Membership Committee Appoints Twenty-Eight Additional State Chairmen

According to its Chairman, Justin A. Stanley, the Membership Committee has appointed twenty-eight new state membership chairmen to assist in this year’s membership drive. This brings the total number of state chairmen to forty-eight, including those listed in the last issue of the Quarterly.

Mr. Stanley, and fellow committee members Griffin B. Bell and J. Roderick Heller, III, are recruiting volunteers to serve as state membership chairmen as part of the most significant membership drive undertaken since the Society’s inception. The goal of this campaign is to increase the Society’s membership from its current 2,500 to approximately 4,000 members. Additional announcements concerning the state chairmen will be published in the Quarterly as they are appointed. The most recent appointees are as follows:

Alabama
N. Lee Cooper, Esq.
Maynard, Cooper, Frierson & Gale
Watts Building, 12th Floor
Third Avenue & Twentieth Street
Birmingham, AL 35203

Arizona (Tucson)
Thomas Chandler, Esq.
Chandler, Tuller, Udall & Redhair
1700 Arizona Bank Plaza
33 North Stone Avenue
Tuscon, AZ 85701

Arizona (Phoenix)
Calvin H. Udall, Esq.
Fennemore, Craig, Von Ammon, Udall & Powers
Suite 1700
100 West Washington Street
Phoenix, AZ 85003

California (Los Angeles)
Stuart L. Kadison, Esq.
Kadison, Pfaelzer, Woodard, Quinn & Rossi
707 Wilshire Boulevard
Los Angeles, CA 90017


California
Burnham Enersen, Esq.
McCutchen, Doyle, Brown & Enersen
40 Arguello Boulevard
San Francisco, CA 94118

Connecticut
James R. Greenfield, Esq.
Greenfield, Krick & Jacobs
205 Church Street
P.O. Box 1952
New Haven, CT 06509

Annual Meeting Notice

Invitations to the Society’s tenth annual meeting, on May 13, 1985, will be mailed to members in the first week of April. The invitations will include a schedule of events and a reservation card for the evening’s annual reception and dinner. Members who wish to attend those two events should return their reservation cards and payment promptly to assure acceptance.

No reservation or advance notice is required for events other than the annual reception and dinner. However, due to the limited seating capacity in the Capitol’s Restored Supreme Court Chamber, members who wish to attend the annual lecture held in that room at 2:30 p.m. are urged to arrive early to assure seating.

This year’s annual lecture will be delivered by Judge Antonin Scalia of the U.S. Court of Appeals for the D.C. Circuit. Judge Scalia is a graduate of the Harvard Law School and a former Assistant Attorney General. Prior to his judicial appointment he served on the faculties of several of the nation’s prominent law schools, including the University of Virginia, the University of Chicago, Harvard, and Stanford.

Following the annual lecture, members are invited to visit the Society’s headquarters building at 3:30 p.m. where refreshments will be served. The membership meeting will be held in the courtroom of the Supreme Court building at 6:30 p.m. following the meeting of the Board of Trustees.
Charles Pelham Curtis, and proceeded to earn himself a place of respect and standing in the bar and in Boston society. He soon became famous for his powerful, well-researched legal arguments, and, as early as 1836, Story remarked on his “learning, research and ability” and stated that he was “as thorough and exact” as any he had ever heard. Indeed, it was said that his careful, exhaustive, logical arguments seemed to get to the very heart of a case, arguing only the pertinent laws and issues, and covering them comprehensively. One of his contemporaries commented that:

his clearness of thought and precision of statement were the delight not only of the bench and bar, but even of the educated layman who could enter into the room for the mere pleasure of listening to him as he unfolded an argument.

Much of Curtis’ power lay in his ability to determine what was germane and to cover it fully, while refusing to address the mere pleasure of listening to him as he unfolded an argument.

Benjamin Robbins Curtis: The Yankee Who Stepped Down from Olympus

When Justice Levi Woodbury of New Hampshire died in 1851, President Millard Fillmore determined to replace him with someone of the Whig party to counteract the preponderance of southern Democrats on the high bench. He wrote to Daniel Webster, his Secretary of State, setting out the qualifications he was seeking:

(I am) desirous of obtaining as long a lease and as much moral and judicial power as possible from this appointee. I would therefore like to combine a vigorous constitution with high moral and intellectual qualifications, a good judicial mind, and such age as gives a prospect of long service.

