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> Elise Hofer, *The Case for Judicial Review of Direct Democracy*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 New Voices) 49 (2014).
>
> Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions*, 4 J.L.: Periodical Laboratory of Leg. Scholarship (1 J. In-Chambers Prac.) 19 (2016).
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TABLES OF CONTENTS

Volume 7 • Number 1 • 2017

• JOURNAL OF IN-CHAMBERS PRACTICE •

• ALMANAC EXCERPTS •

This year's *Almanac Excerpts* consists of more than mere excerpts –
it is the entire "Ethereal Version" of the 2017 *Green Bag Almanac & Reader*!

OPENING REMARKS

A HANDY "CF." OR TWO FOR CITATION STUDIES

Ross E. Davies[†]

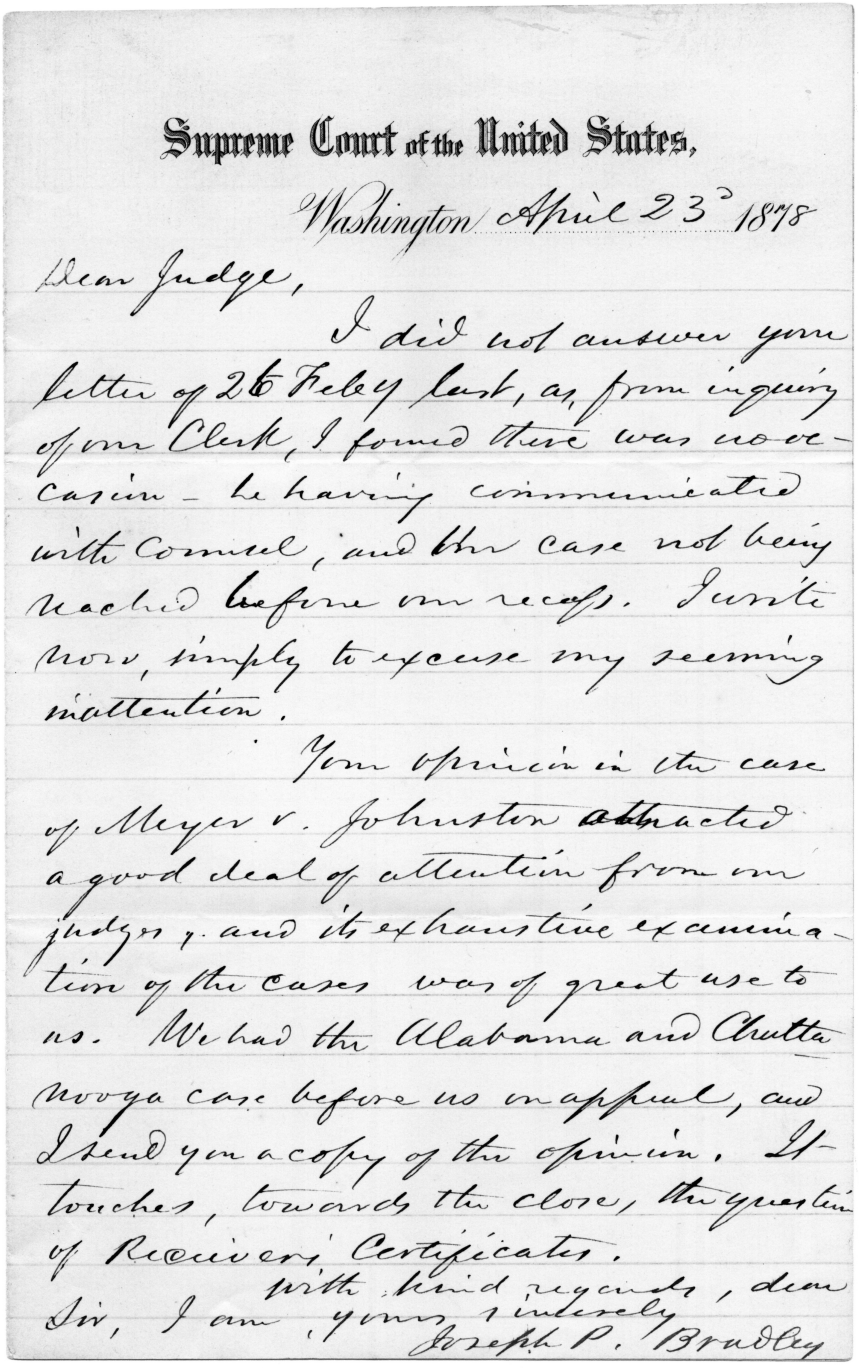
This note from Justice Joseph P. Bradley[1] of the Supreme Court of the United States must have been quite gratifying to the recipient, Justice Amos R. Manning[2] of the Supreme Court of Alabama:

