



THE SUPREME COURT  
HISTORICAL SOCIETY

# Quarterly

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## Thirty-Sixth Annual Meeting Celebrated on June 6, 2011

Scorpions figured prominently in the Society's thirty-sixth Annual Meeting held on June 6, 2011. Fortunately, these scorpions were not the dangerous arthropods but referred to a phrase often attributed to Oliver Wendell Holmes, Jr. in which he was reported to characterize the members of the Court as "nine scorpions in a bottle." The 36th Annual Lecture was held at 2 PM in the Supreme Court Chamber.

After welcoming the large audience, Society President Ralph I. Lancaster, Jr. introduced Noah Feldman, who was chosen to present the lecture for this year. Professor Feldman, currently the Bemis Professor of International law at Harvard, is the author of the critically acclaimed **Scorpions: FDR's Court**. His special insights into the working of the Court began during his service as a law clerk to Justice Souter in the 1998 Term.

Professor Feldman titled his talk, "Nine Scorpions in a Bottle: The Roosevelt Court in Retrospect." The lecture itself was not a simple reprise of the book. Rather, using the book as a starting point he offered a fascinating study of the judicial philosophies of the four Justices who are the principal subject of the book: Hugo L. Black, William O. Douglas, Felix Frankfurter, and Robert H. Jackson. While all four of these Justices were at the time of their appointment recognized as liberal leaders and scholars, their paths on the Court diverged. Each of them developed a philosophy different from the others, and their common liberalism often produced strikingly different judicial results.

Each of the four Justices had a dramatic, outspoken

personality, and their healthy egos undoubtedly accounted for some of the discord among them. Their personal and professional relationships with one another were marked by sometimes bitter and vitriolic exchanges both on and off the bench. Sometimes too, the acrimony became public. Jackson publicly criticized Black for failing to recuse himself from a case that was argued in the Court by Black's former law partner. Black in turn advised President Truman against appointing Jackson to the office of Chief Justice. Frankfurter and Douglas seemed to have a relationship deeply rooted in

acrimony, and their public behavior toward each other was often icily polite.

The concurrent service of the Justices commenced around the time of the outbreak of World War II in 1941 and ran through the famous decision in *Brown v. the Board of Education* in 1954. These years brought complex and often emotional questions and issues before the Court, and the vitriol evidenced among the four was in some

ways reflective of the conflict and contention within the body politic at large. Frankfurter and Jackson were believed by Black and Douglas to be increasingly conservative although they would have argued forcefully that their positions were not conservative at all. Modern scholars agree that the opinions of these four great Justices have had a lasting effect on the jurisprudence of the Court, and some consider that their personal philosophies of Constitutional interpretation are reflected even on the current Court. The text of Professor

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PHOTOS BY STEVE PETERMAN

Noah Feldman presented the lecture for this year. Professor Feldman, currently the Bemis Professor of International law at Harvard, is the author of the critically acclaimed *Scorpions: FDR's Court*.

## A Letter from the President



Gregory P Joseph

At the first meeting of the new fiscal year, the Society's Executive Committee adopted an ambitious program and publications schedule. One of the highlights each year is the Frank C. Jones Reenactment. This fall, it will take place on Wednesday, November 9, 2011, and reprise *Texas vs. White* (1869). White was an original jurisdiction case in

which the Reconstruction government of Texas claimed that the Confederate state legislature's sale of state-owned U.S. bonds during the Civil War was illegal and ineffective. David J. Beck will argue for the State of Texas, and Patricia Ann Millett will present the case for George W. White and the other bond purchasers. Justice Scalia will preside, and his probing and witty questioning and characteristic energy will make for an enjoyable evening for the audience and a lively one for the advocates. (More information about this year's reenactment appears on the back page of this *Quarterly*.) Last year, as many of you will recall, Justice Alito acted as the Court in the reenactment of the 18th century case *Ware v. Hylton*. He presided with distinctive incisive questions and good humor, using bobble head figures to represent Justices who served on the Court at the time of the original argument.

The Society's new book **Courtwatchers** will be published soon. **Courtwatchers** is an anecdotal history that provides fresh insight into the Court and its members. Look for information about the book on the website. Better yet, pick up a copy at the Gift Shop. Another highlight to mark on your calendars, for next spring: on April 11, 2012, the Society will sponsor an event celebrating the 30th anniversary of the first term of Justice Sandra Day O'Connor, the first woman to serve on the Court. This program will itself be historic: every female Justice ever to serve on the Court will appear on the program. Justices O'Connor, Ginsburg, Sotomayor and Kagan will participate in a panel discussion concerning their experiences on the Court. The Newseum Building on Pennsylvania Avenue in Washington will be the venue. You may want to mark your calendars now for what we expect will be a very well-attended event. Closer to the date, invitations will be mailed to members and pertinent

information will be posted on the website.

Other highlights of the coming year include our third cooperative program with the Historical Society of the Courts of the State of New York. On February 6, 2012, Professor Randall Kennedy of Harvard Law School will illuminate the career of Thurgood Marshall as a litigator for the NAACP Legal Defense Fund. Justice Sotomayor will introduce the speaker. Members of the New York Bar in attendance will qualify for CLE credits.

The 2012 Leon Silverman Lecture Series will focus on Property Rights. Three programs are planned for the Spring of 2012, with the remaining two programs in the Fall. Details will be available shortly, and the web site will carry information as soon as it becomes available.

This issue of the *Quarterly* contains the conclusion of the delightful two-part article on Judah Benjamin. Benjamin is among an interesting coterie of people who declined appointment to the Supreme Court, something that for most would be unimaginable. Others in this group include, for example, John Jay (in 1800, for a second stint), John Quincy Adams, James Buchanan, Henry Clay, John W. Davis and John Foster Dulles. These decisions, too, make history, opening the door to the appointments of, among others, John Marshall, Joseph Story and Earl Warren.

