Society Holds Seventh Annual Meeting

The Supreme Court Historical Society held its seventh annual meeting and dinner at the Supreme Court on April 30. The Society’s annual lecture was presented at 2:00 P.M. to an audience of over a hundred members and guests gathered in the restored Supreme Court chamber in the Capitol by Professor Henry J. Abraham, James Hart Professor of Government and Foreign Affairs at the University of Virginia. A graduate of Kenyon College, Columbia University, and the University of Pennsylvania, Dr. Abraham was introduced by Chief Judge Howard T. Markey, chairman of the 1982 annual meeting committee. The title of Professor Abraham’s address was “Some Historical Reflections on the Theory and Practice of the Supreme Court Appointment Process,” a topic on which the speaker is regarded as a leading authority.

Following the lecture, a special tour of the Court was conducted for Society members and their guests by Betsy Strawderman, tour director at the Court.

Shortly after 6:00 P.M. the Society’s Chairman, Fred M. Vinson, Jr., convened the annual meeting of the Society’s board of trustees. Among other business, Melvin M. Payne was elected to a three-year term as a vice president of the Society, and Elizabeth S. Black and Sol Linowitz were elected to one-year terms on the executive committee.

Immediately following the close of the trustee’s meeting, the seventh annual meeting of the Society’s membership was called to order in the Supreme Court chamber by the Society’s President, Linwood Holton. In his report to the membership, President Holton commented upon several of the Society’s accomplishments during the past year. He reported that by action of the Society’s executive committee, a small three-story town house, built in the 1880’s and located across from the Court on Second Street, had been purchased for eventual use as the Society’s permanent headquarters. He also reported that the Society had sponsored a new edition of the book, *Equal Justice Under Law*, which was being published in cooperation with the National Geographic Society. He expressed his hope that this important introductory study of the Court’s history could be made available to a wider audience through a public placement program directed toward libraries and schools throughout the country. The President also announced that contracts had been signed with the Columbia University Press for publication of Volume I of the Documentary History Series, and with the Kraus-Thomson Organization for publication of the two-volume Opinion Index. President Holton concluded his remarks by observing that “with a stable staff, improving financial conditions, and the continuing support of the membership,” the Society was ending its seventh year in better shape than ever before.

Following the President’s report, Virginia Warren Daly, the Society’s secretary and chairman of the 1982 nominating committee, presented her committee’s report. The following were elected to three-year terms on the Society’s board of trustees: Ralph E. Becker, Griffin B. Bell, William T. Coleman, Jr., William T. Gossett, Erwin N. Griswold, J. Roderick Heller, III, Joseph H. Hensage, Bruce Kiernan, Wade McCree, Dwight Opperman, E. Barrett Prettyman, Jr., Merlo J. Pusey, Fred Schwengel and Whitney North Seymour.

*continued on page five*
Supreme Court Appointments Subject of Annual Lecture

What are the criteria for becoming a justice of the Supreme Court of the United States? Are political ideology, religious affiliation, and geographic origin the primary considerations which shape presidential selection and thereby determine the fate of nominees in Senate confirmation hearings? In an address to the Society's membership at this year's annual lecture, Dr. Henry J. Abraham examined these and other fundamental questions pertaining to the Supreme Court appointment process. Some of Professor Abraham's observations and conclusions are summarized below. (Printed copies of his lecture will be distributed to the membership as soon as they become available.)

According to Dr. Abraham, James Hart Professor of Government and Foreign Affairs at the University of Virginia, former members of the Constitution assumed and intended that a threshold of merit should be met by any prospective appointee to the Court. Yet, the founding fathers may not have foreseen the development of political parties, nor the political threat partisan politics might present for the future of the judicial appointment process. Professor Abraham noted that since the Court's founding in 1789, political considerations have played a significant role in the Senate's rejection of 26 presidential nominees to the Court. Nevertheless, partisan considerations have generally yielded to merit as the determining criterion for appointment. Abraham asserted that the necessity of geographical representation embodied in the Congress has had little impact on the appointment and confirmation of justices, noting that only 31 states have been represented on the Court, and that four states—New York, Ohio, Massachusetts and Virginia—have supplied 39 of the 102 justices appointed to date. Commenting further on geographical origin as a consideration for appointment, Abraham said:

The latter fact of political life prompted Republican Senator William Long of North Dakota, then a member of the Senate's Committee on the Judiciary, to commence in 1933 a campaign of opposition to any and all presidential nominees to the Court until his home state, which had been so honored, would receive a Supreme Court nomination. He went to his grave in 1939 with his wish still unrealized.

