The Investiture of Chief Justice Rehnquist and Associate Justice Scalia

Friday, September 26, 1986 marked the investiture of the sixteenth Chief Justice and also the 103rd member of the Supreme Court of the United States. In ceremonies at the White House, William Hubbs Rehnquist and Antonin Scalia took the constitutional oath prior to being sworn in as Chief Justice and Associate Justice of the Supreme Court respectively. With President Reagan looking on, retiring Chief Justice Warren E. Burger administered the oath to both candidates.

President Reagan, saying that “today we mark one of those moments of passage and renewal that has kept our republic alive and strong,” praised Chief Justice Rehnquist and Justice Scalia noting that they were “brilliant” jurists. The President also paid tribute to retiring Chief Justice Burger saying that his seventeen years in office were “a monument of integrity and of dedication to principle, and especially to the judiciary itself.” Chief Justice Burger noted that changes in the membership of the Court would not disrupt the routine of the Court and that as an institution the Court is committed “to continuity” and to the interpretation of the Constitution as a “living document.”

The constitutional oath taken by Chief Justice Rehnquist and Associate Justice Scalia at the White House is taken by all federal employees and is spelled out in the Constitution itself, hence its designation. In this oath, the nominee swears to “support and defend the Constitution of the United States against all enemies, foreign and domestic,” and to “bear true faith and allegiance to the same. . . .”

After taking his constitutional oath, Chief Justice Rehnquist

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Shortly after the investitures of Chief Justice Rehnquist and Associate Justice Scalia, the new Rehnquist Court posed for this informal photograph. Left to right are Associate Justices Sandra Day O’Connor, Lewis F. Powell, Jr., Thurgood Marshall, William J. Brennan, Jr., Chief Justice William H. Rehnquist, Associate Justices Byron R. White, Harry A. Blackmun, John Paul Stevens and Antonin Scalia.
expressed thanks to the President saying: "Mr. President, I am grateful beyond measure to you for affording me the opportunity to serve my country as Chief Justice of the United States. And I pray that God will grant me the patience, the wisdom and the fortitude to worthily follow in the footsteps of my illustrious predecessors in discharging the responsibilities of this office."

Justice Scalia thanked the President for appointing him saying, "I am very grateful and will do my best to live up to [your] confidence. . . . I have to thank my wife Maureen who's an extraordinary woman, and without whom I wouldn't be here, or if I were here, it wouldn't have been as much fun along the way. And I have to thank a lot of other people, going way back to teachers in Public School 13 in Queens." He remarked that he had "enormous personal regard for all current Justices," and that he looked "forward to working with them in our common enterprise for many years to come."

After the ceremony at the White House, the Justices took their judicial oaths at a ceremony in the Supreme Court Chamber. This ceremony set a precedent in the history of the Court, as it marks the first time that a Chief Justice and an Associate Justice took their judicial oaths in the same place, at the same occasion.

At 2 PM on the afternoon of September 26, 1986, with Chief Justice Warren E. Burger presiding over a special session of Court, William H. Rehnquist took the judicial oath requisite to enter upon his duties as Chief Justice of the United States. Chief Justice Burger, sitting in the center chair for the last time, opened the special session of Court. Attorney General Edwin Meese 3rd delivered to the Clerk of the Court, Joseph E Spaniel, Jr., the parchment commissions signed by President Reagan calling for the appointment of William H. Rehnquist as Chief Justice of the United States, and Antonin Scalia as an Associate Justice. Mr. Scalia read the commissions after which Chief Justice Burger called Justice Rehnquist from his usual place at the bench to come to the center chair and take the judicial oath.

The judicial oath, which is set out in an act of Congress, calls the appointee to: ... "solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me . . . according to the best of my abilities and understanding. . . ." All federal judges take this oath prior to assuming their responsibilities on the bench.

During this portion of the ceremony Judge Antonin Scalia sat in an historic wooden chair in the well of the Court Room close to the Clerk's desk. This chair was used in the 19th century by Chief Justice Marshall when he presided over the Court. Lewis F. Powell, Jr., William H. Rehnquist, John Paul Stevens, and Sandra Day O'Connor all used the same chair as they awaited their swearing in as Associate Justices. Chief Justice William H. Rehnquist then called Judge Scalia to the center chair and administered the judicial oath to him. Upon the fulfillment of the oath, Chief Justice Rehnquist wished Justice Scalia "a very long life, and a very long and happy career in our common calling." After this exchange, the Clerk of the Court announced, "May it please the Court, ladies and gentlemen, I have the honor to present the new Supreme Court of the United States."

