



THE SUPREME COURT HISTORICAL SOCIETY

Quarterly

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Society Annual Meeting Held June 1, 2015 By Gabrielle Mills*

This year the Annual Meeting, always a highlight of the Society's calendar, marked the 40th anniversary of the event. It was held on June 1, 2015 in the Supreme Court Building in Washington, DC.

The meeting opened with the Annual Lecture delivered by the Right Honourable, the Baroness Hale of Richmond, Deputy President of the Supreme Court of the United Kingdom. Lady Hale's presentation focused on Magna Carta. The 800th Anniversary of Magna Carta fell exactly two weeks after the address was given. This charter, agreed to by King John of England on June 15, 1215, embodies much of the shared legal heritage of the United Kingdom and the United States.

Gregory Joseph, President of the Society, provided a brief introduction highlighting some of the accomplishments of Lady Hale's career. Lady Hale graduated with honors with a law degree from Cambridge University in 1966. She went on to teach law at Manchester University from 1966 to 1984, while simultaneously qualifying as a barrister and practicing law part-time. In 1984, Lady Hale became the first woman to be appointed to the Law Commission, a statutory body which promotes legal reform in the United Kingdom. In 1994, Lady Hale became the first High Court Judge to have made her career as an academic and public servant rather than as

a full-time practicing barrister. Five years later she became the second woman to be promoted to the Court of Appeals, before becoming the first woman Law Lord in 2004. Lady Hale was named Deputy President of the Supreme Court in June 2013.



Baroness Hale (left) was photographed with Justice Ginsburg after presenting the Annual Lecture on the influence of Magna Carta on the American legal system.

Photos by Steve Petteway

Lady Hale described Magna Carta's genesis. Initially a peace treaty between King John and a group of rebellious barons, Magna Carta promised to all "free men" the right to justice and a fair trial, and stated that no taxes could be demanded without the "general consent of the realm." At the time, the terms of Magna Carta applied to a very small portion of the population, notably to the barons, knights and bishops. The original version was annulled but edited forms appeared subsequently. It was the 1225 version of Magna Carta that ultimately became part of English

statute law in 1297.

Notwithstanding the changes to the original charter, the ideas enshrined within the original version persisted in English common law. Lady Hale demonstrated that three essential ideas of modern constitutionalism can be found in the original Magna Carta: "The idea that fundamental rights can only be taken away or interfered with by due process and in accordance with the law; the idea that government

Continued on Page 3

A Letter from the President



On November 20, 2015 the Society was honored to present a program at New York University at which Chief Justice John G. Roberts, Jr., the Honorary Chairman of the Society's Board of Trustees, was the principal speaker. The Chief Justice lectured about his predecessor, Chief Justice Charles Evans Hughes, in our continuing series *Nominated from New York*, which

we co-sponsor each year with the Historical Society of the New York Courts. Following his presentation, Chief Justice Roberts was interviewed by Chief Judge Robert A. Katzmann of the Court of Appeals for the Second Circuit. We are very grateful to the Chief Justice for his willingness to present this lecture — and to travel to do so — as his official duties leave precious little time for other events. We are also grateful to Chief Judge Katzmann, the author most recently of *Judging Statutes*, whose many duties and responsibilities are also too exhausting to catalog.

The 2015 Leon Silverman Lectures Series just concluded, and I am pleased to report that C-SPAN recorded each of the four programs in the series this year. The common subject was the Supreme Court and Reconstruction, and the lectures focused on landmark decisions including *The Slaughterhouse Cases*. Articles derived from the lectures will appear in a future issue of **The Journal of Supreme Court History**, giving researchers and armchair scholars access to the information in written form in perpetuity. The Society's website provides a direct link by which you may access the video recordings of the Silverman lectures, and I encourage you to watch them when you have an opportunity. A great deal of material has been added to the website recently and new content is added as it becomes available. The site is a very rich source for research on the Court and its history.

We have scheduled the third New York Gala for Wednesday February 24, 2016, as detailed on the back page of this issue. The Plaza Hotel will again be the setting for the event. This year the two former Supreme Court law clerks we will honor are our Trustee David Leitch of Bank of America (who formerly chaired the Society's Development Committee) and Gregory K. Palm of Goldman Sachs. Both honorees exemplify the highest standards of the legal profession and are very fitting recipients of the Society's Amicus Curiae Award. The Gala will again provide attendees an enjoyable and unique opportunity to honor important leaders in the legal profession, and it will raise essential funding needed to underwrite the cost of producing the Society's publications, programs, and acquisitions for the Court. All of these endeavors enable the Society to fulfill its mission to preserve, promote scholarship, and educate the public about

the history of the Supreme Court of the United States and the federal judiciary.

At the Gala, Society Vice President Dorothy Tapper Goldman will display an original printing of The Stone Engraving of the Declaration of Independence. This image of the Declaration is probably the most familiar to Americans, having been reproduced countless times in the form of posters and as illustrations in text books. It was originally created by William J. Stone, who was commissioned by the U.S. government (Secretary of State John Quincy Adams) to produce a facsimile of the Declaration text and signatures for the 50th Anniversary of the nation. The copperplate was completed in June 1823 and 200 engravings were printed. The distribution of those copies was specified by a congressional resolution which ordered them to be distributed to official repositories, significant officeholders and to the surviving signers of the Declaration, who included Thomas Jefferson and John Adams. The Stone Engraving on display will be a rare 1833 printing from the 1823 plates. Also on display will be an early edition of the Declaration of Independence with Embossed Lettering for the Blind.

Without the support of our members and public-minded foundations and organizations, we would be unable to carry on this work. As your situation allows, I hope you will consider supporting or attending the Gala or making a contribution to the Annual Fund. All proceeds from these sources are critical to ensure the continuation of the Society's work. Together we can take great pride in the continuing excellence of the programs and publications produced by the Society. Thank you for playing a major role in this effort.