Abraham pointed out, however, that equity of other representational factors such as race, religion, gender, and perhaps even age, have become of increasing concern in the appointment process.

Whatever the Framers' unspoken intentions may have been, the notion of entitlement to a "peer model" has become all but pervasive in judicial staffing today.

Nevertheless, partisan political considerations have probably been the single most influential consideration shaping presidential selection in federal judicial appointments. Washington, for example, appointed all Federalists displaying a perfect record of party loyalty. Woodrow Wilson—"the only President yet elected to have earned a Ph.D."—followed Washington as a close second with 96.8 percent of his nominations being fellow Democrats. Jimmy Carter ran a close third with 97.8 percent of his appointments going to his own party. Least guilty of selecting nominees exclusively from his own party, was Republican President Gerald Ford, whose partisan appointments number only 81.2 percent of his total, and William Howard Taft, who appointed fellow Republicans in only 82.7 percent of his opportunities and who crossed party lines on three of his six appointments to the Supreme Court.

Professor Abraham asserted that while politics, religion, race, gender and age have all been considerations which have influenced the judicial appointment process, these considerations cannot be traced to the intentions or expectations of the founding fathers. Further, if the concept of "representativeness" can be legitimately applied to the judicial selection process, it should be "wholly dependent upon the demonstrable presence of merit at the threshold." Professor Abraham proposed six standards by which a candidate's qualifications for judicial appointment might be judged: (1) demonstrated judicial ability; (2) professional expertise and competence; (3) absolute personal as well as professional integrity; (4) an able, agile, lucid mind; and (5) approach continued on page eight.
Fortas (continued from page three)

veil's "trustee," Arnold had headed the Justice De-
partment's Antitrust Division. Together with Paul Porter, 
Arnold and Fortas founded what quickly became one of 
Washington's leading law firms. Arnold won the Texas 
senatorial primary in 1948 by less than 150 votes. 
Opponents challenged the election, and a predisposed 
judge took John's name off the ballot. Acting on behal-
of his new client, Fortas won a stay from Supreme Court 
Justice Hugo Black, restoring Johnson's name to the ballot. 
Johnson subsequently won election by a wide 
margin. Fortas' successful representation provided the basis 
for an enduring friendship, and in time, Fortas became one of 
Johnson's most trusted advisors. President Johnson later 
described his lawyer-friend as one of the "wisest, ablest 
and fairest opponents challenged the election, and persuaded a federal 
judge to take Johnson's name off the ballot. Acting on behalf 
of many of the country's corporate giants, Fortas himself 
joined the Court. His well-crafted and articulate opinions soon joined those of his 
colleagues, broadening the constitutional rights of criminal 
defendants, and extending due process guarantees to juve- 
niles. In one case, Fortas insisted that "a murder trial is not a 
sparring match," and in another that "under our Constitu-
tion, the condition of being a boy does not justify a hangaroo

court." Fortas was uncomfortable with the mechanistic appli-
ation and extension of theoretical doctrines, standing in one 
case that he could not agree with "the implication that the tall 
slocker's most serious injury." In an important slander case, Fortas 
achieved a result for realistic limits and defended the right of 
public officials to be protected from "shotgun attacks in 
which you are considered to have no rights." 
In 1963, Fortas joined the majority in Griswold v. Con-
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prohibiting the use of contraceptives. He provided support 
for an enduring friendship, and in time, Fortas became one of 
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Society Acquires Early Accounts of Chase Court

Editor's Introductory Note

The Society recently acquired several excerpts from mid-19th century editions of Harper's Weekly, two of which are printed below. The magazine, a prominent periodical which appealed to the educated middle-class and elite of American society, provides an interesting perspective of the Court in the post-Civil War period. The first article, reprinted below, is a general account of the Court which appeared in Harper's February 1, 1868, edition. Typical of journalism in the period, the authors rely heavily upon editorial license in relating their story. The group picture of the Justices, for example, is described as depicting the members of the high bench in one of the Court's conference rooms. More probably, the architectural splendor in the background is the product of artistic imagination, for aside from the elegance of the courtroom's arched ceiling, the additional space allotted to the Court in the Capitol building was rather modest.

