

THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

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Portrait of Justice White Presented to Court

The Supreme Court Historical Society sponsored a reception on November 13, 1995 for the unveiling of Justice Byron White's portrait. This portrait, by noted artist Chris Owen, is the latest addition to the Society's collection of portraits and busts on display at the Court for the educational enrichment of the more than one million visitors to the Supreme Court building each year.

The unveiling ceremony was held in the West Conference Room of the Court. Chief Justice William H. Rehnquist, Associate Justices Sandra Day O'Connor, Antonin Scalia, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg and Retired Associate Justices Harry A. Blackmun and William J. Brennan, Jr., were present to honor Justice White.

Society President Leon Silverman welcomed guests and thanked Justice White's law clerks for their generosity in raising funds for the portrait. Mr. Silverman also thanked Justice White for his ongoing enthusiasm and support for the Society.

Mr. Larry Simms of Gibson, Dunn and Crutcher then spoke briefly on behalf of Justice White's law clerks and presented the portrait to Court. Chief Justice William H. Rehnquist accepted the portrait on behalf of the Court and remarked that Justice White's career on the Court had begun with a confirmation that



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

took place only eight days after his nomination. The Chief Justice also noted Justice White's influence on the Court during his career, and the more than 450 majority opinions he wrote for the Court during his tenure.

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

Chief Justice William H. Rehnquist accepted the portrait of Justice White on behalf of the Supreme Court.



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

Justice Byron R. White spoke briefly after his portrait was unveiled, thanking the Society and his clerks for their efforts.

A Letter From the President



Leon Silverman

Today the term has taken on another meaning to some scholars but when it was first attached to four conservative Justices in the 1930s, the appellation "Four Horsemen" was a condemnation of Justices James C. McReynolds, George Sutherland, Pierce Butler and Willis VanDevanter. They had taken a hard look at the policies and programs of

the New Deal and determined to challenge those programs' proponents in the Supreme Court. Their lockstep rejection of change, even in the face of economic catastrophe, led to their depiction as a modern-day Four Horsemen of the Apocalypse.

Time and historical trends that they could not alter eventually led to the defeat of the Four Horsemen's obstruction of New Deal reforms, but not before they had registered some notable victories against the New Dealers. In their view, these reformers sought nothing less than to defile the sanctity of property rights which, by extension they perceived to be the basis of all liberty.

Conversely, the New Dealers regarded the economic and social catastrophes associated with the Great Depression as changing the very foundation upon which rested any prospect of continued democratic government in the United States. If the government were hamstrung from responding to cataclysms by archaic constitutional interpretations, then those interpretations must be changed to meet the necessities of the day. Government was meant to serve the governed, not to confine them to poverty and continued suffering by legal artifice.

These stark contrasts in views on the role and power of the government were not weeks or months in the making. They were not simple differences of opinion among the Justices on how or even if the Court should respond to a contemporary crisis. The Four Horsemen, and indeed, at first, a majority of the Court, applied protections to property and freedom of contract which had been forged in cases reaching at least as far back as *Lochner*. These positions were then tempered in the crucible of the Progressive Era in the early twentieth century and stood ready to be challenged in a contest of ideology and philosophy brought on by the Great Depression and the advent of Franklin Delano Roosevelt's "New Deal."

This spring the Society begins its most ambitious educational program to date with a series of presentations entitled, "The Four Horsemen v. the New Deal." The program will include five lectures covering philosophical shifts on the Court from the late nineteenth century to the late 1940s and an unprecedented case reenactment.

The lectures will examine the development of modern conservative jurisprudence in the late nineteenth century; the influence of the early twentieth century Progressive movement on the Court; the conflict between the Court, as a last bastion of conservatism, and the

political floodtide of New Deal reform; as well as a retrospective look at the New Deal's long-term effects on the Court in the 1940s.

As was the case with prior lecture series, the program includes respected scholars from around the country, each of whom will be introduced by a member of the Supreme Court. Professor Herman Belz of the University of Maryland is serving as the Society's principal academic advisor for the series. Scholars presenting papers will include Professor Paul Kens of Southwest Texas State University, Professor Benno Schmidt of the Edison Project, Professor Hadley Arkes of Amherst College, Professor William Leuchtenburg of the University of North Carolina and Professor David Currie of the University of Chicago. Each lecture will take place in the Supreme Court Chamber and will be followed by a reception where members and guests can meet and talk with the program participants.

The major departure from earlier programs is an experimental reenactment of the *Gold Clause Cases*. Justice Antonin Scalia has agreed to preside over an historical reenactment of the 1935 case which to many represents a federal abandonment of the sanctity of property rights and a fundamental departure by the Court on various issues related to the contract clause.

Justice James C. McReynolds, not known for his tolerance of change, or for that matter his tolerance of much else—misogyny, racism and anti-semitism being but a few of his biases—was so disturbed by the outcome of the *Gold Clause Cases* that he penned one of the most caustic dissents ever to emanate from the High Bench, announcing among other things that "the Constitution is dead." He was joined in vote, if not in temperament, by his fellow "Horsemen"—Van Devanter, Butler and Sutherland.

Following an historical introduction by Professor Kenneth Tollef of Howard University, two experienced members of the Supreme Court Bar will present "compressed" arguments in the Supreme Court Chamber. Elevating the historical reenactment to a previously unattained level of realism, Justice Scalia will represent the Court and conclude the program with excerpts from and commentary on the Court's majority and minority opinions. The program is designed to provide a near first-hand view of the Court in action over sixty years ago.

The first lecture in "The Four Horsemen v. The New Deal" series will take place in the Supreme Court on April 2, 1996. A subsequent lecture is scheduled for April 9, and the case reenactment will take place on May 23. The series will then take a summer recess and reconvene on October 1, with subsequent lectures on October 10 and October 22 to conclude the series.

The closing three lectures in October are planned to coincide with a national celebration of Roosevelt History Month, a series of programs and events commemorating the FDR presidency. Those programs, being prepared by historical groups throughout the country, will culminate in the October opening of the Roosevelt Memorial in Washington.

More information will be available in the invitations which will be mailed to members in early March. I will defer a more detailed report of the Society's other programs and activities until the next *Quarterly*. Suffice it to say that we continue to be in good health and look forward to a year of continued service to the Court.

Leon Silverman

Horace Lurton: A Confederate on the Court

Burnett Anderson

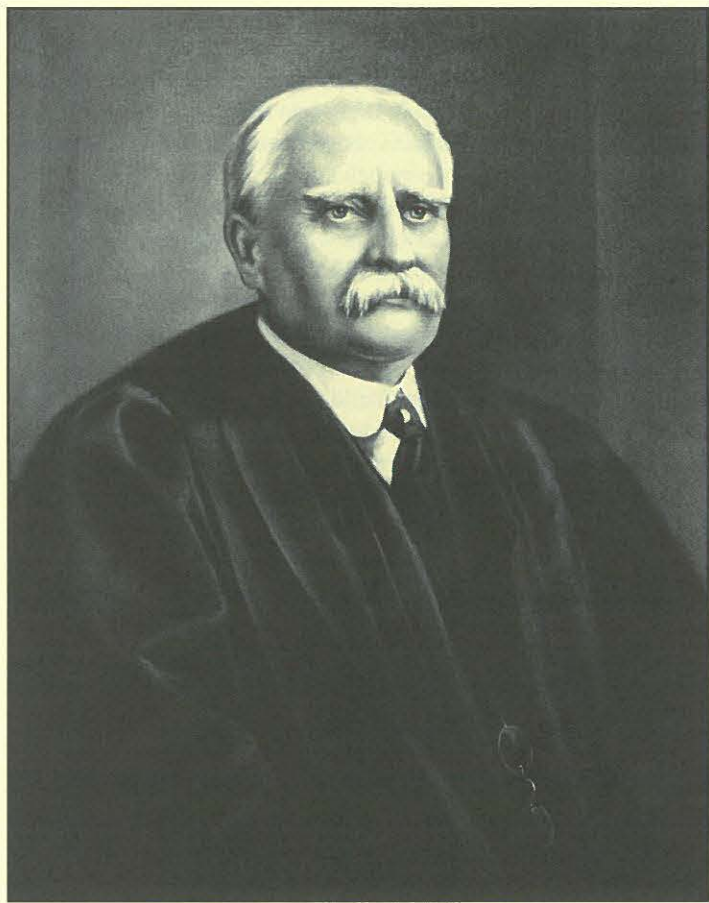
Editor's Note: This biography was originally published in The Supreme Court Justices: Illustrated Biographies, 1789-1995 Second Edition, Edited by Clare Cushman (Washington: D.C., Congressional Quarterly, Inc.). This volume is available for sale at the Society's Gift Shop (202-554-8300).

