THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

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Stephen G. Breyer 108th Member of the Supreme Court

Nominated on May 13, 1994 by President Bill Clinton to fill the seat vacated by the retirement of Justice Harry A. Blackmun, Stephen Gerald Breyer was then serving as the Chief Judge of the U.S. Court of Appeals for the First Circuit. President Clinton noted that it was his desire to nominate an individual "whose experience manifests the quality in the justice that matter[s] most—excellence. Excellence in knowledge. Excellence in judgment. Excellence in devotion to the Constitution, to the country, and to the real people. . . . Without dispute, he is one of the outstanding jurists of our age. He has a clear grasp of the law, a boundless respect for the constitutional and legal rights of the American people, a searching and restless intellect, and a remarkable ability to explain complex subjects in understandable terms." Justice Breyer, the 108th individual to serve on the Supreme Court of the United States, is all of those things and more; he is also a man of diverse interests and dimensions, not all of which are intellectual in nature and which will also shape to some degree his service on the Court.

Stephen Gerald Breyer, came to the Court from Massachusetts; but he was "born and bred" in California. He was born on August 15, 1938 in San Francisco to Irving and Anne Breyer. He was educated at Grant Grammar School and Lowell High School. Throughout his school years, Breyer excelled at his work, but also participated in extracurricular activities. He was an enthusiastic Boy Scout, and with his characteristic desire to do things completely, achieved the rank of Eagle Scout at a young age, making him one of the youngest Eagle Scouts in the country at that time. Despite his high academic achievements, Breyer was not afraid to challenge authority. He once complained to the principal of the grammar school that it was unfair and sexist to make boys take shop, and girls home economics. To underscore his point, "he signed up for home ec himself." One friend relates that this was not Breyer's only confrontation at the school. One day, the Justice "got into a boxing match with Julie Klein and another girl. I forget why we were arguing, but I think Julie Klein won."

Breyer joined the debating team when he entered Lowell High School. The school was "the flagship" of the San Francisco public schools, and there Breyer participated in many extracurricular activities. One of his frequent debate opponents at Lowell was future California Governor Edmund G. "Jerry" Brown, Jr. Beyond his oratorical skills, Breyer's writing skills were also well honed,

Ken Heinen, Collection of the Supreme Court of the United States

Justice Antonin Scalia administers the federal oath to Justice Stephen Breyer while Dr. Joanna Breyer holds the Bible. In recent history, it has been customary to have a public swearing-in ceremony at the White House, and a separate investiture ceremony at the Supreme Court.

and he was the "senior class essayist, focusing his essay on civil rights in 1955." Breyer also served as a leader in the San Francisco Youth Association, where his responsibility was to get youth involved in government. As part of his work on that committee, he interviewed leaders of large companies to inquire what would motivate them to hire young people, then report on the results of his findings.

His school days also included instruction in the Jewish religion. Consistent with his usual attitude to instruction, he applied himself with diligence to this task, winning a Kiddish cup in a sermon competition. The runner-up in the contest said that Breyer later offered the cup to him because he felt embarrassed about winning in such a close competition. This attitude seems to characterize the

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A Letter From the President

Leon Silverman

The Society needs your help to secure passage of a coin bill commemorating the distinguished life and legal career of Justice Thurgood Marshall. For those of you not familiar with coin bills, I will explain what we are trying to accomplish, and how you can help.

Each year Congress contemplates a wide assortment of proposals for coin commemoratives, passing only a handful of bills authorizing the Bureau of the Mint to strike limited edition commemorative coins. Typically, the bills attach a surcharge to the sales of these coins and this surcharge devolves to various worthwhile charities. Funds generated in this way in recent years have furthered the causes of the historical preservation of the White House, and the United States Capitol, supported the programs of various veterans organizations, and provided funding for the United States Olympic Committee. In that Congress has already deemed it appropriate to pass coin bills which benefited the Executive and Legislative branches, the timing seems propitious to seek this much needed aid for the Supreme Court.

For several years, the Society has been helping the Court amass a substantial collection of portraits, busts, antiques, artifacts and historical memorabilia which have been entrusted to the care of the Court Curator. Hundreds of items from this significant and growing collection are incorporated into educational displays throughout the building for the benefit of the one million Americans who visit the Court each year.

Unfortunately, not all of the items in this collection are acquired in perfect condition. And those items which are put on public display sometimes endure the kind of wear and tear one might expect would occur in a large public exhibition. The consequence is that the Court's permanent historical collection has attached to it an enormous backlog of deferred and preventive maintenance costs for which neither the Supreme Court nor the Supreme Court Historical Society have adequate funds.

As a consequence, some parts of the collection are never used in the Curator's displays, because they are too fragile, or their condition is too poor to make them suitable for public viewing. Worse still, inadequate funding on several occasions has forced the Society to forego acquisition of historically significant items which the Curator has identified as being appropriate for acquisition. In these instances, the Court has simply lost opportunities to acquire physical connections to its past which might otherwise have been used to enhance and enrich the learning environment the Court provides to visitors. Passage of the Thurgood Marshall coin commemorative would provide needed funds to maintain and expand the Court's permanent historical collection.

Another substantial benefit the Court and the Society would reap from passage of this bill would be the provision of funds necessary to complete the Documentary History of the Supreme Court of the United States, 1789-1800. Anyone who has been a member of the Society for more than a few days cannot have escaped my importunings on this important research project's behalf. But, since we are always adding new members, and we are yet short of our goal for funding the DHP, I will cover this ground afresh in hopes of inspiring a few more of the faithful to take up the cause.

The Documentary History was initiated in 1977 to collect and publish a complete and accurate annotated collection of documents outlining the critical founding decade in the Court's history. Four of eight anticipated volumes have been completed, and a fifth is expected to be published within days. When it appears, I have little doubt that it will garner the same enthusiastic response from scholars around the country that the preceding volumes have earned.

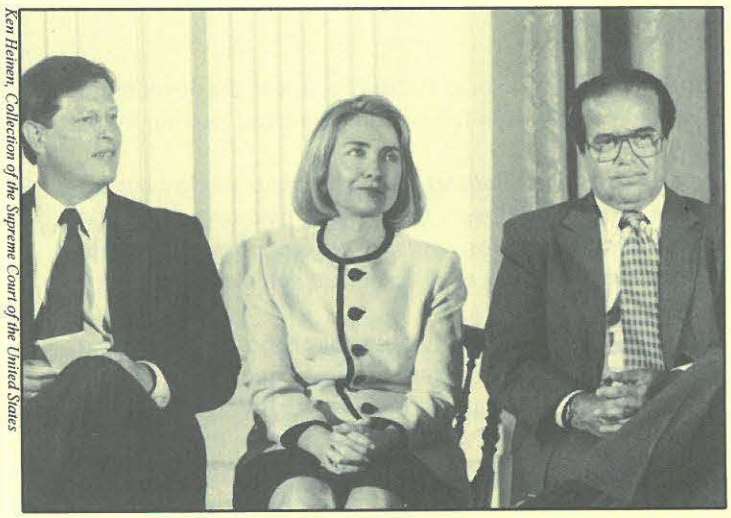
Beginning in 1979, when the Society lacked adequate resources, the Court agreed to undertake partial funding of the Project, in addition to providing needed office space and other support. This arrangement continued until 1993, when the Court's own budget shortfalls necessitated that the Society assume a greater financial role in completing the DHP. Although it has been no easy task, the Society has attracted an impressive degree of grant support and significant member donations, enabling the Project to continue. However, we continue to face a substantial shortfall if our goal of eight volumes is to be achieved. If passed, the Thurgood Marshall coin commemorative would help ensure that this important endeavor would be adequately funded to its anticipated completion at the end of this decade.

It is fitting and proper that a bill commemorating one who spent so much of his life serving the Court would create a permanent legacy to that institution in his name. The bill would do this by authorizing the mintage of 500,000 coins, each with a $10 surcharge attached to its sale—generating a permanent endowment of $5,000,000, the interest income from which would be used for the purposes I have described above.

Society members can help us realize this goal by assisting in securing the necessary sponsors in the Senate and the House of Representatives. If you know a Senator or a Representative well enough to contact them on the Society's behalf, please contact the Society's Director, David Pride, at (202) 543-0400. He will see that you get the necessary background materials on the bill.

Your help now can assure that a great American will receive deserved recognition for his contributions to our Nation. It will also help to preserve the Court's history for future generations.