In the era immediately preceding the advent of professional press bureaus and wire services, articles like the second one, also printed below, provided the only form of reporting on the Court. The account of the Court's proceedings which appeared in Harper's April 27, 1867 issue was probably atypical of the magazine's coverage of the Court. Apart from the passing excitement stirred by the Court's rulings on paper currency and reconstruction issues in the postwar period, the Court's day to day business, from an editor's viewpoint, did little to stimulate circulation. A comment made by Chief Justice Earl Warren in his Memoirs concerning the Court's relationship with the press suggests that little has changed in this regard over the years: "The media [do] not consider the Court's work newsworthy until it makes a decision which stirs emotion on the part of great numbers of people on the losing side."

April 27, 1867
UNITED STATES SUPREME COURT ROOM

The persons who were attendant in the room of the United States Supreme Court at Washington on April 5 were witnesses to one of the most significant and remarkable scenes which ever occurred in any hall of justice. WILLIAM L. SHARKEY and ROBERT J. WALKER, as counsel for the people of the State of Mississippi, rose in their places and asked leave to file an injunction restraining the President and military commanders from enforcing the Reconstruction Act on the ground of its unconstitutionality. For the first time in the history of any nation, the legal representatives of the participants in an organized rebellion, defeated in the field, were permitted to appear in court, not to defend their clients on trial, but to arraign and deny the authority of the law-making power, and plead anew the issues of the cause already decided by the sword. After accepting the terms of surrender they proposed in the Supreme Court to test the very right admitted by their surrender. No greater effrontery on the part of insurgents and rebels against legal authority has ever been witnessed, and no instance of such licentiousness on the part of any other government can be quoted as this, in which the highest tribunal in the country patiently sits to hear arguments which, if admitted, would declare the war for the Union to have been unjust and oppressive instead of a justifiable effort to preserve the peace of the Union, and maintain the republican form of government which the people enjoyed and demanded.

We have presented a picture of the Court-room on this occasion for several reasons. It marks an important period in the history of Southern Reconstruction, and will be interesting in that connection. The public are not very familiar with the room itself, and as it is the same in which the great statesmen of the country have for the past thirty or forty years framed the laws and interpreted the Constitution, its every feature as well as its every reminiscence will be of interest. The room now in use by the Supreme Court is the old Senate Chamber as it existed prior to the remodeling of the Capitol. It has been somewhat improved for the purposes of the Court by alterations lately made. Our engraving will give the reader an idea of the appearance of the apartment and the officials.

February 1, 1868
THE JUSTICES OF THE UNITED STATES COURT

As we write this article Congress is engaged in debating a bill further regulating the jurisdiction of the Supreme Court of the nation by declaring what shall constitute a quorum of the Justices of the Supreme Court; doubtless before it shall reach the eyes of war readers that body, the highest judicial tribunal in the land, will be invested with the new power which this bill contemplates giving it. In view of this fact, and the additional importance given to the Chief Justice and his assistants, a great deal of interest has been manifested to know more of them; and we therefore give on other pages of this issue of the Weekly accurate portraits of MR. CHASE and the Assistant Justices. Our engraving is taken from an imperial photograph recently published at Washington by Mr. ALEXANDER GARDNER. It represents the members of the court attired in the official robes worn by them when upon the bench, but seated in their private room or consultation-chamber, not in the hall of the Supreme Court.

The sessions of the court for hearing arguments and deciding cases are held always at Washington, commencing on the first Monday of December and continuing through the winter, a greater or less time according to the amount of business before it. During the spring, summer, and fall, the judges are largely occupied in holding circuit courts for the trial of causes, each one of them having a circuit composed of various States assigned to him.
Annual Lecture (continued from page two)

priate professional educational background or training; and (6) the ability to communicate clearly, both orally and in writing, especially the latter.”

