

# NUNC PRO TUNC

The Historical Society of the United States District Court for the District of New Jersey



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## The 2003 Annual Gala: Lifetime Achievement Awards

The focus of this issue of Nunc Pro Tunc is the Society's Annual Gala on October 16, 2003. Under the guidance of Chief Judge Bissell and Magistrate Judge Hedges, the program included not only informative talks by Professor Mark E. Lender and James B. O'Hara (both of which are excerpted at length in this issue), but also presentations to two especially worthy members of our Federal family. (Photos on following pages.)

Senior District Judge Dickinson R. Debevoise, who has served on this Court for more than 24 years, also is an accomplished author, historian and World War II veteran. The Society was honored to present to him its inaugural Lifetime Achievement Award – a plaque inscribed with the Judge's own words from his opinion in *United States v.*

*Steinmetz*, a 1991 decision focused on rights to the bell from a sunken sailing vessel. We were especially pleased that Peter C. Harvey, N.J. Attorney General and a former law clerk to Judge Debevoise, was able to make the presenting remarks.

Robert C. Morris, served this Society for many years as its liaison with the National Archives. As noted by Judge Hedges in presenting a Lifetime Achievement Award, "Since the birth of the Historical Society, Mr. Morris has demonstrated an unwavering commitment to it, both as an advisor in historic preservation and in making this Court's historical documents available to the bench, the bar and the public." Sadly, Bob passed away in late December.

*We thank both for their contributions to our Court.*

## "This Honorable Court"

*Professor Mark E. Lender, of Kean University in Union, has been working on the Society's formal history of the Federal Court in New Jersey for 4 years; his manuscript is now complete, and we are eagerly awaiting the publication – promised for this Spring. As a teaser, Professor Lender provided brief remarks at the Society's October 16, 2003 Gala, of which the following are excerpts:*

This is a history that began in 1789, but I'm going to begin in December of 1964. In that year the United States District Court for the District of New Jersey convened in a Special Session to observe the 175th anniversary of the holding of the First Session of the Court on the 22nd of December, 1789. And it was an opportunity not only to celebrate that First Session, but to look in a little bit greater depth at the evolution of the Court for the better part of two centuries. It fell to

former Chief Judge Phillip Forman, a man with many years of distinguished service on the District Court and on the Court of Appeals, to offer a brief historical overview. And in so doing, he noted that his was not the first effort in this regard. It seems that in 1935, under the auspices of the WPA, a young lawyer, to use the term of Judge Forman, was engaged to write a formal history of the District Court. Forman reported this individual -- and again quoting from the judge -- toiled for many months in the Office of the Clerk of the Court, and I suppose elsewhere, but queries concerning his progress brought only vague and noncommittal responses. Finally, he was seen here no more and it was assumed that he had finished the book. Nothing developed, and he was asked whether he had retained a copy of his research. He had not, stating that his only copy had been forwarded



*Professor Mark Lender*

to the headquarters of the WPA in Washington, D.C. Inquiry there developed that there was no record of even any such project, so that the field remains limitless and open to any ambitious historian, ending Judge Forman's quote.

Now, the Judge's tone in relating the story was somewhat bemused because, in effect, the Court had been hoodwinked in 1935. And though I understand Judge Forman's feelings in the matter, I've got to tell you now that I have a soft spot for the unknown young lawyer.

He may have come a cropper in 1935, but he has left the way clear for me and allowed me to undertake one of the most interesting and, frankly, rewarding projects I've encountered in my years as a practicing historian.

And unlike the phantom effort of 1935, this venture is close to completion and we'll see print, we are anticipating, in early 2004. Indeed, in various publications, segments of the book have already appeared, so this time the Court will have its history.

The tentative title is taken from the words of court cryers as they open each session. And to this I must attribute credit to Don Robinson, who -- or that of the Green Street Café where I think he came up with it first. The title will be ... "This Honorable Court: A History of the United States District Court for the District of New Jersey." ...

Now, as I said, it was an interesting project. And, in fact, we can note that the history of the District of New Jersey is inherently compelling. As Don Robinson noted, the District was created pursuant to the Judiciary Act of 1789 as one of the first federal judicial districts. Indeed, the first two District Judges, David Brearley, who served less than a year before dying on the bench, and Robert Morris, who served for 25 years between 1790 and 1815 were, indeed, appointed by President George Washington. And Washington took his judicial appointments seriously as he saw the new judiciary as essential to the success of the new National Government.

