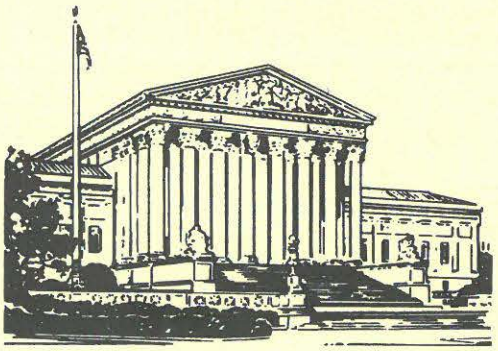


THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME XV NUMBER 2, 1994

Justice Blackmun Announces Retirement

On Wednesday, April 6, 1994, Senior Associate Justice Harry A. Blackmun announced his forthcoming retirement from the Supreme Court of the United States. As the Justice noted in his letter to President Clinton, his retirement will take effect "as of the time the Court 'rises' for the summer or as of the date of the qualification of my successor, whichever is later, but, in any event, not subsequent to September 25, 1994."

Justice Blackmun's retirement at the age of eighty-five marks an end to his service of twenty-four Terms on the Supreme Court bench, for a total of thirty-four years service on the Federal bench. He has served as Senior Associate Justice for the last year, since Justice Byron R. White's retirement from the Court. In a press statement made in the Supreme Court building, Justice Blackmun expressed his feeling that "it's time" to retire, and noted that although it was a job that "hasn't been much fun,". . . [i]t's been a great privilege, really to be here for these many years."

In tribute to his dedicated service on the Court, we republish here a biography of Justice Blackmun written by Alan S. Madans, an attorney at the firm of Rothschild, Barry, and Myers in Chicago, Illinois. Mr. Madans clerked for Justice Blackmun in the 1982 Term. This biography appears in the Society's recent publication, *The Supreme Court Justices: Illustrated Biographies, 1789-1993*, published in 1993 by Congressional Quarterly, Inc.

Franz Jantzen, Collection of the Supreme Court of the United States

Senior Associate Justice Harry A. Blackmun announced his intention to retire at the end of the Court's term in a speech in the Supreme Court's West Conference Room on April 6, 1994.

Justice Harry A. Blackmun

Alan Madans

Harry Andrew Blackmun was born in Nashville, Illinois, on November 12, 1908. He grew up in St. Paul, Minnesota, where his father owned a grocery and hardware store. The Blackmun family was of modest means but, looking back on those years, the Justice suggested that the family's circumstances "didn't do me any harm at all."

After high school, the Harvard Club of Minnesota selected Blackmun to receive a tuition scholarship. To cover his expenses at Harvard College, Blackmun worked at odd jobs ranging from delivering milk to grading math papers. He majored in mathematics, receiving his A.B. summa cum laude and Phi Beta Kappa in 1929. Blackmun initially thought of becoming a physician, but ultimately decided on a career in the law and received his LL.B. degree from Harvard Law School in 1932. Among his law professors was Felix Frankfurter, whom Blackmun did not much admire at the time, but whom he later came to regard as a great teacher and a formative influence.

After law school, Blackmun served as law clerk to U.S. Circuit Court Judge John B. Sanborn in St. Paul for a year and a half. He then spent sixteen years in private practice in Minneapolis with Dorsey, Colman, Barker, Scott & Barber, specializing in the "characteristically precise fields" of taxation, trusts and estates, and civil litigation. During that time he taught real property and tax courses at the St. Paul College of Law and then at the University of Minnesota Law School. In 1941 Blackmun married Dorothy Clark; they had three daughters—Nancy, Sally, and Susan.

In 1950 Blackmun became the first resident counsel at the Mayo Clinic, a world-renowned hospital in Rochester, Minnesota. He

—continued on page eleven

A Letter From the President

Leon Silverman

Within a few weeks, each of you will be receiving a comprehensive President's Report describing the Society's accomplishments during the last three years, outlining our immediate and long-term goals, and detailing how we plan to achieve those goals. I hope that each member, in reading that document, will be thinking of how he or she can most effectively assist the Society with its important endeavors on the Court's behalf. In the interim, and because a substantial number of members are unable to attend the Annual Meeting, I should like to relate to you an abbreviated form of the status report I delivered to the members who attended this year's Nineteenth Annual Meeting on June 13, 1994:

The Society, which operates on a fiscal year ending on June 30, 1994 is about to complete a very successful year. A few weeks ago we concluded an extremely well received six-part lecture series on the Supreme Court in the Civil War, which drew over 1,400 guests and was broadcast nation-wide on C-SPAN. The papers delivered at this program, like those from last year's series on the Court's Jewish Justices, are providing the basis for a series of special publications which the Society will begin to publish later this Summer.

This is but one part of an extremely ambitious publications program for an organization of such limited resources. And, in case you were not aware of it, I should like to briefly recount the extraordinary product of the Society's commitment to publications which is coordinated by the Society's Publications Committee, Chaired by Kenneth S. Geller.

First, there is the Society's *Journal of Supreme Court History*—an annual collection of scholarly articles which grows in stature with each passing year. I should acknowledge that the Society owes a special debt to Professor Melvin Urofsky, whose chairmanship of the publication's Board of Editors is building upon the success of predecessors, including Professor Michael Cardozo, the late Merlo Pusey and the late William F. Swindler.

The *Quarterly* continues its growth in an effort to report the Society's expanding programs and to meet the needs of a growing membership. Once published sporadically as a four or six page newsletter, it now appears routinely, four times a year, and rarely falls below twenty pages.

Within the past few days, the Society has also published two new books—a genealogy of the family of Chief Justice Charles Evans Hughes, which was funded by a generous grant from the Charles Evans Hughes Foundation, and a new edition of *Equal Justice Under Law: The Supreme Court in American Life*, which was produced in cooperation with the National Geographic Society. *Equal Justice Under Law* is probably the most widely circulated general history of the Supreme Court in print today, and the Society has much to be proud of in its continuing involvement with the production of this fine book.

National Geographic, as many non-profit educational publishers, has endured a severe strain on its resources in recent years as a result of the increased costs of printing and mailing. In light of this, we are especially grateful to the National Geographic Society for its continuing commitment to its special publications division in making this book possible.

Yet another publication which is earning accolades for the Society is *Supreme Court Justices: Illustrated Biographies, 1789-1993*, which was developed by the Society and published by Congressional Quarterly, Inc. at the close of Fiscal Year 1993. This book has been recognized by the American Library Association as one of the outstanding reference works of 1993, and has already gone into a second printing.

Our most important research/publication effort continues to be the Documentary History Project. Last year we held a reception in the Court marking the release of Volume 4, in what is anticipated will become an eight-volume series—and this book has received nothing short of superlative reviews in various academic journals. The Project, headed by Dr. Maeva Marcus, has also recently completed its manuscript for Volume 5 which is now at the printer and is due out later this year. I am happy to report that work has also commenced upon Volume 6.

This project has been no easy task. Funding has always been a critical problem because of the long lead-time and substantial staff commitment required to bring each volume to press. But we are grateful to the NHPRC, the William Nelson Cromwell Foundation, West Publishing Company, the Clark-Winchcole Foundation, the Charles Evans Hughes Foundation, and most recently, the Mellon Foundation for their generous support to the continuation of the Documentary History. We are also deeply appreciative of the strong grass-roots support the Project has enjoyed from the Society's members. Many of you have made voluntary contributions in addition to your annual dues, and your generosity will help to see the Documentary History Project to a successful conclusion in the next six years.

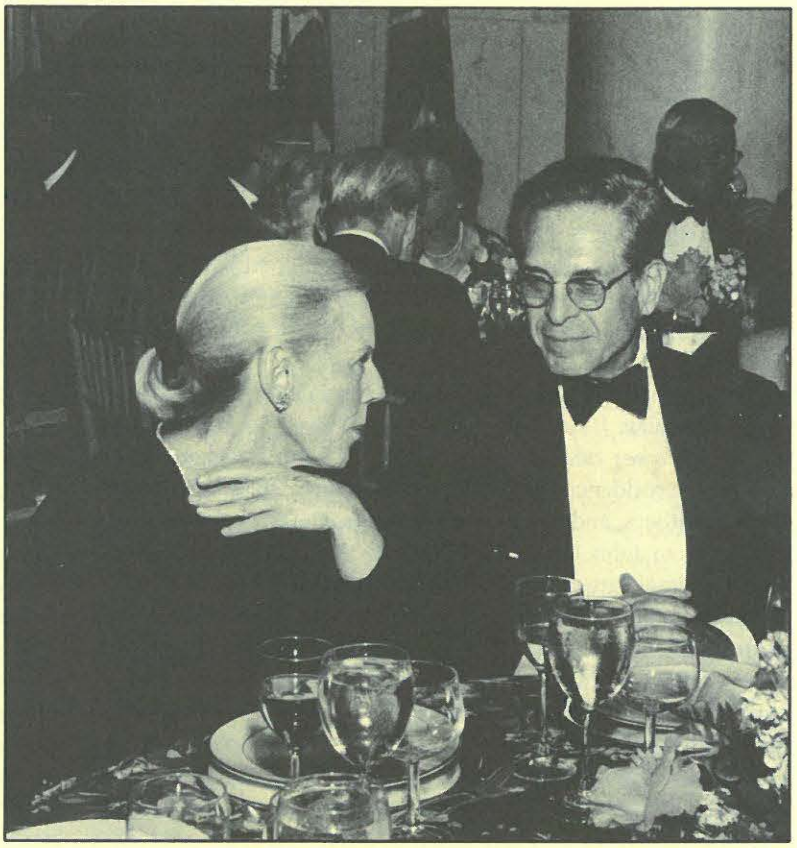
In closing, I would like to congratulate and welcome the Society's new Honorary Trustee, Retired Associate Justice Byron R. White, our new Trustees, Herman Belz and Mrs. Thurgood Marshall, and finally, our new Executive Committee members, Sheldon Cohen and John R. Risher. These additions strengthen the Society's Board of Trustees and Executive Committee, and better prepare us to move forward with the work which lies ahead.

Leon Silverman

Nineteenth Annual Meeting Successful Celebration

The Nineteenth Annual Meeting of the Supreme Court Historical Society was held on Monday, June 13, 1994. In the tradition of previous years, the first event in the day's program was the Annual Lecture. Associate Justice Antonin Scalia presented a thoughtful and fascinating presentation focusing on dissenting opinions of the Court. Although concurring opinions are usually not considered to be in this category, Justice Scalia contended that they could be appropriately considered as dissents as they are predicated on alternative interpretations of the law, and hence do not support the logic and conclusions stated in the majority opinion, even though they may ultimately reach the same conclusion. The presentation was enlightening and thought-provoking. Speaking to an audience of more than 250 persons, Justice Scalia provided an exciting commencement to the day's proceedings. (For more on Justice Scalia's lecture see page nineteen.)

Through the courtesy of the Office of the Curator of the Supreme Court, lecture guests were offered tours of the Supreme Court building immediately following the lecture. Many availed themselves of this opportunity. Guides not only discussed the daily procedures of the Court, but also provided information about the iconography of the decorative motifs used throughout the building. Tour participants had an opportunity to see many of the paintings and furnishings which the Society has helped acquire for the enrichment and decoration of the building.