Leon Silverman



Ken Heinen, Collection of the Supreme Court of the United States

Vice President Al Gore, First Lady Hillary Rodham Clinton and Justice Antonin Scalia await the ceremony in which Justice Breyer would take the federal oath required of government officials on August 12, 1994.

Justice's desire to do his best, but with great sensitivity to others. As a high school student, Breyer appeared on a "television program sponsored by the Jewish Community Relations Council dealing with issues of church and state." Justice Breyer's brother, Charles, has stated that the Justice "does attach some importance to his Jewish heritage," and he is the seventh person of the Jewish faith to serve on the Supreme Court.

Upon graduation from high school, Anne Breyer encouraged her son to attend Stanford University rather than Harvard, which was Breyer's first choice. Breyer enrolled in Stanford where he studied philosophy and received an A.M. with highest honors in 1959. Upon graduation, Breyer spent two years as a Marshall Scholar at Oxford University, Magdalen College, receiving a B.A. in 1961. Returning to the United States, Breyer enrolled in Harvard Law School, graduating with an LL.B. magna cum laude in 1964. While at Harvard, Breyer was an articles editor on the *Harvard Law Review*.

There was a lighter side to Breyer's college career. Friends remember parties held at the Justice's apartment in which food and good company were important elements as people discussed philosophy and politics over games of bridge. Judith Richards Hope, one of Breyer's fellow law school section-mates, related a story that shows Breyer's "self-deprecating sense of humor" was also a conspicuous part of Breyer's character. The incident occurred in a class when "the professor quizzed the section on the nature of fair advertising. Stephen, whose hairline even then was beginning to recede, gave an example about hair restorers. . . . He said he would buy any restorer, even if he knew it wouldn't work. He would have eternal hope." While Ms Hope doesn't remember the legal point Breyer made on that occasion, she remembers his abilitity to take things in stride. Other friends underscore Breyer's ability to laugh at himself. He is also noted as a very sociable person, fond of good food and good company. Friends say that as impressive as his intellectual abilities and accomplishments are, it is his warmth and humanity that makes Stephen Breyer such an important part of their lives.

Following his graduation from Harvard, Breyer served as a law clerk to Supreme Court Justice Arthur Goldberg from 1964-65. During his tenure with the Justice, Goldberg wrote his most famous opinion in the case *Griswold v. Connecticut*, articulating the theory of the "right to privacy" in the opinion. Stephen Goldstein, Breyer's fellow law clerk that term, gave Breyer much of the credit for the reasoning of the opinion, stating that "there weren't too many changes after Breyer did the first draft. . . ." From Justice Goldberg, Breyer acquired a distaste for lengthy footnotes, (or for footnotes at all) in opinions, a practice of which Goldberg thoroughly disapproved.

Public service has been an important part of Breyer's life and at the completion of his clerkship, Breyer became a special assistant to the assistant attorney general in the antitrust division of the U.S. Justice Department. He later became Assistant Special Prosecutor

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Ken Heinen, Collection of the Supreme Court of the United States

Justice Brennan congratulates Justice Breyer shortly before the ceremony at the White House. In the background Retired Chief Justice Burger, Justice Anthony Kennedy and First Lady Hillary Rodham Clinton converse.

The Supreme Court Historical Society

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Amicus Curiae

The Supreme Court Historical Society recognizes that there are many individuals who are dedicated to the Supreme Court and the preservation of America's rich judicial heritage. Since its inception twenty years ago, the Supreme Court Historical Society has benefited from the foresight and generosity of members and friends who share a commitment to the Supreme Court and its history. The Amicus Curiae *section of the* Quarterly *has been created to inform Society friends of ways to strengthen the Society and at the same time take advantage of the benefits associated with planned giving. This issue contains the first in a series of articles exploring the many planned giving options available to individual donors.*

What Is Planned Giving?

Planned giving is just what it says, it represents gifts that are "planned," typically in the context of ones's estate plan. By making a planned gift, the donor can support the Supreme Court Historical Society, and at the same time, benefit from income and estate tax advantages.

For example, a donor may have appreciated assets which pay a low current dividend. In addition, he or she may have a strong charitable inclination toward the Society. A properly structured planned gift strengthens the Society, increases income to the donor during the donor's lifetime, and avoids paying the capital gains tax. This is just one example of how a planned gift can be helpful to the donor and the Society.

What Are Some of the Planned Giving Options?

Outright Gifts of Appreciated Stocks or Bonds The donor is able to save twice on taxes: first through the charitable gift deduction and second through the avoidance of capital gains tax.

Life Income Gifts These gifts, which are usually funded by appreciated stocks, bonds or real estate, permit the donor a double tax benefit and satisfy the donor's goal of strengthening the Society. Typically, the arrangement provides a reliable amount of annuity income for the life-time of the donor or for a period of years, with the remaining interest passing to the Society.

Life Insurance Policies This gift incurs modest out-of-pocket costs for the donor. Donors with paid-up policies and whose original need for insurance coverage has diminished, can transfer the policy as a convenient vehicle for making a planned gift.

Gift of Home or Farm A donor may choose to donate real estate, and can even structure the gift so that the benefactor retains the right to live on the property for his or her lifetime.

Charitable Lead Trust A gift of income, placed in this type of trust for a fixed period of time, will provide the donor with an income-producing asset that will later return to the donor or heirs.

Wealth Replacement Charitable Remainder Trust Gifts paying an annuity to the donor and/or others, and adding insurance to replace the asset value which would have passed to the heirs had the gift not been made. The cost of premiums may be defrayed by the tax savings and/or increased income from the gift plan.

Wills & Bequests Many times an individual can benefit the Society after his or her death when during their lifetime there were other needs for their assets. In addition to leaving an outright legacy to the Society, the benefactor has an opportunity to create remainder trusts, gift annuities, lead trusts and retained life estate plans.

Subsequent articles will examine in detail the many planned giving concepts that have been introduced above. The Society recognizes the importance of keeping members informed on issues that involve donor benefits, and hopes that this and ensuing articles on creative giving will foster your interest in the opportunities donors, beneficiaries and non-profit organizations can realize. If you would like more information about this unique approach to charitable giving, please contact Charlotte Sadel, Director of Development at (202) 543-0400. All inquiries will be considered confidential.

Note: This article is for information purposes only. Before finalizing a planned gift or otherwise relying on information contained in this article, the donor should consult with his or her attorney or other tax advisor.

THE CURRENT LAW THAT PERMITS DEDUCTIONS on the full value of stock contributed to private foundations expires on December 31, 1994. Because there is no guarantee that Congress will act to extend the deduction rule, persons wishing to make a charitable contribution of stock that will yield a tax savings are advised to consider making their gift before the end of the current tax year.

United States v. Shipp

Contempt of Court in the Supreme Court

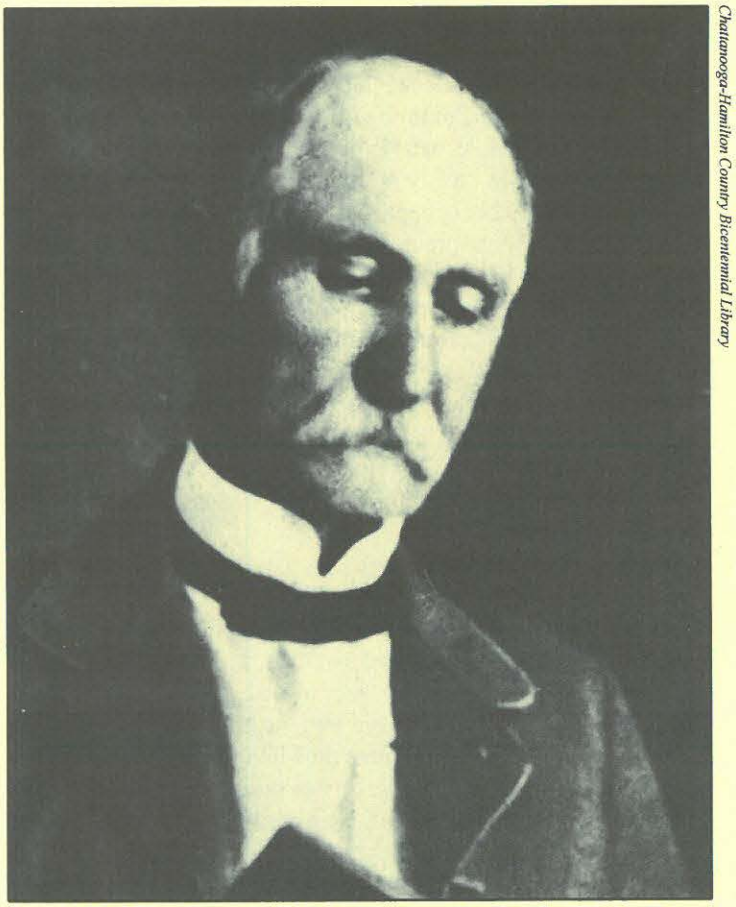
Mary Deibel
Scripps Howard News Service
Supreme Court Correspondent

The Supreme Court of the United States is surely the most decorous site in the city of Washington. Here dark suited lawyers speak in learned accents in a jewel-toned courtroom, where they are closely, and precisely questioned by black-robed jurists, who then discretely retreat into oak-paneled anonymity, to reappear only once their decisions are made. These jurists are polite, they wait quietly to be asked their opinion, and would never deign to meddle in the maelstrom of popular politics that foams right up to the curbside of their pristine marble temple.

