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Thirty-Nine and Counting: Society Annual Meeting June 4, 2014

The transition from spring into summer is marked by many wonderful social events, not the least of which is the Society's Annual Meeting which was held on June 4, 2014. The now traditional one-day event is the highlight of the Society's social calendar, and, once again, the Supreme Court Building was the setting for the day's activities.

The opening event of the meeting was the Annual Lecture. Justice Sonia Sotomayor addressed a large audience of members and their guests who assembled in the Court Room. Society President Gregory P. Joseph welcomed members, and observed that this was Justice Sotomayor's first Annual Lecture for the Society, but he hoped that she would follow the example set by some of her colleagues who have given more than one Annual Lecture.

The Justice's presentation centered on her autobiographical book **My Beloved World**, which debuted atop the *New York Times* best seller list in February of 2013 and has gone on to become one of the top-selling books ever written by a member of the Supreme Court. Mr. Joseph advised the gathering that, immediately following her presentation, the Justice would answer some of the questions submitted by audience members prior to the lecture.

Prior to her discussion, Mr. Joseph gave a brief biographical sketch of the Justice's life and career. Born in the Bronx, New York, Sonia Sotomayor earned an undergraduate degree from Princeton, and a J.D. from Yale Law School, where she

served as an editor of *The Yale Law Journal*. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979 to 1984. She then became an associate and subsequently a partner, at the firm of Pavia & Harcourt in New York City, where she litigated international commercial matters. She represented a number of high profile

clients during that period, including Ferrari Motors. President George H. W. Bush nominated her to the U. S. District Court, Southern District of New York, in 1991 and she served on that Court from 1992 until 1998. In 1998 she was nominated and appointed a Judge on the U. S. Court of Appeals for the Second Circuit, and served on that Court from 1998-2009. President Barack Obama nominated her as an Associate Justice of the Supreme Court of the United States, and she



Steve Petteway/Collection of the Supreme Court

Justice Sonia Sotomayor delivered the 39th Annual Lecture centered on her autobiography *My Beloved World*.

assumed her seat on August 8, 2009.

Since joining the Court Justice Sotomayor has contributed generously of her time to Society programs, including presiding over the reargument of *Flood v. Kuhn* in the 2013 Frank C. Jones Reenactment Series. In that role she exhibited her quick wit and great knowledge of and love for baseball and the law.

Justice Sotomayor spoke from the well of the Courtroom, but soon asked that the rope separating that area from the general seating area be removed so that she could be closer to the audience members. Her remarks were warm

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A Letter from the President



July 1 is the first day of the Society's fiscal year, and this year promises to be filled with interesting publications, programs and opportunities. Events already calendared for the Fall include The Frank C. Jones Reenactment of *McCullough v. Maryland* with Justice Breyer presiding; two lectures in the Leon Silverman Lecture Series focusing on Civil War-related

topics (Roger Taney and Abraham Lincoln, respectively); and a special lecture to kick off a symposium marking the 150th Anniversary of Salmon P. Chase's appointment as Chief Justice. Further information about each of these events is available on the Society's website, www.supremecourthistory.org.

Also on the calendar this Fall is the Society's Second New York Gala which will be held on October 28, 2014. This fundraising event is one of the most enjoyable and festive ways to support the work of the Society. The Grand Ballroom of the storied Plaza Hotel is the setting, and that evening we will recognize two special honorees, both former Supreme Court Law Clerks. They are: Katherine L. Adams, Senior Vice President and General Counsel of Honeywell; and Ivan K. Fong, Senior Vice President Legal Affairs & General Counsel of 3M. Both are recognized leaders in the corporate counsel field, and each has a strong interest in the work and history of the Court. Both served as Law Clerks to Justice Sandra Day O'Connor.

The Gala is designed to allow maximum time for people to mix and renew acquaintances, as well as to recognize the accomplishments of the special honorees. Like our inaugural Gala, it will include a uniquely historical element. Society Vice President Dorothy Goldman will exhibit two pieces from her private collection related to the Bill of Rights. Guests on October 28th will have a rare opportunity to view a **Slip Copy of the First Proposal for the Bill of Rights** handed to Congressmen in August 1789, and the leather bound **Journal of the Senate containing the first approval of the Bill of Rights**. Both will be on display that evening. Each guest will receive a miniature marble block, hewn from the Court Building, bearing the Seal of the Supreme Court and other souvenirs.

The Gala is the only fundraising event the Society conducts, and the funds it generates underwrite much of the expense involved in producing our publications and programs. Specifically, funding for the Summer Institute for Teachers and the forthcoming one-volume history of the federal judiciary is provided by contributions in support of the Gala. Please consider providing support to this event to the extent that you are able. It is one of the most effective ways to foster the work of preserving and disseminating the history of the Supreme Court of the United States and the federal judicial system.

