Tribute to Justice Harry A. Blackmun

Tuesday, March 9, 1999 the body of Retired Associate Justice Harry A. Blackmun left the Great Hall of the Supreme Court Building where it had lain in repose for twenty-four hours. Colleagues, friends, and members of the public had filed past the bier to pay their respects to this Justice who served for twenty-four years on the Supreme Court Bench.

Harry Andrew Blackmun was nominated to the Supreme Court by President Nixon on April 14, 1970. The Senate unanimously confirmed President Nixon's third choice for the seat, on May 12, 1970. During his service in the ensuing twenty-four years, the Justice acquired a reputation for his concern for "the little person" in formulating his judgments. It is a testament to his jurisprudence and long tenure on the Court, that when he retired he was hailed as one of the Nation's most respected jurists. Among the attributes repeatedly ascribed to the Justice throughout his career were his enormous appetite for work and his careful attention to detail, as well as his passion for justice and the law.

Memories of the 1937 Constitutional Revolution

by Warner W. Gardner

Mr. Gardner wrote some biographical notes about the preparation of this paper which the Editors quote herewith: "In the October Term, 1934, when the first of the New Deal statutes were invalidated, I was a clerk to Justice Stone. I was a junior in the Office of the Solicitor General in the 1935 Term, lending minor assistance in the defense of the next round of doomed statutes. In the early months of the 1936 Term, under the direction of Attorney General Cummings, I did the research and drafting which produced the early versions of the "court-packing" bill. I continued in the Office of the Solicitor General for the next four Terms (serving as First Assistant in the last three), luxuriating in the presentation of argument to a thoroughly sympathetic tribunal, as I continued on infrequent occasion to do in 1941-1943 as Solicitor of Labor then of Interior. . . ." [The opinions which, making no gesture toward objectivity, are scattered through this piece are my own."

I have recently read a good many books and papers which undertake to explain the constitutional crises that arose and were resolved in the years 1935-1938. They range from the foolish, to the speculative, to the wise. But virtually all have in common at least a flavor of artificiality. The actors move across the stage on waves of footnotes, not on human feet. Words put into diaries or letters two-thirds of a century ago, when taken out of the context of their times, can mislead as well as enlighten. Inferences drawn from silence are even more hazardous. As Felix Frankfurter put it,
A Letter From the President

This fall the Society will celebrate its silver anniversary. Marking the beginning of that celebration, the Society will hold the official opening of its new headquarters building at 224 East Capitol Street, N.E. in Washington, hopefully to coincide with the opening of the Court's next term.

The move to the new building will also usher in a new era in the Society's history, beginning a second quarter of a century of service to the Supreme Court and the Nation. The new headquarters will better enable the Society to fulfill that mission by providing a conference room and library as well as much-needed office space.

There is a role for every member of the Society in its silver anniversary celebration. The Society has a number of standing and ad hoc committees whose volunteers will shape the Society's goals for its next twenty-five years. We have standing committees on programs, publications, acquisitions, membership, development, investment, budget and finance, and facilities.

Additionally, the Society employs ad hoc committees to address special needs. One such committee established the Society's oral history program. Another reviews potential candidates for recognition by the Society's coveted Erwin Griswold Prize.

During the past four years the ad hoc Headquarters Search Committee conducted a thorough search of Capitol Hill for an appropriate site for the new headquarters. Once the site was selected, the committee identified architects and contractors to carry out the necessary renovations.

I regret to inform you that John Risher, the energetic chair of that committee has recently died, sadly before he could see the building completed. John believed in the headquar­ ters project and worked long hours to resolve thorny contract negotiations and zoning issues related to its purchase. He was an exemplar of the kind of dedicated volunteer on whom the Society so heavily relies and his labors on its behalf helped to position the Society to better serve the Court and its membership in the coming quarter century.

The Society depends upon its members in many ways, from conceiving and carrying out policy and programs to providing financial support necessary to meet its program commitments. Yet the membership limit is posted to some degree around 5,000. If the Society grows much larger than this it outgrows the Court's capacity to house the Court and the Society's capacity to participate in them.

Accordingly, with our size limited for practical reasons, each member takes on added importance. Last year, for example, members fulfilled duties in over 200 committee assignments. Over 100 members qualified as Sustaining or Life members through their extraordinary financial support. Over 300 more made special contributions in addition to their membership support. And these rough calculations do not even begin to contemplate the incalculable contributions members make by reviewing books, writing articles, serving as speakers to other organizations, and other commitments of time and expertise. Our General Counsel, Bob Jucean could make a full-time practice of handling the Society's legal affairs on a pro bono basis, but he is but one of the stalwarts who have propelled the Society to a record of twenty-five years of accomplishment.