Horace Harmon Lurton, at age sixty-five, was the oldest jurist ever to ascend to the Supreme Court; he was also the first southern Democrat to be appointed to the High Bench by a Republican president. Lurton was born February 26, 1844, in the town of Newport, Kentucky, across the Ohio River from Cincinnati. His ancestors were English, settling in Virginia in the eighteenth century; some members of the family gradually moved west in the great trans-Appalachian migration. Horace was the son of Sarah Ann Harmon Lurton and Lycurgus Leonidas Lurton, a practicing physician and pharmacist who eventually became an Episcopal minister.

During the 1850s Dr. Lurton uprooted his family to cross Kentucky and live in Tennessee. They settled in Clarksville, a town of about 15,000 inhabitants forty miles north of Nashville on the Cumberland River. Young Horace was educated locally until the age of sixteen, when his family moved to Chicago, and he enrolled at the now defunct Douglas University.

In less than two years his education was interrupted by the shots fired at Fort Sumter, heralding the beginning of the Civil War. Eager to find a way to join the Confederate forces, Lurton gave up his studies. "It is my desire to yet strike a blow in defense of the best of causes—Southern Independence. I would go now if my ma would only consent," he wrote to a friend on June 2, 1861. In later years Lurton recalled that he had received a hoopskirt or two, symbol of shirking from military duty, which may have helped overcome his parents' reluctance to return to the South from Illinois.

Lurton enlisted in the Fifth Tennessee Infantry Regiment (later the Thirty-fifth) and by the end of the 1861 was a sergeant-



Collection of the Supreme Court of the United States

Horace Lurton was appointed to the Supreme Court in 1909 by President William Howard Taft to succeed Rufus Peckham.

major and a seasoned campaigner. A lung infection sidelined him in February 1862, and he returned to Clarksville with a medical discharge and orders to rest. The interruption was very brief; he reenlisted in time to be made prisoner of war with 12,000 other Confederates in General Ulysses S. Grant's sweep which took Forts Henry and Donelson only a few weeks later. It is unclear whether he escaped or was released, but once free Lurton joined up with the guerrilla band of General John Hunt Morgan, selling a watch his father had given him to buy the required horse. For more than a year Lurton rode with Morgan's daredevil cavalry in a succession of raids, performing acts of sabotage on Union railroads, bridges, and communications stations. But in July 1863, at the end of a long bold campaign, most of Morgan's 2,500 irregulars were captured. Lurton was to spend the next eighteen months of the war in a prison camp on an island in Lake Erie, where he came down with tuberculosis.

Fearing for his health, Lurton, according to a "good character" letter written by his fellow prisoners, apparently took the oath of loyalty to the Union to secure his release. Other reports, notably those circulated by Lurton in later years, describe how his mother

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The Second Indo-U.S. Legal Exchange

Harvey Rishikof¹ and Paul Wagner²

Increasingly as nations cast about for models of judicial independence, it has become important that the legal communities of different nations exchange views in an effort to understand one another. Significantly, as judiciaries begin, or continue the process of finding an institutional role to play in the fragile experiment of democracy, the continental and constitutional common law experiences stand out as possible models.

But not all constitutional common law experiences are equivalent, nor do all lessons easily adapt when transplanted. As the field of comparative law evolves, it has become apparent that certain countries enjoy "elective affinities" that make for easier understandings. In particular, exchanges between India, Canada, Britain, and the United States have been fruitful because of shared experiences and common law traditions. Building on these exchanges helps create a basis for comparison when contrasting different common law histories to each other, or to continental approaches.

In January 1994, Justices Antonin Scalia and Ruth Bader Ginsburg of the Supreme Court of the United States led a delegation of American lawyers and judges on a visit to India to learn more about the Indian legal system. To reciprocate in May 1995, a distinguished Indian delegation, headed by Chief Justice of India A.M. Ahmadi, journeyed to the United States for the Second Indo-U.S. Legal Exchange.

The Indian delegation was composed of A.M. Ahmadi, Chief Justice of India; Justices Kuldeep Singh, J.S. Verma, M.M. Punchhi, and K. Ramaswamy of the Supreme Court of India; M.J. Rao, Chief Judge of the Delhi High Court; Dipankar Gupta, Solicitor General of India; K.K. Venugopal, Esq.; Fali S. Nariman, Esq.; P. Vishwanath Shetty, Esq.; and Zia Mody, Esq. The American College of Trial Lawyers, a major sponsor of the exchange, had a delegation including Edward J. Brodsky, Fulton Haight, Charles B. Renfrew, and Richard H. Sinkfield.

The Second Indo-U.S. Legal Exchange began with a non-argument session of the Supreme Court followed by a meeting with the Justices and a tour of the Court building. The delegation then visited



Justice David Souter spoke with Justice and Mrs. Punchhi at a reception for members of the Indo-American Legal Exchange delegations.

the Library of Congress, the Embassy of India, and the residence of Indian Ambassador Siddhartha Shankar Ray.

The next program was held at the Federal Judicial Center and focused on case management, judicial education, judicial ethics, and judicial discipline in the federal courts. Following the program, the Chief Justice hosted a reception at the Supreme Court.

At the Supreme Court, after opening remarks by the Chief Justice, the Chief Justice of India, A.M. Ahmadi, briefly presented the Indian delegation's perspective on the accomplishments of the first Indo-U.S. Legal Exchange. Charles Renfrew then spoke of the first exchange's accomplishments from the perspective of the U.S. delegation.

For the first discussion, Justice Antonin Scalia presented an address on "The Dissenting Opinion." Justice Scalia reasoned that the value of dissenting opinions, both outside of and within the Court, far outweigh commonly presented objections to the practice of allowing separate concurring and dissenting opinions.

Justice Scalia cited several well-known dissents and dissenters, including Justice John Marshall Harlan's "prophetic dissent" in *Plessy v. Ferguson*, Justice Oliver Wendell Holmes' "memorable dissent" in *Abrams v. United States*, and Justice Robert Jackson's "classic defense of freedom of speech" in *Board of Education v. Barnette*. Justice Ruth Bader Ginsburg moderated the discussion.

The second panel discussion involving "Federalism, the Federal Courts, and their Interactions with State Courts" was presented by Dr. Russell Wheeler, the deputy director of the Federal Judicial Center. Wheeler discussed the unique features of American federalism and its historical evolution. The presentation then outlined the development and present structure of the extensive dual court system of the United States. He concluded with a few specific examples of state/federal court interactions and remarks on the general historical vindication of the structural tension built into the multitiered judiciary of the United States. The discussion was moderated by the Chief Justice.

The afternoon discussion of the First Amendment, particularly concerning the separation of church and state, was conducted by



The Indian Supreme Court met with members of the Supreme Court of the United States during the Second Indo-American Legal Exchange. (Seated) Chief Justice William H. Rehnquist and Chief Justice A.M. Ahmadi. (Standing, from left) Justices Breyer, Ramaswamy, Singh, Verma, Punchhi and Rao.



Members of the Indo-American Legal Exchange delegations. Seated: Chief Justice William H. Rehnquist and Chief Justice A. M. Ahmadi. (Standing, second row, from left) Mr. Aurora, Justice Breyer, Justice Ramaswamy, Justice Rao, Ms Mody, Justice Punchhi and Mr. Nariman. (Standing, third row, from left) Mr. Sinkfield, Mr. Renfrew, Justice Singh, Justice Verma, Mr. Reavely, Mr. Venugopal, Solicitor General Gupta, Mr. Brodsky and Mr. Haight.

