



THE SUPREME COURT
HISTORICAL SOCIETY

Quarterly

VOLUME XXXVIII

NUMBER 4, 2016

Anniversary of the Appointment and Confirmation of Justice Louis D. Brandeis

Professor Melvin Urofsky spoke at the Court on October 19th, 2016 in a special lecture to mark the 100th anniversary of the appointment and confirmation of Justice Louis D. Brandeis. The event was cosponsored by the Supreme Court Historical Society and the Brandeis School of Law at the University of Louisville.

The evening also provided an opportunity to acknowledge previous winners of the prestigious Brandeis Medal annually awarded by the school. Professor Urofsky received the award in 2010. Justice Elena Kagan, the 2016 winner, introduced the speaker. A number of earlier Brandeis Medal winners were in the audience, including Justice Ruth Bader Ginsburg, who received the award in 2003.

The evening began with remarks by Susan Duncan, Dean and Professor of Law at the University. Following that, Justice Kagan was introduced by Society Vice President Chilton Varner.

Justice Kagan spoke eloquently about her own appreciation of Brandeis and his contributions to the law. She noted that she sits in the Brandeis seat on the Court. The Justice added that her favorite Supreme Court opinion of all time is Brandeis' concurring opinion in the *Whitney* case. She observed that in the opinion the Justice "connects to the



Louis Dembitz Brandeis was an Associate Justice of the Supreme Court of the United States from 1916 to 1939. On June 1, 1916 he was confirmed by the Senate by a vote of 47 to 22.

Collection of the Supreme Court
deepest values of American civic life, and talks about how and what the first amendment does. . . .“ His conclusions and explanation are conveyed through the “. . . beauty of his prose. . . .“ and his “own quietly eloquent words.” The Justice said that in her opinion the best way to celebrate him is “to read Justice Louis Brandeis.” Taking her own advice, she then read a lengthy portion from the *Whitney* concurrence in celebration of Brandeis and his legacy.

Following Justice Kagan's remarks, Professor Urofsky presented his lecture. Melvin Urofsky is unquestionably the leading living authority on the life and work of Louis Brandeis. Speaking to an audience that included heirs of the great Justice, the speaker traced certain characteristics of Brandeis' approach to the law. Some of these characteristics were observable long before his appointment to the Court.

As a young lawyer Louis Brandeis became convinced

that no adequate legal advice could be given to a business client unless the lawyer himself knew as much about the business as his client did. Even as a young man he became a master of detail. This philosophy led to the famous “Brandeis Brief”—a legal tactic bringing a massive collection of relevant facts to the attention of the Court. The effect of this

Continued on Page 3

A Letter from the President



At this time of year, it seems appropriate to consider not only developments over the past twelve months but to look forward to what is anticipated in the new year. First, let's look to the future. Several programs and publications — continuing and new — are planned for the first half of 2017. The 2017 Silverman Lecture series will center on the topic of appointments from the

Cabinet to the Supreme Court. While this practice has become less common in recent years, several Justices had served in the Cabinet before joining the Court, such as Chief Justice Salmon P. Chase, who served as President Lincoln's Secretary of the Treasury, and Chief Justices Marshall and Jay, both of whom served as Secretary of State. A complete schedule of topics and dates for these lectures will appear in the next issue of the *Quarterly*.

I am pleased to announce that the Society will join with the Women's Bar Association of Washington, DC to present the 2017 Frank C. Jones Reenactment. The case to be reenacted (really, re-envisioned, as the advocates create with their own arguments) is the landmark case *Goesaert v. Cleary*. In *Goesaert*, two female bartenders from the State of Michigan challenged a law that prevented a woman from obtaining a license to tend bar unless her father or husband owned the saloon. After their petition was denied at the state court level, they were successful in obtaining a favorable ruling from the Supreme Court. The reenactments are always very popular, so I encourage you to make a reservation when your invitation arrives by mail or email in the Spring.

The Society's publications and teacher training programs continue to be well-received and reviewed, and we look forward to pursuing those activities — and developing new and different ones — as circumstances allow. Membership is of vital importance to the success of the Society, and we are grateful to Robert Anello, National Membership Chair, and his dedicated State Chairs for their efforts to spread awareness of and participation in the Society. In the next issue of the *Quarterly*, there will be a list of those who are engaged in these efforts currently so that you will be aware of chairs working in your area.

Recent weeks have seen significant development of the multimedia component of the Society's website, www.supremecourthistory.org. A large volume of new material has been added. The website organizes the video content and showcases video interviews and Society lectures taped by C-SPAN. We will soon offer more podcast style content,

which is being uploaded to the site as it is developed. The website also features an audio component that allows users to listen to content when they cannot access the video. Clare Cushman, our Director of Publications, is recording introductions and adding content to highlight our events, speakers, lecturers and authors. Please take the opportunity to visit the site frequently to see what has changed and been added and avail yourself of this material.