As we prepare to celebrate our silver anniversary, and to begin our next quarter century of service to the Court, I hope you will join with me in a search of Capitol Hill for an appropriate site for the new headquarters. Once the site is selected, the committee identified contractors and contractors to carry out the necessary renovations.

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Managing Editor/ Kathleen Shurtleff
Assistant Editor/ Christopher McGaheghan

Belva Lockwood's First Appearance at the Supreme Court

The next issue of the Journal of Supreme Court History will include an article by Jill Norgren, a professor of political science at the City University of New York, whose original research establishes that Belva Lockwood, the first woman to argue before the Supreme Court of the United States, did so in 1880, shortly after she was admitted to the Supreme Court Bar.

In 1879, Lockwood, a Washington D.C. attorney with a thriving local practice, became the first woman admitted to the Supreme Court Bar. Prior to her admission, the Supreme Court and the D.C. Court of Claims had refused to allow women to practice before them because of their sex. Undaunted, Lockwood struggled for five years to gain admission to the Supreme Court Bar. At the urging of a bill in Congress permitting women to practice before the nation's highest court, the legislation forbade the federal courts from preventing women from practicing before them and Lockwood joined the elite bar shortly thereafter.

Some popular accounts of Lockwood's career do not distinguish between the dates of her bar admission and her first argument. Other sources firmly indicate that Lockwood did not find an opportunity to argue a case before the high court until 1906, at the age of 79, when she successfully represented a segment of the Cherokee tribe in a dispute against the United States government. This victory, at the time the largest claim ever made against the government, garnered much publicity for Lockwood and her clients.

Belva Lockwood was also the first woman to run a full campaign for the presidency. Maureen Mahoney notes that, "An incredible perseverance of women like Belva Lockwood has finally brought us into a new era in which women are commonplace in the courtroom and serious contenders for the Presidency. That is quite a legacy."

Lawyers Have Heart

Join the race against heart disease and stroke for the American Heart Association. The mission of the American Heart Association is to reduce disability and death from cardiovascular diseases and stroke, the #1 causes of death of all Americans.

The 10K race and the 5K race are for students, community education programs of the American Heart Association/National Capital Area Council. Since its inception in 1991, the event has raised over $1,500,000 and has featured thousands of Washington area private and government lawyers, members of the Administration, Congress, the judiciary, legal assistants, law firm administrators, legal secretaries, law students, and those from the general public. The 10K race has a team category and you need at least 5 runners to form a team.

Help make Heart Disease and Stroke a thing of the past!

Lawyers Have Heart IX will take place 8:30 am Sunday, June 13, 1999 at the Washington Harbour, Georgetown Waterfront. For additional information, please call the American Heart Association at 202-686-6888.

Kathleen Shurtleff
A new exhibit organized by the Office of the Curator opened this fall at the United States Supreme Court Building in Washington, D.C.: High Courts of the World: An Introduction brings photographs, artifacts and judicial attire from around the world into the Court’s Lower Great Hall, providing a glimpse of life at some of the world’s highest tribunals. More than 75 high courts participated in the exhibit, which evolved from a suggestion by Chief Justice William H. Rehnquist during a meeting with Curator Gail Galloway.

In 1997 high courts were contacted for material. During the eighteen months that followed Assistant Curator Matthew Heldt organized the objects received. With the help of legal experts he then developed text and captions for them. Assistant Curator Catherine Fitts worked closely with a design team to create the exhibition space.

The exhibit consists of six sections, each addressing a different topic and distinguished by a recessed arch. Throughout the exhibit, photographs of the high courts, their courtrooms and judges are used to illustrate each topic. Small icons of the building of the Supreme Court of the United States indicate text specifically related to this high court. They were included to provide points of reference for visitors.

The first section, “What are High Courts?,” provides background information on the topic for the visitor. The next section, “The Judicial Process,” follows. It describes how legal issues reach these high courts and their roles within their respective legal systems. The work of the high courts is the subject of “Proceedings.” The largest section in the exhibit is titled “Architecture,” which examines the homes of high courts worldwide. “Judges/Judicatures” follows.

The exhibit concludes with the “High Courts Information Center,” featuring a computer database of information about the world’s high courts. The database is accessible through three terminals in the exhibition hall. Visitors can use them to learn about high courts around the world, or test their knowledge of the high courts using the Information Center’s quiz.

A pl'il Waiter

1999 Lecture Series
The First Amendment: Free Speech, Political Rights and Liberties

Professor Murray Dry
Professor Dry of Middlebury College introduced the origins of the First Amendment, and discussed the first major challenge to those rights, The Alien and Sedition Acts of 1798. Justice Sandra Day O’Connor introduced Professor Dry.