This year we celebrate the 40th Anniversary of the Society which was founded in 1974. On behalf of the Officers and Trustees, let me offer our thanks for your support of the Society and its many activities. We also welcome, and are grateful to receive your ideas, articles and contributions of time and effort. The events planned for the year will be as successful as your participation makes them. I encourage you to visit the website now and make plans to attend or support our outstanding events.

Gregory P. Joseph



Guests are shown at the dinner portion of the Inaugural Gala held in March 2013. The Ballroom of the Plaza Hotel in New York will be the setting for the Second Gala on October 28, 2014.

Quarterly

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Managing Editor Kathleen Shurtleff
Advisory Editor James B. O'Hara
Advisory Editor Frank D. Wagner

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J. Walter Sinclair, (left) photographed with Justice Scalia, was recognized for his successful work as the Idaho State Chair.

and candid and again exhibited her wit. Following those remarks, she answered questions from the audience. Her response to the questions provided even greater insight into the Justice and the experiences that have shaped her personal and professional life. The text of the Justice's remarks will appear in a forthcoming issue of the **Journal of Supreme Court History**.

Following the lecture, many Society members and guests toured the building. An optional tour was also available prior to the lecture, under the direction of the Office of the Curator of the Court. Participants learned about the history and construction of the building and many other interesting historical insights into the history of the institution. These tours afford a wonderful opportunity for guests to view portions of the building that are not usually open to the public. We express gratitude to the Curator of the Court, **Catherine Fitts**, and to **Erin Huckle**, Director of Tours, and her assistants for providing this opportunity.

At 6 PM, members of the Board of Trustees gathered in the Supreme Court Chamber to hold the Annual Meeting of the Board. President Joseph opened the meeting, welcoming Trustees and their guests and identifying other officers present. They were: Chairman of the Board, **Ralph I. Lancaster**; **Philip Kessler**, Secretary of the Society and Chair of the Nominating Committee; Vice Presidents, **Vincent Burke III**, **Dorothy Goldman**, **Jerome Libin**, **Cecilia Marshall** and **Chilton Varner**; Treasurer **Sheldon Cohen**; and Vice President Emeritus, **Barrett Prettyman, Jr.**

Mr. Joseph presented a brief summary of the past year's most significant events. Program activity is coordinated under the direction of the Society's Program Committee chaired by **Kenneth Geller**. Important programs given over the past year include The National Heritage Lecture delivered on May 22 by noted author and historian James Swanson who discussed Chief Justice Earl Warren and his role on the Warren Commission. The first two of the four lectures in the 2014 Leon Silverman lecture series, which focuses this year on the Supreme Court and the Civil War

were also presented in May. Members can view the lectures through the Society's website, www.supremecourthistory.org, by linking to the C-Span site through the Events Page of the Society's site.

Two sessions of the Summer Institute for Teachers were held in June. This marks the 20th year of the Institute, which provides teachers from around the nation an opportunity to experience the work of the Court first-hand and to be instructed by experts including some who work in, or practice before the Court. In October 2013, the Society partnered again with the Historical Society of the Courts of New York for a panel discussion of the office of the Solicitor General of the United States. We were honored to have Justice Kagan participate with two other distinguished former Solicitors General, Paul Clement and Drew Days. The moderator was Jeffrey Minear, Counselor to the Chief Justice. Both Messrs. Clement and Minear are Trustees of the Society, and Mr. Days is a Trustee Emeritus.

The Society conducts an ambitious publications program. **Professor James O'Hara** recently stepped down after a long and distinguished tenure as Chair of the Publications Committee, but he will continue to serve as Chair of the Library Committee to oversee the extensive collection of works relating to the Court's history. **Don Ayer** succeeds Prof. O'Hara as Chair of the Publications Committee and brings great expertise and talent to that task. Production of the Society's newest special publication, the one-volume history of the Federal Judiciary, is progressing ahead of schedule. The Society has contracted with prestigious Oxford University Press to publish this much-needed, concise history of the federal courts.

The Society's active acquisitions program focuses on acquiring artifacts and memorabilia of historical significance for the Court. This collection continues to grow under the direction of Society Vice President **Dorothy Goldman** who works closely with **Catherine Fitts**, Curator of the Court, and other members of her staff. Many of the items in the collection are utilized in temporary displays, while others are displayed on a more extended basis. Portraits of past Associate Justices, for example, grace the hallways of the ground floor of the building and can be viewed by visitors to enrich their understanding of the Justices and the institution. The Society assisted in obtaining many of those portraits, and they represent only a small portion of the total collection.

Vincent C. Burke III continues to serve as Chair of the Gift Shop Committee. The Gift Shop (located on the ground floor of the Court) offers a wide range of quality items for sale, including publications relating to the Court and special gift items. All profits from sales at the Gift Shop are utilized to underwrite the general operations of the Society, and all members receive a discount as a benefit of membership.