Gregory P. Joseph

Quarterly

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Advisory Editor Frank D. Wagner

"Annual Meeting" Continued from page 1

rests upon the consent of the governed, and the idea that government, as well as the governed is bound by law."

Lady Hale traced the influence of Magna Carta to America. When English settlers colonized the New World in the seventeenth century, they brought the precedents of Magna Carta with them. The concepts embodied in those provisions of the charter were cited by many colonists as justification for the American Revolution. In particular, the charter expressly forbade the imposition of taxes without consent, a right that the English government violated in 1775 with the introduction of the Stamp Act. Both the Constitution of the United States (1789) and the Bill of Rights (1791) echo elements of Magna Carta, most notably in the underlying principle that government requires the consent of the governed. Lady Hale noted that Magna Carta continues to be cited by the Supreme Court of the United States in modern cases.

Following the lecture, many Society members and guests toured the building under the direction of guides from the Office of the Curator of the Court. The tours provided a wonderful opportunity to view portions of the building.

At 6 PM, members of the Board of Trustees gathered to hold their Annual Meeting. President Joseph identified other officers present: Chairman of the Board, **Ralph Lancaster**; **Philip Kessler**, Secretary of the Society; Vice Presidents **Dorothy Goldman** and **Jerry Libin**; and Treasurer **Sheldon Cohen**.

The proceedings opened with a tribute to the Society's late Chairman Emeritus **Leon Silverman** who passed away in January, but whose influence is still felt through the continuance of the programs and publications he initiated and nurtured, and the financial stability of the Society. A moment of silence was observed to honor Mr. Silverman.

Mr. Joseph provided a summary of the past year's accomplishments. Program activity directed by Program Committee Chair **Kenneth Geller** was a critical part of the work. Important programs presented include the Erwin N. Griswold Prize Lecture, delivered on April 30 by Professor

Kevin J. McMahon. An original interview with Professor McMahon about his award-winning book, *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (2011) is available on the Society's website. Other events include the first two of the four lectures in the 2015 Leon Silverman lecture series which were given in March and May on the overall topic, "The Supreme Court and Reconstruction." Members can view the lectures through the Society's website, www.supremecourthistory.org by linking to the C-Span site through the Video Page of the Society's site.

Two sessions of the Summer Institute for Teachers were scheduled for late June 2015. These sessions bring sixty teachers from around the country to Washington D.C., to study the Court first-hand and learn from practitioners and others with specialized expertise.

Chair of the Publications Committee, **Don Ayer** oversees the publications which include the **Journal of Supreme Court History** and the **Quarterly** newsletter. The manuscript for the latest special publication, a one-volume **History of the Federal Judiciary**, will be

submitted to Oxford University Press in the Fall of 2015.

Dorothy Goldman heads the Acquisitions Committee, working closely with Catherine Fitts, Curator of the Court, to identify and acquire items of significance for inclusion in the Society's collection of artifacts and memorabilia. An avid collector herself, Ms. Goldman displayed a rare 1556 printing of Magna Carta following the Annual Lecture.

Mr. Joseph acknowledged Society Treasurer **Sheldon S. Cohen's** two decades of conscientious service to the Society as Treasurer, overseeing all aspects of the Society's financial well-being. Additional fiduciary oversight has been provided by the Investment Committee, chaired by **George Adams**, who has also served long and faithfully.

Vincent C. Burke III serves as Chair of the Gift Shop Committee and was instrumental in the ambitious renovation of the shop. **Frank Gilbert** heads the Facilities Committee and he has carefully inspected the condition of the Headquarters Building to see that it is well maintained.



Sheldon S. Cohen was recognized for twenty years of service to the Society as Treasurer. He was joined by members of his family (from left are his wife Faye Cohen, Sheldon Cohen and Justice Scalia holds the plaque. The Cohen family members appear to the right of the plaque.)

Continued on Page 4



Professor Jeffrey Gonda (left) received an award from Justice Scalia for his article on the landmark case *Shelley v. Kraemer*

The President's office in Opperman House will be renovated and dedicated to the memory of **Leon Silverman**. **James B. O'Hara** supervises the ever-expanding collection of volumes in the Library as Library Chair.

Mr. Joseph then turned to the business portion of the meeting. **Philip Kessler**, Secretary and Chair of the Nominating Committee, presented a list of candidates for election to the Board of Trustees and other offices. Nominated to serve an initial three-year term on the Board were **Rudy Aragon, Bruce Yannett and Paul Smith**.

A second list of candidates was presented for nomination to serve an additional three-year term as a member of the Board. They were: **Peter Angelos, Max W. Berger, Beth Brinkmann, Vincent C. Burke III, Paul Clement, Robert A. Clifford, Harlan Crow, Charles W. Douglas, Miguel Estrada, Gregory S. Gallopoulos, Kenneth S. Geller, Dorothy Goldman, Brad S. Karp, August Kline, Daniel Kolb, Christopher Landau, Jerome Libin, Thurgood Marshall Jr., Timothy Mayopoulos, Lee I. Miller, Patricia Millett, Michael Mone, James Morris III, James B. O'Hara, R. Hewitt Pate, James W. Quinn, Jay Sekulow, Kelly J. Shackelford, John Siffert, Dennis R. Suplee, Chilton Davis Varner, Daniel K. Webb, W. Wayne Withers, and Foster Wollen**. **Maureen Mahoney** was nominated to serve as Trustee Emeritus.

The third and final list of candidates included nominations to serve as officers and members at-large of the Executive Committee. **Carter Phillips** was nominated to a three-year term as Treasurer, succeeding Mr. Cohen. Nominated to fill a one-year term as a member at-Large of the Executive Committee were: **Robert Anello, Charles Cooper, Kenneth S. Geller, Robert Giuffra, David Leitch, Teri McClure, James Morris, John Nannes, James O'Hara, Theodore Olson, Leon Polsky, Richard (Doc) Schneider, and Seth P. Waxman**. The Committee also nominated **Sheldon Cohen**

as Treasurer Emeritus.

