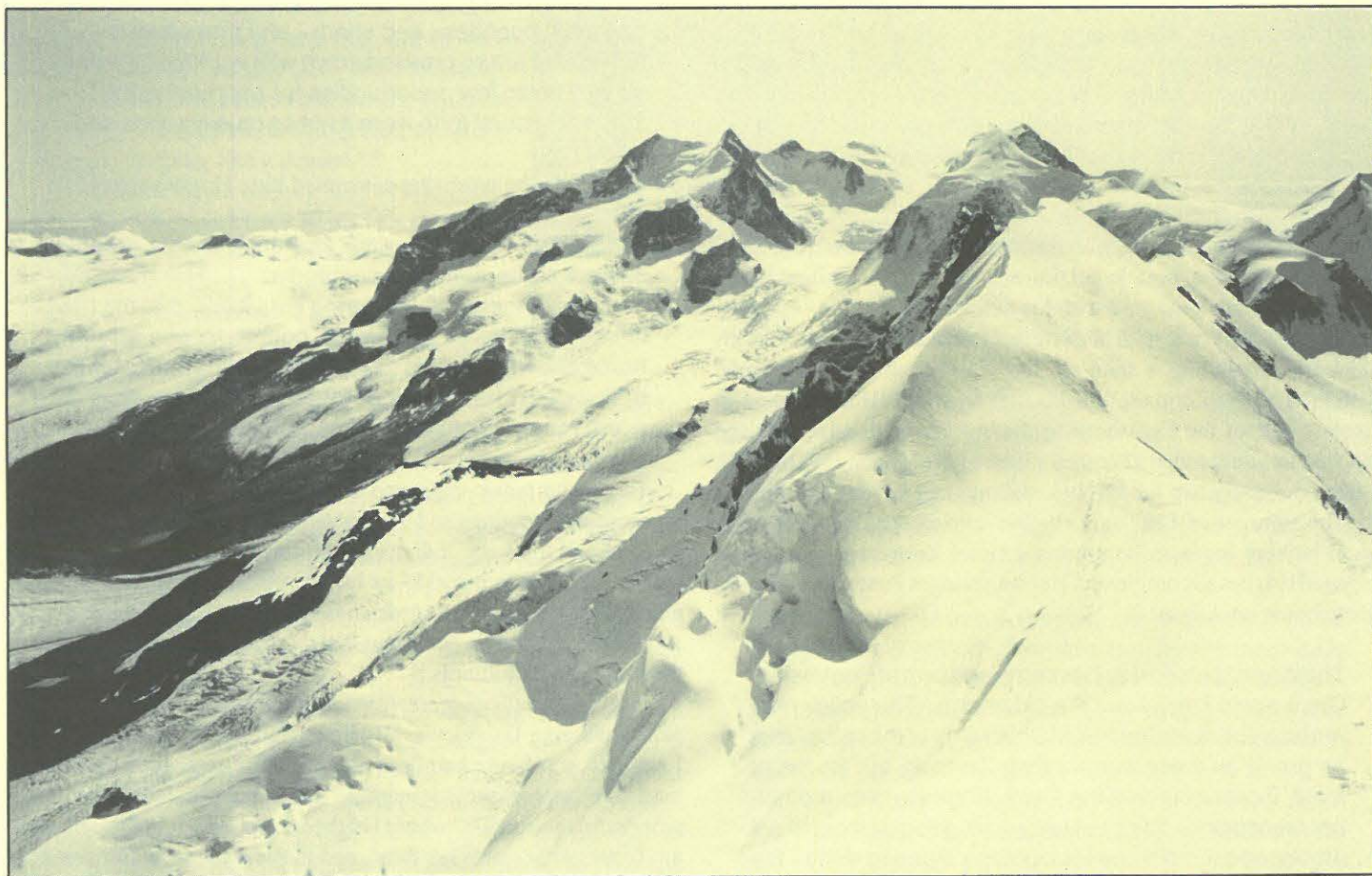
From Meiringen, Hughes continued by stage to Handegg, and then took to his boots again for a four hour hike up and over the Grimsel Pass in a dense fog. As Hughes descended to the Hotel Belvedere, sited at the toe of the Rhone Glacier, he ran into a snow and sleet storm that drenched him and nearly froze his alpenstock to

his hand. Arriving in late afternoon, he sent his clothes to the drying room, took a hot bath, and laid down for a good nap. Awakening at the sound of the seven o’clock dinner gong with a ravenous appetite, Hughes found to his horror that his clothes had not returned and that the electric bell would not ring. Opening his door a crack, he summoned the chambermaid and attempted to explain his problem. She brought him “nearly everything in the hotel” but his clothes. Finally, by shaking his foot at her through the doorway, he made her understand he was “sans habits,” and his clothes were finally returned in time to allow him to “connect with dinner in good shape.”²³

The next day, Hughes continued over the Furka Pass, and made his way via Lucerne and Basel to Boulogne for the steamer home. With these “thirteen glorious days” in the mountains, Hughes came home a new man: “I was gone a bare month, but no outing had ever done me so much good, a reinvigoration in body and spirit.”²⁴

Hughes returned to his busy New York law practice. In addition to the usual office practice, he did a great deal of court work, both trials and appeals. As the pressure built, his thoughts again turned to the Alps. During the winter he happened upon Amelia Edwards’ book *Untrodden Peaks and Unfrequented Valleys* and was filled with the desire to visit the Dolomites.²⁵ This he did in the summer of 1895. Leaving New York alone on the brink of nervous exhaustion, he sailed for Europe, while his family stayed with his parents at a

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Courtesy of John E. Nesbitt

Charles Evans Hughes made five solo trips through the Alps during the 1890s. These expeditions provided relief from his busy law practice. Like Holmes, Hughes relished his climbing experiences in the years following them. His correspondence with Holmes is filled with mountain climbing references.

farm in Chesham, New Hampshire. In the Dolomites, Hughes followed Miss Edwards' route from Cortina, hiking seventy miles in three days over the high alpine passes to Caprile, Canazei, St. Ulrich, and Bolzano. Today one can do the same route in a few hours by automobile. It took that seventy mile hike to restore some strength and vigor. Hughes had slept lightly on the boat over and found "the clatter of London [most] disturbing." During his three days through the Dolomites, Hughes took side trips up the neighboring peaks from the summit passes, much as people still do today. At the end of a day's journey, Hughes would sit "in placid contemplation, while my feet renewed their youth in hot water."²⁶ Hughes greatly enjoyed the ambience of the quaint mountain villages he passed through, and his letters evince much interest in the inhabitants and their customs. From Bolzano, Hughes wrote of his hopes upon his return:

Darling one - if I can only come back to you well & strong & *normal* - for I know now as I did not know when I left - how close I was to nervous exhaustion. The difficulty I have had in getting my poise attests to it. Kisses for the little ones. How I love them & how hard this separation is. I hope we shall all come home so much better for our outing. Courage - wife - dear.²⁷

From Bolcano and over the Stelvio and Bernia Passes, Hughes made his way to Pontresina in the Engadine, a place to which Hughes would return again and again.

