

A Conversation Between Two Old Friends

By John A. Stookey, Larry A. Hammond*

The setting was a reddish adobe structure, befitting its location in a city (Tucson, Arizona) nicknamed the "old Pueblo." Inside, two old friends sat on stools, warmly and casually swapping stories about their younger days. A typical scene? Yes. But, a closer examination reveals that these were not typical stories about the exploits of youth, but instead, about such weighty issues as Harry Truman's attempt to seize the steel mills during the Korean war and the Supreme Court's monumentally significant rejection of "separate but equal" in the *Brown* case. The two old friends were the Chief Justice of the United States, William Rehnquist, and Professor and Former Dean Charles Ares of the University of Arizona College of Law, reminiscing about their experiences as clerks at the Supreme Court of the United States.

Chief Justice Rehnquist and Dean Ares had kindly agreed to have this conversation as part of the annual meeting for the Arizona Branch of the Supreme Court Historical Society, and allowed ninety lucky guests, to not only listen in on, but to participate in, the conversation. The audience included academics, judges, lawyers and students. Ed Hendricks, who is an attorney with the Phoenix law firm of Meyer, Hendricks, Bivens & Moyes and serves as Chair of the Arizona Chapter of the Historical Society, introduced the Chief Justice and Dean Ares. He reviewed the longtime relationship between the two speakers dating back to the early 1950s. Both the Chief Justice and Dean Ares were from Arizona and after graduating from law school (Rehnquist from Stanford and Ares from the University of Arizona), they were selected to clerk at the Supreme Court of the United States. During the 1952 term, Chief Justice Rehnquist clerked for Robert Jackson and Dean Ares clerked for

William O. Douglas. Hendricks also pointed out the similarities between their early careers. Both were engaged in private practice and later government service. Laughter and knowing nods of the heads of the Chief Justice and Dean Ares were received when Hendricks pointed out that they were not, however, alike in all ways. As Court watchers know, the Chief Justice has consistently followed a more conservative political and judicial philosophy, while in contrast, Dean Ares has adhered to the liberal tendencies of his mentor, Justice Douglas.

In response to a question from the audience, the Chief Justice and Dean Ares discussed the now-abandoned tradition of Justices reading their opinions from the bench. Dean Ares seemed somewhat wistful about the loss of this tradition as he told a wonderful story of Hugo Black delivering his opinion in an Interstate Commerce Commission case. Black, the New Dealer and former Senator, apparently revealed his concern for the "little guy" and fell back into his political rhetorical style contrasting with great emphasis and drama, the plight of the small independent trucker against the large corporate defendant trucking company. The Chief Justice prompted laughter from the audience when he quickly, and without qualification, punctuated this part of the conversation by stating that he, for one, did not miss the tradition of Justices reading their opinions.

The Chief Justice and Dean Ares also described with many vignettes, oral advocacy and its role in the judicial process. To the surprise of many, the Chief Justice stated that he thought the quality of oral advo-

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A Letter From the President



Leon Silverman

On April 14 Justice Antonin Scalia hosted a reception and dinner at the Court for State Membership Chairs and special friends of the Society. One of those friends who I had become most accustomed to seeing at nearly all Society events is Howard Goldman, who passed away while I was writing this column.

Howard had fought a brave fight against cancer for the past few years, but on April 29 he finally succumbed to complications of that condition. He was a true friend of the Society's, having served as a Vice President, a member of the Executive Committee, and on nearly every other standing and ad hoc committee that constitutes the Society's volunteer organization. He has offered his good counsel on issues as wide-ranging as gift shop management to acquisition of a new headquarters building.

His was an abounding enthusiasm for the Society and the Supreme Court matched only by his generosity. A few years ago, when it appeared that two Thomas Sully portraits of Justice and Mrs. Peter Vivian Daniel were beyond the Society's reach, and would be lost to the permanent collection we make available to the Court, Howard stepped in with a major contribution.

At the beginning of this decade, when the Society was seeking to build an endowment, Howard asked "How can I get my name on the list of donors?" It was a question you could count on every time the Society conducted a fund-raising effort. Whenever Howard saw a need, he volunteered to help.

In addition, Howard was a great student of history, having amassed during his lifetime one of the largest collections of signed documents by Supreme Court Justices in private hands. His collections also included numerous signed documents from the Signers of the Declaration of Independence and the Constitution. His most noteworthy acquisition, however, was his purchase of one of only eight copies of the original printing of the Constitution, believed to be the only copy not owned by a museum or other institution. Howard generously loaned

these items for display purposes throughout his life, and several items from his collection have appeared in educational displays within the Supreme Court. Most recently he and his wife Dorothy have made generous donations to the Society's Annual Fund and toward the purchase of two scale models of the current Supreme Court Chamber and the Restored Chamber in the Capitol building.

Had his health not been failing, the Society would once again have been expressing its gratitude for his generosity at the April 14 dinner for its membership chairs and other special friends. As I said earlier, there were few of the Society's endeavors in which Howard was not actively involved. When he was not helping Bill Haight to recruit State Membership Chairs, he was actively signing up his own friends and colleagues as members.

Although it is difficult to segue from the passing of a dear friend to praise for another, I think it right to extend thanks to Bill Haight for his outstanding work as this year's national Membership Committee Chair.

As a result of the State Chairs' efforts, and with approximately two months remaining in the Society's Fiscal Year 1997, membership is nearing a record-high. Further, because Society members have been increasing their dues commitments in record numbers, member-generated revenue is meeting the combined challenges of expanded Society programs in the face of declining federal revenues. This is in no small part a consequence of Bill Haight's energetic coordination of the Society's membership campaign throughout the past three years.

Chairing the Membership Committee is one of the

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most daunting tasks within the Society. Each year the Chair must appoint a new State Chairman in each of fifty states, and secure from him or her a commitment to strive for a specific recruiting goal. The cumulative sum of these state-by-state goals plus a certain number of new members gleaned from various mailings each year, hopefully, will provide the Society with a modest rate of growth less attrition.

But appointing the State Chairs is hardly the end of the task. Throughout the year the National Membership Committee Chair writes and calls State Membership Chairs constantly to coax and encourage. At this task, Bill has worked tirelessly on the Society's behalf. As a result membership at this writing stands at 5,224—just shy of the Society's all-time record of 5,266—and I have every confidence we will exceed that record before the close of our Fiscal Year on June 30, 1997.

This is especially laudatory considering that during Bill's stewardship of the Membership Committee he conceived and implemented a fifty percent dues increase for most members—a change which normally causes organizations to suffer an appreciable drop in membership. Two years ago Bill called for an analysis of membership costs, noting that the Society had not

had a single dues increase for well over a decade and that in addition to other new programs, it had in recent years doubled the number of books it was sending to members. That study led to a needed overhaul of the Society's dues structure and a boost in the revenues the Society uses to sustain the many program and publications efforts. The Society owes a debt of gratitude to Bill for all he has done during the past three years. I hope the State Chairs will redouble their efforts to ensure that Bill's tenure as Membership Committee Chair ends by surpassing the membership record he himself established only two years ago.

In closing, I want to thank Bill once again, and also to extend the condolences of all of my fellow Officers and Trustees to Howard's dear wife, Dorothy.