This year will provide many opportunities to enjoy your Supreme Court Historical Society membership. The national economic situation continues to be challenging, and we need help from members and foundations. I hope you will continue your support and expand it if possible. I look forward to meeting many of you at the events. The Society's members are among its greatest assets. I look forward to working with you to make this a truly outstanding year.

A handwritten signature in black ink that reads "Gregory P. Joseph". The signature is written in a cursive style.

## Quarterly

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Feldman's remarks will appear in an upcoming issue of the **Journal of Supreme Court History**.

At the conclusion of the lecture, members and their guests had the opportunity to tour the Supreme Court Building under the direction of the Office of the Curator of the Court and members of her staff. The Society expresses gratitude to Catherine Fitts, Curator, and Gwen Fernandez, Director of Tours, for their assistance in providing this opportunity.

The annual meeting of the General Membership, followed by the annual meeting of the Board of Trustees, commenced at 6 PM in the Supreme Court Chamber with outgoing President Ralph I. Lancaster, Jr. presiding. In opening remarks, Mr. Lancaster noted that as it was his last report as President, he wanted to express thanks to many who had helped to make his presidency "among the most personally rewarding experiences of my life." He thanked the officers and trustees with whom he had served, complimenting them on their exemplary commitment to the Society and its activities and programs.

Mr. Lancaster then provided a brief overview of the accomplishments of the year. He noted that first and foremost, he was happy to report that the Society was on a sound financial footing and debt-free, due in part to the careful husbanding of its resources and to the continuing generosity of its members and supporters. He noted that the net assets of the Society totaled \$12 million and that the organization owns the headquarters building outright. Another

matter of pride for members is the recent completion of the Gift Shop which was financed entirely through private contributions, a remarkable accomplishment in these troubled financial times. The collections of the Society also continue to grow with the acquisition of historically relevant and unique items. One of the most recent items added to the collection involved the identification and purchase of a hitherto unknown portrait of Justice John McLean.

Even with financial concerns, the Society has con-

tinued to conduct outstanding educational programs and lectures. He said he was especially pleased that funding had been procured to allow the Society to sponsor two sessions of the important teacher-training conducted in conjunction with Street Law Inc. and Georgetown University Law School. Other accomplishments include the continued production of outstanding publications, financial worries notwithstanding.

These are impressive accomplishments on their own merit, but are even more impressive in light of the difficult financial times. Volunteer contributions made by members have been an essential element of these accomplishments. Financial generosity has been coupled with contributions of time and professional skills to make possible much of the work. Enormous amounts of time and talent are volunteered by the officers, committee chairs and trustees of the Society to achieve these results. He expressed his gratitude to all with whom he had served and worked and pledged his continuing support of the Society.

Anticipating the nominations to follow, Mr. Lancaster expressed his unqualified support for the candidacy of Gregory Joseph as President of the Society. Mr. Lancaster said he had worked with Mr. Joseph in professional organizations and the Society, and that he had demonstrated outstanding

leadership skills, a deep sense of commitment and a practical common-sense approach to handling problems. All of these attributes will make him a skillful leader of the Society in the coming years.

Following his remarks, Mr. Lancaster called upon **Maureen Mahoney**, Acting Secretary of the Society and Chair of the Nominating Committee, to present the candidates for election to the Board of Trustees. The following were nominated to serve an initial three-year term on the Board of Trustees: **Dennis J. Block, Darryl Bradford, James R. Figliulo, James Gauch, Christy Jones, Judge Judith Kaye, John Quinn, Jeffrey E. Stone, Thomas Tongue and David Weinstein**. All candidates were elected by a unanimous vote.

Ms. Mahoney then presented a slate of candidates

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Leon Silverman (seated) was congratulated on reaching his 90th Birthday. Standing left to right: Ralph Lancaster, Maureen Mahoney, Gregory Joseph, and Chief Justice John G. Roberts.



for election to an additional three-year term as members of the Board of Trustees. Those nominated were: **Norman Brothers, Sheldon S. Cohen, John Dalton, Drew Days III, David Frederick, William J. Haynes, Philip Kessler, Robert Juceam, Joan Lukey, Gregory Maier, Mrs. Thurgood Marshall, Rick Nydegger, Theodore Olson, Teresa Roseborough, Richard Schneider** and **Kenneth Starr**. All candidates were elected by unanimous vote.

A third set of nominations was presented. In recognition of lengthy and loyal service to the Society, the following were nominated to serve as Trustees Emeriti: **Frank Gundlach, Charles Renfrew, and Bernard Reese**. All three of these candidates were also elected by unanimous vote.

Following the elections, Mr. Lancaster adjourned the Meeting of the General Membership and called upon Leon Silverman to preside over the Annual Meeting of the Board of Trustees. Mr. Silverman paid tribute to Ralph I. Lancaster, Jr. for his service during the previous three years as President of the Society. Serving in a period of great economic change, Mr. Lancaster deserves great credit for the economic stability of the Society in spite of difficult economic times. The fact that the Society has been able to maintain its commitments without eliminating any programs or publications and to retain the staff is certainly a tribute to Mr. Lancaster's dedication to the Society and his hard work to manage existing resources and to attract gifts and grants necessary to fund these activities. Mr. Silverman observed that Mr. Lancaster's contributions to the Society went far beyond his recent service as President. He served as National Membership Chair previously, and under his leadership the Society swelled to the greatest number of members in its history. Subsequent to that Chairmanship, Mr. Lancaster served as the Chair of the Committee for the John Marshall Commemorative Coin. In that case he worked with an outstanding committee of influential persons throughout the country to obtain Congressional approval for the coin. Both of these achievements were significant and when taken with his service as President, result in an impressive legacy.

Mr. Silverman called upon Ms. Mahoney to present candidates for election as officers of the Society. Ms. Mahoney presented the following names for election to the of-

fices indicated: **Leon Silverman, Chairman of the Board; Gregory Joseph, President; Vincent C. Burke III, Vice President; Mrs. Thurgood Marshall, Vice President; and Philip Kessler, Secretary.**

The Committee also nominated **Ralph I. Lancaster, Jr. as President Emeritus**, joining Frank C. Jones.