Making his headquarters at the Hotel Kronenhof, as he would in later trips, Hughes engaged in solitary climbs of the surrounding peaks, such as the Piz Languard, where he could view Monte Rosa of the Bernese Oberland and the Mt. Blanc range. What attracted Hughes most to Pontresina was the high altitude and the bracing air that came with it. To be sure, there were "some of the swagger set" at the hotel, but within a few hours of setting out, one could achieve views rivaling the best in all Europe.²⁸ Hughes returned home anxious to return next year with his beloved "wife."

Hughes' 1896 trip with his wife retraced the easier aspects of his 1894 trip, including a hike up the Gornergrat from the Hotel Riffelberg above Zermatt. With his wife on a mule, Hughes hiked up the east side of the Eggishorn to the hotel to which Holmes and Stephen had descended after their climb of the Monch.²⁹ All and all, it was a leisurely trip for Hughes, without any serious climbing.

The summer of 1897 saw Hughes solo in the Engadine Alps, again making his base Pontresina's Hotel Kronenhof. No retreat engaged Hughes so completely. Upon arriving at Pontresina, Hughes wrote home on August 8:

The long expected day has come and I am at Pontresina. Once again I 'reweave the old charm.' The valley may not be as beautiful as that of Chamonix or the mountains as grand as those surrounding Zermatt, but for me at least, Pontresina and the Ober. Engadine has a peculiar fascination. The past two years seem almost like a dream and the old spell is over me. For one thing - the air is so exhilarating that Chamonix with its lower level is not to be compared with it for healthfulness, and one

has that *joie de vivre* which gives so much zest to every undertaking.

After his first week at Pontresina, Hughes' enthusiasm was undiminished: "I love Pontresina so much. I shall not be contented to go anywhere else . . . For Switzerland, for me eclipses all else - and Pontresina is the best of Switzerland."³⁰

Hughes' letters from Pontresina in 1897 are among his most introspective. He had written from New York for a quiet room at the Kronenhof, and was assigned one far from the street. He sought a real "rest - not being obliged to converse [or exert] the slightest mental effort." His now annual excursions provided needed therapy:

I am not disposed to mental labor, however - and a little reading tries me. But being alone in this way, though physically well - one is not mentally normal. The zest and persistence of daily work is as much needed for the best mental results as correspondingly, physical labor, regular and properly chosen, is needed for the best physical output. So this - for my mind - is my annual Sabbath - and for my body - my annual training.³¹

Hughes took daily climbs up the "barren peaks, vast glaciers," braced by the "invigorating air." Hiking in solitude, he reproached himself for allowing work to dominate his family life: "Do the little ones think of Papa sometimes - or is he simply one who works and plays all by himself."³² And to his wife:

I am so thoughtless and sharp - and that when we are together - I am so pressed down with work that the days go by with so few opportunities for expressing the love that would burst forth were it not so cruelly restrained.³³

Regarding the work that consumed him, Hughes wrote:

Sometimes I feel uncertain as I think of that dreadful office with its constant demand The most disheartening thing is the growing conviction that my best is not much. But I have what counts most - a happy home and what counts next - good health - and to tell the truth - what I have not - weighed in true balance is not worth much - that is, money and fame.³⁴

Hughes' mindset improved the more he fell into the rhythm of vigorous daily outings and enjoyable evenings: "My work may not be ideal and my surroundings in part unsatisfactory - but it is my work - and goes the world - its highly attractive and I am preeminently fortunate."³⁵ He made friends with some English "idlers," sat at their dinner table - a "constant 'gale'" of good humor - and bested them at evening billiards.³⁶

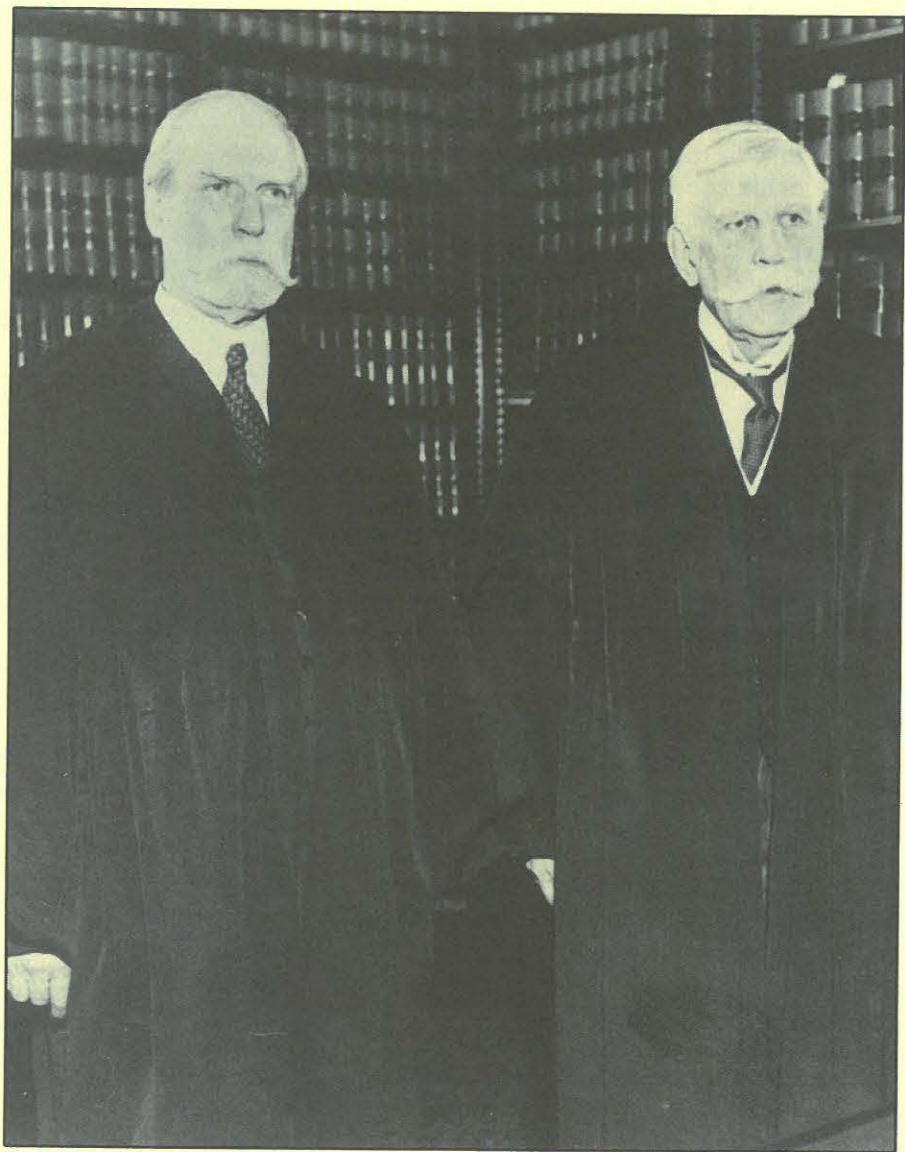
The daily outings were filled with climbs of the surrounding peaks, offering fine views. His first effort was a climb of the Piz Languard, a peak he had done in 1895. The final push was "very hard," an "almost sheer precipice," but rewarded with "a view too wonderful to describe" where Hughes could "drink in the delicious air, bathe in the warm sunshine, and feast on the view for over two hours."³⁷ Subsequent days brought excursions up the Schafberg and to the glaciated Bernina mountain range across the valley. Every day