Judicial Fellows Commission Invites Applicants for 1998-99

The Judicial Fellows Commission invites applications for the 1998-99 Judicial Fellows Program. The Program, established in 1973 and patterned after the White House and Congressional Fellowships, seeks outstanding individuals from a variety of disciplinary backgrounds who are interested in the administration of justice and who show promise of making a contribution to the judiciary.

Up to four Fellows will be chosen to spend a calendar year, beginning in late August or early September 1998, in Washington, D.C., at the Supreme Court of the United States, the Federal Judicial Center, the Administrative Office of the United States Courts, or the United States Sentencing Commission. Candidates must be familiar with the federal judicial system, have at least one postgraduate degree and two or more years of successful professional experience. Fellowship stipends are based on salaries for comparable government work and on individual salary histories, but will not exceed the GS 15, step 3 level, presently \$78,857.

Information about the Judicial Fellows Program and application procedure is available upon request from Vanessa M. Yarnall, Administrative Director, Judicial Fellows Program, Supreme Court of the United States, Room 5, Washington, D.C. 20543. (202) 479-3415. The application deadline is November 17, 1997.

A Conversation *(continued from page one)*

cacy, both then and now, was generally “good.” Dean Ares recalled John W. Davis as the consummate oral advocate. He said that Davis was the only attorney he ever witnessed who the Justices would allow to talk beyond the “red light.” Ares recalled in particular, a case where Davis’s time had run out and the Justices stood up to leave, but all of them stood in place by their high backed chairs and did not move until Davis finished his last point with a flourish of his arm.

In response to a question about Court collegiality, both the Chief Justice and Dean Ares recalled the ongoing battle between Justices Frankfurter and Douglas. Chief Justice Rehnquist recalled an instance in which the supporters of one side of a case hired a lip reader to sit in the Court to see if they could tell what was being said between the Justices during oral argument. The only thing the lip reader observed, the Chief Justice said, was Justice Douglas leaning over to another Justice saying that he wished “that little——[Justice Frankfurter] would shut up.” The Chief Justice also surprised some of the audience by saying that he believed there was considerably greater harmony on the Court today.

The conversation was also revealing as to the work of the law clerks and how that role differs by Justice. For example, the Chief Justice noted that Justice Jackson drafted his own opinions and while he allowed his clerks to participate in the editorial process, there had usually not been very much to edit. He added that Justice Jackson would try to let each clerk draft one opinion during the course of his clerkship, but usually in a relatively unimportant case. Dean Ares recalled that Justice Douglas rarely involved his clerks in opinion writing, and was so fast at writing them himself, that the opinions were usually done and out the door before the clerks ever saw them. The Chief Justice commented that today he usually assigns his clerks to prepare the initial drafts of opinions in accordance with the conference’s discussions.

In a related discussion, the Chief Justice pointed out that Justice Stevens is the only current Justice who has his clerks review each certiorari petition, rather than participating in the “cert pool,” which coordinates clerks’ reviews. (The task of reviewing certiorari petitions has grown since these gentlemen were law clerks in the early 1950s. The Chief Justice recounted that the annual volume of petitions has jumped from about 1,200 in the 1950s, to in excess of 6,500 today.)

A most interesting story of Justice/clerk interaction



Library of Congress

Justice William O. Douglas had a lifelong love of the outdoors and nature. His former clerk, Dean Ares, described a hike they took along the Appalachian Trail.

was Dean Ares’ account of the day he and Justice Douglas (who he and the rest of the clerks called W.O.D. or simply, “WOD”) went for a walk on the Appalachian Trail. Ares was clearly moved by the candor with which Douglas discussed important issues with him that day. Interestingly, following the close of the program’s discussion, Dean Ares was talking to a group of people and further commented about his walk with Douglas. He stated that he found it curious that as soon as he and Douglas returned to the Supreme Court that day, even as they were riding the elevator together, he (Ares) “could feel the wall coming down.” Dean Ares made a gesture as if someone were inserting a glass barrier between Douglas and himself while he recounted the event. He

went on to say that within the Court, Douglas's relations with his clerks seemed always to be formal and rigid. Ares had made a similar point during the program's discussion when he stated that Douglas wanted his clerks to be busy at all times and thought that attending oral arguments was a waste of clerks' time. Ares recalled instances when he would want to hear an argument, but would have to hide behind the pillars in the courtroom to keep WOD from seeing him because if he were seen, the Justice would immediately send a note assigning him additional work to do.

In response to another question from the audience, the Chief Justice said that he would not favor having cameras in the courtroom, a position he has consistently maintained. He justified his position in terms of the

Justices's interests in privacy. He said that he liked the fact that Justices are still a rare combination of people who are able to go to the store or walk down the street and not be recognized, yet at the same time take an active role in the important decisions in government.

Those of us who attended this wonderfully intimate conversation between the Chief Justice and Dean Ares are thankful that each of them was willing to forsake their privacy for this time and allow us to join and benefit from their experiences and memories.

**John A. Stookey and Larry A. Hammond are both attorneys in the law firm of Osborn Maledon in Phoenix, Arizona.*

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Lincoln: The Politician and the Supreme Court, 1861-1865

By Dr. David M. Silver*

The lectures on the Supreme Court during the Civil War presented in 1994 and the resulting publication circulated recently, present an admirable treatment of some basic aspects of the Court during the conflict.

As a political historian and student of Professor James G. Randall at the University of Illinois, who remains one of the leading historians of the Lincoln story, I would like to discuss some of the political fires that swirled around the Supreme Court during the conflict that provide additional insight into the Court's history during the Civil War.

One of the dire threats to Abraham Lincoln and the Union as he began his presidency was the fact that the city of Washington itself was in jeopardy as Virginia soon seceded and Maryland was a hotbed of secessionism. Lincoln had good reason to fear that Maryland could secede leaving the city of Washington isolated. As a precaution against such an eventuality, on April 27, 1861, Lincoln directed General Winfield Scott to suspend the writ of habeas corpus within the area from Washington to Philadelphia wherever he deemed it necessary.

Shortly thereafter a major struggle ensued between President Lincoln and Chief Justice Roger B. Taney, who presided over the federal circuit court in Baltimore. The controversy resulted from the fact that John Merryman, a prominent citizen of Maryland, was arrested on May 25 at the order of General George Cadwalader, the commanding general of the area.

Merryman, an active secessionist sympathizer, was taken to Fort McHenry and imprisoned. Promptly, a petition was filed in the federal circuit court at Baltimore

requesting the court to issue a writ of habeas corpus in behalf of Merryman. It happened that Chief Justice Taney was in Baltimore and was presiding over the court.

Taney sent the marshal of the court, Washington Bonifant, to the fort, but Bonifant was prevented from entering the fortification. Taney was thoroughly aroused, and the next day, at his direction, the marshal took a writ of attachment to Fort McHenry to serve upon General Cadwalader. Again, Bonifant was denied admission to the fort.

Taney then issued a ringing denunciation of arbitrary military arrest, noting that the Federal courts were functioning in Maryland

and that the position of the Lincoln administration was totally out of harmony with constitutional guarantees. He directed that his finding be recorded in the court's record and that a copy be sent directly to President Lincoln so that he could consider the significance of what was transpiring.