In addition, the following individuals were nominated to fill one-year terms as At-Large members of the Executive Committee: **Charles Cooper, Kenneth S. Geller, Christy Jones, Maureen Mahoney, Teri McClure, James Morris, John Nannes, Theodore Olson, Leon Polsky, Richard Schneider, Nicole Seligman, Larry Thompson and Seth P. Waxman**. All the nominees were elected by unanimous vote.

The elections concluded the business of the Annual Meeting of the Board of Trustees and

Mr. Silverman adjourned the meeting. He then asked Mr. Joseph to assume the podium as the newly-elected President of the Society to conduct an awards ceremony to acknowledge the work and support of State Chairs and major donors to the Society.

Mr. Joseph called upon Chief Justice John G. Roberts, Jr. to assist in presenting awards to those recognized. In introducing the Chief Justice, Mr. Joseph said he would follow the injunction of others that the Chief Justice preferred short introductions. Mr. Joseph said that in deference to that, he would note only that long before he became Honorary Chair of the Society, the Chief Justice had been actively in-



**Gregory P. Joseph (left) was elected President of the Society, succeeding Ralph I. Lancaster, Jr.**



**Chief Justice Roberts presented a bow tie to Ralph Lancaster (left) to commemorate his service as President of the Society. The tie is made from the velvet draperies that graced the Court Room prior to its refurbishment.**

volved in the Summer Institute for Teachers, and that he has been a faithful participant in that program ever since. Mr. Joseph thanked the Chief Justice also for his participation in many of the Society's programs and activities since joining the Court and then asked him to come to the podium.

The first awards were given to honor outstanding contributions to the **Journal of Supreme Court History**. The Hughes Gossett Literary Prizes recognize the accomplishments of those who are working to preserve the history of the Court and contributing to the Society's educational mission. The first award given was presented to Professor Christopher Waldrep. Professor Waldrep is the Jamie and Phyllis Pasker Professor of History at San Francisco State University. Professor Waldrep was awarded the prize for an article published in 2010, but because he was out of the country at that time, he had not been officially recognized for that achievement. His award-winning article was "Joseph P. Bradley's Journey: The Meaning of Privileges and Immunities." The Student Prize winner for 2011 is Chrissy Kendall, a student at George Mason University School of Law for her article "Because of His Spotless Integrity of Character, The Story of Salmon P. Chase: Cabinets, Courts and Currencies." The 2011 senior academic award was presented to Judge Jeff Amestoy. Judge Amestoy is the retired Chief Justice of the Supreme Court of Vermont and a Fellow for Public Leadership at the Harvard Kennedy School. Judge Amestoy was recognized for his article titled "The Supreme Court Argument that Saved the Union: Richard Henry Dana, Jr., and the Prize Cases."

Following the presentation of the literary prizes, Mr. Joseph asked **Philip Kessler, National Membership Chair** to assume the podium to make presentations to successful State Chairs. Mr. Joseph said that Mr. Kessler's

hard work and dedication to the campaign had been extraordinary. Over the past two years, Mr. Kessler has been doing the impossible, pushing to expand the Society's membership base during a period when very few were willing to undertake new charitable causes. In spite of this obstacle, Mr. Kessler has motivated his Chairs to achieve and 18 have met or exceeded their recruiting goals a month before the end of the Fiscal Year. While some of these Chairs were recognized in April at a dinner hosted by Justice Thomas, others were present to be recognized at the Annual Meeting.



During the dinner, Justice Sonia Sotomayor visited with Trustee James Gauch (left) and Trustee Emeritus, Joseph Moderow (right.)

Mr. Kessler called upon Chief Justice Roberts to assist him in making presentations. The successful state chairs present to be recognized were: **Robert Anello, New York; Francis Devine III, Pennsylvania; Christy D. Jones, Mississippi; Ted Sherwood, Oklahoma; and Steven Smith, Southern California.**

Mr. Joseph returned to the podium to conduct an awards ceremony honoring a number of the Society's most faithful and generous contributors. He noted that many had been recruited by the late Jerry Solovy. The Society is deeply in Mr. Solovy's debt and will continue to benefit from his outstanding efforts to create support. Mr. Joseph then called upon the Chief Justice to again assist in handing out the awards. Mr. Joseph noted that some of those receiving awards



The Alexandria Harmonizers performed a delightful concert under the direction of their conductor Joseph Cerutti, Jr.

were recognized for personal contributions, while others represented organizations and foundations providing vital support the Society. The award recipients were: **Sheldon S. Cohen, The Marshall Coyne Foundation; David Frederick; Dorothy Goldman; William Haynes; Joan Lukey; Maureen Mahoney; Joseph Moderow; Steven Molo, Molo Lamken; Gary Naftalis, Kramer Levin Naftalis & Frankel;**

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Mr. and Mrs. Dwight Opperman; Carter Phillips, Sidley Austin; Jay Sekulow, American Center for Law and Justice; Leon Silverman; Mathew Staver, Liberty University; Jeffrey Stone, McDermott Will & Emery; Thomas Tongue, American College of Trial Lawyers; and Dean Ziehl, Pachulski Stang Ziehl & Jones.

At the conclusion of the Awards Ceremony Mr. Joseph thanked all those present, giving special thanks to the Chief Justice for his assistance. He then said he would like to pause for a moment to recognize the fact that in three days Leon Silverman would celebrate his 90th birthday. The Chief Justice joined those present in a round of applause in recognition of this milestone. As there was no further business, Mr. Joseph then adjourned the ceremony.

The traditional black tie reception and dinner commenced at 7 PM. The East and West Conference Rooms provided the setting for the reception. The Annual Dinner was held in the Great Hall. Mr. Joseph welcomed guests and thanked the eight members of the Court present for their attendance. They were: Chief Justice Roberts, Justice Scalia, Justice Kennedy, Justice Thomas, Justice Ginsburg, Justice



Judge Jeff Amestoy received a literary award from Chief Justice Roberts for his article “The Supreme Court Argument that Saved the Union: Richard Henry Dana, Jr. and the Prize Cases.”