> Washington April 23d 1878
>
> Dear Judge,
>
> I did not answer your letter of 26 Feby last, as, from inquiry of our Clerk, I found there was no occasion – he having communicated with counsel, and the case not being reached before our recess. I write now, simply to excuse my seeming inattention.
>
> Your opinion in the case of Meyer v. Johnston attracted a good deal of attention from our judges, and its exhaustive examination of the cases was of great use to us. We had the Alabama and Chattanooga case before us on appeal, and I send you a copy of the opinion. It touches, toward the close, the question of Receivers' Certificates.
>
> With kind regards, dear Sir, I am, yours sincerely
>
> Joseph P. Bradley

[†] Professor of law, Antonin Scalia Law School at GMU; editor-in-chief, the *Green Bag*.

[1] Bradley was born in 1813 in upstate New York. He moved to New Jersey, where he graduated from Rutgers in 1836, and spent most of his adult life in law practice there until he was made a Justice of the U.S. Supreme Court in 1870. He died in office in 1892, in Washington, DC.

[2] Manning was born in 1810 in New Jersey. He moved to Alabama and, after graduating from the University of Tennessee, spent most of his adult life back in Alabama practicing law and politics. He was elected to the Alabama Supreme Court in 1874 and served until his death (shortly after undergoing surgery in New York City) in 1880. As best I can tell, Manning and Bradley never met and were not pen pals, despite their shared sympathies for receivers in bankruptcy and connections to New Jersey and New York.



Supreme Court of the United States,

Washington April 23d 1878

Dear Judge,

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With kind regards, dear Sir, I am, yours sincerely

Joseph P. Bradley

So, Manning – who already knew his opinion in *Meyer v. Johnston* was the law of the land in Alabama[3] – now knew (courtesy of an authoritative source) that it was a significant influence on the law of the land nationwide. That made for a nice note, but not a very interesting one for anyone other than Manning. Today, though, that note is more interesting – not for what it said, but for what it did not say:

First, in his note to Manning, Bradley did not describe how the Court actually treated *Meyer v. Johnston* in the "Alabama and Chattanooga case" – *Wallace v. Loomis*.[4] *Loomis* was, like *Meyer*, an Alabama case involving a railroad bankruptcy and a chancery court's power to authorize receivers to issue debt with priority over pre-receivership debts. Indeed, at that time, *Meyer* was a leading case on the subject. And yet *Meyer* – which "attracted a good deal of attention" within the Court and "was of great use" to the Court – was not cited or even mentioned in the Court's unanimous opinion in *Loomis*. Thus, a modern citation study – the kind in which scholars analyze data gathered and coded by research assistants digging in databases – would show that Manning and his opinion had no influence at all in *Loomis*. Hmm. Doesn't it make you wonder just how many opinions like Manning's in *Meyer* there are out there, and how many notes like Bradley's to Manning, and how many similar notes that were never sent but could have been? And what they might teach us.

Second, in his note to Manning, Bradley did not identify the Justice who wrote the opinion for the Court in *Loomis*. It was Bradley himself. Moreover, in his *Loomis* opinion, Bradley failed to identify himself as the "justice of the fifth circuit" who first dealt with the initial complaint in *Loomis* when it was filed in 1872, as well as other matters in the case.[5] (Those were the days when members of the U.S. Supreme Court routinely sat on matters in the circuit courts to which they were assigned.[6]) And, obviously, Bradley did not recuse himself. Why so shy about stating in *Loomis* both that he had been the judge on circuit and that Manning's opinion in *Meyer* had been "of great use" to the Court?

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[3] 53 Ala. 237 (1875).

[4] 97 U.S. 146 (1878).

[5] *Id*. at 147, 150; Transcript of Record, *Wallace v. Loomis*, 97 U.S. 146 (1878), 163-64, 558-60 (filed Nov. 21, 1874); Appeal from the Circuit Court of the Southern District of Alabama, at Mobile, *Wallace v. Loomis*, 97 U.S. 146 (1878), 57 (O.T. 1877); 97 U.S. v-vi (1879).

[6] *See generally* Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753 (2003).