Looking back, on a sad note, the last quarter of the year brought the loss of a titan of the Supreme Court bar and a long-time Officer and Trustee of the Society, E. Barrett Prettyman, Jr. Mr. Prettyman had been involved with the work of the Society since the early 1980s. He served as Chair of the Publications Committee, as a Trustee and as a Vice President and a Vice President Emeritus. Mr. Prettyman practiced law at the distinguished firm of Hogan & Hartson (now Hogan Lovells), where he established the firm's appellate practice. During his long and acclaimed career, he clerked for multiple Justices and argued 19 cases before the Supreme Court. His work at the Hogan firm brought him into close association with another distinguished, then-young, lawyer, John G. Roberts, Jr., who became a leading Supreme Court advocate before his ascension to the Bench. When the Society took on the Summer Institute for Teachers, Mr. Prettyman urged the future Chief Justice Roberts to participate, and for many years he provided insightful and incisive instruction to the teachers about the role of advocates before the Supreme Court. (Even after he was appointed to the United States Court of Appeals for the D.C. Circuit, then-Judge Roberts taught this session. Since his appointment to the Supreme Court, the Chief Justice has graciously sponsored a reception for program participants each year.) Mr. Prettyman's contributions to the Society extended well-beyond introducing the Chief Justice to the Society, and he was a valued and important contributor and participant. He was a paradigmatic example of the volunteer commitment and enthusiasm that have helped to make the Society successful.

On behalf of my fellow Officers and Trustees of the Society, I would like to thank you for your continuing support. We are grateful for your participation and encourage you to attend programs whenever possible, to avail yourself of the many resources available on the website, and to utilize our outstanding publications. We remain committed to working to increase understanding of, and scholarship about, the Supreme Court of the United States and encourage you to support the Society to the extent your circumstances allow. Together we look forward to a new year of successful and rewarding work.

Gregory P. Joseph



Professor Mel Urofsky is the author of an award-winning biography of Justice Brandeis.

approach was to place his clients' legal case into an extra-legal context, and to make sometimes slow-to-change Judges more aware of a larger social and cultural picture.

Brandeis joined the Supreme Court in 1916, and served for over 20 years until his retirement in 1939. Not surprisingly, his attention to detail as a lawyer was transferred to the craftsmanship of his opinions as a Justice. He always wanted to get everything right, and, he expected his awe-struck clerks to correct him if he remembered facts incorrectly. He also warned them, gently but firmly, that they could not get the facts wrong themselves. This same attention to detail led Brandeis to spell out his so-called Ashwander Rules—a list of particulars which he believed Justices should follow when determining the constitutionality of congressional action.

Professor Urofsky noted also the sophistication of Brandeis' approach to anti-trust litigation. Perhaps because he was so devoted to the factual backgrounds of all litigation, he insisted that judicial inquiry into anti-trust issues be multi-dimensional, not simplistic.

Many Justices have been called "great" dissenters. In Professor Urofsky's opinion, Brandeis deserved the title "THE great dissenter". In his 23 years on the Court, the Justice dissented only 74 times, but he used his dissents always for a higher purpose. He believed that a dissent should be used judiciously, and sometimes he joined a majority opinion when he was not entirely convinced. This, he felt, was a small price to pay when dissent could be used in a more important context to educate the bench, the bar, and the general public when great principles were at stake.

In two areas especially, there were such important issues. The first involved Freedom of Speech. One can follow the development of the Justice's thought in his important dissents on this subject throughout his career. It is a tribute to Brandeis' depth of analysis that his view of the constitutional protection of speech is now the law, accepted without

question by later Courts, both conservative and liberal.

A second great area of Brandeis' contribution to the law is privacy. A law review article written by Brandeis with his early law partner Samuel Warren first raised the question of privacy as an issue at law. Initially the young lawyer saw privacy as a possible subject for actions in tort. But over time the Justice recognized the constitutional implications of the concept. His brilliant dissent in the *Olmstead* (wiretapping) case insisted that the 4th and 5th amendments of the Constitution conferred a general right of privacy on citizens, and that when that right was violated by government, government itself became the law breaker.

Prof. Urofsky's lecture was delivered before a capacity audience. It might be noted that he has lectured more frequently than any other speaker for the Society. The program was videotaped by C-Span and is available for viewing through their site, or by linking to the Society's web site at supremecourthistory.org.

The Society has often cosponsored events both in



Photo by Steve Petteway

Justice Elena Kagan spoke eloquently about her admiration for the work of Justice Louis Brandeis.

Washington and throughout the country. However, this collaboration with the University of Louisville was somewhat unique. A number of law schools are named after Supreme Court Justices, but the relationship between the University of Louisville and Justice Brandeis is special. The Justice was

Continued on Page 4

Quarterly

Published four times yearly in Spring, Summer, Fall, and Winter by the Supreme Court Historical Society, 224 E. Capitol Street, N.E., Washington, D.C. 20003. Tel. (202) 543-0400, <http://www.supremecourthistory.org>.

Distributed to members of the Society, law libraries, interested individuals, and professional associations.