Breyer, Justice Alito, and Justice Sotomayor. Mr. Joseph then asked Chief Justice Roberts to deliver the traditional toast to the President of the United States.

At the conclusion of dinner service, Annual Meeting Chair Maureen Mahoney offered thanks to all in attendance that evening, with special thanks to the members of the Court. She recognized with gratitude the outstanding assistance of Marshal Pamela Talkin and the members of her staff who coordinated all of the physical arrangements in the building necessary to make the evening successful.

Ms. Mahoney then announced the concert for the evening. The now-traditional concert was performed by the Alexandria Harmonizers, under the leadership of musical director Joseph Cerutti, Jr. One of the preeminent men’s choruses in the world, the Harmonizers have been delighting audiences with their tight harmonies and high-energy choreography for more than 60 years. Their renowned “wall of sound” has led to numerous prestigious performance in-



Chrissy Kendall is the recipient of the student Hughes Gossett award for her article on the career of Justice Joseph P. Bradley. Chief Justice Roberts conferred the award.

itations and to 16 international contest medals, including four world championships. The men are all amateur singers and range in age from 18 to 81. They have performed at the White House and in other prestigious venues including several previous performances for the Society’s Annual Dinner. The ensemble’s repertoire includes a variety of music ranging from traditional choral music to folk songs to Broadway music. Ms. Mahoney thanked the members of the chorus in advance for their efforts to make it a very special evening at the Court.

The Harmonizers provided a musically diverse and entertaining program for the concluding portion of the evening. Following their performance, the meeting was adjourned for the year.



Christy Jones was recognized by the Chief Justice for her achievement as the State Membership Chair for Mississippi.

The 37th Annual Meeting will be held on Monday, June 4, 2012 in the Supreme Court Building. The Annual Lecture will be given by Professors Judith Resnik and Dan Curtis based on their recent book **Representing Justice**. The presentation will discuss the symbolism used in the Supreme Court Building to portray the goals of justice. Business meetings and a Black Tie Reception and Dinner will be held that evening.

## Judah P. Benjamin: Part II: The Queen's Counsel

By Judah Best\*

Let us set the scene. It is now the beginning of April 1865. Judah P. Benjamin has served in the cabinet of President Jefferson Davis, Confederate States of America, for four long years, first as Attorney General, next as Secretary of War, and finally as Secretary of State. When we left him, he had just said farewell to the United States Senate, departed Washington, and returned home to New Orleans to join in the celebration of secession from the Union. It was a heady time in New Orleans: full of sound and fury, signifying very little.

He was called to Montgomery, Alabama, the site of the new Confederate Government (provisional) to consult with the new President, Jefferson Davis. Benjamin had first become acquainted with Davis when they had served in the United States Senate. In fact, Davis, in their first contact, had

been so acerbic and ill-tempered that Benjamin had felt his honor had been questioned, and called Davis out in writing to a duel. When Davis received Benjamin's letter, he realized that he had gone too far and made amends on the floor of the Senate. In the aftermath of this incident they became fast friends: both, after all, were or had been plantation owners, and came from the adjoining

states of Louisiana and Mississippi. Equally as important, they had lived and harmonized in the small capital city of Washington, especially through the efforts of Jefferson Davis' elegant young wife, Varina. And so, Judah Benjamin packed, and bid all his American relatives an affectionate farewell, with the hope of returning, if but for a brief visit now and then. He could not know that he would never return to New Orleans, or that he would never see his sisters or brothers again.

In Montgomery, he was chosen Attorney General of the Confederacy by Jefferson Davis, who later stated that "Mr. Benjamin, of Louisiana, had a very high reputation as a lawyer, and my acquaintance with him in the Senate had impressed me with the lucidity of his intellect, his systematic habit and capacity for labor. He was therefore invited to the

post of Attorney General."

If anything, Benjamin was over-qualified for the position, and with his capacity for work and efficiency, he soon had the Confederate Justice Department up and humming. What Jefferson Davis really wanted, it seems, was a close legal advisor (in modern terms: a Counsel to the President). Throughout Judah Benjamin's tenure in the Confederate Government (particularly when the government was moved to Richmond after Virginia seceded from the Union) that's what he became. And when the Secretary of War resigned to become a Brigadier General, Judah Benjamin, on 17 September 1861, was appointed Acting Secretary of War (while remaining Attorney General as well).

To put it bluntly, Judah Benjamin was a disaster as Secretary of War (he was confirmed in the post 21 November

1861). He managed to establish systems and controls within the War Department that had been sorely lacking, and that Department also hummed, but the greatest efficiency cannot produce overseas shipments of munitions and guns, which were ordered too late (before his tenure). Moreover, the best of initiative cannot prevent inequities in the diet of fighting troops, when food was always in short supply.

He worked seven days a week, but it was not enough, and his great instincts and talents were out of place: first, he got into a quarrel with "Stonewall" Jackson that nearly resulted in that gifted general's resignation, and worse, he became involved in and thus was censured for the capture of Roanoke Island by Union forces. His role in the fiasco was this: he allowed himself to be positioned in the middle of an argument between a senior general officer and his junior on the issue of whether or not to provide additional fortification and ammunition for the fort on the island. When the senior officer, a West Point graduate, assured Benjamin that the island was adequately fortified, he supported him. He chose the wrong horse, and when the fort was lost, the Confederate Congress wanted him investigated for malfeasance.

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Judah Benjamin (seated, far left) served in several positions in the Confederate Cabinet including Attorney General and Secretary of State.



What the Congress did not know, is that there were no arms and ammunition available to send to the fort, and Benjamin could not tell a congressional committee how desperate the situation was without revealing this fatal information to the enemy.