In late September 1789, before the new judges actually took their seats, he reminded them in a circular letter of the significance of their appointments: "In my nomination of persons to fill the offices in the Judicial Department, I have been guided by the importance of the object, considering it to be of the first magnitude and as the pillar upon which our political fabric must rest. I have endeavored to bring into the high offices of its administration such characters as will give stability and dignity to our National Government."

Now, as you know, Washington was rather taciturn and a man of very few words, and it was just as well. Because I think it's difficult to put the role of the courts with greater clarity or force. Without stability and dignity; that is, without a government able to project its authority and enforce its laws consistently, while at the same time acting in a fashion as to retain the respect and voluntary support of its citizens, the new republican experiment was doomed; and frankly, that's an observation as true today as it was in 1789. ...

The first phase [OF THE COURT'S HISTORY] involved simply establishing the federal institutions and their authority. And we can date this at least in the New Jersey context roughly to 1815 with the conclusion of the tenure of Judge Robert Morris. It saw the minutia of organizing the courts; hiring the first clerks, calling the first juries, hiring cryers, other court personnel, finding physical facilities in the towns of New Brunswick and Burlington where alternate sessions of the District Court were held, and in Trenton where the Circuit Courts were held. It was a pioneering period, and the Court had to meet in borrowed accommodations. There were no federal courthouses. They met in county courts. And if a county courtroom wasn't available, in the chambers of the State Senate of the State of New Jersey; and when that wasn't available, they retired to any number of different taverns in Burlington, Trenton and New Brunswick. And I suppose there's room for a study on the efficacy of justice after they had adjourned to a tavern, but we don't have that. The taverns we do know about are a surprising number; and the Court was convened in taverns not infrequently. This is not a rarity. ...

And the new government was especially keen to shore up its finances as the basis of a sound national economy. And when it prosecuted counterfeiters or prosecuted those arrested for fraud against various federal securities, it took these very, very seriously indeed because it saw counterfeiting or fraud against the fiscal stability of the government as something striking at the very heart of government stability.

New Jersey saw a number of those key cases. And in dealing with them consistently and effectively, I think it's fair to say the District contributed its share to the early stability of the new national system; so, frankly, did the lengthy tenure of Judge Robert Morris. ...

Justice Bushrod Washington, nephew of the first president and a distinguished member of the Supreme Court, had

New Jersey on his circuit, and Bushrod Washington openly expressed his admiration for affairs in the District. And so the formative period I think we can say contributed both to the stability and to the dignity of the new government.

We can view much of the rest of the 19th Century as a period focusing on the forging of the national economy. The consolidation of federal authority over interstate commerce, fostering economic growth and enterprise, creating uniform laws to conduct business across the nation, rewarding initiative through the protection of patents, copyrights and trademarks. The District and Circuit Courts of the District of New Jersey were fully immersed in all these matters.

A series of New Jersey cases, for example, helped refine the meaning of *Gibbons vs. Ogden* as the federal courts asserted themselves in interstate commerce. And in *Goodyear vs. Day*, one of the great patent cases in all of American history, which was heard in Trenton, in which Charles Goodyear defended his patent for vulcanized rubber -- those of you who drive automobiles owe a certain debt to this case -- was not only heard here, but was one of the first media sensations to ever come out of a federal court case. They had to close down Trenton, because the attorney arguing for Goodyear's patent was none other than the sitting Secretary of State of the United States, Daniel Webster. His opponent, representing Day's challenge to the patent, was Rufus Choate, perhaps one of the greatest trial lawyers of his day, and the showdown between the two was major news.

Goodyear won. It was Webster's last great trial. And two months later Webster was nominated for the presidency of the United States by the WIG party by none other than his good friend and opponent, Rufus Choate, who had opposed him in *Goodyear v. Day*. It was a close[] community. ...

In *Sprague vs. United States*, Judge Clark of this District ruled that the Eighteenth Amendment to the Constitution of the United States was, in fact, unconstitutional. And this got everyone's attention. The day after he announced his decision, lawyers as far away as Ohio were using his decision to defend clients accused of violating the prohibition laws of the United States.