Society Secretary Virginia Warren Daly chats with newly elected Executive Committee member Sheldon Cohen during the Society's Annual Dinner.

The evening's program commenced with the Annual Meetings of the General Membership and the Board of Trustees. President Leon Silverman presided over the Membership meeting, updating members on the Society's activities and successes of the past year. Notable among these was the lecture series entitled "The Supreme Court in the Civil War." A six-part program which commenced in March and concluded in May, this series broke new ground for the Society as it was the first of the Society's lecture programs to be broadcast on national cable television. Another highlight of the year was the success of the new publication, *Supreme Court Justices: Illustrated Biographies-1789-1993*. Published at the conclusion of the last fiscal year, the book has been highly acclaimed during recent months, including a rating of "Outstanding Reference Source" by the American Library Association in May 1994. Publications are a high priority for the Society, and 1994 will see the publication of the fifth volume of the Society's major research project, the *Documentary History of the Supreme Court of the United States: 1789-1800*. Mr. Silverman noted that many members recently had made voluntary contributions in support of this important project which is scheduled to complete its work within the next six years.

Society Treasurer, Peter A. Knowles, presented abbreviated financial reports on the status of the Society, reporting that the Society was financially very sound and that he anticipated that Fiscal Year 1994 would end as one of the most successful years in the Society's history. Another important part of the business of the evening, was the election of Officers and Trustees. Mrs. Virginia Daly, Secretary of the Society, presented the report of the Nominating Committee. The first order of business was the nomination of retired Associate Justice Byron R. White as an Honorary Trustee of the Society. Justice White was elected by acclamation. Further nominations were made for election to the Board of Trustees. Elected by the membership for an initial three-year term as a Trustee

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The Supreme Court Historical Society

Quarterly

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Assistant Editor	Jennifer M. Lowe
Consulting Editor	Kenneth S. Geller

The Homes of Justices

James B. O'Hara

Several years ago, I saw one of those coffee table books which history buffs love to page through. There, in one attractive volume, were pictures and stories about all of the houses throughout the country which had been residences of the various Presidents.

Over the next few weeks, in idle moments, I wondered about the homes of the Justices. I already knew that there was no book on the subject, but I wondered if there might be a comprehensive list somewhere, or a set of pictures. An initial search indicated nothing, the Supreme Court Historical Society knew of no list, and neither did the Curator's Office at the Court.

Just around this time, I found another fascinating book for sale at the Smithsonian. It was called *Who Lived Where: A Biographical Guide to Homes and Museums* 1983) by John Eastman, and it detailed the residences of a variety of notables: statesmen, actors, villains, authors, and much to my surprise, eleven Supreme Court Justices from John Jay through Holmes and Brandeis to Warren, Douglas, Frankfurter and Black. I was now on my way.

For the last three years, I have gone through guidebooks, books on architecture, histories of the Court, city directories, and old maps. I have talked to museum directors, city planners, relatives of deceased justices and dozens of helpful colleagues from universities and colleges around the country. I have visited and photographed houses and cursed biographers who write Justices' lives without ever suggesting that the subjects had a place to live. I have railed at public authorities who tear down a Justice's house to provide a parking lot. In short, I have become a little obsessed. *But*, I do now know a lot about where the Justices lived!

There was one rule of thumb followed throughout. I made no effort to trace the residential history of a living Justice, although in a few cases a book or magazine did provide information.

In addition to all the books and conversations, I visited the Office of the Curator of the Supreme Court. I had called in advance to see if it might be possible to examine their files. A friendly warning that there was "not much" was coupled with an equally friendly invitation to "come and see." Though prepared in advance for disappointment, I was disappointed not at all. Though no systematic study had been done, there were lots of clippings, guidebooks from some of the houses, and some very useful correspondence—including a long letter from William O. Douglas, Jr., detailing the residences of his late father.

Thus far, I have located over 200 still-standing structures that were for some significant time residences of Justices. Here is a preliminary report.

About twenty of the Justices' homes are museum/houses. Others have been put to a wide variety of uses. There are academic buildings, Governors' mansions, offices and even two "Bed and Breakfasts!" One is now an Ambassador's residence, and one is a law office. Dozens more are privately owned, still family homes.

It might be noted that members of the Court prior to the Civil War did not usually maintain a home in Washington. Since sessions were relatively brief, the Justices boarded at local inns, often staying at the same boarding house. After the War, Justices began to establish residences in the District, but still spent significant portions of time on circuit, with houses in their home states as a base. Only in this century have most of the Justices resided in Washington, or in suburban Virginia or Maryland, with the more affluent owning a vacation residence somewhere else.

Here are the residences maintained as Museums:

***Baldwin-Reynolds House*—639 Terrace Street, Meadville, PA** Built by Justice Henry Baldwin in the early 1840s, and his residence at the time of his death in 1844. The house is owned and maintained by the Crawford County Historical Society.

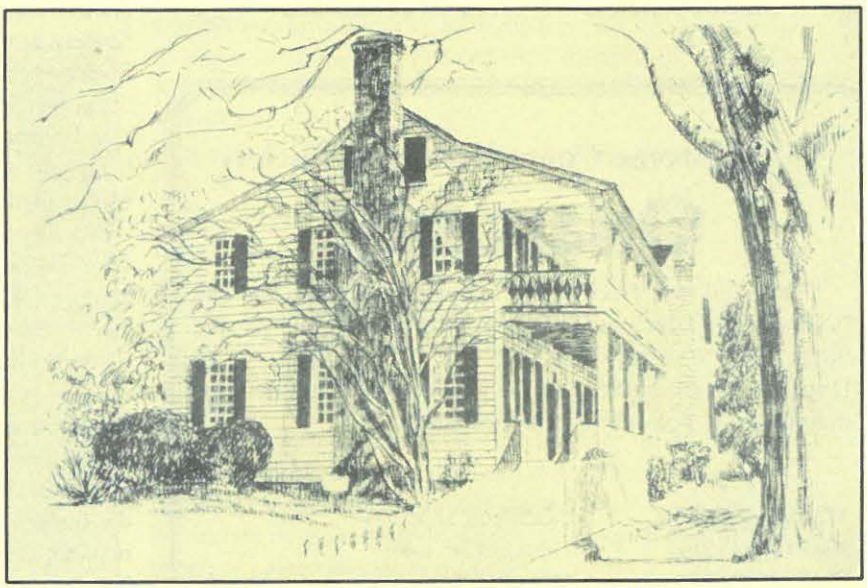
***John Blair House*—Duke of Gloucester St., Williamsburg, VA** Home of Justice John Blair, this interesting old house is part of Colonial Williamsburg and located only a short distance from Bruton Parish Church, where Blair is buried.

***David Davis Mansion*—1000 E. Monroe, Bloomington, IL.** This was the residence of Justice Davis, friend and legal executor of Abraham Lincoln. Built in 1872, the house featured central heating and indoor plumbing. It is open to the public and under the care of the Central Illinois Preservation Agency.

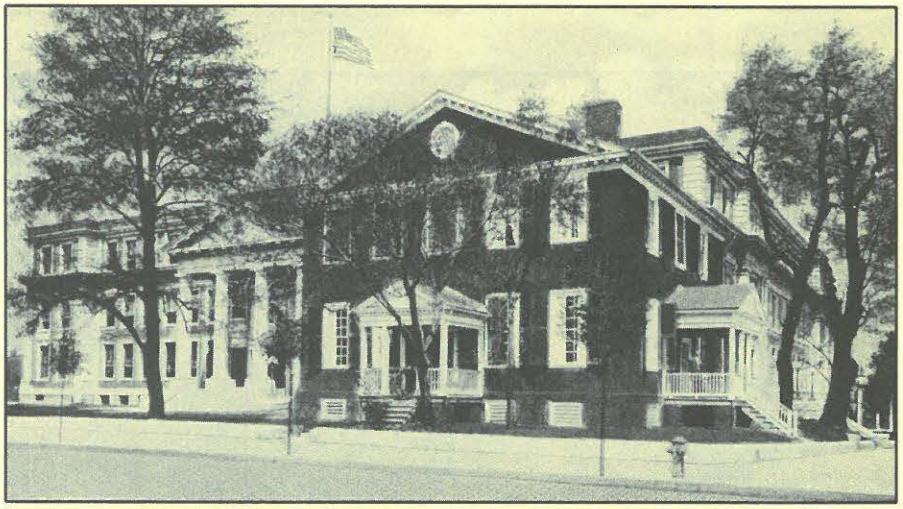
***Marietta*—Prince George's County, MD** Built between 1813-16 for Justice Gabriel Duvall, Marietta is presently under restoration as a house museum and as headquarters and library for the County Historical Society.

***The Oliver Ellsworth Homestead*—778 Palisado Ave., Windsor, CT** Also called *Elmwood*, this 1690 residence was the birthplace and lifelong home of the third Chief Justice. It was bequeathed in 1903 to the Connecticut Daughters of the American Revolution and is open to the public May through October.

***James Iredell House*—East Church Street, Edenton, NC** The



The Iredell House, circa 1773, in Edenton, North Carolina was the home of Justice James Iredell. It is listed in the National Register of Historic Places. The second story piazza was added by Iredell's son, Governor James Iredell, Jr., in the early 18th Century.



The Richmond, Virginia home of Chief Justice John Marshall is the oldest brick house in the city.

Iredell House was the home of the Justice until his death in 1799, and was subsequently enlarged by his son, James Iredell, Jr., governor of the state in 1827-28. This property is a North Carolina state site, and is located only a short distance from the site of the Hornblow Inn, where Justice James Wilson died.

***John Jay Homestead*—Katonan, NY** This was the retirement home of the first Chief Justice, who lived here from 1801 to 1829. The home is owned as an historic site by the New York Office of Parks, Recreation and Historical Preservation.

***Rose Hill Manor*—1611 North Market Street, Frederick, MD** This charming old home was the gift of Justice Thomas Johnson to his daughter Ann on the occasion of her marriage in 1788. After the death of his wife, the former Justice and Governor moved in and remained until his death in 1833. The estate is now a Children's Museum operated by the Frederick County Parks and Recreation Commission.

***John Marshall House*—818 E. Marshall St., Richmond, VA** This late Georgian structure is the oldest brick house in the city and was Marshall's principal residence for 45 years. It is operated by the John Marshall Foundation, privately established in 1987 to restore and endow the house.

***The Miller House Museum*—318 North Fifth Street, Keokuk, IA** This Federal style brick home was built in 1857, and Miller lived there until 1872. The house was purchased in 1965 by the Lee County Historical Society which also maintains it.

***Frank Murphy Birthplace*—142 So. Huron St., Harbor Beach, MI** Still owned by the Murphy family, this simple frame cottage and early childhood home of Justice Murphy is now a small museum and antique store. An addition to the north was the law office of Murphy's father.

***William Howard Taft National Historical Site*—2038 Auburn Ave., Cincinnati, OH** The Taft birthplace and boyhood home is owned and maintained by the National Park Service. A second house associated with Taft is, of course, the White House, where he lived as President from 1909-1913.