The National Membership Campaign was spearheaded by **Richard (Doc) Schneider** of Georgia. He assembled a

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team of dedicated volunteer state chairs who reached out to invite their colleagues and friends to join the Society. Mr. Schneider has served as state chair for Georgia in the past, so his membership service extends well beyond this year as National Chair. Several successful state chairs were present and were recognized in the Awards portion of the Annual Meeting.

Following the summary of Society activities for the year, Mr. Joseph turned to the business portion of the meeting. He called upon **Philip Kessler**, Secretary of the Society and Chair of the Nominating Committee, to present candidates for election to the Board of Trustees and other offices. The first nomination was **Robert Anello**, who was nominated to serve an initial three-year term on the Board of Trustees.

Mr. Kessler presented a second list of candidates who were nominated to serve an additional three-year term as a member of the Board of Trustees. Those nominated were: **Dennis Block, Norman Brothers, Sheldon S. Cohen, James R. Figilulo, David Frederick, James Gauch, William J. Haynes, Christy Jones, Philip Kessler, Gregory Joseph, Robert Juceam, Judge Judith Kaye, Joan Lukey, Mrs. Thurgood Marshall, Theodore Olson, John Quinn, Teresa Roseborough, Richard Schneider, Kenneth Starr, Jeffrey E. Stone, and David Weinstein.**

The third and final list of candidates included nominations for election as officers and members at large of the Executive Committee. The following were nominated to serve for a three-year period in the offices indicated: **Gregory Joseph, President; Vincent C. Burke, Vice President; Mrs. Thurgood Marshall, Vice President; and Philip Kessler, Secretary.** Following the nomination of officers, Mr. Kessler read the list of candidates nominated to fill a one-year term as a member at-Large of the Executive Committee: **Robert Anello, Charles Cooper, Kenneth S. Geller, Maureen Mahoney, Teri McClure, James Morris, John Nannes, James B. O'Hara, Theodore Olson, Leon Polsky, Richard (Doc) Schneider and Seth P. Waxman.**

Mr. Joseph called for a motion to elect the nominees to the positions indicated in the Report of the Nominating Committee. A motion was made, seconded and a vote was taken. All persons were elected to the positions and for the terms as presented by the Nominating Committee.

The elections marked the conclusion of the business portion of the Annual Meeting of the Board of Trustees. The annual awards ceremony followed the meeting, and Justice Antonin Scalia assisted by presenting awards to those identified for recognition. Mr. Joseph expressed his gratitude to Justice Scalia for his tremendous support to the Society throughout the years of his service on the Bench, even before his elevation to the Supreme Court, and asked the Justice to join him at the podium.

Customarily, the first prizes presented at the Awards Ceremony are delivered to the winners of the Hughes

Gossett Literary Prizes for outstanding articles published in the **Journal of Supreme Court History**. Regrettably, none of the prize winners was able to attend to receive the award in person, but Mr. Joseph announced their names. For the first time in the history of the prize, it is shared this year between three authors who collaborated on their award-winning piece, "*Revisiting the Roosevelt Court: The Critical Juncture from Consensus to Dissensus.*" The authors are **Amy Steigerwalt, Artemus Ward, and Pam Corley**. The student prize was awarded to **Jessie Steffan** for her article "*Doing Brandeis Justice: The Development of the Liebmann Dissent.*"

Mr. Joseph announced that the first awards to be presented that evening would honor successful state chairs who were recruited by **National Membership Chair, Richard (Doc) Schneider**. Mr. Schneider was persuaded to accept the task of recruiting and organizing 50-plus state and regional chairs to carry out a national membership campaign. Mr. Schneider was able to carry out this task while conducting a busy and successful national legal practice simultaneously. Mr. Joseph thanked Mr. Schneider for his efforts.

Mr. Joseph then announced the names of the five state chairs present to be recognized for their successful work. They were: **Robert Anello of New York City; Francis Devine III of Pennsylvania; J. Walter Sinclair of Idaho, John Tucker of Oklahoma and Alan Vickery of New York City.** Justice Scalia congratulated each award winner and assisted by presenting them marble paperweights in recognition of important contributions to the work of the Society.

Mr. Joseph expressed gratitude to **David Leitch, Chair of the Development Committee**. The members of the Development Committee work to secure the financial support for the Society, and Mr. Leitch has filled the role as Chair extremely ably. The range of fund-raising efforts include an Annual Fund campaign and corporate and foundation giving. The Inaugural Gala was also organized and promoted by Mr. Leitch and the Development Committee. Although the event held in March 2013 technically falls in the previous fiscal



Society Trustee Laurie Webb Daniel of Holland & Knight (shown with Justice Scalia) was recognized for her support of the Society.