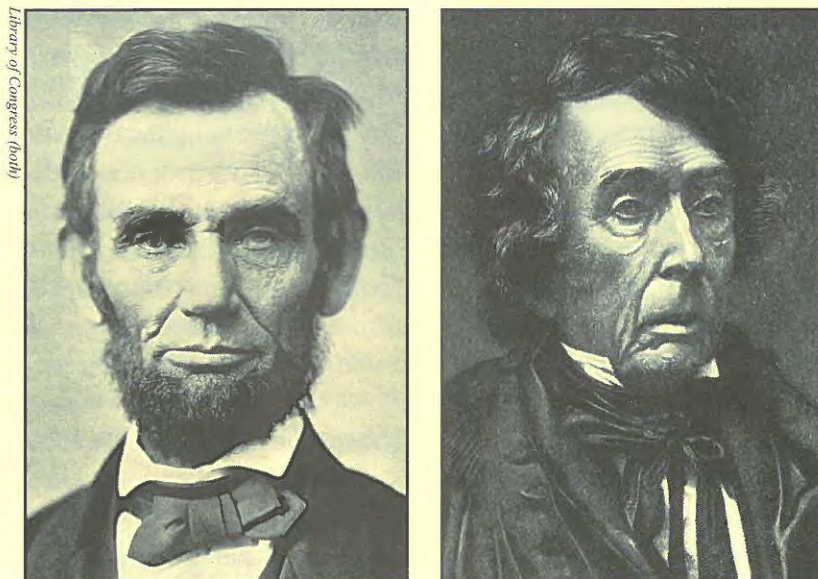
The President was far too preoccupied with military events and other problems resulting from

the coming of war to turn his attention to this controversy with Chief Justice Taney. He did not even respond directly to Taney, although he was to refer to Taney's finding in messages he presented to Congress in July and December 1861.

As the war began, there were considerations about the Supreme Court that played into the hands of Lincoln and his administration. It happened that Lincoln, very early in his presidency, faced three vacancies on the Supreme Court.

On May 31, 1860, Justice Peter V. Daniel, a Virginian and a member of the Court since his appointment by Martin Van Buren, had died at Richmond, vacating

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President Abraham Lincoln (left) and Chief Justice of the United States Roger B. Taney (right) clashed over significant constitutional issues during the Civil War.

Library of Congress (both)

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a seat that was claimed by Southerners, being one of the five held by them at that time. It is not surprising that a spirited struggle ensued over the choice of a successor, and President Buchanan found no candidate who could command adequate support. So the vacancy remained throughout the fateful campaign and presidential election of 1860. And on December 4, 1860, when the Supreme Court met for its regular term, this seat was yet unfilled.

Other vacancies on the Court had occurred as well. Justice John McLean, who had served on the Court since his appointment by Andrew Jackson and who was known as a friend of the Lincoln administration, died on April 4, 1861 at his residence in Cincinnati. Now the administration faced two appointments to the Supreme Court, and the events at Fort Sumter soon produced yet a third vacancy.

Justice John Archibald Campbell, a prominent politician of Alabama, a competent lawyer, a man of affairs, and a slaveowner, who was appointed to the Court by President Franklin Pierce in 1853, resigned on April 25, 1861. His resignation in part was the result of his dissatisfaction with Secretary of State William H. Seward, who apparently had assured him that Fort Sumter would be evacuated. Events at Fort Sumter proved otherwise, but Campbell was loyal to Alabama and undoubtedly would have resigned anyway.

The Lincoln administration was thus presented with the opportunity to significantly modify the make-up of the Court as one-third of the membership was now at its disposal. There were those in the Congress that were determined to take drastic action regarding the Court, but in the final analysis the Lincoln administration found a suitable way to modify the Court without destroying it. Abraham Lincoln was determined to restore the Union, and he had no desire, whatever, to destroy the Supreme Court in the process.

When Congress met in December, however, Senator John P. Hale of New Hampshire led a major attack upon the Supreme Court. His contempt for the Court, resulting from the decision in *Dred Scott* and Taney's role in the Merryman case, was so intense that he introduced a bill in the Senate to destroy the Supreme Court!

Hale introduced the following resolution: "Resolved: That the Committee on the Judiciary be instructed to inquire into the expediency and propriety

of abolishing the present Supreme Court of the United States, and establishing instead thereof another Supreme Court."

The Radicals had unveiled their plan to scuttle the Taney Supreme Court. This was to be the Chief Justice's recompense for the *Dred Scott* decision and his interference in the case of John Merryman. Senator Hale took the floor on December 9, 1861, to give the Senate a demonstration of rationalization rarely equaled even in a legislative body where attributing creditable motives to one's actions is often developed to a fine art.

Senator Hale had the boldness to give novel interpretation to that portion of the Constitution which creates the Supreme Court. He said that many people interpret the Constitution as providing specifically for a Supreme Court, but he declared that the Constitution provides that "The judicial power of the United States shall be invested in one Supreme Court, and in such inferior courts as Congress, may from time to time, ordain and establish."

The New Hampshire senator demanded of Congress that it act in accordance with this constitutional provision, that it "look this thing right in the face, right in the eye, and march up to their duty and establish a Supreme Court as the Constitution requires them to do "from time to time, yes sir, from time to time." Hale boomed out to his Senate colleagues, "My idea is that the time has come, that this is one of the very times the framers of the Constitution contemplated."

It was the contention of Hale that the Supreme Court had based its decisions in the past upon the desire of the Democratic party rather than attempting "to study and find out and declare the law." He tempered this somewhat by adding that "Indeed, I would not undertake to say that there is not a good man on the bench of the Supreme Court. I am far from going to that extent."

Senator Lafayette S. Foster of Connecticut, a member of the committee on the judiciary, replied to Hale. Foster denied that Congress had authority to abolish the nation's highest tribunal. Even if the Taney Court could be dissolved, said the senator, new justices would be appointed by a "fallible President," and confirmation would be voted by a "fallible Senate," and "we would be subject to very much the same evils that we have been subject to for eighty years past."

Republican Senator Jacob Collamer of Vermont entered the fray to state in opposition to the resolution, "I can hardly conceive of anything more radical. . ."

He stated that the underlying objective of the resolution was not to inquire about the Supreme Court but to abolish it."

Senator Orville H. Browning of Illinois, an intimate associate of Lincoln, quickly responded to Hale's proposal: "If you repeal the Supreme Court out of existence to-day for the purpose of getting rid of obnoxious judges, and reorganize it, and have new judges appointed, the very moment there is a change in the political complexion of Congress the same 'town-meeting proceeding' will recur." The Senator concluded that every Congress would create a Supreme Court to its own liking.

Not to be outdone, Senator Hale modified his approach. After much bitter debate, he offered a resolution which directed the committee on the judiciary to inquire into the "expediency and propriety of abolishing the present judicial system of the United States."

A few weeks later, Hale and the Radicals and the Radical press, which had vigorously endorsed Hale's resolutions, failed in their efforts to destroy the Supreme Court. On December 20 Senator Lyman Trumbull, chairman of the judiciary committee, asked that the Senate discharge the committee from further consideration of Hale's resolutions. Trumbull explained that the committee had reported a bill in relation to federal circuit court reorganization and had decided to take no action on Hale's proposals.

