



SUPREME COURT HISTORICAL SOCIETY

P U B L I C A T I O N S

1976 Yearbook

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Introduction: the Supreme Court Historical Society

WARREN E. BURGER

Chief Justice of the United States

With the first number in this annual series of Yearbooks, the Supreme Court Historical Society undertakes to contribute to the professional literature for the Bicentennial of American Independence. This volume also marks its own inaugural activity as an agency devoted to informing the American people about the third, and least understood, branch of government. The Yearbook appears virtually on the first anniversary of the Society's formal incorporation as a nonprofit educational agency in the District of Columbia. That incorporation in turn marked the culmination of more than three years of planning by the Advisory Committee of legal scholars, historians, archivists, museum and gallery administrators, and interested laymen appointed to consider the broad problems the Society will now seek to treat.

The Supreme Court Historical Society joins similar historical agencies devoted to the interpretation of the White House and the Capitol, but in one sense it has a more difficult task. Most people know, or think they know, what the President and Congress are expected to do under our Constitution. Relatively few have any definite idea of what goes on in the courts generally, and in the Supreme Court of the United States in particular. Even though hundreds of thousands of visitors a year have gone through parts of the building, and perhaps observed oral arguments briefly, for most of them it has remained a remote, austere "marble temple" housing some seldom-seen jurists who periodically issue pronouncements on the law of the land. This is not because the Justices prefer remoteness and surely not because they do not want people to understand the judicial function in our system, but rather because there are few people qualified to interpret and explain this role in terms widely understood.

But the courts, like the other branches of government, ultimately belong to the American people, serving the individual and the general public interest through time-proven legal processes. An independent and disinterested judiciary need not be a mysterious area of government or appear to be an occult priesthood. Like all institutions, it consists of flesh-and-blood mortals with individual personalities, the normal human traits, and past lives whose activities are available to any diligent enough to inquire.

The Historical Society seeks, quite simply, to translate the impersonal and technical elements of the judicial process into understandable and interesting presentations. This will be done in a variety of ways. Recently, for example, the Supreme Court established an office of curator, to provide professional supervision over a number of artifacts and memorabilia already in the Court's possession. Through the curator's office, an expanded program of exhibits, making public some of the collection first exhibited four years ago, has been devised for the main ground floor hall of the Court building itself. While the new Historical Society is not an official agency of the Court or of the government, it obviously will work henceforth in the closest cooperation with the curator's office, as well as with other public and private groups as appropriate, in all activities within the Court building.

The Yearbook is also an obvious medium for interpretation of the story of the Judicial Branch. For this first issue, it seemed appropriate to its sponsors to focus to a large degree on anniversary subjects—the bicentennial of the American judiciary generally, the centennial view of the Court in the nineteenth century, the fiftieth anniversary of the Judiciary Act of 1925, and the Court's move into the present building. Future annual numbers will of course feature other individuals, great cases, and interesting accounts of the Court's history since the Court was first convened on February 2, 1790.

As the Society grows in number and resources, other undertakings will doubtless become appropriate and will be announced from time to time in the members' quarterly Newsletter. Membership in the Society, it should be stressed, is open to any interested person. Information may be obtained from the Society's offices which are listed along with the membership of the Board of Trustees and the Advisory Board, on page 4.

Following this introduction is an article of personal reminiscence by the Society's first President-- Mrs. William T. Gossett, nee Elizabeth Evans Hughes--on the colorful years when her father was an Associate Justice and later Chief Justice of the United States. (Go to article) This will, it is hoped, become one of the significant features of the Yearbook--personal views of history by those who lived through it. In somewhat similar character is the reprint of experiences in the Supreme Court recalled by former Attorney General Augustus H. Garland.

"We are very quiet there," wrote Justice Oliver Wendell Holmes in a familiar speech, "but it is the quiet of a storm center, as we all know." Not every generation of Justices, nor every term of Court, has witnessed cataclysmic constitutional decisions, but scarcely a year has passed, since the Constitutional Convention of 1787 created "one Supreme Court" and such other courts as the Congress may from time to time establish, that there have not been interesting and significant people and acts associated with the Court. The Society, and its Yearbook, will undertake to preserve and chronicle some of them and bring them to an increasingly wide audience.

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Charles Evans Hughes: My Father the Chief Justice

ELIZABETH HUGHES GOSSETT

It is a pleasure and a privilege to greet and welcome our readers to this, the first issue of the Supreme Court Historical Society's annual Yearbook, and at the request of the Editor, to reminisce a little about my father.

NEAR THE END of father's second term as Governor of New York, President Taft wrote to sound him out about his willingness to accept a position on the Supreme Court, intimating that ultimately he would like to appoint him Chief Justice to succeed Melville Fuller, who was in failing health. The appointment actually offered to father was an Associate Justiceship, to replace Justice Brewer. Father accepted, and on May 2, 1910, Taft sent his nomination to the Senate, which confirmed him unanimously following a discussion of about five minutes. That was quite a contrast to the two weeks of heated debate over his nomination as Chief Justice in February 1930, when he was finally confirmed by a vote of 52 to 26, the largest vote against a confirmed Supreme Court nominee in this century.

On July 10, 1910, Chief Justice Fuller died and the President vacillated for about five months before naming a successor. Father took his seat on October 10 of that year, and for the next two months there were constant references in the newspapers, among his friends, and even among members of the Court to the fact that he was the leading candidate for Chief Justice. In the circumstances--with a heavy load of judicial work, and the need to adjust to life on the Court, including the establishment of compatible relations with his new Brethren--those rumors embarrassed him. Of course, he never made any reference to the letter that Taft had written to him in April, with its intimations about the Chief Justiceship. Indeed, father had mental reservations about such an appointment. Was he too new on the Court? Was he too young and inexperienced as a judge? Would the older Justices be offended?

In any event, the die was cast on December 10, when he received a telephone message to call on the President at the White House. Half an hour later, another White House call came, this time to cancel the appointment with the President. Then came the public announcement: Edward D. White, an Associate Justice from Louisiana, had received the nomination. Father, although no doubt disappointed, was relieved to have the matter settled. Merlo Pusey, father's biographer, made some interesting comments about the historical implications of Taft's action:

From the hindsight of four decades, it would have been no mistake for Taft to have carried out his original intention: Hughes would have found it rough going for a time, but he would soon have been master of the situation; and the tenure of his Chief Justiceship. would have rivaled Marshall's and Taney's. His executive ability and his keen legal mind were ultimately to give him power within the Court that Chief Justice White never succeeded in attaining.

It is interesting to contemplate the changes in history resulting from Taft's vacillation. Had Hughes become Chief Justice in 1910, he would not likely have resigned to run for the presidency in 1916, and he would not have arrested the naval armament race in 1922 as Secretary of State. From 1910 to 1930 he would probably have led the Court in more sweeping and successful adaptations of the law to our changing industrial civilization than either the White court or the Taft court achieved. And, of course, Taft would never have realized his great ambition to be Chief Justice. Taft privately lamented in 1910 the irony of the fate that forced him to give to another the one position in all the world that he coveted for himself. We may reasonably assume that the possibility of cutting off his last chance to be Chief Justice by

naming a man as young and hardy as Hughes flickered through the President's mind. But it must have been a remote factor. In any event, the President was right in saying Hughes was young enough to wait. Yes, he would still be young enough in a distant day to take the Chief Justiceship from Taft's own dying grasp.

My earliest memories of Washington, D.C., are somewhat less than vivid, to say the least. They include riding with my mother in a horse-drawn carriage to the Supreme Court and getting caught in a violent thunderstorm with high winds, falling trees, and bolting horses. I faintly remember, too, moving from a rented house at 2401 Massachusetts Avenue to the only house father ever built--at the corner of Sixteenth and V Streets. This, he thought, was to be his abode for the rest of his days. He could not anticipate the intervention of fate! It was a comfortable, roomy four-story red brick house in which we lived for five years, until June 1916. My grandmother Hughes had a room on the top floor, and I was her neighbor. My brother, Charles E. Hughes, Jr., having been graduated from Harvard Law School, was living in New York, starting practice there; Helen, my older sister, was at Vassar; my sister Catherine was at National Cathedral School, and so was I after spending a couple of years at Holton Arms.

I remember well the rides in mother's electric automobile to take father to the Court and often call for him there. During that period I began to realize that my family was different, and I felt a compelling need to do the best I could so as not to "let father down." There was no mention of this at home; but my brother, sisters, and I just felt it and carried on as best we could. I remember, also, some of the other Justices on the Court, particularly the formidable Justice Harlan, Chief Justice White, the frail Justice Day, Justices McKenna and Lurton, and, of course, Justice Holmes. As they died or left the Court for one reason or another and the new appointees arrived, I came to know them also--Justices Lamar, Van Devanter, McReynolds, and Pitney. It is interesting to note that when father returned to assume the Chief Justiceship in 1930, fourteen years after he resigned as an Associate Justice, only Justices Holmes, Van Devanter, and McReynolds were still there. And now of the Justices on the Court when he retired in 1941, only Justice Douglas is left.

The former President and Chief Justice, William Howard Taft, was a good friend of our family. When he was President, he came to Albany to call on father and joined the family at dinner. He picked me up, set me in his lap, genial and jovial as always. But I was not a bit impressed. I began to cry, slid down, rushed to my mother and said: "Oh! What a biggy man!" A second meeting occurred when he was Chief Justice and father was Secretary of State. We met casually one day on the Connecticut Avenue bridge. As we walked together he talked to me, told stories and did some reminiscing about Washington, which he seemed to enjoy. But I was concerned. Whenever I walked with father, we often did so in silence, and I sensed that he was intellectually engaged in working out difficult legal problems that were involved in cases then before the Court. So when Taft insisted on conversing so volubly, I became self-conscious and said to him: "Mr. Chief Justice, you don't need to talk to me." He roared with laughter, his large stomach shaking like that of Santa Claus. Shortly after I arrived at home, Taft telephoned father to report my remark and expressed his amusement.

Even though I sensed father's need for deep concentration at times, even at home, and acted accordingly, he was by no means a stern parent. He left most of the child disciplining to mother, and although heavily burdened with work, he seemed to forget it all at mealtimes. And so I remember only happy dinners, with much laughter and light conversation. Father was an inveterate story-teller, with a great ability as a mimic, especially in dialects.

I was allowed to join the family at dinner at an unusually early age, because my parents realized that otherwise I would be alone. Thus I was fortunate enough to be allowed to listen and absorb when guests came; and distinguished ones some of them were! Children were "seen and not heard" in those days, and to me that seemed an advantage. I wouldn't have ventured a remark in any event, but I listened carefully and tried to understand what I heard. Although father never discussed cases pending before the Court, of course, he occasionally expressed a

confidential opinion on current events; but he always cautioned us with the remark: "This is not to be repeated to anyone." We never did and were benefited by that early training.

In his "Autobiographical Notes," father describes his early days on the Court and gives intimate accounts of the Justices. Harlan and White apparently did not admire each other, nor did they see eye to eye. Harlan and Holmes, he wrote, were antipathetic; yet each respected the other and they were "gentlemanly opponents." Harlan longed for the Chief Justiceship, and when White was promoted instead, it was a bitter pill for him to swallow, and yet he did manage to conceal his disappointment. Things became smoother on the Bench after resolution of the uncertainty as to who was to become Chief Justice; and father wrote that the Court was greatly strengthened by the accession of Van Devanter and Lamar, followed by Pitney.

He added that, "Of all these judges with whom it was my privilege to serve during my Associate Justiceship, Holmes had the most fascinating personality. Not that on the whole he was a more admirable character, but that by reason of his rare combination of qualities--his intellectual power and literary skill, his freshness of view and inimitable way of expressing it, his enthusiasm and cheerful skepticism, his abundant vitality and gaiety of spirit--he radiated a constant charm. My relations to him were of the happiest sort."

Indeed, it was a happy and stimulating six years, during the course of which he gave up smoking, a decision that he said was of great benefit to his health and vigor. During the course of those first years on the Court, he wrote 151 opinions of the Court and dissented in only 32 cases. In the eleven years as Chief Justice, he wrote 283 Court opinions and dissented in 23 cases. Thus, his record in the seventeen years of service was 434 opinions of the Court and 55 dissents.

Commencing in 1915, there were rumblings in the press and within the ranks of the Republican Party about a draft of father as nominee for President in 1916. Although he discouraged such talk, he was conscious of the increasing pressure and demand. "It was thought," he said, "that I was the only one who could unite the factions of the Republican Party and restore it to the place it had held before the rupture in 1912; and that this restoration was essential to the working of the two-party system."

Mr. Taft, who had appointed him, agreed that he should not refuse, if nominated. Justice Van Devanter felt the same way; Holmes understood the situation and so did Chief Justice White. The latter expressed the view, however, that if father remained on the Court he would get the Chief Justiceship after he, White, retired, which he wanted to do. Father's response was that President Wilson would never appoint him Chief Justice. "Well", White replied, "he wouldn't appoint anyone else, as I happen to know." "I told Chief Justice White," said father, "that I was going to do what I thought was right and that I would not be influenced by any such suggestion."

One of my most vivid Washington recollections is of returning home from school with my sister Catherine (about to graduate) in June of 1916, when we found a large crowd around the front door of our house, extending out into the street. Snapshots were being taken, and my father was standing on the front steps talking with reporters. Not wishing to interfere, we entered the house through the back door. A little while later, father came to us and said: "Catherine, Elizabeth, I have just sent in my resignation from the Court to President Wilson and have accepted the nomination of the Republican Party to run against him for President."

That was exciting news, of course, and I recall spending the summer in Bridgehampton, Long Island. There were state troopers and Secret Service men about and I remember that father and mother were constantly leaving for and returning from cross-country campaign trips. The most important event of all was when mother awakened me at midnight of election eve to show me the lights of Times Square, with 200,000 or so people chanting "Hughes, Hughes" in unison, and the statement flashing from the tower of the New York Times building: "Hughes Elected"!

As everyone knows, the next morning there was doubt about the outcome and later news of father's defeat. Senator Hiram Johnson had won the State of California and father had lost

the state and the election by a small margin. In his autobiographical notes, he describes his reaction: "I was not cast down by my defeat. As I wrote Mr. Taft, I had 'no complaints and no regrets.' I had done my best. While of course I did not enjoy being beaten, the fact that I did not have to assume the tasks of the Presidency in that critical time was an adequate consolation. The New York Times, which had vigorously opposed me as a candidate, gave me a generous welcome as I returned to professional practice in New York." The Sixteenth Street house was sold and the family moved back to New York.

But father's career of service to the country was not over. We returned to Washington when he was appointed Secretary of State in the Harding Cabinet. Entertainment was part of the job, and father and mother often entertained at home. Those were the days of receptions--not cocktail parties, but afternoon teas. Wives of Cabinet officers and of other officials were "at home" on various days of the week. For example, Mondays were reserved for the Supreme Court ladies, Wednesdays for the Cabinet wives, Fridays for the embassies and legations, etc. In addition, the official wives in all categories often paid calls on others and left calling cards. Such practices fortunately were abandoned during the Second World War. Not only were those elegant teas costly; they were time-consuming and tiring.

Mother's first day at home after father returned to Washington as Secretary of State, I shall never forget. More than a thousand people "dropped in"; traffic was snarled around the house where we lived on Eighteenth Street near Dupont Circle, and we ran out of food. It is not difficult to imagine what might happen these days if "open-door" receptions were held. The "twenties" and "thirties" may have had their problems, but the Washington crime rate was low, and there was little or no fear of serious incidents.

In 1925, father resigned and returned to the practice of the law in New York. He bought an apartment at 1020 Fifth Avenue, and again thought this move to be final and permanent. During those years between 1925 and 1930 I was at Barnard College, and each summer father and mother and I vacationed in Europe, motoring at leisure and visiting many countries. In September 1928, though, father was elected by the Council and Assembly of the League of Nations as Judge of the Permanent Court of Justice at The Hague and was a member of that court during its session from May to September, 1929.

He thoroughly enjoyed that work, and for mother and me it was another period of exciting events. We were caught up in the social whirl of The Hague, which as a nation's capitol was reminiscent of Washington, D.C., with the various festivities of the embassies. Calling and card leaving was again part of the weekly routine. The volume of work on that court was not large, and yet the necessity for constant translation of oral arguments encumbered and slowed down the court procedure. Father was not fluent in French, but he could read it and could understand much of the arguments that were made in that language.

To aid in the process, father hired a young man to serve as his law clerk. He, Edmund L. Palmieri, fresh out of Columbia Law School, spoke French fluently, and Italian as well. This was a great asset and Ed, as we called him, lived at our hotel, the Wittebrug, and became a close and valued friend of the family. Incidentally, after our return to the U.S.A., he entered law practice as an associate of father's old firm and later became a Judge of the United States District Court for the Southern District of New York, a position he still holds.

While serving as a judge of the Permanent Court, father of course continued his law practice in New York. He was happy in that dual role and especially enjoyed our summer at The Hague. Once more he thought he would be serving out his full term there, not realizing that the Chief Justiceship was in the offing. It was a mere four months after he returned from The Hague, on February 3, 1930, that President Hoover sent his name to the Senate for confirmation as Chief Justice. Chief Justice Taft was in failing health, too ill to perform his duties, and died about a month later. His resignation had been accepted by the President on the third, the same day he sent in father's nomination.

Meanwhile, my brother, Charles E. Hughes, Jr., was serving as Solicitor General of the United States. He had been appointed by Hoover in May 1929, to that demanding position and had established an enviable record there. But fate decreed that Charlie would serve only about a year in that capacity. He recognized the conflict of interest problem immediately, of course, and did not wish to stand in the way of father's Chief Justiceship. Accordingly, he resigned shortly after father's appointment was confirmed.

Several days prior to February 3, 1930, something occurred that caused me to ponder. About 8:00 p.m., at our apartment in New York City, father received two distinguished visitors from Washington. They were Justices Van Devanter and Butler. Characteristically, father had not mentioned that they were coming. After a short stay, they left, and father, seeing the light on in my room, realized that I had seen them and issued the usual warning, "Please do not mention this visit to anyone." Nor did I, but when he telephoned me from Washington a few days later to tell me of his acceptance of the appointment as Chief Justice, I put two and two together! The visiting justices obviously were there to sound father out about his willingness to accept the appointment.

The two-week debate in the Senate over father's nomination both distressed and wounded him deeply. A majority of the years of his mature life had been spent in service to the country, and to hear the derogatory references to his character, to his "big-business" clients, to his large legal fees, was bitter medicine. Indeed, I believe it hurt him more than the loss of the presidency. Even though his ultimate confirmation probably was never in doubt, the unjust attacks in public debate were difficult for him. He was a sensitive man and a proud one. The principal thrust of the attack was: (1) that he was reactionary in his views because many of his clients had been large corporations; and (2) that in his opinions as Associate Justice he "had unduly interfered with the authority of the states as to the extent of the power of Congress over interstate commerce." But his votes as Chief Justice in the years ahead served to refute and dispose of such claims as mere political sham.

When he took the oath on February 24, 1930, he was greeted warmly by his brethren of former years, Holmes, Van Devanter and McReynolds. Justice Stone he knew well, having been a colleague of his in the Coolidge Cabinet; Brandeis, also, was a friend of many years; and the others, Sanford soon to be replaced by Roberts, and Butler and Sutherland, all knew him as a prominent member of the bar of the Court. Holmes remained on the Bench for two years with father as Chief. His failing health soon became apparent, though, and the Justices were all agreed that father should ask him to resign. This was a difficult, disagreeable task, "a highly unpleasant duty." But on Sunday, January 11, 1932, he went to see "the grand old man" at his home and told him as tactfully and graciously as he could.

Holmes received the word with grace and dignity, and in father's words: "At his request I got out from his bookshelves, the applicable statute and he wrote out his resignation with his usual felicity of expression." The next day he sat on the Bench for the last time, read the tender, affectionate letter written by father and signed by all the Justices, and replied with these words: "My dear Brethren: You must let me call you so once more . . . Your more than kind, your generous letter touches me to the bottom of my heart." Holmes lived for another three years; he died on March 6, 1935, and in his memorial tribute father said: "The most beautiful and rarest thing in the world is a complete human life, unmarred, unified by intelligent purpose and uninterrupted accomplishment, blessed by great talent employed in the worthiest activities, with a deserved fame never dimmed and always growing."

Father's relationship with the other Justices was excellent, and although he was aware of a cleavage in the Court, much as he had been aware of the same situation on the Court he served as Associate Justice, he was not concerned with so-called labels, each man being entitled to his own opinion. "Now it was Van Devanter, McReynolds, Sutherland and Butler, all able men of high character who generally acted together."

Summing up this attitude are his own words delivered in an address before the Judicial Conference of the Fourth Circuit, June, 1932. "A young student wrote me the other day to ask whether I regarded myself as a 'liberal' or 'conservative.' I answered that these labels do not interest me. I know of no accepted criterion. Some think opinions are conservative which others would regard as essentially liberal, and some opinions classed as liberal might be regarded from another point of view as decidedly illiberal. Such characterizations are not infrequently used to foster prejudices and they serve as a very poor substitute for intelligent criticism. A judge who does his work in an objective spirit, as a judge should, will address himself conscientiously to each case, and will not trouble himself about labels."

In commenting upon drafts of opinions, the Justices often wrote notes in the margins of the galley-proofs or in letters. Some of those notes are quite amusing. As an example, I quote the following letter from father to Justice Frankfurter:

"Dear Justice Frankfurter: I am surprised that exception should be taken to the statements in the paragraphs you mentioned in your letter. I thought that they gave the true milk of the word. While I think the opinion will not be as complete and well rounded without them, I am willing in the interest of harmony to make the omission you suggest. Justice Holmes used to say, when we asked him to excise portions of his opinions which he thought pretty good, that he was willing to be 'reasonably raped.' I feel the same way. Faithfully, Charles E. Hughes."

The "plan" which President Franklin D. Roosevelt sent to Congress on February 5, 1937, "to reorganize the judicial branch of the Government," startled the country, and before it was laid to rest in defeat the following July, had stirred the populace into writing thousands of letters in opposition, reflecting "the strength of public sentiment in support of the independence of the Court." Father's contribution to the defeat of the bill and deep feeling of resentment and opposition to the proposal is well known. Yet his personal relationship with Roosevelt always remained cordial. And I think it is worth repeating here the story that after father had administered the oath of office to Roosevelt for the third time, he told him that "I had an impish desire to break the solemnity of that occasion by remarking: 'Franklin, don't you think this is getting to be a trifle monotonous?'"

It is my own view that father might have remained on the Court for a longer period if he had been an Associate Justice. Although he had suffered from a duodenal ulcer for more than a year, he was still able to fulfill his responsibilities as Chief Justice. But he feared that the time would soon come when he could not keep the pace that he had set for himself. And he was concerned also that if he started to slip mentally or physically, his brethren on the Court would be reluctant to tell him as Chief Justice that he ought to resign. And so, at 79, although in good health, he sent his resignation to President Roosevelt at the end of the term, June, 1941.

Characteristically, fearing a leak, he did not tell us, his children, of this decision. We learned it from reading the newspapers. It was fortunate, though, that he was alive and able to read the countless articles and editorials in the press applauding his long, faithful years of distinguished public service. The hundreds of telegrams and letters he received showed the warmth and esteem in which he was held by the people of the nation in all walks of life. So often such an outpouring of sentiment comes only after a man dies and without his knowing the impact he has made. Father fortunately did and, modest as he was, received it with extreme pleasure and wonderment.