Justice Scalia presented Professor James B. O'Hara (left) a special award to honor the Professor's long and extraordinary support of the Society.

year, the proceeds raised provided much-needed financial support for Society activities in the current year. He thanked Mr. Leitch for his outstanding work to sustain the Society's operations, and for his great leadership.

The second New York Gala will take place on October 28, 2014 and Mr. Leitch and members of the Development Committee have worked hard to organize and plan the event. This year's Gala honorees are **Katherine L. Adams, Senior Vice President and General Counsel of Honeywell, and Ivan Fong, Senior Vice President, Legal Affairs and General Counsel of 3M.** Mr. Joseph said the goal for the event is to meet or exceed the \$650,000 raised through the first event. He called upon Trustees and other loyal supporters of the Society to support the event by purchasing tables in increments of \$25,000, \$15,000 or \$10,000. **Society Vice President Dorothy Goldman** will display some rare documents pertaining to the founding of the Republic at the Gala providing participants the chance to view two important documents relating to the Bill of Rights.

Mr. Joseph announced during the evening's award ceremony that some donors to the Inaugural Gala who had not been recognized previously would receive awards. In addition, awards will be presented to several who have contributed to the 2014 Gala, as well as major donors who will be recognized for contributions made to support other projects and programs. Mr. Joseph expressed particular gratitude to all five of the Society's Vice Presidents who have consistently gone above and beyond the call of duty in terms of their generosity. They are **Vincent Burke, Dorothy Goldman, Jerry Libin, Cissy Marshall, and Chilton Varner.** Their significant leadership and participation in the work of the Society was supplemented by generous financial support which has aided in funding special programs and publications, obtaining valuable acquisitions for the collection, and in underwriting the construction of the Society's headquarters building and the renovation of the Gift Shop.

Justice Scalia joined Mr. Joseph in presenting awards to the special donors. Present to be recognized that evening were: **Vincent C. Burke III, The Clark-Winchcole Foundation; Sheldon S. Cohen, The Marshall Coyne Foundation; Charles J. Cooper, Cooper Kirk; Laurie Webb Daniel; Dorothy Goldman (Gala 2013); James L. Goldman; William J. Haynes, II; Philip J. Kessler (New York Gala FY 2013); Thomas C. Leighton, Thomson Reuters; David G. Leitch (New York Gala FY 2013); Dennis J. Maggi, American College of Trial Lawyers; Joseph R. Moderow; Steven F. Molo, Molo Lamken; Gary P. Naftalis, Kramer Levin Naftalis (NY Gala FY 2013); Michael H. Park, Dechert (NY Gala 2013); Carter G. Phillips, Sidley Austin, (NY Gala FY 2013); Richard A. Schneider, (NY Gala 2013); John S. Siffert, Lankler Siffert & Wohl (NY Gala FY 2013); Mathew D. Staver, Liberty University; Chilton D. Varner (NY Gala 2013); Paul Verkuil; Alan B. Vickery; and Tal Weberg.**

The last award was one rarely presented by the Society. It was a seal of the Court framed in velvet fabric that was once a portion of the original draperies from the Supreme Court Chamber. This award is reserved for individuals who have provided extraordinary service to the Society. That evening the recipient was **Professor James B. O'Hara.** Although there is a long list of contributions he has made to the Society, the most visible is the collection of well over 1,000 volumes on Supreme Court history that grace the shelves of the library at Opperman House. The library collection has continued to grow under the careful supervision and efforts of Mr. O'Hara, who has overseen the collection of additional volumes over the last decade. Professor O'Hara served as Chair of the Publications Committee for many years, and has served as a contributor to and as advisory editor of the *Quarterly* magazine for some years as well. He has been a



Justice Sotomayor was photographed with Society Vice President Chilton Varner (right) during the 39th Annual Reception.

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featured speaker in the Leon Silverman Lecture series and has travelled the country speaking on behalf of the Society in programs produced with other historical groups. The presentation of this special award serves as an expression of the deep and abiding respect in which Professor O'Hara is held by all.

At the conclusion of the ceremony Mr. Joseph thanked all those present, offering thanks again to Justice Scalia for his assistance, and the meeting was adjourned.



President Gregory Joseph (left) welcomes guests to the 39th Annual Dinner. Chief Justice Beverley McLachlin of the Supreme Court of Canada is shown seated next to Chief Justice John G. Roberts, Jr.

The traditional black tie reception and dinner started at 7 PM with the East and West Conference Rooms as the setting for the reception. The Annual Dinner was held in the Great Hall. When dinner was convened, Mr. Joseph gave a brief greeting and thanked the members of the Court for their participation. The members of the Court who attended that evening were: Chief Justice Roberts, and Justices Scalia, Thomas, Breyer, Alito and Sotomayor. After recognizing the members of the Court present, Mr. Joseph called upon the Chief Justice to deliver the traditional toast to the President of the United States.