Hughes improved mentally and physically: "I am riotously well. If I can only bring it all home." "My heart is where wife is, my business is in New York - but my Gesundheit is in the Alps."³⁸ "The thought of leaving this altitude distresses me. It's like giving up a tonic."³⁹ "I have never anywhere felt so well - *continuously* - no 'downs' - all 'ups' in this climate."⁴⁰ Hughes returned home renewed, vowing to do his "work without grumbling" and telling his wife that "we shall grow closer and closer to one another and let our love flow over the dear little ones."⁴¹

The birth of his daughter, Catherine, in August, 1898 kept Hughes away from the Alps that year. But 1899 found Hughes in the Alps in July after depositions in London in a will case. This was to be Hughes' last solo trek and, in his words, "my best trip."⁴² The letters home had little of self-doubt and reproach that occupied Hughes in 1897. The ensuing two years had produced professional growth and stature. Delighted in his return to the Alps after a two year absence, Hughes spoke of the freedom of not being bound by the "programs" he had set for himself in previous trips: "How pleasant it is to think that I have no program to carry out and nowhere 'to go.'"⁴³ Only in one letter did Hughes return to his old anxieties: "climbing makes one forget everything but the 'next step' and rids one of this wretched nervous fatigue and self-consciousness."⁴⁴ Rather, his letters sounded his positive well-being: "I am well, thriving, frisking like a youngster, sleeping like a deacon."⁴⁵

From Courmayeur on July 13, 1899, Hughes wrote of his "Tour de Mount Blanc" via the south side. Starting on a whim he had during a bicycle ride along Lake Geneva, Hughes made his way to Gervais, France, and secured a guide. On foot by 5:30 a.m. Hughes made the 6,300 foot ascent to the Col du Four by 1:30 and thereafter over the Col du Bonhomme, through L'Allee Blanche, and descending by the Lac de Combal to Courmayeur after one overnight in a mountain hut.⁴⁶ Reminiscent of the Holmes' descent of the Balmhorn, Hughes used an expedient, but inelegant technique of glacial descent: "[A]s my guide says *marcher a derriere*, [f]inally, tired of digging my heelings in, I put my Alpenstock flat on the snow and lie on it, and away I fly with incredible velocity, until I am ready not only to use my heels but my hands, nose, anything to stop."⁴⁷ Hughes mentioned with pride his guide's compliment on his "slender legs" as opposed to the guide's contempt for the "generous underpinnings" of a German party they distanced early the first day. Hughes arrived with his face burned and eyes outlined by the circles of his goggles.

Hughes' enthusiasm was never more evident than in his account of his traverse from Brieuil over the Theodule Pass to Zermatt. This was the reverse of Holmes' trek out of Zermatt on his way to Courmayeur, and more difficult. Reaching the plateau of the Theodule Pass, Hughes and his guide "went silently over the snow under the peak of the Matterhorn, my one thought - to step in the exact



Charles Evans Hughes and Oliver Wendell Holmes, Jr., served together as Associate Justices for six years before Hughes resigned to accept the Republican presidential nomination. Fourteen years later, Hughes rejoined the Court as Chief Justice with Holmes sitting on his left as the Senior Associate Justice.

footprints of my guide - and every now and then getting an savage wrench as I suddenly sink into the snow."⁴⁸

Reaching the Theodule Hut around noon, Hughes and his guide enjoyed the rest of the day lounging amidst the fine views of the Pennine Alps. The next day was to be Hughes' finest climb: As he wrote to his wife from the Monte Rosa hotel at Zermatt:

[A]t half past three in the morning, I am waked and make ready for the Breithorn. The stars are shining peacefully in the dark blue sky and we are sure of a clear sunrise. We take our coffee black (we have no milk) and set out. I am securely fastened to my guide by a stout rope - and away we go over the snow, now hard and firm. The morning is beautiful - every mountain unclouded. Soon the Matterhorn is tipped with rosy light and one by one the mountain peaks are lit like torches. We cross the

—continued on next page

Theodule Glacier, then on over a fairly steep ascent of snow until we reach the Breithorn plateau and so to the base of the summit, if I may express it . . . We climb the steep sides, digging our shoe nails vigorously into the snow and zig-zag up. There is no suggestion of danger, and there was none beyond the risk of losing one's head and consequently his footing, and sliding 'quite indefinitely.' Once we came to a little level space and stopped to rest. 'No,' says the guide, 'You are over a cravasse.' So I must rest on the steep slope leaning on my stick. The morning air is cool and we go rapidly and reach the top in 2 1/2 hours - all over snow and ice. The summit is a ridge of ice . . . with precipitous descents on both sides. I spread out my mackintosh and sit down to enjoy 'the finest view in Europe.' So many call it and I have never seen anything approaching it . . . I have had the best the Alps can give, and that is saying a good deal.⁴⁹

Hughes was delighted with his performance, and coasted on his laurels for the rest of the trip, doing easy day hikes around Zermatt. His good humor is evident by his account of the start of his way home: "The weather changed and I left yesterday in the midst of thick clouds, picking my way along the path. I could hardly see and followed by my pack mule who no doubt thought me more of an ass than he himself for coming out on such a beastly day."⁵⁰ To his young son, Charles, then seven, he wrote: "I long for the time when you can come to Switzerland with me and we can climb these mountains together."⁵¹

In later years, Hughes would return to the Alps again and again in the company of his wife and children. His vacations during his years of public service would be in the mountains, whether it be in the Alps, the Adirondacks, or later, in western Canada. As his biographer, Merlo Pusey, put it:

Every trip into the mountains was an uplifting experience. Hughes thrived on the high altitude, the bracing air, the sense of achievement in climbing, the awareness of natural beauty, and the delight of satisfying an appetite whetted by exercise. As he found renewal of vigor year after year, even at a heavy cost of loneliness, he came to believe that Switzerland had saved his life and made it possible for him to carry a work load that otherwise would have pulled him down in middle age. Not only that; the mountains calmed his feverish ambitions, gave him perspective, and in this sense prepared

him for the larger responsibilities ahead.⁵²

HOLMES AND HUGHES ON THE SUPREME COURT

Although Holmes and Hughes never climbed together, their respective mountaineering experiences provided a common ground that sparked a devoted friendship. They first met at a White House dinner in 1908, Holmes already a Supreme Court Justice and Hughes then Governor of New York.⁵³ Two years later when Hughes was appointed an Associate Justice, Holmes wrote to a friend that he liked Hughes "very much," and was "excited and pleased" with the nomination, especially since he had "the admirable merit of having told me in former times that my book started him in law."⁵⁴

Once on the Court, Holmes and Hughes became immediate friends. An early sign of their mutual respect occurred two months after Hughes joined the Court when Chief Justice Fuller died. The talk around Washington was that Hughes would be nominated his successor, and indeed, the President had intimated to Hughes that such would be the case.⁵⁵ The Justices, however, did not cotton to the idea of the newest, youngest, and most inexperienced member of the Court being appointed their Chief, and they drew up a "round robin" letter to the President protesting the prospect. Only Holmes refused to join his brethren in their objection, as he thought Hughes would make a fine Chief Justice.⁵⁶