May 4, 1999 — Free Speech: “The Lost Years”—1870-1917
Professor David Rabban
ChiefJustice William H. Rehnquist introduced Professor David Rabban of the University of Texas School of Law in the second program of the series. Much has been made of the First Amendment jurisprudence of World War I and beyond. However, new scholarship indicates that before World War I there was a libertarian radicalism that laid the groundwork for what followed. This lecture examined cases from this era.

October 6, 1999 — Free Speech: The Clear and Present Danger Test 1917-1953
Professor Douglas Laycock
This lecture will reconsider the “Clear and Present Danger Test” that Justice Oliver Wendell Holmes, Jr., introduced in Schenck v. United States during World War I, also with its subsequent applications by Justice Brandeis and others. Professor Laycock teaches at the School of Law at the University of Texas and will be introduced by Justice Stephen G. Breyer.

Professor Lillian BeVier
Professor BeVier of the University of Virginia School of Law will consider free speech cases of the Warren and Burger Courts and their impact on political speech and liberties. Professor BeVier will focus on the Warren Court’s expansion of First Amendment rights and subsequent constraints imposed by the Burger Court. Justice Clarence Thomas will introduce Professor BeVier.

Invitations to the lecture series have been mailed. Reservations may be made by reply card, or by telephoning the Society’s main office at (202) 543-0400.

The 1999 Lecture series was made possible by gifts from the West Group, Dorothy Tapper Goldman, and the Charles Evans Hughes Memorial Foundation.
Blackmun Memorial (continued from page one)

Harry Blackmun did something remarkable at age 61. He made a direct conscious effort to reach out and to understand those whose life experience was different than his own. That is why every summer he would host a seminar at Aspen where men and women of very different points of view would come together to discuss justice. That is one reason he loved to talk to students from all backgrounds. He used his free time, his conversations, his power of imaginative understanding, to help assure that the experience, say, of those whose poverty made it difficult for them to find representation before our Court, would not be lost on the Court and thereby affect the decisions he was called upon to make. It is not often that a man or woman of 61, in a cloistered office, manages through the years to find, not a narrowing, but a broadening of mind, of outlook, and of spirit. But that is what Harry Blackmun found.

There is yet another word that continually reappears in descriptions of Harry Blackmun, along with words like "gentle," "modest," and "careful." That word is "compassionate." He Harry cared—first of all for course of his marvelous family, his beloved life’s companion, Dottie, whom he liked to call "Miss Clark," his three daughters, Nancy, Sally and Susie, whose very difference (which he described as, one more intense, one with a special sense of fairness, one with a "deep sense of adventure") gave him what he referred to as great joy. He cared for his colleagues, those he had known and been with him for close to twenty-five years. He cared for his law clerks. He cared for Court employees, whom he would often ask, for example, "How are the kids doing?"

His vision was a buttress of that compassion, which reveals itself in his effort, through imagination and will, to understand the individual human beings whose lives his opinions would affect. In 1994 Harry wrote for himself a list of 27 human "needs" which he kept in his office. On that list, along with "truth," "clarity," "courage," "perspective," "faith" and "a sense of humor," appears the word "compassion." He lived that list.

Is his "caring" important to the law? Harry Blackmun properly understood that it has everything
Jefferson v. Marshall: the Aaron Burr Conspiracy Trial

by Christopher McGranahan

A toast popular in 1807 went "Aaron Burr - may his reach to his country exalt him to the scaffold, and hemp be his escort to the republic of Dust and ashes." Few political figures in U.S. History have fallen in public esteem so rapidly and completely as did Aaron Burr. In 1801 he was nearly elected President of the United States, eventually losing to Thomas Jefferson. Burr went on to serve as the nation's third Vice-President where his talents for alienating potential friends and infuriating rivals soon unid him. He left office in March, 1805 financially ruined, a political outcast, and wanted in the states of New York and New Jersey for the murder of Alexander Hamilton.

Burr then did so many down-and-out Americans did at that time, he headed west to rebuild his fortune. Unfortunately, questions regarding the surreptitious nature of his plans brought him back east to Richmond, Virginia on March 26, 1807, to stand trial for treason and high misdemeanor. At this time in history, Supreme Court Justices still "rode circuit", presiding over cases now taken by the U.S. Court of Appeals, and Virginia was then in the territorial jurisdiction of the Chief Justice John Marshall.

Burr argued that he would be unable to get a fair trial, and with good reason. On January 22, 1807, Jefferson declared in a special message to Congress that Burr's "guilt is placed beyond question," and news stories about the case tarred Burr as the villain. By the time he had arrived in Richmond he had already been found guilty in the court of public opinion. There was extreme pressure on Chief Justice Marshall to allow a similar verdict in the court of law.