At the conclusion of dinner, Annual Meeting Chair **Carter Phillips** thanked all who had participated for their support and offered thanks for the outstanding assistance of **Marshal Pamela Talkin** and the members of her staff who coordinate all the physical arrangements in the building necessary to make the evening successful.

Mr. Phillips then introduced the musical program. For the first time in the history of the event, the concert was not performed by a choral group. Instead guests were entertained by the Federal City Brass Band. This band recreates the sound and appearance of a regular U.S. Army Regimental Brass Band of the 1860s. With a few exceptions, all instruments used are original dating to the mid-19th century



The members of the Federal City Band doff their caps in salute to the audience following their performance on June 4.

and come from the collection of band members and the Mark A. Elrod Collection. The sources of the music played by the band include original band journal and sheet music of the Civil War era. Comprised of professional musicians, music educators, historians and re-enactors, the group travels throughout the mid-Atlantic region and has performed in such national landmarks as Arlington National Cemetery, Ford's Theater in Washington, DC, the Kennedy Center for the Performing Arts and the Smithsonian Institution. The Band is under the direction of their founder, Jari Villanueva. The mission of the group is to enrich, educate and entertain audiences with their performances.

The sound of the instruments reverberated throughout the Great Hall with the notes of patriotic and traditional Civil War period tunes, and provided a dramatic and exciting conclusion to the Annual Meeting.



Society Vice President Mrs. Thurgood Marshall and her son John Marshall were photographed prior to dinner.

Opinion Days in the Supreme Court

By: Hon. Jon O. Newman*

The profusion of opinions filed in the closing days of the Supreme Court’s most recent term – 24 in June -- prompted this survey of the opinion day practice of the Court, which for many years filed opinions only on Mondays.

My interest in the opinion day practice stems from my year as senior law clerk to Chief Justice Earl Warren during the October 1957 Term. In conversations with Anthony Lewis, who began his distinguished reporting on the Court for the *New York Times* that term, we both shared a concern that the Court’s practice of handing down opinions only on Mondays made it difficult for the press to report on the many opinions filed in the final weeks of the Court’s term. In June 1958 the Court decided 38 cases on Mondays -- 15 on June 30, the final Monday of the Court’s 1957 Term.

In the spring of 1958, I raised the matter with the Chief Justice, who expressed some sympathy for the reporters’ plight and broached the issue within the Court. Justice Frankfurter was adamantly opposed to varying the Monday opinion day. When I had the temerity to suggest to him that because the Court wrote its opinions to inform the public of its reasons, spreading out opinion days in June would enhance reporters’ ability to assist the Court in that endeavor, he told me that such concerns were none of the Court’s business.

Many years later, when Linda Greenhouse, then the distinguished Supreme Court reporter for *The New York Times*, suggested to Chief Justice Rehnquist that opinion days should be spread out in the Court’s closing weeks, he replied (perhaps playfully), “Just because we announce them all on one day doesn’t mean you have to write about them all on one day. Why don’t you save them for the next day?” See Linda Greenhouse, “Telling the Court’s Story: Justice and Journalism at the Supreme Court” 105 *Yale L. J.* 1537, 1558 (1996).

Early practice. For most of its history the Supreme Court handed down opinions only on Mondays. See Eugene Gressman *et al.*, *Supreme Court Practice* 17 (9th ed. 2007) (“Sup. Ct. Practice”). Rare exceptions were *Wolf v. Hamilton*, 108 U.S. 15 (1882), decided on Friday, Nov. 10, 1882, and *Vicksburg and Meridian R. Co. v. Putnam*, 118 U.S. 545 (1886), decided on Friday, Oct. 22, 1886. A very odd filing occurred in the October 1882 Term when *In the Matter of Amendments to Rules 1 and 10*, 108 U.S. 1 (1882), concerning taxation of the clerk’s fees for printing of records, was filed on Sunday, November 26, 1882.

Modern practice. “Beginning with the 1971 Term, the Court abandoned Mondays – at least during the weeks when oral arguments are scheduled – for the normal release of written opinions in argued cases. . . . Once the argument schedule has ended, the Court may issue some written opinions on Mondays, . . . [b]ut even that late in the term, Monday is not the exclusive day for announcing opinions.”

Sup. Ct. Practice 17. A notable precursor to the practice that began with the 1971 Term was the filing of the “Pentagon Papers” case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), on Wednesday, June 30, 1971, at the end of the 1970 Term.