After setting forth these requirements President Fillmore asked Webster for his opinion of “Mr. B. R. Curtis. Do what you say of him? is his age Constitution? Legal attainments? Does he fill the measure of my wishes?"

Benjamin Robbins Curtis fitted the measure of Fillmore’s requirements in every way. Born in 1809 in Watertown, Massachusetts, Curtis, in 1842, was 42 years old and the epitome of a successful Boston lawyer. Like many prominent New Englanders, Curtis was something of a self-made man. His father, Benjamin Curtis, III, a ship’s captain, was lost on a voyage to Chile when Curtis was only five years old, leaving Benjamin’s mother, Lois Curtis, to care for him and his brother. He accomplished this by starting a dry goods business and acquiring a circulating library. While the dry goods store probably supplied the majority of the family’s income, it was from the library that Benjamin derived most of his intellectual sustenance, devouring books as rapidly as they became available. Not surprisingly, Curtis proved to be an apt and dedicated student. He studied with several outstanding teachers, including John Appleton, who later became the chief justice of Maine, and qualified for admission to Harvard. He entered Harvard in 1825, his tuition paid by his faithful maternal uncle. Harvard was a boarding house for undergraduate students in Cambridge. Graduating in 1829 with the highest honors, Curtis decided to continue his studies. Perhaps due to the influence of his uncle, Harvard Professor George Ticknor, Curtis enrolled in Harvard Law School which was under the direction of Joseph Story. In addition to his judicial responsibility, Justice Story was also serving as the Dane Professor of Law at Harvard Law School. Under his supervision the Law School became an effective, professional school. The students held moot courts, studied, and argued the laws and issues from a practical and realistic viewpoint. Professor Story even had the students render decisions on cases that were currently pending before the Supreme Court.

Curtis took a break from law school to prepare himself financially for marriage by taking over the law practice of a lawyer in Northfield, Massachusetts. There, he later reported, he was “obliged to rely upon my own investigations—often my own inventions—to help me through difficulties and novelities.”

Returning to Harvard briefly, Curtis finished his studies and was admitted to the bar in August 1832.

In 1834 Curtis joined the law firm of a distant cousin, Charles M. Thompson, Esq., in South Dakota.

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Curtis (continued from page three)

Pay little attention to the good side of the case at first, that side will take care of itself, but be sure you look well into the bad side — not forgetting to explore the strongest form of proof, and knowing that an opportunity to prove even what is false may be used by your adversary, unless you have certain means to refute it. Never try to discover what has not been proven, and supply therefore the missing link in the adversary's chain of evidence.

Never forget that an innocent person, with enemies, may be in a more dangerous position than a guilty one with friends and influence.

The pulse of the people beat nearest together through the columns of the press, and a few wicked papers may tell a jury much in half accounts of an occurrence that will shake the whole story of it unwares.

Curtis was also careful to limit himself in his practice so that he never felt he was over-extended and unable to give each case the attention it deserved. He once criticized a contemporary saying, "He has always had too much business to be a good lawyer."

Although Curtis became adept in virtually every type of law, he specialized in questions of commercial law, maritime insurance law, and bankruptcy proceedings, and he argued so many patent cases that he became known as one of the first patent attorneys in the United States. His reputation as an able advocate grew as he argued over one hundred cases before the Supreme Judicial Court of Massachusetts, and as many as many before the First Circuit Court of the United States in Boston. As testament to his reputation and standing, Curtis was appointed at the age of thirty-six as a fellow of the Harvard Corporation to replace the late Justice Story; indeed an indication of his professional and social standing in the Boston community.

Reverdy Johnson, a distinguished advocate himself, praised Curtis for his professional techniques, stating that his arguments at the bar possessed . . . sterling merit. The statement of his case, and the points which it involved were always transparently perspicuous, and when his premises were conceded or established, his conclusion was necessarily clear. His analytical, and logical powers were remarkable. In these respects, speaking from the knowledge of the great men whom I have heard during a very long professional life, I think he was never surpassed . . . He was always calm, dignified, and impressive, and, therefore, persuasive. No lawyer who heard him begin an argument ever failed to remain until he had concluded.