Roosevelt accepted father's resignation with regret and invited him to lunch to discuss the appointment of his successor. Father's strong recommendation was Justice Harlan Fiske Stone, which Roosevelt accepted, and thus Stone moved up as had White before him. The Stones had always been good friends of our family and we were delighted. Five years later, by a strange

coincidence, I happened to be in the Court with our eleven-year-old daughter when Chief Justice Stone was stricken, assisted from the bench and died a few hours later--an event that neither of us will ever forget.

Father adjusted to retirement well. He retained his faithful secretary, Wendell W. Mischler (who had formerly served Chief Justice Taft in that capacity), kept up with his voluminous mail, read, walked, meditated and, while mother was still able, indulged in his favorite hobby--travel. When she died four years later, much of the joy of living went out of his life. The family tried to persuade him to move back to New York, where he could be closer to us, but he did not want to move, saying: "I prefer to live here in this house: it is your mother's memorial."

He lived three years more, taking turns visiting each of us, his mind as clear and sharp as ever. But early in 1948, his ulcer symptoms returned, causing his heart to misbehave. Had he been able to take digitalis, he probably would have lived longer. As it was, the medicine disagreed, and he died while summering with us at Cape Cod, on August 27, at the age of 86 plus. During those two months prior to his death, we had many wonderful long talks, and he would say, as he sat on the porch of our cottage: "I like to watch the waves--they do all the moving for me."

It would not be appropriate, even if it were possible, to describe what it meant to live with such a person. It was an unforgettable and indescribable experience. But let me quote the Resolution presented by Solicitor General Perlman to the Bar of the Supreme Court at the Memorial Service for father held in the Court, May 8, 1950, and follow with a quotation from Chief Justice Vinson's address on the same occasion. Mr. Perlman said: "It is notable. . . that he followed the rule laid down by Benjamin Franklin, never to seek a public office and never refuse one when offered. It could never be said of him that he was greedy for office. No nomination or appointment came to him of his own seeking. And his various forms of service were ended by his resignation." And Chief Justice Vinson added: "Bullying he opposed at home as well as abroad. He was constantly solicitous of the liberties which the Constitution assures the individual. His opinions on this Court, as Associate Justice as well as Chief Justice, display an appreciation of and fealty to, lofty ideals of fair trial for ideas as well as individuals. His vigilance to protect individual freedom, to promote world peace and to improve public means for dealing with problems which apparently no longer could be solved by unaided or unregulated individual enterprise, stamp Charles Evans Hughes as intensely humanitarian.

"Humane but efficient he manifests the balance which is especially worthy of emulation today. There is overmuch interest these days in classification at the expense of comprehension. There is excessive pressure to take all or none of a single dogma, rather than to accept the good and reject the evil of all proposals. In our times, there is extreme need of men like Charles Evans Hughes, who have some inner gyroscope of conscience and capacity which maintains a balanced devotion to duty. Chief Justice Hughes had his own exalted standards and principles and he lived by them. In him there was no surrender to the purposes of the uncritical or the critique of a single viewpoint."

Finally, here are father's own words:

"One of the most important lessons of life is that success must continually be won and is never finally achieved.

"There are those who look upon the supposed fortunate in our social effort who have achieved places of influence and distinction, as though they had in some way gained a citadel in which they could stand secure against every attack. In truth, all they have done is gain another level of responsibility in which they must make good.

"Every day is one of test. Every day puts at risk all that has been gained. The greater the apparent achievement, the more serious is the risk of loss.

"As has been well said, it is not worth while to talk of the end of a period, for you are always at the beginning of a new one. You cannot rest content. You have been vigilant; it remains to be yet more vigilant. You have been faithful, but fidelity is an active virtue which demands its daily sacrifices of any counter interest, its daily response in energetic service."

Elizabeth Evans Hughes (Mrs. William T. Gossett) is President of the Supreme Court Historical Society. Her husband is a past president of the American Bar Association.

Evolution, Law and Order

WILLIAM F. SWINDLER

As the royal courts in the American colonies closed, at various dates between 1774 and 1776, most civil and criminal actions were left without a trial forum. Minor, local judicial business in some cases could be handled by local officials or agencies serving partly as administrative bodies, but their jurisdiction and authority was severely limited. The early state constitutions in due time established a general system of courts for each state. But it would be fifteen years, after a new Constitution had been approved and a new national government launched, before something like the former royal courts would reappear.

There was a fundamental difference between the higher judiciary in the British colonies and the Federal judiciary which came into being with the congressional enactment of September 24, 1789. The royal judges, and the Privy Council in England to which appeals were taken, dealt with each American colony separately. The Federal court system was set up from the beginning to deal with the states and the national government as a whole. This was the lesson learned by the Americans in the years between 1774 and 1789--that some independent agency was required to deal with the steadily growing number of disputes between states, or between citizens of different states.

The Continental Congress recognized the need for some sort of national or interstate judicial process early in the Revolution. George Washington, in fact, urged creation of such a court in November 1775, nearly eight months before the formal Declaration of Independence. Congress conceded in principle that the laws of capture and prize demanded some agency to arbitrate "the disposal of such vessels and cargoes belonging to the enemy, as shall fall into the hands of, or be taken by, the inhabitants of the United Colonies." A month later, a special committee to which the matter had been referred reported back to the delegates in Congress, recommending that each of the states establish a prize court and that appeals from judgments of these courts be reviewed by Congress.

Hindsight was to show that such a system was to work badly if at all. In the first place, each state created a court whose jurisdiction and powers were defined by that state; thus, there would be no uniformity of procedure, jurisdiction or rules of decision, except as the state laws followed the examples of the former British vice-admiralty courts. In the second place, each state reserved the right to determine the circumstances under which it would permit an appeal to Congress. By the end of the Confederation period, the refusal of states to abide by decisions of the special courts of appeal which had been established under the Articles of Confederation had become so notorious that it made one of the strongest possible arguments in favor of a separate, independent system of national courts.

But, as John Adams phrased it, the new nation had to be driven into a disciplined union by failure and harsh experience. When the Revolution began, the resentment at royal justice in general, and the vice-admiralty courts in particular, was too virulent to permit any suggestion of a system of superior courts that would limit the absolute sovereignty which each state asserted for itself. One of the charges against George III, leveled in the Declaration of Independence, was that "He has made the judges subservient to his will alone." This could be read differently on different sides of the Atlantic; to the Tory leaders in England, it was a complaint that the royal judges were too independent of colonial whim, that what the Americans really wanted were courts subservient to them rather than to the Crown.

Royal courts, it was said in England, were unpopular in America because they enforced unpopular laws. The vice-admiralty courts, established by English authority to deal promptly and locally with smuggling and other illicit maritime activities, were the most unpopular of all. Colonial critics of these courts conveniently overlooked the fact that admiralty courts existed in

England as well, preferring to insinuate that they represented an alien, tyrannical judicial process which jeopardized the Englishman's birthright of common law trial and protection. More pragmatically, the vice-admiralty courts were resented because they threatened the widespread colonial practice of evading royal customs requirements by many ingenious devices. Ships and cargoes captured by royal revenue patrols were subject to condemnation and forfeiture when their owners or masters were brought before the admiralty courts.

Twelve of the new states eventually responded to the recommendation of the Continental Congress committee, creating prize courts or conferring admiralty jurisdiction on the trial courts established by their new constitutions. (New York, whose only port was occupied by British troops throughout most of the Revolution, had no occasion to enact any admiralty legislation.) The cases which could be appealed to Congress were widely varied. New Hampshire, for example, limited such appeals to captures made by armed vessels outfitted at the expense of the United Colonies. For most of the war, the Philadelphia admiralty court denied any right of review in any prize case, but Maryland on the other hand appeared to allow appeal to Congress in all instances.

The review process in Congress was slow to become standardized. The first appeals, between September 1776 and the end of January 1777, were heard by ad hoc committees appointed for that purpose. Then a standing committee was created, which regularly heard cases from the states until it was replaced in May 1780 with a special Court of Appeals in Cases of Capture. In these various forms, the first national court of the United States was established. For its specialized purpose, and for the limited period in which it functioned, its achievements were significant. The men who were assigned to discharge its functions were experienced colonial lawyers who had handled admiralty cases before the former royal courts, and the precedents established by this first American tribunal were recognized and incorporated into the law of the Federal courts under the new Constitution in 1795 (*Penhallow v. Doane*).

The first "federal" judges in the American judicial system may thus be identified as the appointees to the Court of Appeals. The Continental Congress "resolve" provided for a three-judge bench and its first nominees were George Wythe of Virginia, William Paca of Maryland and Titus Hosmer of Connecticut. However, Wythe declined the appointment and Hosmer died that August. Paca was then joined by Cyrus Griffin of Virginia, but the third position remained unfilled for two years. In 1782 Paca resigned to become governor of Maryland, and Congress finally brought the court to full strength by adding George Read of Delaware and John Lowell of Massachusetts.

Of one hundred and eighteen cases to come before the prize review committees and the Court of Appeals (including eight reported in Alexander Dallas' first volume of *Supreme Court Reports*), forty-five reversed the judgments of the state courts, thirty-nine affirmed. The rest of them were compromised, or the records lost so that the outcome is unknown. Specialists in admiralty law have concluded that the large numbers of reversals were due to a misunderstanding of the relevant evidence on the part of the juries at the trial level. This in itself was an ironic turn of events; the colonists had condemned the vice-admiralty courts because they had no juries, and accordingly the state courts created for prize cases uniformly provided for jury trials--to their own undoing in more than half of the appeals.

The prize cases continued to be litigated--in common with most of the major litigation bred by the Revolution--long after the end of the struggle for independence. The final appeals of this period were settled in the Supreme Court some years after the Confederation Era, one of the tangible elements of continuity from the first years of independence to the government under the Constitution.

Until the system of national government created by the Articles of Confederation deteriorated to a stage where, as Edmund Randolph said, it "cried aloud for its own reform," there was general assumption that a national judiciary would be needed only for occasional interstate or international issues. The analogous royal courts had been courts within, not

between, colonies, and as these colonies now converted themselves into states they set up their own judicial systems within their borders. At the same time, each state was setting about answering, in its own way, three fundamental questions of the law by which it would now be governed. First was the question of the surviving force of the existing statutes in the erstwhile colony; second, the question of the common law as it had been applied therein; finally, the question of the specific legal character of the new, written constitutions which appeared in eleven of the states. (Connecticut and Rhode Island, until well into the next century, continued to be governed by their colonial charters.)

Part of the colonial grievances against England had developed from the insistence of Parliament, after the French and Indian War, on the right to determine legislative power as it affected colonies. Parliament itself, with increasing frequency, enacted imperial legislation extending to all British possessions, or to some of them as it saw fit. Colonial assemblies, on the other hand, enacted local laws subject to often-protracted review, and frequent disallowance, by the Crown in London. This also was listed in the objections set out in the Declaration of Independence: "He has refused his assent to laws the most wholesome and necessary for the public good," said the colonists of George III, and added that the King had further "forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation until his assent should be obtained; and when so suspended, he has utterly neglected to attend to them."

The newly constituted state legislatures, therefore, took it upon themselves to reverse the roles of the colonial period. They undertook to examine the existing laws and to decide which should be declared continuing in force, which should be amended or modified, and which should be terminated. In Virginia a famous committee of "revisors" consisting of Edmund Pendleton, George Wythe and Thomas Jefferson addressed itself to a massive body of English jurisprudence, both statutory and common law, to divide specific subjects into these three classes. Although the committee's recommendations were never fully implemented, the state assembly did pass two laws, still in force, continuing the effect of certain acts of Parliament and providing for the "reception" of the common law.

It was this insistence on the supremacy of legislative power in the states which accounted for the fatal weakness of the Continental Congress. During the war years its own legislative power was virtually nonexistent, and under the Articles of Confederation severely circumscribed; indeed, the provision that nine states were required to ratify congressional enactments brought the complaints of the Declaration against the King to full circle. As the experience under the Confederation demonstrated, the Continental Congress was never much more than an inter-parliamentary union which had little legislative authority, an improvised machinery for adjudicating or arbitrating disputes, and no executive.

Yet a national process was needed to deal with territorial disputes between the states, which steadily increased after the Revolution. The Continental Congress itself was the battleground for the primary struggle over the "western lands" claimed by some of the erstwhile colonies and demanded by the "landless" states as part of the national domain. Until the cession of these lands was agreed upon, ratification of the Articles of Confederation hung fire and a frame of government for the new nation was impossible to establish. While twelve of the states ultimately acceded to the draft of the Articles, despite Virginia's refusal to give up its own enormous holdings, Maryland held out stubbornly for more than four years, until Virginia at last capitulated. It was a major concession--the Virginia claims extended from the Ohio River to the eastern part of present-day Minnesota.

Georgia presented another land problem. It did not finally complete its cession to the United States until 1802, insisting upon a reimbursement of more than \$2,000,000 for the settlements it had previously (and fraudulently) developed in the far western part of its territory, near the junction of the Mississippi and Yazoo rivers, and the loss of expected revenues from development of the remainder of what later became the states of Alabama and Mississippi.

(Contract claims growing out of the Yazoo frauds would later be the basis for a famous Supreme Court case--Fletcher v. Peck--in 1810.)

The Articles did provide for a select committee of the Continental Congress to hear and determine "disputes and differences" between two or more states in boundary and territorial matters. Half a dozen such disputes, and proposals for adjudication or arbitration, were noted in the Journals of the Congress, but of these only one was pursued to final judgment, one was never formally submitted to Continental jurisdiction and the remaining four were settled out of "court" or simply dropped.

The long dispute over the "Hampshire grants," which eventually produced the state of Vermont, was the first of the attempts at interstate adjudication, precipitated in January 1777 when the settlers in the area declared themselves an independent state. The dispute, involving Massachusetts, New Hampshire and New York, had its origins in the confused geographic references in the early colonial charters and the overlapping claims of English and Dutch proprietors. In 1750 New York, on the strength of the earlier Dutch claims, extended its jurisdiction eastward to the Connecticut River, and the New Hampshire governor retaliated by making a series of land grants under his colony's seal to tracts between the river and Lake Champlain. Following the French and Indian War, in 1764, an order of the King in Council assigned the area to New York, with a retroactive effect which cast in doubt the titles to a number of the Hampshire grants on which New England men had settled.

New York made sporadic efforts to assert its jurisdiction (and collect taxes) in the area, but these were forcibly resisted. When the Vermont separatist movement reached its climax in 1777, therefore, New York appealed to Congress for settlement of the issue, and sought to join Massachusetts and New Hampshire in the action. The impotence of the Continental Congress--particularly evident in this period when not even the colorable authority of the Articles of Confederation had been established--made the quasi-litigation an exercise in futility. In September of that year Congress asked the states involved to enact legislation submitting the issue of Continental jurisdiction. New York complied rather quickly, New Hampshire less promptly, while Massachusetts, which had only minimal interest in the matter, failed to take any action. In 1780 the first two states laid their claims before Congress, each asserting jurisdiction but agreeing that in any event Vermont inhabitants could not separate themselves from the existing state or states. No determination of these questions was ever made, partly because Congress itself was divided and more practically because Vermonters were prepared to defend themselves against any outsiders. The following year Massachusetts formally recognized Vermont's independence; New Hampshire followed suit within a few months, but New York clung to its claims until 1790. When, in that year, it abandoned the struggle, the way was cleared for Vermont's admission to the Federal Union, which came in 1791.

If the struggle over the Hampshire grants demonstrated the ineffectiveness of interstate arbitration prior to the Constitution, the Wyoming Valley dispute showed the other side of the coin. The area involved lay along the northern border of Pennsylvania, which that state claimed under the 1681 grant to William Penn. Connecticut, which had settled the valley, insisted that the Penn grant was subject to its own 1662 charter, with its vague claims to territory "westward to the south seas." Connecticut, like many other enterprising colonies, had organized a development agency, the Susquehanna Company, which had established a number of small settlements in the Wyoming region. To further enforce its territorial claims, Connecticut had even organized the region into a county which was represented in its legislative assembly.

In the summer and fall of 1778 a series of Tory and Indian massacres in the Wyoming Valley had decimated the population, and three years later, seeking to forestall survivors' attempts to resettle and thus re-establish Connecticut claims, Pennsylvania petitioned Congress to adjudicate the matter. The following year in Trenton a five-man tribunal was sworn in by Justice Isaac Smith of the New Jersey Supreme Court; this ad hoc body consisted of Welcome

Arnold of Rhode Island, David Brearly and William C. Houston of New Jersey, William Whipple of New Hampshire and Cyrus Griffin of Virginia, already serving as a member of the Court of Appeals in Cases of Capture. After forty-two days of elaborate testimony, the court returned a unanimous verdict in favor of Pennsylvania. An effort to convene a new court in 1784, to hear claims of individual tenants, was dismissed, the Continental jurisdiction over individual claimants being in doubt. In 1799 Pennsylvania passed legislation to compensate holders of provable titles from the original settlement, and the matter was finally closed.

The prolonged decline of the national government under the Articles, after the compelling necessities of war had passed, aggravated the steadily increasing number of cases in which interstate disputes demanded--but did not find--effective judicial remedies. In 1787, the year of the Constitutional Convention, the states of South Carolina and Georgia, tiring of Congress' inability to provide such remedies, settled a territorial dispute between themselves in a "treaty" which was held valid nearly ninety years later in a Supreme Court decision of 1876 (*South Carolina v. Georgia*).

With the waning effectiveness of the Continental Congress, the judicial functions of the Court of Appeals and the committees on interstate disputes also went into decline. The need for national judicial machinery, on the other hand, steadily became more manifest. State-imposed duties on "foreign" goods coming from other states were threatening to balkanize the "perpetual union." On the Chesapeake, Virginia and Maryland were chronically on the verge of hostilities over fishing and navigation rights. Claims of citizens of one state could only be litigated in another state under the greatest handicaps. With the future of the nation so hardly and recently won in the Revolution now in serious question, Washington invited Virginia and Maryland representatives to Mount Vernon in March 1785 to seek an amicable settlement of their Potomac River disputes. When, somewhat to everyone's surprise, an agreement actually was reached, the way was open to attempt a broader solution of all the problems threatening the union.

Although the Annapolis Convention the next year was disappointing--only five states were actually represented at the time--those aware of the desperate need for concerted action issued another call for a meeting of all the states. On May 25, 1787, the Philadelphia Convention assembled. Some ten days later the delegates unanimously approved a resolution "that a national judiciary be established."

Like most of the other details of the Constitutional Convention, the judicial article was to require hard work and extended debate before it reached a final form. The threshold question was whether the new Federal court system should be merely a strengthened version of the Continental judicial process--all issues being brought to trial in state courts, with the Federal court being simply an appellate court. Future Chief Justice John Rutledge of South Carolina, indeed, strenuously opposed authorization of any trial courts within the Federal system. Roger Sherman of Connecticut supported Rutledge on the ground that a complete system of national courts parallel to the state court systems would be too expensive.

James Madison of Virginia and the future Associate Justice James Wilson of Pennsylvania opposed the Rutledge-Sherman position. The experience under the Confederation, Madison pointed out, at best was a disposition of cases on a state-by-state basis: each appeal either overturned or sustained a judgment growing out of the law of the state where the case had been tried, but no uniform national law resulted. As for the matter of admiralty law on which the appeals to the Continental court had been based, Wilson added, the subject of admiralty was itself one of exclusively national concern and ought to be tried and reviewed entirely within a national court system. Rufus King of Massachusetts joined the attack, directing his argument at Sherman's economy rationale: the application of a uniform national law in national trial courts would cost less than the process of appealing from state trials to Federal review, since appeals would be less frequent where a uniform national law had been applied at the trial level.

Proceeding from the organizational question to a jurisdictional one, the delegates then deadlocked over the proposal that the Federal high court should have the power to declare state

laws invalid. Such an invasion of local sovereignty, declared Rutledge and others, would doom any chance of ratification of the new Constitution in the states. Madison replied that since the state courts would tend to give effect to state laws which might trench upon national rights, a national court of necessity had to review and where necessary strike down such holdings. Edmund Randolph added that it was essential to declare (as the "supremacy clause" of the Constitution does declare) that all state and national officials were to be bound by the supreme law of the land. Judicial independence was another essential upon which Madison and Wilson insisted--appointment for life (i.e., during good behavior), no diminution in salaries, and nomination by the executive with confirmation by the Senate.

The debates in the Convention continued through the summer, with the advocates of a strong, independent and national judiciary holding their ground against a succession of objections by states' rights zealots. The completeness of their victory is illustrated in the opening language of the judicial article of the new document:

"The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The first clause of the following section of this article then filled in the dimensions of this judicial power:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime Jurisdiction; --to controversies to which the United States shall be a Party;-- to Controversies between two or more States;-- between a State and citizens of another State; --between Citizens of different States; -- between Citizens of the same State claiming Lands under the Grants of different States; and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The mere recital of these specific areas of jurisdiction was a reminder of the cumulated problems of the new nation in the vacuum between the disappearance of the pre-Revolutionary royal courts and the advent of the new constitutional system.

To "sell" the new Constitution, and particularly to explain the significance of the various articles including the judicial article, the local press was the logical medium for pseudonymous writers pro and con, state by state. The most famous of the newspaper articles, in the critical state of New York, was a series assembled by Alexander Hamilton, John Jay and James Madison which became known to history as *The Federalist*. It was clear that to overcome New York's entrenched opposition, a most eloquent and persuasive case had to be established--and established fast. This called for the most convinced writers--Hamilton, the only member of the New York delegation to the Constitutional Convention to sign the final document; Jay, the young nation's most experienced diplomat and therefore the most knowledgeable person available to make clear the vital need for a strong sovereign United States in the society of nations; and Madison, the prolific Virginia note-taker at the convention, whose participation in the convention itself and whose authoritative commentaries in the form of his notes were to earn him in his lifetime the accolade of "Father of the Constitution."

Hastily written against newspaper deadlines as these articles were, they reflected the deepest convictions of some of the most dedicated men of their time. As a result, the series was published in book form even before the end of its serialization--and it continued through many editions and translations to the present. Intended originally for an ad hoc campaign, they

became in effect the primary reference on the theory of constitutional government in the United States.

The articles on the Judiciary reiterated the basic arguments on the subject at Philadelphia. Hamilton did take occasion, however, to enlarge upon his own convictions. He agreed with Madison that a full-fledged judiciary (i.e., competent to try and review cases) was implicit in the principle of separation of powers. He contended that a government of limited powers, which the Constitution established, required a judicial branch with final authority over the nature and scope of these powers, and the relationships of state and nation in a federal system. Judicial control--Hamilton did not use the term judicial review--was indispensable in a government of delegated powers, since (to quote recent constitutional pronouncements) no agency should be the final judge of its own authority.

The struggle for ratification of the new Constitution took nine months, from November 1787 to July 1788; nine states were needed to establish the majority, but since it was impractical to proceed without the key states of Virginia and New York, the campaign continued until the tenth ratification (Virginia's) was won in June and the eleventh (New York's) in July. (Rhode Island and North Carolina held out until after the new government had gone into effect.) Congress finally mustered enough Senators and Representatives to organize for business in March 1789; George Washington became President in April. The third branch--the judiciary--finally came into being in the famous Judiciary Act of September 24, 1789.