Chief Justice Rehnquist became the third Chief Justice to be promoted directly from service as an Associate Justice, to serve as a Chief Justice. His two predecessors were Edward Douglass White who took his oath as Chief Justice on December 19, 1913 after having served as an Associate Justice since 1894, and Harlan Fiske Stone who took his judicial oath on July 3, 1941 after having served as an Associate Justice since 1925. Chief Justice Stone took his oath from a park commissioner in the Rocky Mountain National Park where he was vacationing when the Senate confirmed his nomination.

Two other Chief Justices came from the ranks of Associate Justices, but neither of them was serving as an Associate Justice at the time nominated as Chief Justice. The first of these was John Rutledge who served as an Associate Justice for only one year, from 1790-1791. In 1791 he received an interim appointment as Chief Justice, but he took his oats and entered service on August 12, 1795, president over the Court and participating in several cases. However, the Senate rejected his "promotion from within," from the bench, that of Charles Evans Hughes. Chief Justice Hughes served as an Associate Justice from 1910 until 1916 when he resigned to run for President of the United States. Fourteen years later, in 1930, Charles Evans Hughes rejoined the bench, this time as Chief Justice. He served there from 1930 until 1941. Hughes to this day holds the distinction of being the only man to have served as an Associate Justice, leave the Court for an extended period, and later be confirmed as Chief Justice of the United States.

While these individuals represent the only promotions from within the Court that actually took place, there were at least two occasions when incumbent or former Justices were nominated and confirmed to replace an Associate Justice who had declined the appointment.

The second was in 1800 when Chief Justice John Marshall resigned to replace Oliver Ellsworth. He was nominated by the President on December 18, 1800 and was confirmed by the Senate the following day. He formally declined the appointment on January 2, 1801 saying that he had resigned in 1789 because he was doubtful that the Court would ever "obtain the energy, weight, and dignity" . . . essential to its functioning as the "last resort of the justice of the nation" . . . and that he saw no indication in 1800 that the Court had accomplished these goals.

According to the statistics there have been two other occasions on which any two members of the Court took the judicial oath at the same time. The first was on January 3, 1911, when Associate Justice Willis Van Devanter and Joseph Rucker Lamar took their judicial oaths in the same ceremony. The second was on January 7, 1972 when Lewis F. Powell, Jr. and William H. Rehnquist both took their judicial oath in open Court.

It is interesting to note that Chief Justice Rehnquist is not only the first person to serve as Associate Justice and Chief Justice, but that the judicial oath in two ceremonies in which he was not the only member of the Court being sworn in, but he is also the first Chief Justice of the United States to take his judicial oath in ceremonies with an Associate Justice.

Usually the constitutional and the judicial oaths are taken on the same day, but there have been occasions when they were not. The Judicial Act of 1789 stipulates that "the associate justices shall have precedence according to the date of their commissions [or letters patent], or when the commissions of two or more of them bear date on the same day, according to the respective ages." This latter stipulation has been construed to apply to all federal judges as well.
in Cuba, after serious rioting in Havana. The Cubans were protesting the Spanish promises of autonomy and were demanding nothing short of complete independence. On February 4, 1898, Day wired Lee to report the Secretary of the Navy felt that for health reasons the Maine should leave the harbor in Havana. Lee responded by saying he did not feel the health hazards were great and that he felt it was unwise to remove the Maine until another first-class battleship was able to replace her.

Lee's assessment proved inaccurate when little more than a week later, on February 15, 1898, the Maine was destroyed by an explosion. In addition to the ship, more than 250 men were lost. This incident, which was vociferously and sensationally reported in The Journal and The World, infuriated the American public, encouraged by the reports of the yellow journalists, had already found the Spanish guilty.

As soon as the findings of the American Commission were made public, the American people demanded war. "Remember the Maine" became the cry for a patriotic outpouring of tremendous proportions. Despite the public clamor, Day and McKinley attempted another peaceful solution. They asked for an armistice between Spain and the insurgents pending negotiations for a permanent solution through the good offices of a neutral power. The Spanish Commission later, in a report which alleged that the ship had been destroyed following an explosion of an undetermined origin, in the forward magazine. It is generally believed the American report was correct, but responsibility has never been determined.