***Taney House and Museum*—121 South Benz St., Frederick, MD** This is a two-story brick house where Chief Justice Taney lived from 1815 to 1823, prior to moving to Baltimore. The house is owned by Frederick County and also contains items belonging to Francis Scott Key, Taney's dear friend and brother-in-law.

***Mount Vernon*—Mount Vernon, VA** Obviously, the house of George Washington is little associated with the Supreme Court, but Justice Bushrod Washington inherited Mount Vernon and occupied it from Martha's death until his own. He is buried in the crypt next to his famous uncle. The house and grounds are owned and maintained by the Mount Vernon Ladies' Association.

***Wayne-Gordon House*—142 Bull Street, Savannah, GA** This house was built on property bought in 1818 by Justice James Moore Wayne while he was mayor of Savannah. He sold the house in 1831 to the Gordon family. In 1860, Juliette Gordon Low, founder of the American Girl Scouts, was born in this house. The house was purchased by the Girl Scout Organization in 1953, and has been lovingly restored as a museum and scouting center.

***Edward Douglass White Historic Site*—Thibodaux, LA** The birthplace and boyhood home of the Chief Justice was built by slaves in 1790. Open to the public for many years under state ownership, the house was closed for budgetary considerations in the 1980s, although the small park surrounding the house remained open. In 1993, the legislature transferred ownership to the Louisiana Secretary of State's office. Funding should now be more predictable. The Friends of Edward Douglass White Historical Site, a private group of interested citizens have provided energetic leadership in the preservation for this important property.

In addition to these houses, a number of the Justices' residences have retained some sort of public character. Ten Justices served as Governors of their states, and three of these lived in an official residence provided by the State, still in use. Charles Evans Hughes was Governor of New York from 1906 until 1910. The Executive mansion purchased by the state in 1877 is still the residence of New York's Governors. It stands, a huge Victorian edifice, sumptuously decorated, at 138 Eagle Street in Albany.

The Governor's mansion in Sacramento, California was Earl Warren's home from 1943 until he was appointed Chief Justice ten

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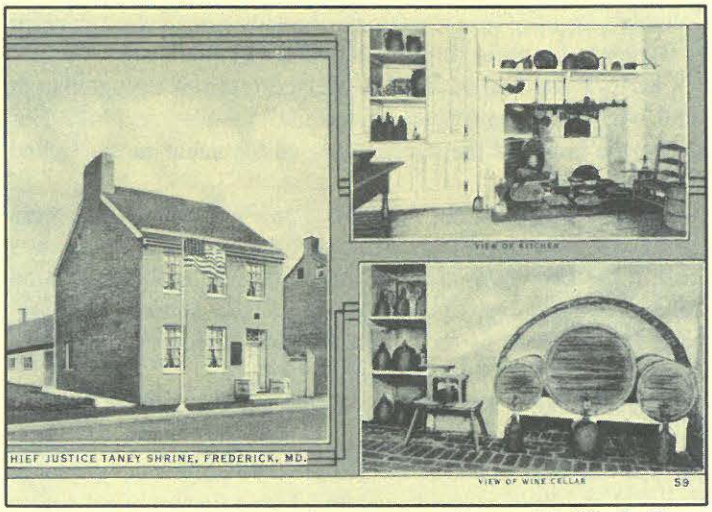
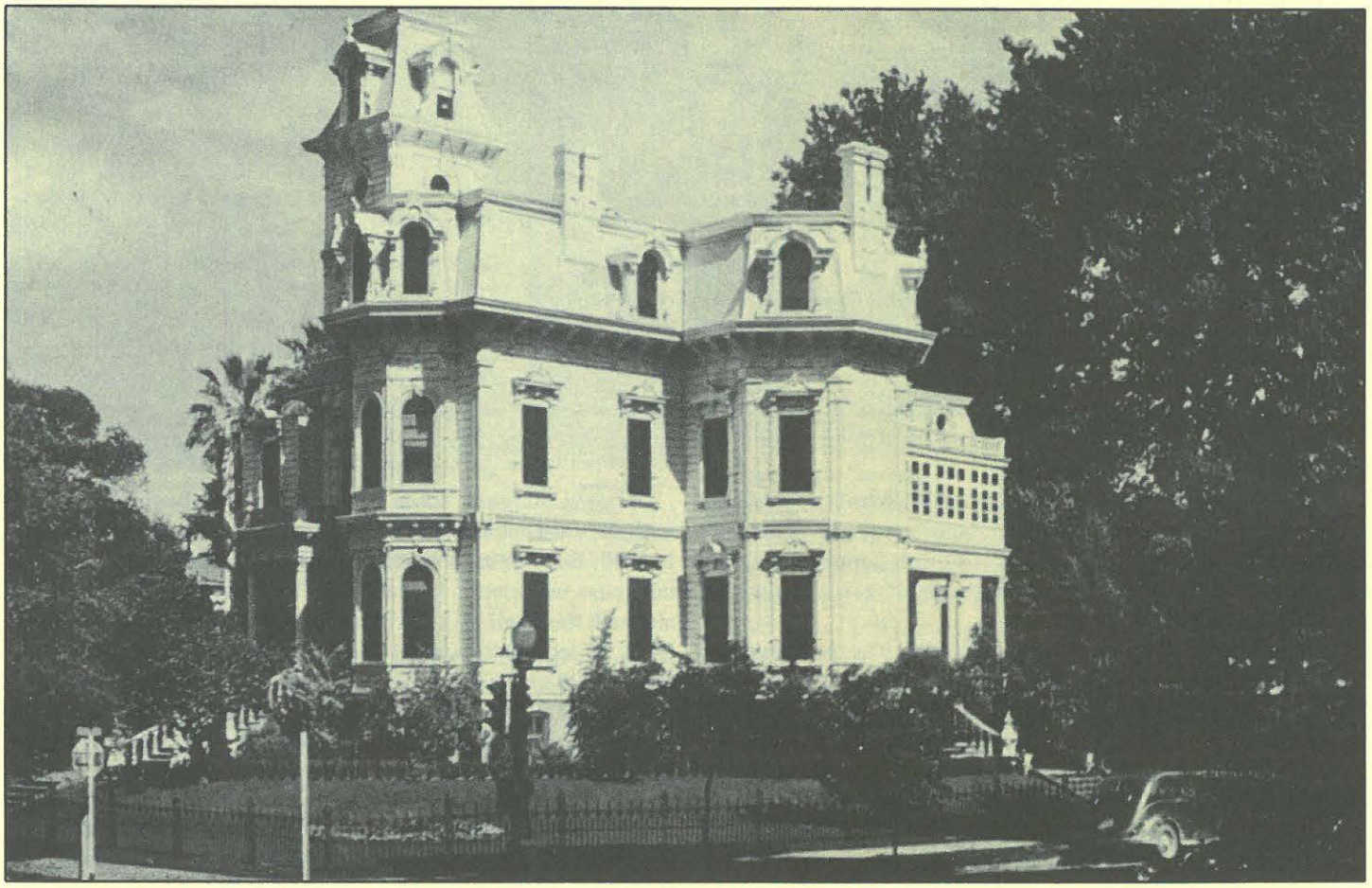


This Frederick County, Maryland museum is a tribute to Chief Justice Roger Taney and also features items belonging to Francis Scott Key.

Homes *(continued from previous page)*



The Governor's Mansion in Sacramento was home to Earl Warren and his family for ten years from 1943 until 1953. During Governor Jerry Brown's tenure the building was converted into the State Historical Museum.

years later. After Warren had left California for the Supreme Court, the Mansion was abandoned as a residence and is now a State Historical Museum. It stands at 1526 H Street in Sacramento. James Byrnes became Governor of South Carolina in 1951, after earlier service as a Congressman, Senator, presidential assistant, Secretary of State and Supreme Court Justice. The lovely residence he occupied as Governor is located at Richland and Lincoln Streets in Columbia. Some of the furnishings—including a grand piano given by Byrnes to his wife—originally belonged to the Justice.

Charles Evans Hughes lived at 2223 R Street in Washington from 1930, when he became Chief Justice, until his death in 1948. This is now the home of the Ambassador of Myanmar to the United States.

Justice George Shiras, Jr. resided in Pittsburgh at the then-fashionable Schenley Hotel. After almost a century of service as a hotel, it has been born anew as the William Penn Student Union Building of the University of Pittsburgh. Shiras' house in Washington at 1515 Massachusetts Avenue has been torn down, but the site is now the location of the Indonesian Embassy.

Joseph Rucker Lamar's first job after graduating from Bethany College in Bethany, near Wheeling, West Virginia, was as a Latin instructor at his alma mater. He married the daughter of the college president and lived in the President's house for two years before beginning his legal studies and career. That house, called Pendleton Heights after Lamar's father-in-law, is still the presidential residence at Bethany.

One other house has an academic connection—albeit less official than the other two. When Wiley Rutledge completed law school at the University of Colorado in 1922, he remained in Boulder for two more years, practicing law and teaching part-time. His house at 1145 Grandview Avenue now seems to be a student boarding house. During a brief visit in the summer of 1993, I photographed the house and a dilapidated sofa clearly shows on the roof. Although Justice Rutledge lived in Boulder only a few years at the beginning of his professional life, he is buried there at the foot of the mountains he loved under a simple stone which is marked only with his name.

Two homes of Justices are now small inns. The historic John Rutledge House, located at 116 Broad Street in Charleston, SC., was Rutledge's home while he served as Governor during the Revolutionary War. George Washington once visited him there. The house has been beautifully and comfortably restored and stands next to the Catholic Cathedral, only a block or two from St. Michael's Churchyard, where Rutledge is buried. The birthplace of Salmon P. Chase is also an inn. Located on the Connecticut River at Cornish, NH., the Chase house has been greatly enlarged, but from the front looks exactly the same as the line drawing found in early biographies of the Chief Justice.

At least a few of the homes have now been put to other commercial use. I suspect there are more but my efforts so far have

The Charleston, South Carolina home of Chief Justice John Rutledge is now a small inn. George Washington visited Rutledge at this house.

uncovered only two. The residence of Justice Samuel Nelson at 66-70 Main Street in Cooperstown, NY., originally a wide two-story townhouse, was elevated to three stories in 1880. The first floor has in modern times been made into storefronts and in the recent past has housed a restaurant, a real estate brokerage, a Sears catalog store and a Christmas shop; the upper floors have been divided into apartments. A more obvious use has been made of the Washington home of Justice Pierce Butler at 1229 19th Street, NW. It now houses a law firm. Years ago, it was one of the early offices of Arnold, Fortas and Porter, so the site is associated also with Justice Abe Fortas.

Several other residences or sites might be mentioned for their association with Justices. *Hickory Hill,* the McLean, Virginia home of John F. Kennedy from 1954-57 and of his brother Robert from 1957 until his death in 1968, and still the home of his widow Ethel, was the Washington estate of Justice Robert H. Jackson. Chase-Lloyd House, a magnificent three-story Georgian mansion at 22 Maryland Avenue, Annapolis, Maryland, was built in 1769 by Samuel Chase—the same Samuel Chase who signed the Declaration of Independence and served on the Court. But Justice Chase always seemed to have financial problems, so, after having built the house, he had to sell it to pay for it, and never lived there!