Hughes enjoyed his association with Holmes:

Of all these judges with whom it was my privilege to serve during my Associate Justiceship, Holmes had the most fascinating personality. Not that on the whole he was a more admirable character, but that by reason of his rare combination of qualities - his intellectual power and literary skill, his freshness of view and inimitable way of expressing it, his enthusiasm and cheerful skepticism, his abundant vitality and gaiety of spirit - he radiated a constant charm. My relations to him were of the happiest sort.⁵⁷

Holmes enjoyed their relationship as much as Hughes did. When Hughes resigned in 1916 to run for President, Holmes wrote: "I shall miss him consumedly, for he is not only a good fellow, experienced and wise, but funny, and with doubts that open vistas through the wall of a nonconformist conscience."⁵⁸

When Hughes rejoined the Court as Chief Justice in 1930, it was Holmes who administered the oath of allegiance, and at once their old-time comradeship resumed.⁵⁹ Mountain metaphors continued to punctuate their discourse. On one of the first of Hughes' draft opinions as Chief Justice, Holmes wrote: "Wee - Mussoo - Ye crags & peaks. I'm with you once again."⁶⁰ This happy association was to last until Holmes' death in 1935.

Endnotes

¹ M. Pusey, *Charles Evans Hughes*, 682 (1951).

² *The Remarkable Hands: An Affectionate Portrait*, 62 (Nelson ed. 1983).

³ M. Pusey, *supra* note 75, at 621.

⁴ W. Douglas, *The Court Years*, 214 (1980).

⁵ M. Pusey, *supra* note 75, at 636.

⁶ *Id.* at 632.

⁷ Gossett, "My Father the Chief Justice", *1976 Supreme Court Historical Society Yearbook* 7, 14.

⁸ E. Gerhart, *America's Advocate: Robert H. Jackson*, 165 (1958).

⁹ D. Danelski and J. Tulchin, Editors' Introduction, *The Auto-*

biographical Notes of Charles Evans Hughes, xiii, (1973) (hereinafter "*Autobiographical Notes*."

¹⁰ K. O'Brien, *The Great and the Gracious on Millionaire's Row*, 220 (1978).

¹¹ *Id.* at 219.

¹² Mr. Waddell, it should be mentioned, is a great outdoorsman, as was his grandfather.

¹³ *Autobiographical Notes*, supra note 83, at xvi.

¹⁴ M. Pusey, supra note 75, at 118.

¹⁵ *Autobiographical Notes*, supra note 83, at 114 - 15.

¹⁶ C. E. Hughes letter to Antoinette Hughes, August 8, 1894.

Hereinafter all letters cited are to his wife unless otherwise noted and cited "Hughes letter, date."

¹⁷ Hughes letter, August 15, 1894.

¹⁸ *Id.*

¹⁹ See text accompanying note 40.

²⁰ Hughes letter, August 15, 1894.

²¹ *Id.*

²² Hughes letter, August 18, 1894.

²³ *Id.*

²⁴ *Autobiographical Notes*, supra note 83, at 115.

²⁵ *Id.*

²⁶ Hughes letter, August 26, 1895.

²⁷ *Id.*

²⁸ Hughes letter, August 30, 1895.

²⁹ M. Pusey, supra note 75, at 125.

³⁰ Hughes letter, August 16, 1897.

³¹ Hughes letter, August 19, 1897.

³² Hughes letter, August 8, 1897.

³³ Hughes letter, August 23, 1897.

³⁴ Hughes letter, August 16, 1897.

³⁵ Hughes letter, August 19, 1897.

³⁶ Hughes letter, August 15, 1897.

³⁷ Hughes letter, August 11, 1897.

³⁸ *Id.*

³⁹ Hughes letter, August 16, 1897.

⁴⁰ *Id.*

⁴¹ Hughes letter, August 23, 1897.

⁴² *Autobiographical Notes*, supra note 83, at 117.

⁴³ Hughes letter, July 7, 1899.

⁴⁴ Hughes letter, July 13, 1899.

⁴⁵ Hughes letter, July 10, 1899.

⁴⁶ Hughes letter, July 13, 1899.

⁴⁷ *Id.*

⁴⁸ Hughes letter, July 17, 1899.

⁴⁹ *Id.*

⁵⁰ Hughes letter, July 26, 1899.

⁵¹ Hughes letter to his son, Charles E. Hughes, Jr., July 24, 1899.

⁵² M. Pusey, supra note 75, at 131.

⁵³ L. Baker, supra note 14, at 435.

⁵⁴ *Id.*

⁵⁵ M. Pusey, supra note 75, at 271 - 73.

⁵⁶ L. Baker, supra note 14, at 437.

⁵⁷ *Autobiographical Notes*, supra note 83, at 171 - 72.

⁵⁸ M. Pusey, supra note 75, at 284 - 85.

⁵⁹ *Id.* at 663.

⁶⁰ *Id.* at 668 - 69.



In the interest of preserving the valuable history of our highest court, the Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature or any other materials related to the history of the Court and its members. These items are often used in exhibits by the Curator's Office. If any of our members, or others, have anything they would care to share with us, please contact the Acquisitions Committee at the Society's headquarters, 111 Second Street, N.E., Washington, D.C. 20002, or call (202) 543-0400.

Thurgood Marshall Memorialized By Bar

Portrait by Simmie Knox Unveiled at Ceremony

Thurgood Marshall was honored at a special session of the Supreme Court Bar held on Monday, November 15, 1993 in the East Conference Room of the Supreme Court building. Held in accordance with long-standing tradition, the session memorialized the life and career of Associate Justice Thurgood Marshall who died in January 1993. Convened under the direction of Solicitor General Drew S. Days, III, members of the Supreme Court bar and special guests met. Those present included Retired Associate Justice William Brennan, Jr., Cissy Marshall and other members of the Marshall family, and special invited guests. The Chair for the event was Judge Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania.

Judge Pollak had a close personal association with Justice Marshall when they worked together at the NAACP Legal Defense Fund. Together they worked to foster civil rights and to litigate cases that would do away with the barriers of segregation. Judge Pollak explained that the primary purpose of the meeting was to formally adopt a "Resolution of the Supreme Court Bar In Tribute to Justice Thurgood Marshall" which would be presented to the Supreme Court later that afternoon. The resolution was prepared by a committee of the bar chaired by Karen Hastie Williams. Judge Pollak added that some of Thurgood Marshall's closest associates were present for the session. These included William T. Coleman, Jr., Jack Greenberg, Oliver Hill, Spotswood Robinson and Alice Stohl, as well as Justice Brennan.

Four speakers addressed the audience and each touched upon a different aspect of Justice Marshall's career in which he or she had been personally associated with the Justice. The speakers were chosen in consultation with the Marshall family, and they brought firsthand knowledge and personal experience to their accounts of Marshall's outstanding career.