Unfortunately for Day's peace overtures, the incident of the Battleship Maine took place only a week later. The ship had been sent to Havana at McKinley's behest, the President of the United States. Spain refused to accept the terms as outlined and countered with proposals which would make it impossible for the Cuban insurgents to continue the war. McKinley attempted another peaceful solution. They asked for an armistice between Spain and the insurgents pending negotiations for a permanent solution through the good offices of a neutral power. The Spanish Commission later, in a report which alleged that the ship had been destroyed following an explosion of an undetermined origin, in the forward magazine. It is generally believed the American report was correct, but responsibility has never been determined.

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Americans as the overwhelming military victories crippled the Spanish. By July of 1898 the international as well as the American press began to call for an end to the hostilities.

The Americans felt no compunction to limit the hostilities with Spain to Cuba and the Spanish fleet in the Philippines alone. After the surrender of Santiago, General Miles and 35,000 American troops moved into Puerto Rico and in two weeks took the island with casualties amounting to only three dead and forty wounded. The Spaniards finally asked the French government to authorize the French Ambassador to the United States to arrange the terms of peace. The negotiations resulted in a protocol issued August 12 which set the following terms: the immediate evacuation of Cuba and the relinquishment of Spanish sovereignty; the cession of Porto Rico [sic] by way of indemnity; the occupation by the United States of the city, bay, and harbor of Manila pending the conclusion of a treaty of peace which shall determine the control, disposition, and government of the Philippines.

The protocol further called for a meeting by peace commissioners in Paris to finalize the terms of the peace in October of the same year. Day resigned from the Department of State to lead the American delegation at the Peace Conference. Although Day was a strong proponent of anti- Expansionist views, pressure from such leading American figures as Senator Henry Cabot Lodge, Captain Alfred Thayer and Colonel Theodore Roosevelt was hard to counteract. Day favored retention of the port of Manila, but was against outright annexation. Day felt annexation ran contrary to America's commitment to self- government. In addition he expressed a concern in assuming responsibility for "eight or nine millions of absolutely ignorant and many degraded people." Although the language of this objection sounds reprehensible, it echoed Day's sincere belief that if the United States annexed these areas the American government must then be prepared to care for the people and provide economic and social aid. In Day's opinion, American control of an area should benefit the territory, in addition to providing economic advantages to the United States.

At first McKinley seemed disposed to retain the bay and city of Manila as a naval base and part or possibly all of the island of Luzon. But sentiment in the country was strongly in favor of complete acquisition. In addition, the British and the Japanese favored American acquisition. Day favored retaining control of only the northern islands, as he pointed out that the southern islands, particularly Mindanao, were of a different race and religion.

In Cabinet meetings he and several other Cabinet members had expressed the desire for a naval base only. McKinley said that "Judge Day only wants a hitching post." After the meeting adjourned Day pointed out that McKinley had not put Day's motion forward for a naval base. The President reportedly answered: "No Judge, I was afraid it would be carried."

After much consideration, McKinley finally instructed Day to call for the acquisition of all the Philippine Islands. The Treaty, as finally agreed upon, called for the complete independence of Cuba, the outright acquisition of Puerto Rico and Guam, and in return for a payment of $20,000,000, the entire 5,780 islands that comprise the Philippine Islands. Day credited with the idea of paying $20,000,000 for the Philippines. How he determined the figure is not clear, but it is obvious that he felt better paying for it than taking it. There were many Americans who shared Day's opinions against acquisition, but the expansionists won the victory.

McKinley himself apparently struggled over the disposition of the Filipinos. He defended his policy in a speech he made in an Episcopal church on November 21, 1898 where he explained his decision.

...I have been criticized a good deal about the Philippine business. I have but don't deserve it. The truth is I didn't want the Philippines, and when they came to us, as a gift from the gods, I did not know what to do with them. When the Spanish War broke out, Dewey was at Hong Kong and I ordered him to go to Manila and to capture or destroy the Spanish fleet, and he had to; because, if defeated, he had no place to refit on that side of the globe, and if the Donos were victorious, they would likely cress the Pacific and ravage our Oregon and California coast....