Perhaps Bradley's third omission from his note to Manning is a clue. (It probably was not about Bradley's failure to recuse, which would not have been an eyebrow-raiser by itself, because conflicts and recusals were not treated then as they are now.[7]) What was telling was that in the note, Bradley did not thank Manning for treating him so well in *Meyer*. Manning's opinion in *Meyer* had repeatedly and respectfully (fawningly would be a slight overstatement) cited Bradley by name for his decisions on circuit in the *Loomis* case.[8] In other words, in an intriguingly serpentine and slippery sequence of citations and silences: (1) Bradley's decisions as "justice of the fifth circuit" in *Loomis* in 1872 were (2) cited and relied upon by Manning as a justice of the Alabama Supreme Court in *Meyer* in 1875 and (3) Bradley was telling Manning in a private note in 1878 that his opinion in *Meyer* was "of great use" to the U.S. Supreme Court in (4) the Court's decision reviewing and upholding, in an opinion written by Bradley in 1878, (5) Bradley's decisions as "justice of the fifth circuit" in *Loomis* in 1872. At some point, Bradley may have recognized that a half-measure of reciprocal citational backslapping in print was not sustainable, and that he had to choose between publicly giving full credit where it was due, or none at all. He chose none. Doesn't it make you wonder just how many modern judges (and scholars) have arrived at a similar moment in their own work and made a similar decision?[9]

Professor Paul Carrington once said, "To be cited by a court on an issue laden with political implications is not to have influence, but to be used."[10] Perhaps he should have added that sometimes to be uncited on an issue laden with predeterminations is not to lack influence, but to have too much.

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[7] *See, e.g.*, Malcolm J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person*, 7 St. Louis U. J. Health L. & Pol'y 201, 255 n.175 (2014) (describing the non-recusal practices of Stephen J. Field, one of Bradley's contemporaries on the Court); *see generally* G. Edward White, *Recovering the World of the Marshall Court*, 33 J. Marshall L. Rev. 781 (2000).

[8] 53 Ala. at 310, 341-44.

[9] *See, e.g.*, Benjamin J. Keele and Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 Law Libr. J. 383, ¶¶31-37 (2012) (citing, along with many other interesting works, Carol M. Bast and Linda B. Samuels, *Plagiarism and Legal Scholarship in the Age of Information Sharing: The Need for Intellectual Honesty*, 57 Cath. U. L. Rev. 777 (2008), and Richard A. Posner, *The Little Book of Plagiarism* 43 (2007)); *cf.* Brenda Maddox, *Rosalind Franklin: The Dark Lady of DNA* (2002).

[10] *Stewards of Democracy: Law as a Public Profession* 70 (1999).

THE JOURNAL OF IN-CHAMBERS PRACTICE

INCLUDING RAPP'S REPORTS

VOLUME TWO — NUMBER ONE
2017

THE JOURNAL OF IN-CHAMBERS PRACTICE

• Articles •

• Rapp's Reports •

• Appendix to Rapp's Reports •

Contents

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There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

Justice Samuel Freeman Miller,
In re Neagle, *135 U.S. 1, 55-56 (1890)*

INTRODUCTION

IN-CHAMBERS OPINIONS – HISTORY AND MYSTERIES

Ira Brad Matetsky[†]

The predecessor of this publication, first compiled by Cynthia Rapp and later led by Ross Davies, was entitled *In Chambers Opinions by the Justices of the Supreme Court of the United States.* Today, in-chambers opinions by U.S. Supreme Court Justices are an endangered species. As I write this introduction in December 2017, it has been more than three and one-half years since any Justice wrote an in-chambers opinion ("ICO"), and there have been only three since October Term 2011.[1] Only the Justices know for sure why they write so few ICOs these days and whether they expect to write any more of them.[2] In the meantime, we editors of the *Journal of In-Chambers Practice* continue our search for still-obscure old ICUs and the history of in-chambers practice at the Court.

In this issue, John Q. Barrett, Professor of Law at St. John's University School of Law and the proprietor of the Jackson List blog,[3] retells the background to a series of bail applications made first to Judges of the U.S. Court of Appeals for the Second Circuit and then to Supreme Court Justices, culminating in ICOs by Justices Robert H. Jackson and Stanley Reed

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[†] Partner, Ganfer & Shore, LLP, New York, N.Y.

[1] The Court's website has a page listing all in-chambers opinions not yet found in bound volumes of the *United States Reports.* www.supremecourt.gov/opinions/in-chambers.aspx (last visited Dec. 20, 2017).

[2] Regarding possible reasons for the recent dearth of ICOs, and some recent changes in the Court's procedures relating to single-Justice applications, see Ira Brad Matetsky, *Introduction: The Current State of In-Chambers Practice*, 6 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (1 J. IN-CHAMBERS PRAC.) 9, 10-12 (2016).

