Society Plans 7th Annual Meeting

The Society will hold its Seventh Annual Meeting and Dinner on Friday, April 30, in Washington, D.C. The Chairman of this year’s Annual Meeting Committee, Chief Judge Howard T. Markey of the U.S. Court of Customs and Patent Appeals, noted the change from the Monday evening meetings of the past several years, explaining that a Friday had been chosen in response to the growing sentiment that a Monday evening was inconvenient for many members, especially those who live any distance from the Capital.

The Annual Lecture, traditionally presented on the day of the annual meeting, will be given this year by Dr. Henry J. Abraham, James Hart Professor of Government and Foreign Affairs at the University of Virginia. The lecture will be presented at 2:00 p.m. in the Restored Supreme Court Chamber in the U.S. Capitol. A well-known author, whose works include The Judicial Process, Justices and Presidents, Freedom and the Court, and The Essentials of American National Government, Professor Abraham took his undergraduate degree from Kenyon College. A member of Phi Beta Kappa, he did his post-graduate work at Columbia University and the University of Pennsylvania, where he was a member of the faculty for many years. In addition to his major publications, Professor Abraham has written widely for law reviews and other journals on constitutional law and the judicial process. He has also lectured at universities in this (continued on page ten)

New Court Photograph Available

Continuing the century-old tradition of having a formal photographic portrait taken upon the installation of each new justice, the Court this month released its most recent formal photograph.

Copies of this photograph are available at the Society’s Kiosk at the Supreme Court in three forms: 8x10 black and white ($8.00); 11x14 color ($16.00); and, 11x14 color on a 13x16 mat ($20.00).

Mail orders should be directed to the Society’s offices at 1511 K Street, N.W., Suite 612, Washington, D.C. 20005 and must include an additional $2.00 for postage and handling. As with all other materials distributed by the Society, members enjoy a 20 percent discount on the prices listed above.
Jefferson (right).

Though related, and both natives of Virginia, there was no love lost between Chief Justice John Marshall (left) and President Thomas Jefferson (right).

Law And Politics In The Jeffersonian Era

By George L. Haskins

(Continued on page nine)
Stephen J. Field: Frontier Justice

On the morning of March 10, 1863, the Supreme Court announced its decision in the *Prize Cases*, upholding President Lincoln’s executive order blocking southern ports in the Spring of 1861. The decision had split the Court 5-4, and the margin defending the Union had been a narrow one. Fearful of an adverse ruling, Republicans in the Congress had already made provision for enhancing Union sympathies on the Court by adding to it an unprecedented tenth seat. This plan promised the added advantage of cementing Oregon and California to the Union camp by providing those states with their own federal circuit, and representation on the high court.

If the creation of a new circuit and of a tenth seat were extraordinary measures, the man Lincoln nominated to fill the new vacancy was equally extraordinary. Stephen Johnson Field was a Democrat, and his appointment represented the first clear instance of a President crossing party lines to fill a Court vacancy. President John Tyler, a Whig, had nominated Democrat Samuel Nelson in 1845, but Tyler had come into office on the death of President Harrison, and party infighting had substantially alienated him from his Whig supporters. By the time of the Nelson nomination, Tyler was no longer clearly identified with either party. Strongly and outspokenly pro-Union, Field satisfied the exigency of appointing someone who could be expected to vote sympathetically on issues pertaining to the war. Unlike his Radical Republican supporters, Lincoln was also looking toward the war’s end in Field’s nomination, at which time a Democrat might prove less of an obstruction to reconstruction plans than as a member of his own party.

Senate approval of the Field nomination, by coincidence, fell on the same day that the Court announced its decision in the *Prize Cases*. Two months later, in his adopted state of California, Field took his oath of office.

Field arrived in California in December 1849, 2 years after Mexico had ceded the territory to the United States. During the previous year, he had toured revolution-torn Europe with his father, David Field, a strict congregationalist minister from Connecticut. When he returned to New York in October 1849, he learned of the discovery of gold in California and immediately booked passage to Panama. Once there, he contracted with some natives to ferry him in a canoe across the Isthmus. By late December, Field reached San Francisco, with only ten dollars in his pocket and no immediate prospect of a job.

Unlike many of his travelling companions, Field had no intention of breaking his back in search of gold. He had graduated at the top of his class from Williams College in 1837, and had studied law with his eldest brother, David Dudley Field, and with John Van Buren, the Attorney General of New York. He was admitted to the New York State Bar in 1841, and subsequently practiced law with his brother in New York for several years. As much entrepreneur as lawyer, Field travelled to California with the hope of establishing a lucrative legal practice in the rapidly expanding San Francisco area. After spending a month or so there, Field realized that his expectations had been illusory. He decided to move inland, travelling 100 miles by boat up California’s Sacramento and Feather Rivers to what would become “Marysville”—so named for one of the few survivors of the Donner party, and one of the few women living in tents, shacks, and a few small adobe buildings.