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

The elections marked the conclusion of the business of the Annual Meeting of the Board. The annual Awards ceremony followed and Justice Antonin Scalia assisted in the presentation of awards.

The first awards were the Hughes-Gossett Literary Prizes given to outstanding articles published in the **Journal of Supreme Court History**. The student prize was awarded to **Jesse Bair** for his article, "*The Silent Man: from Lochner to Hammer v. Dagenhart, A Re-evaluation of Justice William R. Day.*" **Professor Jeffrey Gonda** was awarded the senior prize for his paper, "*Litigating Racial Justice at the Grassroots: the Shelley Family, Black Realtors, and Shelley v. Kraemer (1948).*" His paper was adapted from his 2013 lecture on the same topic in the Leon Silverman Lecture Series. **Jesse Stephens** and **Artemus Ward** also received awards.

Awards were given to honor those responsible for the membership campaign under the direction of the National Membership Chair, **Robert Anello**. Mr. Anello recruited the 50-plus state and regional chairs necessary to carry out a national membership campaign and coordinated the campaign itself.

Five state chairs were present to be recognized for their successful work. Those honored were: **John and Christopher Houlihan of Connecticut; Dawinder Sidhu of New Mexico; Catherine Recker of Pennsylvania; Dan Riggs of Wyoming and Troy Giatras of West Virginia**. Justice Scalia presented a marble paperweight to each honoree.

Robert Giuffra, Chair of the Development Committee, worked with his Committee members to raise funds to underwrite the Society's ever-growing publications and programmatic endeavors. The Committee organized and



Catherine M. Recker, State Membership Chair for the Philadelphia area, received an award from Justice Scalia for her successful campaign.



Justice Scalia presents an award to John Houlihan (left) and his son Christopher Houlihan (right) for their work as co-chairs for membership for the state of Connecticut.

promoted a very successful Fundraising Gala in New York in October 2014, raising over \$660,000. Mr. Joseph announced that the third New York Gala will be held on February 24, 2016, and asked Trustees, officers and other loyal supporters of the Society to support the event by purchasing tables.

The next awards honored several contributors to the 2014 Gala, and other major donors. Mr. Joseph expressed gratitude to all five of the Society's Vice Presidents, who continue to be generous and supportive of every program. Two of them were present to be recognized that evening: **Dorothy Goldman and Jerry Libin.** Justice Scalia joined Mr. Joseph to assist in presenting awards. These recognized were: **Bijan Amini, Storch Amini and Munves; Robert J. Anello, Morvillo Abramowitz Grand Iason and Anello (NY Gala 2014); Mark S. Cohen, Cohen and Gresser; Sheldon S. Cohen, The Marshall Coyne Foundation; Laurie Webb Daniel; Miguel A. Estrada, Gibson Dunn and Crutcher (NY Gala 2014); David C. Frederick; Dorothy Tapper Goldman (NY Gala 2014); James L. Goldman; William J. Haynes II; Philip J. Kessler, Honigman**



Through the efforts of Society Trustee Richard (Doc) Schneider (center), guests were entertained by an after-dinner concert performed by Siahao He (left) and Amy Schwartz Moretti (right) of Mercer University's School of Music.

Miller Schwartz and Cohn (NY Gala 2014); Thomas C. Leighton, Thomson Reuters (NY Gala 2014); Jerome B. Libin, The Park Foundation (NY Gala 2014); William G. McGuinness, Fried Frank Harris Shriver and Jacobson (NY Gala 2014); Joseph R. Moderow; Steven F. Molo, Molo Lamken (NY Gala 2014); Carter G. Phillips, Sidley Austin (NY Gala 2014); Richard A. Schneider, King and Spalding (NY Gala 2014); Kelly J. Shackelford, Liberty Institute (NY Gala 2014); Tal M. Weberg; and Francis M. Wikstrom, American College of Trial Lawyers.

The final award presented was one rarely given by the Society, and constitutes the highest honor the Society bestows: the framed seal of the Supreme Court mounted on velvet fabric that was part of the original draperies from the Supreme Court Chamber. The award recognizes an individual who has provided extraordinary service to the Society. **Sheldon Cohen** was recognized on June 1st. Mr. Cohen will now serve as Treasurer Emeritus.

At the conclusion of the ceremony Mr. Joseph thanked all in attendance and offered thanks to Justice Scalia for his assistance.

The traditional black tie reception was held at 7 PM in the East and West Conference Rooms. The dinner followed in the Great Hall where each of the previous thirty-nine dinners were held. Mr. Joseph recognized the members of the Court in attendance. They were: **Chief Justice John Roberts, and Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Samuel Alito and Sonia Sotomayor.** Mr. Joseph also acknowledged the presence of Baroness Hale and her husband Professor Julian Farrand.

Following dinner, **Carter Phillips**, Chair of the Dinner Committee, thanked all present for their support. He offered special thanks for the assistance of **Marshal Pamela Talkin** and the members of her staff, who coordinate all the physical arrangements necessary for Society events held in the Supreme Court Building.

The evening concluded with a musical performance given by **Amy Schwartz Moretti** and **Siahao He**, both from the Mercer University Townsend School of Music. Ms. Moretti, a violinist and the Director of the Robert McDuffie Center for Strings, has performed internationally and throughout the United States, and has recorded a number of classical pieces. Siahao He, a cellist and student at the McDuffie Center for Strings, has won many prestigious international competitions and has performed with international philharmonic orchestras. The duo played music that had been especially arranged for violin and cello for the occasion by Christopher Schmitz of the Townsend School of Music faculty. Their selections included *Georgia on my Mind* and a world premier arrangement of *The Star-Spangled Banner*. Mr. Phillips thanked Society Trustee **Richard (Doc) Schneider** for making the arrangements for the concert which marked a captivating conclusion to the Annual Meeting.