In June of the 1971 Term, ten opinions were filed on Wednesday, June 7, 1972, seven on Thursday, June 22, 1972, and ten on Thursday, June 29. However, the Court reverted to filing June opinions on Mondays in the 1972 Term. Four opinions were filed on Monday, June 4, 1973, eight on Monday, June 11, 1973, and twelve on Monday, June 18, 1973.

Filings on days other than Mondays in June resumed in the 1973 Term with six opinions filed on Wednesday, June 19, 1974, seven on Tuesday, June 25, 1974, and seven on Wednesday, June 26, 1974. That term ended in July with the notable filings of the Nixon tapes case, *United States v. Nixon*, 418 U.S. 683 (1974), on Wednesday, July 24, 1974, and an important school desegregation remedy case, *Milliken v. Bradley*, 418 U.S. 717 (1974), on Thursday, July 25, 1974. Filings on days other than Mondays in June continued thereafter as indicated by the following table for the 1974-1977 Terms:

Week & Year	Tue	Wed	Thur	Fri
6/2/1975			1	
6/16/1975	5			
6/23/1975	6	5	6	
6/7/1976			3	
6/14/1976			8	
6/21/1976			8	8
6/28/1976	3	3	4	4
6/6/1977			6	
6/13/1977	1		7	5
6/20/1977	2		5	2
6/27/1977	2	5		

At the end of the 1975 Term, six opinions were filed on Tuesday, July 6, 1976, after the long July 4 holiday.

Although the Court has continued to file opinions on days other than Mondays in the closing weeks of subsequent terms, there have been instances when filings on a single day imposed an especially difficult burden on the press. On Wednesday, June 29, 1988,

the last opinion day of the 1987 Term, the Court filed nine opinions totally 446 pages. See 487 U.S. 589-1035 (1988).

Of the non-Monday filings in June of the 2013 Term just ended, two opinions were filed on Thursday, June 12, 2014, three on Thursday, June 19, three on Wednesday, June 25, 2014, and two on Thursday, June 26, 2014. The term’s last opinion was filed on Tuesday, July 1, 2014, followed by the important opinion relating to an order filed on Thursday, July 3, 2014, in *Wheaton College v. Burwell*, 2014 WL 3020426 (2014).

By spreading out the filing of opinions on days other than Monday in June the Court has helped the press perform its task of informing the public about the substance and significance of the Court’s opinions.

* Judge Newman is a senior judge of the U.S. Court of Appeals for the Second Circuit.

Footnotes and the full article can be found on our website at www.supremecourthistory.org on the publications page

The Care and Feeding of Justice Oliver Wendell Holmes, Jr.

By: Todd C. Peppers*

Over the years, much has been written about Justice Oliver Wendell Holmes, Jr. and his law clerks. Graduates from Harvard Law School, and handpicked by Harvard Law Professors John Chipman Gray and Felix Frankfurter, the young men who clerked for Holmes were more than legal assistants. Besides reading cert. petitions and looking up case citations, they were expected to provide a host of non-legal services – from paying the Justice’s bills and keeping track of his will to being social companions to the Justice.

In Justice Holmes’ voluminous personal papers, there exists a fascinating letter from out-going law clerk John Lockwood to incoming clerk Alger Hiss. Written on June 1, 1929 (but updated and mailed on September 26, 1929), in the letter Lockwood announces that he is sending Hiss a memorandum (prepared years before by former Holmes clerk James Nicely) which contains a list of clerkship instructions. Lockwood, however, cannot resist sharing his own suggestions and insights with Hiss, thereby providing a rare glimpse into how the Holmes clerks guarded and served the aging Justice Holmes.

Secrecy is the first topic discussed by Lockwood, which is ironic since Hiss would become one of the most notorious spies of the twentieth century. For Lockwood, the duty of confidentiality included both the business of the Court as well as the personal life of the Justice.

I wish herewith to enjoin upon you the matter of secrecy. Not that you will not want and realize the necessity of it but that I think that you may not, as I did not, quite, at the start, appreciate the full meaning of it. It runs not only to the question of what the decision will be but to a myriad of things that may give clues. After if it is know[n] that a certain Justice is writing the opinion the result may be guessed. I cannot go into the matter au fond [fundamentally] but I urge you never to discuss seriously any case before the court and be damned careful if you joke about it. With the O’Fallon case I had to take a good deal of kidding, but, of course, I could not even know whether the case had been decided. Keep your mouth shut not only on the big cases but the little ones as well. With the other Secretaries (Chief Justice, Stone & Brandeis) this rule has not applied. But, with them, you will discuss the cases [and] not the opinions of your boss.

Lockwood’s discussion of the duty of confidentiality is echoed in the memorandum he sends to Hiss, in which James Nicely writes that “the only reason that Justice Holmes does not give you a long speech on the subject [of confidentiality] is because he has confidence in your integrity. I cannot warn you to be too careful. The best rule is not to talk about the

cases outside at all.” Interestingly, it would not be until 1987 that the Supreme Court formally adopted official confidentiality rules for its law clerks.