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The Supreme Court Gets a Home

Catherine Hetos Skefos

Laying the cornerstone to the new Supreme Court building on October 13, 1932 officially marked the termination of 143 years of the Court's existence without its own permanent home. "The Republic endures, and this is a symbol of its faith," said Chief Justice Charles Evans Hughes on that occasion.¹ He perceived the new building as a national symbol—a symbol of the permanence of the Republic and of the "ideal of justice in the highest sphere of activity, in maintaining the balance between the Nation and the States and in enforcing the primary demands of individual liberty as safeguarded by the overriding guarantees of a written Constitution."²

It may even be said that the construction of a building exclusively for the use of the Supreme Court was a reaffirmation of the nation's faith in the doctrine of judicial independence and separation of powers. The ideal of separation of powers had been, after all, of utmost concern to the delegates to the Constitutional Convention of 1787. They were determined to make the judicial a coordinate, but independent branch of government. The long overdue construction of a magnificent building exclusively for the use of the Supreme Court would indeed be a dramatic illustration of a commitment to the early Republic's faith in the separation of powers.

Although the new "temple of Justice" could be said to embody these lofty national ideals, ideals alone could not account for the impetus required to effect the execution of the project. It is fair to say, as did Chief Justice Hughes, that the building is the result of the "intelligent persistence" of Chief Justice Taft.³

When William Howard Taft became Chief Justice in 1921, he presided in a Courtroom which had housed the Supreme Court since 1860. Originally designed for and used by the Senate, this room in the Capitol building was remodeled for the Court in 1859 when the Senate moved to its own wing of the Capitol. In his 1850 report on the extension of the Capitol, the architect Robert Mills stated that the members of the Court had suffered much from the inconvenience of the Courtroom, and from its cold, damp location which had proved injurious to health. "The deaths of some of our most talented jurists have been attributed to this location of the Courtroom; and it would be but common justice in Congress to provide better accommodation for its sittings."⁴

The Court's move to this "better accommodation" in 1860 did provide it with more space than it had previously. However, by the time Chief Justice Taft joined the Court in 1921, the twelve rooms for offices and records were scarcely adequate for the expanding judicial and administrative work of the Court. "In our conference room," Taft complained, "the shelves have to be so high that it takes an aeroplane to reach them."⁵

This physical handicap was intolerable to Taft, and no wonder: it was a blatant contradiction to the ideal of efficient and effective administration of justice that he had advocated for most of his public life. Dissatisfaction with the administration of justice had been expressed for many years, but not until Taft did a President provide leadership for extensive reform. In his first message to Congress on December 17, 1909, Taft reiterated and gave official status to feelings he had expressed as Circuit Court Judge and as a member of Theodore Roosevelt's Cabinet: "a change in judicial procedure, with a view to reducing its expense to private litigants in civil cases and facilitating the dispatch of business and final decision in both civil and criminal cases, constitutes the greatest need in our American institutions."⁶

As Chief Justice, Taft pursued these ideas, hoping to overcome the obstacles to his reforms which he had encountered in the Congress during his four years as President. One result of his persistence and active lobbying was two major Judicial Reform Acts: the Act of 1922

establishing the Judicial Conference (then the Conference of Senior Circuit Judges); and the Judges' Act of 1925, reducing the Court's obligatory jurisdiction and extending discretionary review by means of certiorari. The passage of these two Acts was one part of Taft's effort to make the administration of justice less costly, less time-consuming and more efficient.

This concern for how courts operate left Taft with little patience for the inefficiencies created by inadequate facilities for the Court. The issue gained heightened proportions in 1923, when Senator Charles Curtis of Kansas responded to the Court's plea for more space by assigning it an undesirable room. Taft told Senator Curtis: "We do think you might be willing to keep your Senate Committees within space which is reasonable in view of the real needs of the judicial branch of the government.... With the very large Senate Office Building," he continued, "you ought to be willing to let the Supreme Court have at least breathing space. The room which you propose to give us is an inside one. It really is not fair."⁷ Reluctantly accepting the proposed room, Taft warned that he would "continue to protest against the fact that you do not allow the Supreme Court to have space enough for its records."⁸

He was obviously ready to take on the Congress in order to accomplish his goal of providing the Court with more space. Rather than confront Congress for extra rooms, though, why not relocate completely--into a building "by ourselves . . . and under our control?"⁹

The nomadic existence of the Court throughout its history gave precedent to such a relocation, but could not account for the elegant, fully-equipped and specially-designed edifice which Taft envisioned for the exclusive use of the Supreme Court: the Court had traditionally occupied incommodious quarters which it either shared or was bequeathed after others had departed for better accommodations.

Pursuant to the Judiciary Act of 1789, the first session of the Court was held in New York, the Capitol City. It was here that its tradition of sharing space began--this time with the House of Assembly of the State which held morning sessions while the Supreme Court held its sessions in the afternoon.¹⁰ It is true that at the time the Court had little need for chambers of its own. During the first two terms there were no cases on the docket and selection of officers, the framing of rules and the admission of new members to its bar were the only matters which came before the Court. The concept of a "federal judiciary" was in fact so novel that no official robes were ordered for the Justices (they each wore their own academic robes) and the Clerk of the Court, a Massachusetts man, erroneously entitled the first official minutes of the Court "At the Supreme Judicial Court," the name of the highest tribunal in his home state.¹¹

However, sharing space was not the only inconvenience which this first location presented. The Exchange Building where it met had been designed not as a courthouse but as an open-air market¹² with meeting room facilities on the second floor. Only in November 1789, thirty-seven years after the construction of the Exchange, and two months before the first session of the Supreme Court, did the Common Council direct that the butchers be moved and that chains be fixed "across the streets at the Exchange to prevent the courts of justice and the legislature . . . from interruption from the noise of carts."¹³

In July 1790, an Act of Congress removed the Capitol from New York to Philadelphia (1 Stat. 130), causing the Supreme Court to abandon its modest second-floor accommodations and find shelter in the new Capitol. The understanding appears to have been that the Justices would meet in City Hall. However, construction of this building did not begin until 1790, and it seems that it was not ready for occupancy when the Supreme Court met for their February Term, 1791.¹⁴ Although the Term was only two days long, the Court nevertheless required housing and found temporary refuge in Independence Hall, then known as the "State House."¹⁵ The room was attractive, but hardly perfect. It had been designed to house the Supreme Court of the Province and the Pennsylvania Commonwealth, and thus was fairly well suited to the work of the Supreme Court of the United States. However, several years before, the State Assembly had refused to supply stoves such as warmed the Legislature and the room remained unheated.¹⁶

Moreover, even when the new City Hall building was completed, the Court had to share its courtroom with the Mayor's Court. We read, for example, that on March 14, 1796, the Supreme Court vacated the courtroom and sat in the Chambers of the Common Council on the second floor of the building¹⁷ so that the Mayor's Court could hold its previously advertised session in the courtroom.¹⁸

In this same year, 1796, a committee of the House of Representatives, reporting on the progress of the new-born Capitol City, the District of Columbia, noted that arrangements had been made for housing the executive and legislative branches of the government but "a building for the Judiciary" was among the objects "yet to be accomplished."¹⁹ Once again the Court would be relegated to available space--suitable accommodations were not being arranged expressly for the third, co-equal branch of government. In the Journal of the House of Representatives for January 23, 1801, there is a notation that:

"Leave be given to the Commissioners of the City of Washington to use one of the rooms on the first floor of the Capitol for holding the present session of the Supreme Court of the United States."²⁰

As architect Benjamin Latrobe comments in an 1809 letter to President Madison, "The Courts of the United States both the Supreme Court and Circuit Courts . . . occupied a half-finished committee room, meanly furnished and very inconvenient."²¹

Even in the new Capitol building, the Court was relegated to the unappealing recesses of the lower level. Not until 1810 did it acquire chambers especially designed for it by architect Latrobe; yet even here, the space was not entirely for the use of the Supreme Court, but was shared with several other courts, among them the United States Circuit Court and the Orphans' Court of the District of Columbia.

Space problems were aggravated when, in 1814, the British burned the Capitol and the Court was forced to hold sessions in a local tavern described as "uncomfortable, and unfit for the purpose for which it was used."²² The year 1817 marked the return of the Court to the Capitol--to a room "little better than a dunjeon"²³ until its own chambers were adequately restored in 1819. It was in these restored chambers that the Court remained until 1860, the year it moved to the Chambers and offices formerly occupied by the Senate, the facilities that were antithetical to the standards of efficient administration of justice which Taft brought with him to the Chief Justiceship in 1921.

The Senate's passage of a bill authorizing expenditures of \$50,000,000 for new public buildings in 1925²⁴ provided just the impetus Taft needed to bring about the realization of his dream of a new building for the use of the Supreme Court. Not even the comments of some of his judicial colleagues, opposing a "marble palace" as a breach of tradition, slowed the momentum of the Chief Justice. He attributed their feelings to the fact that "they did not look forward or beyond their own service in the Court or to its needs."²⁵

With great finesse, Taft seized the opportunity which the fifty million dollar public buildings bill presented and approached Senator Reed Smoot of the Senate Committee on Public Lands and Surveys: "I would like to invoke your attention to and your introduction into the bill of, a provision for the purchase of land and the construction of a building for the sole use of the Supreme Court."²⁶

The proposal was defeated. However, since the Senate Appropriation bill conflicted with the version drafted in the House, the bill went to conference and afforded Taft a second opportunity to press for the insertion of his provision. While the measure was pending, the Chief Justice negotiated both with members of the House Committee and with the Conference Manager of the bill, the Chairman of the House Public Buildings Committee. The conference report, issued a week later, attests to the success of Taft's lobbying, for it authorized the

Secretary of the Treasury "to acquire a site for a building for the use of the Supreme Court of the United States."²⁷

This intense level of personal involvement characterized Chief Justice Taft's participation throughout the building project. In the determination of a site location, in the composition of the United States Supreme Court Building Commission and in the selection of the architect, Chief Justice Taft was the keystone to the major decisions. One possible site was eliminated, for example, because Taft was "afraid that that would so lower the building as to make it a kind of side hill concern."²⁸

As to the composition of the Supreme Court Building Commission, the Commission authorized to organize and oversee the building project, Taft saw to it that the Court, not the Architect of the Capitol, had supervision over its own building. Balking at a measure proposed to the House in April 1928, making the Architect of the Capitol both a Commission member and the executive officer authorized to select consulting architects and have custody of the building after its completion,²⁹ the Chief Justice and Justice Van Devanter sought to regain control of the project and requested "that we draft a bill making such amendments as we thought ought to be made."³⁰ At a Saturday conference, the Justices approved this amended draft and authorized the Chief Justice to say that they were "very anxious to have the bill go through as we have recommended it" at the forthcoming hearings.³¹ From the discussion at the hearings emerged the final, refined version of the bill--the provisions of which were entirely acceptable to Taft and the Court.

Rather than provide that only one member of the Court serve on the Commission, as the original bill had done, the final version created a Commission which included both the Chief Justice and an Associate Justice. Moreover, the bill did not assign to the Architect of the Capitol the broad spectrum of long and short-range responsibilities which had originally irritated Taft. The section of the bill discussing the Architect's supervisory function over the completed building was ultimately deleted. Instead, the Architect's role was simply to "serve as executive officer of the Commission . . . and perform such services as the commission . . . may direct."³² The bill, enacted that December,³³ effectively minimized the role of the Architect of the Capitol and shifted the influence within the Commission to the two representatives of the Court--the Chief Justice and Justice Van Devanter.

The Building Commission's selection of the Chief Justice as its Chairman further enhanced the Court's supervisory control and left little doubt as to who would be chosen architect of the new Supreme Court Building. On April 10, 1929, the Commission entered into its first personal service contract--for preliminary studies--with Cass Gilbert,³⁴ a prominent architect who had achieved national acclaim for such buildings as the Minnesota state capitol, the Woolworth building and the Department of Commerce.

As President of the American Institute of Architects (1908-1909), Gilbert, an ardent Taft supporter, had several times invited President Taft to speak at dinners of the Institute and had, in fact, written a letter to Taft suggesting that he employ an architect to assist with the planning of the Panama Canal ³⁵--a recommendation which was later adopted. Taft, then, was familiar with Gilbert's name both for personal and professional reasons. In 1910 when the President signed the legislation creating the Commission of Fine Arts to review and approve plans for Washington buildings and monuments, he named Gilbert a charter member.³⁶ After Taft's presidency, their association was maintained, informally, as both were members of the Century Club, an organization "for the purposes of promoting the advancement of art and literature. . . ."³⁷

It was no surprise, then, that the Chairman of the Supreme Court Building Commission, Chief Justice Taft, proposed Gilbert's name as a candidate for architect of the new building, and the Commission voted to adopt the advice of its Chairman.³⁸

Having received this initial \$25,000 contract, it became Gilbert's responsibility to transform his imaginative pencil sketches into cost estimates, preliminary plans and renderings

and plaster models of the proposed building. Completed May 13, 1929, Gilbert's plans and models were accepted by the Commission,³⁹ which a few weeks later submitted a report and recommendation to the Committee on Public Buildings and Grounds of the House:

"It has been the purpose to prepare a building of simple dignity and without undue elaboration, looking rather to the choice of the proper material, to the proper disposition of space, to the general comfort of the occupants as well as to a harmonious addition to the Capitol group of buildings now existing. For these reasons the Commission recommends the adoption of the plans submitted and the appropriation of such sums of money as may be necessary to complete the proposed building in the manner set forth by the plans and by the Architect's explanatory statement . . . The sum of \$9,740,000 is hereby recommended to be appropriated."⁴⁰

In December of that year, an act was passed adopting the Commission's recommendation. It authorized the Commission to provide for the construction and equipment of the building, and the Architect of the Capitol to provide for the demolition and removal of every structure on the site and to enter into contracts for materials, supplies and personnel. Most importantly, the act authorized the \$9,740,000 appropriation necessary for the construction.⁴¹

With this authorization, the Secretary of the Treasury, who had been renting or leasing the property on the site for the government, terminated the leases and rental agreements and served notices upon tenants to vacate the premises within thirty days.⁴² In May 1930, a second contract with the firm of Cass Gilbert, Cass Gilbert, Jr., and John R. Rockart for furnishing all architectural and engineering services was signed and by December, the site, architectural specifications and blueprints were at a stage where construction could begin.

That Gilbert considered this building his most monumental endeavor is certain. In a December 19, 1929, entry made in his Diary, he notes:

"This opens a new chapter in my career and at 70 years of age I am now to undertake to carry through the most important and notable work of my life. I have built other buildings that are larger and most costly, some that were no doubt more difficult but none in which quite the same monumental qualities are required."⁴³

He signed, dated and annotated all of his early pencil drawings no matter how rudely sketched on the back of a blank check or in the corner of a scratch paper. Moreover, he injected into his plans the ultimate in convenience where, in fact, less would have sufficed. This building was to be the most beautiful and commodious that he was able to create.

We see, for instance, that not only did he design the building to provide ample space for the Justices' offices, a convenience unavailable to them in the Capitol building; but he also arranged that each chamber have a working fireplace for a Justice who wished to dispose of confidential papers.⁴⁴ As for Court records, Gilbert planned the structure so that there would no longer be the kind of storage problem about which Taft had so vociferously complained in 1921. Records rooms, temperature and humidity controlled for paper preservation, were part of Gilbert's carefully-calculated design.⁴⁵

Perfection was his goal and he went to any length to achieve it. The specifications for the building stated that marble used in the building, with the exception of the Courtroom, was to be quarried from domestic sources--quarries in Alabama, Vermont and Georgia. When the Alabama quarries sent to Washington columns of different quality and veining than those samples which Gilbert had originally approved, they were condemned and returned, repeatedly, until a closer approximation could be met.⁴⁶

As for the marble in the Courtroom itself, Gilbert felt that only the ivory buff and golden marble from the Montarrenti quarries near Siena, Italy, would be beautiful enough for this room. So intent was he upon procuring the best quality marble that in May 1933, he met with Premier Mussolini in Rome to ask his assistance in guaranteeing that the Siena quarries sent nothing inferior to the official sample marble that he had selected and specified for use in the Supreme Courtroom.⁴⁷

When Chief Justice Taft died in 1930, the construction of the Court had barely started. When Cass Gilbert died in 1934, it was 14 months from completion. Neither man, each so enamoured with the idea of a new Supreme Court building, lived to see the realization of his dream. It is fascinating, however, that both men are represented in the carved triangular pediment on the front of the building--two of the nine classically-garbed figures bear striking resemblances to Taft and Gilbert.

It is not known how these and other faces of distinguished living and dead jurists and individuals involved with the construction of the building came to be used as models for the otherwise allegorical figures. We read in the *New York Times*, December 8, 1934: "The depiction of these faces in the pediment came as a surprise to the Supreme Court Building Commission, it was learned today . . . some of those now depicted in enduring marble were astonished, not the least of these Chief Justice Hughes."⁴⁸

Robert Aitken, the sculptor of the pediment, had submitted a description of his sculpture to the Commission for their approval prior to the actual carving. In this he said:

"In designing the sculpture for the West pediment my aim had been toward simplicity with directness of motif--a composition rich in relief (light and shadow) and true in balance and scale to its architectural setting. My simple sculptural story is as follows: Liberty enthroned---looking confidently into the Future--across her lap the Scales of Justice--She is surrounded in the composition by two Guardian figures. On her right 'Order' (the most active or alert of the two) scans the Future ready to detect any menace to Liberty. On her left 'Authority' is shown in watchful restraint yet ready to enforce, if necessary, the dictates of Justice. Then to the right and left of the Guardian figures groups, of two figures each represent 'Council.' Then right and left two recumbent figures represent 'Research' Past and Present."⁴⁹

The rough-hewn marble was placed in position for carving and the area was screened by platforms and tarpaulin, behind which the stone cutters worked to "evolve Mr. Aitken's finished design above the high columns of the portico."⁵⁰ Only when the pediment was completed was it evident that the faces of Taft, Gilbert and others had been used as models.

The two figures representing "Council," to the immediate right of "Order" (who holds fasces), are startling likenesses of Chief Justice Hughes and Mr. Aitken--the Chief Justice in classical robe and Mr. Aitken with a roll of drawings across his lap. To the extreme right is a representation of a youthful John Marshall perusing a scroll.

On the left of "Authority" (who holds the sword and shield) is the figure bearing the resemblance to Mr. Gilbert. He appears to be listening intently to "Elihu Root," former Secretary of State, Secretary of War and Senator.⁵¹ At the far left of the pediment is the representation of Taft, depicted as he looked when a student at Yale.

Immortalized in marble, in one of the most commanding spots of the Supreme Court building, are the faces of several of the most dynamic forces in the creation of the new structure. They are forever attached, in public view, to the dream they cherished, but frozen in a medium that cannot do justice to the energetic, vigorous men they were.

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Endnotes

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- 26 WHT to Reed Smoot, July 3, 1925.
- 27 U.S. Congress, An Act to provide for the construction of certain public buildings, and for other purposes, Pub. L. 281, 69th Cong.
- 28 WHT to Cass Gilbert, February 10, 1928.
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- 31 Ibid.
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- 35 Cass Gilbert to WHT, December 29, 1908 (WHT Papers).
- 36 Cass Gilbert to WHT, November 21, 1924.

37 Act to Incorporate The Century Association, Passed March 7, 1857, The Century Association Yearbook, 1975, p. 35.

38 Final Report (note 34), p. 5.

39 Ibid., p. 6.

40 U.S. Congress, House, Report to Provide for the Construction of a Building for the Supreme Court of the United States, H.R. 34, 71st Cong., 2nd sess.

41 U.S. Congress, House, An Act to Provide for the Construction of a Building for the Supreme Court of the United States, Pub. L. 26, 71st Cong.

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43 Cass Gilbert, Diary, December, 19, 1929 (The Library of Congress Manuscript Division).

44 Conversation with Cass Gilbert, Jr., 3/27/74.

45 House Report (note 40).

46 Cass Gilbert, Diary, April 13, 1933; also, Minutes, United States Supreme Court Building Commission, April 19, 1932.

47 Cass Gilbert to Benito Mussolini, August 11, 1932.

48 The New York Times, December 8, 1934, p. 1.

49 Robert I. Aitken, Description of proposed sculpture for West Pediment, United States Supreme Court Building, Washington, D.C. (Supreme Court Archives).

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51 It is interesting to note that in November 1929, Elihu Root was awarded a medal by the President of the National Academy of Design, Cass Gilbert. At the presentation ceremony of the medal (designed by Robert Aitken), Gilbert read a letter from Chief Justice Taft in which the Chief Justice recalled that during his presidency, Senator Root had introduced the bill creating the Commission of Fine Arts, the Commission to which Taft appointed Gilbert in 1910.

The Court a Century Ago

Augustus H. Garland

(August Hill Garland (June 11, 1832-January 26, 1899) was born in Tipton County, Tennessee, but the following year the family moved to Miller County, Arkansas. In 1850, when he was eighteen, Garland was admitted to the state bar and practiced for the next ten years in Little Rock. Following the state's secession in 1861 he served in the Confederate House of Representatives until 1864, when he was appointed to fill a vacancy in the Confederate Senate.

(Following the war, President Andrew Johnson granted him a full pardon in 1865, and Garland sought readmission to the Supreme Court bar. His application was challenged under an act of Congress passed earlier that year, barring persons who had held office under the Confederacy. Garland challenged the constitutionality of the law on the grounds that it was a bill of attainder *and ex post facto* (U.S. Const., Art. I, Sec. 9). In 1866 a 6-3 majority of the Court, speaking through Justice Stephen J. Field, sustained Garland's contentions and ordered him reinstated (Ex parte Garland, 4 Wall. 333).

(Garland became governor of Arkansas in 1874 and served until his election to the United States Senate in 1877. He remained in the Senate until becoming Attorney General in the first administration of Grover Cleveland in 1885. Leaving public office in 1889, he practiced law in Washington the last ten years of his life. During that time he wrote a small volume entitled, *Experience in the Supreme Court of the United States, with Some Reflections and Suggestions as to that Tribunal*, published in 1898. The following text is made up of excerpts from that book.)

In December, 1860, when I was about half-way between twenty-eight and twenty-nine years of age, I left Little Rock, Arkansas, to come to the court. But as I stood up before the court and took the attorney's oath, my vision became disturbed, and the judges all appeared to be, at least, twice the size they were, and more than double in number, and the surroundings generally appeared magnified in like proportion. This, I believe, is the experience of all young men on being admitted to practice in that court. Soon my vision was restored to its normal condition, and my nerves were composed, and after motions were called, I arose to visit the Senate.

Leaving Washington about the 15th of January, 1861, I returned to my home, and did not visit Washington again for over four years, as I had pressing business all this time at Montgomery, Alabama, and at Richmond, Virginia, so urgent and pressing I could not even visit the capital of the United States during that period.

In July, 1865, after the row between the States had subsided, I called on President Johnson with much amiability, and requested pardon for my deeds of commission and omission, in that row, and seconded by the efforts of my constant and steadfast friend, Reverdy Johnson, I procured the pardon--it was large and capacious, and I hugged it closely and went off rejoicing, with exceeding great joy, *as a novus homo* would naturally do.

Before going home, however, I went to the clerk's office of the Supreme Court and renewed my very pleasant acquaintance with those there whom I knew, and formed the acquaintance of others quite agreeable. Looking over the papers and records of that office, I found the cases I had lodged there more than four years before were still there undisturbed.