Contemporary accounts tell us that this legal genius was of rather average appearance, being of average height, somewhat stocky in build, with a pleasant, but basically unremarkable face enlivened by expressive eyes. His voice was well modulated adding immensely to his calm, reasonable, dispassionate presentation in court. He was by nature, sedate and sober, and while he was generous and warm with his family and close friends, he maintained a certain detachment and distance from others. He was an active member of the Boston community, supporting its civic institutions and contributing generously to charitable institutions from his growing income.

Curtis married three times, producing twelve children. His first wife, Eliza Maria Woodward, was his cousin. They were married for eleven years and had five children before she died of tuberculosis. Eliza's death was a serious blow to Curtis. About eighteen months later, he married Ann Wroe Curtis, who was a distant cousin and the daughter of his law partner. They had three children and were married fourteen years before she died. A year after Ann's death, Curtis married Malvieve Allen from Pittsfield, Massachusetts, with whom he had four children. His family and friends were of great importance to Curtis and he found within his family and social circle:

CONTINUED ON NEXT PAGE
The Anti-Federalists: Our Other Founding Fathers

Dr. Bradford Wilson, California State University, San Bernardino, Cal.*

The United States is near the bicentenary of the drafting and ratification of the first federal government under that Constitution. A thirst for knowledge of the words and deeds of America's founding statesmen is appearing in a significant part of the population, one of the greatest opportunities for civic education ever to arise in the nation's history is seized upon. The names of Washington, Madison, Hamilton, and Wilson will be preserved for posterity, and the thoughts and actions of the statesmen of that period will be the objects of many cerebrations and celebrations. For it is that remarkable generation of pro-Constitutionists, or Federalists, that we should shoulder the lion's share of responsibility, and accompanying glory, for the constitutional design of the nation, with its far-reaching consequences.

To most, that design was then, and remains still, an unmitigated blessing for the American people. Simple truth, rather than pious hyperbole, is perceived in testimonials such as that offered in 1823 by William Johnson, Jefferson's first appointee to the Supreme Court:

In the Constitution of the United States, the most wonderful instrument drawn by the hand of man, there is a comprehensiveness and precision that is unparalleled; and I can truly say that, after a lifetime in studying it, I daily find it to be an excellent new selection.

A shadow of skepticism, however, has followed the Constitution in its historical journey. The original skeptic, or "men of little faith," had doubts about the wisdom of those who opposed the adoption of the Constitution in the ratification struggle of 1787-1788. The pro-ratification party referred to them as "Anti-Federalists," a name which created such confusion that it is often used today. In its place, the Anti-Federalists had the purpose of government is to regulate and thereby the protection of individual rights and that the best instrument for this purpose is some form of limited, republican government. But, as we all know, differences within the family are nonetheless real. What, then, were the Anti-Federalists for that inclined them against the Constitution?

Mr. Wilson, standing for Federalism, understood as the primary and equality of the states, as opposed to what they referred to as the consolidating nature of the Constitution, which they argued would subdivide the states to the national government as to in time, perhaps, destroy them. Mr. Storing points out that in, as in many other respects, the Anti-Federalists were the conservatives in the debate, defending the status quo embodied in the structural principles of the Articles of Confederation. Indeed, the Anti-Federalists accused the Federalists of abandoning the principles of the Revolution as stated in the Declaration of Independence when they abandoned the doctrine of pure federalism.