Field promptly established a police force to maintain order for serious offenses, as there was no jail nor any funds to build one. The prevailing local prescription for theft and other crimes had been lynching, for which Field had considerable personal disdain. The new alcalde settled upon an alternative form of punishment which he applied as circumstances warranted. One such instance involved a man convicted of stealing a large quantity of gold dust, the location of which he refused to reveal after his capture. Field instructed his new sheriff accordingly:

> Therefore it is ordered that said defendant, John Barrett, is to be taken from this place to Johnson’s Ranch, and there to receive on his bare back within twenty-four hours from this time, fifty lashes well laid on, and within forty-eight hours from this time, fifty additional lashes well laid on; and within three days from this time, fifty additional lashes well laid on; and within four days from date fifty additional lashes well laid on. But it is ordered that the four last punishments be remitted provided the said defendant make in the meantime restitution of the said gold dust bag and contents.

Unfortunately, the sheriff’s second reading of Field’s order revealed no provision for remitting any of the first fifty lashes, and despite the prisoner’s full confession, the remaining thirty were “laid on”, as the order instructed. Field later recalled this incident with some considerable satisfaction; “the sense of justice of the community was satisfied. No blood had been shed; there had been no hanging; yet a severe public example had been given.”

Aside from his duties as the town’s first alcalde, Field also served as an informal arbiter for land disputes, directed the grading of the riverbanks to facilitate landings by river traffic, and performed various administrative services for the town. He proved equally energetic in his private affairs, amassing the substantial sum of $41,000 in three short months through real estate speculation and fees charged as alcalde.

Field’s duties as alcalde ended in May 1850 with the installation of new local officials under the newly approved Mexican cession of the territory. Spanish law, the position encompassed a wide range of powers as the only form of legitimate local authority surviving Mexican cession of the territory.

Field promptly established a police force to maintain order by levying a tax upon the local gambling tables. At the outset, he found himself in somewhat of a predicament in providing justice for serious offenses, as there was no jail nor any funds to build one. The prevailing local prescription for theft and other crimes had been lynching, for which Field had considerable personal disdain. The new alcalde settled upon an alternative form of punishment which he applied as circumstances warranted. One such instance involved a man convicted of stealing a large quantity of gold dust, the location of which he refused to reveal after his capture. Field instructed his new sheriff accordingly:

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Emotions ran high and a local celebration ensued; a dinner was held during which the town’s new “benefactor” was called upon to speak. He persuaded his audience of the necessity of electing a local government, and though in town only three days, his eloquence secured his own election as the town’s first alcalde. A judicial office originating under real state speculation and fees charged as alcalde.

Field’s duties as alcalde ended in May 1850 with the installation of new local officials under the newly approved California state constitution. Relations between Field and his successor, California District Court Judge William R. Turner, were openly hostile from the outset, motivated perhaps by mutual jealousy and political differences. Whatever the cause, Field’s first appearance before Turner produced a heated verbal exchange which earned the former alcalde a $500 fine, two days incarceration in the judge’s cell, and served as an informal arbiter for land disputes, directed the grading of the riverbanks to facilitate landings by river traffic, and performed various administrative services for the town. He proved equally energetic in his private affairs, amassing the substantial sum of $41,000 in three short months through real estate speculation and fees charged as alcalde.

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Field (continued from page five)

chambers and disbarment. Field immediately secured a ruling from the California Supreme Court overturning the decision and also petitioned the Governor for Turner's suspension. Failing in this latter effort, Field engaged Turner in a running exchange of editorial abuse throughout the summer of 1850 in a battle of words, with each volley, signed by Field, so enraged the Judge that he ordered Field brought before him and demanded that he show cause why he should not be expelled from the bar. Once in court, Field characteristically unleashed a vituperous assault on his adversary's judicial competence and personal character. The future Supreme Court justice was once again disbarred.

Reinstated by the California Supreme Court, Field deci-
ded upon a different tack, and in the Fall of 1850, he ran for election to the California State Assembly. Victoriously, he introduced a variety of judicial reforms, one of which succeeded in banishing Judge Turner to a newly created district in the comparative wilderness of Trinity and Klamath Counties in the extreme northwestern corner of California. Despite this new legal and political challenge from Judge Turner, Field continued to deplore his loss of the nomination by two votes and immediately set out to take his revenge: he traded away the votes for political favors. Field thus lost the nomination from loyal delegates unable to attend the convention.

In the summer of 1851, Field hoped to advance his legislative career by running for California's State Senate, and he acquired a sufficient number of proxies to assure his nomination from loyal delegates. Despite the efforts of his political adversary, Field's political career advanced. While a member of the State legislature, he served on the Judiciary Committee where he was primarily responsible for codifying California's morass of Spanish law, frontier practices, and American legal precedents into a single body of civil and criminal state law which could be generally applied. The example for this code writing was drawn from his experience a few years earlier in assisting his brother to codify the laws of the State of New York. His substantial legal experience suited to California's early years of statehood, and his contribution to the state's legal system laid a foundation that became a model for codification in surrounding states in the years to come.