For Lockwood, the duty of confidentiality was broader than the business of the Court; it also included the Justice’s personal life. He writes:

This leads to another important matter, and a more difficult one. Many people will be interested and will question you about the Justice as a person - not with any malicious purpose. It is disarming - but remember that you are serving a public character - and that his private affairs are not yours to give away. Try not to say much more than that he is a grand person, well etc. It is a matter of discretion which you must decide for yourself in each case but what I wish to do is to impress upon you that you had best say too little rather than too much. – As examples of what I mean people will ask you who are his friends, who he goes to see. The answer is I think, that you don’t know. Also I have not said a great deal about the nature of my work. The thing to emphasize here is always how hard-working he, and the Court generally, are.

The duty of confidentiality, however, apparently did not extend to Harvard Law School professor Felix Frankfurter. The Holmes papers contains copies of letters that Holmes law clerks wrote Frankfurter while clerking for the Justice, letters which divulged personal information about the Justice, his activities, and his work habits. These letters included several from Lockwood himself, who voiced his concerns about the Justice’s ability to keep up with his work. In an October 1, 1928 letter to Frankfurter, Lockwood conveys the following story:

These are hard days for the Justice too, because the certioraris are piled high and the Chief Justice [Taft] is driving the court at them hard. The ones that were done during the summer are dwindling before the onslaught so that we were at them most of Sunday and cheat the supper hour at night trying to keep ahead of the game. It is tiring on him but fortunately he is content to grumble at the speed and at certioraris in general and never hazards any suggestion that he himself is getting old. He came near it this evening for he nearly fell asleep while I was giving him an outline of a case. He started to talk about this slip later but fortunately Mrs. Holmes was on hand and turned the whole thing aside by saying that it was nothing to the number of times he fell asleep when she was talking to him... [y]ou told me how wonderfully she kept him on his



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Justice Holmes and an aide were photographed at his home office where he did most of his work. During his later years, Holmes' clerks performed many extra duties and served as companions.

toes, but one has to see it to appreciate the artistry of it.

Despite his worries about the Justice's energy levels, Lockwood warns Hiss the eighty-eight year old Justice Holmes did not like to fall behind in the business of the Court.

His method of work is always to keep at it till it is done. He becomes bothered by having things hang over. Your part in this is to try your best to convince him there is no need of bothering but more to clear up whatever the business is. When you have business to do for him he will appreciate as much speed as is commensurate with accuracy.

In his September 26, 1919 addendum to his letter, Lockwood concedes that the formal duties of the Holmes clerks are not that onerous. "He will not keep you busy all the time. You can go off anywhere if court is sitting and there is no work but you should plan to be back when he returns (5:00 P.M.) unless you have a particular engagement (not too often) or unless he tells you he is going to make a call and will not be back till late (usually Thursdays)."

Lockwood's description of the limited demands of the Holmes clerkship is also reflected in a November 5, 1928 letter written to Frankfurter, in which Lockwood writes: "The discouraging feature of the job is that they [Justice and Mrs. Holmes, still living] are both so nice to me that I wonder at times whether I am secretary, guest or prodigal son. I have a suspicion that I shall never have another boss whom it will be so difficult to convince that I should be allowed to help him – nor one whom I shall be so anxious to help."

While Holmes always depended on his clerks for a degree of companionship, that aspect of the clerkship grew after the death of Fanny Holmes in the spring of 1929 – a

fact which Lockwood addresses in his letter.

I could have you realize that the job is not simply one of your own pleasure in listening to the sage, and reading petitions for certiorari. Particularly now that Mrs. Holmes has gone, you will be a companion as well. When court is sitting this will not be so apparent but when you take rides with him and have meals with him and, when occasions offer, you will talk to him and help to amuse him. Your own sensibilities will tell you how but for your initial guidance I will suggest that this does not necessarily mean a philosophical discussion. I think you will find yourself noting in the papers and your own experience things that you can tell him about briefly. He likes to go to the zoo, to see flowers, etchings etc. The essence of the thing is to get yourself as far in tune with him as you can, to enjoy what he enjoys, to play with him, to sense his mood and meet it on his ground. It will generally be very easy but, to me it is the one of the most important features of the job.

In an effort to provide some topics of future conversation, Lockwood writes that Justice Holmes "is crazy about P.G. Wodehouse and Saki, particularly the latter. We have talked of them often. *Nota bene* [note well]. If you don't know Saki (H.H. Munro) I recommend him highly on any account – very witty, brief stories, sometimes with a startling an[d] even macabre denouement." Perhaps taking a hint from Lockwood, it would be Alger Hiss who would institute the new practice of reading to Justice Holmes at night, a task formerly performed by Mrs. Holmes. All subsequent Holmes' clerks would follow this new tradition. Hiss recalls: "When he [Holmes] was in his usual high spirits a regular greeting on coming back from the Court was, 'Shall, we have some culture,' or, perhaps, 'Will it be murder, or shall we improve our minds?' The reference to 'murder' was in recognition of his frequent indulgence in mystery stories."