The following is a story of that trial. We tend to think of the U.S. Constitution as if it had been brought down from the mountain etched in stone. In 1807, however, it was still a new document. Jefferson, for one, had become deeply skeptical of an independent judiciary, particularly one dominated by his rivals. After only nine months in office, Jefferson wrote to a friend: "The Federalists have retired into the judiciary, and from that battery all those works of republicanism are to be broken down and erased." Furthermore, Jefferson and Marshall despised one another, both personally and professionally. During the Presidential election of 1801, then Representative Marshall was asked by his friend, Alexander Hamilton, to support Jefferson over Burr. On New Year's Day 1801, Marshall responded:

To Mr. Jefferson whose political character is better known to me than that of Mr. Burr, I have felt in no insuperable objections. His foreign prejudices seem to me totally to unfit him for the chief magistracy of the nation which cannot indulge those prejudices without sustaining deep and permanent injury. Your representation of Mr. Burr, with whom I am totally unacquainted, shows that from him still greater danger than ever from Mr. Jefferson may be apprehended. But I can take no part in the business. I cannot bring myself to aid Mr. Jefferson.

President Jefferson's tenure in office was punctuated by clashes with the judiciary. Actions such as the recall of the Judiciary Act of 1801 and the impeachments of Federalist Justices Charles Cotesworth Pinckney in 1803 and John Rutledge in 1804 strained the relationship. Burr's trial, however, allowed the Republicans to watch the trial closely for the opportunity to use the Burr case against Chief Justice Marshall and the Supreme Court.

The Aaron Burr conspiracy trial was a morass of conflicting statements, vague intentions, and colorful characters, infamous, famous and soon-to-be-famous. Two issues, however, dominated the proceedings. The first was the court's ability to subpoena the testimony of a sitting president, the second was the definition of treason. The first issue came to the fore soon after the grand jury trial commenced on June 9, 1807. Aaron Burr demanded as evidence a letter sent by General Wilkinson to President Jefferson. Wilkinson had forwarded correspondence between himself and Burr to Jefferson, but removed evidence of his own participation in the alleged conspiracy. Chief Justice Marshall found in favor of the defendant and subpoenaed the letter. Jefferson tried to provide the letter or to testify in person before the court. He did, however, offer to provide transcripts of portions of the letter. Neither Marshall nor Jefferson were interested in pressing the issue, and the subpoena issue quietly faded once the trial moved to other issues.

A greater weight was establishing the legal definition of treason. The prosecution depended heavily upon the English common law version, whereby even contemplating the king's death could be considered treason. The framers of the Constitution, however, defined treason in far narrower terms: "in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort" and provided that "No Person shall be convicted of Treason unless the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

The prosecution had scores of witnesses to suspicious actions committed by Burr, but not one witness to any actual deed. Marshall ruled that without two witnesses to the act of treason, or to the procurement of men and arms for the expedition, the prosecution could not present testimony from any witness. While this ruling could not have been totally unexpected, it left the prosecution little with which to work. On September 8, 1807, the jury found Aaron Burr "not guilty by any evidence submitted to us."

The wording of the verdict reflected the feeling of some jurists that Marshall had denied them the right to hear the evidence gathered by the prosecution fueled by much of the country, and nearly all the Republicans. However, the law regarding treason was straightforward, and Marshall would not bend the rules simply because the defendant was seen as unscrupulous and was disliked by the general populace.

Many Republicans were prepared to impeach Marshall. Bimam Bennettsbaker, a co-defendant in the trial, observed: "...time will prove him incapable in all his future efforts as he has been in the past." After the trial Burr fared away as one of history's more tragic figures.
The constitutional Revolution (continued from page one)

"The dictum that history cannot be written without documents is less than a half truth if it implies that it can be written from them [alone]."

In this view it seems worth relating what a participant remembers of those days. My participation was at the working level, not in a policy position, but was rather well rounded. An additional impetus to record my memories is found in my belief that no other participant now lives to give a firsthand account of the events.

My experience may show that I am entitled to speak. It does not demonstrate that I speak truly. I have, at an advanced age, been presented with ample evidence that my memory is often quite unreliable. However, the historians' careful work with the documents, dispelled even a paragraph ago, has proved most helpful to me in checking and ordering my own recollections.

I do not believe it possible to understand the constitutional issues of the 1930's without a lively appreciation of the perilous state of the national economy at that time. On Roosevelt's inauguration day on March 4, 1933, every bank in the country was closed, some of their own necessities and others because of Roosevelt's immediate and wise exercise of a wholly non-existent power. They were reopened a week later, on the gamble that a Government guarantee would stem the hemorrhaging.