But once upon a time, a time when the country was still struggling to recover an equilibrium shattered by the Civil War, an outraged Court—infuriated and affronted by the lynching of a black man whose execution they had ordered stayed only twelve hours before—launched its own criminal investigation, publicly quarreled with the Attorney General of the United States, and otherwise reached out beyond its sedate perimeters to find a fistful of Chattanoogans in contempt of court.

The case was U.S. v. Shipp. *The cast of players included a Confederate-Army-veteran sheriff in personal conflict over doing his duty or gaining reelection, a "Negro with a soft, kind voice," and two brave black attorneys who tried to save their client's life. With John Marshall Harlan and those grand mustachioed gentlemen, Chief Justice Melville Fuller and Oliver Wendell Holmes, leading the way, the sheriff, one deputy, and four mob leaders were convicted of contempt and personally sentenced to confinement in a District of Columbia jail by Fuller, as he presided from his central chair in the vaulted, old Court chamber.*

One can imagine the elderly Chief Justice glowering down at the six miscreants from his lofty seat, and saying "You Joseph F. Shipp[1], Jeremiah Gibson, Luther Williams, Nick Nolan, Henry Padgett, and William Mayse, are before this court on an attachment for contempt. . .you have been found guilty. . . ."



Chattanooga-Hamilton County Bicentennial Library

Joseph F. Shipp was the Sheriff for Hamilton County, Tennessee. He was charged with contempt of court for his role in allowing the lynching of Ed Johnson in 1906.

The case began January 23, 1906, in Chattanooga, Tennessee. A white schoolgirl, Nevada Taylor, reported being attacked that day by a "Negro with a soft, kind voice" at the gate of Chattanooga's Forest Hills Cemetery.

Two days later, Ed Johnson, a black man, was arrested and charged with rape. That night, a mob stormed the Hamilton County jail, shot out windows and attempted to get to Johnson, but Sheriff John F. Shipp had moved him to Nashville. Shipp had planned to take Johnson to Knoxville but changed course mid-trip to confuse those who might harm his prisoner.

There was no confusing Nevada Taylor, however. She and her brother arrived the next day at the Nashville jail, where she was asked to identify whether Johnson or another black prisoner attacked her. The two prisoners were told to speak so she could tell if either had a "soft, kind voice." She identified Johnson.

Although Chattanooga churches condemned the mob's action and state Circuit Judge S.D. McReynolds, the judge for Johnson's upcoming trial, declared that the mob leaders must be found out and punished, Johnson's trial was set for two weeks hence, February 6, back in Chattanooga.

McReynolds had appointed three white lawyers to represent Johnson. "There is but one question and that question is whether the arrested man is the right man," one told reporters.

Shipp brought Johnson back for the trial's February 6 start, but their movements and Johnson's whereabouts remained a "jealously guarded court secret."

Johnson attorney W.G.M. Thomas asked that the trial be moved. "We do not believe that this is the time or Chattanooga the place, in view of recent happenings, for this trial to take place," he said. But McReynolds rejected the request, saying that he thought all along that the trial should take place in Chattanooga—and as soon as possible.

As the three-day trial began, the defense team tried to establish an alibi for Johnson and to show that another man actually carried

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U.S. v. Shipp *(continued from previous page)*

out the attack, but Nevada Taylor, from the witness stand, pointed to Johnson and identified him as "the guilty Negro." One juror, moved to hysteria, shouted from the jury box, "If I could get to him, I would tear his heart out right now."

The jury, after temporarily hanging at eight to four for conviction, found Johnson guilty and McReynolds ordered that Johnson be "hanged from the neck until dead" on March 13, a little shy of five weeks hence.

Johnson's white lawyers, citing their own strain, said there would be no appeal: They didn't think Johnson's case would wait until September when the Tennessee Supreme Court was scheduled to sit in regular session. "It was the judgment of all present that the life of the defendant, even if the wrong man," could not be saved, Thomas said. Besides, he added, the very act of appeal could "cause mob violence."

Two black Chattanooga lawyers, hired by Johnson's father, took up the cause. Styles L. Hutchins, fifty-four, was a veteran attorney, former judge and one-time member of the Tennessee legislature, while forty-year-old Noah Parden, an orphan who entered the law department at Central Tennessee College "without a dollar" and went on to graduate at the top of his class, had practiced in Chattanooga for thirteen years.

Parden said he and Hutchins considered that the court-appointed white lawyers had abandoned the case when Thomas published his declaration "that the choice had been submitted to Johnson to die either at the end of a lawful rope or one applied by a mob."

On February 13, 1906, Parden moved for a retrial of Johnson, but Judge McReynolds turned down the request and refused to recognize Parden and Hutchins as Johnson's lawyers for purposes of appeal. McReynolds simultaneously ordered Sheriff Shipp to move Johnson to the Knoxville jail for the defendant's safety.

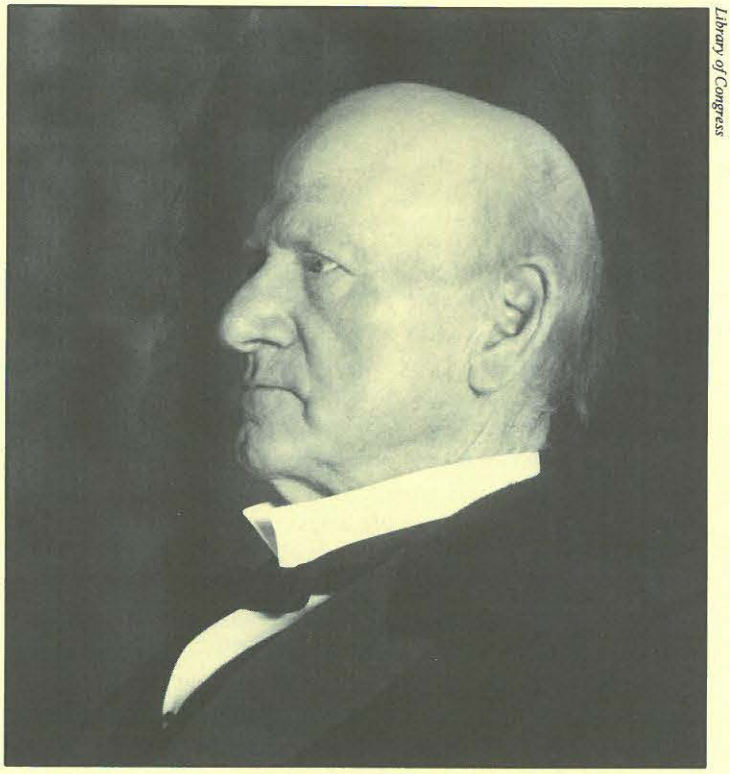
Parden and Hutchins wouldn't give up. Hutchins was reported to be "busying himself at the courthouse, looking up the record of the case, and he has expressed the intention to get the case before the court of last resort if possible." Newspapers also reported that black churches were raising money to pay for the appeal.

Despite McReynolds' refusal to recognize Hutchins and Parden as Johnson's lawyers, the two went before the Tennessee Supreme Court in early March, arguing that Johnson's fair trial rights were violated when a juror took ill and a substitute was appointed mid-trial. When the state Supreme Court turned Johnson down, the *Chattanooga Times* reported, "There does not seem anything in the way of an execution."