Lockwood ends the addendum by wishing his predecessor good luck, telling Hiss that "[y]ou will be with one of the grandest old men of all time. It will be a severe wrench for me to hand him over to you." Like Lockwood, Hiss would also fall under the spell of the Magnificent Yankee.

Today's "modern" Supreme Court law clerk is involved in all aspects of chamber business, from preparing cert. memos and bench briefs to drafting opinions. The "care and feeding" of the justices, however, is no longer part of their job duties. One could argue that this change in the clerkship model has resulted in a less rich and diverse experience.

**Todd Peppers is a professor at Roanoke College and the author of Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk.*

Footnotes and the full article can be found on our website at www.supremecourthistory.org on the publications page

Robert H. Jackson Name Officially Unveiled on United States Courthouse in Buffalo

A celebration honoring the dedication of the United States Courthouse in Buffalo was held on September 30, 2013. The building was named in honor of Associate Justice Robert H. Jackson, a long-time resident of Western New York. Representatives of the federal government, courts, legal community, and leaders from the Robert H. Jackson Center joined members of Jackson's family to celebrate the occasion.

Senator Charles Schumer who sponsored legislation to name the building in honor of Jackson spoke at the ceremony and observed that "Robert H. Jackson was at the center of some of the greatest judicial debates of the 20th Century, and to this day, his intellect, his judgment, and his character makes proud the region he called home. Today's ceremony will cement the legacy of a man who dedicated his life to the pursuit of justice, and achieved great ends in the struggle for civil rights, and the prosecution of war criminals in Nuremberg."

Government and legal officials were joined by two Jackson grandchildren, Thomas A. Loftus, Jr. and Julia Craighill. In her comments, Ms. Craighill commented that her grandfather had loved New York and his hometown Spring Creek, a small town in central Pennsylvania where he took his two children once a summer while they were growing up. He would pitch a tent there and relax by riding horses and cooking for his family. "He believed the natural world had a lot to teach us," Craighill said. As for his culinary skills, Craighill reported that her mother ". . . would often boast that he was the only one who could make flawless pancakes on an open fire."

Born and raised near Jamestown, New York, Jackson spent the first 42 years of his life in western New York. For some time he lived on Johnson Park, an area of Buffalo that is in the shadow of the Courthouse named in his honor. He practiced law at the historic Ellicott Square Building in downtown Buffalo and became a prominent local attorney.

Construction on the 10-story, 261,000 square-foot federal courthouse began in 2007 after Congress authorized \$137

million to fund the project in Buffalo. Situated on a 1 ¾ acre site at Niagara Square, the building is home to five District and four Magistrate courtrooms. Portions of the building are allocated to the use of the U.S. Marshal's Service, the U.S. Attorney, and Probation and Pretrial Services. Although the official dedication to Jackson did not occur

until 2013, the building opened in November 2011 and in that year won the 2011 Award for Design and Manufacturing Excellence from the Architectural Precast Association.

The striking design of the 10-story structure is glass covered and includes a small pavilion creating a distinctive appearance. The General Services Administration, tasked with constructing and maintaining the building, describes the Courthouse as follows: "The design for Buffalo's new federal courthouse expresses the dignity and the transparency of the federal judicial

system while accommodating courtroom and office space to meet the needs of the U.S. District Court and court-related agencies in Buffalo. Colored glass panels designed by Buffalo-area native Robert Mangold are installed in the courthouse pavilion lobby. The curved south wall, oriented towards the Square, encloses the public lobbies while its transparency reveals the activity within. A veil of glass panels suspended in front of the pre-cast skin of the ellipse reinforces the inherent grace of the shape with an expression of lightness, while the 255 foot elevator tower topped with a glowing lantern firmly anchors the structure to the site and marks the urban context at both ground and sky. A glass pavilion creates a courtyard interlocked with the tower form. All 4,536 words of the United States Constitution are etched on the glass face of the pavilion, casting a silhouette upon all who enter into the building."

On September 30, Jackson's name and bust were unveiled as part of the ceremony. The bust will be displayed inside the courthouse. It was created by Dexter Benedict, and is a replica of one currently featured in a statue in Jamestown.



The Federal Courthouse in Buffalo, New York, was named in honor of Justice Robert H. Jackson in a dedication ceremony held in September 2013. Jackson spent the first 42 years of his life in western New York and practiced law in the shadow of the new building.

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