Senator Hale and the Radicals recognized that their efforts had failed, and decided to withdraw from the contest for a time. He announced that he would not object, and the committee was discharged. Trumbull had revealed what would be done to make the Supreme Court more to the liking of the Republicans. The key to a more palatable Supreme Court was not to assault openly the Court, but instead to attempt to modify the federal circuit court system so that a majority of the federal circuits was assigned to the Northern states. That, in turn, would result in more justices being appointed from Northern states.

Lincoln and his advisors had soon recognized that reorganizing the federal circuit court system was the simplest way to modify the membership of the Supreme Court. The states could be reassigned to circuits and the South would end up with fewer circuits, when the Union was restored. Combining reorganization with the three vacancies would result in a Supreme Court that would reflect the philosophy of the Republican party. Thus, the combination of political skill and luck enabled the Lin-



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Senator John P. Hale was appointed U.S. attorney in 1834 by President Andrew Jackson and was removed by President Tyler in 1841. Elected as a Democrat to the 28th Congress, he refused to vote for the annexation of Texas although he had been instructed to do so. He was an unsuccessful candidate for President on the Free-Soil ticket in 1852.

coln administration to more readily combat the problems presented to it by the Supreme Court.

It took over six months of jockeying by Congress to get the states satisfactorily assigned to circuits so that favorites of leading politicians would be the most likely to be appointed to the Supreme Court by President Lincoln to fill one of the vacancies. Members of Congress used every bit of political skill they could muster to see to it that assigning states to the circuits met their ulterior motives.

A few examples will suffice to illustrate this point. Trumbull's committee recommended that the three Northern circuits remain unchanged. The First Circuit, presided over by Justice Nathan Clifford, was comprised of Rhode Island, Massachusetts, New Hampshire, and Maine. The Second, presided over by Justice Samuel Nelson, was comprised of New York, Vermont, and Connecticut. And the Third, presided over by Justice Robert C. Grier, covered Pennsylvania and New Jersey.

It was in recommendations to condense the Southern and border circuits that the plan of the committee

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revealed itself. Chief Justice Taney was to preside over the Fourth, consisting of Maryland, Delaware, Virginia, and North Carolina. The Fifth, to be presided over by Justice James M. Wayne, was to consist of South Carolina, Georgia, Alabama, Mississippi, and Florida. And the Sixth, to be presided over by Justice John Catron, was to consist of Louisiana, Texas, Arkansas, and Tennessee.

The committee, in harmony with Republican desires to increase the number of Northern circuits, proposed to assign the three remaining circuits to the Middlewest. The proposed Middlewestern circuits were the Seventh, Ohio and Kentucky, the Eighth, Wisconsin, Michigan, Indiana, and Minnesota, and the Ninth, Illinois, Missouri, Kansas, and Iowa. Senator Trumbull stated that the three vacancies on the Supreme Court would be filled from the Middlewest and the new justices would be assigned to these circuits.

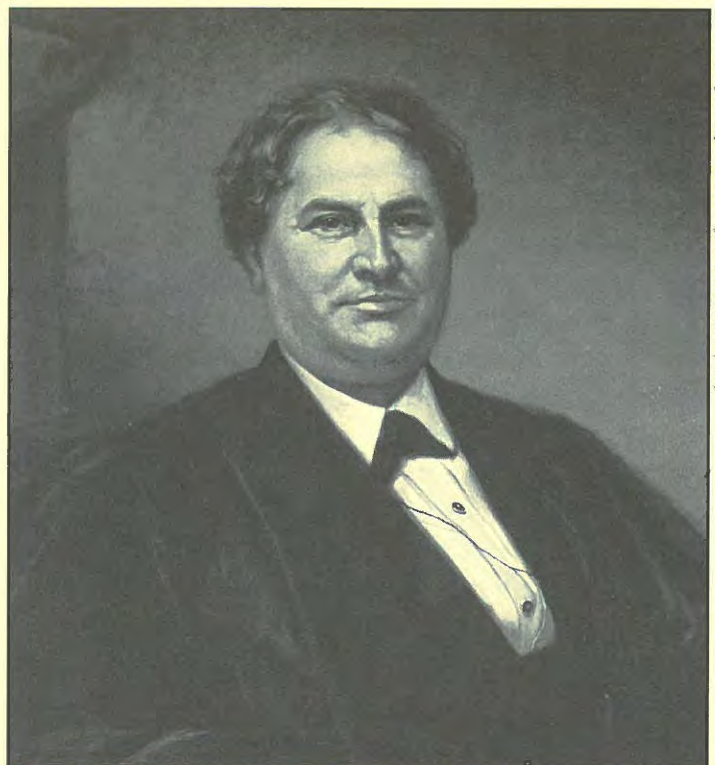
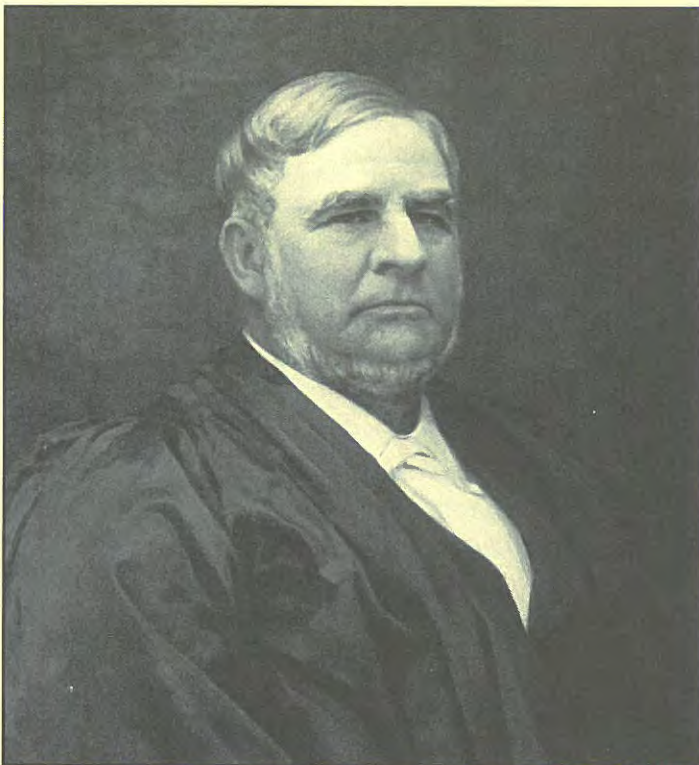
He clarified the situation as to California and Oregon. He stated that they were left out of the reorganization plan because "They have a peculiar system there. They have a circuit system of their own with a circuit judge who is not a judge of the Supreme Court."

He declared, also, that the situation could not be changed without naming a tenth justice, and that the committee did not feel that these two states of the Far West had enough population to merit a tenth justice on the bench of the Supreme Court.