Before I came to the court again, I was elected to the United States Senate and took my seat in March, 1877, and this brought me in more frequent contact with the court.

Becoming Attorney-General necessarily I was brought still nearer to the court, and had to watch its proceedings closely. Among the first cases I argued in the court as Attorney-General was *Lamar v. McCullough*, 115 U.S. 153, involving a large amount for cotton seized and disposed of by the government. The pleadings in the case were complicated, and ran into the utmost limits of the common law system of pleadings. In preparing a brief in the case I had a

map, or so to speak, a genealogical tree of the pleadings made up and attached, and among the mass there were *numerous* similiter (Lat., doth the like). I called the attention of the court to these especially, and remarked, it brought to mind an occasion in the United States Court at Little Rock when Justice Miller first presided there! A most excellent lawyer and gentleman, Mr. Stillwell, arose on motion call and offered *to file a similiter* in a certain case, and at once Mr. Justice Miller shoved his docket in front and fell back in his chair, and said, speaking a little above a whisper, "Clay (addressing District Judge Caldwell, who sat with him, his name being Henry Clay Caldwell, but his great many Iowa friends called him tenderly Clay), *what is a similiter?* I have not heard of one for over twenty years!" and to this Judge Caldwell replied, "he did not know, for he did not believe he had ever heard of one."

During this somewhat subdued colloquy, Mr. Stillwell waited and looked set back, for fear he had offended against some unknown and invisible spirit, when Mr. Justice Miller remarked, "Well, Mr. Stillwell, you can file it, and we will look into the thing and see what it is." The court seemed to enjoy this no little, and a Justice who sat next to the right of Judge Miller in a voice loud enough to be heard from where I stood, asked him if this was a true statement, and he replied, "Oh, yes, but really I can't see how it affects this case."

Thinking over this case, with its intricate and complicated mass of pleadings, suggests that the science of special pleadings is now fast becoming one of the obsolete and unknown sciences, but it does have a charm about it that survives to the older lawyers who were disciplined in it. Its boast and pride were to come to an issue single and obvious. In the 7th volume of Robinson's Practice (Appendix), is contained as sweet and finely pointed a travesty, or parody in verse based upon young love's dream, on special pleading as can be found. I venture to append it to this paper. As said by Robinson, the verses are curious as illustrating the early bent of a great and original genius, and as showing the language of special pleading is not incapable of adaptation to the emotions of the tender passion. It is *entitled The Special Pleader's Lament!*

There is, I think, of late years, and it seems to be growing, an undue haste on the part of the court in hearing and disposing of motions. While it is not true in point of fact, the court looks on motions filed with some suspicion, frequently errors are committed and injustice done by not receiving and listening to motions with more patience than seems to be exercised in such matters. A little more time spend in hearing these would serve, it seems to me, to dispose of business more satisfactorily than such haste would. Chief Justice Taney was in the habit of saying to a gentleman on presenting motions when explaining the same, "And let us understand this, take your time and explain it." This was right and made the attorney feel at home, and court and counsel understood each other, and things went well and smoothly. Very often I have seen lawyers high up in their profession, but not used to the ways and manners of this court in this respect, frightened, so to speak, out of their wits into forgetfulness of the entire case, when suddenly pulled up by the court to know this or that before they had time to tell anything of it, and when they were getting ready to tell it. This is probably due, to a great extent, to the heretofore over-choked and charged condition of the business of the court.

The gorged condition of the docket has for the past several years been much relieved, under the workings of the Circuit Court of Appeals Act, March 3, 1891, and the Court need not be so restless under the pressure of a docket, which amounts in the aggregate at the beginning of the term in October, to some five hundred cases instead of three times that number before that law was passed. This act has done well, I think, in the main, and has contributed much to bring justice as near as may be to each man's door, the chief wish of all great lawgivers from Moses, Justinian, Alfred and Frederick down to the present day. What supposed infirmities there are in that act are to be discussed before the law-making power and there cared for, and are not proper subjects of debate here.

The opinions of the court are, as a rule, too long. The court is not intended to be a law school in which the judges are to deliver law lectures. When a controversy between parties comes before the court, it is enough to state just what the law is in that case, upon its facts. A

simple resolution finding, as the facts are such and such, the law is thus and so, and there stop. It is a dangerous business for a judge or any one handling a subject to say more than is absolutely necessary to reach and make known the merits. An attempt of this sort accounts *for so many* Obiter Dicta that we encounter in opinions. The object of a judicial proceeding is merely the restoration of a violated right, and no more is needed to be said than what can ascertain and fix the right in dispute. More than this is apt to be misleading, and it multiplies law books to such an extent as to render impossible at this day, for lawyers to have even a fair law library of the Reports, to say nothing of the time wasted by judges in preparing and getting ready these essays.

I am persuaded, after a long and close consideration of the matter, the publishing and making known dissenting opinions is not a good practice. It has its advocates, however, and they have their reasons, too, but I think it should not be known to the world if there is a difference among the judges, but the opinion should go forth and stand as that of the whole court. If, as contended for above, the object is to settle the right involved in a particular controversy, what do we care for anything but the opinion of the court?

It is the opinion of the court we want, and when that is given as such, of the whole court, it carries weight and is calculated to determine the question and quiet it against any further dispute or agitation. Dissenting opinions only add to the bulk of the volumes of reports, take up much valuable time and weaken the force of the judgment of the court.

I do not pretend to say or to intimate, the judges do not labor anxiously and often painfully to agree and be unanimous, but on the contrary I know they do. Often and often in coming out of the conference or consultation room they look worn and fatigued, and as if they had been on rides on bicycles, or had just returned from participating in a game of football in the most approved modern style, or in a game of golf. I do know they struggle to come together and it is not possible to do so in all cases, but I do think the disagreement should be known to themselves only, and the judgment of the majority should go to the public, as that of the entire court.

The hour of the meeting of the court does not seem to me to be a good one. I should rather think it should commence at ten and one-half A.M. and sit till one P.M. and then take a recess for an hour for refreshments and rest, and then sit from two till four:--this brings in four and one-half hours of hearing and doing court business, and this would be sufficient. There is no peculiar force or enchantment in four hours, and four and one-half could be well be substituted. Meeting as the court does now at twelve M., in the course of an hour the judges show signs of weariness and fatigue, and commence one by one to retire to lunch and sometimes barely a quorum is left; even Mr. Reed, the speaker, with his well known acuteness and adroitness to find a quorum would be puzzled at times to establish the existence of one. And it is true that at the hour from one to two sometimes we do find some of the judges unavoidably

Napping, napping, only this
And nothing more.

The lunch they manage to snatch the way they are now situated cannot be very satisfactory. Behind their seats, where persons are passing to and fro, a sort of ad interim or Pro Tempore restaurant is in progress, and counsel is arguing in front and hears the rattle of dishes, knives and forks, and the judges eating are in a state of unrest, to eat and get back. Of all things eating should be allowed full time and ease. To meet at ten and one-half when the system is comparatively fresh, alive and active, and not yet vexed by work or study, much work can be done till one. And then all may go and recreate and refresh themselves decently and in order, and resume work, not in a doze or a half awake and half asleep condition, but invigorated and reinforced. There is plenty of time in the meanwhile, with Saturdays entirely given to that purpose, for conference and consultation.

During the history of the court there have been several painful instances of the secrets of the court getting out, in the way of telling how certain cases are going to be decided--what is called LEAKS. It is really surprising there have not been more. The pressure to get at decisions in advance in important cases, is frequently unceasing and anxious, and at times the most ceaseless vigilance cannot escape it. The seekers after this information evince the knowledge of the scientists, who from a small bone or ligament work up to and find out the kind of huge animal from which it comes--they, from an item or two dropped inadvertently, make up a report of large proportions, of more or less accuracy or verity, that shakes up the public no little. But the judges are very cautious and quite reticent, although often pumped and tapped.

It chanced one Monday--opinion day--as I was going up to the court in company with Mr. Justice Brown, I asked if there would be many, or any opinions on that day, and he said yes, there would be several, and named some of the cases that would be decided, but in no wise intimating how they would be decided. We were rising on the eastern brink of the hill ascending towards the Capitol, and I asked, *I wonder* if Stanley v. Schwalby, a case I was much interested in, would be among them, and at once he said, "Mr. Garland, how lovely those little flowers (calling some name botanical, I suppose, I was not in the least familiar with, and pointing to some yellow buds just opening to our left) are when they first appear." I replied, "Oh, beautiful indeed," but I wondered within myself, *what that had to do* with Stanley v. Schwalby. We went in to the court-room saying but little after that. Opinions being called for after the meeting of the court, Mr. Justice Brown's time came to speak for the court and he delivered some opinions, and finally the chief justice spoke out he was directed to announce the opinion of the court in Stanley v. Schwalby (147 U.S. 508). My sensations were not pleasing at all, and were of a very doubtful and fluctuating character. He had not read far before I saw my hopes in that case were shattered. I was defeated, and then I could not help thinking of the lovely flowers which were blooming on our left as Mr. Justice Brown and I were coming up, and I thought they were not lovely but quite common, and that there was nothing attractive about them. This was as near a LEAK in one of the judges as I ever saw, and this was quite far from one. But I have never inquired more *of any one* of them, if Doe v. Roe or any other case was coming up for decision, but have ever since waited patiently or impatiently as the case may be.

Traditions and customs are adhered to and upheld with great precision, and probably it is well. This tribunal sits as a free and independent branch of the government, and it should have its insignia and devices to fix it and to have respect deep-founded for it. While it should not stand out too far from lawyers and the people, it must of necessity be fixed and steadfast in things pertaining to it in the somewhat ancient ways. Its chief justice is chief justice of the United States and not merely chief justice of that court, thus is his office national and not merely local with the court. Many of the old forms of writs and process are, in so many words used, and no one can question or interfere with them. The court is opened with the old invocation of "God save the United States and this Honorable Court," which is sometimes understood by persons hard of hearing, or of a malicious *turn of mind*, to be *God Save the United States* from this Honorable Court. But this is a mistake.

As the judges approach, the lawyers and audience are expected to rise, stand until the judges reach their places and a respectful bow all around is in order and the judges are seated and the opening proclamation made. This solemnity is impressed upon the proceedings, and men are made to know a great tribunal is now to work upon great things and great ideas. With all this the judges are robed in dark flowing gowns which seem to "make assurance doublesure," that all will be conducted with due formality and order. To the young attorney first coming into the court, these gowns strike wonder and almost awe, and make him feel not as much at home as he would like to. No law or rule provides for the use of these gowns, but by custom, to the contrary of which the memory of man runneth not, etc., they have been used, and while they are not actually necessary for any practical purpose, and may probably be considered

by some as contrary to the spirit of our institutions of democratic simplicity, yet they are harmless, and do make a feeling of respect for the court and might not be without them.

Mr. Justice Miller never tired of telling the story, of how Mr. Lincoln, at a reception, meeting him as he came in, compared the judges, with their long black gowns, to those long-winged black ants that fly out from under the bark of certain trees the season after they were cut down on the farms. Mr. Justice Miller thought the comparison good and fitting, but it may be, as he was reared on a farm, it had a smack of farm to him that others not so reared might not relish.

There is an implacable antipathy, like unto that of Hannibal against the Romans, on the part of the judges towards the appearing of attorneys before the court in coats not black. They do not regard especially the color of the other garments, but woe unto him who comes in with other than a black coat on. I have several times seen attorneys first coming there, in a coat not black, or of many colors, almost stripped in the clerk's office before the meeting of the court and encased in a deep black coat, borrowed to suit the occasion. This kind of coat is not unlike to the judges the noted red flannel hung out before a certain animal to infuriate and make him mad. Joseph's old coat would have been torn to tatters if it ever came into the presence on the back of an attorney appearing there.

It must not be inferred the judges never unbend and become jocose and mirthful. When without these robes and not at work, they are as lively a set and can punch each other and their friends about as well as any body or bodies you ever saw, and if a man has a weak or raw place about him they find it, and send an unerring shaft right there. Mr. Justice Blatchford, with very serious countenance, congratulated Judge Howell Jackson on his coming in to take his seat as a justice of that court, that he had not graduated at Harvard, while standing around close to him several justices who were proud of that honor. Not unfrequently do they, from the bench, send forth a witticism that strikes and cuts as it flies. Mr. Justice Gray, when an attorney was speaking, and exhibiting a map as giving "A BIRD'S-EYE VIEW" of certain localities, asked if that map was printed in the record, "that he was a bird and could not see as a bird." Mr. Justice Miller, when the words *Dominus Litis* were used, asked "and what is *Dominus Litis*?" Why, sir, said the attorney, it is, explaining the meaning, &c. "Well, why did you not say so, instead of coming in here with Latin, or whatever it is, for I think the English sounds better than that." Or Mr. Justice Brewer, in a criminal case, saying, "they would have the party not only released, but taken out and carried home in carriages with a brass band besides." And Mr. Justice Brown saying, "the wicked flee when no man pursueth," did well as Scriptural doctrine, but it had no particular application in a law case; and Mr. Justice Shiras, when the writer referred to one of Mrs. Gaines' cases as furnishing a precedent for his contention, observed, "But Mr. Attorney, that was the case of a woman, was it not?" To which Mr. Attorney replied that was the common or current understanding, but he believed no writ had ever been issued to determine the fact! These instances could be multiplied almost indefinitely.

This court, too, has received its full share and amount of criticism, if not abuse. All public functionaries do, and this seems to be part of the price exacted on account of their high positions. And some times, in the zeal if not heat of opinions, the court is raked by its own members, and no mistake. In judging them, however, we must always reflect, we see alone from our standpoint, lawyer and client, and that not the best calculated to do ample and unprejudiced justice, they have to see and act from all the points, the judges, the lawyers and both parties, and thus acting they must see as other do not, and cannot. This is what they are there for.

Appendix

The Special Pleader's Lament

Say, Cary, can'st thou sympathize
With me, whose heart lies bleeding;
Condemned to wake from "Love's young
dream,"
And take to special pleading?

For since I lost my suit to you,
I care not now a fraction
About these stupid suits at law,
These senseless forms of action.

But in my lonely chambers oft,
When clients leave me leisure,
In musing over departed joys,
I find a mournful pleasure.

How well I know the spot where first
I saw that form ethereal!
But, *oh!* in transitory things
The venue's not material.

And reading Archbold's practice now,
I scarce believe 'tis true,
That I could set my heart upon
An arch bold girl like you.

But then that bright blue eye sent forth,
A most unerring dart,
Which, like a special capias made
A prisoner of my heart.

And in the weakness of my soul,
One fatal long vacation,
I gave a pledge to prosecute
And filed *my declaration.*

At first your taking time to plead
Gave hopes for my *felicity;*
The doubtful negative you spoke
Seemed bad for its duplicity.

And then that blush so clearly seemed
To pardon my *transgression,*
I thought I was about to snap
A Judgment by confession.

But soon I learned, *most fatal truth!*

How rashly I had counted,
For non assumsit was the plea,
To which it all amounted.

Deceitful maid! another swain
Was then adored by thee;
The preference you gave to him
Was fraudulent to me.

But then, alas! the Barons held
The transfer of this treasure
Could *not by me be* set aside,
Being made when under pressure.

Ah, when we love, so Shakspeare says,
Ill luck is sure to have us,
The *course of true love* never ran
Without some special traverse.

Say, what inducement *could you have*
To act so base a part
Without this, that you smiled on me,
I ne'er had lost my heart.

My rival I was doomed to see
A husband's rights assert!
And now *'tis wrong* to think on you,
For you're a feme coverte.

When late I saw your son and heir,
'Twas wormwood for a lover;
But the plea of infancy,
My heart could not get over.

I kissed the little brat, and said
Much happiness *I wish you;*
But, oh! I felt he was to me
An immaterial issue.

Mary, adieu! *I mourn* no more
Nor pen pathetic ditties;
My pleading was, alas! in vain,
So now I'll stick to Chitty's.

The Many-Sided Attorney General

Joseph C. Robert

After suffering from erysipelas and from well-meaning doctors who plied him with leeches, hot bricks, and exhausting medicines, William Wirt died on February 18, 1834, in the City of Washington, where he and his family had been temporarily residing while he was attending to Supreme Court business. Later that same day, John Quincy Adams, making his way to the Capitol, passed the house where Wirt had lodged, and observed the crepe tied to the door knocker. Adams, not ordinarily given to excessive praise, on this occasion told himself that "the glories of this world" were passing away, that Wirt had not left behind him "a wiser or better" man, and that in the campaign of 1832, so recently ended, "a very little difference in the state of the public mind at that time would have affected his election" as President of the United States.

Who was William Wirt? Here is his biography in capsule form: Wirt was born in Bladensburg, Maryland, November 8, 1772. His father, a tavern-keeper identified as "German protestant" in his naturalization record, died when Wirt was two years of age, his mother when he was eight. The orphan--"poor orphan" in reminiscent mood he called himself--had an unsettled childhood and a moody adolescence, scarred by certain tyrannical experiences. As a young man he tutored, studied law a few months under private instruction, moved to Virginia, was admitted to the bar, and before long became a popular and effervescent member of the Albemarle County group which had as its most illustrious patron Thomas Jefferson. Wirt's first wife was the daughter of Jefferson's physician and friend, Dr. George Gilmer. After her death, Wirt settled in Richmond, on Jefferson's commendation became Clerk of the House of Delegates, subsequently took residency in Williamsburg, where for a season he headed the Chancery Court, married into the prosperous Gamble family of Richmond, and then went to Norfolk. Next he returned to Richmond, where he resided until 1817 when his friend James Monroe appointed him Attorney General of the United States. Wirt resigned this office in 1829 with the exodus of John Quincy Adams from the presidency, and moved to Baltimore, his legal residence at the time of his death in 1834. So much for his wanderings, but this outline fails to register his quality and his achievements.

Wirt was a man of several talents. As *the Washington City Gazette* recited at the time of his appointment as Attorney General, he was a "sound lawyer, an eloquent orator, a fine writer, and an accomplished gentleman." While not a universal scholar in the sense of a Franklin or a Jefferson, Wirt was broadly informed and achieved contemporary distinction in a variety of fields. One begins to measure Wirt's actual stature only when judgments by individual critics, each looking at a single aspect of the man, are totalled.

Legal historians have identified Wirt as the "first great Attorney General," and as the first to make the Attorney General a real cabinet officer. It is undeniable that Wirt was the first to keep records of official opinions, and that he was Attorney General longer than any other man, over eleven years.

He appeared in virtually all of the landmark cases of the first third of the nineteenth century. Even a simple listing of citations says something about the man: the Callender sedition case, the Burr treason trial, both of the foregoing in Circuit Courts; then before the Supreme Court *Dartmouth College v. Woodward*, *McCulloch v. Maryland*, *Cohens v. Virginia*, *Gibbons v. Ogden*, *Brown v. Maryland*, *Ogden v. Saunders*, *Worcester v. Georgia*, *Cherokee Nation v. Georgia*, *Charles River Bridge v. Warren Bridge*, and others. On various occasions, beginning in the 1790s, Jefferson designated Wirt as his personal attorney. Wirt influenced a number of young lawyers who studied in his office. Several became prominent, among them Salmon P. Chase, later Chief Justice of the United States. Chase, even in the heat of the sectional controversy, never forgot his debt to this benign slave-holder. "One of the purest and noblest of

men" is the affectionate phrase used by Chase during the otherwise high-tempered Kansas-Nebraska debate. As a practicing lawyer Wirt has been denominated "the most beloved of American advocates."

Wirt was given an opportunity to become an educator in the institutional sense, for the Board of Visitors of the University of Virginia actually elected him law professor and first president, offices which for financial reasons he refused. As already noted, another sort of presidency might possibly have come his way. In the unnatural role of politician, he was the first nominee of a national political convention in American history, becoming associated with the Anti-Masonic party.

If Wirt was not the very best orator of his time, he was by common consent among the first half-dozen in competition for that distinction. His most famous single piece, one which was learned by a whole generation of little boys in knee breeches to recite at Friday afternoon school exercises, is undoubtedly his description of Blennerhasset, given in the course of the Burr trial. Wirt's oratory was of the occasional, as well as the forensic, variety, and he was a natural choice to deliver the congressional eulogy after the strangely coincidental deaths of John Adams and Thomas Jefferson on July 4, 1826. Wirt was a student of the theory of eloquence as well as an able practitioner of the art, producing notable essays on the subject.

Some specialists, moving from the spoken to the written word, classify Wirt as the leading Southern literary figure of his time. Apparently he was the most widely read essayist of his region and of his era, *The Letters of a British Spy* being his initial venture into the world of letters. *His Sketches of the Life and Character of Patrick Henry* was the first full-length treatment of that Revolutionary hero. When a relatively young man Wirt headed what one historian describes as "the first literary group of any importance in the South," his associates being the Virginians who joined him to produce the *Rainbow* and the *Old Bachelor* essays.

As a gentleman, Wirt was considered in some quarters as an authority on the unwritten Southern code of honor, even the beau ideal of his time, and his life inspired two or three sentimental novels, notably one by the tear-inducing Mrs. E. D. E. N. Southworth. As John Handy Hall observes, "It is doubtful if any man at his death was more generally regarded and loved."

The foregoing calendar of primacies and reputed achievements might lead the reader to wonder whether the writer of the present essay is attempting to picture Wirt as a one-hundred-percent hero, a man who went through life with little or no censure, and posthumously escaped criticism. Not so. Emphatically not so. With little trouble any historian may collect a mass of unfavorable judgments and a bundle of assertions that such primacies as Wirt achieved were of small or no importance, that he appealed to transient rather than to permanent values. Let us administer a hurried antidote to the above syrup of praise, injecting a few censorious comments.

Wirt was accused of loving money too well. During his first days as Attorney General he talked too much about his small salary and of "bread and meat for his children." Dividing his time between his official duties and his private practice, Wirt left himself open not only to charges of inconsistency in interpreting the law, but to accusations of many conflicts of interest. His concern for his private clients, his narrow interpretation of his official duties, and the superficiality of his office reforms simply add up to failure as Attorney General, so thinks a modern scholar.

Henry Wheaton, famous lawyer and court reporter, judged that early in life Wirt's oratory suffered from "a redundancy of florid rhetorical ornament," and Wheaton damned, with a cleverness that bordered on malice, Wirt's literary achievements as "the best of a bad school." Dozens of critics, then and now, have classified Wirt's book on Patrick Henry as more eulogy than fair-minded summary. According to Daniel Webster, Jefferson thought it "a poor book

written in bad taste." In academe today Wirt is offered the supreme insult by instructors who warn overly enthusiastic students to "de-Wirt" their reports!

As a young man Wirt probably gambled too much, and certainly he drank too much, especially with the comradely and bibulous legislators when he was Clerk of the House of Delegates. Wirt himself confessed to past misbehavior when he wrote from Williamsburg to Colonel Gamble in an effort to win the hand of Betsy. But, he assured the Colonel, this was not a habit, no "settled propensity to vice of any kind, but merely the occasional overflowing of a social heart."

When a widower, Wirt played the fool by writing what one can only conclude were overly-warm letters to a Richmond matron regarding her comely daughter. She got her letters back from Wirt, but refused to surrender his, and they must have been magnificent items of their kind because even after Wirt's death Mrs. Wirt was still trying to recover them.