On March 7, Hutchins and Parden went into federal court in Knoxville, where Shipp had gone to retrieve Johnson for hanging.

Three days later, federal Judge C.D. Clark announced that, while he found no violation of Johnson's constitutional rights, the execution would be delayed to let Johnson appeal to the Supreme Court of the United States "in order that there might be no mistake as to the identity of the guilty party and to give the condemned man every possible chance."

On March 15, 1906, Parden left for Washington to press the Supreme Court appeal. Headlines declared that it was "now up to the last court" to determine the fate of Johnson, who had been brought back to Chattanooga despite the stay of execution.



Library of Congress

John Marshall Harlan I, the "Great Dissenter," issued a temporary stay of execution on March 17, 1906 to prevent the execution of Ed Johnson. Two days later the full Court issued an indefinite stay.

Meantime, the press reported that Tennessee Gov. John I. Cox had ordered Johnson's execution delayed to March 20. Cox also offered to send in the National Guard in case Chattanooga authorities feared a recurrence of mob violence.

Johnson, meanwhile, had "experienced religion" during his jail time and said he was "ready to die," according to press accounts. While Johnson was being baptized in his Chattanooga jail cell that Saturday, March 17, Supreme Court Justice John Marshall Harlan announced that he had stayed Johnson's execution and that the full court would take up the appeal on Monday, March 19.

Harlan, "the great dissenter" known best for his scathing attack on *Plessy* v. *Ferguson*, the notorious 1896 ruling that made "separate but equal" treatment of blacks the law of the land, telegraphed federal Judge Clark and Chattanooga authorities to alert them.

At noon March 19, the Court for the first time in four years issued an indefinite stay of execution. Word was sent instantly to Chattanooga.

By 4 p.m., the *Chattanooga News* was on the streets with headlines, "An Appeal Is Allowed/Ed Johnson Will Not Hang Tomorrow." "The gallows in the Hamilton County jail has again been disappointed," the *News* account read, while the editorial page sympathized with a community "aggravated" by delay. "If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here if another such crime is committed. Such delays are largely responsible for mob violence all over the country," the editorial declared.

By 8 p.m., a mob of men, some with handkerchiefs pulled up over their faces arrived at the jail, where only Deputy Jeremiah Gibson, the elderly night jailer, remained stationed. Sheriff Shipp, who had heretofore taken meticulous care of his imperiled charge, had gone home but returned after being told that a crowd of seventy-

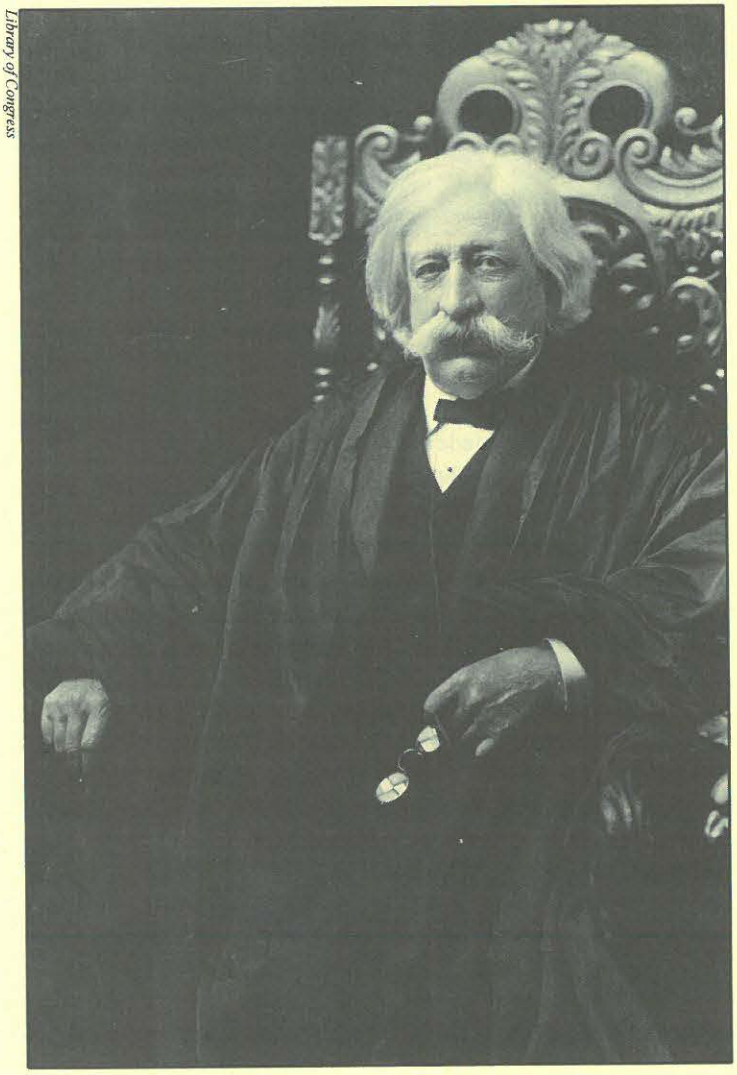
five was attacking the jail. According to the findings of fact by the Court, Shipp was temporarily shut in an unlocked closet while the mob bludgeoned its way into Johnson's cell. The whole affair took at least an hour, but Shipp neither unholstered his sidearm, nor sent for assistance, although the National Guard was drilling at the armory not ten minutes from the county jail.

Nor did Shipp attempt to follow this "small but determined band" during its ten-minute trip to the county bridge over the Tennessee River six blocks away. By 11 p.m., the mob had hanged Johnson from the bridge, then shot his body fifty times in case the rope failed. Forty days after Nevada Taylor stood and pointed an accusing finger in the courtroom, Ed Johnson was dead.

The next morning's *Chattanooga Times* headline screamed: "**'GOD BLESS YOU ALL—I AM INNOCENT,' Ed Johnson's Last Words Before Being Shot to Death By a Mob Like a Dog/ MAJESTY OF THE LAW OUTRAGED BY LYNCHERS/ Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant/Terrible and Tragic Vengeance Bows City's Head in Shame.**"

"The City of Chattanooga is shamed and humiliated as never before," the *Times* editorialized.

Library of Congress



Chief Justice Melville W. Fuller summoned the members of the Supreme Court to his home to discuss their course of action after the murder of Ed Johnson.

Word reached Washington later that day. The Justices, who weren't scheduled to meet until April 2, were summoned to a special session at the Foggy Bottom home of Chief Justice Fuller to discuss their course of action. (Perhaps fittingly, Fuller's handsome brick manse at 1801 F Street had once been the boarding house occupied by John Marshall and colleagues when Court was in session.)

President Theodore Roosevelt, calling the lynching "an affront to the highest tribunal in the land that cannot go by without proper action being taken," sent Secret Service agents to Chattanooga. TR also told his Justice Department to help the Supreme Court in every way. It appears from newspaper accounts that United States Attorney General William Moody was nevertheless a little slow out of the gate. Saturday, March 24, five days after the lynching, Justice Harlan issued a rare statement to the press in which he said the Court had power to punish the mob and confirmed that the Justices had sent their own investigators to Tennessee to determine who to punish for defying the court. Harlan's statement led that Sunday's *Washington Post* beneath the headline: "Supreme Court Declares Its Right to Punish Mob."

A defensive Moody told the *Post* that the Court has authority to deal with the offenders, but that the Justice Department had the right to investigate, too. "The only punishment in my opinion lies in the process through grand jury proceedings," Moody said.

Moody apparently got on board; when the federal grand jury empaneled at Chattanooga failed to indict mob leaders or anyone else, he filed an information with the Supreme Court asking that Sheriff Shipp and twenty-six other Chattanooga men be cited for defying the Court. Shipp was ordered to appear before the Justices October 15, 1906, "then and there to show cause why he should not be punished for contempt."

Shipp, in Birmingham, Alabama, reacted to the contempt proceedings by telling reporters there that "the Supreme Court of the United States was responsible for this lynching. I had given that Negro every protection I could." He dismissed the contempt proceedings as "a matter of politics." Nevertheless, the sheriff was "frank to say that I did not attempt to hurt any of (the mob) and would not have made such an attempt if I could." He added, "I had looked for no trouble that night and, on the contrary, did not look for it until the next day."