The Treaty was signed on December 10, 1898 and was sent to the Senate for ratification on January 4, 1899. There was strong opposition in the Senate, led by Senator Hoar of Massachusetts, who said that acquisition of the Philippines was an utter repudiation of the spirit of the Declaration of Independence and the Constitution. William Jennings Bryan came to Washington and called on the Democratic Senators to ratify the Treaty saying that the fate of the Philippines could be determined at the next Presidential election. When fighting broke out between American and Filipino Troops, the Treaty was ratified on February 6. The United States stood on the threshold of the twentieth century with an empire that spread from the Caribbean to the Pacific.

When next I realized that the Philippines had dropped into our laps I confess I did not know what to do with them. ... I went down on my knees and prayed Almighty God for light and guidance more than one night. And one night it came to me this way... (1) That we should not give the Orient to Germany. That would be cowardly and dishonorable; (2) That we could not turn them over to France or Germany—our commercial rivals in the Orient—which would be bad business and detractive; (3) That we could not leave them to themselves—they were unfit for self-government and they would soon have war and turmoil worse than Spain was; and (4) that there was nothing left for us to do but take them all, and to educate the Filipinos, and uplift and civilize and Christianize them, and by God's grace do the very best we could by them.

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John Bassett Moore, who served as Secretary of the American Peace Delegation to the Peace Conference, later wrote that the Commission had been "singularly harmonious and agreeable... All my colleagues have distinctly risen in my estimate of them during these six weeks; and Judge Day, in particular, has shown great clearness, precision of views, and well-balanced judgment." Senator Gray of Delaware also served on the Commission and he made the following remarks about Judge Day: "No State in this Union could have contributed to that function of statesmanship, a mind and a character more equipped, settled, clear, and strong than was contributed by Ohio when she sent that quiet, sensible, strong statesman, William R. Day to Paris to conclude the treaty of peace."

With the conclusion of the Peace Conference in Paris, Day's career as a diplomat ended. Before going to Paris he had expressed to McKinley his desire to become a private citizen again, and he did return briefly to Canton and resume his law practice. There were rumors in Ohio that he would run for Governor or some other high political office, but Day denied them all and emphatically stated that he would not be a candidate for Governor. But on February 25, 1899, McKinley prevailed upon him to accept an appointment to the United States Court of Appeals for the Sixth Circuit. Day took his seat on the bench with two other Judges who would also later serve on the Supreme Court bench, William H. Taft and Homer H. Lurton. The Sixth Circuit encompasses Kentucky, Michigan, Tennessee and Ohio. During his four year tenure on the Court, Day wrote some eighty opinions. Most of the cases involved private litigation, and technicalities concerning rules of evidence and

(Continued on next page)
Day. The nomination was presented to the Senate on February 19, and confirmed on the 23rd. The appointment took effect on March 2, 1903.

In September 1903, Day's close association with McKinley was ended by the President's assassination. McKinley was shot while attending the Pan-American Exposition in Buffalo, New York on September 6 by an anarchist. The President was standing in a receiving line and had just given a little girl the red carnation out of his buttonhole when an anarchist named Leon Czolgosz, gun concealed in a handkerchief, shot him twice. According to the account in The New York Press on September 7, only one bullet was removed, while the other remained in his body. At first the doctors thought that he would recover, but on September 14, 1901, McKinley died of complications. The Nation mourned the passing of President McKinley who was seemingly died with McKinley, but on January 29, 1903, President Roosevelt proposed the position to William Howard Taft who was serving as the Governor of the Philippines. Taft declined the position on the grounds that he was too busy with the war in the Philippines, but his great desire to serve as Chief Justice, not as an Associate Justice, was probably also a consideration in his decision. In the postscript of a letter Roosevelt wrote to Taft regarding the matter, he said: "If only there were three of you! Then I would have one of you on the Supreme Court, as the Ohio member, in place of good Day; one of you in Root's place as secretary of war, when he goes out; and one of you permanently governor of the Philippines."

Accordingly Day had not been Roosevelt's first choice as a candidate for the position. He had previously offered the position to Howard Taft who was serving as the Governor of the Philippines. Taft declined the position on the grounds he was too busy with the war in the Philippines, but his great desire to serve as Chief Justice, not as an Associate Justice, was probably also a consideration in his decision. In the postscript of a letter Roosevelt wrote to Taft regarding the matter, he said: "If only there were three of you! Then I would have one of you on the Supreme Court, as the Ohio member, in place of good Day; one of you in Root's place as secretary of war, when he goes out; and one of you permanently governor of the Philippines."