Judge Clark was an interesting character. A very accomplished artillery officer in the First World War, something of a free spirit when he was named to the bench. He could find no foundation in law for holding the Eighteenth Amendment unconstitutional ... so he admittedly made it up. He said he came to it

through his own study of political science.

That what he had done simply made more sense than what the nation had done in enacting the Eighteenth Amendment, and he decided to do away with it.

He did so to the applause of anti-prohibitionists and the utter consternation of the Anti-Saloon League, and it was interesting to watch how quickly his colleagues on the bench in New Jersey ran away from him, announcing publicly that day that they were, quote, not to be held accountable to Judge Clark's decision.

CHIEF JUDGE BISSELL: If I may interject here. I understand that this Court solved its problem by making sure that Willie Clark was elevated to the U.S. Court of Appeals. Is that correct?

PROFESSOR LENDER: He indeed went to the United States Court of Appeals.

[I]n his defense, I will say that he was a man with the courage of his convictions. When the Second World War broke out, while well past the age where he would have been recalled to active duty, he wrote to the Army indicating that he felt uneasy urging others to go off to war while he still felt himself physically capable of doing so. The Army accepted this, brought him back. He served as a colonel of artillery during the Second World War. He was there at D-Day, he served with distinction in the European theater of operations, and in the Pacific after the surrender of Germany. And he came back, requested his position back on the Court of Appeals and, of course, the answer was "no."

He had been replaced by President Roosevelt. He took his appeal to the Court of Claims, which said "no." But he was given the position of Chief Judge of the United States Commission of Occupation and Occupied Germany. So he did end the war, at least ended his career on the bench. An interesting man, probably worth a biography right there. ...

Part of the answer of how the Court did it was institutional. And I've had to discuss the structural changes in the District. There used to be two districts: It was the District of East Jersey and a District of West Jersey. We've got to look at how the Court would assess its administrative needs and giving credit where it's due over time. I think those in the Court and those who thought about how the courts ought to function, both on the bench and the various clerks and others affiliated with the Court, there was a great deal of flexibility in how they approached these issues.

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[Judge Clark] could find no foundation in law for holding the Eighteenth Amendment unconstitutional ... so he admittedly made it up. He said he came to it through his own study of political science. That what he had done simply made more sense than what the nation had done in enacting the Eighteenth Amendment, and he decided to do away with it.

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"These guys are going to get a fair trial whether they like it or not."

*Judge Clarkson Fisher*

Until 1906 there was one judge in the District of New Jersey with case loads that would seem astonishing today. Generally done without court clerks -- without clerks for the judges. And so they had to do all sorts of different things. They experimented with commissioners who would take bails, serve other functions, handle preliminary arraignments, and these, of course, morphed into the magistrate judges that we know today. There were various referees over time, and then commissioners of bankruptcy, which eventually evolved into our bankruptcy judges.

There were technological innovations. One of the fun things -- it wasn't fun but as least one of the interesting things because you're bleary after you plow through the records all the time -- and I don't know long -- until I picked up on it -- everything was elegantly written by hand. At some point you realize you're reading typescript instead of something hand-written, and all of a sudden you're seeing pre-printed forms for the Court that weren't there only a few years before. ...

I think another reason that there was stability was that, in fact, there was dignity. And we need to return to dignity, which I think was critical to the success of the Court. From the beginning, the ethics of the bench were such as to command the respect of the public, a matter that Washington felt critical when he made his first appointments. While there have been intense legal battles between judges, and even personal disputes among judges, the Court has a history of acting in a manner with Washington's initial desire that

the federal judiciary reflect credit on the integrity of the National Government. ...

Dignity is important; for in dignity is the basis of public trust in the federal courts. Ours is not a perfect republic, and a good thing, too. One man's perfect republic is another's tyranny. ...

The courts have been the moderators for any number of various contentious causes. Not all litigants win, but I think as the history of the District of New Jersey has shown, access to the courts has been a fact, and judges by and large --always exceptions -- have done their best to uphold the decorum of the bench. One of the quotes that comes to mind -- and this is a paraphrase from Judge Clarkson Fisher, angry with the conduct of counsel in a case, stalked out into his chambers and was heard to say that "These guys are going to get a fair trial whether they like it or not." And I think, by and large, an effort to provide fair trials has been a benchmark. ...