Wirt sometimes let his temper get away from him. And once he broke his hand on the skull of a disobedient domestic, an accident which probably amused the servant tremendously. Although he professed to abhor the practice of duelling--and helped to prevent several encounters--Wirt himself while Attorney General of the United States challenged a former Attorney General, William Pinkney.

Wirt was a slaveholder, buying and selling household servants. The last major financial venture in his life was to purchase the whole lot and parcel of Prince Murat's slaveholdings in Jefferson County, Florida, with which to stock his own plantation there.

* * * * *

In all decency one should call a halt here and ask if there is any rejoinder to the foregoing calendar of weaknesses and reputed faults. An apologist might argue that many of the so-called black-marks charged to Wirt might be explained and perhaps even excused by the age in which he lived.

First taking up Wirt's last-named fault, slaveholding, one might remember that Wirt, like others touched with the Revolutionary philosophy, at least conceded that the institution was an evil. As a young lawyer in Albemarle County, he called slavery "the guilt of the nation." It was "that foul disgrace to men who affect to glory in the hallowed name of liberty." When Attorney General he issued an official opinion declaring unconstitutional the South Carolina statutes providing for the confinement of black sailors when their ships were in the port of Charleston and elsewhere in the Palmetto State, an opinion treasured and circulated in Great Britain, though ignored by the South Carolinians. *In the case of The Antelope*, which involved the smuggling of slaves into this country, Wirt's fervor in claiming this to be a "case . . . of human liberty" and in describing slavery as a "calamity" upset the pro-slavery people, especially those in Georgia. Georgia had another count against Wirt when he became attorney for the Indians in the Georgia-Cherokee controversy (Jackson thought Wirt "wicked" to support the Indians) And neither Georgia nor South Carolina ever forgot or forgave.

It is inevitable that Wirt's acceptance of the Anti-Masonic nomination in September 1831 is cited as prime evidence of bigotry in addition to political ineptitude. Wirt's uncharacteristic movement into the political arena was prompted by fear for the country with Jackson in the White House. He hoped that a coalition between the "Antis," as they were called, and the burgeoning National Republican group could be effected. In a sense Wirt was now captive of his famous Rutgers College address of 1830, widely distributed, in which he underscored the old virtues, moaned about current events, and advocated self-sacrifice for the public good.

Strange as it may seem to the twentieth century, Wirt's contemporaries looked on Anti-Masonry with considerable respect. Or at least some of them did. John Marshall himself sat with Wirt on the platform at an early session of the Anti-Masonic Convention. Wirt, who as a young man had joined the order, avoided a general condemnation of Masonry in his acceptance speech

to the delegates who had chosen him as their presidential nominee. The coalition for which he had hoped failed to materialize, and Wirt most reluctantly kept his name on the ticket. But before the calendar year 1831 had ended he ceased going through the motions of being a candidate and concentrated on his legal work. This ill-fated venture into the political arena which he so heartily disliked is usually the one fact mentioned when Wirt is noticed at all in the textbooks of today.

As an author, Wirt himself was aware of grave weaknesses in his book on Henry, and his prefatory words constitute an apologia beyond the conventional. He emphasized his reliance on reminiscences, some contradictory, and repeatedly reminded his readers that these were only sketches, "crude sketches," the materials on which they were based being "scanty and meager." Thus *the authorized title was Sketches of the Life and Character of Patrick Henry*. Wirt had set out to be impartial, but as the work progressed he discovered to his mortification that he could not keep his promise to be both inspiring and objective. Critics often forget that Wirt did expose a series of weaknesses in the character of his hero. What of the charge, more current in the twentieth than the nineteenth century, that Wirt simply fabricated the speeches credited to Henry in the book? Concentrating on the major subject of controversy the "Give-me-liberty-or-give-me-death" speech in Richmond in 1775, one may safely conclude that the key phrases are authentic and that, building on the recollections of Tyler, Randolph and especially Tucker, Wirt simply acted out the play as he thought it might have been. Perhaps it should be said that the speech is a "Williamsburg restoration," authentic foundations and a superstructure built in the spirit of the times.

Once the hue and cry have subsided one may find certain virtues in Wirt's biographical effort. Much of the book would qualify for a respectable place on the shelves of what busy researchers with tape recorders today call "oral history," for with the aid of friends Wirt collected reminiscences of old men and saved them for posterity. And Jefferson's very full letters to Wirt on the project constitute a sort of belated appendix to Jefferson's Notes on Virginia. Old John Adams, upset by primacies claimed by Wirt for Virginia, was goaded into writing famous comments by way of rebuttal. The present writer ventures to suggest that if Wirt's Henry did no more than excite recollections by Jefferson and Adams it was perhaps worthwhile.

As for his personal habits, at no time after his appointment as Chancellor did he backslide into early addiction to the bottle, though certainly he was no teetotaler. Late in life he enjoyed the luxury of washing his head in whiskey, a practice which must have given him a sensational aroma when he appeared before the courts! Wirt put women on a pedestal, and wrote and published such strong essays asking for improvement in their status that he should be listed as an early and notable advocate of women's rights. There was considerable provocation for the challenge to Pinkney, who could be insufferable with his sneers as opposing attorneys. Contemporary opinion was strongly on Wirt's side, and Wirt protested that his professional career would be ruined if he had not responded to Pinkney's insult. In Wirt's final humble explanation to his wife--"Do not reproach me when I come home for this is, now, my only terror"-- he vowed that no other course was open to

Wirt did indeed desire money and security. All through his life he was tormented by the thought that he might die destitute and leave his family dependent on "the insulting pity" of a heartless world. This diligent search for security is the clue to Wirt's major professional decisions. As for the position of Attorney General offered by his friend Monroe, Wirt wrote: "My single motive for accepting the office was the calculation of being able to pursue my profession on a more advantageous ground--i.e. more money for less work." Incidentally, Monroe himself was often without money. This fact and the sarcasm of Robert Gamble the younger, Wirt's brother-in-law, accounts for a note which Gamble wrote to Wirt soon after Wirt's move to Washington. Monroe owned a debt long due "(and which I presume he considered paid by your appointment) shall I dun him or well [sic] you pay it? which:--"

Monroe may have been slow about paying his debts at the time of his invitation to Wirt, but he was prompt in his assurances to Wirt (1) that Wirt need not relinquish his part-ownership of Bellona Foundry, the cannon factory near Richmond which did business with the federal government, and (2) that he could continue the private practice of law. The office of Attorney General was and had been since the founding of the federal government a part-time job with fractional salary, making the officer "a sort of mongrel," said Edmund Randolph, the first to occupy the post. Here was an open invitation to trouble! This hybrid character of his work was the root of Wirt's major embarrassments as Attorney General.

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Wirt found that he had inherited a job without office space, desk, clerk, or record of the opinions of his predecessors. Soon he created a physical establishment with orderly procedures; there were permanent record books. Once upon a time he suggested that if his opinions were ever put into print they would do him more honor than anything else he ever wrote. It is an interesting fact, however, that his one opinion receiving most attention in the last two or three years was considered so insignificant in the nineteenth century that the editors of *the printed editions of the Official Opinions* of the Attorneys General did not think it worthy of publication! Still in manuscript form at the beginning of the litigation to determine whether Richard Nixon must obey a subpoena was Wirt's opinion that James Monroe, President of the United States, ought to accept as valid the writ issued by a naval court martial in Philadelphia. Under date of January 13, 1818, Wirt wrote, "A subpoena ad testificandum may I think, be properly awarded to the President of the US." Though he adopted an uneasy and uncertain tone as he developed the subject, Wirt was quite sure that the President should give respectful answer to the Judge Advocate. But Monroe could plead a conflict of governmental duties and thus avoid actually going to Philadelphia to appear at the trial of Dr. Barton. Several times during the Watergate investigations Wirt's opinion was noted, most significantly by the U. S. Court of Appeals for the District of Columbia.

Giving a strict interpretation of the statute under which his office was established, the Judiciary Act of 1789, Wirt insisted and with some success that his official opinions should be rendered only on request by the President and the heads of departments, and then solely on questions of law. Of course he gave less formal advice directly to the President and to his fellow cabinet members.

Often merely echoing the views of his chief and frequently out of town on his private business, Wirt was seldom a decisive influence in cabinet meetings. Of course there were occasions when he was a positive force; for example, he placed a restraining hand on Monroe and on Adams when the Monroe Doctrine was being formulated, persuading them to eliminate from preliminary materials belligerent wording described as a hornet. If a surviving letter to Monroe concerning a Supreme Court vacancy is a fair sample of verbiage given in face-to-face encounters, Wirt could assume a position of statesman-like majesty. Wirt's message to Monroe in 1823 recommending the appointment of Chancellor Kent, strong-minded old Federalist, is one of the great letters of the nineteenth century. In the words of Charles Warren, "The lofty status of the Court, and the philosophy by which appointments upon it should be guided, have never been more adequately set forth."

Wirt represented the government before the Supreme Court when such action was required by the nature of the cases, but in virtually all of the landmark cases he appeared as *attorney for private parties*. Even in *McCulloch v. Maryland*, in which he was arguing to sustain the power of the federal government, he received a substantial fee from the Bank of the United States, which he was to serve not only as periodic counsel but as director. As already suggested, the part-private, part-official nature of his duties invited inconsistency if not outright scandal. Perhaps the best examples of inconsistency in interpreting *the law* are offered by the Prize

Cases, where his arguments changed with the needs *of his clients*. In the case of *The Amiable Isabella* the opposing side accused Wirt of using his power as Attorney General to obtain a reargument after he discovered privately that the Supreme Court had agreed on a decision against him and his client. The Judiciary Committee of the House cleared Wirt of charges of improper conduct, though modern scholars are still wagging their heads over the event.

Through unbelievably long hours of study Wirt usually came to court well armed with pertinent facts, literary allusions, and judicial precedents, but not always. On at least two occasions he appeared before the nation's highest tribunal deficient in preparation, according to his own standards. One of these events was, of all things, his initial venture before the Supreme Court, March 1816, while he was still *a private lawyer in Richmond*. In *Jones v. Shore's Executor*, though he won the case, he cut a "mean and sneaking figure," to use his own words. He had lost his notes used when arguing the case in a lower court, and the planned study period had been claimed by old friends who simply would not leave him alone. The other case, argued two years *later*, *March 1818*, was the famous *Dartmouth College v. Woodward*, which he probably should never have entered; only recently had he moved his family to Washington, and he was absorbed in a multitude of new official duties. Though the contemporary audience was beguiled by his style of oratory, he *was far from* his legal best in the *Dartmouth* case.

It might be added *here that the special report* of the *Dartmouth College v. Woodward* case did not salvage all that could have been salvaged from Wirt's argument, maybe because of Wirt's own failure to cooperate with the reporter. He also suffered from inadequate reporting in *Ogden v. Saunders*, and in other cases. One suspects that the reporting which *made him most unhappy* was that for *Gibbons v. Ogden*. Wirt's vanity was wounded when his sensational peroration, a rebuttal of Thomas Addis Emmet's Latin quotation, lost all its point by virtue of the reporter's permitting Emmet to revise his own statement.

In Wirt's typical appearance there was not only color to his phrasing but substance to his argument. He acknowledged a too florid style in his early years, and substantially remedied this weakness, but his youthful reputation as "a whip syllabub genius" haunted him. Though the judgment may seem harsh it is probably right to say that Wirt's official opinions and his arguments before the courts made no major impression on American constitutional law. Wirt was a practical, case-by-case lawyer, interested in furthering the cause of the client whom he represented that day. He eagerly sought for precedents, and rarely created them.

Lest the foregoing statements be misread as a diagnosis of legal myopia, two discriminating authorities should be permitted to speak pieces which give some evidence in another direction. Joseph C. Burke, one of the few modern scholars giving careful attention to Wirt as Attorney General and constitutional lawyer, suggests a prophetic character to at least one phase of Wirt's pleading. "His pleas for judicial tolerance of state legislation and construction of state grants in favor of the public have a modern ring." And Leonard D. White, authority on administrative history, says that Wirt "laid the foundation on which, much later, the Department of Justice was to rest."

Although in the "contract" cases which *Wirt argued before the Supreme Court--Dartmouth College v. Woodward, Ogden v. Saunders, and others--*he was contending for the validity of the state laws immediately under examination, it is clear that as the years went by Wirt shifted from a strong states' rights position to a medium-ground sort of nationalism. In a sense Wirt was merely catching up with his own arguments he advanced before the *Virginia Court of Appeals in 1814* in *Hunter v. Martin, Devisee of Fairfax*. Although restrained in his constitutional definitions, he expounded the doctrine of national supremacy and the vitality of the "necessary and proper" clause, all in a manner *prophetic of the court's dictum* in *McCulloch v. Maryland*. It was this case before the *Virginia Court of Appeals* which eventually developed *into Story's great pronouncement* in *Martin, v. Hunter's Lessee*.

Wirt's movement toward a broader outlook may be credited to several factors, among them being his residence in the somewhat cosmopolitan atmosphere of Washington. The major influence, however, on Wirt's gradual shift of emphasis came from one man, John Marshall.

Because of politics there was originally a coolness between the two men. Wirt studied Marshall carefully when they were both residents of Richmond, and *pictured him with amazing frankness* in *The Letters of the British Spy*, noting his indolent habits, his careless appearance, but crediting him with a mind simply overwhelming in its forceful logic. In the judgment of Edward S. Corwin this is the best of all descriptions of the Chief Justice. Though there was some conflict between judge and lawyer during the Burr trial, Wirt soon returned to his role of admirer from afar, and uniformly encouraged his students and young friends to speak *like Henry*, to write like Jefferson, and to reason like Marshall. While never as close to Marshall as was Story or even Webster, Wirt was on good, friendly terms with the Chief Justice during the Washington years. Wirt grieved when he heard of Marshall's illnesses, and helped the old chief with sundry small items such as the delivery of a whale oil lamp. From time to time in the business of the Supreme Court Wirt had a discernible effect on Marshall--notably in the Cherokee Nation controversy--but characteristically it was the other way around.

In this conversion of a rampant Jeffersonian to at least a mild variety of Marshall-like federalism, reinforcement came from Wirt's wife Betsy Gamble and her family, devoted friends of John Marshall. Betsy as a child had stood at Marshall's elbow when he played cards with her father. One of her brothers in the role of secretary had accompanied Marshall to France on the XYZ mission, the lad's expenses being paid by Colonel Gamble himself. The marriage of Betsy Gamble and William Wirt was one long love affair. Wirt went to Betsy for advice in all major decisions. Betsy had a bright mind, an animated personality, a manner considered a bit lofty by some, and a streak of authoritarianism in her management of domestic affairs. In a limited way she was an author *in her own right*, publishing the popular *Flora's Dictionary*, a guide to the language of flowers. In identifying the pressures moving Wirt towards a nationalism akin to that of John Marshall one must not neglect the "hidden persuaders," the wife and in-laws.

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All of this brings us to a hard question, the nemesis of many a biographer: What were the mainsprings of the subject's behavior? Here personal prejudices crowd impartial judgment. Wirt proves to be a most charming person, and thus even the modern investigator must be on guard! To quote one hostess, "Mr. Wirt was more than fascinating; he sang, he talked, he laughed, & told stories, & was all that anybody could be that was delightful." All contemporary descriptions agree that he made an imposing figure, with generous dimensions all over, large handsome head, curly hair. In his last years he became confessedly too heavy, and as his hair thinned he developed a conspicuous mannerism of patting his scalp to keep the thin locks over the bald spot.

Admitting the device of enumeration to be artificial, the present writer chooses to think that Wirt was what he was because of four determining influences. There is considerable overlapping in this arbitrary schedule. (1) The circumstances of Wirt's childhood had much to do with forming the adult. He came out of poverty and insecurity and he was determined not to return to these conditions. (2) Wirt may be understood only within the context of family and friends. *When he came to Virginia he found himself accepted*, and he resolved to conform to the standards of that society. As he privately admitted, he always found it important to receive a pat on the back every now and then, and thus to be reassured that his friends were still there and still approving. Wirt assumes his most winsome role as father, husband and friend. His tender personal letters can be read as models of their kind. His family messages are teasing, didactic, and affectionate. He was not above making kiss-marks on his letters for all his children

(3) Wirt had an evolutionary spiritual experience which left him with a profound desire to do right. He tried to move his religion from the closet to the market place. It was Benjamin Edwards, in whose home he tutored as a young man, who gave him creative counsel, developed his self-respect and encouraged a conscience, "a court of oyer and terminer in my own breast," to quote the appreciative Wirt. (4) Finally, Wirt had a love for his country that was genuine and sacrificial. At times he was flamboyant in his Fourth-of-July oratory, but his patriotism was deeper than that. He loved his country in sections and then as a whole. His familiar essays are best approached as pieces of social criticism, a plea to *return to the* better times of the fathers. His Patrick Henry was a book designed to instill patriotism, and this may have been its weakness, but *his motives were* noble. He clamored for an American scholar long before Emerson gave the magic pronouncement.

Imperfect as he was, Wirt has something to say to America today. Any sensitive citizen can learn from a man who daily subjected himself to his private court of oyer and terminer, his conscience. Wirt's enduring love was a love of country, a passionate conviction that America is great in direct proportion to its adherence to the finest ideals of the men of 1776. Maybe America could profit from this sort of patriotism in the year 1976.

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Early Court Reporters

Gerald T. Dunne

Brave men were living before Agammenon
And since, exceedingly valorous and sage
A good deal like him too, but quite the same none
But then they shone not on the poet's page l

To suggest the lustre of Mr. Chief Justice John Marshall and Lord Mansfield would be diminished were it not for the talents of Mr. Henry Wharton and Sir Jame Burrows 2 is merely to follow the insistence of Horace that Agammenon would be much the lesser man without Homer's lyre.

But there is more to it than the petulance of the trade union of poets, for if poetic commemoration is essential to epic heroism, the reporter's craft is indispensable, not only to the art of judging but to law itself, as another great poet, John Milton, made clear in a tribute to Cyriack Skinner's still unknown ancestor:

CYRIACK, whose grandsire on the royal bench
Of British Themis with no mean applause,
Pronounced, and with his volume taught, our laws.³

Interestingly, Roscoe Pound said much the same thing on the other side of the Atlantic in pointing out that law holds a dimension transcending precepts and institutions: "Indeed, in the everyday administration of justice, along with legal precepts, the traditional art of the lawyer's craft--the traditional mode of selecting, developing and applying the received legal materials, the traditional technique of finding the grounds of decision in those materials and of developing them into a judgment--is a factor of no less importance. That art and a certain body of received ideals . . . are in truth much more enduring than legal precepts. They give unity and continuity to legal development."

Pound went on to assert *the distinct cachet* of the common law inheritance: "Ours is a technique of utilizing recorded judicial experience . . . Even when we have written texts, as on American constitutional law, we proceed at once to look at them through the spectacles of the common law, and our method is not one of development of the text but of development of judicially found grounds of decision which, if they began in the text, have since led an independent existence."⁴

Pound also noted that mystic chord of purpose which linked the modern advance sheets and term reports to the same spirit which prompted Glanville *to write* his Customs and the shadowy medieval figures to compile their yearbooks. Indeed the constellation of talents which makes a reporter of the law a true reporter is an elusive thing indeed--foremost perhaps is to be a frustrated judge with essentially the same feel for the law, and also with industry, purpose, and dedication.

But to be a mindless recorder of all that transpires simply will not do, for as a rare criticism of Sir James Burrow put it, in recording everything which fell from Lord Mansfield's

lips he "has in many cases given weight and permanence to what was a mere casual or suggestive remark, never intended to be delivered as an utterance for posterity."⁵ Above all, selectivity is indispensable, for as Edmund Plowden, doubtless the greatest of them all, wrote in 1578: "I have purposely omitted much that was said both at the Bar and at the Bench, for I thought that there were few Arguments so pure as not to have some refuse in them, then and yet holding that to be the best method of reporting. But this is a task not easily accomplished. . . 6

Beyond all this, the reporter's product must ring true in the hours of test. If it does not, even a great name in other areas of law (and the reporter's list includes Blackstone, Coke, Thomas Jefferson and John Marshall)⁷ will not save it. "All the respect we entertain for the reporter," observed Chief Justice John Marshall of Sir William Blackstone, "cannot prevent the opinion that words of the land keeper have been inaccurately reported. If not, they were inconsiderately uttered."⁸

Mention of Marshall does suggest that in the rise of the Supreme Court, surely one of the factors was that group of men to whom are due "that magnificent series of reports, extending in an unbroken line down to the present that chronicles the work of the world's most powerful court." ⁹

The magnificent chronicle began modestly enough, particularly in view of the fact that when the Supreme Court first met in the national capitol of New York City for the (February) 1790 Term, it had clerk and marshal but no reporter at all, a circumstance doubtless reflected by the fact that only one volume of American reports (reputedly Kirby's Connecticut cases) was in existence.¹⁰ Kirby's had made the first appearance the previous year in response to a 1785 statute of that state requiring the judges of its highest court to give their opinions in writing.

The oral-manuscript tradition yielded ground grudgingly in the federal Supreme Court. Not until March of 1834 did an order even require the filing of opinions (8 Peters vii). Moreover, the printed record of the Court began only with the (December) 1837 Term and from 1863 to 1871, two records of opinions, one printed and one manuscript, co-existed side by side.

Hence, it was indeed a singular stroke of good fortune that when the Supreme Court moved to Philadelphia to join the President and Congress in that city, in early 1791, Alexander James Dallas of that city's bar was prompted to respond to that mysterious combination of love of law, self-satisfaction, private gain, and public spirit which had moved nameless and shadowy predecessors in intellectual title to comb the court rolls and produce both for his own use and the profession those reactions or reports which Lord Coke called "a publike relation or a bringing again to memory cases judicially . . . resolved . . . together with such causes or reasons as were delivered by the judges."¹¹

Two points might be made clear. First, in the long tradition of English reporting, Dallas was working for personal gain, or (what was much the same thing), professional reputation. As he himself said in the preface to his first volume, he undertook the task, "pursuant to the wish of some friends [he] was desirous to oblige."¹² Second, Dallas had no intention of becoming the founder of the literary dynasty he did in fact commence, for his concerns were provincial enough--with state, not national, decisions as the title page of his first volume makes clear: "Report of Cases Ruled and Adjudged in the Courts of Pennsylvania, Before and Since the Revolution." It was in his second volume, appearing in February, 1790, that he added the opinions of the Supreme Court then sitting in his home town, changing his title page to indicate the volume covered reports of the "Several Courts of the United States and Pennsylvania held at the seat of the federal government." The amorphous title indicated what may have been another element in Dallas' decision to "federalize" his product, namely, a decision to include in the original project the opinions of the Third Circuit Court, which began its sessions in Philadelphia shortly after the initial Supreme Court meeting in New York.

Thus, almost as a by-product to a state reporting system, did the "magnificent chronicle" begin. Notwithstanding such happenstance, however, Dallas does indeed for the service alone warrant the eonium bestowed in Bray Hammond's *Pulitzer prize-winning Banks and Politics*

in America (1957)--"Mr. Dallas was a very competent person who left things better than he found them."¹² Something of a real Renaissance man, the West Indian born, British educated (Inner Temple) Dallas did well at everything to which he put his hand--Secretary of the Commonwealth, district attorney, and finally service as Madison's Secretary of the Treasury, in which office he found the national exchequer virtually bankrupt and left with a surplus of \$2 million. In addition, he also served for a short time as Secretary of War. He has a claim to fame beyond this--his son was George Mifflin Dallas, Polk's vice-president, and through whom his name is perpetuated in that of the Texas metropolis, "Big D."