Fulton Haight. Mr. Haight outlined how traditional justifications for free speech emphasize its importance for the pursuit of truth and/or for the exercise of self-government. Yet he noted a shift in free speech focus in the courts and commentary during the 1970s and 1980s, from self-government to a more general principle of respect for persons as individuals. Chief Justice Ahmadi moderated the discussion.

The final meeting of the day was an Open Forum on "The U.S. Legal System and U.S. Supreme Court Practices" moderated by Justice Ginsburg. Following the forum, closing remarks were deliv-

ered and the program was adjourned. One possible outcome of the visit is the recent Indian High Court decision to begin experimenting with limiting the time allowed for oral argument.

While in Washington the Indian delegation also met with Vice President Gore and counsel to the President Abner Mikva, enjoyed a White House reception, and visited the U.S. Court of Appeals for oral arguments and a meeting with Chief Judge Edwards, the Justice Department, the Georgetown University Law Center, the Office of the Federal Public Defender, and the Environmental Protection Agency's Environmental Appeals Board.

After leaving Washington, the delegation traveled to the National Center for State Courts in Colonial Williamsburg, where the justices had an opportunity to view the courtroom of the 21st century.

Many contributed to the success of this valuable exchange, but certain individuals and groups require specific recognition including: Robb M. Jones and the Federal Judicial Center, the United States Information Agency (which provided support for the exchange), the Embassy of India, the Curator's Office of the Supreme Court, the American College of Trial Lawyers, and the Supreme Court Historical Society.

As more countries seek models of an independent judiciary, different constitutional developments can offer a rich path of experiences, and exchanges such as these can make contributions that are immeasurable.

Endnotes

¹ Administrative Assistant to the Chief Justice.

² Judicial Intern, Office of the Administrative Assistant to the Chief Justice.

Trivia Questions Bernard Schwartz

1. What Justice practiced as an M.D. for nine years before giving up medicine for law?
2. What Justice resigned to become a U.S. Senator?
3. What Justice wrote the most opinions?
4. What Justice wrote the fewest opinions?
5. When President Lincoln visited the front lines and climbed a parapet to see the battle (with his tall figure an obvious target), what future Supreme Court Justice shouted, "Get down, you damn fool"?
6. Who was the first Justice to go to law school?
7. What Justice served on the Court with his former law professor?
8. What Justices were members of the Constitutional Convention of 1787?

answers appear on page 14

Two Gentlemen from Virginia

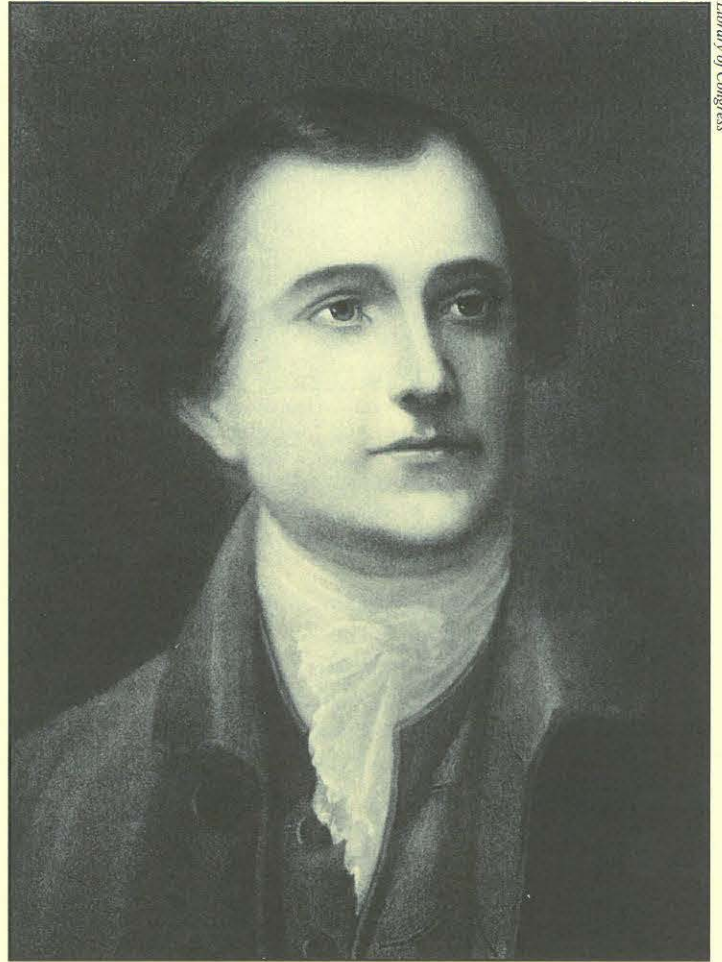
A slender volume, *Sketches, Essays and Translations* by the late Francis Walker Gilmer of Virginia was printed in Baltimore in 1828. It contained the writings of a young gentleman from Virginia, who in the words of the editor "was cut off very early in life." The "youngest son of Doctor George Gilmer, an eminent physician, of Albemarle county in Virginia," the younger Mr. Gilmer was an accomplished classical scholar and practitioner of the law. Gilmer grew up in close proximity to Monticello, and his father and he enjoyed "the intimacy and friendship of Mr. Jefferson."

Something of a prodigy, he was such an impressive scholar that by the age of seventeen, Gilmer was offered the ushership of the grammar school attached to William and Mary College. He also studied in the office of William Wirt, the future Attorney General of the United States. Upon completing those studies, he commenced the practice of law in Winchester, Virginia and in the Shenandoah Valley. In 1818 he relocated in Richmond to avail himself of increased advantages there. Although he declined his choice of professorships at the University of Virginia, Jefferson persuaded him to travel to England to recruit professors from the universities of Oxford and Cambridge. He did so, but became ill on the voyage home and never fully recovered his health. He died in 1826 at the age of thirty-six.

He left behind him writings which included sketches and impressions of lawyers and orators he had found especially noteworthy and of high caliber. Possessed of impressive intelligence and talents himself, his observations of his contemporaries furnish added insight into the characters of some of the great advocates before the Supreme Court. As he was particularly interested in the skills and attributes of outstanding oratory, he measured his contemporaries by their abilities or inabilities in this field. Below are extracts from his writings describing his impressions of Edmund Randolph, the first Attorney General of the United States, and the Great Chief Justice, John Marshall.

Randolph was fifty-five years of age in 1808, the year Gilmer first recalls hearing him speak. By that time he had resumed the practice of law, but earlier in his career he had been involved in the political workings of the state of Virginia and the emerging nation. "Though vacillating by nature, he was the most popular Virginian next to Patrick Henry, . . ." one historian observed. He served as a delegate to the Continental Congress and the Constitutional Convention. He also served as governor of Virginia and as Attorney General of the United States, and briefly as Secretary of State. He resigned from the Cabinet in protest over the false accusations against him that he had solicited bribes from France at the time of the Jay Treaty. In 1807 he served as chief counsel for Aaron Burr in Burr's trial for treason.

"The first time that I ever felt the spell of eloquence was when a boy, standing in the gallery of the capitol in the year of 1808. It was on the floor of that house I saw rise, a gentleman, who in every quality of his person, his voice, his mind, his character, is a phenomenon among men. His figure is tall, spare, and somewhat emaciated: his limbs long, delicate, slow and graceful in all their motions; his countenance with the lineaments of boyhood, but the wrinkles, the faded complexion, the occasional sadness of old age and even of decrepitude: possessing, however, vast compass and force of expression. His voice is small, but of the clearest tone and



Library of Congress

Edmund Randolph was the first Attorney General of the United States and later succeeded Thomas Jefferson as Secretary of State.

most flexible modulation I ever heard. In his speech not a breath of air is lost; it is all compressed into round, smooth, liquid sound; and its inflections are so sweet, its emphasis so appropriate and varied, that there is a positive pleasure in hearing him speak any words whatever. His manner of thinking is as peculiar as his person and voice. He has so long spoken parables, that he now thinks in them. Antitheses, jests, beautiful conceits, with a striking turn and point of expression, flow from his lips with the same natural ease, and often with singular felicity of application, as regular series of arguments follow each other in the deductions of logical thinkers. His invective, which is always piquant, is frequently adorned with the beautiful metaphors of Burke, and animated by bursts of passion worthy of Chatham. Popular opinion has ordained MR. RANDOLPH the most eloquent speaker now in America.