Managing Editor Kathleen Shurtleff

Advisory Editor James B. O'Hara



Five recipients of the Brandeis Medal were recognized and photographed with Dean Susan Duncan: Justice Elena Kagan, Justice Ruth Bader Ginsburg, Stephen Bright, Judi Dash representing her father the late Sam Dash, and Professor Melvin Urofsky.

born in Louisville in 1856. His family moved away when the young man was only 16, and he never permanently returned. However, the Justice always remained fond of his birthplace, and this fondness translated into a very special interest in the University.

Consistent with his belief that States were the natural laboratories for social experiment, Brandeis fervently hoped that local colleges and universities could ultimately become



Justices Elena Kagan (on the left edge of group) and Ruth Bader Ginsburg (on the right edge of group) posed with descendants of Justice Brandeis. Mrs. Ann Gilbert and her husband Frank Gilbert, grandson of Justice Brandeis, are shown next to Justice Kagan.

true centers of scholarly excellence. During his lifetime the Justice maintained a lively correspondence with officials of the University, offering encouragement and advice and financial support. It was his fond hope that Louisville and the University would lead the way to local excellence in ideas and education.

On his death, Brandeis bequeathed a substantial portion of his personal papers to the University. More importantly, the ashes of the Justice and his wife are now buried in a niche on the portico of the school of law. An appropriate plaque commemorates the site, regularly visited by students and by visitors.

Not surprisingly, the University is a center of Brandeis scholarship. In 1997, the law school was formally named after the Justice. Earlier, in 1982, a Brandeis medal was struck to honor individuals whose contributions to the law



Justice Kagan was photographed prior to the lecture with Prof. and Mrs. Melvin Urofsky and their two granddaughters.

exemplified the Brandeis spirit and philosophy. To date, six Supreme Court Justices have been honored by this medal: Harry Blackmun (1983), Sandra Day O'Connor (1992), Ruth Bader Ginsburg (2003), Stephen G. Breyer (2004), John Paul Stevens (2013) and Elena Kagan (2016).

This lecture at the Court was the culmination of a year-long series of events to commemorate the appointment of Justice Brandeis by President Woodrow Wilson in 1916. To chronicle the long relationship between the University of Louisville and Justice Brandeis members of the faculty of the Brandeis School of Law published a book in 2006 titled "Brandeis at 150: The Louisville Perspective."

ANSWERS TO THE TRIVIA QUIZ (ON BACK COVER)

1) In 1910, William Howard Taft, a Republican, appointed Edward Douglass White, a Democrat.

as a member of the Arizona State Senate. She was elected majority leader of that body in 1972, the first woman to hold such office anywhere in the United States.



and William Howard Taft



Elena Kagan being sworn in by Chief Justice Roberts

2) Franklin D. Roosevelt, a Democrat, appointed Harlan Fiske Stone, a Republican, to serve as Chief Justice in 1941.

3) John Adams appointed John Marshall, his Secretary of State, to be Chief Justice in 1801.

4) The last President was John F. Kennedy who appointed Arthur Goldberg, his Secretary of Labor in 1961.

5) George Washington appointed John Jay who had been elected to represent New York at the First Continental Congress. Jay would later resign the Chief Justiceship to serve as Governor of New York.

6) Ronald Reagan appointed Sandra Day O'Connor in 1981 who had served previously

Library of Congress



Vice-President John Adams crossed party lines to appoint John Marshall.

7) Franklin D. Roosevelt appointed Stanley Reed in 1938.

8) President Barack Obama appointed Elena Kagan to the Court in 2010.

9) This is a trick question. Woodrow Wilson appointed Louis Brandeis who had been a Republican as a younger man, but who was an Independent at the time of his appointment. Later President Roosevelt (as noted above) appointed Harlan Fiske Stone to be Chief Justice after he had already been on the Court as an Associate Justice. Harry Truman appointed Harold Burton in 1945, his old Senate colleague.

10) Richard Nixon appointed Lewis F. Powell in 1971.



President Ronald Reagan, Chief Justice Warren Burger and Sandra Day O'Connor



Nixon Confirmed William Rehnquist and Lewis F. Powell as Associate Justices of the Supreme Court

Collection of the Supreme Court

Collection of the Supreme Court

The Legacy of John Jay

By Jude Pfister*

The three most important achievements in John Jay's life are: co-author of *The Federalist* Papers, first Chief Justice, and negotiation of the Paris Peace Treaty of 1783 formally ending the American Revolution. Jay's other achievements include being President of the Continental Congress (1778-1779), Minister to Spain, and the negotiation of the Jay Treaty. He was also Governor of New York, his last public office. It would be useful to give some background on Jay's ancestry.