No article on this subject would be complete without at least a brief comment on the DACOR Bacon House at 1401 F Street, NW in Washington. The house was built on three lots originally belonging to Tobias Lear, George Washington's private secretary. Following Lear's suicide, his widow sold the land to Tench Ringgold. Ringgold built the three-story house sometime after 1825. For many years Ringgold served as a marshal of the District of Columbia. Study of old congressional directories reveals that from 1832-33, John Marshall, Joseph Story, William Johnson, Gabriel Duvall, Smith Thompson, John McLean and Henry Baldwin boarded at the Ringgold house during the Court's annual sessions. In 1833, having been advised by Ringgold that he could no longer accommodate them, the Justices took up residence at Mrs. Dunn's on Capitol Hill.

The Bacon House is associated with the Supreme Court for more than the 1832-33 period, however. From 1835 to 1839, the house belonged to Mr. and Mrs. William Thomas Carroll. Mr. Carroll served as Clerk of the Supreme Court from 1827-1855. He was also one of the founders of the Law Department at George Washington University. After Mrs. Carroll's death in 1897, Chief Justice and Mrs. Fuller bought the house which they lived in for the rest of their lives. Through the generosity of Mrs. Robert Low Bacon who lived in the house from 1925 until her death in the late 1970s, the house now belongs to an organization, the Diplomatic and Consular Officers, Retired, frequently referred to as DACOR.

One last residence should be mentioned. For much of his time on the court, Justice Stephen J. Field lived at 21 First Street, NE near Maryland Avenue. That home was torn down for very good reasons; it became the site for the Supreme Court of the United States.

Obviously, there is much more to be done on this project. Ultimately, I hope to have an inclusive list for placement with the Curator's Office and with the Society. The author will be grateful if readers will send information about homes of the Justices to the Society or to:

Professor James B. O'Hara
Loyola College in Maryland
4501 North Charles Street
Baltimore, MD. 21210

1995-96 Judicial Fellows Program

The Judicial Fellows Commission invites applications for the 1995-96 Judicial Fellows Program. The Program, established in 1973 and patterned after the White House and Congressional Fellowships, seeks outstanding individuals from a variety of disciplinary backgrounds who are interested in the administration of justice and who show promise of making a contribution to the judiciary.

Four Fellows will be chosen to spend a calendar year, beginning in late August or early September 1995, in Washington, D.C., at the Supreme Court of the United States, the Federal Judicial Center, the Administrative Office of the United States Courts, or the United States Sentencing Commission. Candidates must be familiar with the federal judicial system, have at least one postgraduate degree and two or more years of successful professional experience. Fellowship stipends are based on salaries for comparable government work and on individual salary histories, but will not exceed the GS 15, step 3 level, presently $74,054.

Information about the Judicial Fellows Program and application procedure is available upon request from Vanessa M. Yarnall, Administrative Director, Judicial Fellows Program, Supreme Court of the United States, Room 5, Washington, D.C. 20543. (202) 479-3415. The application deadline is November 18, 1994.

Membership Update

The following members joined the Society between March 16, 1994 and June 15, 1994.

Alabama

Elizabeth A. Hinds Esq., Birmingham
Rick Hynds, Birmingham
Peyton Lacy Esq., Birmingham
Matthew H. Lembke Esq., Birmingham

Arizona

Professor Charles E. Ares, Tucson
James E. Eustace, Tucson
Laurel H. Finch Esq., Phoenix
William P. French Esq., Phoenix
Robin A. Goble Esq., Phoenix
John J. Kelley, Phoenix
John A. Stookey Esq., Phoenix
Joseph M. Udall Esq., Phoenix

Arkansas

H. Murray Claycomb Esq., Warren
John Elrod Esq., Siloam Springs
The Hon. J. Smith Henley, Harrison
Richard W. Hobbs Esq., Hot Springs
Glenn W. Jones Esq., Little Rock
Bobby McDaniel Esq., Jonesboro
Louis L. Ramsay Esq., Pine Bluff
Thomas E. Sparks Sr. Esq., Fordyce

California

James C. Enochs, Ceres
Jerry Gronfein, San Francisco
J. Michael Hennigan Esq., Los Angeles
Charles L. Hobson Esq., Sacramento
James Knight, Culver City
Larry S. Lee Esq., San Francisco
Sanford Jay Rosen Esq., San Francisco
Benjamin B. Salvaty Esq., Los Angeles
Kent S. Scheidegger Esq., Sacramento
The Hon. Ronald W. Stovitz, San Francisco
C. Henry Veit, Oakland
Harry F. Wartnick Esq., San Francisco

Connecticut

Kathleen Mullan, Glastonbury
Alexander F. Nahas, Danbury

Delaware

Mary E. Copper Esq., Wilmington
Kent A. Jordan Esq., Wilmington

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Harry F. Cole Esq.
Steven B. Fabrizio Esq.
Eugene Goldman Esq.
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John Peters Irelan
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Gregory L. Wortham Esq.

Florida

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Kimberly Taffer, Miami

Georgia

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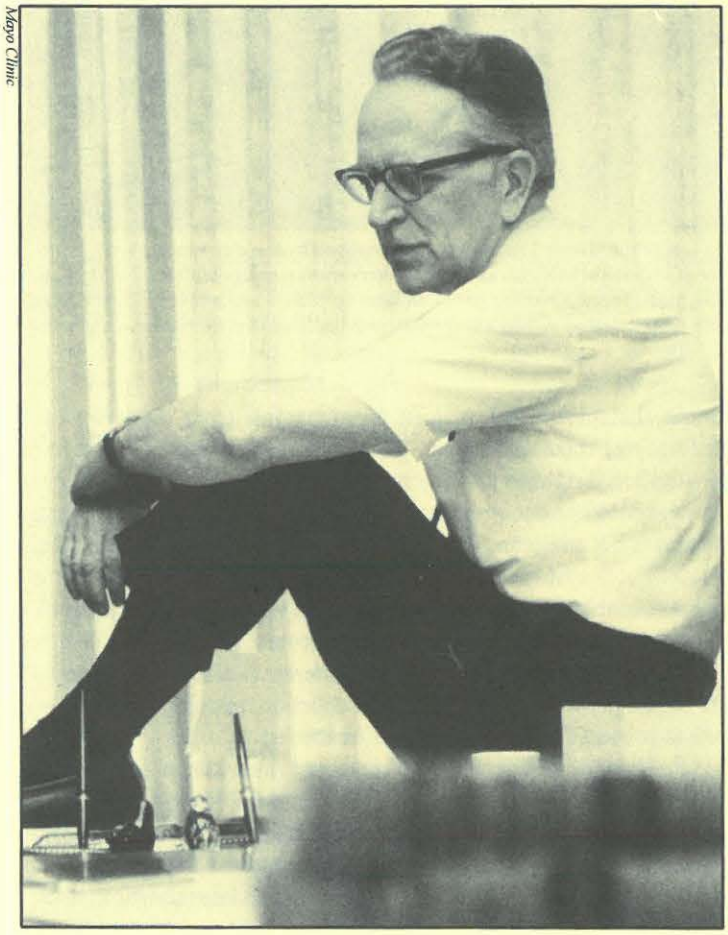
In the interest of preserving the valuable history of our highest court, the Supreme Court Historical Society would like to locate persons who might be able to assist the Society's Acquisitions Committee. The Society is endeavoring to acquire artifacts, memorabilia, literature or any other materials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

Blackmun *(continued from page one)*

remained in that position until 1959, a period he subsequently described as the "happiest decade" in his life, largely because it gave him "a foot in both camps—law and medicine." Blackmun's association with the Mayo Clinic enhanced his reputation as a serious, hard-working, and capable attorney, and prompted President Dwight D. Eisenhower's nomination of Blackmun to the Court of Appeals for the Eighth Circuit. Blackmun joined the Court on November 4, 1959, replacing his former mentor Judge Sanborn. Blackmun established himself as the most studious member of the Court, and was generally labeled a "conservative."

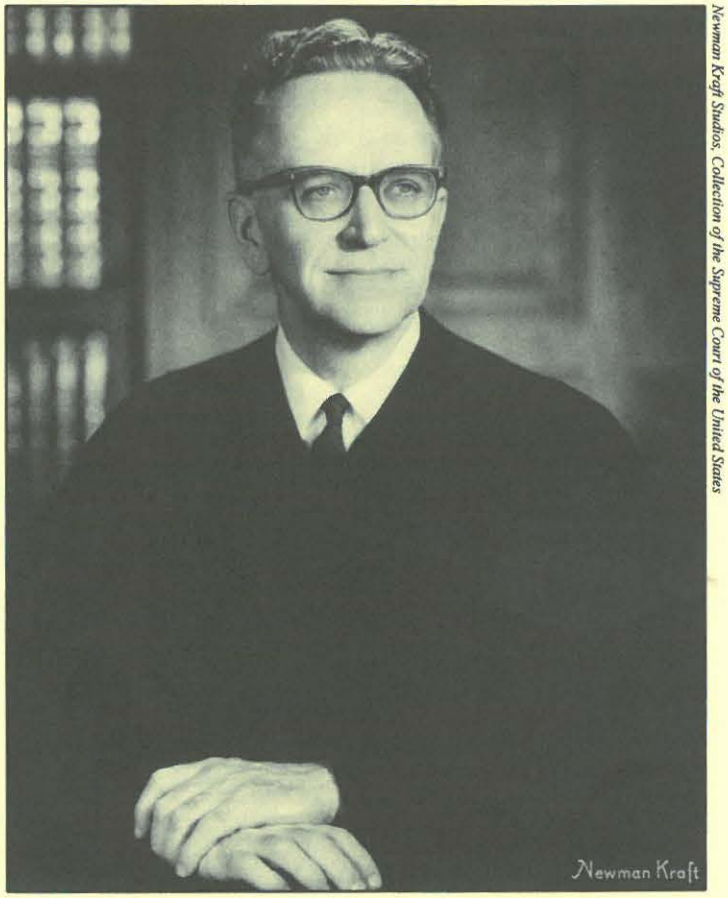
A substantial percentage of Blackmun's opinions on the Eighth Circuit was in the area of taxation, but he also wrote notable opinions in other areas. For example, in perhaps the first appellate opinion declaring brutal treatment of prisoners to be illegal, Blackmun wrote in *Jackson v. Bishop* (1968) that disciplining prisoners by lashing them was cruel and unusual punishment. Blackmun later expressed pride in the Jackson decision and in the role such cases have played in improving conditions at the nation's prisons.

In a 1967 case, Blackmun held that because of binding precedent his court could not prohibit a private homeowner from refusing to sell his home to a black. Inviting the Supreme Court to rethink the precedents, Blackmun suggested several approaches for finding such discrimination unlawful, and was pleased when the Supreme Court accepted his invitation and reversed its position.



Mayo Clinic

Harry A. Blackmun served as the first resident counsel at the renowned Mayo Clinic from 1950 until 1959. This experience helped shape his work on the Supreme Court as the interplay between legal and medical issues is one of the recurrent themes in Justice Blackmun's opinions.



Newman Kraft Studios, Collection of the Supreme Court of the United States

Justice Harry A. Blackmun took the Judicial Oath on June 9, 1970 to become the Supreme Court's 98th Justice, succeeding Justice Abe Fortas. President Bill Clinton has nominated Judge Stephen Breyer to fill Justice Blackmun's seat.