The congressional battle to control the placement of states in the circuits began at once. Probably the most spirited was over the placement of Iowa and Illinois, although there were numerous additional battles. The Iowa congressional delegation had its favorite candidate for appointment to the Court. He was Samuel F. Miller, a prominent Republican leader from Keokuk. And the most prominent Illinois candidate was David Davis, a close friend and associate of Lincoln, whose efforts in behalf of Lincoln at the Republican convention in Chicago were non-ending.

And so the struggle went on and on until mid-summer of 1862. In the meanwhile, both Chief Justice Taney and Justice John Catron suffered illnesses that resulted in frequent absences from the bench. At times it was impossible for the Court to maintain a quorum during its regular session which began in December.

Consequently, President Lincoln nominated Noah H. Swayne of Ohio on January 21, 1862, to fill the first of the three vacancies. Swayne was a leading Ohio



Collection of the Supreme Court of the United States (both)

David Davis (left) was appointed an Associate Justice of the Supreme Court in 1862 by President Lincoln. He served until March 4, 1877 when he resigned to become a United States Senator. His colleague on the Bench, Samuel F. Miller (right) began his career not in law, but in medicine. Miller was appointed to the Court by Lincoln in 1862.

Republican. In nominating Swayne, Lincoln was paying off a great debt to Ohio as at the Chicago nominating convention Ohio had played a key role in his nomination for the presidency. And Swayne was totally loyal to the Union and an Ohioan with a distinguished political career.

Once the circuits were reorganized, Lincoln proceeded to fill the remaining vacancies on the Supreme Court. The Iowans and Illini won their battle; Iowa and Illinois were reassigned so that Illinois was in the Eighth Circuit and Iowa was in the Ninth. Samuel F. Miller was administered his oath of office on July 21 by Chief Justice Taney.

There came to be so many strong candidates for appointment from Illinois that Lincoln was to delay for several months before he decided to appoint David Davis. In fact, delay was so lengthy that confusion and embarrassment resulted for all of the contenders as well as Lincoln. Davis soon found that he was in an energetic battle with Senator Orville H. Browning, another close associate of Lincoln, and Thomas Drummond, Federal district judge in Chicago, who also had strong support.

The Lincoln collection of papers reveals that an overwhelming volume of entreaties was sent to the President, who obviously was sorely pressed and delaying a decision that was most painful to him. But on October 17, 1862, Lincoln finally decided to appoint his friend David Davis. This struggle was over.

One of the great controversies that continued to plague the administration was arbitrary military arrest and the question whether the writ of habeas corpus could in fact be suspended or ignored in emergency, with or without congressional action and presidential direction. And there were many other matters that provoked legal action; among them were ships that had been seized at sea, so-called slavers, ships that were seized as prize as they carried contraband, and ships that breached the blockade that Lincoln proclaimed early in the war.

From time to time, when congressmen most feared decisions by the Supreme Court that would be injurious to the war effort, they would introduce bills to provide for increasing the Court to as many as thirteen or fifteen members. Their purpose was to put the Court on notice that there could be danger to the court if decisions adverse to the war effort were handed down.

Secretary of War Edwin M. Stanton had to deal with the sticky problems of military arrest every day, and he became anxious to push cases in the Federal courts on to

the Supreme Court, hoping to obtain satisfactory decisions to support his actions promoting the war effort. The Copperheads and other trouble-makers in the North were proving to be a severe problem for the Lincoln administration. And even newspapers that were not opposed to the war efforts were questioning arbitrary military arrest.

Although Secretary Stanton wished for legal action that would bring the issue before the Supreme Court at an early date, Attorney General Edward Bates was far more cautious. Even as Lincoln was filling the vacancies on the Court, Bates was counseling extreme caution in dealing with the Supreme Court on matters involving arbitrary arrest, as he explained in correspondence with Stanton.

Bates believed that there was a danger that the Court would rule adversely to the administration on this issue, and he expressed the opinion that it was better to let the matter ride. He believed that no decision by the Supreme Court was better than taking the chance of receiving an adverse decision. Stanton heeded Bates' advice, though reluctantly.

Bates clearly understood the views of the members of the Court, as events would demonstrate. Probably the most important cases to come before the Court while the war raged consisted of cases known as the *Prize Cases*. They grew out of proclamations on April 19 and April 27, 1861, issued by President Lincoln, blockading the entire coastline of the Confederacy. This action was taken while Congress was not in session, so it rested solely upon the authority of the President.

When Congress met in special session in July, 1861, it empowered the President, whenever he deemed it necessary, to declare ports closed where the authority of Federal customs collectors was challenged. Clearly, the concept of a closed port system was preferable to a blockade. As a matter of fact, however, Lincoln continued his policy of blockade.

Seizure of foreign vessels had resulted almost immediately. And this brought complications with foreign powers. The British schooner *The Tropic Wind* was seized in May while it was trying to run the blockade of Virginia ports. Ultimately, the case of *The Tropic Wind* was combined with cases involving *The Brig Amy Warwick*, *The Schooner Crenshaw*, and *The Barque Hiawatha*, and they were appealed to the Supreme Court.

It was deemed crucial to the Lincoln administration that its policies on blockade be upheld by the Court. The

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whole question of presidential power was at stake. Even though Congress had retroactively approved of Lincoln's actions in the period before Congress met in special session in July, the question of whether he acted legally on his own was at stake.

Richard H. Dana, Jr., the Federal district attorney for Massachusetts, who had been appointed by Lincoln, presented the argument to the Court that resulted in a decision favorable to the administration.

Attorney General Bates was correct in urging caution in dealing with the Supreme Court. Justice Robert C. Grier spoke for the majority. He was joined by the three recent Lincoln appointees—Swayne, Miller, and Davis—and the loyal and devoted Justice James M. Wayne of Georgia. Without the Lincoln appointees, it appears that the administration would have suffered a catastrophic loss.

Justice Grier stated that there could be no successful challenge of the President's authority to inaugurate blockade, and he declared that a state of war existed when Lincoln issued the proclamation of blockade. Grier examined the problem of what war is and when it is that war exists. He eliminated the contention that war exists only by declaration, stating, "War has been well defined to be 'That state in which a nation prosecutes its right by force.' "

Although the Constitution confers on Congress the right to declare war, Grier pointed out, it is impossible for Congress to declare war upon one or several of the states. When an emergency such as insurrection occurs, the President has the responsibility of repelling the invasion and suppressing insurrection. Grier declared that although the conflict was deemed an insurrection by the Union it was war, nevertheless.

The majority of the Court ruled that the President's acts were legally correct on the basis of presidential power alone. The President had the power to institute blockade of the South which neutral powers were obliged to recognize; the conflict was insurrection and war; the Southerners were traitors and enemies. The administration had leaped over a tremendous hurdle. Its efforts to sustain the Union were not impeded by the Court.

Most significantly, in the very days that the Supreme Court was involved in hearing the *Prize Cases*, Congress was going about the process of approving a tenth justice for the Supreme Court. The *Prize Cases* were argued before the Supreme Court from February 10 to February 25, 1863. On February 20 Senator Milton S. Latham of California introduced a bill to

provide for a tenth circuit consisting of California and Oregon. Of course, a tenth circuit would require the appointment of a tenth Justice.