On arriving in Washington for the October 15 Supreme Court hearing, Shipp told Chattanooga reporters he was "interested, but not nervous—confident of the outcome." Before going to the Court, Shipp and Judge McReynolds stopped by the White House to meet President Roosevelt. Roosevelt was "evasive and finally bowed his visitors out without committing himself" in the case, the Chattanooga press reported. Black Chattanooga attorneys Parden and Hutchins came to Washington, too, and met with Emanuel D. Molyneaux Hewlett, a prominent black lawyer and former judge in Washington who handled the earlier motion that won Johnson the Supreme Court execution stay.

The Justices set oral arguments for December on the threshold question of whether the Supreme Court had jurisdiction to punish Shipp or anyone else for contempt. By the time of the hearing, Attorney General Moody, who first came to national prominence as one of the prosecutors of Lizzie Borden, had bowed out of the *Shipp*

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U.S. v. Shipp *(continued from previous page)*

case because President Roosevelt had named him to the Supreme Court. As a member of the high court, Moody took no part in the contempt proceedings. His former Justice Department deputy, Henry Hoyt, continued to make Moody's argument to the Court that "the power of a court to make an order carries with it the equal power to punish for disobedience of that order."

Arguing for Shipp that the Court has no such power was a former U.S. attorney general, Judson Harmon of Cincinnati. Harmon contended that the fundamental question was whether Johnson had the right in the first place to have the Supreme Court consider his appeal: If Johnson didn't, Harmon said, there could be no contempt of court by Shipp.

Justice Oliver Wendell Holmes, writing for the Court, rejected Harmon's claims. Whether the Supreme Court had jurisdiction or not over the appeal by the lynched Johnson, "this court and this court alone could decide that such was the law," Holmes wrote, but "the murder of (Johnson) has made it impossible to decide that case . . . .

"Either way, the (Supreme Court's) order suspended further proceedings by the state against the prisoner," Holmes concluded in ordering the contempt trial to proceed.

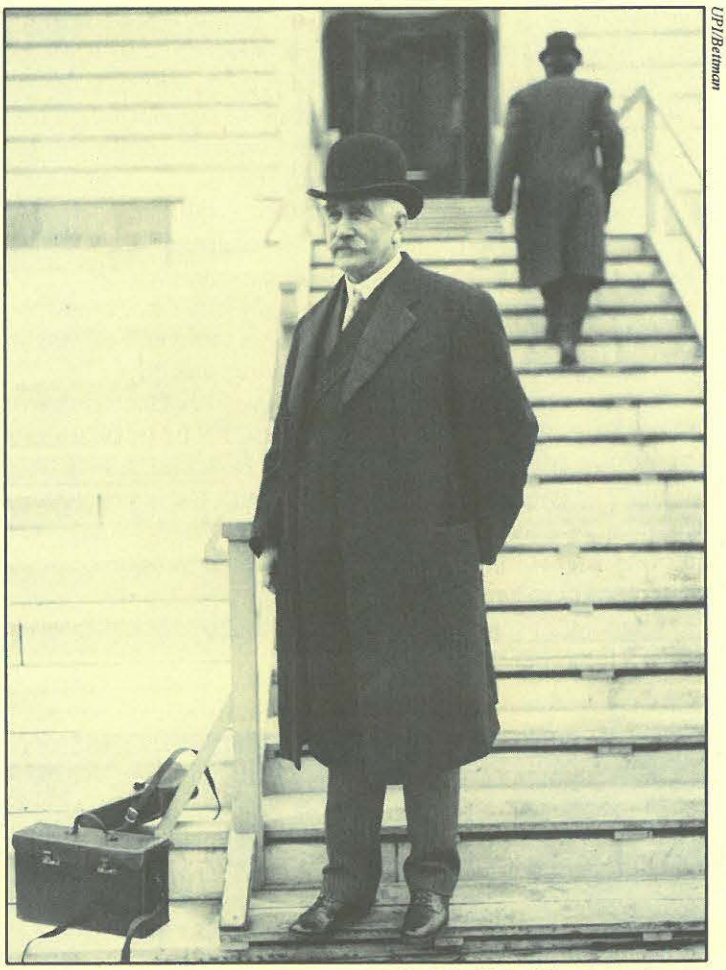
The court tapped its deputy clerk of Court, James D. Maher (who went on to serve as Court Clerk from 1913–1921), to take testimony in Chattanooga—a record that would take two years to build. After Maher presented a twenty-volume report detailing seventeen days of testimony in October 1907, he and the Justice Department learned that two eyewitnesses did not come forward "on account of fear." So, Maher returned to Chattanooga the following July to hear from two members of the African Methodist Episcopal Church who'd been attending a church election the night the lynch mob marched by with Ed Johnson in tow. Witnesses for Shipp and the other defendants dismissed the testimony as statements by "white haters."

By October 1908, Maher produced a 2,458-page record for the Supreme Court that resulted in charges being dropped against all but six men. Shipp and his night deputy, Gibson, along with four alleged mob leaders still faced contempt charges, however.

As the federal government moved to prosecute Shipp, he won re-election in 1906 with 5,000 votes, the largest majority ever given a sheriff in Hamilton County history. By the time the two-day contempt trial started March 2, 1909, Shipp had hung up his badge.

The lawyers filed briefs in advance of the Supreme Court trial. Justice Holmes managed the case for the court while Attorney General Charles Bonaparte, TR's replacement for now-Justice Moody, argued the federal case against Shipp and the other five defendants. Bonaparte had told the court that Shipp should have known of the possibility of mob violence that March night three years before. "One cannot read (the local press accounts) without feeling that they were a distinct warning that there was a danger of mob violence," Bonaparte maintained. He also pointed to Shipp's actions in moving Johnson to Nashville before and Knoxville after the trial.

Former attorney general Harmon, arguing for Shipp, countered that the people of the South were "struggling with a task the like of which was never known before" but that "irregular justice" was getting in the way of healing divisions left by a Civil War that split



UPI/Bettman

Judson Harmon served as attorney general of the United States during the second administration of Grover Cleveland. He later served as Governor of Ohio.

and scarred Chattanooga no less than the military battles that had been fought there.

To Harmon, court-made delay in rape trials and other cases "has engendered whatever mob spirit existed throughout the country . . . If we could have speedy trials rather than delay them, it would have a good effect on the public with reference to allaying in the future any such mob spirit."

Chief Justice Fuller announced May 24, 1909, that the Court had found Shipp and the other five in contempt. The vote was 5-3 to fault Shipp for making no preparations to prevent the murder of the prisoner by a mob . . . although such action was reasonably to be anticipated, and for making no efforts to resist the mob, save the prisoner or identify the participants in the lynching. "Only one conclusion can be drawn" from the facts of the case and are "clearly established by the evidence—Shipp not only made the work of the mob easy, but in effect aided and abetted it," Fuller wrote for the Court. Shipp "was a candidate for re-election, and had been told that his saving the prisoner from the first attempt to mob him would cost him his place, and he had answered he wished the mob had got to (Johnson) before he did," Fuller wrote.

Justice Rufus Wheeler Peckham, in dissent, said that "there is not

—continued on page twelve

Membership Update

The following members joined the Society between June 16, 1994 and September 15, 1994.

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K. Stephen Jackson, Birmingham
Susan James, Montgomery
Supreme Court and State Law Library, Montgomery
Phillip W. McCallum, Birmingham
Jim Miller, Birmingham
Sandra Mundinger, Huntsville
Jack G. Paden, Bessemer
R. Shan Paden Esq., Bessemer
Robert E. Paden Esq., Bessemer
Adam M. Porter, Birmingham
W. Stancil Starnes Esq., Birmingham
Tommy E. Tucker Esq., Birmingham

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Joe P. Josephson Esq., Anchorage

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Richard Frank Esq., San Francisco
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Lois E. Jeffrey Esq., Orange
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Barbara A. Smith Esq., Spring Valley
Gary Smolker, Los Angeles
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Marshal & Mrs Dale Bosley
William P. Bowden Jr. Esq.
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Warren M. Cheek Jr. Esq.
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Douglas A. Graham Esq., Chicago

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Membership *(continued from previous page)*

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Roger K. Newman, Bronx
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George B. Yankwitt Esq., New York

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Michael E. Haglund Esq, Portland
Robert Hirshon Esq., Portland
The Honorable Robert E. Jones, Portland
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W. F. Lubersky Esq., Portland
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Stephen Neustein Esq, Pittsburgh
Carmine Petrella, Philadelphia
Norman J. Pine II Esq., West Chester
Neil Price Esq., Johnstown
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Charles Jones, Dallas
Gregory V. Judice, Irving
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T. John Ward Esq., Longview