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Jefferson (continued from page three)
laying down principles, setting limits, within which the Court would and could act. A skilled trial lawyer, Marshall was carefully separating legal from political matters. He was not, as some have supposed, simply avoiding an uncomfortable political confrontation with Jefferson. By the Marbury decision, Marshall announced in a statesmanlike manner that political questions would be kept away from the doors of the national courts where they did not belong, unless the constitutionally protected rights of an individual petitioner were violated. Then, if the case came before the appropriate court in the proper procedural way, the federal judiciary would act as the watch-dog and guarantor of such rights. His basic justification was that the dictates of the Constitution made the departments of government separate and independent, and that the actions of one should not overstep the proper boundaries of another; but of the legitimacy of those actions, the Constitution made the Supreme Court the ultimate judge.

A second illustration of Jefferson’s efforts to meddle with the judiciary and politicize its normally independent functions can be seen in the trial of Aaron Burr, his former Vice-President, for treason against the United States. Few acts in the public career of Thomas Jefferson have so blackened his reputation and revealed his “darker side” than his relentless persecution of Aaron Burr, and his obsession to see him convicted and hanged for treason. Few acts of any President have so adversely reflected on the office of the presidency as did Jefferson’s special message to Congress, on January 22, 1807 in which he named Burr as the prime mover in a conspiracy to sever the Union and attack Mexico. Well before Burr had been arrested and long before he had even been indicted or tried, Jefferson openly declared that his guilt was beyond question, and this on the flimsiest of hearsay evidence.

Reference to the Burr trial is relevant less to highlight the darker aspects of Jefferson’s career and personality than to illustrate how his personal antagonisms could be turned into political and even judicial policies that threatened the independence of the judiciary, and which jeopardized the growing awareness of a distinct rule of law. Equally important, it emphasizes the masterful way in which Marshall dealt with this head-on confrontation with a President who sought to use his executive power to further vengeful ends against those he considered his political enemies. Burr was tried at Richmond before John Marshall in his capacity as circuit judge. Although George Hay, the United States attorney at Richmond, was nominally in charge of the prosecution, he was directed and guided personally by the President in his conduct of the trial. The full array of evidence, from his initial declaration of Burr’s guilt to the collection of blatantly false affidavits, makes unpleasant reading (continued on next page)
Jefferson (continued from page nine)

reading for those with preconceived notions about Jefferson’s self-proclaimed moral virtues. On the other hand, the printed record of the trial, as it appears in the Annals of Congress, occupying some 400 pages of small print, illustrates how adroitly, and in the most painstaking and lawyer-like way, Marshall dealt with every motion, made for or against the accused. In the end, Burr was acquitted of the treason charge, and Jefferson was outraged to the point of asking Congress to impeach John Marshall.

What conclusions can be fairly drawn from these brief episodes in our history that may have relevance today? In spite of opposing onslaughts, Chief Justice Marshall was able to keep core segments of the constitutional process free from the intrusion of politics. Although the Constitution was adopted by the people and hence reflected the popular will, it embodies as Marshall once said, “certain great principles of justice universally acknowledged.” The vital clue to the survival and success of the Marshall Court lies in its dedication to the ideas of the supremacy of law distinct from the self-interest or unpredictable actions of the executive and the legislature. More than one distinguished constitutional lawyer has observed that the legacy of that fundamental era in American constitutional development must first be comprehended if it is to be possessed, and not lost or destroyed.

Annual Meeting (continued from page one)

country and abroad as a Fulbright Fellow, a Rockefeller Foundation Scholar, and most recently, in connection with the National Endowment for the Humanities Summer Research and Teaching Program. Professor Abraham’s topic for this year’s Annual Lecture will be “Some Historical Reflections on the Theory and Practice of the Supreme Court Appointment Process.”

The annual meeting of the general membership will follow the trustees’ meeting, and will be held in the Supreme Court Chamber at 6:30 pm. A reception will be held in the East and West Conference Rooms beginning shortly after the meeting is adjourned, with dinner to be served in the Great Hall promptly at 8:00 pm.

Within the next several weeks, every member will receive an invitation and program providing additional details. Members are advised that, due to the limitations of the Great Hall, reservations for the reception and dinner will once again be limited. Beginning on Monday, March 29, reservations will be confirmed as payment is received, on a first-come, first-served basis, with reservations for no more than four persons accepted per member. For additional information concerning the Annual Meeting/Dinner, please contact the Society’s Executive Offices, 1511 K Street, N.W., Suite 612, Washington, D.C. 20005, or telephone (202) 347-9888.