Twenty-five years later, at the unveiling of the Robert E. Lee monument in Richmond, Colonel Charles Marshall (who had served as aide to Lee) read an extract from an old letter of Benjamin's which revealed all this information. The letter revealed also that Benjamin had consulted with President Davis, had advised him of "my utter inability to supply the requisitions" and Davis had agreed to allow Benjamin to "submit to unmerited censure" rather than "reveal to a congressional committee our poverty." What Davis did was move him upstairs to Secretary of State before Benjamin's enemies in Richmond could successfully attack him.

And so, with this tumultuous background, on 17 March 1862, Benjamin assumed the only position in the Confederate Administration that his language skills and world picture would help him administer skillfully—except that it was too late: had he been appointed Secretary of State in early 1861, he might have established meaningful relations with England and France and so gained official recognition by each of these two powers for the Confederate States of America. There were already able Confederate Agents in England (James Murray Mason) and France (John Slidell). Both men had been in the U.S. Senate with Benjamin: Mason as Senator from Virginia, and Slidell as Senator from Louisiana (and Slidell was Benjamin's closest political advisor back home in Louisiana). However, the timing was off; 1862 saw President Lincoln's issuance of the Emancipation Proclamation, 1863 saw, by July 4, the North's victory at Gettysburg and the South's surrender of Vicksburg. The political climate in Europe, particularly in France and England, turned irrevocably against the South. The next move, the rise of General Ulysses S. Grant and his assumption of control (together with General Meade) over the Army of the Potomac, and the drawn out war of attrition in Virginia between Grant and Robert E. Lee, with the fate of Richmond and Petersburg hanging in the balance, spelled the beginning of the end of the Confederacy. Add to this mix General Sherman's march through the South and General Sheridan's destruction of the Shenandoah Valley as the breadbasket for Lee's trapped army, and the end was in sight.

Judah Benjamin could see the end, certainly by late March of 1865. By that time the Confederate government had been quietly packing its valuable archives and removing them from Richmond. On April 1, 1865, General Lee informed Jefferson Davis that he could not hold out much longer, and would have to evacuate the Richmond defenses, which would turn Richmond into an open city for Union troops and agents. Thus, on April 2, 1865, Judah Benjamin was burning papers of the Department of State and papers related to the activities of the Confederate secret service, for

in addition to his other responsibilities for Jefferson Davis, Benjamin was in charge of a number of shadowy projects which were underway in Canada and the Northern United States. Those papers were too sensitive to remain in a government office about to be overrun by Union troops.

Shortly after eleven o'clock that night, a train bearing Davis, Benjamin and other Confederate officials set out for Danville, Virginia. The fugitive government remained at Danville until word of Lee's surrender at Appomattox Court-house on April 9 reached them. They then fled at night by train to Greensboro, North Carolina, and from there proceeded southward to Charlotte. Benjamin there advised Davis that surrender was the only option available to the Confederacy. Davis would not accept this, and the Davis party continued their flight with the President of the Confederacy still resistant to surrender. Benjamin, more realistic, left them near Washington, Georgia on May 3 1865, and set out to escape, first disguised as a Frenchman traveling through the South on horseback. But let him tell his story as he later related it in writing to his sisters:

**I started on my journey on horseback, and knowing it to be a hazardous one, I determined to disguise myself and assume a false name. I cannot begin to give you the details of my adventures. I found my most successful disguise to be that of a farmer. I professed to be traveling in Florida in search of land on which to settle, with some friends who desired to move from South Carolina. I got a kind farmer's wife to make me some homespun clothes just like her husband's. I got for my horse the commonest and roughest equipment that I could find, and I journeyed as far as possible on byroads, always passing around towns and keeping in the least inhabited districts. My progress was necessarily slow, about thirty miles a day, till I reached central Florida.**

He was then guided to the beautiful mansion of Major Robert Gamble near the Manatee River. Benjamin remained there until plans could be completed for his flight to the Carribean. The stay, while idyllic, was not without potential peril, for Davis had been captured by this time and the hunt was on for Judah P. Benjamin. Captain Archibald McNeill who was also sheltered in the mansion, was himself sought by Union soldiers. There was a surprise raid by Union troops on the mansion, and Benjamin and McNeil (accompanied by his dog) only just escaped into the dense thicket at the rear of the house where they hid in absolute silence while the soldiers searched the mansion and the surrounding land, including the thicket. Benjamin, McNeil and the dog, (who was being hugged by McNeil to keep him quiet) stayed there until darkness when the soldiers gave up the search. It was time to move on, and we pick up Judah Benjamin's travails from his letters to his family:



**I made my way, therefore, to the western coast of Florida, and was nearly a month in procuring a small boat and securing the services of two trusty persons to accompany me in the perilous effort to cross the Gulf of Mexico in a little open boat. I finally departed on the 23rd June, and after a voyage of about six hundred miles in a yawl-boat open to the weather, with no place to sleep, and exposed to frequent squalls, some very severe, I happily arrived at the Bemini Isles [sic] on the Bahama reef, on Monday the 10th instant. Here my risk of capture was at an end, and I deemed it safe to take passage in a small sloop, loaded with sponge, for Nassau.**

Actually, that was not the end of this adventure, because the sloop leaked, the sponges expanded with water and burst the seams of the sloop, and Benjamin had to be rescued at sea by an English Brig that landed him back at Bimini, where he acquired yet another sloop for the trip to Nassau. Upon arrival, he immediately left for Havana, and from there, to St. Thomas to catch the steamer for England.

Five hours after departure, the steamer caught fire and returned to St. Thomas, and the fire was put out through concentrated dousing by all the other ships in the harbor. Two days later, Benjamin set out yet again and finally reached England on 30 August 1865. After the

initial exhilaration of escaping and arriving in England, he settled some last business for the Confederacy, counseled with James Mason in England, and proceeded to France to visit with John Slidell, but more importantly, to be reunited with Natalie and Ninette. While in France, Benjamin was told that if he wished, he could obtain “an honorable and lucrative position in the financial circles in France.” But he had decided that his future lay in becoming a London barrister.