Senator Trumbull reported the bill favorably three days later—the administration was demonstrating speedy action. On February 26 the Senate, sitting as the Committee of the Whole, considered the proposal and approved it. The House, only a few days later, on March 2 suspended its rules and concurred in the Senate's action. The bill was enrolled and signed by Speaker Galusha A. Grow on March 3, and sent to President Lincoln, who approved it the same day.

This was exactly one week before the decision in the *Prize Cases* was announced on March 10. At a later date, Nevada, which was admitted to the Union just in time for it to add Republican votes to Lincoln's reelection, was added to the Tenth Circuit.

The justification for a Tenth Circuit was that as the result of numerous Mexican land title cases that were making their way through the Federal court system, there was clearly need for a member of the Court who was expert in Spanish land law. It was anticipated that Lincoln would appoint a tenth Justice who would meet that need. And, of course, he did just that.

Lincoln was to appoint Stephen J. Field, a Unionist and a Democrat to the tenth seat. At the time of his appointment Field was Chief Justice of the Supreme Court of California. Field fulfilled the basic requirement that Lincoln applied to all of his appointees to the Supreme Court, which was unswerving loyalty to the cause of the Union.

On the occasion of the completion of the telegraph line connecting the Pacific coast with the Atlantic, Field had telegraphed Lincoln on October 25, 1861, "The people of California desire to congratulate you upon the completion of the great work. They believe that it will be the means of strengthening the attachment which bind both East & West to the Union." He added, "They desire in this first message across the continent to express their loyalty to that Union & their determination to stand by the government with affection & will adhere to it under all fortunes."

Governor Leland Stanford and the entire California congressional delegation supported Field's appointment. In addition, Field's brother David, who had been active in bringing about Lincoln's nomination and who gave Lincoln advice and counsel throughout the war, played a prominent role in securing the tenth Justiceship for his brother.

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The speed with which the decision to appoint a tenth Justice was made indicates that Lincoln had been considering such a solution for some time, even if he had not articulated it in public speeches. Fortuitous circumstances played into the hands of the Lincoln administration as a result of the addition to the Court. The Court became a more friendly Court when it became a Court of Ten. A new Justice from the West was justified, and whether the Court was packed or not, the result was the same.

After the *Prize Cases* were litigated, there were other important war-related cases that the Supreme Court heard. In none of them was a decision handed down that was adverse to the war effort of the Union. If the Court could not hand down a decision favorable to the Lincoln administration, it simply denied that it had jurisdiction over a particular case. This principle became the guide for the Court while the war raged.

A few cases merit special examination in this regard. One was *James J. Roosevelt v. Lewis H. Meyer*, which questioned the validity of the Legal Tender Act. In a ruling on June 3, 1863, the supreme court of New York denied Congress the right to issue paper money without adequate security to support it.

On September 29, 1863, the New York court of errors and appeals handed down a ruling on legal tender in the case of *The Metropolitan Bank v. H. H. Van Dyck*, reversing the decision of the supreme court of New York in the *Roosevelt* case.

The *Roosevelt* case was appealed to the United States Supreme Court. Arguments took place on December 21. The Court chose to ignore Roosevelt's appeal that his constitutional rights were violated.

The Supreme Court did not choose to state that legal tender was valid. It simply decided to interpret the Judiciary Act of 1789, which set out the considerations under which appeal from the highest court of a state could be made to the Supreme Court, quite narrowly and gracefully side-stepped the broader issues involved in the litigation.

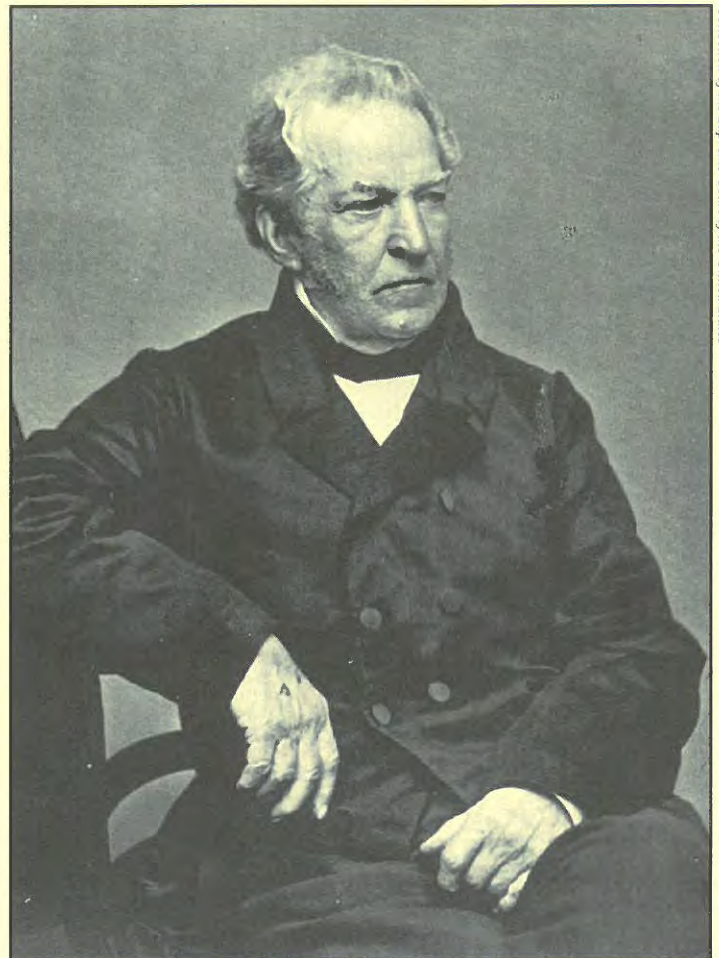
Justice James M. Wayne announced that the Justices concluded that inasmuch as the validity of the Legal Tender Act was questioned "and the judgment of the Court of Error and Appeals was in favor of it this Court had no jurisdiction to reverse the judgment; that the dismissal of the case was accordingly to be directed." The question of unsecured paper money would, of course,

be revisited by the Supreme Court in the years ahead.

The case of *Ex Parte Vallandigham* reveals even more clearly yet that the Supreme Court would not interfere with the efforts of Lincoln to restore the Union. The December Term, 1863, which had already seen the Court refuse to interfere with legal tender, was to see the attention of the Court finally directed to the highly controversial subject of arbitrary arrest.

The controversy developed out of an order of Major General Ambrose E. Burnside, commander of the military department of Ohio, who issued a general order on April 13, 1863, stating that he would not tolerate treason in his department. Clement L. Vallandigham, who had served in the United States House of Representatives from 1858 until his defeat in the election of 1862, was arrested at Mount Vernon, Ohio, on May 5, 1863.

He was arraigned before a military commission the next day. The charge was that at a public meeting in Mount Vernon, he had declared that the "present war was



Collection of the Supreme Court of the United States

Justice James Wayne died in 1867 after thirty-two years of service on the Supreme Court. He is one of only twelve Justices to serve for more than thirty years.

a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism.”

Vallandigham denied that the military commission had any authority over him, and he refused to enter a plea. Following the presentation of evidence, Vallandigham was ruled guilty as charged. He was sentenced to confinement in a fortress of the United States for the duration of the war. Vallandigham moved swiftly to seek the protection of the Federal courts.