The story of the Huguenots of France is very much part of the story of the Jays. The immediate family had its roots in La Rochelle, France (a major Huguenot city). Jay's grandfather, Augustus Jay (1665-1751), emigrated to America in the late seventeenth century, arriving in South Carolina and then quickly moving to New York City in 1688. His departure from France was in direct response to Louis XIV's revocation of the Edict of Nantes of 1685. In fact, young Augustus was away on business when the revocation was enacted and his parents and siblings had already secretly fled to England. Augustus found himself homeless and destitute (and technically prohibited from leaving) when he returned to France but quickly left for America through a network of friends. Years later, in his memoirs, John Jay referred to the revocation of 1685 as the "detestable proceedings."¹

Augustus seems to have effortlessly become a part of his new home in New York and joined the French Protestant Church. In 1725 a clerical dispute drove Augustus Jay into the Anglican Church, which became the Jay family religion going forward. Augustus and his wife Anna Bayard had four children to survive. Their son, Peter—John's father—was born in 1704. Peter, like his father and other family members, was trained as a merchant. In 1728 he married Mary Anna Van Cortland. John Jay was born, the eighth child of Peter Jay and Mary Van Cortland on December 12, 1745 in New York City. His parents would relocate to Rye shortly afterward. Somewhat prophetically for a future Chief Justice, John Jay was named John after his aunt's husband, John Chambers, a justice of the Supreme Court of the colony of New York. Listening to vivid family stories about persecution and religious intolerance as a child left a lifelong impression on

Jay who was one of the most outwardly religious Founders. He would harbor anti-Catholic sentiments his whole life but did not appear to act on them.

At the age of six, Jay was sent to a grammar school kept by Reverend Stoope in New Rochelle (its roots stretched back to the French city of La Rochelle). John Jay impressed his parents and teachers at an early age by taking "to learning exceedingly well."² Jay stayed with Reverend Stoope three years before returning home for private tutoring before entering college. In May 1764, Jay graduated high in his class with a Bachelor of Arts degree. He had by this point

already decided on pursuing law as a career. Without delay, Jay entered the law office of Benjamin Kissam to commence his legal studies. After three years of study and practical experience, Jay was admitted to the bar in 1768. His reputation for hard work, sound reasoning, and strong principles, (and his father's network of associates) gained Jay a lucrative business practice in short order. Jay's first important assignment on the public stage came in the early 1770s when King George III appointed a commission to adjudicate the boundary dispute between New York and New Jersey. The commission appointed Jay to be the secretary. On April 28, 1774, Jay married Sarah Livingston, daughter of the soon to be first non-royal governor of New Jersey, William Livingston. (The Jays were married at Liberty



Collection of the Supreme Court

John Jay served as the first Chief Justice from 1789-1795.

Hall which is today on the campus of Kean University.)

John and Sarah Jay's honeymoon was short-lived. News reached the colonies of the new British law called the Boston Port Bill scheduled to take effect in May of that year. The Port Bill closed the port of Boston as an aftermath of the Boston Tea Party. On May 16, 1774 (three weeks after they wed), prominent men of New York City met to discuss the turn of events in Boston and what implications this Bill could have on New York. This gathering produced a committee of fifty to work with the other colonies on a joint response to Parliament. John Jay, still a newlywed, was appointed to this committee.

On September 5, 1774, John Jay took his place among the delegates who gathered in Carpenter's Hall in Philadelphia for the First Continental Congress. Jay was one of the youngest delegates—if not the youngest—to be a representative of his

colony; he was 28. Jay was appointed to multiple committees and quickly earned a reputation as a good writer and even better thinker.

Jay made the most of his first experience with national issues, and impressed nearly all the delegates with his energy and determination. John Jay was subsequently elected to the post of delegate to the Second Continental Congress meeting in May 1775. Jay's national career was cut short however when he returned home to help draft the New York state constitution.

Under the new state constitution of New York in 1777, Jay (who was instrumental with drafting the document) was named the chief justice of the state Supreme Court. He was offered the governorship, but declined, saying he felt he could best serve New York by being a part of the judiciary. For over two years Jay served as a Judge and was no longer a member of the Continental Congress. He therefore missed his chance to be a signer of the Declaration of Independence.

In late 1778, Jay was recalled to Congress and made its president. Upon this distinction, he resigned as chief justice of New York. In September 1779, the Continental Congress selected John Jay to be minister plenipotentiary to Spain.

Spain was not overly keen on acknowledging American independence. For Jay, however, American independence was an established fact; never mind the war being fought. The Spanish however, colonial masters themselves, were not so sure independence was a suitable course for colonies to pursue. They wanted proof America was ready to go its separate way; Jay could not provide proof (this was a pivotal moment in his development as a nationalist/diplomat). Spanish officials thus treated Jay accordingly, "Pains were taken to prevent any conduct towards me that might savour of an admission or knowledge of American independence."³ He did manage to secure a small loan for the Americans from Spain. It is somewhat ironic that Jay, despite his anti-Catholic feeling, ended up serving in two of the most Catholic countries in Europe. In fact, the Spanish monarch was often referred to as his "Most Catholic Majesty". When Jay's daughter Susan was born in 1780 in Spain, Jay wrote to William Livingston that he and his wife Sarah would not follow the local Catholic custom of naming the child after the saint who was being honored the day of the birth. Jay's reasoning was "as the Saints are at War with us Heretics we shall name it after



Collection of the Supreme Court

Sarah Livingston married John Jay in 1774. She was the daughter of the first non-royal governor of New Jersey.