"It has often been objected to this gentleman, that his speeches are desultory and unconnected. It is true; but how far that may be a fault, is another question. We are accustomed in America, to look upon the bar as furnishing the best, and nearly the only models of good speaking. In legal discussions, a logical method, an accurate arrangement, and close concatenation of arguments is essential; because the mode of reasoning is altogether artificial, and the principles on which we rely, positive and conventional. Not so in parliamentary

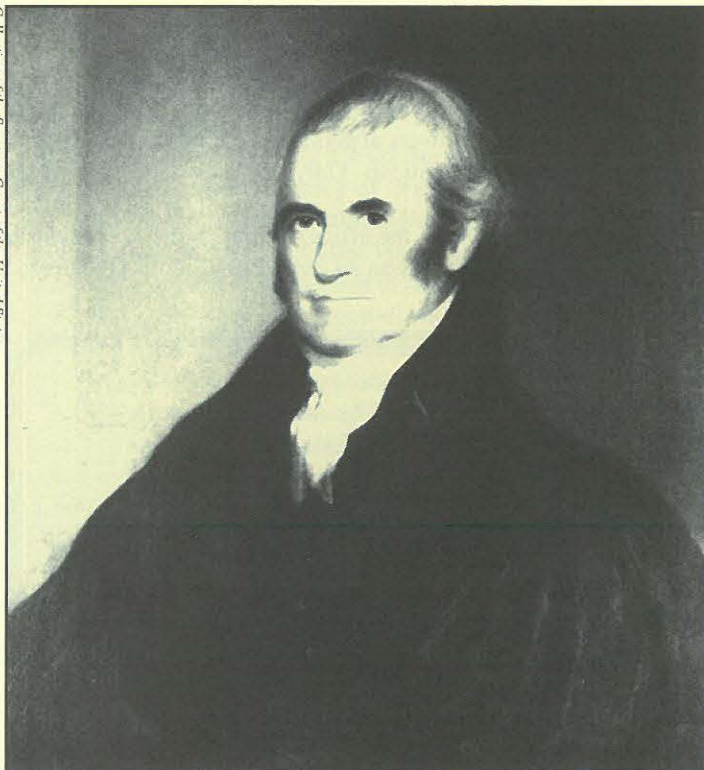
debate. There, questions are considered on principles of general policy and justice; and the topics are capable of illustration by facts and truths familiar to all, and in fact pre-existing in every mind . . .

"An opinion prevails too, that Mr. Randolph is successful only in the ludicrous. He is doubtless eminently gifted in his qualifications for the comick and satirical; I would mention his attack upon the answer to 'war in disguise,' as an instance: 'against six hundred ships in commission (said he,) we enter the lists with a three shilling pamphlet'— . . . Though he possess an exquisite fancy for repartee and wit, it is far from being his only, or his brightest endowment. Like a genuine orator, he can touch all the strings of the mysterious harp into which we are so 'fearfully and wonderfully' wrought. . . . Whenever Mr. Randolph has attempted the tender strains of eloquence, he has had the same success as in the lighter and more comick parts he chuses to play. When he deplores the death of a friend, his grief, . . . is violent and insatiable; his expression of it, deep and tragical. . . .

"The style of his eloquence generally, it must be admitted, is not favorable to the excitement of any deep or permanent passion; such effects can only be produced by successive impulses. . . . [E]very thing in the manner, the mind, the voice of Mr. Randolph is imperious. His genius too, is fickle, and continues but a short time under the influence of any one emotion. . . . His deliberate, graceful, and commanding delivery, cannot be too much praised; his total want of method cannot be too much condemned.

"Gifted with a fine fancy, a prompt and spirited elocution, and stamped with a character ardent and impetuous; obeying only the impulse of the moment; speaking without premeditation, and acting without concert, he was more successful in early life than of later years: the effusions of his youth possess a freshness and glow, which his more recent efforts want. . . . I have seen and heard it [Randolph's voice] a volcano, terrible for its flames, and whose thunders were awful. . . ."

Collection of the Supreme Court of the United States



John Marshall was the third Chief Justice of the United States, appointed by President John Adams after retiring as Secretary of State.

John Marshall

"One of the most remarkable speakers who ever appeared at the American bar, . . . [e]very one has heard of the gigantick abilities of JOHN MARSHALL. As a most able and profound reasoner, he deserves all the praise which has been lavished upon him. And in answer to those who would doubt the powers of his mind, from the tedious and heavy narrative of his history, I would say no more than,

*Non omnia possumus omnes.*¹

"A capacity for speaking and writing well, have been so rarely combined, that the wonder is not to see them apart, but to find them united. His mind is not very richly stored with knowledge; but it is so creative, so well organized by nature, or disciplined by early education, and constant habits of systematic thinking, that he embraces every subject with the clearness and facility of one prepared by previous study to comprehend and explain it. So perfect is his analysis, that he extracts the whole matter, the kernel of inquiry, unbroken, undivided, clean and entire. In this process, such is the instinctive neatness and precision of his mind, that no superfluous thought, or even word, ever presents itself, and still he says every thing that seems appropriate to the subject. This perfect exemption from any unnecessary encumbrance of matter or ornament, is in some degree the effect of an aversion from the labour of thinking. So great a mind, perhaps, like large bodies in the physical world, is with difficulty set in motion. That this is the case with Mr. Marshall's is manifest, from his mode of entering on an argument both in conversation and in publick debate. It is difficult to rouse his faculties; he begins with reluctance, hesitation, and vacancy of eye; presently his articulation becomes less broken, his eye more fixed, until, finally, his voice is full, clear, and rapid, his manner bold, and his whole face lighted up, with the mingled fires of genius and passion: and he pours forth the unbroken stream of eloquence, in a current, deep, majestic, smooth, and strong. He reminds one of some great bird, which flounders and flounders on the earth for a while, before it acquires the impetus to sustain its soaring flight.

"The characteristic of his eloquence is an irresistible cogency, and a luminous simplicity in the order of his reasoning. His arguments are remarkable for their separate and independent strength, and for the solid, compact, impenetrable order in which they are arrayed. He certainly possesses in an eminent degree the power which has been ascribed to him, of mastering the most complicated subjects with facility, and when moving with his full momentum, even without the appearance of resistance.

"The powers of these two gentlemen are strikingly contrasted by nature. In Mr. Marshall's speeches all is reasoning; in Mr. Randolph's every thing is declamation. The former scarcely uses a figure; the latter, hardly an abstraction. One is awkward; the other graceful. One is indifferent as to words, and slovenly in his pronunciation; the other adapts his phrases to the sense with poetick felicity; his voice to the sound with musical exactness. There is no breach in the train of Mr. Marshall's thoughts; little connexion between Mr. Randolph's. . . ."

Endnote

¹ This has been attributed to Virgil and translates as *All things are not possible for all people.*

Lurton *(continued from page three)*

traveled to Washington and personally persuaded President Abraham Lincoln to let him go. However the release was accomplished, Lurton returned home full of anti-Union sentiment. "We think a foreign war is rapidly approaching," he wrote to a friend on May 4, 1865, "and if it does then the banner of our invincible Confederacy will again be thrown to the breeze from every house top in our fair Southland. Never despair of so just a cause when supported by such a people."