The first speaker was District Judge Constance Baker Motley who worked closely with Justice Marshall at the NAACP Legal Defense Fund. She noted that her first visit to the Supreme Court came in 1948 when she accompanied Thurgood Marshall to the Court. On that occasion, Marshall argued the case *Shelley v. Kraemer* which challenged the legality of racially restricted housing covenants. In 1948 Washington was a segregated city so while Marshall and Motley were able to appear before the Supreme Court of the United States to argue their case, they were unable to eat in the restaurants, patronize the hotels, or use the same taxi cab services available to white Americans. Judge Motley outlined many of the landmark cases which Marshall argued while he was with the NAACP Legal Defense and Educational Fund; cases which carefully and relentlessly sought to eliminate the segregationist restrictions which kept African-Americans separate and unequal.

In introducing the next speaker, Ralph Winter, Judge Pollak alluded to him as the original "knucklehead", the affectionate term Thurgood Marshall used in referring to his clerks throughout his tenure on the Federal Appeals Court and the Supreme Court. Indicative of Marshall's sense of humor, Winter pointed out that the nickname was actually an indication of high praise and acceptance.

Winter explained that Marshall was not given to idle flattery and



From: Janzen, Collection of the Supreme Court of the United States

Professor Susan Low Bloch officially presents the portrait of Thurgood Marshall to the Chief Justice on behalf of the Marshall Clerks and the Historical Society.

compliments, nor complacency. He demanded a great deal of his clerks, expecting total commitment to the job at hand. He was also quick to point out faulty or incomplete work, and to push until it was corrected. He held himself to the same standards and demanded as much or more of himself as he did his associates. Despite his gruff behavior, Winter said that Marshall had real affection and respect for his colleagues. Winter expressed his sense of gratitude and pride at being the first of Marshall's "knuckleheads."

Focusing his remarks on Marshall's career as a federal appeals court judge, Ralph Winter spoke about his personal role as the first clerk to Judge Marshall. Marshall received an interim appointment to the federal bench in October 1961. Because of his interim status, Judge Marshall was not provided chambers, and as a result, every few weeks the office was moved to the chambers of a judge who was vacationing. Despite the extra work it took to constantly move and reorganize, Judge Marshall kept up with his workload and performed valuable and exemplary service. This continual relocation lasted more than a year as his confirmation was stalled by a group of pro-segregation senators, but he was ultimately confirmed by the Senate in late 1962.

Winter related an incident which characterized Marshall's sense of humor and exemplified the badinage between him and his clerks. During the winter of 1961-62, a terrible blizzard occurred. Anxious to prove his dedication to his job, Winter set out from his home in Connecticut and drove through the storm reporting for work at the

court house in Foley Square at exactly the appointed hour. There he found Judge Marshall already at work in his chambers. Winter presented himself to the Judge, proud of having conquered the elements and expecting some praise. Instead, Marshall looked out the window at the snowstorm, looked back at Winter, and said, "Now I know how dumb you really are."

Despite the lengthy delay in obtaining confirmation to the Circuit Court, Marshall was not to serve in that capacity very long. In the summer of 1965, Lyndon Johnson nominated Marshall to be Solicitor General. Another bitter Senate fight resulted, but again, Marshall was confirmed ultimately. He served in this position from August 11, 1965 to August 30, 1967. Rex E. Lee, President of Brigham Young University and Solicitor General of the United States from August 1981 until June 1985, spoke about Marshall and his career as Solicitor General.

Lee discussed Marshall's career as the government's chief advocate. He noted that while serving as Solicitor General, Marshall won approximately seventy-three percent of the cases he personally argued before the Supreme Court. In his work as an advocate for the NAACP, Marshall won approximately eighty-seven percent of the cases he personally argued before the Supreme Court.

Marshall's performance as a private advocate would certainly have won him a place in the history books, Lee commented, comparing him with another great advocate of the 20th century, John W. Davis of South Carolina. Beyond that outstanding accomplishment, however, Marshall had another impressive career as a government advocate. When these two aspects of Marshall's career are considered together, he is very likely the most influential figure in Supreme Court advocacy in this century. When Marshall's third career, his twenty-four year tenure as an Associate Justice of the Supreme Court, is combined with his Supreme Court advocacy, he becomes perhaps the single most influential figure in twentieth century Supreme Court history.

Lee observed that whenever he had spoken with Marshall about his career as Solicitor General, Marshall had told him it was "the best job I ever had." Lee speculated that Marshall felt that way because being Solicitor General afforded him an opportunity not only to attack those things he perceived as "social wrongs" in the American justice system, but also to assist in planning governmental policies to help eradicate those wrongs. These were the same "wrongs" he had worked so hard to correct as a private advocate. Marshall was a great believer that law has an educational function, and that law could change things for the better. Lee said he thought that Marshall's accomplishments bore out this philosophy.

The concluding speaker was Randall Kennedy, a professor at Harvard University, who had clerked for Justice Marshall at the Supreme Court. Kennedy reiterated many of the tributes that had already been paid to Justice Marshall and his accomplishments and expressed his gratitude for having had the opportunity to know him personally and work closely with him in the unique environment of the Supreme Court.

At the conclusion of the speeches, the resolutions prepared by Ms. Williams' committee were

officially adopted by the bar, after which that meeting was adjourned.

A special session of the Supreme Court was convened at 3 p.m. with all the Justices in attendance to hear resolutions commemorating the career of Thurgood Marshall. Solicitor General Days presented the resolutions on behalf of the bar. Attorney General Janet Reno then addressed the Court, presenting a tribute to the life and career of Thurgood Marshall. At the conclusion of her speech, Chief Justice Rehnquist formally accepted the resolutions of the bar and the remarks of Attorney General Reno. The Chief Justice then expressed the admiration and respect of the members of the Court for Thurgood Marshall and his many contributions to the work of the Supreme Court.

At the conclusion of the special session of the Supreme Court, the group adjourned to the lower Great Hall where the oil portrait of Justice Marshall was unveiled and officially presented to the Chief Justice on behalf of Marshall's former clerks and the Supreme Court Historical Society. Justice Marshall sat for the portrait which was completed in 1989 by noted artist Simmie Knox. When Marshall was asked to review the completed work he had two comments: first, he noted that his wedding ring was missing; second, he said he "didn't look mean enough" in the portrait. The first item was quickly corrected, but Mr. Knox either couldn't, or wouldn't, make the Justice look mean.

While this occasion marked its official unveiling, the portrait had already been viewed by thousands of people who filed past the Justice's bier when it lay in state in the Great Hall of the Supreme Court building in January 1993. At that time, the portrait stood on an easel behind the bier with a single rose resting on the marble floor in powerful and silent tribute to the Justice. The portrait will now be hung in the Supreme Court building where it will join the portraits of Marshall's predecessors on the Court.



Franz Jantzen, Collection of the Supreme Court of the United States

Mrs. Cissy Marshall with artist Simmie Knox next to the portrait of Justice Thurgood Marshall. Not only is this the first portrait of an African-American to hang in the building, but also the first painted by an African-American.