some Sinner that will probably have more Affection for it."⁴

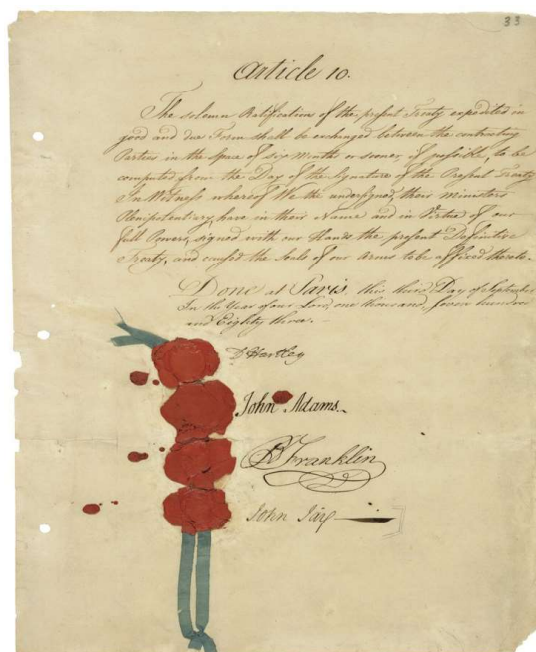
During the summer of 1781, Jay received word from Congress that he was to participate, with other American diplomats in Europe, in talks with Great Britain for peace; the talks were to be mediated by the Russian and German Emperors; the Americans were instructed by Congress to let

the Europeans do the negotiating. On September 20, 1781, Jay wrote a powerful letter to Thomas McKean (of Delaware), president of the Continental Congress. Writing from St. Ildefonso in Spain, Jay did not hold back his feelings on what he was being asked to do in his new instructions:

At the commencement of the present troubles I determined to devote myself, during the continuance of them, to the service of my country, in any station in which she might think it proper to place me. This resolution, for the first time, now embarrasses me.⁵

Jay was concerned here about America giving up its power to negotiate with European powers on an equal footing. This was one

John Jay Continued on Page 8



Library of Congress

Jay's signature is the last signature on the Paris Peace Treaty of 1783. The Treaty was one of his greatest diplomatic achievements.

John Jay Continued from Page 7

of the first instances of Jay's nationalism being put in print. These talks collapsed before they ever started.

Amidst the fast-paced flow of events occasioned by the end of the fighting after Yorktown, Jay received a letter from Benjamin Franklin in Paris in May 1782 asking him to proceed to join him in preparation for anticipated peace negotiations with England. His move to Paris would mark a new aspect of his career and a further enhancement of his credentials. Jay was instrumental in urging direct negotiations with Great Britain against the advice of the Congress who recommended letting France take the lead—very much like his opposition to Russia and Germany negotiating for America.

The greatest achievement of Jay's time in Europe was the Paris Peace Treaty of 1783. It was his one true accomplishment of nearly five years overseas. Two separate letters within a week of the formal signing on September 3 show the matters impacting Jay's life at this point—one serious, one not so serious. To Egbert Benson of New York, Jay related his reading of reports about the propensity of the states to take unnecessary actions against Loyalists. Jay was long interested in providing legal protection for Loyalists. He wrote to Benson (and this is classic Jay):

Your irregular and violent popular proceedings and resolutions against the Tories hurt us in Europe—we are puzzled to answer the question how it happens that if there be settled government in America the people of every town and district should take upon themselves to legislate. The people of America must either govern themselves according to their respective constitutions and the confederacies or relinquish all pretensions to the respect of other nations. The newspapers in Europe are filled with exaggerated accounts of the want of moderation, union, and government which they say prevails our country.⁶

Amidst his worries over the fragmentation—if not collapse—of the American political scene and the damage it was doing to the American cause in Europe, Jay noted in two letters the appearance of a new machine: air globes, or, hot air balloons. Jay wrote to Robert Livingston: “All the people here are running after air globes....and who knows but travelers may hereafter literally pass from country to country on the wings of the wind.”⁷

After the signing ceremonies for the Treaty were over, the exhausted Jay left alone for Bath, England, to find physical and mental restoration.

Jay returned to New York with Sarah on July 24, 1784, five years after he left. When he stepped off the ship he was hailed as though a conquering hero. There was little rest for the weary though as Congress had appointed Jay to the office of Secretary of Foreign Affairs. Jay immediately accepted, despite his fatigue. Jay dutifully fulfilled his role as Foreign Affairs Secretary for three years, eschewing larger domestic issues facing the newly independent United States. Jay was not involved with any convention or committee work leading up to the Constitutional Convention in 1787; in fact, his political enemy, New York Governor George Clinton, maneuvered to prevent Jay from being part of the state's delegation to Philadelphia in 1787. (Thus Jay missed being a signer of the Constitution too.)



John Jay is shown standing at the far left edge of this incomplete painting of the signing of the Treaty of Paris. Benjamin Franklin is the second seated figure from the left.