**Ms Mills was a summer intern.*

Opinion Days: A Broader Historical Perspective

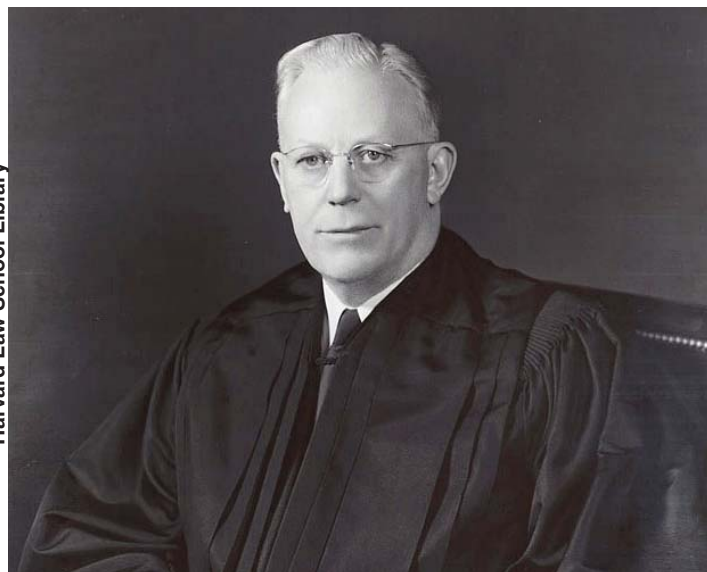
By Craig Alan Smith*

In an essay published in the *Quarterly*, (vol. 36, no. 2) the Honorable Jon O. Newman, formerly senior law clerk to Chief Justice Earl Warren (1957 term), examined the Court's shift from its long-standing tradition of announcing opinions only on Mondays to announcements on other days of the week as well. Judge Newman's article focused primarily on discussions about relieving the press of reporting decisions one day a week, especially in June at the end of a Court term. Judge Newman reports that, in spring 1958, Warren discussed the possibility of announcement days other than Mondays, but Felix Frankfurter was "adamantly opposed" to the idea, ending Warren's effort to accommodate press reports for the time being. Judge Newman writes that not until the 1971 term (under Warren Burger's guidance) did the Court abandon Mondays for the announcement of decisions. Other than a few nineteenth century exceptions to Monday announcements, Judge Newman believed it was not until the Wednesday, June 30, 1971, announcement of *New York Times v. United States*, 403 U.S. 713 (1971), that the Court portended a change in procedure, which then became manifest in June 1972 (one Wednesday and two Thursday announcements) and standard in June 1974 (one Tuesday and two Wednesday announcements). Judge Newman then tabulated instances when the Court announced June decisions from Tuesday through Friday during the 1974 to 1976 terms and contrasted this with more recent trends. "By spreading out the filing of opinions on days other than Monday in June," Judge Newman concluded, "The Court has helped the press perform its task of informing the public about the substance and significance of the Court's opinions."

While acknowledging Judge Newman's contribution to our understanding of opinion days, which principally reviewed June decisions and considered a relatively short period of time, this essay presents a somewhat broader historical perspective for changes to Monday opinion announcements. First, national holiday irregularities throughout the mid-twentieth century led to numerous exceptions to Monday announcements, exceptions even Frankfurter could not ignore. Second, at the time Judge Newman clerked for Warren, suggested changes to Court procedures, including Monday opinion days, took place amid interpersonal rivalries and external attacks on the Court's decisions, leading at least one other justice to favor non-Monday announcements. Finally, Judge Newman relied on Gressman *et al.* (*Supreme Court Practice*, 9th ed., 2007) to account for the Court's changed procedure but there are other relevant secondary scholarship and primary sources. Specifically, it turns out that the Court began announcing decisions from Tuesday through Thursday during other months of the year much earlier than 1971.¹

In his account, Newman provided three "rare exceptions" to the Court's Monday announcement of opinions—all

decided in the 1880s. Considering that the origins of Monday announcements remain a mystery—at the time the Court changed its practice, the *New York Times* reported the convention was established by 1908), nineteenth century exceptions were not as notable as twentieth century exceptions. During the 1950s and 1960s, for example, the Court frequently made use of Tuesdays to announce decisions when Monday fell on a national holiday. The usual



Harvard Law School Library

A change in Court procedure occurred during the tenure of Chief Justice Earl Warren. The change involved reporting opinions as they were ready, rather than grouping them to be announced on Mondays.

national holidays to interfere with Monday announcements were Washington's Birthday (February 22) and Memorial Day (May 30). At that time, holiday observance occurred on the calendar dates, whether or not they fell on Monday. Therefore, when Memorial Day landed on Monday in 1955, the Court announced two decisions on Tuesday, May 31.² Similarly, when Memorial Day returned to Monday in 1960 and 1966, the Court again announced two decisions on Tuesday, May 31.³ Washington's Birthday fell on a Monday three times from 1950 to 1970, but only once did the Court announce decisions on a Tuesday. On that occasion, February 23, 1960, four justices announced Court opinions in eight cases, and Frankfurter had no compunction about filing three of his own opinions—one concurring and two dissenting.⁴

In addition, when national holidays fell on Sunday the Court's observance of them on Monday similarly pushed the announcement of opinions to Tuesday. This happened in 1954 when the Court announced two decisions on Tuesday, June 1, including a Frankfurter dissent.⁵ It happened next in 1959 when the Court announced 15 decisions on Tuesday,