The Court in the first week of 1935 invalidated the "hot oil" provision of the Petroleum Code by an 8-1 decision that Congress had delegated too much of its legislative power. The case was entrusted with bizarre errors of administration. One, the inadvertent elimination of the criminal provision of the code which the suit sought to enjoin, was discovered only when the Government's Supreme Court brief was being written. The other administrative error griped the Court's attention as the plaintiff's attorney described, in the nasal drawl of hill-country Texas, a step-by-step search through local, state and national offices for a copy of the governing regulation, finally finding it "in the hip pocket of the federal agent in the next field to the east." I like to consider that, although obviously not a familiar of the law books, he was the founding father of the Federal Register.

In February the Court decided the Gold Clause Cases. I found its argument memorable chiefly because of the remarkable muscular coordination of the attorney for Bankers Trust. He was plump, white-haired and impeccably dressed. When the inquirers of the Congress led him to fling his arms to the sky, out sailed his false teeth. With a fluid, one-handed gesture, he caught them at knee-level, inserted them in his mouth, and continued his argument imperturbably and without perceptible pause. The Court upheld 5-4 the power under the Constitution to invalidate the gold clauses in private contracts; it held 8-1 that Congress could not violate its own contracts, but that the plaintiff suffered no damages because, had he been paid in gold, the required surrender of the gold for devalued currency would have been valid under the currency clause. If one brushed aside the metaphysics as inconsequential, or even indefensible, the Government had won, and had escaped the almost unimaginable chaos which would have resulted if two major powers in the nation with a claim for two-thirds more.

Any benign confidence that arose in February was short-lived. In May the Court, by a startling 5-4 decision, invalidated the Railroad Retirement Act.

The opinion by Justice Roberts found distasteful a few provisions, such as allowing retirement after 30 years service even though not 65 which was "clearly an arbitrary imposition of liability to pay again for services long since rendered and fully compensated," while coverage of a former employee recently re-employed was "arbitrary in the last degree," and was "taking the property of one and bestowing it on another" (295 U.S. at 349-354). Not content with washing the Act in the name of due process, the Court gratuitously went on to exclude social programs from the commerce clause. If aged employees were a hazard, they could be discharged without pension; fostering a contented mind is not regulation of transportation, it is "an attempt for social ends to impose by sheer fiat non-contrabalanced incidents upon the relation of employer and employee." The conjoined commands of the commerce and due process clauses, as decreed by the Court, seemed to me to be close to a ruling that the Congress could fix a speed limit on interstate trains but nothing more.

Three weeks later the Court, sitting for almost the last time in the small, dark room which had long ago housed the Senate, buried the National Industrial Recovery Act, one of the major elements of the New Deal. The opinion by Hughes held that extraordinary conditions could not enlarge powers not granted; that the delegation of legislative power (in most cases to trade associations) was invalid because it was subject to no standards, and that regulation of hours or wages after the interstate commerce was completed was not within the commerce clause. Justices Stone and Cardozo concurred, specially, but none dissented. The NRA was not very popular among the New Deal attorneys, since its icon, the Blue Eagle, seemed to live in a trade association cage, but they were distressed that Schechter, along with Ashton, blocked the way to any national regulation of the national economy.

The Court on the last occasion that the President could not remove the Chairman of the Federal Trade Commission because of his dogged resistance to any vitalization of that agency. One commentator finds this a major defeat for Roosevelt, equal to those enforcing the asserted constitutional limitations. This was simply not the case; the decision was an irritant but not a disaster.

The fears of constitutional impotence were, early in the next Term, expanded to the Government's efforts to relieve the agricultural disaster. January brought the invalidation of the Agricultural Adjustment Act in United States v. Butler. The Government had sought to raise the disastrously low prices of the basic commodities by imposing a tax to finance payments. Justice Roberts wrote: "The Court rejected with undisguised gusto the view of the Blue Goose, and captured the attention of every person in the country, not tax and spend to promote the general welfare when the activity was one left to the states. While the program of purchasing a reduced production, "killing little pigs," was not very attractive in a nation with several millions of hungry people, it was disheartening to have the whole area of agriculture removed from federal power.

The Court in May reinforced its demolition of federal powers under the commerce clause by invalidating the Bituminous Coal Act, which had authorized fixing minimum wages and prices. Justice Sutherland, writing for the five-man majority in Carter v. Carter Coal Co., declared comprehensively that neither manufacture nor production was "commerce," and that Congress' power was not enlarged merely because the states could not act. Moreover, delegation of wage-fixing power to a private group was a plain violation of due process. While the price-fixing act (the Court had sustained bituminous coal price fixing agreements designed to aid the mine operators in Appalachian Coal v. the United States), they continued on page twelve.
Constitutional Revolution (continued from page twelve)

were so closely related to the wage provisions that they, too, fell, despite the statutory severance clause.