Dallas' work as reporter has been criticized both for promptitude and completeness, his last volume not appearing until 1807. The flaws were doubtless the inevitable consequences of the lack of institutional habit and precedent. Thus, Charles Warren observed that in 16 "active" terms following 1790, Dallas reported decisions in only sixty cases and omitted a number of important ones which consequently went unreported. On the other hand, Chief Justice Hughes, following J. C. Bancroft Davis, concludes that Dallas "probably" published all opinions that were filed.¹³

The transit of the Court to Washington in 1800 brought a change in the office of reporter, and a remonstrance of Dallas' successor, William Cranch, suggested that opinion writing had at last become habituated for the nation's highest court. Cranch asserted he was "rescued from much anxiety as well as responsibility by the practice which the court had adapted of reducing their opinions to writing in all cases of difficulty or importance."¹⁴

The Yankeelike anxiety was most appropriate for a reporter who had come to his post from the Boston Bar. Cranch, an Adams relative and a Harvard classmate (1787) of John Quincy Adams, came to the new capital as an agent for a real estate speculation syndicate. The venture failed disastrously, and wound up a subject in the reports Cranch was to publish.¹⁵ In 1800 President Adams appointed him a commissioner of the public buildings of the District of Columbia and then, pursuant the Judiciary Act of 1801, probably made him one of the "midnight judges" appointed thereunder. Despite the subsequent Jeffersonian proscription of those officials in 1805, and the Adams relationship notwithstanding, President Jefferson made Cranch Chief Justice of the District Court in 1805 and he served on that Court an unprecedented 54 years. It was in 1802 that he undertook to become the reporter of the Supreme Court and published the volumes covering the terms from 1801 to 1815.

Like Coke, Cranch's work as judge was more prominent than that as reporter. Particularly outstanding were *the views he expressed in U.S. v. Bollman & Swartwout*, when his close reading of the treason clause forecast Marshall's historic decision.¹⁶

The demands of judicial office forced his resignation as Supreme Court reporter in 1817, but subsequently he collected and published his own decisions on the District Bench *in the six volumes of the Reports of Cases Civil and Criminal in the U.S. Circuit Court for the District of Columbia* (1852-53). In addition, there was also *officially published his Decisions in Cases of Appeal from the Commission of Patents, 1841-47*.

Cranch never returned to Massachusetts, dying in Washington in his 87th year on September 1, 1855. *His reports, note the Dictionary of American Biography*, "have been highly regarded for their clarity and accuracy and are of great importance since they contain a large number of Chief Justice Marshall's most vital opinions on fundamental constitutional problems."

Cranch's successor, Henry Wheaton of New York, in many ways personified the strengths and the flaws of the early system. Exemplifying the institutional crystallization of *the Court*, his was the first official appointment, the office of reporter having been formalized by statute in 1816. More than that, the following year Congress provided an appropriation of \$1,000 per annum as his stipend. Not that the payment was seen as anything approaching a living wage, for the office was indeed expected to support the incumbent as Wheaton's published advertisements announced his availability both at the New York bar and "at the Supreme Court

of the United States at Washington which Mr. Wheaton regularly attends as a Counsellor and the Reporter of its decisions."¹⁷

Moreover, purchasers of Mr. Wheaton's reports received a real dividend for in addition to the opinions of the judges as well as illuminating headnotes, the volumes also contained long, baroque disquisitions on arcane branches of law. (Wheaton's fifth volume even included a speech of John Marshall in the House of Representatives.) Unfortunately, this genre of writing provoked an intimacy with members of the Court, particularly Justice Story, which eventually involved its own undoing.

Not only did Wheaton plead with Story for editorial help ("Will you have the goodness to . . . draw up a short marginal note of *the principal points decided in Dartmouth College v. Woodward*")¹⁸ but of professional employment as well ("I pray you bear me in mind on the Circuit for retainers").¹⁹ Typical of a familiarity whose ultimate consequence could only be contempt were the slighting comments on other members of the Court which Wheaton felt secure enough to pass on to the Massachusetts Justice ("I am sorry," he wrote of the outspoken Justice William Johnson, "that there are so many of our friend's crudities in this volume . . . he has unfortunately most concert where he is most deficient--But what can't be cured must be endured.").²⁰

Justice Story, *himself* something of a reporter manqué obviously regretted Wheaton's resignation upon the latter's appointment as Minister to Denmark in 1827; Story nonetheless effected a rapport with the successor, Richard Peters of Philadelphia, as close as the one he had ever held with Peters' predecessor.

In an illuminating datum of cultural history, and proving that each age must write its own reports, Peters turned out a very different product from that of Wheaton. It was typical of the busy, bustling young republic that lawyer demand shifted from the lengthy Wheaton erudition to the streamlined, stripped-down, synoptic product which Peters turned out, not only for his own time in office but for the years of his predecessors. In updating and summarizing the entire Supreme Court series, Peters disclaimed any intention of "interfer[ing] with the interests of those gentlemen who have preceeded the reporter in [that] station. . . ." In effect telling Wheaton to keep his notational embellishments, Peters insisted that the "opinions of the court are public property."²¹ Asserting the contrary, Wheaton returned from Denmark and filed suit for an accounting for the materials in his own volumes. The issue went all the way to the Court whose cases he had once reported, and at the 1834 Term that Court, per *Justice McLean*, held against him in *Wheaton v. Peters*,²² (1834), and insisted that its opinions were indeed in the public domain, with only the notations being the subject matter of private ownership.

Wheaton was especially distressed at the decision, which he regarded as Story's betrayal and he insisted that Chief Justice Marshall "pinned his faith on the sleeve of his prevaricating brother." Indeed the outraged Wheaton hinted at blackmail, insinuating that Peters (or someone) had "something in writing under the hand of one of [the] learned bench which if made public would condemn him to infamy."²³

Wheaton assuredly had grounds for his wrath, for if any characteristic of the reportorial system was quintessentially clear, was the status of the work product as private property. Such was the entire thrust of the common-law tradition ²⁴ supported by an abundance of confirmatory data from testamentary litigation ²⁵ to extrajudicial comment. Threads of the fabric can be seen in Justice Story's observation on his own circuit opinions ("A volume . . . is prepared by the reporter, but he finds no person willing to print them or pay any value for the copyright").²⁶ Indeed Dallas copyrighted his work product as did Cranch (who duly protested to Peters, when the synoptic series appeared, that he was still \$1,000 out of pocket for the publication of his last three volumes). And so did the luckless Wheaton, all doing so in the spirit of Lord Hale's legacy of his manuscripts to Lincoln's Inn, which epitomized the whole proprietary spirit:

"They are a treasure well worth the having and keeping, which I have been forty years in gathering with very great industry and expense."²⁷

Yet, insofar as poor Peters was concerned, his erudite "industry and expense" of his learned asides made as little impression on the anti-intellectualism of the age of Jackson as his proprietary claims outraged the new antipathy to private monopoly. Wheaton was literally ruined by the decision--in fact he spent his inheritance on the fruitless litigation seeking to uphold his claim.

Wheaton was to have a sweet revenge, all in due course. At the moment, however, the adverse legal decision, for all its distressing financial consequences was but the momentary faltering of a meteorically successful rise. Returning to Europe, this time to Berlin for at the request of the Kingdom of Prussia he was appointed charge d'affaires in 1835 and promoted to minister in 1837. The promotion was largely *occasioned by the publication* of his *Elements of International Law* in the preceding year. Wheaton continued to serve under successive Presidents until James K. Polk requested his resignation. He returned to the United States in 1847 after an almost unprecedentedly long and successful diplomatic career, and was preparing notes for a lectureship at Harvard when he died at Dorchester in March 1848.

In addition to his Reports and Elements, Wheaton's literary legacy--indeed thirteen printed pages are required *for his bibliography* 28--includes his *Histoire des Progres du droit des gens en Europe, depuis la Paix de Westphalie Jusq'au Congres de Vienne*, which was published in Leipzig in 1841, and republished in New York in English (1842) under the title *History of the Law of Nations* in Europe and America. The History, thanks to editorial cross-reference, eventually became a companion volume to the Elements, the fourth (French, 1848) of the latter work being repeated, re-issued and translated into Italian, Spanish and even Chinese and Japanese.

Moreover, in an ironic post-mortem, Wheaton's name and widow were again involved in copyright litigation in *Lawrence v. Dana* (5 Clifford)²⁹ which unsuccessfully asserted an unfair use by (Richard Henry) Dana in the eighth edition of the Elements of the plaintiff's notes to the sixth and seventh editions.

Indeed, just as Wheaton's career was approaching its meridian, that of poor Peters encountered a virtually Gothic deadfall when he was summarily discharged as a consequence of a long simmering antipathy with certain members of the Taney Court, principally Justices Catron and Baldwin. While the formal occasion of the breach seemed to have been the delay in publishing the reports--a long standing complaint about reporters, down through the ages-- an item that surfaced even in appropriation statutes 30--the actual cause seems to have been a personality conflict, pure and simple. Indeed, little came of the incident save that the outraged, overreached and unconsulted Justice Story considered resigning over the incident but philosophically forbore ("But let it pass, I no longer expect to see revived the kind and frank courtesy of the old Court").³¹

Peters lived to 1848, his other works including *Cases in the Circuit Court of the United States for the Third Court . . . District of New Jersey 1803 to 1818, and in the District of Pennsylvania 1815 to 1818 (1819)*; *Report of cases . . . in the Circuit Court of the United States for the Third Circuit* from the Manuscripts of Bushrod Washington (4 vols. 1826-1829); *The Public Statutes at Large of the United States (1848)*; and *A Practical Treatise on the Criminal Law* (3 vol. 1847), an edition of Chitty's earlier work.

Exemplifying Peters' brittle personality was his action in publishing the (now rare) last volume of his reports, Vol. 17, covering the same ground as the first volume of his successor's, the latter including a terse notice of the change of reporters and a letter from Justice Catron appending a multipage list of errata per an alleged promise. Typical also was Peters' reply to an apparent complaint from Justice McLean (who surprisingly voted for retention) that the latter's delay in furnishing an opinion delayed the Term reports by five weeks.

Peters' successor was Benjamin Chew Howard (1791-1872) of the Baltimore Bar, a veteran of the War of 1812 who had then undertaken a long career in Maryland politics serving in the Baltimore City Council and the Maryland House of Delegates and the National House of Representatives from 1829 to 1833 and from 1835 until 1839 and bore the militia title of "General" with dignity. He was thereafter Senator in the Maryland legislature, resigning to accept appointment as reporter of the Supreme Court. There does not appear to be any evidence that he sought the appointment (which apparently came his way through long association with Chief Justice Taney) or was otherwise implicated in Peters' ouster. Significantly, his term carried into and ended in the days of the Civil War which he dreaded. ("I fear that our country is to be cut up . . . as you would slice up a loaf of bread.")³² He served as a delegate to the wartime Peace Conference of February 1861, and resigned during the vacation following the 1861 Term to become the Democratic nominee for the Maryland governorship, but was defeated by an unconditional Unionist. He died in Baltimore in 1872 after a lingering illness.

The 23 volumes of his reports were models of "clarity, diction, and thoroughness.

Irascible, outspoken and choleric William Sullivan Black (1810-1883), who thought Abraham Lincoln "very small potatoes and few in a hill" and Horace Greeley "A musntord and traitor,"³³ missed elevation to the Supreme Court itself by the narrowest of margins, became its reporter in December 1861, coming to the job from an extensive background in law and politics. Born in Stony Creek, Pennsylvania, he was admitted to the bar in 1830, quickly succeeding to an extensive practice and thereafter rising through the offices of deputy state attorney general and to the state supreme court, which he eventually headed as chief justice.

Black was brought to Washington as Attorney General by his fellow-Pennsylvanian and political associate James Buchanan. There his hard-lining strict construction made his cabinet post a cockpit of controversy. His first targets were the "squatter" sovereignty supporters of Stephen Douglas, whom he vigorously attacked by word and pen on the thesis that state legislatures were powerless to *override the* guarantees of the Fifth Amendment per Dred Scott and he subsequently supported the Lecompton Constitution in the Kansas tragedy. This experience doubtless shaped the doctrinaire and paradoxical policy which, at his urging, the Buchanan administration adopted in its closing days--that secession was unconstitutional, that the President was nonetheless bound to protect federal prerogative and property everywhere throughout the Union, that the President was constitutionally powerless to coerce a seceding state. Manifestly grateful for services rendered, Buchanan appointed Black Secretary of State in December of 1860 and named him to the Supreme Court in February of 1861. On the eve of Washington's birthday at the 17th year, Black's temper and pugnacity caught up with him as the Senate rejected him 25-26, the negative votes being supplied by a strange coalition of Republicans, Douglas-Democrats and Southern secessionists, all of whom Black had progressively outraged.

After Lincoln's inauguration, Black settled into the comparatively placid reportership of the Supreme Court, which he held for two terms, mainly spending his time as a consultant on California land litigation, an expertise he had acquired during his Attorney-Generalship. Political adversity did not dull his sharpness for throughout the War he remained an outspoken critic of the Lincoln dictatorship and scored *a decisive* postwar victory for his views in *Ex Parte Milligan*, 1 Wall. 243 (1864): ("Of all the arguments, the most powerful is that of Jeremiah S. Black . . . `undisputably the most remarkable forensic effort before that argued tribunal, delivering his address without a solitary note of reading from a book, and yet he presented an array of law, fact, and argument with such remarkable force and eloquence as startled and bewildered those who listened to him . . . '")³⁴; and, *Ex Parte McCardle* ("The speech of Terry Black was an extremely bitter copperhead harangue on State Rights and the unconstitutionality

of the Reconstruction laws. He evidently *argued the McCardle* case con amore")³⁵; and the Slaughterhouse cases as well.

Devout Campbellite and champion of lost causes to the end, Black expounded Tilden's claims to the presidency before the Electoral Commission of 1876-1877. As an admiring biographer writer in the Dictionary of American Biography notes, ". . . he died in August 1883, his great mental energy unflagging to the end . . . and [after] quarter of a century upon the national stage as a defender of the Constitution, the Union, and the Ten Commandments."

The last of the oldtime reporters was also a Philadelphian, John William Wallace, who, was in addition the first law librarian to hold that position. A man of extraordinary literary talents which included the art of print, Wallace's extensive bibliography included, in addition to his *Supreme Court reports, a remonstrance, The Want of Uniformity in the Commercial Law Between The Different States of our Union (1851), Pennsylvania as a Borrower . . . Her Ancient Credit, Her Subsequent Disgrace (1863), remarks on his grandfather, An Address Delivered at the New York Historical Society, May 20, 1863, of the Two Hundredth Birthday of Mr. William Bradford (1863), and in the same vein, An Old Philadelphian, Col. William Bradford, The Patriot Printer of 1776*. In view of his ultimate appointment, his most significant writing must surely be accounted an anonymous contribution to the *January (1844) American Law Magazine entitled The Reporters, Chronologically Arranged: With Occasional Remarks Upon their Reporting Merits*. Subsequently republished (1845, 1855 and 1882, the latter photo-reprinted in 1959) as a book, the work, a towering tour de force of scholarship, firmly established Wallace's reputation, and rightly so in view of its remarkable combination of solid research and lively style.³⁶ Unfortunately, only English reporters were the subject of appraisal, but no Americans.

Nonetheless, certain of these asides, made by the subjects themselves, their contemporaries, or Mr. Wallace, warrant current repetition:

"Judge Jenkins--on the capital sentence of the Long Parliament: 'I shall go with the venerable Bracton's book on my left shoulder and the statutes at large on my right. I will have a Bible with a ribbon put round my neck hanging on my heart . . . All these were civil counsellors and they must be hanged with me.' 37

"The Yearbooks--`The style of reporting which marks this volume is quite unlike that of modern days. The report seems to be almost an exact transcript of whatever was said or done in court during the trial of a cause and often ends with the statement or argument of counsel (being as far as the case proceeded during the first day) without mention of what became of it finally. This of course gives the report a mutilated aspect and an air of dramatic darkness not very inviting to the modern reader.

"When the yearbooks were reprinted in 1678, they were recommended by Lord Nottingham and the other judges' to the students and professors of the law as a principal and essential part of their study, but so completely have they *been swept in wrath* by 'time's urgent tide' that in *Seymour v. Barker*, when sergeant Williams cited a case from 7th Edward III, Mansfield, C. J., told the sergeant that it was 'a great way to go back for a precedent,' while Mr. Justice Heath irreverently exclaimed: 'come to modern precedents, something within three hundred years!' . . . [But] the judges of the King's bench *would seem* to regard them more dutifully; for in *Vyvyan v. Arthur*, a precedent was quoted from this *same reign and, being* in point, ruled the case. So in *Outran v. Morewood*, Lord Ellenborough greatly relied on the yearbooks, and we even find them quoted in our own country as lately as 1837 in a local court on a question relating to the law of Pennsylvania (*Bujac v. Phillips, 2 Miles 73*).' 38

"Coke--Sir Edward Sugden cautions us also in regard to all the reports lest `our just admiration for Sir Edward Coke's profound legal learning carry us too far.' `His system of turning every judgment into a string of general transactions or resolutions has certainly a very

imposing appearance, but there is a system of all the others, the least calculated to transmit a faithful report.

"Notwithstanding all this, however. . .Coke's reports . . . will continue to be THE REPORTS and no higher eulogy need they ever receive than that which they drew from Coke's great enemy and Lord Bacon: `Of this I say no more, but that to give every man his due, had it not been for Sir Edward Coke's reports (which, though they may have errors and some peremptory and extra-judicial resolutions more than warranted, yet they contain infinite good decisions and rulings only of cases) the law, by this time, had been almost like a ship without ballast, for that the cases of modern experience are fled from those that are adjudged and ruled in former times.'"³⁹

Best of all, his comment on the great Plowden makes up the presumption for the complete reporter:

". . . Plowden seems to have understood a reporter's duty for he tells his readers that before the case was argued he had copies made of the record, and took pains to study the points of law arising thereon; so that if he had been put to it, he was ready to have argued when the first man began.' He attended the arguments with utmost assiduity and after he had drawn out his reports, submitted them in many instances to the judges or sergeants who argued the case. He gives the pleadings at length. His labors have not been without their recompense for his reports, according to Lord Coke, are `As they deserve to be with all professors of the law, of high account.'" (Pref to 10th Reports)⁴⁰

The line of the old reporters comes to an end with Wallace. No statute ordered it. No action of court provided for the change. However, as one metaphor put it, Adam Smith's invisible hand was becoming more palsied as the 19th century wore on, and the problems of production, distribution, authenticity and so on required some socialization. One straw in the wind came with the judiciary appropriation in 1874 in which an unprecedented \$25,000 was allocated to the Supreme Court reports and the 91st volume of "the magnificent chronicle" issued under the caption "United States Reports" rather than the name of the reporter.

The old tradition died hard for the name of the first of the new line, William Tod Otto (1816- 1905) appeared on the title page if not on the exterior binding. Otto, like many of his predecessors was born and died a Philadelphian. A graduate of the University of Pennsylvania (1829), he studied law in an Indiana law office. He served as an elected judge from 1844 to 1852, and from 1847 to 1852 was professor of law at Indiana University. During his subsequent practice of law, he was a Lincoln delegate to the 1860 Convention. In 1863 he was appointed Assistant Secretary of the Interior, resigning to become an arbitrator of Cuban claims. *He continued his law practice*, which included argument of *Murdock v. Memphis*, 20 Wall. 590 (1875), and in the latter year was appointed the first of the non-proprietary reporters, an appointment which he resigned in 1883 after 18 volumes of the United States Reports had passed under his stewardship. Indeed the terms of his leaving office signalled how the old order had passed away, for he made his resignation "[E]ffective upon publication of Volume 107 of the United States Report," and the matter was duly noted in the forepart of that volume. After his resignation as reporter, he served as a United States Commissioner to the International Postal Congress, and died in Philadelphia in his ninetieth year.

In terms of sheer distinction, another of the second dynasty must be memorialized. This was John Chandler Bancroft Davis (1822-1907), a descendant of two distinguished families and a nephew of George Bancroft. Class of 1847 at Harvard (delayed degree) Davis was admitted to the Massachusetts bar in 1844, practiced in New York City and served with the American legation in London from 1849 to 1852. Returning home, he again took up *practice in New York* and became American correspondent for the New York Times. Subsequently he was elected to the New York legislature *and served* as Secretary to the American Commissioners in the

Alabama settlement, personally preparing the case of the United States. He thereafter successively served as Assistant Secretary of State, becoming Judge of the Court of Claims in 1883, and later in 1895 he was appointed reporter of the Supreme Court, in which his service *was distinguished* by a scholarly appendix (on reporters, inter alia) in Volume 131 U.S. He retired in 1902 after 19 years of service. His other publications *include works in legal and diplomatic history, and a tract, Origin of the Book of Common Prayer in the Protestant Episcopal Church* (1897).

Notwithstanding their public and private virtues and their intellectual and institutional links with their predecessors in title, Otto and Davis stand apart from the dynasty of proprietary reporters, and have no part in that the tradition which like reporting itself, prescind from an almost mystic force rather than rule of court or statute in ordaining that volumes of the Supreme Court prior to 91 U.S. are cited by the name of the proprietary reporter.⁴¹

Thus the old reporters live on, not through sentiment, however important, but in the very necessity of the case. ". . . [T]o obliterate the records of the old Reports is impossible," writes John William Wallace. "You might as well repeat the folly of revolutionary France, and begin again with the year one. In the physical world, every vestige of the ruined past may be swept away. Not so in the intellectual and moral. As now the old Reports are, so they will continue to be . . . the cradle of our jurisprudence. In the law, the present is ever of the fact."⁴²

Happily the old tradition not only goes down fighting, but fighting hard. Beginning in 1954 the law reviews introduced the "thoroughly abominable"⁴³ system of using the U.S. numerals with a parenthetical citation, the foundationhead of the practice being *the ninth edition of the so-called Harvard Blue* (now white) Book, A Uniform System of Legal Citations. Justice Frankfurter gravely objected, insisting sternly on "the need for preserving ancient traditions."⁴⁴ Despite his *words the innovation* has persisted, as the eleventh edition of A Uniform System irrepentantly proclaims the same insidious doctrine.

There are two possible responses; one verbal as set out by Col. Frederic *Bernays Wiener*, a great American advocate and soldier and scholar par excellence, whose spirit is *lineal to Plowden, Wheaton, and Wallace*:

"Thus, the *citation to Marbury v. Madison* is 1 Cranch 137, not 5 U.S. 137, to *Luther v. Borden* 7 How 1, not 48 U.S. 1 . . . Citations to such cases other than by the name of the reporter alone, mark the brief writer as a legal illiterate, or at the *very* least, as one not very well brought up."⁴⁵

Note the "alone" *supra*, for Colonel *Wiener* especially insists that the foregoing cases emphatically are not cited, 5 U.S. (1 Cranch) 137 or 48 U.S. (7 How) 1. As to the "thoroughly abominable system" of parenthetical extrapolation to the proprietary reporters Colonel *Wiener* adds: "[I]t seems sufficient to remark that it is one of youth's inalienable privileges not only to be wrong, but stubbornly wrong as well. No lawyer worth his salt is going to abandon the Supreme Court's own consistent usage in favor of this deverse innovation."⁴⁶

Beyond words, there is a sanction. To help the salt keep its savor, Mr. Justice Frankfurter, as the price of a law review contribution, required his reportorial citations be carried in the traditional form.⁴⁷ So does Colonel *Wiener*.