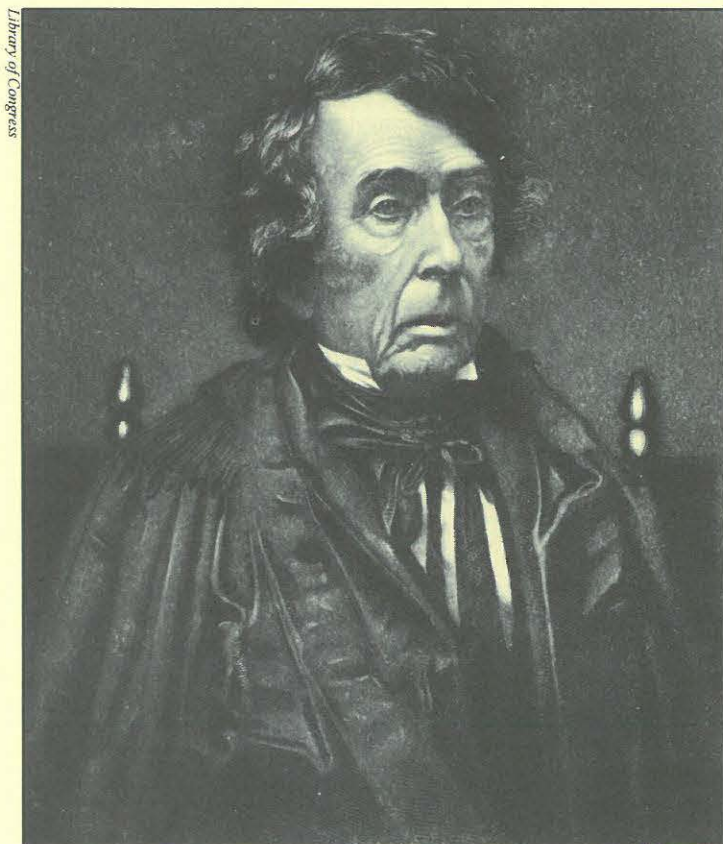
Civil War (continued from page one)

whose origins were partly moral, partly economic, and entirely political.

On March 9, 1994, Chief Justice William H. Rehnquist will introduce a panel discussion in the Supreme Court Chamber featuring Professors Herman Belz (University of Maryland), Ludwell Johnson (College of William and Mary) and Larry Kramer (University of Michigan School of Law), whose topic will be "Antebellum Constitutional Crises."

"As a constitutional issue, the question of slavery was a relative latecomer," notes panelist Ludwell Johnson, "nor was it, as I see it, ever the fundamental issue. . . . At bottom, the question was one of political power." Quoting Jefferson Davis, Professor Johnson characterizes many pre-war constitutional battles as "essentially struggles for sectional equality or ascendancy—for the maintenance or destruction of that balance of power or equipoise between North and South which was early recognized as a cardinal principle in our Federal system."

Southerners clearly viewed expansion of Federal authority as an unconstitutional intrusion upon state sovereignty, and argued that the several states, as co-founders of the republic, were the ultimate arbiters of what was and was not constitutional. Hence, South Carolina's "nullification" of pro-Northern federal tariffs in 1832 was within the State's prerogative. Secession, itself according to this logic, was a legitimate action in that states had not forfeited their sovereignty upon entry into the Union.



Roger Brooke Taney was Chief Justice of the United States during the first three years of the Civil War. Professor Phillip Paludan will explore the personalities of the Taney Court and the Court's relationship with the Lincoln administration on March 30, 1994.

Fellow panelist, Larry Kramer, observes "In contrast with the Southern position, the Northerners asserted that the Union was created by the People acting as a constituent whole. The powers of the federal government were delegated by the people, not by the states, and the states were, therefore, ultimate arbiters of nothing."

The emotional climate in which this debate took shape was elevated with the increasing focus on slavery in the mid-1840s, asserts Professor Belz.

"The Declaration of Independence stated that all men are created equal; it asserted that the equality principle was a self-evident truth. Eleven years later the Constitution recognized the existence of slavery in several of the states. Whether it did more than that was a matter of profound controversy in the period before the Civil War. The disputed points in constitutional law were whether African-Americans were included in the Declaration of Independence, and whether the Constitution was a pro-slavery document which gave affirmative sanction to the institution of Negro servitude, an anti-slavery document that marked it for ultimate extinction, or a neutral document that took no position on slavery in a substantive sense."

Professor Belz notes that the Supreme Court's *Dred Scott* decision of 1857 propounded the Southern perspective by holding that African-Americans were not citizens, and as such, enjoyed no constitutional protections. This ran contrary to the views of the emerging Republican Party and one of its spokesmen, Abraham Lincoln, that the constitution, written in light of the Declaration of Independence, was hostile to slavery.

"The Civil War," asserts Professor Belz, "was fought to resolve these fundamental questions of constitutional law and political philosophy."

By the time President Lincoln assumed office in March 1861, seven states had already made what they considered to be the ultimate assertion of state sovereignty, by seceding from the Union, and four more were to follow in the immediate months. Facing the reality of a crumbling Union, Lincoln began to exercise previously unheard of extensions of Executive power, bringing him into immediate conflict with the Supreme Court.

On April 18, 1861, just a month after his inauguration, Lincoln dispatched troops to the Maryland cities of Baltimore and Annapolis, the State's capital. It was well known that the Maryland State Assembly was prepared to consider a vote on articles of secession, the consequence of which would be to leave the federal capital in Washington completely surrounded by Confederate states.

Fifty miles to the west of Annapolis in Frederick, Maryland, the Assembly met beyond the control of the Union army. Though delaying action on a vote to secede, the Assembly passed a pro-Southern resolution and forbade Marylanders from answering President Lincoln's call to raise an army to suppress the rebellion.

It must have appeared, retrospectively, to many of the Assemblymen, to have been an opportunity lost. By August, Union troops had occupied most of Maryland, arresting nearly 3,000 Southern sympathizers, including fully half of the Assembly itself.

Lincoln's action in Maryland was indicative of events that would transpire in many border states that spring. A Marylander himself, Roger Brooke Taney, then Chief Justice of the United States, was appalled by Lincoln's actions. Acting under his authority as a federal circuit judge (the Justices were also required to "ride circuit" serving as judges in the lower federal courts) he dispatched a U.S.



Baltimore was the site of the first official victims of the Civil War. In 1861, a riot took place in Baltimore when Southern sympathizers attacked the 6th Massachusetts Regiment with bricks and firearms. Four soldiers died as a result of the fracas. A number of citizens were arrested by the military in connection with the incident including John Merryman, a prominent figure in Baltimore. Merryman protested his treatment to Chief Justice Taney who later reprimanded President Lincoln for suspending the proscribed protections of the law.

Marshal to a military prison in Baltimore with orders to secure the release of one John Merryman, who had been imprisoned without trial for anti-Union activities. It would become one of many challenges Taney would make to the Lincoln Administration's prosecution of the war.

On March 30, 1994, University of Kansas Professor Phillip Paludan will speak on Taney, Lincoln and the Constitutional Conversation. In a lecture to be introduced by Associate Justice Sandra Day O'Connor, in the Great Hall of the Library of Congress, Professor Paludan will examine what he views as the Taney Court's "dangerous" subversion of the rule of law in *Dred Scott* to protect "ideals that millions of Americans deplored."

Says Professor Paludan, "Unelected judges were turning the Constitution into a rigid structure that protected slavery forever."