On April 14, 1970, Blackmun was nominated to the Supreme Court in President Richard M. Nixon's third attempt to fill the seat vacated by Abe Fortas. The Senate previously had rebuffed Nixon's attempts to place a conservative Southerner on the Court by rejecting the nominations of judges Clement F. Haynsworth, Jr., and G. Harold Carswell. Chief Justice Warren E. Burger recommended Blackmun for the post; Blackmun had known Burger since they were both children in St. Paul, and had been the best man at his wedding.

The Senate unanimously confirmed "Old No. 3" (Blackmun's self-effacing term) on May 12, 1970. Derided initially as one of the "Minnesota Twins" because of his ties to Burger and their similar voting pattern, Blackmun and Burger soon diverged.

Eventually, Blackmun established himself as a Justice who preferred focusing on the pragmatic aspects of each case rather than the theoretical. He has shown a populist concern for the "little person" who would be affected by the decision and whose modest circumstances may be foreign to many members of the Court.

There are many examples of Blackmun's insistence that the Court stay grounded in the real world. A consistent supporter of race-conscious affirmative action programs, Blackmun asked the Court in *University of California Regents v. Bakke* (1978) to accept

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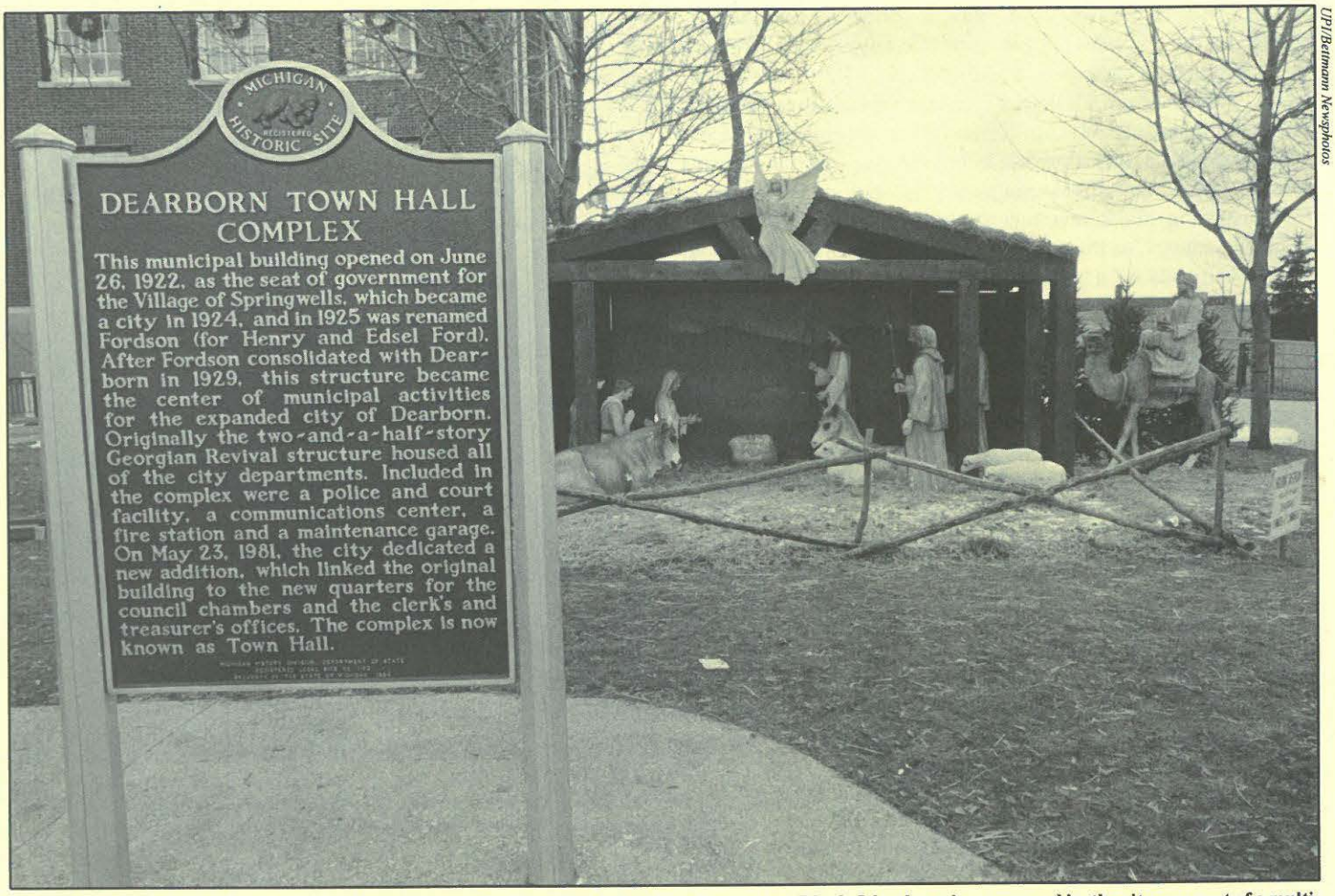


UPI/Bettmann Newsphotos

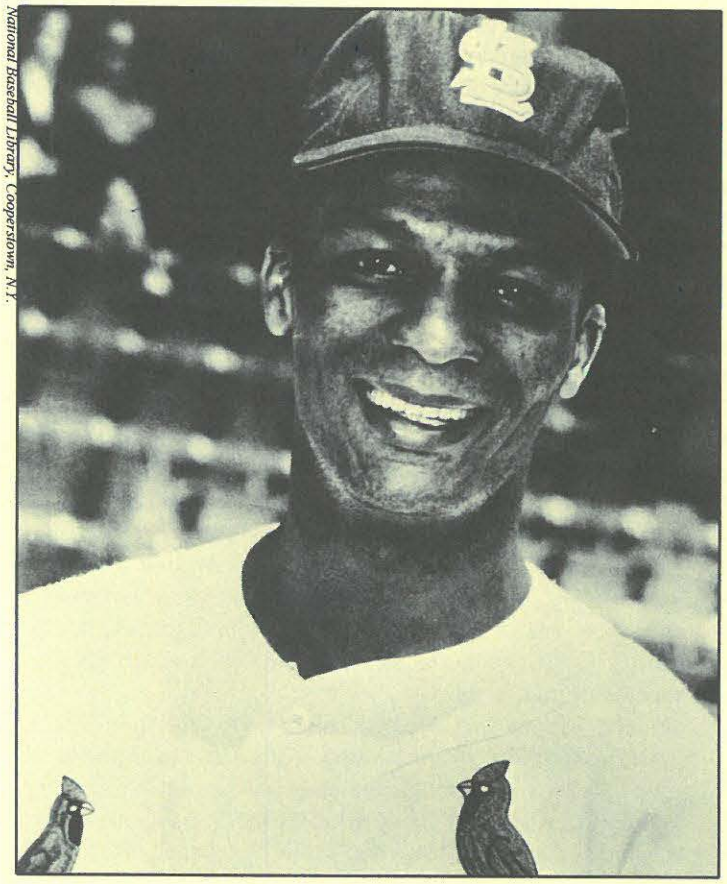
In *Lynch v. Donnelly*, Justice Blackmun dissented from the Court's opinion that a Pawtucket, Rhode Island creche sponsored by the city was part of a multi-faceted Christmas display intended to symbolically depict the historical significance of a national holiday. He argued there was an undeniable sacred message at the core of the creche and that was impermissible on public land. Dearborn, Michigan faced a similar problem later in 1984 when a federal court ruled that the Nativity display outside the Town Hall violated the Constitution. Dearborn responded by selling the display and the land that housed it to a private charitable trust.

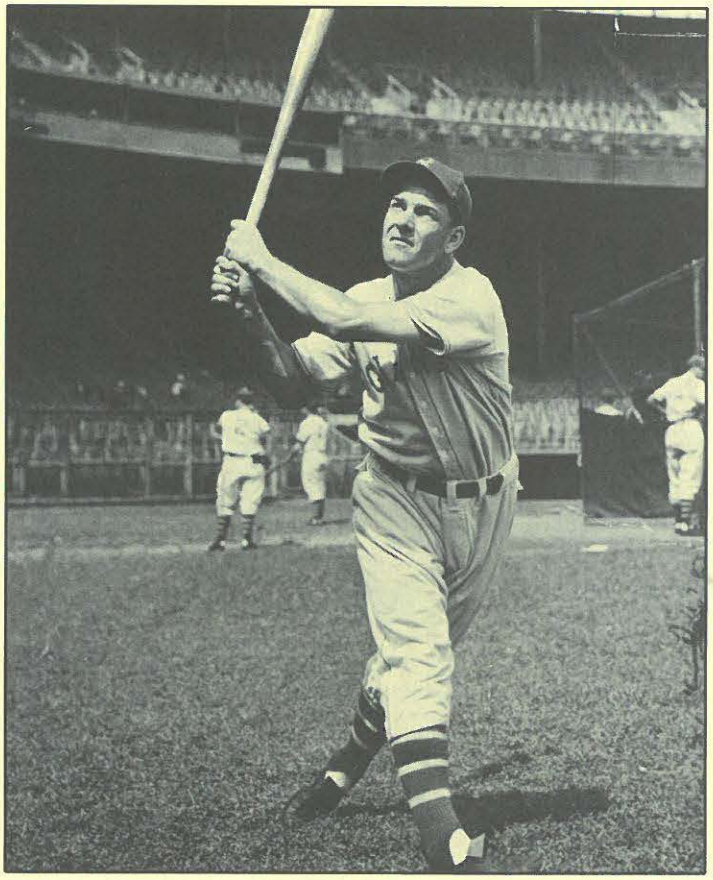
the reality that "[i]n order to get beyond racism, we must first take account of race. There is no other way." Dissenting from upholding limits on government funding of abortions, Blackmun wrote: "There truly is another world out there, the existence of which the Court, I suspect, either chooses to ignore, or fears to realize." Blackmun later challenged the "comfortable perspective" from which the Court decreed that the effect of a regulation increasing the cost of an abortion by $40 was insignificant.

Blackmun found himself (except in some criminal procedure matters) regularly aligned with the Court's liberals and against the Court's right wing. Many see a pronounced leftward shift on Blackmun's part, but he, while conceding a conscious effort to "hold the center," has insisted, as have other observers, that it is the Court that has swung rightward. In any event, Blackmun's evolution shows a greater comfort with his role on the nation's highest court and an increased willingness to allow his personal character and his concern for fairness to influence his decision-making.

Blackmun first showed his growing independence in the decision that remains his best known and most controversial, *Roe v. Wade* (1973). In Roe, a seven-member majority struck down a Texas statute that prohibited women from having (and doctors from performing) most abortions. Blackmun's opinion held that the constitutional right to privacy recognized in earlier decisions was "broad enough to encompass a woman' s decision whether or not to terminate her pregnancy." After weeks of medical and historical research at the Mayo Clinic, Blackmun wrote that until a fetus is viable (capable of surviving with medical help outside the womb), the state may regulate abortion only to protect the mother's health. After viability, the state's compelling interest in the fetus's potential life would permit a complete ban on abortion, except where necessary to protect the mother's life or health.