The gravamen of this charge becomes fully intelligible when it is considered in light of the Anti-Federalist view that there was an inherent connection between the states and the preservation of the individual liberties that had been granted by the states. Why, then, should the government be instituted among men? According to the republican tradition, the Anti-Federalists argued that free republican government could only succeed where there was a relatively small country with a homogeneous population. This argument for keeping primary governing powers in the small republic, i.e., the small state, rested on three considerations. First, a small republic allows for a voluntary attachment of the people to their government and a voluntary obedience to the laws. For in a small republic the people can have a familiar knowledge of those who govern them, and are amenable to the persuasion that accompanies respect. The alternative is government by force, the rigid rule of a large and varied territory through military force, or, as Mr. Storing suggests, through bureaucracy. Second, it is only in a small republic that a genuine responsibility of the government to the people can be achieved. Short terms of office, frequent rotation, and a numerous representation are crucial to ensuring a likeness between the representative body and the citizenry at large, upon which a responsive and dependant representation body ultimately rests. We have seen and its government as proposed by the Constitution would inevitably be unrepresentative and aristocratic. Finally, only a small republic can foster the kind of citizen who is capable of maintaining republican institutions. Self-government depends on civic virtue, understood as a devotion to one’s fellow citizens and a deep attachment to one’s country, together with a willingness to subordinate one’s private interest to the public good when the two conflict. Such a citizenry presupposes homogeneity. In the words of Brutan:

In a republic, the manners, sentiments, and tastes of the people should be similar. If this is true, there will be a constant clash of opinions; and the representatives of one part will be continually striving against those of the other. They can only succeed where the small country is inhabited by a homogeneous population. This argument for keeping primary governing powers in the small republic, i.e., the small state, rested on three considerations. First, a small republic allows for a voluntary attachment of the people to their government and a voluntary obedience to the laws. For in a small republic the people can have a familiar knowledge of those who govern them, and are amenable to the persuasion that accompanies respect. The alternative is government by force, the rigid rule of a large and varied territory through military force, or, as Mr. Storing suggests, through bureaucracy. Second, it is only in a small republic that a genuine responsibility of the government to the people can be achieved. Short terms of office, frequent rotation, and a numerous representation are crucial to ensuring a likeness between the representative body and the citizenry at large, upon which a responsive and dependant representation body ultimately rests. We have seen and its government as proposed by the Constitution would inevitably be unrepresentative and aristocratic. Finally, only a small republic can foster the kind of citizen who is capable of maintaining republican institutions. Self-government depends on civic virtue, understood as a devotion to one’s fellow citizens and a deep attachment to one’s country, together with a willingness to subordinate one’s private interest to the public good when the two conflict. Such a citizenry presupposes homogeneity. In the words of Brutan:

Held in Philadelphia's Independence Hall, the Constitutional Convention of 1787 drew into sharp focus the contrasting Federalist and Anti-Federalist positions on the extent of power to be entrusted to the new Federal government. The Federalists emerged victorious from the debate, but later conceded the necessity of adding some individual protections in the Bill of Rights which took effect in 1791.

Implicit in this Anti-Federalist view of republican citizenship is a deep concern with civic education. As Mr. Storing writes, "the small republic was seen as a school of citizenship as much as a scheme of government." Bills of rights were cherished for their declarative functions. And religious conviction was regarded as a necessary support of republican government. "The Anti-Federalists saw no inconsistency with liberty of conscience and the public support of the religious, and generally Protestant, community as the basis of public and private morality." The consolidated republic under the Constitution, with its multiplicity of religious sects, would substitute selfish interests held together by force for the moral foundations of the self-governing community.

When it came to the question of union, the Anti-Federalists were unequivocally in favor of it. Most admitted that the Articles of Confederation were in need of some revision so as to make the federal government more efficient at providing defense against foreign enemies, promoting American commerce, and maintaining order among the states. But they insisted that this be done without undermining the primacy of the states. They were less sanguine than were the Federalists that America’s ill could be solved through constitutional reform. What was most in need of reform was the American spirit, which no amount of federal tinkering could accomplish.

In any event, the Anti-Federalists maintained, contrary to many of their Federalist opponents, that the central question of the proposed national government was not the organization of the powers that government, as important as that issue was, rather, it was the preservation of the powers themselves. Power should only be granted cautiously. The broad grants of power in the Constitution, taken together with the supremacy clause and the necessary and proper clause, *continued on next page*
Anti-Federalists (continued from page seven)

would create a government of virtually unlimited powers. The lack of sufficient democratic accountability in the representative body, especially the Senate, and the complex character of the institutional scheme, which waters down responsibility, further deprive the government of proper limits. The states themselves would be incapable of erecting any meaningful constitutional barriers to the excessive use of federal power, for, unlike government under the Articles of Confederation, there would be no participation of the states in the operation of the new government. The absence of explicit reservations in behalf of states’ rights exacerbated the danger.