A week later a 5-4 majority (including Roberts but not the Chief Justice) mounted the pinnacle of judicial arrogance by invalidating the Municipal Bankruptcy Act. The Act applied only upon request of the state municipality, and, indeed, in Ashton, Texas had specifically legislated to approve seeking refuge under the Act. Fiscal affairs, wrote Justice McReynolds, were the concern of the State alone, and the powers of Congress could not be enlarged by the consent of the State.

The final trip of the tumbril to the new marble stand carried the New York law fixing minimum wages for women, which fell by the usual 5-4 majority. Justice Butler's opinion rested in part on New York's asserted failure to request that the ruling in the predecessor case Atkins v. Children's Hospital be overruled, and in part on the assertion that the due process clause forbade governmental interference with the freedom of women to contract.

A number of the commentators have suggested that these litigating disasters were at least in part due to the incompetence of the Government attorneys. I would agree that Biggs' 1933 appointment to the Supreme Court was a two-year disaster, that Assistant Attorney General Stevens was an indifferent advocate, and that Richberg and his NRA staff were ill-suited for thoughtful constitutional litigation. But these commentators move much too easily from court defeat to lawyer incompetence. None, in explaining litigation strategy, notes the marked difference in strategic control between agencies (such as the Labor Board) who get into court only on their own enforcement initiative and those who are vulnerable to injunction by threatened legislation. Most (properly) find a great improvement when Reed became Solicitor General, despite the fact that Schechter, Butler, and Ashurst were lost upon his arguments. Several scholars applaud Faby's role in the Labor Board cases without noting that he was also prominent among the lawyers whom they condemn for having lost Pannone Refining. None recognizes, when explaining praise or blame among the agency attorneys, that from mid-1935 on constitutional issues were developed by joint work between the agency attorneys and the Solicitor General's Office, with the latter in charge. Above all, it is all too easy to believe that anyone could read the vehement text of the crippling decisions of 1935-1936 and believe that even Daniel Webster, coached by Denostiches, could have changed a single vote.

Whatever may have caused the decisions, there they were. Almost any action by the federal government to advance or to control the national economy would require a different constitution than that being forged by five elderly men to whom the New Deal was abhorrent.

The problem was forecast and a simple solution offered in 1877: amend the constitution. But this was not a rational solution in 1936. First, it did not, then or now, seem possible to draft a sensible amendment which would loosen the due process constraints, expand the commerce powers of the Congress, and yet preserve state sovereignty. Second, state legislators were sometimes more responsible to generous lobbyists than to abstract principles of good government, and it would require only one house in only thirteen states to reject the amendment. Third, one could not expect final action within a decade. The Child Labor Amendment, surely what one would consider the least controversial social legislation which could be proposed, was languishing in death for eighteen years after Huffman v. Degenhart and twelve years after the Congress proposed the amendment.

The cautious approach to salvation would be to await the retirement of some of the five justices who were determined to preserve the 19th century world they had known in their youth. But the actual prospects of an early redemp­tion was late. In 1936 Van Devanter was 77, McReynolds and Sutherland 74, Butler 70 and Roberts 61. If these ages suggested potential voluntary mortality, one need only consider what Chief Justice Taft, fearful of liberal appointees by President Hoover, on December 1, 1930 wrote his brother.

I am older and slower and less acute and more confused. However, as long as things continue as they are, and I am able to answer in my place, I must stay on the court in order to prevent the hasty recruitment of the wrong kind of person to fill the court. I believe of keeping a consistent declaration of constitutional law is for us to live as long as we can.

If such was the fear of Hoover appointments, presumably shared by the four Justices who outlived Taft, consider how fierce must have been their determination to continue by long distance to block appointments by Roosevelt. I was in hearty agreement with the conviction of the Roosevelt administration that the nation was in peril unless something was done to reassert to Congress the power to govern. The difficult question was "What?"

II.

The November election produced an overwhelming victory for Roosevelt; 523-9 in electoral votes and 62% of the popular vote. Roosevelt had not attacked the Court in his campaign, but the Republicans had made much of his earlier criticisms. In any case, the extraordinary endorsement of Roosevelt and the New Deal must necessarily have led the President and his aides (all the way down to me) to have believed that, one way or another, they could bring the Court's excesses under control.

President Roosevelt, who would sometimes subject unpopular decisions to vindication, explained when the court-packing bill was introduced that many people had for a year been sorting out thousands of ideas by which to escape the barriers erected by the Court. Right after the election, he said he asked two people—Attorney General and the Solicitor General—to do the distillation of the argument. The Court commentators have accepted and elaborated on this account with some enthusiasm. My recollection is rather different.