Continued on Page 7

Supreme Court Historical Society

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2016 POCKET CALENDAR

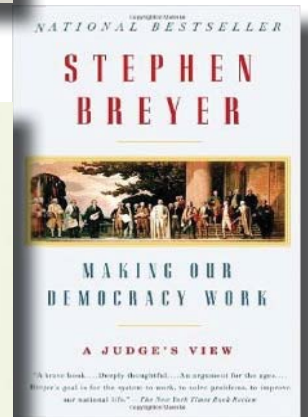
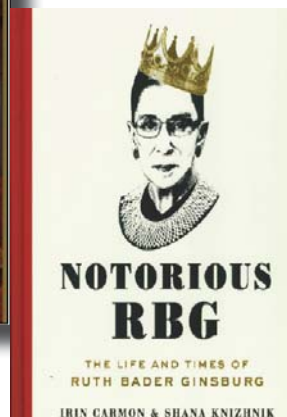
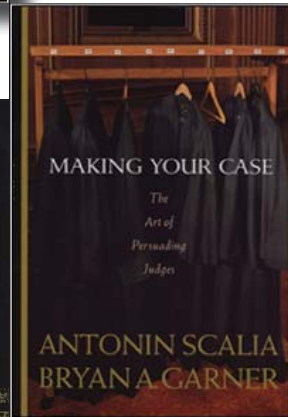
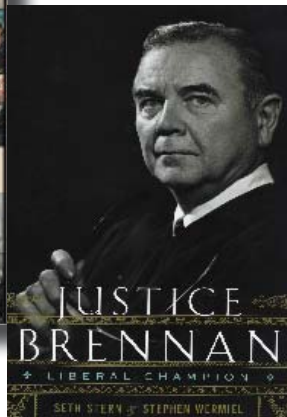
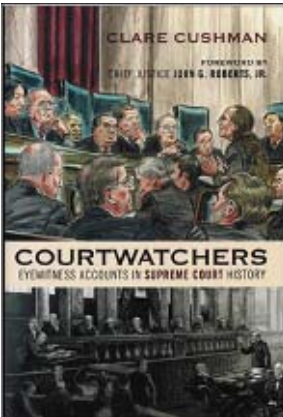
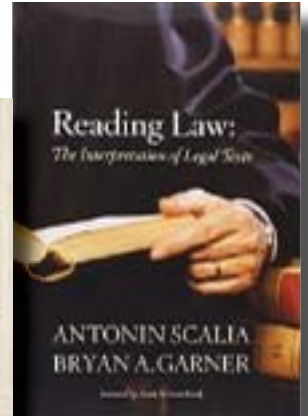
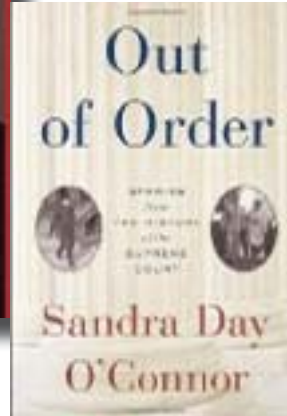
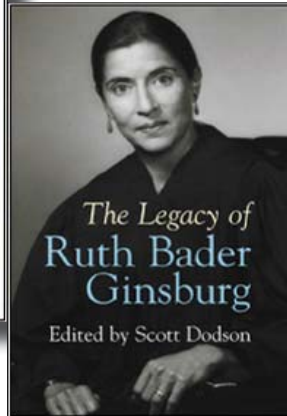
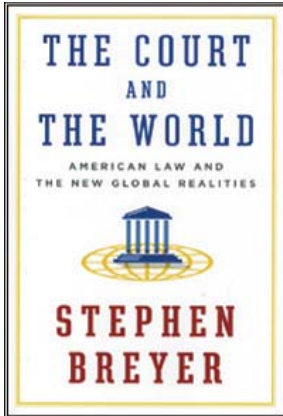
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“Opinion Days” Continued from Page 6

February 24, including four Frankfurter opinions.⁶ Then in 1965 the Court announced two decisions on Tuesday, June 1, but by then the preference for Monday announcements already had been abandoned.⁷ As should be clear, the so-called “tradition” of Monday announcements was not as inviolable as even Frankfurter preferred, given that he yielded to Tuesday announcements when civic duty compelled it.

Synchronous with Judge Newman’s clerk service, the 1957 term began with Chief Justice Warren affronted by Frankfurter accusing him of “massing” important decisions at the end of the previous term. Those decisions included the infamous “Red Monday” opinions of June 17, 1957, which, to some extent, led Congress to consider reprisals against the Court—reprisals that, in the words of political scientist Lucas Powe, came “dangerously, shockingly close” to being realized.⁸ Frankfurter’s “massing” accusations were but a small portion of his annual missive to re-examine Court procedures, a term-opening appeal that Phillip Cooper observed “grew like Topsy over the years.” Typically, Frankfurter requested more time to consider cases before conference or more time to review opinions before announcement. However, Frankfurter’s tone on this occasion and on many others, led some of his colleagues to rebuke his efforts.⁹

This time Tom Clark offered his own suggestions for improving Court procedures, writing:

We should not limit “opinion day” to Mondays. This would permit us to divide the opinions of the week into any number of days necessary to prevent confusion. It would *solve the press problem*. I see no reason for us to continue this practice. Certainly there is nothing “sacred” about Monday being opinion day. The Court is doing itself a great disservice. We should hand down opinions on any argument day.¹⁰

Having dismissed most of Frankfurter’s other suggestions as unnecessary (“what we need is some mechanism to get the opinions out more promptly”), it was unsurprising that Clark offered to change the Monday announcement tradition. Like Warren, Clark was sympathetic to press reporting of Court opinions, and his formal proposal coincided with Newman’s recommendation. Judge Newman’s account, however, did not address the contentiousness attending congressional attacks against the Court and Frankfurter’s suspicion that significant cases were held until the Court’s final sessions. The resultant antagonism between Warren and Frankfurter, which persisted through what Powe called the “stalemate” period, meant Monday announcements would continue as long as Frankfurter remained on the Court.¹¹