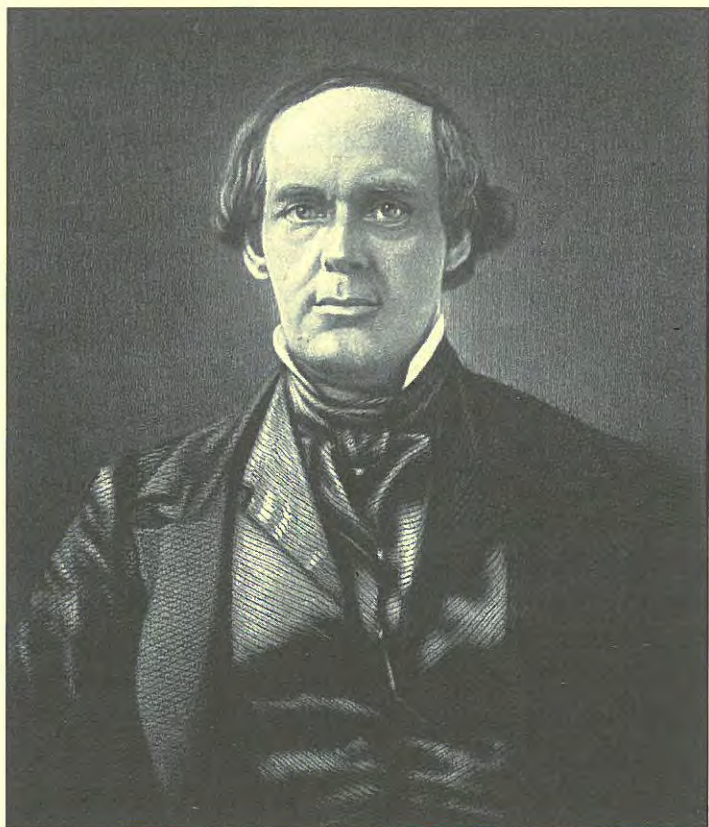
Judge Humphrey H. Leavitt, citing a decision that he and Justice Swayne had handed down in the October Term, 1862, of circuit court in Cincinnati, concerning the military arrest of Bethuel Rupert, declared that Swayne had ruled that military arrests were justifiable as a military necessity even in areas where martial law did not exist. Swayne had declared that in case of military necessity, civil courts were without authority to hear applications for a writ of habeas corpus.

A furious controversy resulted in Congress and the press over the arrest of Vallandigham. Lincoln and his cabinet promptly recognized the need to reduce the tension. So on May 19, Lincoln, acting in his capacity as commander-in-chief, commuted the sentence to banishment from the United States, a most unusual action. A military escort took Vallandigham to Confederate lines in Tennessee and banished him.

Shortly, Vallandigham turned up in Canada. In his absence Ohio Democrats nominated him for governor. His campaign was conducted by correspondence and friends, but he was soundly defeated. And in January, 1864, Vallandigham sought relief by asking that the Supreme Court review the case, which it did. Arguments were heard on January 22 and the Court handed down its ruling on February 15.

Justice Wayne, spoke for all the Justices who participated in the case—Taney was ill and was not present and Justice Miller was absent as well. Justices Nelson, Grier, and Field did not agree with all points made in the written opinion but agreed with the decision. The Court refused to interfere because it could find no authority to justify it taking such action. Justice Wayne ruled that General Burnside’s action conformed with regulations that provided for the government of the armies, approved by the President on April 24, 1863.

Essentially, the Supreme Court had underscored its basic policy. It would not interfere with the efforts of the Lincoln administration to restore the American Union.



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Salmon P. Chase succeeded Roger B. Taney as Chief Justice of the United States in 1864. Both before and during his tenure on his Court, Chase focused much of his political energies on his presidential ambitions.

Lincoln and his advisers recognized, however, that the issue of Vallandigham was too hot to handle, and when he reappeared in Hamilton, Ohio, on June 15, 1864, the administration chose to ignore him.

Lincoln was to have the opportunity to make a fifth appointment to the Supreme Court. Many Republicans had long awaited the death of the aged Chief Justice, and finally Taney died on October 12, 1864. There was much rejoicing that the Republicans could finally name a new Chief Justice.

The Lincoln Papers reveal that Lincoln was simply swamped with letters and entreaties in behalf of lesser contenders for appointment as well as those who loomed as major contenders. With the election of 1864 just ahead, naturally Lincoln delayed making any appointment prior to the election as he did not wish to alienate any of the contenders and their champions.

Politicians often encounter the fact that long delay in making a decision results in greater and great pressure. And Lincoln experienced this as he delayed making the appointment even after his reelection. Even when the Supreme Court met for its December Term on December

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4, Lincoln had taken no action despite the fact that one candidate loomed over all others as the logical choice. But Lincoln's reluctance made him delay.

Finally, on December 6 he notified Salmon P. Chase that he would nominate him for Chief Justice. Thus, Lincoln appointed a man who was a rival and a person who had caused the administration considerable pain during the years that he served in the cabinet and as a rival for the nomination for president. But the public mind associated Chase with the appointment, and Lincoln could not fail to make it.

One additional significant case remains to be examined in understanding the role of the Supreme Court during the war even though it was not decided until shortly after the conflict ended. That is the case of *Ex Parte Milligan*.

The decision in the *Milligan* case reveals even more clearly yet that the Supreme Court had no intention to interfere with the determination of the Lincoln administration to restore the American Union.

Lambdin P. Milligan was arrested on October 5, 1864, at his home and taken to a military prison in Indianapolis. A military commission tried him on October 21 on the charge of joining the Order of American Knights for the purpose of overthrowing the government of the United States. The commission found him guilty, and the sentence—death by hanging—was to be carried out on Friday, May 19, 1865.

A petition was filed on May 10, 1865, in the United States circuit court in Indianapolis requesting a writ of habeas corpus, it being claimed that a military commission had no jurisdiction over Milligan, a civilian. Judge David McDonald and Justice David Davis, who was serving on the circuit court with McDonald, disagreed as to the writ, Davis favoring granting it, and the case was brought before the Supreme Court.

President Andrew Johnson postponed the execution so that the case could be adjudicated further. The *Milligan* case was brought before the Supreme Court from March 5 to March 13, 1866.

Milligan was represented by an array of distinguished members of the Supreme Court bar: David Dudley Field, a brother of the Justice, James A. Garfield, Jeremiah S. Black, J. E. McDonald, A. L. Roache, and John R. Coffuth. For the government there appeared Attorney General James Speed, Henry Stanbery, and Benjamin F. Butler.

Butler skillfully summarized the case of the government when he argued: "We do not desire to exalt the martial above the civil law, or to substitute the necessary despotic rule of the one, for the mild and health restraints of the other. Far otherwise. We demand only that when the law is silent; when justice is overthrown; when the life of the nation is threatened by foreign foes that league and wait, and watch without to unite with the domestic foes within . . . then we ask that martial law may prevail, so that the civil law may again live, to the end that this may be a 'government of laws and not of men.'"

On April 3, 1866, three weeks after the arguments were concluded, Chief Justice Chase announced the decision. The Court ruled that the military commission that tried Milligan had no jurisdiction over the case, and it ordered its sentence set aside. He announced that the written opinions of the Court would be issued at the next term of the Court in December. Chase's announcement caused a sensation.