In the last week of September (just after my 27th birthday) Solicitor General Reed told me to report to Attorney General Cummings for a new assignment. Cummings informed me that the President was determined, if reelected, to find an escape from the Supreme Court's version of constitutional limitation. He told me to bring together all sensible suggestions and to evaluate each. He did not present me with a collection of the "countless memoranda" or the "two fat volumes" which later commentators put in his possession. It is my recollection, to which I could not take oath, that I started from scratch, with my horizons expanded only by an occasional conference with Cummings. There were undoubtedly many memoranda addressing the problem in the files. I can only suppose that Cummings did not present or mention them to me either because he had a low opinion of their quality or because he wished me to cover the same ground with an unhindered mind.

On December 20 I submitted a sixty-five-page memorandum. The loop of two and a half months reflected the circularity of the problem and the procedure constraints. But I believe of keeping a consistent declaration of constitutional law is for us to live as long as we can.

I was also rather active in the lower court defense of the windfall income tax. It was addressed to the Solicitor General in response to a protocol either required or imagined. Reed in fact distanced himself as far as was feasible from the project. I do not know whether his discomfort reflected a natural conservatism or an instinct that as the principal advocate before the Court he should not be plotting against it.

The profusely documented memorandum took this course: (a) The power courts to declare legislation unconstitutional was too clear to challenge. (b) The Court could not be forced to accept Congressional findings of fact as conclusive. (c) The Congress could not oust state courts of jurisdiction to decide constitutional questions unless it preserved such jurisdiction in the federal courts. (d) Congressional control of court procedure could not be stretched to cover a requirement for a supermajority to invalidate legislation. (e) A long exploration of the Congressional power to control the jurisdiction of the lower federal courts and of the appellate jurisdiction of the Supreme Court ended with a more or less evenly balanced result, resolved in favor of invalidity because of an assumed juridical hostility and because of the possibility that the constitutional issue could be raised in a case of original jurisdiction. (f) There was undoubtedly Congressional power to change the number of Justices on the Court, as it had done five times in the past, so long as no sitting Justice was ousted. There were grave questions of policy in which this was not done without a conclusive result to their favor. (g) Somewhat less than a page was devoted to dismissing "the most cynical of the proposals," to provide a reduction in retirement pension for each year by
Constitutional Revolution (continued from page thirteen)

the Congress could strip the Supreme Court of its appellate jurisdiction and create a new highest court which would have final jurisdiction to review federal and state court decisions, leaving the Supreme Court only its original jurisdiction, but that such a result was too distasteful to be acceptable.

A day or two after submission of this memorandum Cummings directed me to put together a draft bill for the enlargement of the Court. In April 1963 I gave a hasty and informal account of the drafting to a daughter who wanted to impress a history teacher. It said:

So far as I know, only Cummings, Reed and I were aware of this bill. The 'working party' was generally down to Cummings and myself. He was a man who seemed to me to have a very high order of largely unrecognized professional talents and, as is usual in such situations, the job was a joint product.

I note that subsequent commentators seem close to unanimous in discounting Cummings as a mere politician. This is a faulty judgment, but it is hard for me to form a correct one. He had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for language, and had a quick mind and sensitive ear for 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Constitutional Revolution (continued from page fifteen)

IV.

The occasion for the court-packing bill seemed to have evaporated before the bill itself did. The 1937 and 1938 Terms of the Supreme Court produced an effective reconstruction of the Court which was given over to the business of a single man, Justice Roberts.

On June 13, 1936, Justice Roberts created the 5-4 majority which invalidated the New York minimum wage for women. Just 10 months later he created the 5-4 majority which on March 29, 1937, upheld the indubitable Oregon law and reversed the June result.

His motivation has been much debated, but it could hardly have been a reaction to the Court's decisions in the cases of the Twelve-Months-Term. The 1937 revolution was the work of but one man, Justice Roberts. He was more than he did in the 1936 Term, the revolution was essentially the work of a single man, Justice Roberts.

The twelve months that began in the spring of 1937 saw the Court invalidated. By a 5-4 margin. The Court invalidated it by a 5-4 margin.

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The present belief is that Roberts, never a very predictable judge, changed course because of two factors: widespread academic and popular criticism of Tignola and the overwhelming support of the President and the New Deal, which was shown by the election in November 1936. Chief Justice Hughes, a somewhat wavering supporter of the three-Justice liberal bloc in any case, and a foremost politician (as governor of New York and narrowly defeated candidate for President), would have been more easily influenced by that election and may have well proselytized Roberts.