Warren waited a respectful six weeks after Frankfurter’s death to inform the Court that Mondays no longer served as the exclusive days for announcing Court opinions. Retired from the Court since August 28, 1962, Frankfurter died at his home Monday, February 22, 1965, Washington’s Birthday—a

date when the Court would not announce opinions.¹² The first week of April, Warren notified the Court that opinions would be reported when ready, beginning Monday, April 26, 1965. In reporting on one of the Court’s “rare breaks with procedural tradition,” the *New York Times* observed that Warren offered no reason for the change.¹³ Therefore, the use of days other than Monday to announce Court opinions began under Earl Warren’s leadership, and Warren Burger later expanded its use to June. The Court’s first non-Monday, non-holiday exception announcement took place Tuesday, April 27, 1965, with decisions in four cases.¹⁴ That was immediately followed by the announcement of four opinions on Wednesday, April 28, and three opinions on Thursday, April 29.¹⁵ So why did Newman, or, more specifically, his sources, concentrate on the Court’s abandonment of Monday announcements “*beginning with the 1971 Term*”?¹⁶

As early as 1970, political scientists Donald Gregory and Stephen Wasby identified 1965 as the Court’s first full term using non-Monday opinion days. The significance of the 1971 shift, as Judge Newman highlighted, was that the Court finally began announcing opinions from Tuesday through Thursday in June—a time typically when the Court’s more difficult and publicly-interesting cases are announced.¹⁷ Coincidentally, 1971 was also when Washington’s Birthday and Memorial Day became perennial Monday observances. Previously observed on their calendar dates, February 22 and May 30, respectively, the so-called “Uniform Holiday Act” assured they would thereafter interfere with Monday opinion days.¹⁸

Following the Court’s first foray into non-Monday announcements, the *New York Times* continued to give the Court front-page headlines—at least, in the beginning. In its usual Monday decision follow-up, the *Times*’ front-page headline for Tuesday, April 27, 1965, was “High Court Upsets Louisiana Red Curb”—referring to the Court’s ruling in *Dombrowski v. Pfister*, where a five-person majority overturned as unconstitutionally overbroad a state statute defining subversive organizations.¹⁹ In follow-up stories, the *Times* gave substance to two *per curiam* decisions and other Court orders under the headlines, “Red Registration of 2 Units Barred: Supreme Court Finds data on Groups is ‘too stale’” (page 22), and “Court to Review 3 Rights Deaths: Will Hear Plea on Dismissal in Mississippi Slayings.” (page 23).²⁰

The next day’s *New York Times* continued to afford the Court front-page status, leading with “today was the first day on which the Supreme Court broke from a century old tradition of issuing opinions only one day a week—almost invariably on Mondays.” The *Times* featured two Court decisions with the headlines, “High Court Voids a State Vote Curb,” and “Tax Benefit Upheld for Business Sold to a Foundation.”²¹ By the next day, however, *Times* coverage of Court rulings was relegated to pages 20 and 21 with the

Continued on Page 8

“Opinion Days” Continued from Page 7

headlines, “High Court Upholds Union Ballot Form,” and “Right to be Silent at Trial is Upheld.”²² The final day’s decisions that week, Thursday, April 29, yielded similar reporting, with the *Times* running stories on page 18, “Court Extends Ban on Illegal Evidence,” and page 37, “Flight Insurance is Held Taxable.”²³

What were the end results of the Court’s 1965 change in procedure? Certainly the press was aided in reporting Court decisions, since no more than four cases were announced on any day that week; but the *New York Times* arguably lost interest in reporting Court decisions as front-page news, and possibly the most historically significant case announced that

week—*Griffin v. California*, extending the right against self-incrimination to prosecutorial comment—was pushed off of Thursday’s front page. Another notable outcome was that the Court ended its session the first week in June, announcing its final seven opinions on June 7. By comparison, the Court had already announced twice as many decisions the last week of April by spreading them out over four days. This was remarkable, considering over the next four terms while Warren served as chief justice the Court continued to use Monday exclusively to announce decisions in June, when the number of decisions that month ranged from 18 to 31.²⁴

As Wasby observed, the Court’s 1965 term made full use of the changed procedure, announcing over 25% of its decisions on days other than Monday.²⁵ In total, the Court announced 27 opinions on Tuesday through Thursday from December through May (although the two opinions announced Tuesday, May 31, would have occurred without the changed procedure because Memorial Day fell on Monday). As a result, in those weeks when the Court spread out opinion announcements over several days, there were no more than five cases with final dispositions announced on Monday; and at most three cases were announced on other days of the week. So even though the Court ended its 1965 term by using only Monday to announce decisions in June (21 cases spread over three weeks), it had already disposed of more cases than that using Tuesday through Thursday earlier in the term.²⁶

In conclusion, up until the Court’s changed procedure in 1965, the “tradition” of Monday opinion announcements had many exceptions resulting from holiday observance irregularities. Frankfurter’s unyielding resistance prevented Warren from changing the tradition in the short run, although at least one other justice shared Warren’s sympathy for accommodating press reporting. Judge Newman may have underestimated his own influence as a clerk in 1957 with his suggestion to change opinion days. That the change happened as early as 1965 may surprise Judge Newman, considering his interest lay with June announcements; but he should accept some credit for helping to plant the seed that Warren finally brought to fruition in April 1965.

**Dr. Craig Alan Smith teaches at California University of Pennsylvania where he teaches constitutional law, classes in judicial history and other related subjects. He is currently working on a biography of Justice Tom Clark. Authors footnotes can be found at the Society’s website at www.supremecourthistory.org in the Publications section.*



Washington Post

Justice Tom Clark (shown here with his long-time secretary, Alice O’Donnell) suggested that Court procedures would be improved by not restricting “opinion day” to Mondays. Felix Frankfurter was adamantly opposed to this idea, and due to antagonism between Chief Justice Warren and Justice Frankfurter, the change was not made until after Frankfurter’s death.