Three problems needed to be addressed: (1) Would he be recognized as an English citizen? (2) How was he to arrange to work and learn under a senior barrister and how was he to join a legal Inn? And finally, (3) How was he to support himself and his family in the United States and in Paris while all this was taking place? The last question was the first solved, at least temporarily. During his time in the Confederacy, Benjamin had been in the practice of purchasing bales of cotton and sending them by blockade runners to

Liverpool for sale. The practice was risky, for it was questionable whether cargoes could avoid Union blockade and reach Liverpool.

Communication between Richmond and Liverpool had been fragile and irregular; but now that he was in England Judah Benjamin found that of the 700 or so bales of cotton he had sent abroad, some 100 bales had landed, and he had about \$20,000 waiting for him. Moreover, as a result of a timely, short-term investment, he had made another \$10,000. In short, it seemed as if he had enough money for his family and to sustain himself while he prepared for the Bar. Months later, his plans were set awry by the failure of the English banking firm where he had placed a large part of his funds. Judah Benjamin’s response was to get a job with an English newspaper writing a weekly by-line on international matters at five pounds an article. He was so successful that he was offered a regular full-time position as sub-editor. He declined the opportunity because it would have interfered

with his plans to become a barrister. He was reduced to living on bread and cheese, but never told any of his relatives of his straitened circumstances.

On 13 January 1866, he entered as a student at Lincolns Inn, and shortly afterward was admitted to “read law” under the instruction of Charles Pollack. Charles Pollack was the son of the Chief Baron of the Exchequer, Sir Frederick Pollack, who “suggested” to his son

that Benjamin study under him. At Lincoln’s Inn, as at all Inns of Court, Benjamin ( in theory) was required to attend for twelve terms (three years) simply by eating a certain number of dinners in the hall of the Society or Inn, that is to say, six dinners in each term. The young men who came up to London to eat their dinners in Hall that term “saw a grizzled man, old enough to be their father, who had, after four years of the fiercest fights, unremitting labour, and the exercise of great power, just escaped with his life, and now sat quietly down to qualify himself to earn his bread.”

On May 22, 1866, Benjamin presented a petition to the Masters of the Bench of Lincoln’s Inn reciting the terms of his birth in St. Croix while that island was under English rule, and the petition recognizing his English citizenship was granted. The *London Times* sets forth succinctly what happened next:



**Fleeing arrest and prosecution for war crimes following the collapse of the Confederacy, Benjamin took refuge in the Gamble Mansion (above) with a famous Confederate blockade runner, Capt. Archibald McNeill. The mansion still stands near Bradenton, FL.**



New York Public Library

In 1866, Benjamin became a student at Lincoln's Inn in London (the emblem of the Inn is shown above.) He was called to the Bar in Trinity only six months later and became an English barrister.

By the influence of Lords Justices Turner and Giffard, of Page Wood (Lord Hatherly) and Sir Fitzroy Kelly, the secretary of the Confederacy was dispensed from the regular three years of unprofitable dining, and called to the Bar in Trinity term (June 6) 1866. Thus, at the age of 55, Mr. Benjamin became an English barrister, joined the old Northern Circuit, and immediately got briefs from Liverpool lawyers, who knew from their American correspondence what a word of power was the name of Judah Benjamin in New Orleans, Washington, and Richmond.

So, less than a year after setting foot in England, Judah Benjamin was a working professional again. There was in fact, some early business: for instance, an old established ship insurance club was desirous of having its Rules, which were very lengthy, revised. The annual meeting of the club was at hand, and as Charles Pollock writes, "the time remaining was so short that two experienced counsel, who had for some years past acted for it, declined the service, although some considerable fee was marked on the papers." Benjamin's name was mentioned and the instructions were sent to him late one evening. Benjamin undertook the assignment:

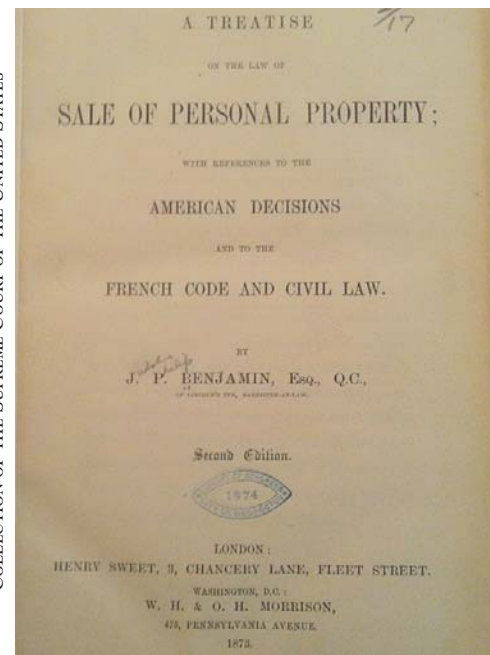
...the very next morning, commencing after an early breakfast, and never pausing for a midday meal, he worked on steadily, and shortly before eight, the hour at which he usually dined, the rules were complete, written out in his own neat hand...with scarce an alteration or correction from beginning to end, as if he had been composing a poem.

Still, he was not all-consumed with work. As Justice Ruth Bader Ginsburg pointed out in her perceptive lecture

at Loyola University School of Law in February 2002, "Repeating his Louisiana progress, Benjamin made his reputation among his new peers by publication." He turned author in 1867 and had in preparation (as he put it in a letter to his family in New Orleans) "a law work which will be ready for publication in November or December next, and will bring me into more prominence with the profession. . . ." Judah Benjamin's law work, "**Benjamin's Treatise On The Law Of Sale Of Personal Property, With References To The American Decisions, And To The French Code And Civil Law,**" commonly known as "**Benjamin on Sales**", was an instant success, both in England and in the United States. In fact, it still is used. Reportedly, it is now in its 7<sup>th</sup> Edition. "**Benjamin on Sales**" "was almost immediately recognized as a legal classic and filled a need long felt by the British bar." As the *London Times* put it, "It was a reasoned and orderly presentation of the law, a discussion of its principles, accompanied by illustrations from the best of the reported cases, and a merciless rejection of those which were repugnant to general rules." It is said that some judges in England would not take their seat without their personal copy of the work beside them on the bench.