Justice Davis spoke for the Court on December 17 declaring that although the *Milligan* case involved principles that were basic in the concept of American freedom, the decision handed down would not and could not have been enunciated if the war were yet in progress.

In a forcefully frank passage of the opinion, Justice Davis summarized the feelings of a majority of the Court during the years of battle and bloodshed: "During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, questions of safety were mingled with the exercise of power; and feelings and interest prevailed which are happily terminated. Now that the public safety is assured, this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment."

The war was over. The Union was restored. Questions that could not be faced while the war was in progress could now be answered. The Supreme Court had granted the Lincoln administration whatever power it required to restore the American Union. The nation was now safe. The rule of law had to be restored. The guarantees of the Constitution again had become sacred.

**Dr. David M. Silver is Professor of History emeritus and Dean Emeritus of the College of Liberal Arts and Sciences, Butler University.*

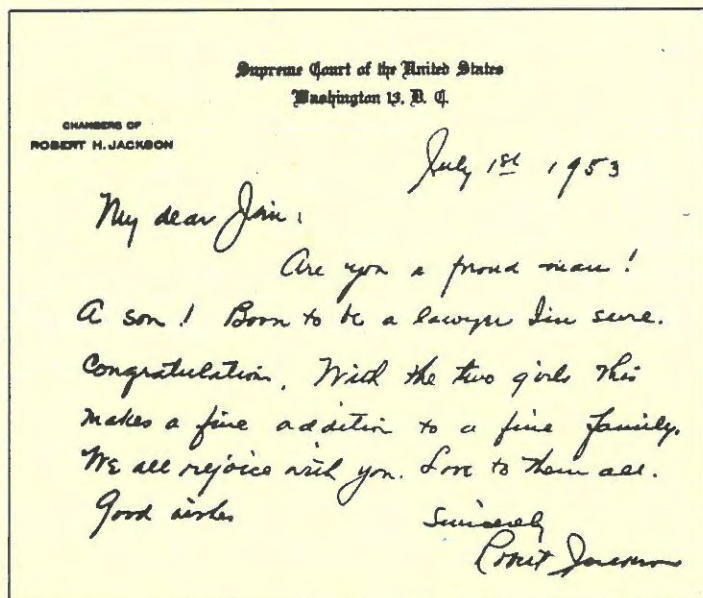
Some Personal Correspondence of Justice Jackson

By James M. Marsh*

The generally held image of a public figure almost always results entirely from his or her performance of duties which by their nature, attract press coverage and public attention. Such is the case of the late Justice Robert H. Jackson, who is probably best remembered for his work as Solicitor General, Attorney General, Supreme Court Justice and American Chief Prosecutor of Nazi war criminals.

However, because of his unaffected, friendly make-up, my wife Toni and I enjoyed a close personal relationship with him during my two years as his law clerk, and saw his other private and very human side.

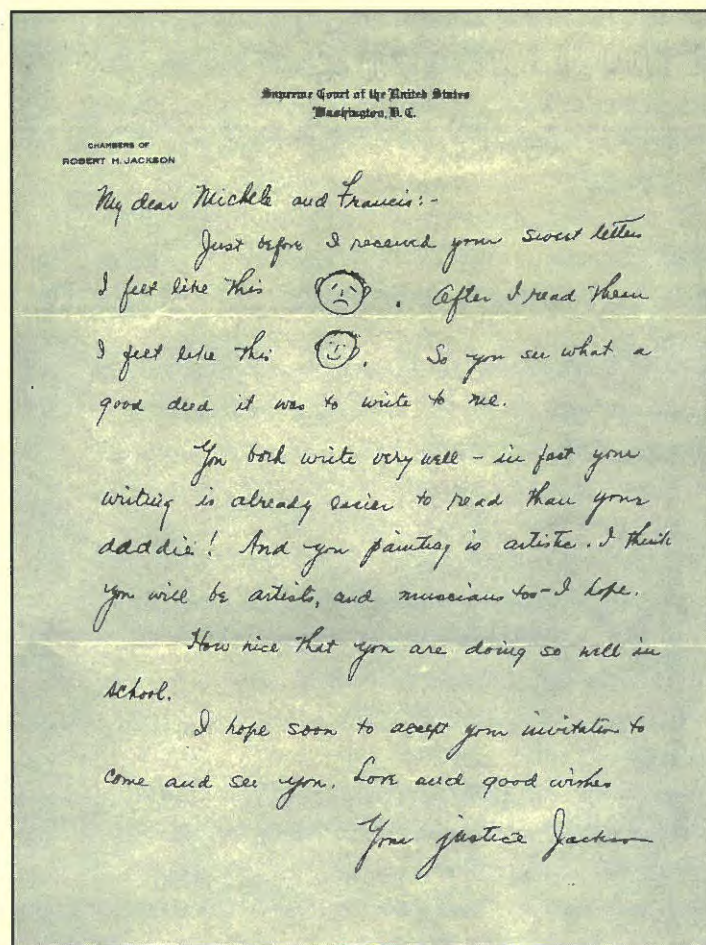
After we had returned to Philadelphia, I frequently visited the Justice in his chambers, when my practice took me to Washington, and we also corresponded from time to time. Recently, while reviewing my files, I ran across many of the Justice's letters, including three which illustrate some of the human qualities which I had described in an earlier article published in the *American Bar Journal*: "The Genial Justice: The Lighter Side of Robert H. Jackson," and in the biographical sketch which I prepared for inclusion in



a collection published by the Supreme Court Historical Society. [*The Illustrated Biographies* volume.]

The three letters I have mentioned tell the story, and none needs any elucidation by me. I must add that his note congratulating my wife and me on the birth of our son, "born to be a lawyer," written the day after he was born, proved to be prophetic. It was, in our minds at least, such a unique bit of memorabilia, that we had it framed and presented it to our son when he and his contemporaries

—continued on next page



Justice Robert Jackson with his law clerk James Marsh outside the Supreme Court.

Jackson (continued from page 19)

were admitted to the Bar of the Supreme Court of Pennsylvania.

Here is that letter, and two others in which the Justice responded to letters sent to him by our daughters, who were then five and six years old.

**James M. Marsh, a Philadelphia lawyer, served as a clerk to Justice Jackson during the 1947 and 1948 terms.*

Collection of the Supreme Court of the United States



Justice Jackson in another relaxed moment.

Supreme Court of the United States
Washington, D.C.
February 14, 1950

My dear Frances and Michele:

I received the letters and pictures which you were so kind as to send me by Mrs. Douglas. I liked particularly the one of the Judge with the many buttons on his front. Some of them reminded me very much of the way we look on opinion day.

We still manage to write some opinions even though your Daddy is not here; but no doubt he notices that they are not as good as they used to be.

Mrs. Douglas says that you are doing fine and are full of vigor and keeping your Mother and Father very busy. I wish I could drop in and see you.

With best wishes and hoping I will see you before too long, I am

Sincerely yours,

Misses Frances and Michele Marsh,
2821 Queen Lane,
Philadelphia 29, Pa.

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