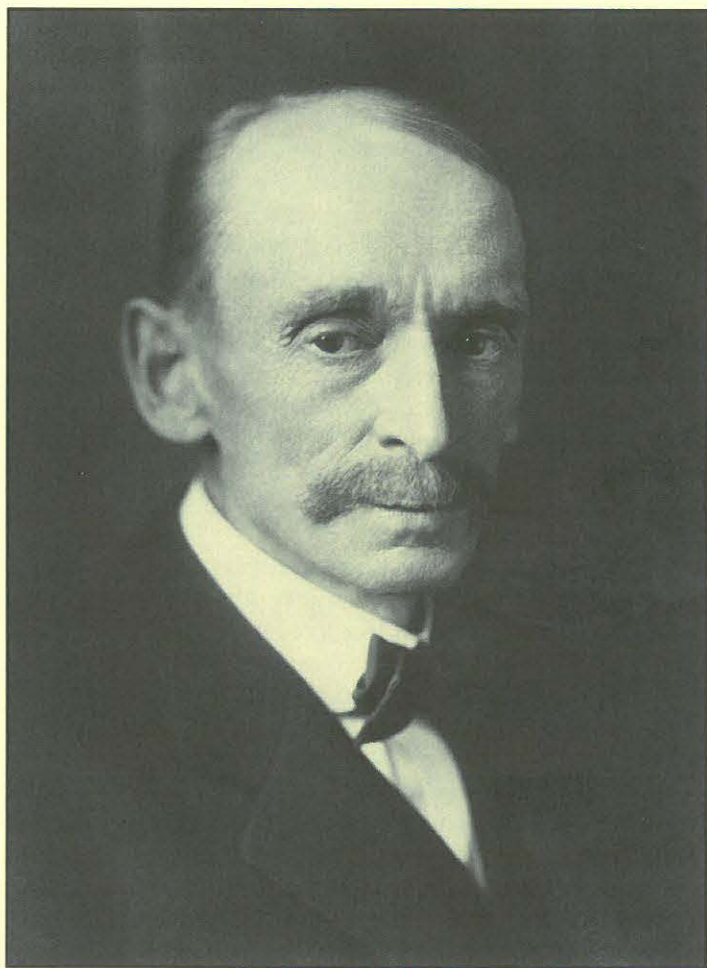
As he recuperated, Lurton gave up any thought of further undergraduate study; by autumn he was able to enroll in the law school of Cumberland University, a few miles from Nashville. Two years of hard study, much of it at night with days spent working in his father's pharmacy, brought Lurton his law degree and admission to the bar in 1867. In September of that year Lurton married Mary Francis Owen, the daughter of a local physician. Their marriage, which lasted until Lurton's death, produced three sons and two daughters.

Soon after graduation, Lurton became a partner in an influential Clarksville law firm headed by James A. Bailey. A prominent Democratic politician, Bailey would later be appointed to fill the unexpired Senate term of Senator Andrew Johnson, the former president, upon his death.

Lurton's association with Democratic politics earned him an interim appointment in 1875 as presiding judge of the Sixth Chancery Division (court of equity) of Tennessee. At age thirty-one, Lurton became the youngest chancellor in Tennessee history. A year later his peers on the bench unanimously voted to retain him for a full term.

Financial need drew him back into private practice in 1878, and he entered into a successful eight-year partnership with his predecessor as chancellor, Charles G. Smith. Their association brought Lurton both material rewards and personal prestige. He became president of the largest local bank, a vestryman in the Trinity Episcopal Church, and in 1882, a trustee of the University of the South.

These assets, combined with a capacity to make friends and a vigorous stump campaign, brought him election, at age forty-two, to the Tennessee Supreme Court in 1886. This position marked the beginning of twenty-eight years on the bench. Once on the court,



Library of Congress

William Rufus Day served on two courts with Horace Lurton, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati and the Supreme Court of the United States. Their eight years on the bench allowed them to develop a close friendship that flourished in spite of regional and political differences.

Lurton began to show an approach to jurisprudence that would stamp his entire career. He became known for his gentleness and civility, his energy, his powers of persuasion, and his great capacity to reconcile opposing arguments. Only rarely did he find it necessary to dissent.

When, after seven years, the office of chief justice was vacated, Lurton's dominant position was so clear that his colleagues voted

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.

unanimously for him to take the center chair. Four months later, however, Grover Cleveland, the newly elected President, selected Lurton to sit on the United States Court of Appeals for the Sixth Circuit to replace Howell E. Jackson, who had been appointed to the Supreme Court of the United States. Both Jackson and Lurton were loyal Democrats, Confederate army veterans, and graduates of Cumberland Law School. With a background so similar to Jackson's, Lurton could be expected to continue the existing political and regional balance of the court.

When Lurton arrived in Cincinnati for his new appointment, fate confronted him in the person of the presiding judge of the three-member court of appeals. The judge was William Howard Taft, only thirty-six years old, a term as Solicitor General already behind him, the Presidency and Chief Justiceship of the United States still to come. In 1899, six years after Lurton's arrival, they were joined by William Day, who, like Taft, was an Ohio Republican. The three became fast friends, the political differences between southern Democrat and two midwestern Republicans giving way to friendship and mutual professional respect. The court was recognized during Lurton's tenure as the ablest of the eight federal appeals courts. Taft later praised Lurton's "industry, his sense of responsibility for the court, his profound knowledge of the law, his wonderful power of reconciliation of the differences in the conference room, and his statesmanlike forecast of the principles of the court's decisions." When Taft left to become governor general of the Philippines, Lurton took over as presiding judge.

With his gentle paternal manner, Lurton was the image of the courteous southern gentleman. Short in stature, he was relatively stout and, in keeping with the fashion of his day, had an enormous mustache. According to one observer, Lurton issued "steady-going judgements" and did not "attempt to render startling or sensational decisions." Generally conservative, he used precedent whenever possible to maintain the status quo. Lurton carried his judicial expertise into the classrooms of Vanderbilt University, where he taught constitutional law from 1898 to 1905, before serving as its dean until 1909.

Lurton was nearly appointed to the Supreme Court in 1906 when his friends Taft, now Secretary of War, and Day, who had been named to the Court in 1903, persuaded President Theodore Roosevelt that Lurton should succeed Justice Henry B. Brown. But Roosevelt could not overcome the opposition of his fellow Republican, Senator Henry Cabot Lodge, who pointed out that, with one exception, Lurton had voted against the government in every case involving the Commerce Clause of the Constitution.

The appointment went instead to Attorney General William H. Moody, a Republican of Massachusetts. Lurton's Confederate past, his Democratic affiliation, and his advanced age were all considered strikes against him. However, on December 13, 1909, Taft, now President, brushed aside questions of political partisanship and age to choose his old friend as his first nominee to the High Bench. Taft later told him, "The only pleasure of my administration, as I have contemplated it in the past, has been to commission you a Justice of the Supreme Court." The expected partisan opposition in Congress never developed, and Lurton was confirmed a week later.

Lurton felt deeply the historic significance of his appointment. He later wrote of his train journey to Washington to take

office, during which he detoured around Cincinnati to take the southern route. "I felt that in appointing me, President Taft, aside from the manifestations of his friendship, had a kindly heart for the South; that he wished to draw the South to him with cords of affection. So, being all a Southerner myself, I determined to go to Washington through the South—every foot of the way."