Roe v. Wade illustrates two recurrent interests and themes in Blackmun's work: the right to privacy, and the interplay between medical and legal issues. Some commentators have noted that portions of *Roe v. Wade* read as if the interest being protected belonged to the doctor as much as the patient. In later abortion cases, Blackmun focused more directly on the woman's privacy interests. In 1986, for example, Blackmun's opinion for the Court invalidated provisions of a state law that sought to "intimidate women into continuing pregnancies." Blackmun concluded: "Few decisions are





National Baseball Library, Cooperstown, N.Y.

Curt Flood (left), had a career batting average of .293 as an outfielder and won Gold Gloves for fielding from 1963 to 1969 while helping to lead the St. Louis Cardinals to three pennants and two World Series rings. Following the 1969 season, the Cardinals attempted to trade him (along with Tim McCarver) to the Philadelphia Phillies for Dick Allen. Mr. Flood refused, writing in a letter to Commissioner Bowie Kuhn, "I do not feel that I am a piece of property to be bought and sold irrespective of my wishes." He turned down a contract offer from the Phillies of $100,000 and challenged baseball's reserve clause in federal court. Ultimately the Supreme Court rejected his plea 5-to-3 in *Flood v. Kuhn* (1972), although the narrowness of the Court's ruling did prompt baseball owners to adopt an arbitration system that led to the free agency of today and did away with the reserve clause. Mel Ott (right) hit 511 home runs and had a .303 batting average as a New York Giant from 1926 to 1947. Justice Blackmun's *Flood v. Kuhn* opinion inadvertently left Ott off the list of all-time greats, a situation that distressed the Justice.

more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

Blackmun expressed his views on the right to privacy most forcefully in his 1986 dissent in *Bowers v. Hardwick*. *Bowers* upheld, by a 5-4 vote, Georgia's prosecution of a homosexual for private, consensual sexual activity under an anti-sodomy law. Blackmun noted that the case concerned not "a fundamental right to engage in homosexual sodomy, " but the "most valued" of rights, "the right to be let alone." He then wrote: "The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds." "Tolerance of nonconformity," Blackmun said, was far less threatening than interference with consensual intimate behavior that occurs at home.

Blackmun's contributions on other medical-legal issues include his exploration of the state's duties to those it commits to mental institutions. In *Jackson v. Indiana* (1972), he wrote for the Court that a retarded deaf mute arrested for petty theft, but found by psychiatrists to be incompetent to stand trial, could not be warehoused indefinitely in a mental institution that provided no treatment. "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." A decade later, Blackmun suggested that a severely retarded man involuntarily committed by the state might be constitutionally entitled to treatment aimed at preserving the basic skills (such as dressing himself) he possessed upon entering the institution.

His aptitude on medical issues likewise sparked Blackmun's dissent from the Court's 1983 *Barefoot v. Estelle* decision, which upheld the practice in capital punishment cases of allowing the jury to rely on a psychiatrist's prediction of the defendant's future dangerousness. Both at the Eighth Circuit and on the Supreme Court, Blackmun had put aside personal misgivings about the death penalty in voting to uphold its constitutionality. But for Blackmun, imposing the death penalty because of predictions which the American Psychiatric Association had shown to have no scientific valid-

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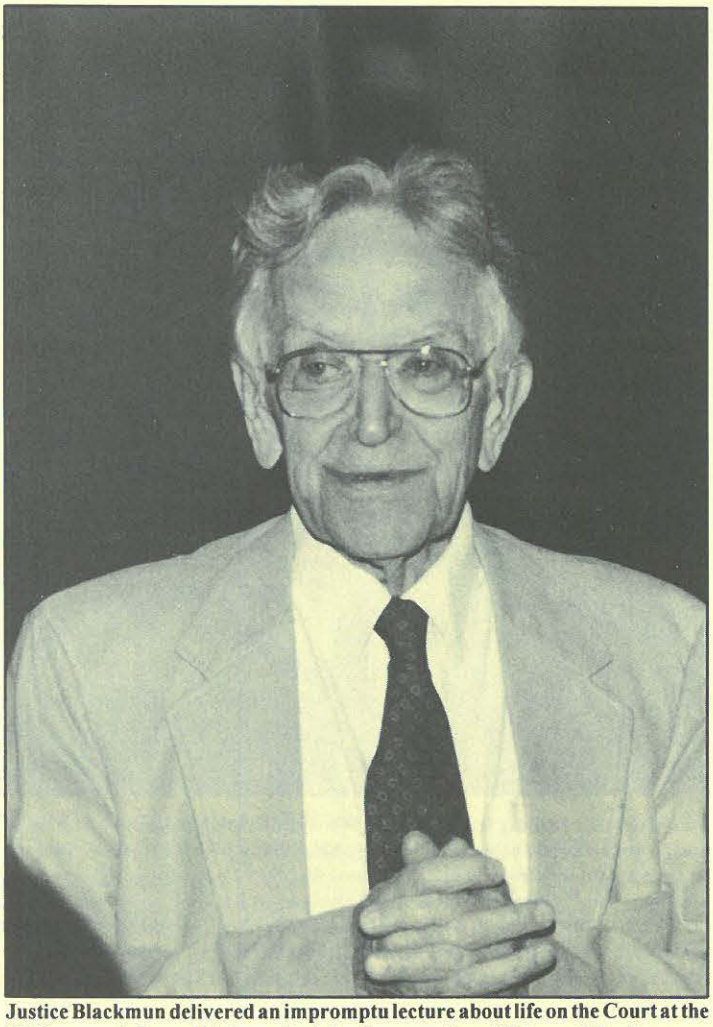
Blackmun *(continued from previous page)*



Justice Blackmun delivered an impromptu lecture about life on the Court at the 1993 presentation of Volume 4 of the Documentary History of the Supreme Court. Justice Blackmun accepted the volume on behalf of the Court. He has served as the Court's representative to the National Historical Publications and Records Commission.

ity, was too much.

During the next decade Blackmun became increasingly convinced, particularly as the Court restricted judicial oversight of death sentences, that "both fairness and rationality cannot be achieved in the administration of the death penalty." Just a few month before his retirement, Blackmun announced that he "no longer shall tinker with the machinery of death," because he had come to believe "that the death penalty, as currently administered, is unconstitutional."

Blackmun's tenure on the Court has produced contributions in a number of other fields as well. In the late 1970s, he authored the key decisions establishing that "commercial speech"—advertising and other speech with a business purpose—is protected by the First Amendment to the Constitution. In the three cases he found that a state could not prohibit truthful advertising about legal abortions, the prices of prescription drugs, or fees for routine legal services.

In religion cases, Blackmun has generally resisted efforts to erode the wall between church and state. In *Lynch v. Donnelly* (1984), Blackmun's dissent noted the harm religion suffers when the wall is lowered. Lynch condoned government sponsorship of a multi-faceted Christmas display that included a nativity scene, reasoning that the creche was part of the city's secular celebration of the Christmas season. Blackmun noted the irony of "a setting where Christians feel constrained in acknowledging [the creche's] symbolic meaning and non-Christians feel alienated by its presence." Blackmun refused to join the Court "in denying...the sacred message that is at the core of the creche." In a subsequent case, Blackmun's opinion for the Court held that by displaying a creche standing alone, the government was conveying an impermissible religious message.

A final Blackmun opinion worth noting is *Flood v. Kuhn* (1972), which reaffirmed that the antitrust laws do not apply to professional baseball. The opinion is best remembered for an introductory section in which Blackmun indulged his love of the national pastime by recalling some baseball lore and listing the game's immortals. Blackmun was mortified when he realized, too late, that he inadvertently had left Giants outfielder Mel Ott off the list.

Blackmun's humility and self-effacing humor prompted Garrison Keillor, a radio personality and fellow Minnesotan, to label him "the shy person's Justice." Although sometimes chided for working too hard and too slowly, and agonizing too much over decisions, he has at times revealed a mischievous streak. Examples include Blackmun's silence when his hearing aid beeped during the Justices' secret conference, leading one Justice to fear the room was bugged; and his delight in arriving at White House functions, behind black limousines, in his old blue Volkswagen.

During the 1980s, Blackmun co-moderated an annual summer seminar on justice and society at the Aspen Institute. He enjoys speaking at universities, often reading from his Court mail and discussing his goal of keeping the Court from drifting too far to the right. A history buff, he represents the judicial branch on the National Historical Publications and Records Commission.

Society Joins Combined Federal Campaign

New Opportunity for D.C. Area Federal Workers

The Supreme Court Historical Society is pleased to announce that it will participate in the 1994 Washington, D.C. Local Combined Federal Campaign (CFC.) As a participant, the Society is eligible for donations made to the CFC by federal employees who work in the Metropolitan D.C. area. Members wishing to donate to the Society through the Campaign should indicate the Society's designation number (7656) when filling out a donation response. The Society will be listed in the Local Voluntary Agencies section of the Campaign catalog. Please call Charlotte Sadel at (202) 543-0400 at the Society's headquarters if you would like additional information.

Justices Participate In Indo-United States Legal Forum

Fulton Haight And Fali Nariman

At the end of January, two Justices of the United States Supreme Court, Antonin Scalia and Ruth Bader Ginsburg, traveled to India with a delegation of Judges and lawyers to participate in the first Indo-United States Legal Forum. Originally conceived of by the Indian Ambassador to Washington, Siddharta Shanker Ray, the purpose of the Exchange was to establish a friendly relationship between Justices of the world's two largest democracies, both of which have legal systems based on the common law. Chief Justice Rehnquist, after a luncheon with Ambassador Ray, endorsed the concept and arranged for the additional participation of four Chief Judges of the Federal Courts of Appeals, Richard S. Arnold (Eighth Circuit), Gilbert S. Merritt (Sixth Circuit), Abner J. Mikva (D.C. Circuit, and J. Clifford Wallace (Ninth Circuit).

A delegation of lawyers, including Robb M. Jones, Jr., the Administrative Assistant to Chief Justice Rehnquist, and five Fellows of the American College of Trial Lawyers, Edward Brodsky, Joan Hall, Charles B. Renfrew, Richard Sinkfield and myself, also participated.

The Indian bar and bench were represented by twelve Justices of the Supreme Court of India and eleven additional Judges and Senior Advocates. At the end of a week of conferences in Delhi, at which we freely discussed our respective approaches to the administration of Justice and our Constitutions, the American delegation flew to Bombay, Madras and Calcutta for brief visits as guests of the High Courts of those districts. There were banquets and receptions each evening, including a state dinner at the President's Palace attended by the President, the Prime Minister and the Chief Justice. The Forum was timed to coincide with several national parades and pageants in Delhi, and we made a side trip to Agra and the Taj Mahal, the Justices traveling by way of Jaipur. As you will see by the attached comments of Mr. Fali Nariman, the President of the Delhi Bar Association, our Indian counterparts were extremely well informed with regard to the American Courts and our Constitution.

Associate Justice Antonin Scalia delivers a speech to the delegates at the Indo-United States Legal Forum.

Justices Scalia and Ginsburg alternated in addressing a variety of challenging legal concepts at the Conferences of Judges and Advocates throughout the trip. In response, the Indian Justices and Advocates projected a proud, energetic picture of their country and its legal system.