National Archives and Records Administration

While serving as Foreign Affairs Secretary, Jay was approached by Alexander Hamilton about a project being developed to assist in the New York ratification of the newly drafted Constitution. *The Federalist Papers*, a series of 85 essays written by Hamilton, Jay, and James Madison, over the course of about seven months from October 1787 to the summer of 1788 were something of an owner's manual for the new, proposed, Constitution.

Unfortunately, Jay had become ill and contributed only five essays, numbers 2, 3, 4, 5, and 64. Each essay dealt with foreign influence and the need to have a union of states with a central government rather than a confederation. Jay was very cautious of the American reputation for having a not-so-stellar record of coordinated government on the national level. Hamilton actually considered Jay a great catch for *The Federalist Papers* project, as Jay was by far the most notable of the three writers in 1787, even though their identity was secret. I want to share some quotes of Jay's from *The Federalist Papers* or other associated writings:

“Nothing is more certain than the indispensable necessity of government.” (Federalist number 2)

“The people must cede to the government some of their natural rights in order to vest the government with requisite powers.” (Federalist number 2)

“We have uniformly been one people with each individual citizen everywhere enjoying the same national rights, privileges, and protections.” (Federalist number 2)

“It takes time to make sovereigns of subjects” from a letter to Jefferson.⁸

“Those who own the country ought to govern it” (his son William wrote this was one of his sentiments).⁹

Jay looked to Queen Anne from 1706 (Federalist number 5) advocating for the union of England and Scotland and brought this thinking into the current situation over the United States being separate governments as opposed to one. Finally, in *The Federalist Papers*, befitting a future Chief Justice, Jay also argued for the sanctity of treaties and of the importance of international law (Federalist number 64).

Jay’s most important role on the national stage occurred with the creation of the new government under the Constitution in 1789. Jay was nominated by President Washington to be the first Chief Justice of the newly created Supreme Court. As Chief Justice, Jay can be credited with creating a body that had no precedent in Britain and only slight instances within the states. He tried most notably several Loyalist cases and British Creditor, pre-War, cases. In his first jury instructions while on circuit duty as the Chief Justice, Jay sounded a familiar theme of inclusive sacrifice for the greater good: “Let it be remembered that civil liberty consists, not in a right to every man to do just what he pleases, ...[but rather] whatever the equal and constitutional laws of the country admit to be consistent with the public good.”¹⁰

A fair argument can be made that Jay established the concept of judicial review of legislation a decade before John Marshall is given credit for that today. The concept existed for centuries prior in England. Here are a few of Jays’ cases:

Hayburns’ Case—Congress could not place on the Court duties not specified in the Constitution;

Chisholm v. Georgia—allowing an out-of-state resident to sue a state, a ruling which led immediately to Congress passing the 11th amendment;

Glass v. The Sloop Betsey—increased the international standing of the United States relative to adjudicating foreign matters and ruling that no foreign court could do that by setting up their own court on American soil.

Two of the reasons Jay loses credit for his Supreme Court work are 1) he left early to negotiate a treaty with the British in 1794 which has come to be known as the Jay Treaty, a much maligned document; and 2) the thirty-five years John Marshall occupied the Chief’s chair. His work in Britain was not unrelated to his work as a Justice. Jay was very concerned over the disregard of key provisions of the 1783 Peace Treaty which he helped to negotiate. Specifically, Jay was concerned about repayment of British debt contracted before the Revolution and the ways states were ignoring the provisions of the Treaty calling for repayment of contracted debt. Jay was intimately aware of the issue not just from the standpoint of his work on the Treaty ten years earlier as a negotiator, but also through his work on the Court. Not only did these cases highlight the extent to which states were going to ignore the Treaty, it also illustrated the level of animosity



After he retired from public life, Jay retired to his home Bedford House located in Katonah, New York.

which some states displayed accepting the supremacy of federal law as established through the Constitution.

Upon his return from Britain in 1795, Jay learned of his election as governor of New York. He took this position without qualm, resigned from the Court, and returned home. After his two terms as governor, he retired from public life to live as a gentleman country farmer, with his wife and family in Katonah, New York. Sadly, Sarah Livingston Jay died in June 1802 and Jay was left a widower for the last nearly 30 years of his life—he died in 1829; the last survivor of the First Continental Congress.

After Sarah’s death he avoided politics and public life. He opposed the War of 1812. He spent most of his spare time, aside from farming, studying the Bible. He served in various capacities with the American Bible Society, including as its president. John Jay died at his summer place in 1829.

**Jude M. Pfister, D.Litt., is the Chief of Cultural Resources at the Morristown National Historical Park where he oversees the library, museum, and archival collections. This article was developed from a lecture given at an historical house, the Hale-Byrnes House in Newark, Delaware*

Dr. Pfisters' new book, *Charting An American Republic: The Origins and Writings of the Federalist Papers*, is a roughly chronological narrative of the seven years between the Yorktown Campaign in 1781 to the writing of the *Federalist Papers* in 1787-1788. The seven years, which some have called the "critical period" of American history, saw hopes rise and fall on the tensions of the time as the young country moved from a war mentality to one of peace and cooperation. While we celebrate Constitution Day every year on September 17, we often forget that the Constitution we recall of September 17, 1787, was just a draft, a proposal. It still had to be ratified by the states. That struggle for ratification is what brought the *Federalist Papers* into being.