This array of authority, particularly when joined to Lord Coke's insistence that reporting is of divine origin (after all, "God hath left the precedent of a judge--who was the first reporter of the law"),⁴⁸ does yield an appropriate closing injunction: that all readers who may also be law review contributors reflect on the Frankfurter-*Wiener* sanction in the light of the still earlier report of Luke 10:37.⁴⁹

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Endnotes

1 Byron, Don Juan, Canto I;v, translating Horace, Book IV, Ode 9, Strophe 7.

2 Sir James Burrow of Inner Temple; was born in Surrey. Both an F.S.A. and F.R.S., he served two terms (1768 and 1778) as president of the Royal Society of Antiquaries. He produced in addition to his famous reports "Observations Relating to Oliver Cromwell and His Family" (1763); the reports first appeared in 1768, the Decisions of King's Bench upon Settlement Cases from the Death of Lord Raymond, March, 1732. His magnum opus is "Reports of King's Bench during the time of Lord Mansfield's presiding"; the classic 5-volume (fourth) edition appearing coincident with Dallas' initial publication in 1790. The Dictionary of National Biography asserts, "Burrows' merits as a law reporter have been universally vindicated," a judgment reiterated by the great American authority, John W. Wallace, "[t]he reports of Sir James Burrows make an epoch in the history of reporting. He made his reports for the purpose of publishing them, but the system of term reporting had not yet been established, he was not driven by the impatience of the bar to send them forth before he was satisfied with the form of them. There have been a few reporters before him . . . Plowden, Saunders . . . But he, more than any man seems to have perceived as a canon of the subject--one, indispensable, and never to be neglected or departed from--that every report in the form in which it comes out at last for the bar should be preceded by a Statement of the Case." Wallace, *The Common Law Reporters* (4th ed. 1882, photo-reprinted, 1959) [Hereinafter cited as Wallace]. Interestingly, the one indispensable canon persists into the current Supreme Court reports wherein each opinion is preceded by a "Syllabus" which "constitutes no part of the opinion of the Court but [is] prepared by the Reporter of Decisions for the convenience of the reader," e.g., *United States v. Nat'l. Asso. of Sec. Dealers, Inc.* 95 S.Ct. at 2430 (1975).

3 Milton, Sonnet XVI to *Cyriack Skinner*, *Poetical Works* 510 (1893) .

4 Introduction to Winfield, Chief Sources of *English Legal History* xiii, quoted in Plucknett.

5 Wallace 325.

6 Plowden, *Commentaries iv* (1816 ed.).

7 See Wallace 443, 165, 590, 590 n3.

8 *Babtist Association v. Hart*, 4 Wheat. 41 (1819).

9 Friedman, *A History of American Law* 283 (1973).

10 While Kerby is customarily given the honor of the "first" American reports, *John William Wallace insists that the honor--by a few months--goes to Hapkenson's Judgments in the Admiralty of Pennsylvania (February, 1789)*, Wallace 471 n.2.

11 Commentary on Littleton 293a quoted in Abbott, *Law Reporting in England 1485-1585* (1973) [Hereinafter cited as Abbott].

12 *Hammond, Banks and Politics in America* 229 (1957).

13 See I Warren, *Supreme Court in United States History* 158 n.2 (1926) [Hereinafter cited as Warren]. On the other hand, Chief Justice Hughes obviously following J. C. Bancroft Davis (note 7, *supra*) concedes Dallas "probably" published all opinions that were filed. Hughes, *The Supreme Court of the United States* 65 (1928); Davis, *Appendix*, 131 U.S. xvi [Hereinafter cited as Davis].

14 Davis xvi.

15 *Pratt v. Carroll*, 12 Cranch 471 (1814).

16 *U.S. v. Bollman & Swartout* Fed. Cas. #14,622 and 4 Cranch 875.

17 *Dunne*, Justice Joseph Story 199 (1970). [Hereinafter *Dunne*].

18 *Id.* at 200.

19 *Ibid.*

20 *Id.* at 201.

21 I. Peters, *Condensed Report of Cases in the Supreme Court* vi (1844 ed.).

22 8 Peters 673 (1834).

23 *Dunne* 327.

24 See generally *Abbott*, note 11 *supra*.

25 See, e.g., *Wallace* 494.

26 *Dunne* 129.

27 *Wallace* 637.

28 Baker, Henry Wheaton 311-324 (1937).

29 *Lawrence v. Dana*, Fed. Cas. #8136 (CC Me. 1869).

30 Thus, the 1828 appropriation (3 Stat. 768) conditioned the reporter's compensation upon the reports' being published within nine months *of the term*, a condition subsequently reduced (4 Stat. 205) to six months.

31 *Dunne* 423.

32 Swisher, Roger B. Taney 540 (1935), 491, 516, 527, 531, 538, 561.

33 *Id.* at 562 and 491.

34 2 Warren 425 n.2.

35 *Id.*, at 465 n.1.

36 *See, e.g. Plucknett, A Concise History of the Common Law 248 (2nd ed. 1936; Abbott 6).*

37 *The Reporters, Arranged and Characterized 71 (1959 Reprint). Quotation American Law Magazine, Jan. 1844 p. 272 n.1.*

38 *Id.* at 273-274, 276-277.

39 *Id.* at 283-284.

40 *Id.* at 282.

41 Stein and Grossman, *Supreme Court Practice 462 (1969)*. *See also, A Uniform System of Citation 15 (11th ed; 1967); Schmeckeber Government Publications and Their Use 259 (1965); Wiener, Briefing and Arguing Federal Appeals 28 (1961) [Hereinafter cited as Wiener].*

42 Wallace 50-51.

43 Wiener 228.

44 "With the Editors," 69 Harv.L.R., (Dec. 1955, p.v.).

45 Wiener 228.

46 *Id.* at 229.

47 *See "With the Editors," n.44 supra.*

48 Preface to Sixth Reports XV. (The reference is to Moses.)

49 "Go, and do thou in like manner."

The "Judges' Bill" After Half a Century

Merlo J. Pusey

There are rhythms of change in the history of the Supreme Court, as in the history of other institutions, and our national bicentennial is an appropriate time to focus on the steps that have been taken to enable the Supreme Court to keep abreast of its momentous task. Fifty years have elapsed since the Court was given a large measure of control over its own workload, thus preparing the way for it to function effectively as a national agency for clarification of the law. In this year when our thoughts are turned to history, the so-called "Judges' Bill" of 1925 merits a perspective view.

The struggle to keep the Court equal to its task has been especially onerous because, despite its status as one of the three coordinate branches of the United States government, it must look to Congress to define its jurisdiction and to create supplementary units of the judicial system. The Constitution gives the President broad powers of executive leadership, and he has seldom been crippled in the discharge of his duties. Congress, too, with its sweeping legislative mandate, has all the authority it needs to shape its course. The Supreme Court, which Alexander M. Bickel and others have called "the least dangerous branch," has to rely upon an understanding of its problems in Congress and to some extent in the bar and in the country.

That has been so from the beginning. In the early days of the Court the Justices were plagued by the requirement of riding the circuits imposed on them by Congress. Despite repeated pleas from the bench and bar, at onerous dissipation of judicial talent continued until 1891, when Congress at last created the Circuit Courts of Appeals to carry the burden of routine appeals from the Federal District Courts. The result was a sudden shrinkage in the workload of the Supreme Court. New cases filed in the Supreme Court dropped from 623 at the 1890 term to 275 in the 1892 term after the new intermediate appellate courts got into action. The act of 1891 became an important landmark in the modernization of our judicial system.

Nevertheless, the relief thus granted proved to be temporary. New legislation, the growth of the country, and expansion of the economy brought a steady rise in the volume of litigation. Within a few decades the courts were once more overloaded. Outmoded procedures, the lack of any systematic organization within the judicial branch, and the continuation of automatic appeals to the Supreme Court in many cases led to clogged dockets and the injustice of long delays in reaching final judgments. In 1908 William Howard Taft, who had been a circuit judge and was then a member of President Theodore Roosevelt's cabinet, complained that "our failure to secure expedition and thoroughness in the enforcement of public and private rights in our courts" was one of the most critical weaknesses of the United States government.

When Taft became President in 1909 he made judicial reform one of his foremost objectives, but Congress was not ready to modernize the courts. Every proposal for change seemed to arouse fears of empire-building or self-aggrandizement on the part of the judges. In 1916 Congress did allow the Supreme Court to reject some cases of minor importance, but this relief proved to be meager in the face of the mounting demands. It was not until Taft became Chief Justice in 1921 that judicial reform began to get the attention it deserved. By this time the average case filed in the Supreme Court had to wait fourteen months for a hearing, even though many of the cases the Court was obliged to hear were of little significance so far as enunciation of the national law was concerned. Justice John H. Clarke complained that "more than one-half of the cases are of no considerable importance whether considered from the point of view of the principle or of the property involved in them."

Chief Justice Taft's first major reforms were aimed at the lack of cohesion in the judicial system as well as delays and inefficiency. Reversing the policy of Chief Justice Edward Douglas White, who eschewed all involvement in legislative policy, Taft labored assiduously for

legislation to improve the quality of justice. The program he advocated before bar associations and committees of Congress in 1921 consisted of three "steps of progress": First, the creation of more federal judgeships; second, the authority to assign these judges to the districts where their services were most needed; third, the establishment of a judicial conference consisting of the senior judges of each circuit meeting with the Chief Justice to survey the work of the judicial system and recommend changes when necessary. Congress rejected the idea of a "flying squadron" of judges, fearing interference from Washington with federal judges in the districts, but it did create twenty-one new judgeships and gave the Chief Justice additional stature as head of the judicial system by authorizing a Judicial Conference of Senior Circuit Judges. The rationale for this step has been cogently stated by Felix Frankfurter and James M. Landis:

"The judiciary, like other political institutions, must be directed. But it must be self-directed. An executive committee of the judges, with the Chief Justice of the United States as head, is a fit and potent instrument for the task."

The Judicial Conference became a powerful instrument for focusing national attention upon the problems of the federal courts. Taft called the first annual Conference of Senior Circuit Judges for December 14, 1922, and demonstrated its usefulness. His successor's faithfully built on that foundation. The conference evolved into an effective instrument for binding an array of separate courts, each one operating independently with no effective check on its work, into a well-managed judicial system. Taft's immediate successor in the Chief Justiceship, Charles Evans Hughes, promoted the idea of conferences within the circuits for the discussion of judicial problems on a more local scale. Then problems of the various circuits were brought together in the national conference. For the first time the courts had a workable system for making their requirements known. In 1939 the Administrative Office of the United States Courts was created to gather statistics and help the courts coordinate their work, while the central tasks of recommending changes, improving administration and working for more judgeships remained with the judges themselves, operating through the Conference of Senior Circuit Judges, which later became the Judicial Conference of the United States. These administrative arms of the judicial system have exerted a momentous influence on its development.

While this introduction of the management principle into the courts was taking shape, Chief Justice Taft was also working on relief of the Supreme Court from the trivia that still cluttered its docket. Drawing a vital distinction between an ordinary court of appeals and the Supreme Court of the United States, he emphasized the necessity of keeping the Supreme Court in a position to pronounce "the last word on every important issue under the Constitution and the statutes of the United States. A Supreme Court," he continued, ". . . should not be a tribunal obligated to weigh justice among contending parties. They have had all they have a right to claim when they have had two courts in which to have adjudicated their controversy."

In this instance Taft named a committee consisting of Associate Justices William R. Day, Willis Van Devanter and James C. McReynolds, which was later assisted by Justice George Sutherland and which of course worked closely with the Chief Justice himself. This group worked with the Judiciary Committees of the House and Senate and, at the request of the interested legislators, drafted a bill which came to be known as "the Judges' bill." Taft explained the measure in an address to the Chicago bar:

"The new bill proposes to enlarge the *field in which* certiorari is to take the place of obligatory jurisdiction.... As it is now, the important governmental, constitutional questions that we have to advance and set down for immediate hearing postpone the regular docket and are likely to increase our arrears.... The Supreme Court will remain the supreme revisory tribunal, but it will be given sufficient control over the number and

character of the cases which come before it to remain the one Supreme Court and to keep up with its work."

The bill encountered stiff opposition from a few legislators, including Senators Thomas J. Walsh, William E. Borah, John K. Shields and George W. Norris, who feared that it would give the Justices too much discretion. In the face of this opposition Congress procrastinated. Taft continued a relentless campaign, through friendly legislators, the American Bar Association, and other groups, to arouse support for the bill. On December 5, 1924, he wrote to Senator A. Owsley Stanley of Kentucky:

"For two years our Court has been very anxious to secure the passage of a bill to give us greater power of certiorari. We wish to put into one statute the grounds and methods of appeal both to the Circuit Courts of Appeals and to us.... The bill is opposed by Senator Thomas Walsh and Senator Shields on the ground that they do not believe in giving our Court greater jurisdiction in certiorari. They think they shouldn't give us too much discretionary power. I am sorry they think so, but the truth is that there is no other way by which the docket in our Court can be reduced so that we can manage it. We are now a year and three months behind."

One aspect of the Judges' bill seemed to play into the hands of the opposition. For reasons of precision in an extremely difficult area of law-making, it was highly technical in its terminology. Thomas W. Shelton informed the Chief Justice that an effort was being made to convince members of the House that they should vote for the bill even though many lawyers did not understand it. The Bar Association, Shelton said, was urging members of Congress to adopt the bill as an experiment and to keep close watch over its operation. If it should lead to unfortunate results, the effects of the bill on the judicial system would then be better understood and corrective measures could be taken.

Whether or not this novel argument carried weight with the legislators, the once formidable opposition to the bill finally melted away. President Calvin Coolidge appealed to Congress to pass the bill, and by December 1924, the Chief Justice was able to count, with gleeful satisfaction, the names of 84 Senators and 80 percent of the members of the House who were at last ready to vote for it. The Judges' bill finally passed with a landslide vote of 76 to 1 in the Senate on February 13, 1925.

The half century that has since elapsed has removed all doubt as to the wisdom of that course. The Supreme Court was able to dispose of its backlog of cases and to reduce its intake to a point where it was *manageable*. Writs of certiorari, which the Court could grant or deny at its discretion, soon accounted for most of its business. The fiftieth anniversary of the Judges' bill quite properly brings a renewal of appreciation for the pertinacity of Chief Justice Taft. His unrelenting campaign over a period of years was the most potent force behind the reform. He is entitled to a large measure of credit for enabling the Supreme Court to concentrate its energies on its historic and essential function of clarifying the law for the benefit of the nation and the public.

Taft himself apparently felt some disappointment because Congress did not go as far as he had wished. The goal of the Judges' bill, in the words of Justice Van Devanter, was "a revision and restatement--a bringing together in a harmonious whole--of the statutes relating to the appellate jurisdiction of the Circuit Court of Appeals and the Supreme Court." That objective failed, but this does not diminish the significance of the milestone that was attained.

However technical the provisions of the Judges' bill may be, the principle enacted is clear enough. Congress voted to allow the Supreme Court to put aside litigation that was interfering with its primary function to clarify the law of the land. When Charles Evans Hughes succeeded Taft as Chief Justice in 1930, he showed great interest in projecting and amplifying the principle

that Taft had succeeded in getting established. One of the clearest statements *of the Court's* certiorari jurisdiction is to be found in the testimony he gave before the Senate Judiciary Committee on March 25, 1935:

"Under the jurisdictional act of 1925, there are only a limited number of cases in which the right of appeal to the Supreme Court is allowed, and the Court determines on application for certiorari what cases should be brought before the Court. That is a very important exercise of authority, and there is nothing that we do to which we give greater attention with reference to the protection of the jurisdiction of the Court and its appropriate exercise.

"The principles are quite obvious. Cases should not go to the Supreme Court of the United States simply because of the amount of money involved, because of the character or prominence of the parties, or because of the counsel. The question before the Supreme Court is, manifestly, the importance of the question of law involved, the importance of an authoritative determination by the tribunal invested with that very important function. We consider these various applications with respect to that, not as to the parties, not as to the amount of money involved, not as to the counsel, but as to the law. The parties have the right of appeal to the circuit courts of appeal. That satisfies the rights of individual litigants. When it comes to a further review by the Supreme Court of the United States, the higher principle of importance to the public at large is involved.

". . . If we are to perform our duty of giving the careful consideration which is required to these very important subjects, we should not be burdened by cases that are not properly before us."

Beyond the practical effect of the 1925 statute in freeing the Supreme Court from an excessive burden is the recognition on the part of Congress that only the Court itself can properly determine which cases it should hear, beyond its elementary constitutional mandate, to carry out its unique function. The jurisdictional act of 1925 and the statute creating the Judicial Conference of the United States go a long way, therefore, toward elevating the courts to their rightful place as a separate and quasi-independent branch of the government.

One other notable reform sought by Chief Justice Taft was not achieved during his lifetime. He pleaded with Congress to allow the Supreme Court to unify the Federal rules of procedure in law and equity. If the courts were allowed to simplify judicial procedure, he argued, the high cost of litigation could be reduced and the delays that so often eviscerated justice could be minimized. But many lawyers found vested interests in the traditional rules carried over from simpler times. Opposition came also from Congress and from some judges. When Congress finally gave its consent, after Taft's death, the Hughes Court ordered an exhaustive study of the rules of procedure in criminal cases and promulgated a new code on criminal appeals in 1934. Then came a broader study by experts of the bench and bar, which resulted in the adoption of the new Federal Rules of Civil Procedures in 1938. The new rules in themselves were a major step in the modernization of our judicial system, and the fact that the Supreme Court presided over the process of shaping them and then put them into effect was another milestone in the movement toward self-regulation within the judicial system.

In a growing country no solution of institutional problems is likely to be permanent. So it has been with the reforms of 1891 and 1925. The 1970s have brought the Supreme Court face to face with new aspects of its old dilemma. Once more it is in danger of being overwhelmed by torrents of litigation that at least beat upon its portals. Sensing new judicial crises, Congress created the Federal Judicial Center in 1968 "to conduct research and study the operation of the courts of the United States." In 1971 the Center assembled a distinguished committee of scholars

and lawyers, headed by Professor Paul A. Freund of the Harvard Law School, to delve into the problems of the Supreme Court. That committee came up with the conclusion that the solutions of 1891 and 1925, vital though they were in their own day, have become part of the Court's new problem. "The Courts of Appeals," it reported, "have encountered a dramatic rise in their own business, with a proportionate outflow to the Supreme Court; and the task of coping with the discretionary jurisdiction on certiorari overhangs all of the Court's work.... Remedial measures comparable to those of 1891 and 1925 are *called for once* again."

In forma pauperis cases filed in the Supreme Court by prisoners and others unable to pay the cost of litigation had increased from 178 in the 1941 term to 1,930 in 1971. In the latter year they constituted more than one-half of the cases filed. The non-ifp cases had multiplied almost by two-and-a-half from 1951 to 1971. The Freund Committee concluded:

"The statistics of the Court's current workload, both in absolute terms and in the mounting trend, are impressive evidence that the conditions essential for the performance of the Court's mission do not exist. For an ordinary appellate court the burgeoning volume of cases would be a staggering burden; for the Supreme Court the pressures of the docket are incompatible with the appropriate fulfillment of its historic and essential functions."

The question raised by this report was how the Justices could possibly find time and ease of mind for research, reflection, consultation in reaching a judgment, critical review of draft opinions, and clarification and revision of such opinions in the light of all that has gone before when they have to dispose of some 3,600 cases a year. Addressing itself directly to the Court's mammoth screening problem, the committee devised a rather drastic proposal--the creation of a National Court of Appeals. The proposed new court would "screen all petitions for review now filed in the Supreme Court, and hear and decide on the merits many cases of conflicts between circuits."

The Freund report aroused a good deal of debate and criticism. It is not the purpose of this article to appraise the report or to join in the debate over the committee's findings and recommendations. Whatever the outcome may be, however, the report served the useful purpose of stimulating discussion and of heightening national awareness of problems comparable to those of 1891 and 1925.

In June 1975, the Commission on Revision of the Federal Court Appellate System published its report calling for a National Court of Appeals of a somewhat different type. This group consists of four members of the Senate, four members of the House, four distinguished lawyers appointed by the President, and four lawyers and judges named by the Chief Justice, with Senator Roman L. Hruska as chairman. It held hearings in various cities and solicited ideas and opinions from the bench and bar in every section of the country. Its factual findings are similar to those of the Freund Committee. One of its conclusions was:

"At the least, the data raise serious questions about the future. They provide no basis for confidence that the Supreme Court can be expected adequately to satisfy the need for stability and harmony in the national law as the demands continue to increase in the decades ahead."

The Hruska Commission agreed with Justice William H. Rehnquist that the real question is not relief for the Supreme Court but "'relief' for litigants who are left at sea by conflicting decisions on questions of federal law." It quoted, with seeming approval, a letter from Chief Justice Warren E. Burger in which he wrote: "[O]ne element of the Court's historic function is to give binding resolution to important questions of national law. Under present conditions, filings

have almost "tripped in the past 20 years; even assuming that levels off, the quality of the Court's work will be eroded over a period of time."

Rejecting any solution that would place a greater burden on the Supreme Court and turning away from all proposals for the creation of more specialized courts, the Commission appears to have arrived at its proposal for a National Court of Appeals by a process of elimination. Its conclusion is summarized as follows:

"The proposed National Court of Appeals would be able to decide at least 150 cases on the merits each year, thus doubling the national appellate capacity. Its work would be important and varied, and the opportunity to serve on it could be expected to attract individuals of the highest quality. The virtues of the existing system would not be compromised. The appellate process would not be unduly prolonged. There would not be, save in the rarest instance, four tiers of courts. There would be no occasion for litigation over jurisdiction. There would be no interference with the powers of the Supreme Court, although the Justices of that Court would be given an added discretion which can be expected to lighten their burdens."

There are major differences between the new appellate courts recommended by the Freund study group and the Hruska Commission. The study group favored a National Court of Appeals consisting of seven United States circuit judges in active service who would be assigned to the new court for "limited, staggered terms." The Hruska Commission called for a National Court of Appeals that "would consist of seven Article III judges appointed by the President, subject to confirmation by the Senate, and holding office during good behavior."

More striking is the contrast between the grants of jurisdiction that would be given to the two courts. The Freund study group recommended "that all cases now within the Supreme Court's jurisdiction, excepting only original cases, be filed initially in the *National Court of Appeals*, preferably on certiorari, but in any event on papers having the same form and content they would have if they continued to be filed in the Supreme Court directly."

The proposed National Court of Appeals (Freund version) would have discretion to deny review, which decision would be final, or to certify a case to the Supreme Court for disposition. The Freund report goes on to say:

"The expectation would be that the National Court of Appeals would certify several times as many cases as the Supreme Court could be expected to hear and decide--perhaps something of the order of 400 cases a year. These cases would constitute the appellate docket of the Supreme Court, except that the Court would retain its power to grant certiorari before judgment in a Court of Appeals, before denial of review in the National Court of Appeals, or before judgment in a case set down for hearing or heard there. The expectation would be that exercises of this power would be exceptional."