Charles Pollock, who had the opportunity to observe Benjamin throughout his career in England, noted, in an article published posthumously, "Reminiscences of Judah Philip Benjamin", that "one great and early advantage held by Benjamin as a lawyer was this—that he was a native of, and educated within, the State of Louisiana, which was one of the French colonies ceded to England, and therefore, the law taught and administered within it was that which took its origin in the Code of Justinian, and was afterwards adopted by the nations of Europe, and continued to be the law of France until the Code Napoleon. The principles and prac-

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Benjamin's lengthy treatise on the law of sale of personal property was published in 1867. Commonly referred to as "Benjamin on Sales", it is currently in its 7<sup>th</sup> edition.



tice of this great system of law Benjamin knew and appreciated thoroughly, and he was at all times ready to point out its leading features, and how they differed in principle from English law.” The special significance of this advantage, as Pollock pointed out, was that this gave Judah Benjamin “a distinct position superior to his brother advocates when arguing, before our Judicial Committee of the Privy Council, appeals from those of the English colonies of French origin which were ceded to England before the Code.”

In the middle of this breakout period in Benjamin’s life as a barrister, author and bon vivant in England, he did not forget the struggles of Jefferson Davis; the former President of the Confederacy had by now been released from military prison by use of the writ of habeas corpus and placed on bond awaiting trial on criminal charges (which trial was never to take place). His health impaired, Davis took the opportunity to travel to England to recuperate and see what financial opportunities might be presented, and to begin writing his memoirs. Benjamin met with Varina and Jefferson Davis in London. It appears to have been an edgy meeting, with the former President concerned with the past and attacks on his reputation, and with the former Secretary of State living in the present and planning for his growing professional future. Davis was particularly infuriated by the accounts of the war and of Davis himself set forth in a book by Edward Pollard, the former editor of the *Richmond Examiner*. He asked Benjamin’s advice on answering the charges. Benjamin’s advice was consistent with his reaction to all matters involving the war:

**If you publish the statement you will find it impossible to remain silent under the replies, and your existence here will be poisoned by the necessities of engaging in a newspaper warfare at every disadvantage against hosts of unscrupulous enemies. The book you notice, I never heard mentioned, and it will drop still-born into oblivion, unless advertised by your notice of it.**

Davis took Benjamin’s advice. They would communicate in writing over the next fifteen years and see each other on five other trips Davis took to Europe, but never with the collegiality and closeness that they had enjoyed during their time together in the Confederacy.

Meanwhile, Benjamin’s reputation and practice were growing. In a letter dated 15 October 1871 to his family in New Orleans, he noted that financially he had “really ‘turned the corner’ at last” and by 10 August 1872, he informed them that he had had “high professional promotion lately”. By early 1870, Benjamin had been made Queen’s Counsel for Lancashire County only, which was necessary for Liverpool business. It would be important for him to be made Queen’s Counsel for all of England. In the Spring of 1872, Benjamin had argued *Potter v. Rankin* in the House of Lords,

and his argument had moved Lord Chancellor Hatherley to recommend to the Queen a patent of precedence. The Queen consented and issued her warrant directing that such a patent should be granted to him. He now had rank above all future Queen’s Counsel. As he put it to his family in New Orleans:

**I received it in person from the Lord Chancellor at his own house, and he gave it to me with some very flattering expressions. I need hardly say that as the law journals and the *Times* have contained some articles on the subject it will be of immense value to me in my profession in various ways, both in increased income and in greater facility of labor, for you must know that a “leader” who has a patent of precedence has not half as hard work as a “junior,” because it is the business of the junior to do all the work connected with the pleadings and preparation of a cause, and the leader does nothing but argue and try the causes after they have been completely prepared for him . . . .**

**I now have to wear a full bottomed wig, with wings falling down on my shoulders, and knee breeches and black silk stockings and shoes with buckles, and in this ridiculous array, in my silk gown, to present myself at the next levee of Her Majesty to return thanks for her gracious kindness.**

Benjamin’s rank as leader dated from 1872 for all legal assignments and for all of England. The extraordinary nature of his receipt of the patent of precedence resulted in a wealth of favorable publicity from the press and the legal journals. He literally had more work than he could handle. He was now restricting himself more and more to practice in London and limiting himself even there to appearances at the House of Lords and the Privy Council. His linguistic ability was attuned to the dominion cases in Privy Council, for he was fluent in English and French, understood Latin, and could read Spanish. In Volume Three of the Appeals Cases for 1877-8, he is listed in 30 of the 65 cases. These include an appeal from the Supreme Court at Shanghai, another from the Supreme Court of South Australia, two from Canada, and one from the British Supreme Consular Court of Constantinople.