Program Honors Judge Learned Hand

The Society had a unique opportunity to co-sponsor a program honoring the 225th anniversary of the important, and chronologically first, Federal Court: The Federal Court for the Southern District of New York (SDNY). Society President Gregory Joseph and Vice President Dorothy Goldman attended.

The event was part of a year-long commemoration of the anniversary and the subject was one of the most distinguished jurists ever to serve on that Court: the famous Learned Hand. Many scholars consider him to be one of the two or three most important judges never to have served on the Supreme Court.

United States District Judge P. Kevin Castel of the SDNY conducted the program which brought together a “triumvirate of three important organizations: the Court itself, The Supreme Court Historical Society and the Historical Society of the Courts of New York. We claim the status of Mother Court because our Court is senior chronologically to the Supreme Court of the United States. The first session of our court was held on Nov. 3, 1789 at the Royal Exchange Building in New York City where Judge James Duane held the first session of any court created under the new Constitution of the United States. The Royal Exchange Building is the same building where the Supreme Court convened for its first session in Feb. 1790. These two courts share two judges in common; Justice Samuel Blatchford and

Justice Sonia Sotomayor. Justice Blatchford was elevated to the Supreme Court bench directly from the District Court to the Supreme Court, while Justice Sotomayor made an interim stop at the Second Circuit Court of Appeals.”

The presentation consisted of three distinct portions: a lecture by The Honorable John M. Walker of the Second Circuit Court of Appeals; comments by Professor Constance Jordan, the granddaughter of Learned Hand; and editor of a book of his selected letters; personal reminiscences of Judge Hand from Judge Miriam Goldman Cedarbaum and Judge Kevin T. Duffy.

Prior to the formal program, Judge Castel inquired, “What if you could hear the real voice of great historical figures? How would it color your impressions of the man?” He then

played a recording of Learned Hand singing a folk song he had learned “about 60 years ago.”

Judge Castel then supervised the unveiling of a portrait of Judge Hand, donated by Mrs. Judith G. Churchill, the widow of a grandson of the Judge. When she learned of the program and the special anniversary, she decided to donate the portrait to the Court. The artist was Gardiner Fox, a prominent portrait artist of the 20th century, Wilson Hand Kidde, Professor Jordan’s son and the great grandson of Judge Hand, helped Judge Castel unveil the portrait. It was displayed adjacent to the framed commissions from Presidents Taft and Coolidge appointing Learned Hand to the District Court and to the Court of Appeals respectively.

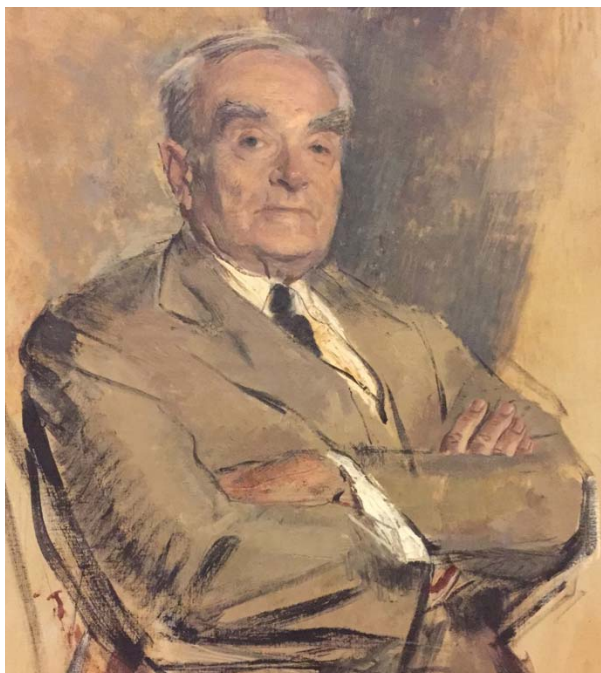
Judge Walker noted that “anyone asked to speak about Learned Hand must necessarily be selective, so rich and varied were his accomplishments over his 52 years of judicial service. These comments place some emphasis on his years as a district court judge, and those were important years, with significance in their own right, but I will also comment a bit on his full career.”

Learned Hand took the oath of office as a district judge 106 years ago on April 30, 1909 at the age of 37 years. He was born in 1872 and grew up in Albany. His father was a lawyer and state judge. In his early years, Learned began to establish a reputation as an intellectual, serving as the class orator at Harvard College. He excelled at Harvard Law School as well but he considered himself

more of an outsider than a joiner in college. He married Frances Finke and they had three daughters. He was active in community affairs and politics and practiced law for 13 years before becoming a Judge.

Judge Walker continued: “A more nuanced picture reveals that he had a deeply introspective nature, and was subject to feelings of insecurity and self-doubt. But those traits of self-examination, insecurity and self-questioning are part of what made him a great Judge, because as a Judge one can never be sure that one is right.”

His years as a lawyer were not terribly successful, but he remained fascinated by the law and how it played out in the real world and he wrote about it. Hand’s lack of professional



This portrait of Judge Learned Hand painted by Gardiner Cox was presented at an event commemorating his important contributions to the American legal tradition. Many scholars consider him to be one of the most important legal figures never to have served on the Supreme Court of the United States.

Continued on Page 14

success as a lawyer was overshadowed by his reputation as a prominent young intellectual and he gained a reputation as a man of sharp wits, broad interests and as an independent thinker.

The docket of his time included many cases in maritime, tort and contract law. Hand had little experience with these kinds of cases and had to educate himself on the job. These early cases laid the ground work for the seminal case *Carroll Towing*, a case involving negligence and the problems of foreseeability, along with the corresponding duty of care. In his opinion on *Carroll*, Judge Hand created an algebraic formula to define negligence and “[t]his elegant definition is still taught in law schools today.”

In his private letters, Hand described much of the work of a Judge as involving the careful interpretation of written text. He wrote extensively of his perception of how a Judge should approach such interpretation so as to avoid insinuating his own personal biases and views into the process. In one letter he observed that this kind of work “if it keeps my wits sharp, it certainly keeps it narrow. This is all that my tribe has ever done and ever will do, consider the meaning of words.”