Once the Roosevelt appointees joined the Court, beginning in September 1937, the Court was a half-century firm assurance that the Court had nothing to fear. As Justice Butler correctly concluded, 1936 was too late to bring in a court-packing bill. It was a sensible price to be paid if necessary to prevent this gigantic windfall. As

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Constitutional Revolution (continued from page seventeen)

used in his pension but was reduced to $10,000 on June 30, 1932 and to $17,000 on June 30, 1933. These reductions expired in June 1936. [By 1936 a benumbed administration must have realized, with a rumored stimulus from within the Court, that this was a demanded economy for those anxious to rid the Court of its aged antagonists.]. Justice Van Devanter retired from active service on June 1. We thought at the time that this was because of the new constitutional protection understood to have been occasioned by the Sumners bill. The Van Devanter retirement finally opened the gate for a Roosevelt appointee, but at the same time it brought, in its wake, the vacancy.

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NOTE 1

The work of Professor William E. Leuchtenburg has proved extremely helpful. This piece has benefited more directly from a sizeable body of careful and knowledgeable comment graciously offered by Professor Richard C. Friedman in respect of an early draft. I bear no responsibility for the opinions which, making no gesture toward objectivity, I scattered through this piece.

2 - Humphreys left intact the almost unlimited supervisory power found in White House control of future appointments, assailed judges' decisions were thenceforth 70,87-22, 9-17, 2. The territorial judge was removed from office but remained on the floor if any Senators continued to object that the Constitutional amendments limiting judicial terms; Aug. 13 - various state provisions for judicial retirements; Aug. 14 - no significant gain from legislation requiring state officials to report on judicial retirements.

3 - The answers included: Jan. 13 - Sumners' retirement bill; Feb. 6 - ambiguities of Sumners retirement bill; Mar. 1 - no real question as to power to make recess appointments to a newly created office but power doubtful if vacancy arose during session of Senate; Feb. 6 - conceivable but unlikely that an over-age Chief Justice not covered; Feb. 6 - ambiguities of Sumners retirement bill probably cued by clarity of committee report; Feb. 24 - only litigation can decide whether Sumners bill covers Court of Claims judges; April 9 - no doubt as to power to appoint successor to retiring justice; April 7 and July 16 - compilation of state provisions for "our proposal" but bill not adopted; whether U.S. could, after intervention, appeal constitutional issue if private party did not [notarial memorandum and Gardner authorship doublefow]; Apr. 17 - drafts of 5 constitu­ tional amendments limiting judicial terms to a case, or 13 - validity of Black appointment in light of emoluments clause; Oct. 14 - no significant gain from legislation requiring senior circuit judge to be under 70.

4 - Here my memory is suspect. I checked Ickes' publica­ tion on the subject of "law and morality are not always identical." It highlights the basic "need to appreciate that usually people - not just legal theory - are involved in the controversies that cannot be treated as mere abstract propositions."


Blackmun Memorial (continued from page seven)

... by being with him, we became more conscious of our own traditions. By being with him, we learned about ourselves. In some ways, my year with the Court made me more like him - more careful, more modest, more afraid to reveal his emotions. He was a man vilified for his beliefs, who never returned vilification. He was a man of law who adhered to a fundamental belief that law must serve the people whose misery and need brought them to the bar of Justice.

Mr. McDaniel's further observation that "[t]he Justice lacked pretension, all pomposity, all phoniness. He possessed dignity, character, a deep and quiet strength, a sure sense of who he was and what he wanted to do. When he did it, it was because he believed it was the right thing to do, regardless of the opinions of the public, of the other Justices, or even of his own law clerks."

Pamela Susan Karlan, Law Clerk to the Justice in 1985 also spoke at the Memorial Service. She shed further insight on Blackmun's unique personality. Justice Blackmun when she observed that "... by being with him, we became more conscious of our own traditions. By being with him, we learned about ourselves. In some ways, my year with the Court made me more like him - more careful, more modest, more afraid to reveal his emotions. He was a man vilified for his beliefs, who never returned vilification. He was a man of law who adhered to a fundamental belief that law must serve the people whose misery and need brought them to the bar of Justice.

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New Members (continued from page nine)

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In the interest of preserving the valuable history of our highest court, the Supreme Court Historical Society would like to locate persons who might be able to assist the Society’s Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature or any other materials related to the history of the Court and its members. These items are often used in exhibits by the Curator’s Office. If any of our members, or others, have anything they would care to share with us, or would care to contribute to the newly established Acquisitions Fund, please contact the Acquisitions Committee at the Society’s headquarters, 111 Second Street N.E., Washington, D.C. 20002, or call (202) 543-0400. www.supremecourthistory.org

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