Plans are underway for a reciprocal exchange, hopefully within a year or two, in the United States. India is opening up its markets to the world, and economic forces in the United States have shown great interest in participating in this new opportunity. Indian Prime Minister Rao's recent visit to Washington provides a further example of this effort to establish friendlier relations between the two countries.

Mr. Nariman presented one of the welcoming speeches to the joint delegations. The following excerpts from that speech, and several comments on our visit, provide an insight into India's constitutional evolution as well as share some historical anecdotes of the past Justices of our Supreme Court.

Contributed by Fali Nariman, Delhi, India: Geographically and politically, India and the United States are continents apart. They came a little closer in January this year with the visit of a delegation of American Justices, Judges and lawyers. The occasion: "The Indo-United States Legal Forum," a convenient label for an informal exchange of information and ideas between a representative section of Law—persons in both countries.

As Justice Ginsburg reminded members of the Supreme Court Bar Association in her brief address to them, India's struggle for independence and Mahatma Gandhi's call for non-violence had found a responsive echo in the movement for civil liberties in the United States.

British India was perhaps the first country outside the United States where decisions of that country's State and Federal Courts were referred to in Judgments. Not because lawyers in India cited them—their libraries were stocked only with English and Indian case-law. It was because a few Indian Judges took a global view of the legal universe.

Sir Ashutosh Mookerjee was one of them. He was amongst the first few Indian Judges in British India—appointed to the High Court of Calcutta in the first decade of this century, and later acting as its first Indian Chief Justice. Sir Ashutosh personally subscribed to all the United States Federal Court and State Reports—and frequently made use of them in his decisions: which will help explain our familiarity (though necessarily superficial) with some facets of United States laws.

The influence of the American Justices increased considerably after the end of the Second World War. They were frequently consulted by constitution-makers from the newly-emerging Nation-States.

Last December, when I was in Jerusalem, I met former Chief Justice Chaim Cohen—a great friend both of India and the United States. He was Israel's first Attorney General and had been instructed by his Prime Minister, Mr. Ben-Gurion, in the late forties, to draft a constitution for a new State. He told me, that on his

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Annual Meeting *(continued from page three)*

Vincent McKusick receives an award from Justice Ruth Bader Ginsburg for successfully concluding a membership campaign in the state of Maine. Formerly chief justice of the state supreme court, Mr. McKusick has been a dynamic agent in the membership efforts in the Maine for three years. He also serves as a member of the Board of Trustees.

of the Society were Professor Herman Belz and Mrs. Cecilia Marshall. Elected to additional three-year terms as Trustees of the Society were: Noel J. Augustyn, Hugo L. Black, Jr., Charlton Dietz, John C. Elam, James D. Ellis, Wayne Fisher, William T. Gossett, W. Fulton Haight, Robb M. Jones, James J. Kilpatrick, Rex E. Lee, Howard T. Markey, William Bradford Reynolds, and Leon Silverman.

Following the adjournment of the General Membership meeting, Dean Erwin Griswold, Chairman of the Board of Trustees, convened the annual meeting of the Board of Trustees. Dean Griswold commented on the Society's many accomplishments of the last year, highlighting the work of E. Barrett Prettyman, Jr.'s Program Committee. This committee organized and planned the Civil War lecture series, among other programs. Mr. Silverman also praised the work of Kenneth S. Geller's Publications Committee which supervises the production of all the Society's publications. The Acquisitions Committee under the leadership of Mrs. Patricia Butler has also performed important service in the past year. Among recent acquisitions are two original printings of the *Dred Scott* decisions, one printed in New York and the other in Washington, as well as an original printing of the pamphlet of the Judiciary Act of 1789.

Election of Officers of the Society was conducted by Mrs. Virginia Warren Daly. Leon Silverman was nominated and elected by unanimous vote to an additional three-year term as President of the Society. Vincent C. Burke, Jr., and Justin A. Stanley were elected to additional one-year terms as at-large members of the Executive Committee, while Sheldon Cohen and John R. Risher were elected to initial one-year terms as at-large members of the Executive Committee. All of these individuals were elected unanimously.

After concluding the official business portion of the evening, Dean Griswold called upon Associate Justice Ruth Bader Ginsburg to present awards to those State Membership Chairs who had accomplished their membership goals during the fiscal year. Charles B. Renfrew assisted Justice Ginsburg in making presentations to the State Chairs who made their goals for the year. Mr. Renfrew, National Membership Committee Chair for the past two years, has elevated membership to a record level. Twelve State Chairs were present that evening and were presented awards for achieving their goals. They were: Hugo L. Black, Jr., Eleventh Circuit Representative and Florida state chair; Michael A. Cooper, New York; Henry A. Field, Wisconsin; Joseph E. Frank, Vermont; Thomas J. Greenan, Washington; Ed Hendricks, Ninth Circuit Representative and Arizona State Chair; Gene N. Lebrun, South Dakota; Vincent L. McKusick, Maine; Hugh G. E. MacMahon, Maine Vice-Chair; Veryl L. Riddle, Missouri; William J. Thomson, Wyoming; and George M. Vetter, Rhode Island.

In addition to these individuals, nine State Chairs fulfilled their goals but were unable to attend the meeting to receive their awards in person. These State Chairs are: George W. Andrews III, Alabama; Ralph Brenner, Pennsylvania; Phillip D. Chadsey, Oregon; Kasey W. Kincaid, Iowa; Rick Nydegger, Tenth Circuit Rep. and Utah State Chair; R. Hewett Pate, Virginia; Harry M. Reasoner, Texas; David Robinson, South Carolina; and Richard A. Schneider, Georgia.

The Nineteenth Annual Reception was held in the East and West

(Left) Justice Ginsburg presents George M. Vetter with an award for his membership efforts in his home state of Rhode Island. (Right) Thomas J. Greenan promoted membership in his home state of Washington. Justice Ginsburg presented him an award on June 13, 1994 in recognition of completing his goal.

Celine Burke, Laura Phillips, Victor Shargai and Society Treasurer Peter A. Knowles converse during the reception. Mrs. Phillips, President of the Clark-Winchcole Foundation, is an important benefactor of the Society. Mrs. Burke's husband, Vincent C. Burke, Jr., has served in many capacities in the Society, including previous service as Treasurer.

Conference Rooms. Music was provided by string quartets of the U.S. Air Force Band. The Great Hall provided the setting for dinner. Prior to dinner, Chief Justice Rehnquist presented the Hughes Gossett awards. These awards recognize outstanding articles published in the Society's *Journal of Supreme Court History*. The first prize of $1,500 was awarded to Philippa Strum, for her article entitled "Louis Brandeis: Lawyer and Judge." Professor Strum is a Professor of Political Science at City University of New York-Brooklyn College and The Graduate Center. Second prize was awarded to Michal R. Belknap, Professor of Law at California Western School of Law and Adjunct Professor of History, University of California, San Diego, for his article "*Dennis v. United States:* Great Case or Cold War Relic?" In Professor Belknap's absence, Professor Melvin Urofsky, Chair of the Board of Editors for the *Journal* accepted the award which is $500. In making the presentation, Chief Justice Rehnquist recognized Professor Urofsky's contributions to the Society and his outstanding work on the *Journal*.

At the conclusion of dinner, guests were serenaded by the Strolling Strings of the U. S. Air Force Band. Under the direction of Chief Master Sergeant Slusser, this group provided a delightful program while guests finished dessert. Since the time of President John F. Kennedy the United States Air Force Strolling Strings have performed for Presidents at the White House, for the Chairman of the Joint Chiefs of Staff, and the Chief of Staff of the United States Air Force as well as many private and civic functions. An elite unit of the U.S. Air Force Band, this group surrounded dinner guests to entertain them with arrangements of popular, classical and international music. A large American flag hung between the columns near the front entrance to the hall furnished a backdrop for the evening's concert performed by The Singing Sergeants of the U. S. Air Force Band under the direction of assistant director, Senior Master Sergeant Julianne Turrentine. This versatile ensemble provided a program ranging from Broadway melodies to the patriotic classic, *God Bless America*. Many guests joined in singing this song and the conclusion of the program was a medley of armed forces songs. Annual Meeting Chair, William Bradford Reynolds, then declared the meeting completed.

Mrs. Rita Silverman looks on as Chief Justice William H. Rehnquist presents Philippa Strum with the Hughes Gossett award for her article "Louis Brandeis: Lawyer and Judge." This article was published in the *1993 Journal of Supreme Court History*. The prize is awarded upon the determination of the Board of Editors for the best article published in the *Journal*.

Justice David Souter and Mrs. Barbara Renfrew, wife of National Membership Committee Chair, Charles Renfrew, share conversation prior to dinner.

Justice Scalia Delivers Nineteenth Annual Lecture
Discusses Dissenting and Concurring Opionions in Court History

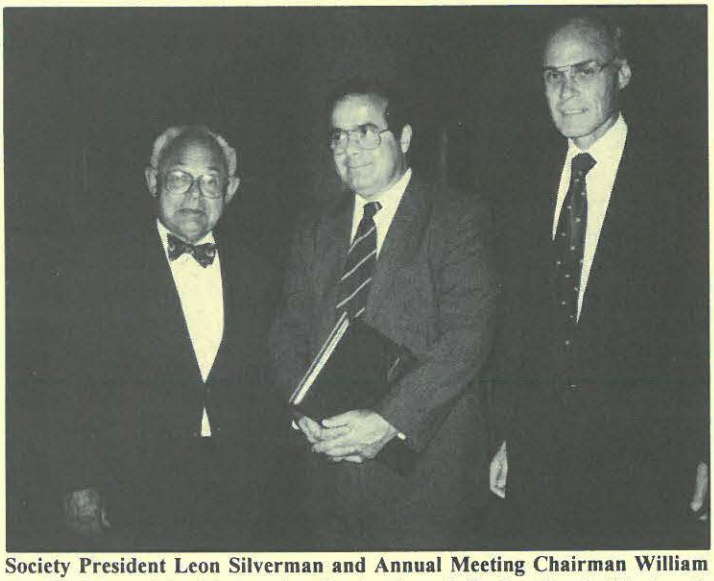
Justice Antonin Scalia launched the Society's Nineteenth Annual Meeting with a well considered address on the role of dissenting and concurring opinions in the Court's history. The Annual Lecture is the traditional start to the day's events and gives Society members an occasion to consider significant aspects of the Court's history.

William Bradford Reynolds, Chair of the Annual Meeting Committee, welcomed members and guests to the Nineteenth Annual Lecture, held in the Supreme Court Chamber. He then introduced Society President, Leon Silverman.

Mr. Silverman introduced Justice Scalia and gave an overview of his career. He noted that "few Justices have come to the Supreme Court so well prepared to assume the duties of the High Court as Justice Antonin Scalia. Justice Scalia graduated summa cum laude in history from Georgetown in 1957 and magna cum laude from Harvard Law School. He joined the firm of Jones, Day, Cockley and Reavis—now Jones, Day, Reavis & Pogue. In 1967 he became a law professor at the University of Virginia. He would later teach at the Georgetown University Law Center, the University of Chicago, and Stanford University.