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J. Kevin Murphy Esq., Salt Lake City

Vermont

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James E. Autry Esq., Fairfax
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Mark Conner, Alexandria
Maj. Gen. W. D. Crittenberger, McLean
Mrs. Willis D. Crittenberger, McLean
Mark V. Ebert, Arlington
Jonathan N. Harris, Arlington
Wendy B. Harris Esq., Arlington
Benjamin King Esq., Charlottesville
Mitchell R. Kreindler Esq., Arlington
David Henderson Martin Esq., Arlington
Joan G. Miller, McLean
Larry A. Miller Esq., Reston
Melissa Rogers, Alexandria
Eric F. Schell Esq., McLean
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William B. Senhauser Esq., McLean
Stuart M. Shalloway Esq., Alexandria
Philip Sundel Esq., Alexandria

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Britain H. Bryant Esq., St Croix
The Hon. Raymond L. Finch, St. Croix

Washington

Rex W. Anderson Jr. Esq., Spokane
Charles Emile Ehlert Esq., Seattle
Francois L. Fischer Esq., Seattle

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Norwood Bentley Esq., Martinsburg
Howard M. Persigner Jr. Esq., Williamson
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James R. Cole Esq., Madison
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Mitchell N. Weber, Waukeska
Walter E. Zimmerman Esq., Milwaukee

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Professor Walter M. Francis, Riverton

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Professor Koichiro Fujikura, Tokyo
Margaret B. Moser Esq., Cheshire

Wanted

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.

U.S. v. Shipp *(continued from page eight)*

one particle of evidence that any conspiracy had ever been entered into or existed on the part of the sheriff."

Shipp and the other five were sentenced November 15, 1909. The Court gave Shipp and two putative mob leaders ninety days while deputy Gibson and two others charged with helping incite the mob got sixty days. Following their sentencing by Chief Justice Fuller, the six were commended to the custody of the Marshal and started serving their terms that afternoon in a District of Columbia jail. Their 20-foot room, outfitted originally for women prisoners, had "beds, one for each of the prisoners, while at one end of the room a table upon which trusties will set the prisoners' meals three times a day. A bathroom adjoining will be used by the prisoners exclusively. Four large circular windows open to the south and west, giving excellent views."

Trial Judge McReynolds and other Tennessee judges had Sen. Robert Love Taylor hand the Chief Justice letters urging clemency so that Shipp "might return home to his family by the time of the Christmas holidays."

The Supreme Court, having made its point, rejected the home-for-the-holidays schedule but did announce early release for deputy Gibson and the others sentenced to sixty days on January 4, 1910. Shipp and the two putative mob leaders won release January 29.

A year after the landmark decision in *United States* v. *Shipp*, Chief Justice Fuller died on July 4, 1910. Justice Moody, the one-time U.S. attorney general, left the Court later that year with crippling arthritis. Justice Holmes, who wrote the opinion that set the stage for *United States* v. *Shipp* and managed the court's one and only criminal contempt trial, didn't retire from the Court until 1932, two months shy of his ninety-first birthday. He died three years later of pneumonia at his home in Washington.

Ed Johnson was buried three days after he was lynched. The pastor who baptized him in the Chattanooga jail the Sunday before and raised money for Johnson's appeal conducted the funeral.

Nevada Taylor, Johnson's accuser, may have married or moved away, or both. Chattanooga histories and census tracts make no mention of her beyond the 1906 proceedings.

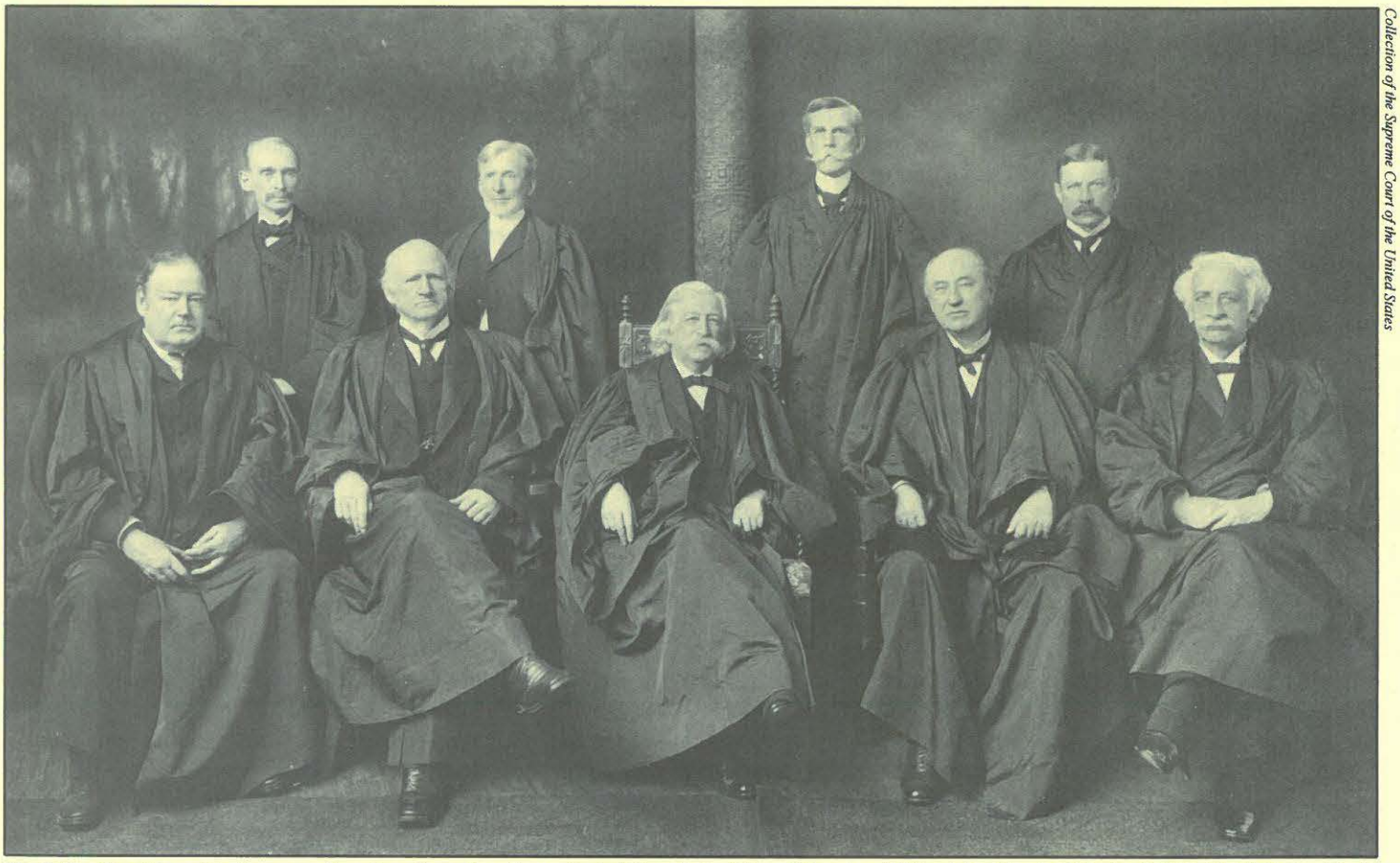
Death threats forced black attorneys Hutchins and Parden to flee with their families to Oklahoma shortly after contempt charges were brought against Shipp.

Shipp, on his release from jail, was warmly greeted on his return to Chattanooga, where he died at age eighty-three in 1925. Confederate Army veterans provided the honorary escort for Shipp, who was buried in his gray captain's uniform. Shipp's lengthy obituary devoted only four sentences to the entire episode.

He was buried in Forest Hills Cemetery, the place where on January 23, 1906, a white schoolgirl, Nevada Taylor, reported being attacked by a "Negro with a soft, kind voice."

Endnotes

[1] The Court opinion, newspaper articles and the "History of the Hamilton County Sheriffd Office" refer to Shipp as Joseph, but the original briefs and other articles refer to him as John.



Collection of the Supreme Court of the United States

The Fuller Court heard the Supreme Court's only contempt case. Seated (from left): Edward Douglass White, John Marshall Harlan I, Melville W. Fuller, David J. Brewer and Rufus Peckham. Standing (from left): William Rufus Day, Joseph McKenna, Oliver Wendell Holmes, Jr., and William Moody.