The Hruska Commission would have the National Court of Appeals hear cases referred to it by the Supreme Court or transferred to it from the regional Courts of Appeals, the Court of Claims, and the Court of Customs and Patent Appeals. Under this arrangement the Supreme Court would have authority to *retain any case* before it on petition for certiorari and *render a decision* on the merits; to deny certiorari, thus *terminating* the litigation; to deny certiorari and refer the case to the National Court of Appeals for that court to decide on the merits; or to refer the case to the National Court of Appeals, giving it the option to deny review or decide the case on its merits.

What the ultimate response of Congress will be to these recommendations remains to be seen. Once more there is widespread disagreement as to the best course to follow. Ground for optimism may be found, however, in the fact that the Supreme Court's caseload problems are

under intensive study and debate and in the further fact that there are historical precedents of far-reaching significance.

Some changes seem to be imperative. The consequences of mere drift in the face of a mounting burden on the Supreme Court which threatens to become unmanageable would be serious indeed in a land dedicated to the concept of a government of law. There is much agreement with Chief Justice Burger's comment in his letter to the Hruska Commission: "I conclude by saying that if no significant changes are made in federal jurisdiction, including that of the Supreme Court, the creation of an intermediate appellate court in some form will be imperative."

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The Supreme Court Bar's First Black Member

Clarence G. Contee

On February 1, 1865, Dr. John S. Rock, a lawyer and abolitionist, was admitted to practice law before the bar of the Supreme Court of the United States. This act marked one of the major steps toward a negation of the provocative Dred Scott decision of 1857, which had emphatically denied the citizenship rights of all Negroes in the United States. *Harper's Weekly* of February 25, 1865, carried a photograph of Rock, and it held that his admission to the bar of the Supreme Court, together with the Thirteenth Amendment, then in the process of ratification, tolled the end of the Dred Scott decision and its doctrines and opened a new day for all black Americans. *Harper's Weekly* went on to say that Rock was "known in Boston as a first class lawyer.... Mr. Rock has never been a slave. He represents the colored freeman, as Mr. [Frederick] Douglass represents the freedman." *Harper's Weekly* understood the significance of the admission of Rock: "The Supreme Court of the United States has taken one of a race crushed down to the earth with its own solemn sanction, has taken one who merely by the chances of birth was not himself a slave, and has placed him not indeed in marble, but upon 'the enduring pedestal' of an honorable citizenship."

John Sweat Rock was born of free parents in Salem, New Jersey, a free state, on October 13, 1825. His parents were not very rich, but they did provide enough for him to be able to avoid going to work as a child. As a child growing up in Salem, he spent a great deal of his time reading, rather than spending most of his time playing with other children in the neighborhood. His parents, keenly aware of his precocity, provided the means and the encouragement for him to pursue and to continue formal education in Salem until about 1844, when he had reached the age of nineteen. He completed enough education to be able to instruct others.

His first occupation was thus as a teacher, after he had been examined and approved as qualified. From 1844 to 1848, he taught school in New Jersey in a one-room schoolhouse. Other veteran teachers praised his work. He was not content with this considerable achievement, and turned his energies to medical study. He so impressed two local Salem physicians, Dr. Sharp and Dr. Gibbon, who let him study their books and use their libraries for eight hours a day every day. Rock was also teaching six hours, and giving private lessons for two more hours. He worked almost to exhaustion.

When he completed his studies with the two doctors, he wanted to go to medical school. However, Rock found racial barriers to the doors of the medical schools in the area. He switched to the study of dentistry, and mastered this profession by the summer of 1849. He then moved to Philadelphia in January 1850 to open an office. He became so expert at dentistry that in 1851 he was able to win a silver medal for a pair of silver teeth he made and displayed. Finally, he began attending medical lectures for two years at the American Medical College, from which he earned an M.D. degree in 1852. He was thus one of the first blacks to receive a medical degree from a regular medical school, and by now had learned the professions of teacher, dentist and doctor; he was just twenty-seven years old. He was surely already one of the best educated blacks (or whites) of his time.

In 1853 Rock moved to Boston, where he opened an office to practice dentistry and medicine. In 1855, Dr. Rock had become well established in both of his medical professions, and he began to assume a leadership role. In mid-October 1855, as a delegate to the Colored National Convention in Philadelphia, he was one of the five in a delegation, among whom were Charles L. Remond, George T. Downing, Robert Purvis, and Stephen Myers, all black abolitionists, to see Passmore Williams, a black who had been jailed for refusing to tell where he hid three fugitive slaves. In December 1855, he was one of the sponsors of a dinner honoring William Nell Cooper, a black Bostonian abolitionist, who had started the litigation integrating

the public schools of Boston in the famous case of *Roberts v. City of Boston* (5 Cushing, 198, 59 Mass. 158 (1849)). In the following year, Rock became more outspoken. In July, he urged Negroes to show their courage by some desperate action; he wanted them to prove to whites that they were not cowards.

In August, at a meeting he joined other blacks, such as George L. Ruffin and George Lowther, later two members of the Massachusetts Legislature, to support the fledgling Republican Party. Rock spoke in favor of the resolution; his speech was called brilliant, and Rock became known as a first-class Lyceum lecturer. He was now almost devoting all his time to speeches against slavery. He had also petitioned the Mayor and Alderman to delete the word "colored" from the voting and tax lists.

But his voice was to be stilled for a while, because his health had been failing ever since the mid-1850s. Rock had been operated on in the United States, and these operations had given some relief. He came to feel, however, that he could obtain the needed surgery only in France in mid-1858. His desire to go to France created a problem concerning the citizenship status of Negroes. In order to get a passport for which he applied, he had to be a citizen. Secretary of State Lewis Cass ruled that Negroes could not receive passports. The Massachusetts Legislature passed a law granting the state the right to give state passports; Rock got one of these. It was accepted by the French officials.

The esteem with which the blacks of Boston held John S. Rock was reflected in a farewell reception given him in 1857 at the Twelfth Baptist Church, a prominent black Baptist church pastored by the Reverend Leonard Grimes, also a leading Boston black abolitionist; Rock was a communicant there. But due to the difficulty he had in securing a United States passport, he did not actually leave until late May 1858. He had attended and spoken at the annual Massachusetts Anti-Slavery Society convention when he made his famous speech. He left on the "Vanderbilt" for Le Harve, and spent eight months in France, learning the French language and literature, sightseeing and recuperating from his surgery.

His health, after showing signs of improvement, had begun its final slow descent by 1860. He gave up his dental and his medical practices. He could not give the time he thought adequate to his patients. He began the study of law; it is not known with whom he read law, but on September 14, 1861, T. K. Lothrop, a white lawyer, made the motion in the Superior Criminal Court before Judge Russell to have Rock examined. Rock passed with ease, and he was admitted on the same day to practice in all of the courts of the state. One week later he was awarded the right to be a Justice of the Peace. He opened an office on Boston's famed Tremont Street. It was a natural development for a man who attacked the laws that held the black man in bondage and without full opportunity and full citizenship.

Rock saw early in 1862 that slavery had been the cause of the war. He saw correctly that slavery would be perpetuated and extended if the South won. Hence, he watched closely the steps Congress and Lincoln took to abolish slavery. By August 1862, his patience had worn thin, and he and other abolitionists became very critical of the slow pace of Lincoln. So, when the Emancipation Proclamation became official on January 1, 1863, Rock, at a meeting in Boston, called the act a turning point. He softened his criticism of Lincoln, for whom he had little enthusiasm in 1860, for Lincoln had by 1863 exceeded Rock's wildest expectations. Thus, when Congress authorized the raising of black regiments, Rock became one of the main recruiters for the two black Massachusetts regiments. But by August 1864, he was among those attacking the Federal government for its failure to give equal pay and status to those black troops.

The highlight of the struggle of Rock as a lawyer came symbolically on February 1, 1865, when he was granted permission to practice before the United States Supreme Court. It had not come easily. In mid-1864, Rock had written to Senator Charles Sumner of Massachusetts to ask his aid in his request. Sumner told him that nothing could be done as long as Roger B. Taney was Chief Justice. Taney died on October 12, 1864, and President Lincoln in December appointed Salmon P. Chase of Ohio, an antislavery champion, as Chief Justice. The atmosphere

changed for the better for Rock. Yet, it took some prodding for Sumner to get Chase to act to admit Rock on February 1, 1865.

Rock, who had waited for this moment in Boston, came down to Washington. The ceremony on February 1 was solemn as both Rock and Sumner stood side by side before Chase. In *addition to Harper's Weekly*, such other widely circulated periodicals as *The Liberator*, *The New York Times* and *The New York Tribune*, which carried a very detailed account of the entire proceedings, reported the action.

Fortunately for the followers of Clio, there was a reporter for *The New York Tribune* present at the ceremony on February 1, 1865, in the chambers of the Supreme Court. His account pointed up the historic nature of the solemn occasion:

"The black man was admitted. Jet black with hair of an extra twist--let me have the pleasure of saying by purpose and premeditation of an aggravating `kink'--unqualifiedly, obtrusively, defiantly, `Nigger'--with no palliation of complexion, no let down lip, no compromise nose, no abatement whatever in any facial, cranial, osteological particular from the despised standard of humanity brutally set up in our politics and in our Judiciary by the Dred Scott decision--this inky hued African stood, in the monarchical power of recognized American Manhood and American Citizenship, within the bar of the Court which had solemnly pronounced that black men had no rights which white men were bound to respect; stood there a recognized member of it, professionally the brother of the distinguished counsellors on its long rolls, in rights their equal, in the standing which rank gives their peer.

"By Jupiter, the sight was grand. 'Twas dramatic, too. At three minutes before eleven o'clock in the morning, Charles Sumner entered the Courtroom, followed by the negro [sic] applicant for admission, and sat down within the bar. At eleven, the procession of gowned judges entered the room, with Chief Justice Chase at their head. The spectators and their lawyers in attendance rose respectfully on their coming. The Associate Justices seated themselves nearly at once, as is their courteous custom of waiting upon each other's movements. The Chief Justice, standing to the last, bowed with affable dignity to the Bar, and took his central seat with a great presence. Immediately the Senator from Massachusetts arose, and in composed manner and quiet tone said: `May it please the Court, I move that John S. Rock, a member of the Supreme Court of the State of Massachusetts, be admitted to practice as a member of this Court.' The grave to bury the Dred Scott decision was in that one sentence dug; and it yawned there, wide open, under the very eyes of some of the Judges who had participated in the judicial crime against Democracy and humanity. The assenting nod of the great head of the Chief Justice tumbled in course and filled up the pit, and the black counsellor of the Supreme Court got on to it and stamped it down and smoothed the earth to his walk to the rolls of the Court."

Benjamine Quarles in Lincoln and the Negro concluded the ceremony; "A clerk came forward and administered the oath to Rock, thus making him the first Negro ever empowered to plead a case before the *Supreme Court*."

The Boston Journal, the home town newspaper of Rock, was also able to feature the admission of Rock. The correspondent of the paper wrote that: "The slave power which received its constitutional death-blow yesterday in Congress writhes this morning on account of the admission of a colored lawyer, John S. Rock of Boston, as a member of the bar of the Supreme Court of the United States." The paper noted that the faces of some of the older persons present at the ceremony were knotted in rage. Even papers in England mentioned the admission of Rock into the bar of the Supreme Court. Most of the observers who reported on the act saw it as a

giant step in the repudiation of the Dred Scott decision of former Chief Justice Taney. It was evident that John S. Rock had set a great legal precedent. Before the adoption of the Fourteenth Amendment to the Constitution, Rock had obtained one highly prestigious symbol of the citizenship status of the Negro in 1865.

While in Washington, Rock had attended a session of Congress; he was the first Negro lawyer to be received on the floor of the House. Congressman John D. Baldwin of Massachusetts, *former editor* of *The Commonwealth* and of *The Worcester Spy*, had escorted Rock to a seat. Baldwin was a close friend of Charles Sumner and Henry Wilson, also a Massachusetts politician of some influence. Rock was warmly received by some of the leaders about to shape Reconstruction policies. Unfortunately, as Rock was returning to Boston, he was brought back to reality when he was arrested at the Washington railroad station for not having his pass. James A. Garfield, a Congressman from Ohio and later a President, thereafter introduced a bill that abolished required passes for blacks.

It appears as if the direct illness that brought Rock's remarkable career to an end began the day before Rock was admitted to the bar of the United States Supreme Court. He had attended the Presbyterian church of the Reverend Henry Highland Garnet, a famous black leader and abolitionist, the day before, on January 31, 1865. He caught cold. He was already in a weakened state of health, and to catch cold in the winter in those days was serious. When he returned to Boston, he had to appear at gatherings honoring him and in the interest of his race. His health continued to deteriorate rapidly.

On December 8, 1866, The Boston Commonwealth published his obituary and eulogized Rock; "John S. Rock, Esq., the talented attorney who was presented by Senator Charles Sumner, two years since to the Supreme Court for practice died on Monday last in this city, of consumption. He was skilled in medicine, having practiced in that profession ere embracing the law, and was also a speaker of grace and ability." Rock had actually died on December 3, at 83 Phillips Street, where he had lived with his mother and son. Rock was buried with full Masonic honors, since he was a Mason, from the Twelfth Baptist Church, where he had worshipped as a member for a long time, with the Reverend Mr. Grimes presiding, and he was laid to rest in the Woodlawn Cemetery. His tombstone contained the fact that he had been the first Negro lawyer to have been admitted to practice before the Bar of the Supreme Court. The inscription on his tombstone reads: "John S. Rock, Oct. 13, 1825, Died Dec. 3rd, 1866. The 1st colored lawyer admitted to the Bar of the United States Supreme Court at Washington; On motion made by Hon. Charles Sumner, Feb. 1st, 1865."

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Departmental Report: The Supreme Court Historical Society William H. Press

The Supreme Court Historical Society, an independent non-profit organization which began operations in the Spring of 1975, is making rapid progress toward its mission of better informing the general public about the bulwark of our constitutional system, the least known branch of government--the Supreme Court of the United States.

It is now almost completely organized, building a substantial membership, fully financed for the year ahead and actively engaged in a number of projects.

The purposes for which the Society is organized are to operate, not for profit, but exclusively for educational and other charitable purposes, as set out in section 501(c)(3) of the Internal Revenue Code of 1954, and pursuant to that purpose, the Society will:

"1. Disseminate knowledge of and provide opportunity for research into such historic, scientific, literary and other documents, records, objects, memorabilia of or relating to the Supreme Court of the United States and the justices thereof and any other miscellaneous data as are pertinent to increased public knowledge of the Supreme Court of the United States and its place in American history;

"2. Acquire knowledge concerning the history of the entire Judicial Branch of the United States Government;

"3. Make the knowledge and materials acquired available to scholars, historians, and the public under conditions prescribed from time to time by the Board of Trustees;

"4. Acquire through gift or loan, or on occasion through purchase, when and as funds for such purposes become available, documents, objects of historical significance, or objects of personal property or other memorabilia which may be related to the Society's purposes, or incorporated into continuing displays within the United States Supreme Court building or elsewhere, in order to portray to visitors to the premises the persons and events associated with the Supreme Court of the United States in the course of its history;

"5. Assist in effectuating the national policy for preserving all documents, records, objects and memorabilia which are of national significance for the inspiration and benefit of the people of the United States, more especially as those materials affect the development, functions, personnel, buildings and history of the Supreme Court of the United States and of the federal judiciary generally and as such preservation may be accomplished through specified activities such as the installation and presentation of educational exhibits, documentation, registration, storage, and when necessary, through acceptance of gifts of services and materials for preservation, conservation, maintenance and security of any articles or data acquired for such exhibits;

"6. Acquire by purchase and accept gifts, royalties or bequests of money, securities and other property, personal or real; purchase or otherwise acquire, own, use, improve, hold and operate for investment or develop, mortgage, sell, convey, lease, donate or otherwise dispose of, or deal in, improved or unimproved real estate wherever situate;

"7. Acquire, own, hold, improve, use and pledge, sell, donate or otherwise dispose of any personal property whatever situate including gifts to the United States, and borrow sums of

money, all in furtherance of the Society's objectives and purposes, and subject always to the provision of the introductory paragraph in this article;

"8. Accept contributions from the public in varying amounts, in return for membership in the Society and benefits derived therefrom, or any otherwise lawful contributions independent of membership;

"9. Employ such staff, personnel or agents as may be necessary, enter into contracts, and do each and everything now or hereafter permitted by the corporation laws of the District of Columbia which are necessary, suitable or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated or which shall at any time appear to be conducive to, or expedient for, the protection or benefit of the Society and which are not inconsistent with these Articles of Incorporation, and subject always to the provisions of the introductory paragraph in this article;

"10. Allow for the extension of the purposes and activities described above to other courts within the Federal Judicial system and to such other agencies, public or private, educational or philanthropic, when and as the Board of Trustees of the Society shall deem appropriate, to the end that ultimately there may be, when resources permit, a continuing, comprehensive study of the historical record of the entire judicial branch of the government of the United States."

The Supreme Court Historical Society was incorporated in the District of Columbia on November 20, 1974 by Rowland F. Kirks, Earl W. Kintner and Alice L. O'Donnell as a result of nearly three years of planning by an *ad hoc* committee appointed by Chief Justice Warren E. Burger. This Advisory Historical Committee was chaired by Professor William F. Swindler and consisted of the following members: Erwin C. Surrency, James B. Rhoads, Richard H. Howland, Clement E. Conger, Charles E. Van Ravenswaay, T. Perry Lippitt and Merlo J. Pusey.

In response to the request of the incorporators, the Morris and Gwendolyn Cafritz Foundation on January 15, 1975, approved a charter grant of \$125,000 to launch the new Society. The grant specifically included funds for the initial organizational, research, mail and other expenses to get the Society under way. Funds were also provided for research and planning for a movie concerning the Supreme Court and for acquisitions of historical significance for display at the Court, including a portrait of the Supreme Court's first six Justices.

On February 12, 1975, William H. Press was named Executive Director by the incorporators, who at that time served as "the initial Board of Trustees."

The initial Board of Trustees on March 31, 1975 adopted By-Laws and a tentative budget for the year 1975. The Board also discussed Society objectives, named retired Justice Tom C. Clark Chairman and compiled a list of distinguished Americans who would be asked to serve as Trustees and members of the Advisory Board. The Executive Committee composition was adopted, an appropriation was made to partially cover costs of Senate ceremonies dedicating the restored Supreme Court chamber on May 22, 1975, and it was agreed that a dinner launching the Society should be held at about this time when convenient to the Chief Justice. The Chief Justice, Mark Cannon, Catherine Hetos and Professor Swindler participated in some of these discussions.

In mid-April, offices of the Supreme Court Historical Society were opened in Suite 400, 1629 K Street, N.W., in Washington.

After the Senate dedication on May 22, the Board of Trustees dinner in the East Conference

Room of the Supreme Court Building convened at 8 PM. Present were the Chief Justice and Mrs. Burger, Justice and Mrs. Blackmun, Justice Brennan, Justice and Mrs. Marshall, Justice and Mrs. Rehnquist, and Justice and Mrs. Clark. Twenty-six Trustees, including most of the Officers, Advisory Board members and wives attended.

During this very enjoyable historic occasion chaired by Justice Clark, our Chairman, Professor Swindler gave a brief history of the work of the *ad hoc* Advisory Historical Committee and probable interests of the Supreme Court Historical Society.

Chief Justice Burger made inspiring comments about the Society's objectives, expressed gratitude to Mrs. Gwendolyn Cafritz for her generous charter grant and introduced Executive Director William H. Press.

No business was conducted at the dinner.

During May and June the incorporators selected the officers and 26 Trustees and revised the Society's dues schedule. The Executive Director developed a membership brochure, invitation and application and a mailing list of approximately 37,000. This mailing was dispatched in mid-July.

In accordance with the By-Laws the Executive Committee was named consisting of President Elizabeth Hughes Gossett, Vice-Presidents Earl W. Kintner, Sol M. Linowitz, William P. Rogers, Robert T. Stevens, Secretary Mrs. Hugo L. Black, Treasurer Vincent C. Burke, Jr. and Trustees Charles T. Duncan, A. Linwood Holton, Rowland F. Kirks and Fred M. Vinson, Jr.

The first meeting of the Executive Committee was held in the Supreme Court Building on July 22, 1975. Trustees for 1, 2 and 3 year terms (as required by the By-Laws) were selected by naming the members of the Executive Committee to three-year terms, and then by drawing, the following were named to two-year terms: J. Albert Woll, Francis R. Kirkham, Patricia C. Dwinnell, Alice L. O'Donnell, Bernard G. Segal, Gwendolyn D. Cafritz, Melvin M. Payne, Glen A. Lloyd, David A. Morse, David L. Kreeger and Richard A. Moore. The remaining Trustees were named to one-year terms ending June 30, 1976: Ralph E. Becker, Herbert Brownell, William T. Coleman, Jr., Newell W. Ellison, Paul A. Freund, Erwin N. Griswold, Joseph H. Hennage, Nicholas D. Katzenbach, Fred Schwengel, Whitney North Seymour, Hobart Taylor, Jr. and Howland Chase. The Chairman of the Advisory Board was designated a trustee *ex officio*.

Standing Committee chairpersons were named as follows:

Acquisitions Joseph H. Hennage

Finance Earl K. Kintner

Membership Fred M. Vinson, Jr.

Nominating Mrs. Hugo L. Black

Publications William F. Swindler

Plans for the first *Yearbook of the Supreme Court Historical Society* were reviewed and in general approved as was an outline of the make-up of the Quarterly Newsletter. Subsequently it was decided that in this first year each member would be sent a copy of the *Yearbook* without cost. Members may purchase additional copies for \$5. All other purchasers will pay \$7.50 per

copy.

The October 15, 1975, Executive Committee meeting adopted an expression of regret because of the death of Trustee Glen A. Lloyd. Two additional Trustees were named, Mr. Orbert C. Tanner of Utah and Mrs. Glen A. Lloyd of Illinois.

Chief Justice Warren E. Burger was elected Honorary Chairman of the Society and David A. Sacks was named Tax Counsel.

Included in Committee reports at this meeting was an estimate of \$436,500 income through June 30, 1976, and a proposed budget of \$170,990 through June. The budget was adopted. Membership of 446 on October 10 was reported, of which 6 were life members. Several other members have announced their intentions to bring their dues paid up to the \$5,000 minimum life membership requirement. Cash balances of \$189,344.42 were reported as of October 15.

Through the generosity of Mrs. Hazen the Society was able to purchase and place in the Justices' Dining Room a Duncan Phyfe Tambourine Table and 14 matching accompanying chairs. Mr. and Mrs. Joseph Hennage presented to the Society an 1810 Sheraton pedestal drop leaf table and an 1810 Sheraton New York sofa. These pieces will be appropriately placed in the Supreme Court Building.

The first public announcement of the formation of the Society appeared in the May 1975 issue of THE THIRD BRANCH, the Bulletin of the Federal Courts. On July 23 a lengthy press conference was held at the Supreme Court in which the Chief Justice, Justice Clark, President Gossett and Executive Director Press participated. Reporters and photographers from the A.P., U.P.I., the *New York Times*, the *Los Angeles Times* and the *Washington Post* and *Star* covered the conference. Excellent articles appeared in the papers covering and several others. A comprehensive article about the Society written by Dr. William Swindler was in the September issue of the *American Bar Association Journal*. A number of magazine articles are being prepared for publication in the near future.