So what then would be the result if dignity failed through the scandal, through the politicization of the courts or, frankly, judges deciding cases in ways that defy logical explanation, and this public trust was lost?

Where then would society find a respected forum for justice? And what then would prevent the American constructive argument from becoming just bickering or posturing?

The District of New Jersey has contributed to the dignity and thus to the stability of this nation. My hope is that a century from now another historian of this or any other court can say the same.

### ***The Eagle: Restored***

The Eagle has landed -- again. The 100-year old limestone sculpture outside the Martin Luther King, Jr. Federal Building and Courthouse has a new head after having been decapitated by a vandal a year ago.

The Society, which had arranged for the historic Eagle to be displayed outside the Courthouse, retained a professional restoration firm to sculpt the new head. Working from photographs of the intact Eagle, sculptor Nicholas Micros carved a reproduction of the original from Indiana limestone. Micros, a New York native, currently resides in Switzerland, but he returns regularly to work on restoration projects in the United States.

The Society is especially grateful to Steve Greenberg, of IDT and CEO of Net2Phone and a member of the Society's Board, and Jonathan J. Lerner, of the New York office of Skadden, Arps, Slate, Meagher & Flom, LLP, for helping to arrange the financing for the restoration project. *Leda Wettre*



## Lifetime Achievement Awards



*N.J. Attorney General Peter C. Harvey with Senior District Judge Dickinson R. Debevoise*



*Attorney General Harvey presenting Lifetime Achievement Award plaque that quotes from 1991 opinion by Judge Debevoise in *United States v. Steinmetz*, 763 F. Supp. 1293.*



*Magistrate Judge Ronald J. Hedges presenting Lifetime Achievement Award to Robert C. Morris of the National Archives*

## Justice Brennan in Historical Perspective

*Professor James B. O'Hara is a former Administrator and Dean of Loyola College in Baltimore and is a Trustee of the Supreme Court Historical Society. He spoke eloquently at the 2003 Society Gala concerning the role of New Jersey native, Supreme Court Justice William Brennan, and why he will continue to have a lasting impact on American law. A few excerpts follow; the transcript of the full remarks, as recorded by Walter Perelli, C.S.R., may be obtained from the Society.*

In 1950, the eminent legal historian, Charles Fairman of Stanford University, delivered the prestigious Bacon Lecture at Boston University Law School, and his topic was a question: What makes a great justice? [In contrast to his eight characteristics, which required lectures over the course of three days, my] own list goes like this -- and I will have only five criteria. Before any questions arise about ability or character traits, a great justice must have -- and I hate to say it, but it is true -- longevity. However intelligent, however able, no judge can significantly influence

the course of the law after only a few years on the bench.

John Quincy Adams once appointed a Justice to the Supreme Court named Robert Trimble, a man of extraordinary ability, but he died after only two years, and his contributions to the Supreme Court and to the constitutional life of our nation are insignificant.

Justice Brennan sat on our highest Court for 34 years, nearly a sixth of the Court's total life. He shared the bench with 22 justices, almost a quarter of the entire 210-year total. He wrote 1,360 opinions; 461 decisions of the Court, 425 dissents, 474 other opinions, mostly concurrences, and dissents from certiorari decisions.

He was a Justice through the presidencies of Eisenhower, Kennedy, Johnson, Nixon, Ford, Carter, Reagan and the first Bush.

His decisions touched every phase of modern legal life: Free speech, flag-burning, freedom of the press, obscenity, freedom of association, freedom of religion, abortion and reproduction rights, criminal justice, the death



*Professor James B. O'Hara, Loyola College (Baltimore)*

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*"I believe he [Professor Frankfurter] thought I had learned the lesson of independence perhaps too well."*

William Brennan



*Justice Brennan Clerks Clyde A. Szuch, Esq. and the Hon. Daniel J. O'Hern, N.J. Supreme Court (Ret.) at the Society Gala*

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*"Brennan was not a bookish intellectual; indeed, bookish intellectuals play bridge, he played poker."*

penalty, police misconduct, gender equality, zoning, one person/one vote, welfare reform, administrative law, the role of the judiciary, standing, jurisdiction and federalism.

On each of these issues there is a recognizable, distinct, well-reasoned, well-written Brennan point of view.