The Supreme Court Trivia Questions

Bernard Schwartz
Chapman Distinguished Professor of Law
The University of Tulsa
College of Law
Tulsa, Oklahoma

Questions

1. Who was the last Justice to use the spittoon behind the Supreme Court bench?

2. What Justice enjoyed a reputation as a minor poet?

3. Which Justices have been known for wearing bow ties?

4. What Justice practiced as a frontier lawyer, carrying a pistol and bowie knife?

5. What Justices' major premise was "God damn it!"

6. What Chief Justice was teased by his friends for driving Justice Holmes from the Court?

7. About what Justice did another write, "you would no more heed [his] tripe than you would be seen naked at Dupont Circle at high noon tomorrow"?

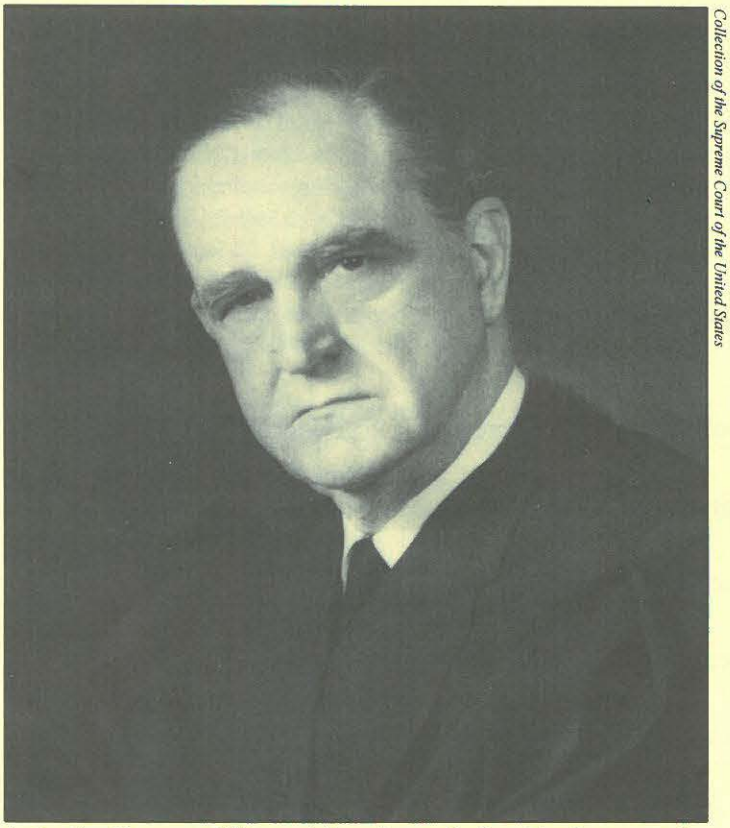
8. Who were the youngest and oldest Justices appointed?

(answers appear on page fourteen)

Attention D.C. Area Federal Employees

The Supreme Court Historical Society is pleased to announce that it is a participant in the 1994 Washington, D.C. Local Combined Federal Campaign (CFC). As a participant, the Society is eligible for donations made to the CFC by federal employees who work in metropolitan D.C. Eligible persons wishing to donate to the Society through the Campaign should indicate the Society's CFC designation number: **7656** when filling out a donation response. The Society will be listed in the "Local Voluntary Agencies" section of the Campaign catalog.

Trivia Answers



Collection of the Supreme Court of the United States

1. Justice Sherman Minton (above) was the last Justice to use the spittoon provided for him behind the bench, which always upset the fastidious Justice Burton next to him. Schwartz, *Super Chief: Earl Warren and His Supreme Court* 58 (1983).

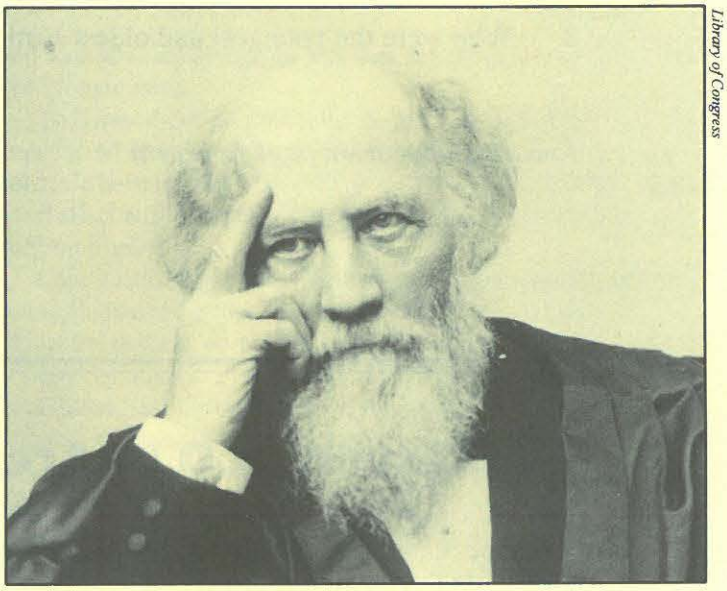
Collection of the Supreme Court of the United States

2. Justice Joseph Story. While studying law, he composed a lengthy poem, *The Power of Solitude*, referring to it in a letter as "the sweet employment of my leisure hours." Story rewrote the poem, with additions and alterations, and published it with other poems in 1804. One who reads the extracts contained in his son's biography quickly realizes that it was no great loss to literature when Story decided to devote his life to the law. Story himself apparently recognized this, for he later bought up and burned all copies of the work he could find. See 1 *Life and Letters of Joseph Story* 84, 109 (W.W. Story ed. 1851).

Supreme Court Historical Society

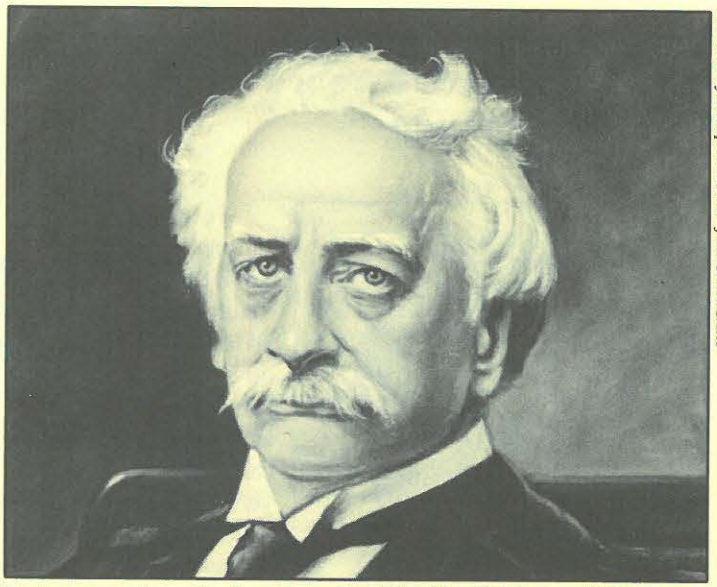
3. Justices Tom C. Clark and John Paul Stevens (above). In 1986, the Justices were hearing argument on whether Orthodox Jews, with their religious duty to wear yarmulkes, should be exempt from the military dress code's ban on hats indoors. Counsel for the government told the Justices, "It's only human nature to resent being told what to wear, when to wear it, what to eat."

"Or whether you can wear a bow tie?" chimed in Justice Stevens. *New York Times,* January 17, 1986, p.7.



Library of Congress

4. Justice Stephen J. Field, one of the most colorful men ever appointed to the high bench. In 1849 he joined the gold rush to California, becoming a frontier lawyer and carrying a pistol and bowie knife. He became involved in a quarrel with a judge, during which he was disbarred, sent to jail, fined, and embroiled in a duel. See Field, *Personal Reminiscences of Early Days in California* (1893).



Collection of the Supreme Court of the United States

5. A young law clerk once asked Justice Holmes, "What was Justice Peckham like, intellectually?" "Intellectualy?" Holmes replied, puzzlement in his voice. "I never thought of him in that connection. His major premise was, 'God damn it!'" Acheson, *Morning and Noon* 65 (1965).