"Four years later Justice Scalia began his distinguished career in public service when he became General Counsel for the Office of Telecommunications Policy. From 1972-1973, he served as Chairman of the Administrative Conference of the United States, an independent agency charged with the task of improving the effectiveness of the administrative process. From 1974 until 1977, he served as an assistant attorney general for the Office of Legal Counsel at the Justice Department.

"In 1982 President Ronald Reagan appointed Justice Scalia to the U.S. Court of Appeals for the District of Columbia. There he served with distinction for four years. It was while sitting on that bench that Justice Scalia first delivered the Society's Annual Lecture in 1984. He spoke on the anomalies in administrative law—an interest he has held over the years. In 1986 President Reagan elevated him to the Supreme Court to fill the vacancy created by Chief Justice Rehnquist's elevation to the center chair."



Society President Leon Silverman and Annual Meeting Chairman William Bradford Reynolds with Associate Justice Antonin Scalia after the Nineteenth Annual Lecture.

Justice Scalia thanked Mr. Silverman for his introduction and gave a brief background to his remarks. He noted that "I have chosen to speak this afternoon about the dissenting opinion. It is not a subject I aspire to becoming an expert in—but it is one, I think, of some interest and importance." Justice Scalia went on to explain that by dissenting opinions he meant opinions that disagreed with the *reasoning* of the Court's opinion. A concurrence can fall into that category as well as what is traditionally thought of as a dissent. He reminded the audience of a couplet spoken by Thomas à Becket in T. S. Eliot's *Murder in the Cathedral*, when Becket is tempted by the devil to resist Henry II to achieve glory and fame through martyrdom, and rebuffs him with: "That would be the greatest treason, to do the right deed for the wrong reason." Justice Scalia argued that the same principle applies to judicial opinions: "to get the reasons wrong is to get it all wrong, and that is worth a dissent, even if the dissent is called a concurrence."

Justice Scalia traced the history of the dissent—noting that the Jay and Ellsworth Courts followed the old English tradition of each Justice filing separate opinions. Thus there were no opinions of the Court to dissent from. Chief Justice John Marshall established the current practice of one of the Justices announcing the opinion for the Court. Dissents were rare during Marshall's tenure—only a single one-sentence concurrence during his first four years in the center chair. This new system infuriated Thomas Jefferson—whose appointees along with President Madison's constituted a majority after 1811, and yet nothing changed on the Court. Jefferson wrote to Justice William Johnson directly, urging the return to the practice of seriatim opinions. He complained that the current practice was "certainly convenient for the lazy, the modest and the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all."

In the years since the Marshall Court the practice of separate opinions has grown steadily. One study calculated that until 1928 dissents and concurrences were filed in only 15% of all Supreme Court cases. Between 1930 and 1957 dissents alone were filed in 42% of all Court cases. "Last Term, a dissent or separate concurrence was filed in 71% of all cases."

Justice Scalia then went on to assess the advantages and disadvantages of separate opinions both within and without the Court. He discussed the latter first: "the foremost and undeniable external consequence of a separate concurring opinion is to destroy the appearance of unity and solidarity. From the beginning to the present, many great American judges have considered that to be a virtually dispositive argument against separate opinions. So high a value did Chief Justice Marshall place upon a united front that according to his colleague, Justice William Johnson, he not only went along with opinions that were contrary to his own view, but even announced some. . . .In more recent times, no less a judicial personage than Judge Learned Hand warned that a dissent 'cancels the impact of monolithic solidarity upon which the authority of a bench of judges so largely depends.'"

Justice Scalia added that he did not agree with that line of reasoning. The impact of the Court's unanimous rulings, such as the

Professor Philippa Strum congratulates Justice Scalia on his delivery of the Nineteenth Annual Lecture.

Warren Court's 1954 *Brown* decision, would be diluted if these rulings were commonplace. He further argued that dissents at this stage in the Court's history add to its prestige rather than diminish it. Finally, "dissents augment rather than diminish the prestige of the Court for yet another reason. When history demonstrates that one of the Court's decisions has been a truly horrendous mistake, it is comforting—and conducive of respect for the Court—to look back and realize that at least some of the Justices saw the danger clearly, and gave voice, often eloquent voice, to their concern." The first Justice John Marshall Harlan's dissent in *Plessy* and Justice Robert Jackson's dissent in *Korematsu* are two such examples.

"A second external consequence of a concurring or dissenting opinion is that it can help to change the law. That effect is most common in the decisions of intermediate appellate tribunals." Dissents from the Circuit Court of Appeals serve as a warning to other Circuit judges that perhaps they should not adopt the same legal rule. A dissent on that level can also aid the losing party in the suit in their appeal to the Supreme Court. It is "evidence that the legal issue is a difficult one worthy of our attention." Rarely does a dissent change law on the Supreme Court level, though. Even Oliver Wendell Holmes, known as the Great Dissenter, saw less than 10% of his dissents ultimately vindicated in later overrulings.

Justice Scalia noted another external effect "is to inform the public in general, and the Bar in particular, about the state of the Court's collective mind." For example, In a 1992 case, *Lee v. Weisman*, the Court held that "the Establishment Clause of our Bill of Rights... forbids public officials from making a nondenominational invocation part of the ceremonies at a public high school graduation. Had the judgment been rendered by an institutional opinion for the Court, that rule of law would have the appearance of being as clear, as unquestionable and as stable as the rule that denominational prayers cannot be made a mandatory part of the school day. In fact, however, the opinion was 5-to-4. It is clear to all that the decision was at the very margin of Establishment Clause prohibition; that it would not be extended much further and may even someday be overruled."

Justice Scalia then discussed one final external effect. "By enabling, indeed compelling, the Justices of our Court, through their personally signed majority, dissenting and concurring opinions, to set forth clear and consistent positions on both sides of the major legal issues of the day, it has kept the Court in the forefront of the intellectual development of the law. . . . The Court itself is not just the central organ of legal *judgment*; it is center stage for significant legal *debate*. In our law schools, it is not necessary to assign students the writings of prominent academics in order that they may recognize and reflect upon the principal controversies of legal method or of constitutional law. Those controversies appear in the opposing opinions of the Supreme Court itself, and can be studied from the text."

Justice Scalia then moved to the internal consequences of separate opinions. But first he reassured the audience that they did not produce animosity or bitterness among members of the Court. He added, "I doubt whether any two Justices have dissented from one another's opinions any more regularly, or any more sharply, than did my former colleague Justice William Brennan and I. I always considered him, however, one of my best friends on the Court, and I think that feeling was reciprocated.

"The most important internal effect of a system permitting dissents and concurrences is to improve the majority opinion." Justice Scalia noted several ways this is accomplished. First, the prospect of a separate opinion often makes the writer of the majority opinion more receptive to suggestions on major points. Second, a draft dissent "often causes the majority to refine its opinion, eliminating the more vulnerable assertions. . . .It forces them [the Justices] to think systematically and consistently about the law, because in every case their legal views are not submerged within an artificially unanimous opinion but plainly disclosed to the world. . . .

"Finally, and to me most important of all, a system of separate opinions renders the profession of a judge—and I think even the profession of a lawyer—more enjoyable. One of the more cantankerous of our Justices, Justice William O. Douglas, once wrote that `the right to dissent is the only thing that makes life tolerable for a judge of an appellate court.' I am not sure I agree with that, but I surely agree that it makes the practice of one's profession as a judge more satisfying. To be able to write an opinion solely for oneself, without the need to accommodate, to any degree whatever, the more-or-less-differing views of one's colleagues; to address precisely the points of law that one considers important *and no others*; to express precisely the degree of quibble, or foreboding, or disbelief, or indignation that one believes the majority's disposition should engender—that is indeed an unparalleled pleasure."

Justice Scalia concluded his address by quoting Justice Robert Jackson on changing one's mind. "This was written in a concurrence explaining why Jackson joined an opinion that reached precisely the opposite result of an opinion that Jackson himself had rendered ten years earlier, when he was Attorney General."

> Precedent. . . is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. . . . Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' . . . And Mr.

—continued on next page

Lecture *(continued from previous page)*

> Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no grounds for its being adopted by this Court. . . .' . . .Perhaps Dr. Johnson really went to the heart of the matter when he explained a blunder in his dictionary—'Ignorance, sir, ignorance.' But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: 'I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion.' If there are others ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."

The complete text of the Nineteenth Annual Lecture will be published in the *1994 Journal of Supreme Court History*.

India *(continued from page fifteen)*

Members of the first Indo-United States Legal Forum, including Justices Ginsburg and Scalia (right), consider one of the topics before them.

constitutional pilgrimage to Washington, he met with Justice Hugo Black, who told Cohen to ensure that the provisions of the Constitution of Israel were sufficiently stringent to control the Executive. Cohen then called on Justice Frankfurter who advised him to draft a Constitution which would severely limit the powers of the Judiciary!

With this sharp cleavage of views amongst leading Justices of the United States, Cohen came back to Israel and told his Prime Minister that they should have no written Constitution—only Basic Laws, to be passed by the Knesset amendable by a specified substantial majority of its members. And so it was.

At about the same time, India's Constitutional Advisor Sir Bengal Rau, who was set the task of proclaiming a draft constitution for independent India, also visited Washington. There, he showed to Justice Frankfurter the draft of the Life-and-Liberty provision (now Article 21 of our Constitution)—it then contained a due process clause: "no person shall be deprived of his life or liberty without due process of law." Justice Frankfurter was appalled—he told Rau that due Process had been one of the major headaches for successive generations of Judges of the Supreme Court of the United States. He suggested that India take as a model the then-recent Constitution of post-war Japan, and re-draft the clause guaranteeing life and liberty. Sir Benegal Rau came back to India and conveyed to the Constitution Committee the advice of Justice Frankfurter; the draft of Article 21 was altered to read:

> No person shall be deprived of his life or liberty except in accordance with procedure established by law.

In India we are also very familiar with the writings and ideas of the great Justice Oliver Wendell Holmes, Jr. This great legal philosopher believed that "[the] main part of intellectual education is not the acquisition of facts, but learning how to make facts live." I had hoped that the participants in the Indo-United States Legal Forum would indulge in such "life-giving" intellectual exchange by considering such topics as "The Judiciary and Freedom of Expression, Equality, Protection of Human Rights and Compensation for their Infringement, and Judicial Review." But that was not how it all worked out. In this first Exchange, much time was spent (in retrospect, usefully spent) in probing questions—from each side—as to how effectively our respective legal systems worked; how the law and deep-rooted social problems interacted; were Judges, the pace-setters, or did their decisions only reflect changes in societal norms. Each side was feeling its way around the topics: we parted with expressions of mutual sympathy for, and some understanding of, the enormous tasks ahead in our respective countries. We did identify common areas of interest—but there were just not enough hours to even begin appreciating how the problems, even in these areas, were resolved by lawyers and Judges in our respective countries. All this must await a second round—a second "Exchange."

Our respective legal systems, though each a part of the English Common-Law heritage, have moved in different directions: but we have appreciated that our objective is the same: how best to strengthen and preserve constitutional government and civil liberties, and uphold the Rule of Law.

We all hope that the visit to India by Justices Scalia and Ginsburg, and their excellent team of Judges and lawyers, will be the first of many intellectual exchanges between members of the legal fraternity of both our countries.