As Justice Souter, who took Brennan's seat on the Court, puts it: The sheer number, the mass of opinions guarantees Justice Brennan a place in legal history and a role in the future decisions that ranks him with Marshall, with Story, with Holmes, with Brandeis, with Black, with Frankfurter.

A second trait on my list is intelligence. Brennan was from his youth a good student. At the University of Pennsylvania he was near the top of his class. At Harvard Law School he got good grades, although he was not a star and was barely noticed by one of his professors who had an eye for a certain kind of flashy brightness which Brennan never had and never, frankly, wanted. He later joked about that professor; Felix Frankfurter. Felix always wanted his students to think independently, but it helped if they thought independently and arrived at his conclusions. "I believe he thought I had learned the lesson of independence perhaps too well."

Brennan and Frankfurter served on the Court but they surely did not think alike. Frankfurter always had an eye for the particular, for minutia, for procedural niceties. Brennan's look was more global. He saw things in relation to one another. He saw one area of law as it dealt with another area of law. He looked at the sweep of things, he looked at trends, he looked at developments. It is not surprising that on important and controversial issues, the teacher always went one way and the student often went another.

Brennan's whole career is evidence of this intellectual mastery. He enlisted in the Army at the beginning of World War II and left it as a full colonel. He began as an associate at one of New Jersey's most prestigious and venerable law firms, and rapidly became a named partner. He served only briefly as a trial and appellate judge before being raised to the State Supreme Court, and then joined the United States Supreme Court at what is for a Justice a very young age of 50.

His times on that Court gives ample evidence of the broad, vast knowledge that he had. Brennan was not a bookish intellectual; indeed, bookish intellectuals play bridge, he played poker.

And his intelligence was always of the pragmatic type, more practical than theoretical.

A third of my characteristics is independence. Justice Brennan was not dominated by his teacher, Frankfurter, in Washington, neither was he dominated by the legendary Chief Justice Vanderbilt in Trenton. Indeed, it was this freedom from domination of others that first attracted Vanderbilt to Brennan, and that first attracted Eisenhower's Attorney General Herbert Brownell to him.

On the Warren Court, he quickly joined the liberal block. But Brennan was never a follower only. His jurisprudence was more scholarly than Warren's and he frequently found himself on a different side of the issue from the genial Chief Justice. His liberalism was sharply different from that of Black, and infinitely, infinitely better informed than that of Douglas.

He sympathized with the views of Thurgood Marshall, and he recognized the special legal talents and insights of Arthur Goldberg and Abe Fortas; but he led them, he did not follow them.

A fourth criteria for judicial greatness, I think, is a point of view, a judicial philosophy that is coherent, that is logical, that is sane. At the time of his retirement, and again at his death, there was considerable discussion of Brennan's philosophy. Much of that discussion centered on what the uninitiated would call his liberalism. Liberals praised him for his liberal conclusions, and conservatives condemned him for his liberal conclusions.

Passing over the question of whether the terms "liberal" or "conservative" can accurately be applied to the career of a judge -- and I think they cannot be easily applied -- they do have a certain usefulness. But William Brennan was not a great Justice only because he was a liberal, or even chiefly because he was a liberal. There have been great conservative justices, too. John Marshall Harlan comes to mind, and Robert Jackson, and even Felix Frankfurter. And there have been liberal justices who surely would not be called great by any really accurate historian.

Brennan's greatness comes from his insight, from his instinct, from his probing ability to see precisely what is at stake in a case, from the capacity to think things out in a way that has vision and which does not so overstate the point of view that future generations are stuck with it instead of being led by it.

William Brennan was a craftsman of the law. Writing clearly and well did not always

come easy to him. He did not dash his opinions off. He labored. He sometimes wrote and rewrote and rewrote again, and he did all of this while he was personally reading virtually every request for certiorari that came to the Court in the 34 years.

His philosophy was straightforward: He believed that every legal wrong had a legal remedy. He believed that access to the courts was the best safeguard that a free people could have. His standards for justiciability, for standing, for jurisdiction were perhaps the broadest ever held by a Supreme Court Justice, except perhaps for Justice Story, who it was said would find federal jurisdiction under admiralty law if a child was playing with a toy boat in a tub within 50 feet of the alleged violation. (Laughter.)