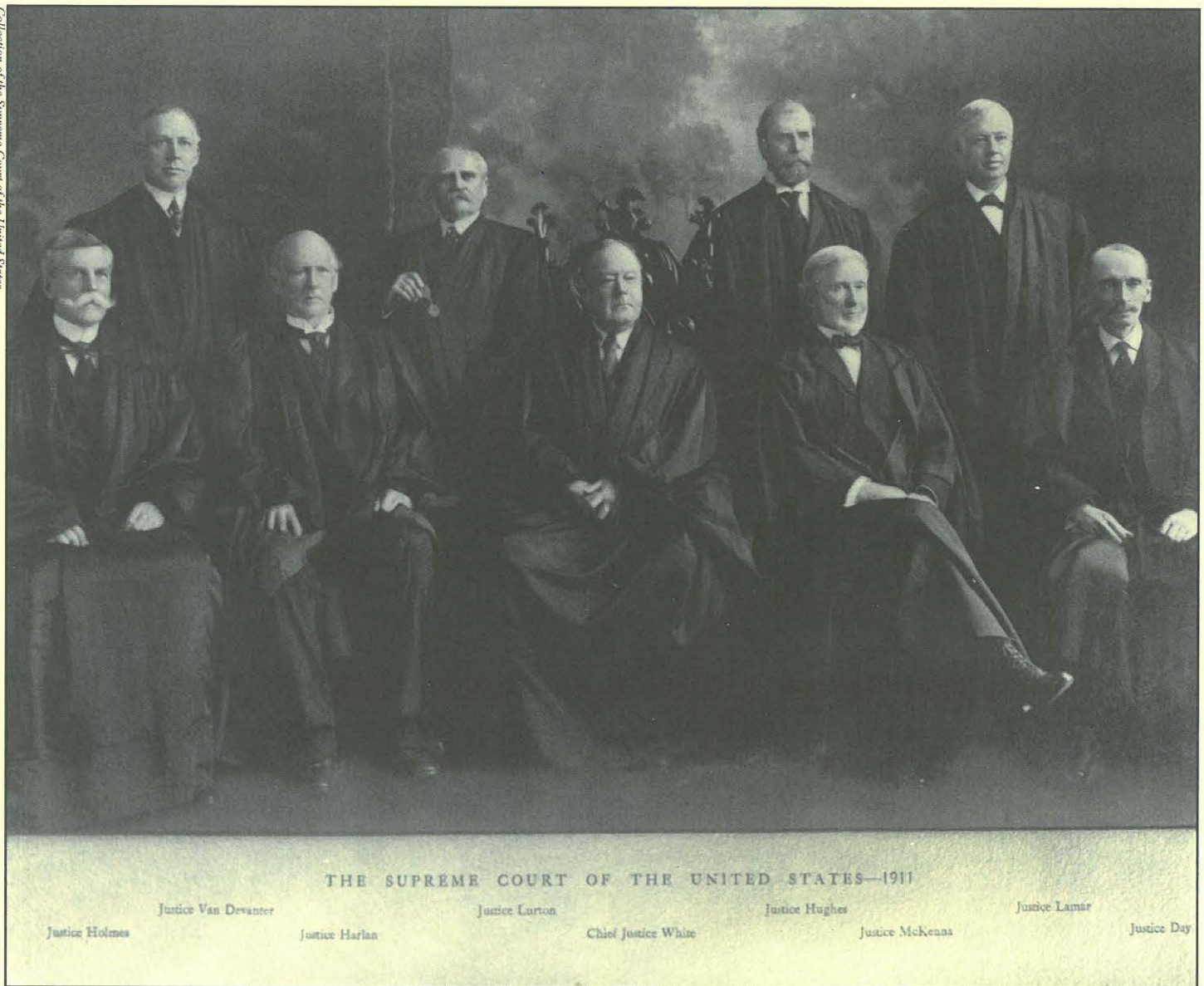
During his four short years on the High Bench, Lurton was

—continued on next page



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William Howard Taft urged President Theodore Roosevelt to nominate Horace Lurton to the Supreme Court in 1906. Political considerations precluded the nomination then. After Taft was elected President in 1908 he took the first opportunity to nominate Lurton to the Court in 1909.



The Supreme Court Justices posed for this photograph in 1911. Standing, from left: Willis Van Devanter, Horace Lurton, Charles Evans Hughes, and Joseph R. Lamar. Seated, from left: Oliver Wendell Holmes Jr., John Marshall Harlan, Chief Justice Edward Douglass White, Joseph McKenna and William Rufus Day.

influenced by his colleagues to become more progressive. Once on the Court he abandoned his earlier conservatism and voted most frequently with Oliver Wendell Holmes, Jr., joining him in eight dissents. Lurton wrote eighty-seven opinions, none of them groundbreaking or landmark cases, all of them based on solid research and argument. Generally, he went along with a substantial majority of the Court in somewhat enlarging the powers of the federal government. He consistently voted with the majority in upholding the Sherman Antitrust Act, particularly in regard to smaller corporations, but at the same time

accepted the concept of “reasonable” monopolies for some corporate giants.

In 1911 Justice Lurton served as a member of the Committee to Revise the Equity Rules in Federal Courts and was apparently so interested in the subject that he went to England that summer to make a special study of English equity practices. He became ill late in the October 1912 Term, but, after a Florida vacation, Lurton resumed full activity on the Bench with the October 1913 Term. That summer he went with his wife for a vacation to Atlantic City, where the genial Tennessean died of a heart attack July 12, 1914.

L. Q. C. Lamar and the Department of the Interior

Editor's Note: Lucius Quintus Cincinnatus Lamar, a former Confederate officer, served as an Associate Justice of the Supreme Court of the United States from 1888 until 1893. Appointed by President Cleveland, he assumed his position on the Bench after having served as the Secretary of the Department of Interior since 1885. Lamar's biographer, Edward Mayes, detailed the circumstances surrounding his appointment to the Cabinet in his 1895 volume, Lucius Q. C. Lamar: His Life, Times, and Speeches, from which this article is drawn.

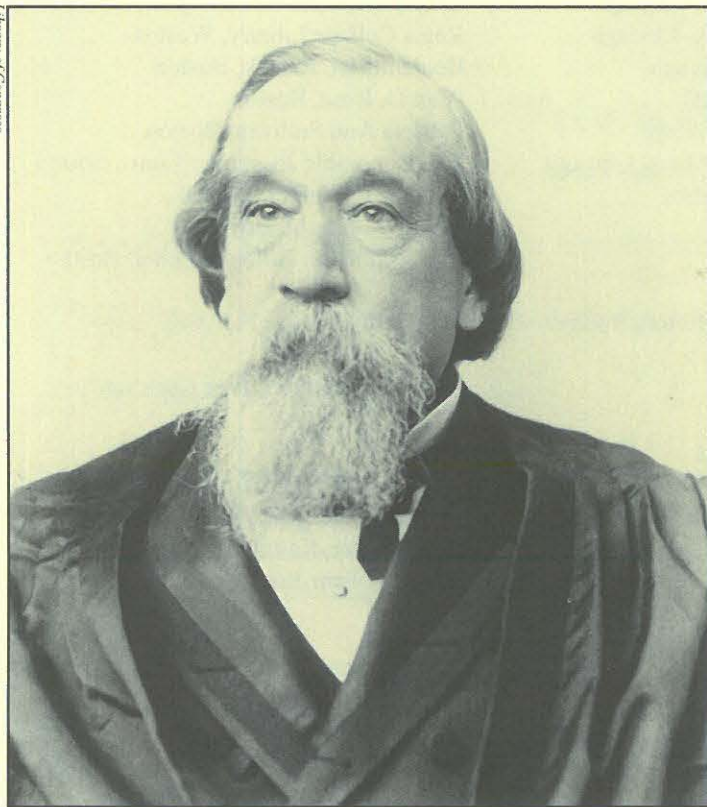
One of the first responsibilities facing President-elect Grover Cleveland was the task of identifying suitable individuals to fill his Cabinet. In 1885, Lucius Quintus Cincinnatus Lamar was serving in the United States Senate representing his home state of Mississippi. Cleveland was interested in appointing at least two members to the Cabinet who came from the South. Lamar's name was mentioned prominently, although Lamar was not particularly interested in becoming a member of the Cabinet, and indeed, tried to entice his friend General Walthall to lobby for such a position. In a letter to Walthall dated February 3, 1885, Lamar indicated that he would "certainly tell him [the President-elect] that he can get more good out of me in the Senate than in the Cabinet, and that I can give him a man my superior in every respect, and better fitted for a Cabinet office than any man in the Democratic party, North or South. If, however, he presses me to become a member of his Cabinet, I shall not give him a definite answer at once, but will take time to consider it. . . ."

Despite Lamar's reservations, Cleveland did offer him a position in the Cabinet and Lamar wrote to Jefferson Davis on February 28, expressing his feelings about the proffered appointment: "I hope that the step I am about to take will meet your approval. It certainly proceeds from no motive of ambition; but when pressed . . . to take a position in his Cabinet, I have hardly felt at liberty to decline. If, by conducting the affairs of an executive department prudently and honestly and fairly to all sections, I may impress the country with a desire of the South, faithfully to serve the interests of a common country, I may do more good than I have ever yet been able to accomplish."