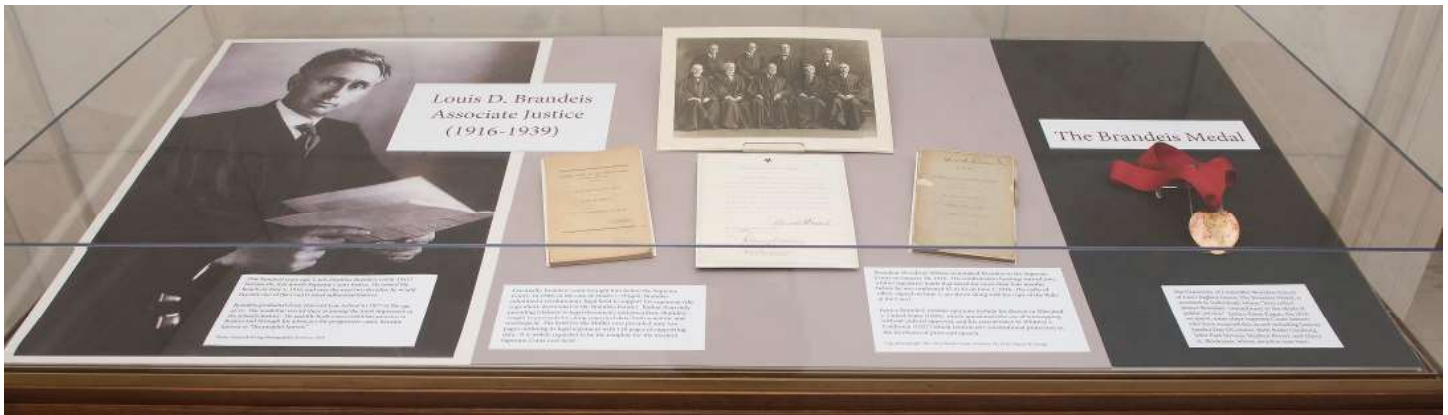
(Endnotes)

- 1 William Jay, *The Life of John Jay* Vol. 1 (Chestnut Hill: Elibron Classics Reprint—Adamant Media Corp., 2005), 3.
- 2 Ibid., 11.
- 3 Ibid., 107.
- 4 Louise V. North et al., eds., *Selected Letters of John Jay and Sarah Livingston Jay*, (Jefferson: McFarland & Company, 2005), 86.
- 5 The Selected Papers of John Jay Digital Edition, Elizabeth M. Nuxoll, editor. Charlottesville: University of Virginia Press, Rotunda, 2014. <http://rotunda.upress.virginia.edu/founders/JNJY-01-02-02-0236> [accessed 06 Jan 2016]. Main Series, Volume 2 (1780–1782).
- 6 *The Selected Papers of John Jay Digital Edition*, Elizabeth M. Nuxoll, editor. Charlottesville: University of Virginia Press, Rotunda, 2014—. <http://rotunda.upress.vir->

- [ginia.edu/founders/JNJY-01-03-02-0185](http://rotunda.upress.virginia.edu/founders/JNJY-01-03-02-0185) [accessed 06 Jan 2016]. Main Series, Volume 3 (1782–1784).
- 7 *The Selected Papers of John Jay Digital Edition*, Elizabeth M. Nuxoll, editor. Charlottesville: University of Virginia Press, Rotunda, 2014—. <http://rotunda.upress.virginia.edu/founders/JNJY-01-03-02-0187> [accessed 06 Jan 2016]. Main Series, Volume 3 (1782–1784).
- 8 *The Papers of Thomas Jefferson Digital Edition*, ed. Barbara B. Oberg and J. Jefferson Looney. Charlottesville: University of Virginia Press, Rotunda, 2008-2016. <http://rotunda.upress.virginia.edu/founders/TSJN-01-10-02-0189> [accessed 06 Jan 2016]. Main Series, Volume 10 (22 June–31 December 1786).
- 9 Jay, *Life of John Jay*, 70.
- 10 Ibid., 276.

Society Receives Unique Brandeis Materials

Photo by Steve Petteway



Ann and Frank Gilbert donated to the Society's collection several items from the personal library of Justice Louis Brandeis. The items were displayed with additional material prior to the lecture on October 19.

Society Trustee Frank B. Gilbert and his wife Ann Gilbert recently donated several significant items related to the legal career of Justice Louis D. Brandeis. Mr. Gilbert is the grandson of Justice Brandeis, and these items have been in the family for nearly 100 years. This generous gift included three items directly related to his practice of law prior to being appointed to the Supreme Court.

The first item is Brandeis' personal printed copy of the brief he submitted in the major case *Muller v. Oregon*. The cover of the paper document reads: "Curt Muller, Plaintiff in Error v. State of Oregon. Supreme Court of the United States, October Term 1907." Brandeis was a young lawyer at the time he argued this case which concerned the ability of the State to impose limitations on the hours worked by women. The case proved to be a watershed moment in Brandeis' career, greatly enhancing his reputation, and is one of the cases most closely associated with Brandeis as a lawyer.