In support of his argument that proven merit was the only criterion cited by the founders, and that merit should remain the primary consideration for appointment, Professor Abraham cited several examples of appointments based primarily on merit rather than representational considerations. Abraham’s first example was President Hoover’s nomination of Benjamin Cardozo, a case in which factors of religion, geography and political affiliation all threatened Cardozo’s appointment, but were ultimately of less significance than the candidate’s proven ability. Cardozo, a liberal Democrat, was neither politically nor ideologically associated with Hoover, a conservative Republican. Moreover, with Justice Brandeis already on the bench, there was little to be gained politically by appointing another Jewish justice. Finally, and perhaps most damaging, Cardozo came from New York, a state already represented by Justices Stone and Hughes, both of whom had been appointed by Hoover. But as Professor Abraham noted, Cardozo was so highly regarded as one of the nation’s most distinguished jurists and legal scholars that support for his nomination crossed both party and ideological lines. Shortly before the President announced his candidate to replace retiring Justice Holmes, and after Justice Stone had volunteered to resign to make room for Cardozo, Hoover met with Senator William E. Borah of Idaho, a conservative Republican and Chairman of the Senate Foreign Relations Committee. Professor Abraham provided the following narrative account of what transpired:

In an often-told dramatic confrontation between two proud men, the President, after discussing the vacancy generally, suddenly handed Borah a list on which he ranked those individuals he was considering for the nomination in descending order of preference. The name at the bottom was that of Benjamin N. Cardozo. Borah glanced at it and replied: “Your list is all right, but you handed it to me upside down.” Hoover protested at first, there was the geographical question to be considered and second, he had to take “religious or sectarian repercussions” into account. Senator Borah sharply retorted that “Cardozo belongs as much to Idaho as to New York” and that “geography should no more bar the judge than the presence of two Virginians—John Blair and Bushrod Washington—should have kept President Adams from naming John Marshall to be Chief Justice.” And, he added sternly, “anyone who raises the question of race (sic) is unfit to advise you concerning so important a matter.”

Hoover could ill afford to ignore such sound and insistent advice, and on February 15, 1932 he sent Benjamin N. Cardozo’s name to the Senate. Few appointments have ever been so unanimously endorsed, and Cardozo’s service proved beyond any doubt that the enthusiasm over his appointment had been entirely warranted.

Professor Abraham cited three other justices who were appointed to the high bench ostensibly because of representational considerations but who would not have received confirmation had they been unable to meet the threshold of merit requirement. Chief Justice Taney was appointed to the Court in reward for his support of President Jackson’s political views and his loyal service in Jackson’s administration. But Taney was also one of the great legal minds of his day and a leader of the Maryland Bar. As Chief Justice, he performed his duties with distinction, and is rightly regarded as one of the Court’s greatest justices.

Justice Wiley B. Rutledge, the next appointment considered by Professor Abraham, was nominated to help balance the Court geographically by selecting someone from west of the Mississippi. But, again, Abraham pointed out that Rutledge was confirmed because he was clearly qualified to “represent” the West. Rutledge, the only Roosevelt appointee to have previous experience in the federal judiciary, served four years on the U.S. Court of Appeals for the District of Columbia. A former law professor at the University of Colorado, and law school Dean at Washington University in St. Louis, and the University of Iowa, Rutledge possessed strong academic credentials. Though his tenure on the Court lasted just over six years, Justice Rutledge will be remembered for his capable service, the geographic considerations for his appointment far overshadowed by his distinguished record.

In a final example, Professor Abraham recounted President Harding’s nomination of George Sutherland in 1922. Sutherland’s appointment was ostensibly motivated by his political and ideological affinity with President Harding, and with Chief Justice Taft who may have suggested the appointment. A close personal and political friend of President Harding in the Senate, Sutherland was highly regarded by his fellow legislators; his nomination was confirmed by the Senate within hours of his nomination. Abraham characterized Justice Sutherland as “a leading expert in constitutional law and an active member of the Utah and U.S. Supreme Court Bars.” Sutherland had served in the Utah Senate and the U.S. House of Representatives prior to serving in the U.S. Senate. Once on the Court, Justice Sutherland distinguished himself as a lucid and articulate spokesman for the Court’s conservative faction.

With the Sutherland example, Professor Abraham brought his lecture to a close. He referred to the “rich mine of giants that have served so remarkably well on the Court” during its near two centuries of service to the nation. He ended his remarks by stating that the examples he had chosen—and others equally compelling—provided “proof positive of promise fulfilled and achievements rendered,” and that a commitment to merit first and other considerations second had fulfilled the founders’ prophecy of a “bench happily filled.”