All this while, he continued sending money to his family in New Orleans and maintaining his wife and daughter in France. On 7 September 1874, Ninette Benjamin was married in Paris to Captain Henri de Bousignac of the French Army. It was a lavish wedding, and Benjamin settled a substantial dowry upon his daughter. Later, he engaged in the construction of a formidable mansion in Paris as he contemplated his retirement. However, by 1882, heart trouble was compounded by a chronic diabetic condition. He nevertheless continued to take cases and argue them. At Christmas

*Continued on Page 12*

1882, Benjamin had a severe heart attack and was forced to retire from his profession. He formally announced his retirement and returned the briefs and the money advanced as retainers. As he later wrote to his sister: "A letter from the Attorney General informs me that he has received a requisition signed by more than eighty Queen's Counsel, and by all the leading members of the bar of England, desiring him to offer me a public dinner in order to take a 'collective farewell' of me and to testify their high sense of honor and integrity of my professional career, and of their desire that our relations of personal friendship not be severed. The correspondence will be made public. This is the first time that such an honor has been extended to a barrister on leaving the profession." The banquet took place in the hall of the Inner Temple, on Saturday evening, June 30, 1883. The Attorney-General introduced Benjamin, who was cheered throughout his remarks, and concluded as follows:

**[F]rom the Bar of England, I never, so far as I am aware, received anything but warm and kindly welcome. I never had occasion to feel that any one regarded me as an intruder. I never felt a touch of professional jealousy. I never received any unkindness; on the contrary, from all quarters I received a warm and cordial welcome, to which, as a stranger, I had no title, except that I was a political exile,**



The Queen's Counsel

**seeking by honourable labour to retrieve shattered fortunes, wrecked in the ruins of a lost cause.**

With cheers of the Bar ringing in his ears, Judah Benjamin left England for France, never to return. On 6 May 1884, he died in his seventy-third year at his mansion in Paris. He was buried in Père-Lachaise cemetery in grounds marked only for the families of St. Martin and Bousignac. The report of the death of this extraordinary man covered three columns in the *London Times* on 9 May 1884.

*"Arms and the man I sing, who first from the shores of Troy came destined an exile to Italy and the Lavinian shores, a man much buffeted on land and on the deep. . ."*

Virgil

*\*Judah Best is a member of the Supreme Court Bar, and is, inter alia, a member of the bars of the State of New York and the District of Columbia. He is a Fellow of the American College of Trial Lawyers, former Chair of the ABA's Standing Committee on Judiciary, and Past Chair of the ABA's Section of Litigation. He is a retired partner of the law firm of Debevoise and Plimpton. The first half of this article appeared in Vol. XXXIII #2, 2011*

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Benjamin Lane Bosell, Dallas  
Helen Bradley, Euless  
Sarah Shelton Branstetter, Houston  
Kristin Nicole Brown, Dallas  
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Craig Carlson, Killeen  
William S. W. Chang, Houston  
Jeff Chapman, Dallas  
Jeffrey Hamilton Chestnut, Dallas  
Randy Cubriel, Austin  
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Mary J. Cureton, Fort Worth

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Edward C. Dawson, Austin  
David Joseph Diamond, Austin  
Susanna Dokupil, Houston  
Holly Elizabeth Etlinger, Houston  
Chad Flores, Houston  
R. James George Jr., Austin  
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Daniel K. Hedges, Houston  
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Scott Keller, Austin  
Kimberly Sharetta King, Austin  
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Janna Proehl, Houston  
Holly Elizabeth Robbins, Houston  
Ashley Marie Senary, San Antonio  
Aashish Kiran Shah, Houston  
Camisha Lashun Simmons, Dallas  
Noah Nicholas Speck, Houston  
Michelle Ann Spiegel, Houston  
Karl S. Stern, Houston  
Nitin Sud, Houston  
Laura Anne Sutton, Houston  
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Allison Cohen, Arlington  
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Paul Fiorino, Arlington  
Vanessa Gallagher, Clifton  
Kristina Godbey, Henrico  
Daniel Hebda, Virginia Beach  
Linda Larson Kemp, Arlington  
Paul Austen Lake, Virginia Beach  
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Milan Sturgis, Springfield  
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Noah A. Barnes, Morgantown  
Joseph R. Blalock, Morgantown

John A. Carr, Charleston  
W. Jesse Forbes, Charleston  
Mark Higginbotham, Hurricane  
Rose M. Humway, Wheeling  
Mark A. Imbrogno, Charleston  
Anne Marie Lofaso, Morgantown  
John McCutcheon, Lewisburg  
L. Thompson Price, Charleston  
Kelley Shaffer, Dailey  
Joshua Smith-Chimer, Morgantown

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Jane Appleby, Shorewood  
Jeremy Bullock, Milwaukee  
William Crowley, Milwaukee  
Christopher Ehrfurth, Wauwatosa  
Laurie Frey, Milwaukee  
Robert H. Friebert, Milwaukee  
Ted Greeley, Milwaukee  
Lars Gulbrandsen, Milwaukee  
Emily Hinkens, Milwaukee  
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James Madlom, Whitefish Bay  
Aaron McCann, Milwaukee  
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Patrick S. Nolan, Milwaukee  
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Anthony Prekop, Milwaukee  
Kurt Simatic, Waterloo  
Lynn Talg, Wausau  
Julia Veenendaal, Washburn  
Shawn Woller, Milwaukee

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Scott P. Klosterman, Casper  
John A. Masterson, Casper  
Ryan Schwartz, Casper  
Richard L. Shanor, Cheyenne  
Michael J. Sullivan, Cheyenne

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Thomas G. Heintzman, Toronto, Ontario

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Edward E. Lehman, Chaoyang District, Beijing

### SWITZERLAND

P. Protopapa, Mies, Vaud

### UNITED KINGDOM

Arthur L. Marriott QC, London, England

**The Supreme Court Historical Society hosts  
The 2011 Frank C. Jones Reenactment  
*TEXAS V. WHITE***

**Wednesday, November 9, 2011 6:00 pm**

**Historical Overview by Professor Melvin I. Urofsky  
Reenactment of *Texas v. White***

**The Honorable Antonin Scalia – presiding  
David Beck – appearing on behalf of the State of Texas  
Patricia Millett – appearing on behalf of George W. White**

***TEXAS V. WHITE*, 74 U.S. 700 (1869) was a significant case argued before the United States Supreme Court in 1869. The case involved a claim by the Reconstruction government of Texas that United States bonds owned by Texas since 1850 had been illegally sold by the Confederate state legislature during the American Civil War. The state filed suit directly with the United States Supreme Court, which, under the United States Constitution, retains original jurisdiction on cases in which a state is a party.**

**Invitations will be mailed to members and further information is available on our website at [www.supremecourthistory.org](http://www.supremecourthistory.org)**