Cleveland was inaugurated on the 4th of March. The following day the Senate considered the proposed appointments to the Cabinet. A correspondent from *The New York Times* reported the events as follows:

Three hours before the time fixed for the opening of to-day's session of the Senate people began occupying the seats in the visitors' galleries. The first comers were rapidly joined by others; and an hour before noon every seat was taken, and the outside corridors were thronged with men and women who grumbled because they had come so late. The Senators began to gather on the floor soon after 11 o'clock. . . . Mr. Pruden, who has carried all the Presidential communications to the Senate since Gen. Grant was President, appeared at the main entrance. He presented Mr. Cleveland's first message to the Senate in a very large white envelope, and retired. Everybody knew that this message contained the nominations of the men selected by the President for his Cabinet, and the visitors leaned forward as if they expected to hear the names read. Instead of this, they heard Mr. Sherman move that the Senate proceed to the consideration of executive business, and a moment later the Sergeant-at-arms was instructed to clear the galleries. . . . After every outsider had been driven out from the place, and all the doors carefully locked, the big envelope was torn open, and the Executive Clerk read the names of the gentlemen whom President Cleveland had selected

Secretary of State: Thomas F. Bayard, of Delaware.
Secretary of the Treasury: Daniel Manning, of New York.
Secretary of War: William C. Endicott, of Mass.
Secretary of the Navy: William C. Whitney, of New York.
Secretary of the Interior: L.Q.C. Lamar, of Miss.
Postmaster-General: Augustus H. Garland, of Arkansas.
Then began a very lively scene, which ended with an adjournment twenty-five minutes later without any of the seven nominations having been confirmed. It is the traditional custom of the Senate to confirm without delay any one of its members who has been chosen by the President for any other office. When, therefore, Mr. Cockrell moved that the nominations of Messrs. Bayard, Garland, and Lamar be confirmed, the Senators were nettled at hearing Mr. Riddleberger object to the present



After serving as an officer in the Confederate Army, Lamar entered the diplomatic service of the Confederacy. He was sent on a special diplomatic mission to Russia, France and England in 1863.

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Trivia Answers *(Questions appear on page five)*



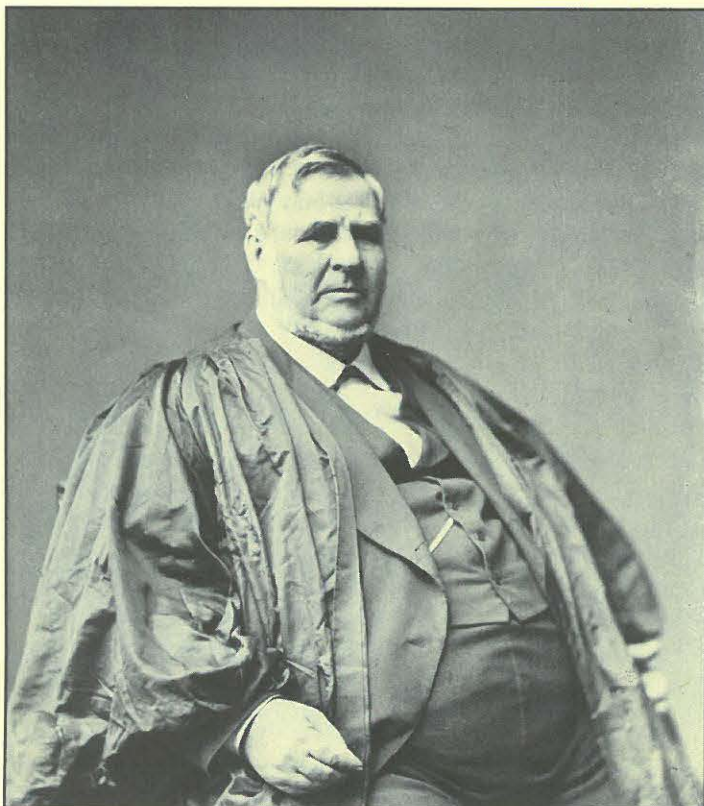
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1. Justice Samuel F. Miller practiced medicine from 1838 until he was admitted to the bar in 1847.



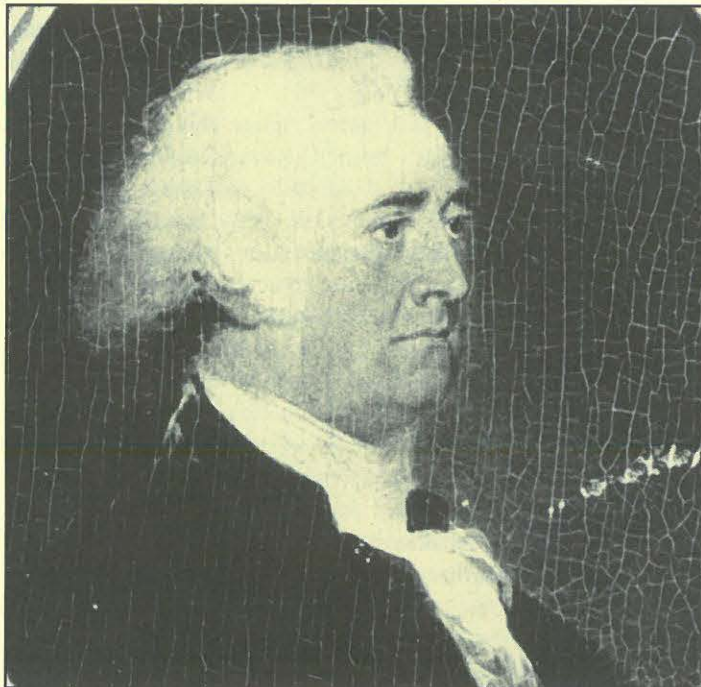
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3. Justice William O. Douglas wrote the most opinions. *The Third Branch*, September 1994, p. 3.



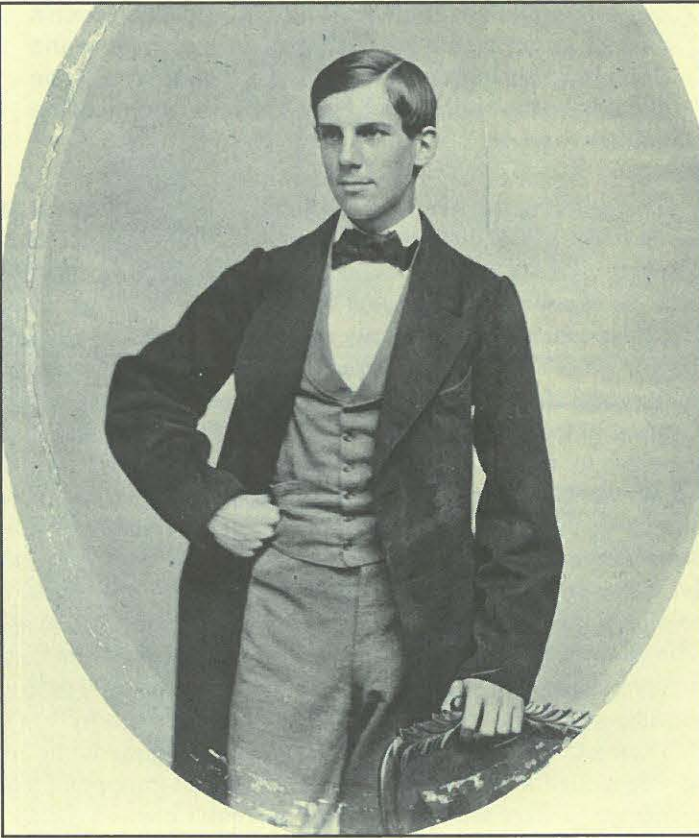
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2. Justice David Davis resigned from the Court in 1877, after the Illinois legislature elected him to the U.S. Senate.