The major constitutional legacy of the Anti-Federalists is, of course, the Bill of Rights. In their view, unlimited power (particularly in the area of taxation) and inadequate representation in the legislature were leading features of the federal government under consideration. And, in the words of An Old Whig:

who shall judge for the legislature what is necessary and proper?... No one; unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgements.

It must be said, however, that the Anti-Federalists were typically somewhat pessimistic about the practical utility of this kind of “parchment barrier” against a government bent on usurpation. As Mr. Storing writes, “The fundamental case for a bill of rights is that it can be a prime agency of that political and moral education of the people on which free republican government depends.” A bill of rights serves as a reminder of the ends of republican government and, if rightly understood, will strengthen the people’s attachment to it.

Mr. Storing concludes that the Anti-Federalists lost the ratification debate because they had the weaker argument. They were in fact guilty, in Hamilton’s (Pulibius’) words, of “attempt[ing] to reconcile contradictions,” instead of “firmly embracing” a rational alternative. They wanted both union and state sovereignty, the great republic and the small virtuous community, a commercial society and a simple, moderate, sturdy citizenry. But, as Mr. Storing also suggests, the Anti-Federalists’ honest recognition of the problematic character of this great constitutional experiment is part of their strength and even glory.

It is sufficient to point to the subsequent adoption of a Bill of Rights to establish the justice of ranking the Anti-Federalists among the Founding Fathers. There is a deeper reason for such consideration, however. While the adoption of the Constitution settled many questions, it did not settle in all respects the shape the American polity would take. As Mr. Storing writes:

[i]...the foundation of the American polity was laid by the Federalists, the Anti-Federalist reservations echo through American history; and it is in the dialogue, not merely in the Federalist victory, that the country’s principles are to be discovered.

[In a future article, we will examine the Anti-Federalist views of the federal judiciary and its powers as provided for in the proposed Constitution.]

Society Activities

Admission to the Supreme Court Bar

Arrangements have been made with the Clerk of the Supreme Court for a mass admission of members of the Society who desire, and are eligible, to be admitted to the Supreme Court Bar on the day of the Annual Meeting, Monday, May 13, 1985, at the opening of Court at 10:00 a.m. Members of the Society desiring to be admitted should advise the Society office without delay, in order to receive, and return to the Clerk, the necessary application form and admission fee.

Capital Gifts

Through the effective efforts of Justin Stanley of Chicago, the Society has received contributions from the Gossett Foundation, Judge Griffin Bell, J. Roderick Heller, III, John Shepherd, Frank C. Jones, and Justin Stanley himself for the purchase of a two-terminal IBM PCXT computer system with printers and appropriate software programs. The system, which is now in place, will be used to support membership record-keeping and other Society functions.

Acquisitions

The Society wishes to thank Wilfred C. Varn, Esq. of Tallahassee, Florida for his recent gift of nine “galley opinions” of the Supreme Court from the 1913-1914 period. These galley opinions were distributed by the justice assigned to write the opinion to the other justices for their review, concurrence or dissent. Several of the opinions received by the Society from Mr. Varn contain the handwritten endorsements and comments of Justice Oliver Wendell Holmes, Jr.

Publications

The Society’s publication, Index to Opinions, the first available resource identifying by each justice all of the Supreme Court’s opinions over the last two centuries, has been reviewed by various publications and termed “essential” for those engaged in serious research on the Court.

The documentary history project, “The First Decade of The Supreme Court, 1789-1800,” jointly sponsored by the Supreme Court and the Society with the support of the National Historic Publications and Records Commission, is moving toward the publication of Volume I, Parts 1 and 2, dealing with the first appointments to the Court and the official records of the Court, etc... Page proofs have been received from the publisher for final checking and it is expected that this long awaited volume will be available within the next few months to scholars and others interested in the early years of the Court.