6. On January 3, 1932, after the Justices had heard oral arguments, Justice Holmes casually announced, "I won't be here tomorrow," and he submitted his resignation late that day. On that day coincidentally, Earl Warren, then a California district attorney, had argued his first case before the Court. Warren used to say that his friends accused him of driving Holmes from the bench. They used to tease him—"one look at you and he said, 'I quit.'" *N.Y. Times*, June 23, 1958, p. 12.

Collection of the Supreme Court of the United States

7. "The short of the matter, is that you would no more heed [Justice Frank] Murphy's (above) tripe than you would be seen naked at Dupont Circle at high noon tomorrow." Justice Felix Frankfurter to Justice Stanley Reed, December 5, 1951.

Collection of the Supreme Court of the United States

8. Justice Joseph Story, thirty-two when President Madison appointed him in 1811; Justice Horace H. Lurton (above), almost sixty-six when president Taft appointed him in 1909.

Changing Of The Guard In Membership Campaign

Renfrew Steps Down After Two Record Years

Haight Begins 1994-95 Campaign

Fulton Haight

Fulton Haight, President of the American College of Trial Lawyers from 1992-1993, has become the new National Membership Chair for the Supreme Court Historical Society. Mr. Haight serves as a Trustee of the Society, a position he assumed four years ago. Mr. Haight is a partner in the firm of Haight, Brown & Bonesteel and specializes in civil trial practice and commercial law. In addition to serving as President of the American College of Trial Lawyers, Mr. Haight has also served as a Fellow and a Regent of the College, as well as serving as Treasurer and President-Elect.

Mr. Haight commenced his legal career in 1949 as an associate in the firm of Morrow & Trippet, moving from there to the Los Angeles City Attorney's Office where he served as Senior Deputy City Attorney for several years. After leaving the City Attorney's Office he resumed the practice of law in the firm of which he is now a key partner. His professional associations include service on the State Bar Board of Governors of the California State Bar and as the Legislative Committee Chairman for the California State bar.

Mr. Haight served as Membership Chair for Southern California for the Society, performing very successfully, greatly increasing membership in the Society during his service. While serving in that capacity, he learned first-hand what is needed to promote membership growth in the Society. During his service as State Chair, Mr. Haight also became involved in the Society's endowment campaign, working with law firms and corporations in southern California. He brings the vitality, energy and direction evidenced in his professional life to the job and is a great asset to the Society's programs and activities.

Mr. Haight has set a goal to not only maintain the current record membership level of 4,900 members, but to exceed it for a total of 5,000 members by the end of June 1995. In preparation for this work, he has appointed a network of chairs throughout the country to assist in the work. A complete list of state and circuit chairs appears beginning on page seventeen of the Quarterly. If you would like to assist in any way, please contact either your state or circuit chair for further information.

Charles Renfrew

Following two very successful years as the Society's Membership Chair, Charles Renfrew is taking what we hope will be a brief, albeit, well-earned sabbatical to serve as President of the American College of Trial Lawyers.

Mr. Renfrew began actively serving the Society as a State Membership Chair in 1989, and as a result of his work, Society Membership in Northern California increased substantially during his tenure. Subsequent to his service as State Chair, Mr. Renfrew was appointed as Chair of the Society's Membership Committee. He has just completed two successive years of record performance in this capacity, culminating in Society membership reaching a record high of 4,900 members as of June 30, 1994. Mr. Renfrew built upon the foundation established by his predecessors, Frank C. Jones, John C. Shepherd and Justin A. Stanley.

During his years of service on the Membership Committee, Mr. Renfrew's professional career was also extremely busy and productive. He was Vice President and Director of Legal Affairs of Chevron Corporation and later became affiliated with the firm of LeBoeuf, Lamb, Leiby & MacRae. Mr. Renfrew also found time in 1994 to serve as a Delegate to the Indo-American Supreme Court Judicial Exchange held in India, January 22-February 5, 1994.

His professional and personal accomplishments are many and varied. He served as a United States District Judge for the Northern District of California from 1972-1980, when he left the district court to serve as Deputy Attorney General of the United States in the Carter Administration. While serving on the bench, he also taught at the Law School of the University of California, Berkeley.

In addition to performing his work as Membership Chair for Northern California, Mr. Renfrew also found time to assist past Society President Justin Stanley in the work of establishing the endowment fund. Mr. Renfrew has worked to support all of the Society's programs, lending his time and assistance to foster the work of the Society in many ways. We are deeply indebted to him for his service and acknowledge with gratitude his great contributions to the Society.

1994-1995 State Membership Chairs

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Meyer Hendricks Victor Osborn & Maledon
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Haight, Brown & Bonesteel
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Breyer *(continued from page three)*

Watergate Special Prosecution Force. He served as Special Counsel (staff director for investigation of Civil Aeronautics Board) for the Administrative Practices Subcommittee, U.S. Senate Judiciary Committee from 1974-1975. His association with the Senate Judiciary Committee continued in 1979 when he became Chief Counsel to the Committee.

Coupled with his public service career, Breyer also embarked on a teaching career at Harvard in 1967, which continued even during his service on the U.S. Court of Appeals for the First Circuit. While at Harvard, he was an assistant professor and a professor at the Harvard Law School, a professor in the Harvard University Kennedy School of Government, and a lecturer in the Harvard Law School. Breyer taught antitrust and administrative law and economic regulation. When asked how much his association with Harvard has meant to him, he responded: "Of course I am very lucky to be part of Harvard. I love to teach and over the years Harvard students have helped me to keep alert, alive, and educated."

Another important aspect of Justice Breyer's life is a lovely lady he met at a dinner party in Georgetown, Joanna Freda Hare. Ms Hare was the daughter of Viscount Blakenham, an influential Tory politician, and at the time she met Breyer, she was working as an assistant to the *London Sunday Times'* Washington correspondent. She too had attended Oxford, graduating from Lady Margaret Hall, one of the five women's colleges of Oxford. There she earned an Oxford degree with honors in politics, and philosophy and economics. The couple shared common interests in camping and bicycling, as well as a keen interest in world politics and current events. They were married on September 4, 1967 in Suffolk, England, returning to the United States to live. Three children were born to the Breyers; Chloe, Nell and Michael. Dr. Breyer is a clinical psychologist, and for the past ten years she has worked at the Dana-Farber Cancer Institute in Boston in the pediatric oncology unit where she counseled young cancer patients and their families.

Nominated in 1980 by President Jimmy Carter to become a judge on the First Circuit Court of Appeals, Justice Breyer served on that Court from 1980-1994, serving as Chief Judge from 1990 until the time of his appointment to the Supreme Court. Judge Breyer also served as one of the original members of the United States Sentencing Commission, created to formulate a uniform standard for punishment of crimes.

Colleagues and friends praise Justice Breyer as possessing a brilliant intellect, a keen sense of humor, a tolerance and respect for differences, and an ability to form a consensus from differing opinions. Gary Katzmann, Associate Deputy Attorney General and a former clerk to Judge Breyer, explained that in the course of his own career he had worked for and argued before Breyer. He summarized his perception of the Justice:

Ken Heinen, Collection of the Supreme Court of the United States

On their way to the reception Mrs. Kennedy, Mrs. Clinton, Justice Breyer, Retired Chief Justice Burger, Justice Scalia and Dr. Breyer enjoy a light moment.

> Every case is important to him. He writes all of his own opinions. He has a tremendous capacity to learn new areas, always gets to the heart of the issue. He has a rule against footnotes. His opinions are written so they can be understood not only by legal scholars, but by the individuals who are the subjects of the lawsuits as well. He's very much a hands-on-judge, reads the records thoroughly, and is extraordinarily well- prepared at oral arguments. He believes in using oral argument for the purpose of advancing legal analysis. He is polite to the litigants, he believes in oral argument as an occasion for dialogue—not to exhibit now brilliant he is. He loves politics, has a very great sense of how to bring people together, and I think has an excellent facility to judge the flows of the political and legislative process. His productivity is staggering.

A traditional investiture ceremony was held on Friday, September 30, 1994. Chief Justice William Rehnquist and the Associate Justices gathered in the Supreme Court chamber and the Chief Justice administered the judicial oath to Justice Breyer, who then took his place at the bench. In a departure from the tradition of his predecessors, President Clinton attended the investiture ceremony, as he had for Justice Ginsburg. At the end of the ceremony, Chief Justice Rehnquist noted that Justice Breyer is the sixth new member of the Court since his own appointment as Chief Justice in 1986. Rehnquist further commented that for the first time since 1945, the Chief Justice is also the most senior Justice in point of service.

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