The second item is Brandeis' personal copy of the Re-

vised Rules of the Supreme Court of the United States Adopted June 8, 1925 and bears his signature.

The third item is Brandeis' copy of Rules of the Supreme Court of the United States Adopted January 7, 1884, and the Rules of Practice for the Circuit and District Courts of the United States in Equity and Admiralty Cases, and Orders in Reference to Appeals from Court of Claims. The booklet was printed by the Government Printing Office, Washington, D.C. in 1901. The publication also bears Brandeis' signature.

The Office of the Curator prepared an exhibit case which featured these pamphlets, along with a photograph of Justice Brandeis and information about the materials. The case was displayed on the Ground Floor of the Court for visitors to enjoy prior to the Brandeis Lecture on October 19, 2016. These three important items donated by the Gilberts are now a part of the Society's permanent collection and will be exhibited on occasion by the Curator for the enrichment of the thousands of visitors to the Court Building.

NEW SUPREME COURT HISTORICAL SOCIETY MEMBERSHIPS

July 1, 2016 – September 30, 2016

ALABAMA

Greg Hawley, Birmingham

CALIFORNIA

Donald M. Falk, Oakland
M. Jonathan Hayes, Sherman Oaks
Christine Scott - Hayward, Long Beach
Weldon S. Wood, Redwood City

CONNECTICUT

Renee Winchester, Clinton

DELAWARE

Mary Sisson, Rehoboth Beach

DISTRICT of COLUMBIA

Clara Altman
Donald I. Baker
Barry Coburn
Carla Hayden
Mary Louise Mitterhoff
Valerie M. Nammery

FLORIDA

Theodore Babbitt, West Palm Beach
William J. Blechman, Miami
Bruce Lyons, Orlando
Charles Marschall, Tallahassee

GEORGIA

Harold T. Daniel Jr., Atlanta
Stephen Northam, Dahlonaga
Barbara B. Woodhouse, Atlanta

ILLINOIS

Kevin J. Conway, Chicago
Michael S. Knippen, Chicago

IOWA

Kenneth De Reus, Des Moines

KENTUCKY

Mike Giordano, Columbia
Caryn Devins, Silver Spring
Robert Ferguson, Baltimore
Emmanuel Moore, Suitland

MASSACHUSETTS

Thomas M. Hoopes, Wayland

MICHIGAN

Amanda Rice, Ann Arbor
Patrick A. Rugiero, Dearborn Heights

MISSOURI

Mark M. Haar, Saint Louis
Matthew J. Haar, Saint Louis
Sarah Recker, Kansas City

NEW HAMPSHIRE

R. James Steiner, Concord
James J. Tenn Jr., Manchester

NEW YORK

Scott Grinsell, New York
Michael J. Murphy, Albany

OHIO

Kimberly Huffman, Smithville
Robert Warren Jr., Cleveland

OKLAHOMA

Laurence L. Pinkerton, Tulsa

PENNSYLVANIA

Sonya Bishop, Philadelphia
Megan Scheib, Philadelphia
Donald F. Smith Jr., Reading
Alexander Urban, Lake Ariel

SOUTH CAROLINA

Brent O. Clinkscale, Greenville

SOUTH DAKOTA

N. Dean Nasser Jr., Sioux Falls

TENNESSEE

David Martin, Rockvale

TEXAS

Raymond Alletto, Irving
Bill Boyce, Houston
Allan E. Parker Jr., San Antonio
Shelly L. Skeen, Dallas

VIRGINIA

Olga F. Casillas, Falls Church
Timothy R. Curtis, Front Royal
Jonathan J. Ihrig, Alexandria
Cheryl Kearney, Annandale
Benjamin Kerschberg, Fairfax
Christopher Michel, Alexandria
Erin E. Murphy, Alexandria
Daniel Shapiro, Arlington

WISCONSIN

Peter M. Sommerhauser, Milwaukee
Ryan Walsh, Lake Mills

WYOMING

Alan B. Johnson, Cheyenne

TRIVIA QUIZ: THE FIRST AND THE LAST

By Professor James B. O'Hara*

Presidential appointments to the Supreme Court Bench are always the subject of great attention and interest, especially in an election year. This quiz presents questions about Presidents who crossed party lines to make nominations, made appointments from their own cabinets, and individuals they nominated who had held elective office in their own right. See how many you can answer correctly.

1. Who was the first President to appoint a Chief Justice from another political party?
2. And who was the last?
3. Who was the first President to appoint a member of his own Cabinet?
4. And who was the last?
5. Who was the first President to appoint a Justice who had held elective office?
6. And who was the last?
7. Who was the first President to appoint a sitting Solicitor General?
8. And who was the last?
9. Who was the first Democrat to appoint a Republican to the Court?
10. And who was the last Republican to appoint a Democrat to the Court?

Answers can be found on page 5.