Professor Paludan will also call into question the Taney Court's attempts to frustrate Lincoln Administration war policies. The very survival of the Constitution was at stake, contends Professor Paludan, using the example of the *Merryman* case.

Could the army, acting on orders of the President, imprison citizens without benefit of a hearing, and then defy a court order to provide legitimate reasons for their incarceration (a writ of habeas corpus)?

"At issue [in *Merryman*]," says Professor Paludan, "was Taney's

contention that the courts, not the President, would have to act on suspension of constitutionally guaranteed civil rights. The President was powerless to suspend the writ of habeas corpus. Only Congress could do it. But since Congress was not in session, the courts would have to act. This at the beginning of the Nation's greatest war."

Professor Paludan contrasts Taney's view with that later expressed by Justice Harlan Fiske Stone, stating, "... Courts are not the only branch of government which must be presumed to have a capacity to govern."

As the "War of Northern Aggression" (as it was sometimes called by Southerners) wore on, President Lincoln had several opportunities to appoint Justices to the High Bench who were more in keeping with Northern perspectives, if not with his own political philosophies. John Archibald Campbell, who voted with the majority in *Dred Scott*, resigned from the Court in April 1861 to join the Confederate government. Just a few weeks before, Justice John McLean had died of pneumonia—McLean's contemporary fame resting largely on his vituperative dissent to the *Dred Scott* decision. These events afforded Lincoln two appointment opportunities in addition to an already existing vacancy left by the death of Peter V.

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Daniel in 1860.

A fourth opportunity occurred midway through the war, in 1863, when the Republican-dominated Congress expanded the Court's bench to a record (and since unrepeated) ten seats to allow for an appointment from California—the colorful and capable Stephen J. Field. The rationale was that some action was needed to assure California's allegiance to the Union, and giving the state a representative on the Supreme Court would help cement the state to the Northern cause. When Chief Justice Taney died in late 1864, Lincoln had a fifth opportunity. On that occasion, he named one of his Republican political rivals, Salmon Portland Chase to the center chair, an act which many have contended was designed to effectively remove Chase from the political arena.

The Chase Court would consider many of the constitutional challenges to the Lincoln Administration's prosecution of the war, notably, the *Legal Tender Cases*, in which the constitutionality of printing paper currency (as a substitute for gold) was questioned. Among those most affected by the substitution were suppliers of war materials who had contracted with the government expecting to be paid in gold, and found themselves instead forced to accept deflated paper currency.

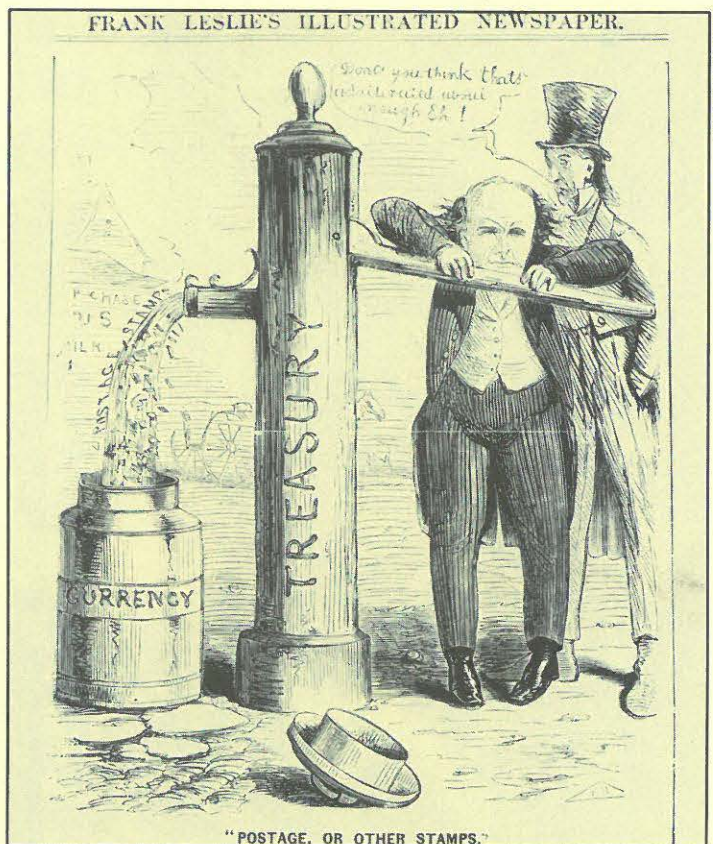
Prior to Chief Justice Chase's elevation to the Court, he had served as Secretary of the Treasury and had supported passage of the Legal Tender Acts. He was, accordingly, expected to vote to uphold the Acts. It was then, much to the government's chagrin, that Chase sided with a majority in striking down the Acts.

As its actions would illustrate, the Chase Court embraced remarkably different viewpoints from the Court which Taney had presided over at the outset of the war. Chase's appointment brought the number of Lincoln appointees on the Court to five, including Field, David Davis, Noah Haynes Swayne and Samuel Freeman Miller. The impact of these changes would be measured on the radically altered constitutional landscape of the post-war period.

In his April 6, 1994 lecture on the Chase Court, Professor G. Edward White, of the University of Virginia, plans to challenge two aspects of the "conventional wisdom" on Chase and the Chase Court.

"The first," according to Professor White, "is that Chase was a singularly uninfluential and 'weak' Chief Justice, principally because his jurisprudence was decisively affected by his persistent (even obsessive) desire to become President of the United States. The second is that Chase's fellow Justices, perhaps because they had contempt for his presidential ambitions, did not respect him as a person or as a jurist, and consequently the Court, during Chase's tenure, was consistently divided on constitutional issues in contrast to the Court during the tenures of Chief Justices Marshall and Taney, where the Justices presented a relatively more united front on such issues."

Professor White will be introduced by Associate Justice David H. Souter and will present his thesis in the Great Hall of the Library of Congress. During the course of his talk, Professor White intends to provide evidence that Chase's moral convictions on matters pertaining to slavery, economic "liberties" and currency, among other issues, transcended political considerations in his decision-making process. White will also contend that earlier Courts had, to some extent, done a better job of concealing internal differences in



In an attempt to pump up the economy during the War, Treasury Secretary Salmon P. Chase was authorized to issue postage or other stamps "in such sums as he may deem expedient." This unusual measure was an attempt to relieve the coin shortage brought on by the Civil War. President Lincoln appointed Chase to the Supreme Court in 1864. Many speculated that Lincoln's appointment was motivated by his desire to eliminate Chase as a possible contender for the Republican presidential nomination.

the opinion-writing process, and that Chase's approach to the Chief Justiceship offered greater opportunity for internal debate than was the case with his two immediate predecessors, Chief Justices John Marshall and Roger Brooke Taney.

Following Professor White's lecture, the series will return to the Supreme Court on April 26, 1994 for a talk by Professor Mark E. Neely, Jr., of St. Louis University. Entitled "Justice Embattled," this lecture will be introduced by Associate Justice Anthony M. Kennedy, and will examine the Civil War's impact on judicial operations in both the North and the South.

"War does not provide a congenial environment for coolly reasoned justice," Professor Neely observes, "and the passions of civil war are even less accommodating."