But Brennan was also sane. What so exasperated his critics was that he always seemed to find a precedent appropriate to the point and his memory was retentive and global and his reasoning was comprehensive.

Finally, a great justice must have an ability to persuade and convince. Every account of Brennan's association with his colleague notes his pixy-like charm, the gleam in his eye, the easy smile, the elfin wit. Everybody was called "pal."

When another justice was having difficulty with an opinion, Brennan would suggest this or that as a way out of the problem. And God knows how many times an opinion was issued in the name of one judge when Brennan actually wrote it.

He looked for consensus, unlike some of his colleagues. He sought coalitions, or as

Justice Souter put it at his remarks at Brennan's funeral: When I was with him he might tell me some things that were true like how a justice is supposed to know how to count to five.

It is a mark of Brennan's unusual talent to get along that his three appointments, that the three appointments of this Democrat to state judgeships were from a Republican Governor, Alfred E. Driscoll, and his appointment to the Supreme Court was at the hands of a Republican President, Dwight D. Eisenhower, who, by the way, never, ever said that he made two mistakes, and both were sitting on the Supreme Court.

Brennan's ability to persuade his colleagues is coupled with his exceptional ability to use the right language in his opinions to convince his readers. Even a reader whose own philosophy takes him on a road quite different from the Justice's will find his argument lucid, vigorous, robust. He writes clearly, carefully, sometimes elegantly, always forcefully. And the words chosen always seem precisely right, leading to a conclusion that seems, after you've read him, inescapable.

So there you have it. A Supreme Court Justice who was intelligent, independent, with a distinct political philosophy uniquely his own, with a powerful ability to persuade and convince; a Justice who served so long that he has powerfully shaped the course of American law.

Was he a great justice?

The answer is not difficult. Of course he was.

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*"So there you have it. A Supreme Court Justice who was intelligent, independent, with a distinct political philosophy uniquely his own, with a powerful ability to persuade and convince; a Justice who served so long that he has powerfully shaped the course of American law."*

## ***Help Wanted – Volunteers with the Society Archives***

As members may know, the Society has embarked on an effort to provide a proper location for the archive materials we have collected, over the years, and anticipate adding in the future. While we seek a more permanent and accessible location – the materials are now filed in the Clerk's Office in Newark – we also need volunteers to catalog the materials on hand.

Files include oral histories of a good number of contemporary members of the Bench. The discussions should be reviewed and annotated for insights and subjects. The oral history project also needs to be continued; and extant dialogues can be the source of interesting articles for this Newsletter.

Files also include transcripts of important events in the Court's history, including swearing-in ceremonies and memorials. Even a brief review of several of the older transcripts reveals a fascinating side of Members of our Court who have passed into history.

Interested volunteers, who need not be attorneys, should contact Don Robinson, Esq., Magistrate Judge Ronald J. Hedges or Susan Travis, in the Clerk's Office in Newark.

Anyone with materials suitable for the Archives also is encouraged to contribute a copy; and we are always interested to accept volunteers for the Oral Histories Project.

**The Historical  
Society of the  
United States  
District Court for  
the District of  
New Jersey**

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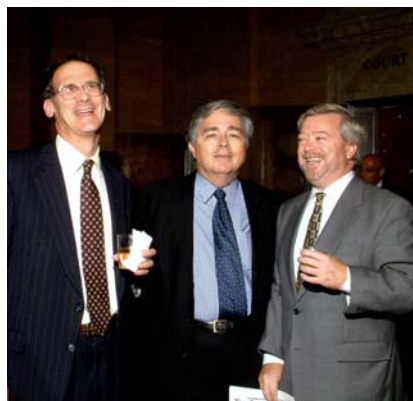
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## **Photographs of the 2003 Gala**



*Photos taken at the pre-Gala  
reception in the Whipple Room  
for Society Members; and dur-  
ing the post-Gala reception*

## **A Thank You**

The Society wishes to thank Kathryn C. Renahan, Esq. for her service as Editor of *Nunc Pro Tunc*. We appreciate her work and wish her well in her new position as Deputy A.G., Section Chief, Employment Litigation, in the New Jersey State Law Department.

Kathryn is succeeded by Bob Bartkus, Esq. who has served as assistant editor. He has agreed to continue his work for this year, after which assistant editor Frances C. Bajada, Esq. will become Editor. Both are pleased to accept any written contributions.