Judge Walker concluded that “[m]ost cases over which Hand presided were not incredibly momentous. Instead his reputation comes from the great way in which he handled small things and his extraordinary ability to express himself in a memorable way. . . . Chief Justice Rehnquist used to say that the Court system was the crown jewel in the Federal system. In a career that spanned more than fifty years, no one polished it more brightly than Learned Hand.”

Professor Jordan, a Professor of Comparative English Literature at Claremont University, has edited a collection of Hand’s writings that has won critical acclaim. Professor Jordan commented on Judge Walker’s observation that the interpretation of legal text is a large part of the work of Judges. She quoted Hand who said that “[t]here is no surer way to misread any document than to read it literally. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.”

Professor Jordan quoted from a letter Hand wrote in which he defined legal interpretation as “. . . the imaginative projection of a concrete situation upon a generalized statement which comes before the judge as his imperative. Two possible approaches are quite different; shall the judge use his private conclusion of what is right; or shall he attempt to hypostatize what the authors of the words would have said had they been confronted with the occasion. In my judgment much of the failure of our American jurisprudence is owing to

the adoption of the first approach.” In other documents Hand rejects what he calls “the dictionary school” of interpretation and argues in favor of the imaginative re-contextualization of the written text.

The question of interpretation of texts occurs again and again in the writings of Hand, and he expresses his desire to interpret without overstepping and insinuating personal biases. He carried on extensive correspondence with Felix Frankfurter discussing various issues that were before the Supreme Court and in that correspondence they often discussed the interpretation of law and other legal texts. Hand believed that it was necessary to try to determine what had been in the mind of the individual who had written the law to attempt to uncover what they had intended the law to do and say before attempting to consider its current meaning.

Following Prof. Jordan’s comments, Judge Miriam Cedarbaum related her experience more than 60 years ago when she clerked for Judge Dimock of the SDNY. At that time Judge Dimock, who drove himself to and from work each day, regularly drove Judge Learned Hand and his cousin Judge Augustus Hand home every evening. “Judge Hand would come down to our chambers every evening and while he waited for Judge Dimock he sat in my office and talked to me. It was an extraordinary experience. What struck me most was the precision of the words that Judge Hand used even in ordinary conversation. He expressed himself with such extraordinary precision in his choice of language that I was simply amazed. His speeches and writings are not in any respect very different from his use of language which was always extraordinary even in conversation. Sometimes we discussed things about which we did not always agree. We often talked about recent Supreme Court cases. During the conversation I said to him about Justice Murphy, ‘But he has a great heart.’ Judge Hand responded: ‘Well, one must use what organs one has.’ Which was a pretty precise statement.”

The Hon. Kevin Thomas Duffy, US District Judge, worked as a bailiff and a clerk for Judge Lumbard during Hand’s time. Judge Duffy said one important thing he had discovered was that Learned Hand was a human being with a sense of humor. “After three years, I left the office and Judge Lumbard had a going away party for me. Judge Hand did not appear at the party. He came into the office the next day and I got up expecting him to go in to see the Judge. He said, ‘No no, I came to talk to you.’ He then gave me some advice: ‘I’d like to summarize, Kevin, how to handle a Court. Tell us the facts, tell us the law. Then with a smile he added, ‘that way we’ll understand it, then we’re in great shape. If we’re going to screw it up, we’ll screw it up for ourselves.’”

In closing, Judge Walker asked Professor Jordan about her remembrances of her grandfather as a grandfather, rather than as a Judge.

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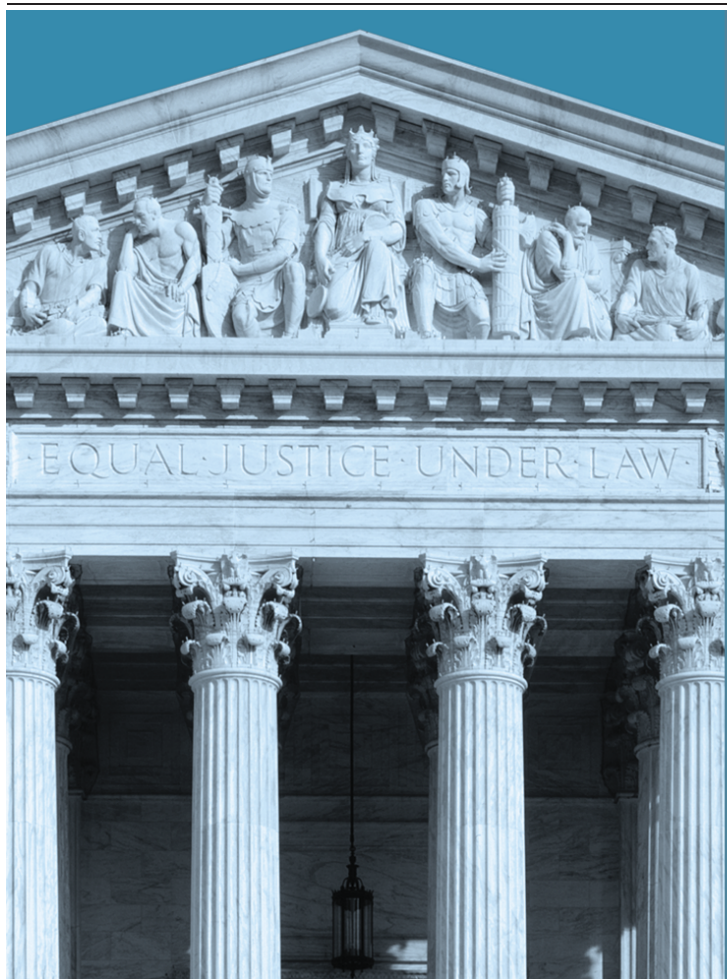
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