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But it was "good Day" who took the oath of office on March 2, 1903. The investiture was described in one paper as follows:

The Nation mourned the passing of President McKinley who was

Justice William H. Day, succeeding Justice George Shiras Jr., was inducted into office as an Associate Justice of the Supreme Court of the United States today in the presence of a crowd of members of the bar and visitors, which filled the historic chamber to overflowing. Chief Justice Fuller announced to the members of the bar that William H. Day of Ohio, who had been appointed to a seat on that bench was present and ready to take the oath.

Day was, of course, devastated by the murder of his friend.

He made a speech on September 12 denouncing the anarchists:

The advocates of its awful tenets must be kept from our shores; its principles must be torn, root and branch, from every foot of our domain, until its adherents learn to attack the government through its highest official is one of the most heinous of crimes, sure to meet with swift and terrible retribution. Let there be no nook or corner of the civilized world in which it can hide and call itself safe.

Following McKinley's funeral, Day resumed his duties on the U.S. Court of Appeals. His influence in Washington had seemingly died with McKinley but on January 29, 1903, President Theodore Roosevelt nominated Day to the Supreme Court of the United States to replace Justice George Shiras who was retiring. In a sentiment of personal gesture, Roosevelt announced his candidacy for the bench by addressing Day at a McKinley memorial meeting as "Mr. Toastmaster, Mr. Justice Day."
The nomination was presented to the Senate on February 19, and confirmed on the 23rd. The appointment took effect on March 2, 1903.
At the age of 73, on November 13, 1922, Justice Day retired from the Supreme Court. The frail Day had survived many of his more robust peers, including many of the heroes of the Spanish American War. President Harding asked him to serve as an umpire on the Mixed Claims Commission which had been established by the United States and Germany to resolve claims from the first World War. The Commission was very much in keeping with the ideals Day had espoused in his speech to the Michigan Alumnists and he was eager to serve. But in May of 1923, Day's poor health forced his resignation from this Commission.

Early in the summer of 1923, Judge Day and his son William L. went to the family camp in Mackinac as usual. By this time Day had grown very frail, but he enjoyed a few days of sun and fishing before his death on July 9. According to the attending physician, "Mr. Day had been living 'on his nerve' for the last few years, believing he must do his part in public affairs despite his advanced age." Justice Brandeis paid tribute to him when he said: "Judge Day gave to the nation the distinguished service of a lifetime. Those of us who were privileged to be associated with him knew also the deep affection and loyalty of his nature. He leaves a distinguished and enduring memory. We join in loving these words of tribute." Day was buried in a simple ceremony in Canton, Ohio. A few of the great dignitaries of the time attended the ceremony and filled the small city of Canton with veterans of the glory it had known when it could boast it was the birthplace of the President. Perhaps Senator Gray of Delaware's tribute paid to Day at the time of the Paris Peace Conference would serve as a fitting epitaph for Judge Day: "... always self-contained, never self-expressive, always self-suppressed, yet firm and courageous in the performance of duty as he saw it, he had illustrated the very highest traits of American statesmanship and American character."

Day retired from a life-long career in public service in May 1923 due to failing health. He passed on just 2 months later.
Inside Look at Court Featured in New Illustrated History

The Illustrated History of the Supreme Court of the United States, which has just been published, may well be the perfect book about the Supreme Court as a library resource, to have and display, or to receive as a gift. This book is for people interested in the Supreme Court of the United States as an institution, its heritage, and its role in the economic, social and political life of our nation. The book contains a lively text by Robert Shnayerson, former law editor at Time magazine as well as former editor-in-chief of Harper's Magazine, and contains copious color and black and white illustrations of the people, places and events indelibly bound up with the history of the Supreme Court.

The handsome coffee table size volume begins with a special twenty-four page color photo section entitled “A Tour of the Court,” providing readers with an exclusive “inside look” at both public rooms and private chambers in the Supreme Court building. The carefully chosen illustrations add much to the fascinating story which the author unfolds of the development of the Supreme Court from “the weakest department of power,” as Alexander Hamilton described it, to the most powerful and effective judicial body in the world today. Important landmark cases decided by the Court come alive as Shnayerson fits them into the economic, social and political life of their time.

The Society, as the co-sponsor of the book, is happy to be able to provide this beautiful 304 page book to our members at the special discounted price of $48.00 per copy.

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