Professor Neely recounts an incident in a specially convened September 14, 1863, Cabinet meeting: "President Lincoln—'more angry than I ever saw him,' recalled Attorney General Edward Bates—informed his advisors that Pennsylvania judges were issuing so many writs of habeas corpus to free army recruits and draftees that they threatened to halt mobilization in that state."

Professor Neely notes that the Confederacy never got around to organizing a supreme court. Nevertheless, the Confederacy had to concern itself with matters of law and Professor Neely observes that, "[President Jefferson] Davis' record on civil liberties was not nearly as spotless as he and other Confederate apologists maintained after

the war." In support of this viewpoint, Professor Neely cites a December 1863 incident in which Confederate General John D. Imboden attempted to hang a Virginian after a court martial had found him guilty of communication with the enemy. A local judge issued a writ of habeas corpus, which the General was prepared to ignore until the Confederate Secretary of War interceded.

"From these and other little-known episodes of political conflict in the Confederacy and in the Union," says Professor Neely, "I plan to offer the outlines of a new and altogether more frightening history of justice in the Civil War."

The fact that the Supreme Court remained in operation and continued to hear cases throughout the war, particularly war-related cases, is a testament in itself, to the strength of the Union constitutional system but also to the fragility of its unsystematic legal "system."

This latter conclusion, explains Rice University Professor Harold Hyman, played a critical role during this period "because lawyers and judges in the 1860s were not prepared, through either professional education or practice, to deal confidently with a domestic, undeclared war, especially with the extended mass conflict that the Civil War became."

Professor Hyman will explore this theme in a lecture scheduled for May 11, 1994, on the Supreme Court's docket from 1861-65. Associate Justice Clarence Thomas will introduce what will be the fifth part of the Civil War series, and the lecture will take place in the Supreme Court Chamber.

Professor Hyman also plans to cover some of the more prominent Civil War cases. In addition to the *Merryman* case, which has been previously mentioned, he will analyze *Ex parte Vallandigham* (1864):

In the War's fourth year, a military court sentenced Ohio Democrat Vallandigham to prison for violating army orders against inflammatory anti-emancipation and anti-war sentiments. Lincoln amended the sentence to banishment in the Confederacy. Returning illegally to Ohio, Vallandigham, claiming his arrest and trial to have been illicit, petitioned the Supreme Court to void them.

Less well known, but equally interesting, is the case of *Lemmon v. N.Y.* (1860), notes Professor Hyman. Precipitating the case, was an action by a New York judge who had ruled that eight slaves traveling in that state with their owners were to be freed because New York law forbade slavery.

Citing *Dred Scott*, the owners sued. A majority of New York's highest court denied that the Constitution's Article IV required New York to respect other states' laws protecting private property—a decision which greatly contrasted with similar court rulings on non-slave related issues—"a fact," Professor Hyman notes, "that South Carolina would soon cite to justify its secession." Nevertheless for the New York court to have done otherwise, Professor Hyman observes, would have been to acquiesce to the existence of slavery there, and by implication, everywhere. Well before *Lemmon*, Lincoln had perceived potentialities in *Dred Scott* to nationalize slavery. In 1860-61 an appeal in *Lemmon*, already on the Supreme Court docket was to be mooted by the cannons at Fort Sumter.

"Ironically," Professor Hyman states, "civil wars were frequent

in mid-nineteenth century Europe, Latin America and China. Losers there suffered bloody mass retributions, and legal processes degenerated. But here losers went to lawyers and courts."

In the end, of course, the North carried the field in a military sense. But, if the War Between the States was fought over constitutional issues, the real measure of victory must be found in which side prevailed in the constitutional arena. The sixth and final part of "The Supreme Court in the Civil War" will examine the war's constitutional aftermath.

On May 25, 1994, Associate Justice Harry A. Blackmun will introduce, in the Supreme Court Chamber, the concluding panel discussion in this series, "Reconstruction: The Constitutional Aftermath of the Civil War." Participating in this discussion will be Professor Belz, along with Professors Michael Les Benedict of Ohio State University, Randall Kennedy of the Harvard Law School and Earl Maltz of Rutgers School of Law.

This distinguished group will consider one of the most heated constitutional debates surrounding the Civil War period—the Supreme Court's enforcement, or lack of enforcement, depending

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Archivist of the Capitol

Chief Justice Morrison Waite with his son and grandson. The conclusion of the lecture series will look at Reconstruction and the Civil War Amendments. Professor Earl Maltz intends to argue that the Waite Court's reputation as an enemy to the federal enforcement of the Reconstruction Amendments has been overstated.

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upon one's perspective, of the Thirteenth, Fourteenth and Fifteenth Amendments—the so-called Civil War Amendments.

"The Thirteenth Amendment abolished slavery," explains panelist Michael Les Benedict. "The Fourteenth defined citizenship and prohibited states from depriving persons of the rights of citizens—of due process of law, or of the equal protection of laws. The Fifteenth Amendment barred racial discrimination in voting."

Collectively, these three Amendments were intended to protect the rights of an underprivileged class of newly freed slaves, and to ensure their political enfranchisement. So what happened?

A century later African-Americans were still being denied voting rights and a multiplicity of other privileges of citizenship, evoking a vigorous and sometimes violent civil rights movement beginning in the mid-twentieth century. The Supreme Court, whose responsibility it was to interpret these new Amendments in the post Civil War era, construed them "more narrowly than their authors had intended," concludes Professor Benedict. Why?

"In the years following their ratification, ambiguities in language and scope of the Civil War Amendments," says Professor Benedict, "led the Supreme Court to interpret the Amendments more narrowly than their authors had intended. The primary reason was that the Amendments had the potential of revolutionizing—in fact eliminating the federal system—a result their authors did not intend."

Fellow panelist Professor Randall Kennedy accepts some of Professor Benedict's conclusions in this regard, but says there is also

a strong case to be made that the Supreme Court, "reflecting prevailing racial beliefs, grievously undermined the promise of the Thirteenth, Fourteenth, and Fifteenth Amendments."

It is a position that has garnered considerable support among some scholars. However, fellow panelist Earl Maltz contends this criticism is too sweeping. During the course of the panel discussion he will assert that, "The Waite Court's reputation as a conservative enemy of federal power to enforce the Reconstruction Amendments has been vastly overstated."

Professor Belz will both moderate and participate in the panel which will conclude the Supreme Court in the Civil War series.

"This series presents a unique opportunity," Professor Belz observes, "for attendees to learn more about the causes and consequences of the single greatest constitutional crisis in the Nation's history. In differing ways, the lectures and panel discussions will engage the momentous question of whether it was really possible, as the Union government insisted in its statements of war aims, to preserve and maintain the Constitution of the Founding Fathers in the course of fighting a civil war."

Each of the panel discussions and lectures will take place at 6:30 p.m. and will be followed by a wine and light hors d'oeuvres reception where attendees can meet and talk with the participants. Series tickets are available for \$100 per person. Some individual lecture tickets will be made available at \$20 per person. However, seating is extremely limited and those who wish to attend should contact the Supreme Court Historical Society's headquarters as soon as possible at (202) 543-0400.

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