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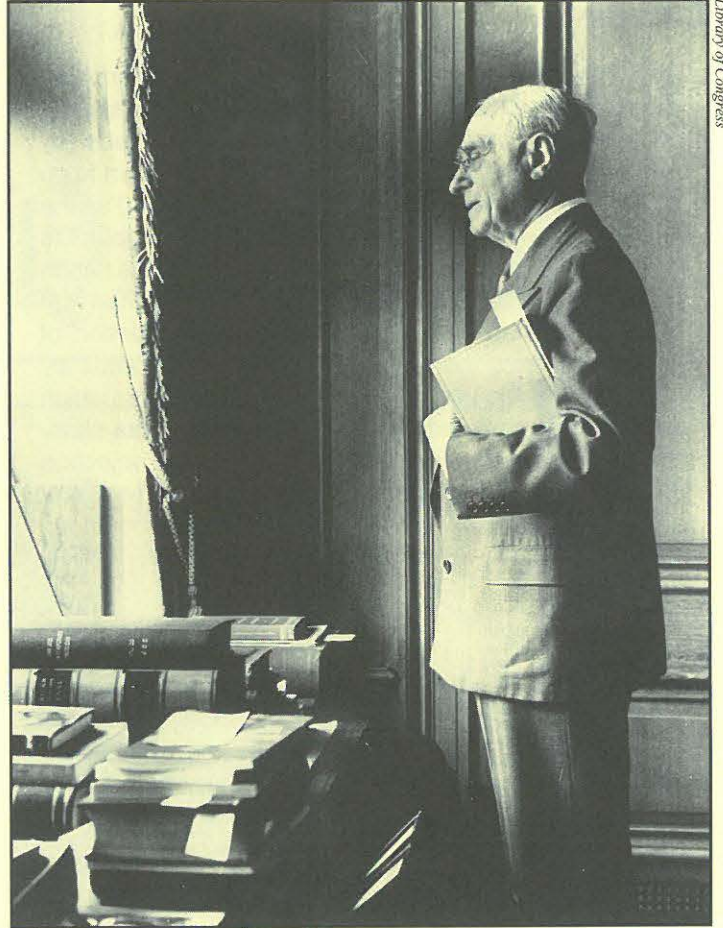
4. Justice Alfred Moore delivered only one opinion, in *Bas v. Tingy*, 4 Dall. 37 (U.S. 1800), though he served on the Court from 1800 to 1804. John Rutledge (above) also delivered just one opinion in *Talbot v. Janson*, 3 Dall. 133 (U.S. 1795) but he served only one year as a Justice and briefly during the August Term 1795 as interim Chief Justice.



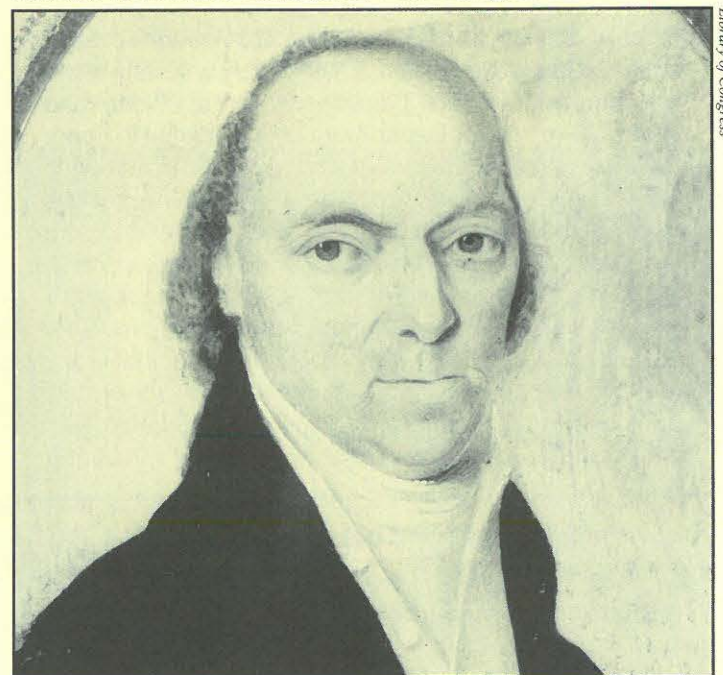
5. Oliver Wendell Holmes, Jr. Lincoln replied, "Captain, I am glad you know how to talk to a civilian." Bowen, *Yankee from Olympus* 194 (1944).



6. Justice Henry Baldwin (above) attended the law school in Litchfield, Connecticut, then the outstanding law school in the country. Justice Benjamin R. Curtis was the first to attend a university law school. He enrolled in Harvard Law School, though he left halfway through the course to work in a law office.



7. Justice William J. Brennan, Jr. who had studied with Professor Felix Frankfurter (above) at Harvard Law School. At the recent Warren Court Conference at the University of Tulsa, Justice Brennan told how Justice Frankfurter had said "at a dinner one night . . . that while he had always encouraged his students to think for themselves, 'Brennan goes too far.'"



8. Chief Justices John Rutledge and Oliver Ellsworth and Justices James Wilson, John Blair (above), and William Paterson.

Lamar *(continued from page eleven)*

consideration of Mr. Bayard's name. Senators from both sides of the Chamber listened with stolid indifference while sharp remarks about his conduct were made [by several Senators]. . . . Mr. Riddleberger told them to go on and confirm Messrs. Lamar and Garland and all the rest if they wished, but he should continue to object to placing the foreign policy of the government in the hands of a man who had more sympathy with England than with the United States. The Senators had no intention of confirming two of their number and not the third, and they pointed out to the Virginian the awkward position in which they would be placed. . . . Mr. Riddleberger was obstinate, and as by the rules of the Senate a single objection throws a nomination over for a day, the Senators finally adjourned in disgust, leaving all the Cabinet nominations to be taken up to-morrow. . . .

The following day, all the Cabinet nominations were confirmed and the new members assumed their duties on Saturday, March 7. One of Lamar's first official acts unleashed great criticism from Republicans. It seemed an innocent enough action at the outset. On March 24 the former Secretary of the Interior under Buchanan, the Hon. Jacob Thompson, died. Following established precedent and custom, Lamar issued an order to close "the department and its several bureaus" on the 26th out of respect for Mr. Thompson. As Mayes noted, "[i]f it were not that in politics almost anything is expectable, it would be amazing, the turmoil which was made over this incident. The Republican papers abounded in the most violent editorials about it, and in the most extraordinary vituperation of Mr. Thompson." Newspaper items appeared on both sides of the issue, alternatively supporting and attacking Lamar. A correspondent from the *New York Tribune* wrote a scathing rebuttal to an article that had supported Secretary Lamar:

It really begins to look as if the Confederates have captured the capital at last. The maimed veterans of the war must wait for their pensions while the officers and clerks of the Interior Department take a holiday to honor the memory of a conspirator and traitor, who gloried in breaking his oath of office and divulging Cabinet secrets to the South Carolina rebels. Secretary Lamar declares that he has 'no apology to make,' and expresses artless surprise because his order is criticised; but he remembers that his eulogy on Charles Sumner also provoked 'adverse criticism,' from which it is fair to infer that in Mr. Lamar's estimation Jacob Thompson was as pure a patriot and as honorable a man as Charles Sumner, and that his memory is equally deserving of honor. Mr. Lamar

can see no difference between the hanging of Thompson's portrait as an historical memento on the walls of the Secretary's office and ordering the department to be closed and the national flag to be lowered in honor of the traitor's memory.

The furor subsided eventually and Lamar sought to concentrate on the business of the department. It was not a felicitous situation, however, even absent the intense press scrutiny. The Democrats had been out of power in Washington for twenty-four years, and when Cleveland assumed office, the city was flooded with a "vast assemblage of office seekers—clamorous, persistent, exacting, and in general resentful of denial or delay. The anterooms of the offices of various members of the Cabinet were thronged for months. . . ." Lamar had more than his fair share of office-seekers. "The pressure upon me for the lowest offices in the department is absolutely greater and more distressing than for the higher positions. Refined and intelligent women from the South tell me that they do not know where they will get their next meal; that they have children, a poor mother, or a consumptive sister; and that they are willing to go into the paste room, or to scour the floor, or to take any position that will give them from twenty to twenty-five dollars per month; and all that I can give them is something they do not want, and that is my keenest sympathy."

These and numerous other difficulties plagued Lamar during his service in the Cabinet. It was perhaps, then, with great relief that Lamar accepted the appointment to the Supreme Court in 1888, and embarked on a new phase of his professional life.



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Grover Cleveland was the only Democrat elected President between 1860 and 1912. He was also the only Chief Executive to serve two nonconsecutive terms.

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