[3] thejacksonlist.com (last visited Dec. 20, 2017). To join the Jackson List and receive periodic e-mails containing Professor Barrett's latest insight on Jackson, send a "subscribe" note to barrett@stjohns.edu. Highly recommended.

in 1950 and 1951.[4] The defendant-movants who came before Second Circuit Justice Jackson included the defendants in *Dennis v. United States,*[5] the famous (or infamous) Smith Act case, as well as several of their lawyers, who had been cited for contempt. The defendant-movants who came before Acting Circuit Justice Reed (Jackson was on vacation) in *Field v. United States* a few months later were three trustees of the Bail Fund of the Civil Rights Congress of New York. That fund had posted bail for several of the defendants in *Dennis*, four of whom absconded after conviction. This led the government to seek information from the Bail Fund, whose leaders were held in contempt of court and imprisoned for "refus[ing] to answer certain questions and to produce the records of the Bail Fund of which they were trustees."[6] Spoiler alert: the people in charge of posting bail were not allowed to post bail for themselves, an irony that surely was not lost on anyone. An earlier version of Barrett's article about these cases appeared on the Jackson List. We are grateful to him for expanding it and allowing us to share it with our readers.

The *Field* contempt proceedings led directly to an instance of Art Imitates Life. Some dates are significant: The U.S. District Court in Manhattan held Frederick Vanderbilt Field, one of the three *Field* defendants, in contempt for refusing to identify the Bail Fund's contributors, and remanded him on July 6, 1951. The other two defendants were jailed for the same offense three days later. The three men's convictions were front-page news in New York and around the country. Applications to release them on bail were denied by Second Circuit Judges Swan and Learned Hand on July 17, 1951, and by Justice Reed on July 25, 1951.[7]

As all this was taking place and making headline news, the mystery writer Rex Stout was at his home in Brewster, New York, preparing to write one of his Nero Wolfe mystery novellas. Stout started writing his

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[4] John Q. Barrett, *Jackson, Vinson, Reed, and "Reds": The Second Circuit Justices' Denials of Bail to the Bail Fund Trustees (1951)*, 7 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 19 (2017) (discussing *Williamson v. United States*, 184 F.2d 280, 1 Rapp 40 (1950) (Jackson, J., in chambers); *Dennis v. United States*, 1 Rapp 57 (1951) (Jackson, J., in chambers); *Sacher v. United States*, 1 Rapp 55 (1951) (Jackson, J., in chambers); *Field v. United States*, 193 F.2d 86, 1 Rapp 58 (1951) (Reed, J., in chambers)).

[5] 341 U.S. 494 (1951).

[6] *Field*, 193 F.2d at 89, 1 Rapp at 60.

[7] All these dates are drawn from Barrett's article and the sources cited in it.

story on July 27, 1951, and completed it on August 10, 1951.[8] He called it "Home to Roost," which was its title in book form a year later, but his magazine editors ran it first as "Nero Wolfe and the Communist Killer."[9] The story is a murder mystery (all the Wolfe stories are). One of the characters and suspects is a man named Henry Jameson Heath, who is "one of the chief providers and collectors of bail for the Commies who had been indicted. He had recently been indicted too, for contempt of Congress, and was probably headed for a modest stretch."[10] Ultimately, Wolfe persuades Heath that despite Heath's "inviting a term in jail rather than disclose the names of the contributors" to the Bail Fund, he must reluctantly identify one particular contributor because that person's identity is vital evidence in the murder case.[11]

Why did Stout, in July 1951, create a character who was at the head of a Communist bail fund and at risk of going to jail for contempt? Partly, perhaps, because suspicion of Communism in general and of Bail Funds in particular was in the air and in the papers at the time. (This was not even the first time that worry over a possible Communist was key to the plot of a Wolfe tale.[12]) Partly, perhaps, because Stout was very much a political man – a World Federalist, a prominent liberal intellectual (who turned out to have FBI and HUAC files), but also a Freedom House trustee and an avowed anti-Communist.[13]

And partly, I am sure, because one of the *Field* defendants – the Chairman of the Civil Rights Congress of New York Bail Fund – was "Dashiell ('Dash') Hammett, acclaimed writer of mysteries including *The Thin Man* and *The Maltese Falcon*."[14] Stout knew and respected Hammett's work, if probably not all of his politics. He had ranked *The Maltese Falcon* second on a list of the all-time "ten best detective stories" that he prepared for Vincent Starrett in 1942, and kept it on updated top-ten lists in 1951

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[8] JOHN MCALEER, REX STOUT: A MAJESTY'S LIFE 375 (2002) (citing Stout's handwritten "Writing Record," John McAleer Faculty Papers, Burns Library, Boston College, box 14, folder 44).
[9] THE AMERICAN MAGAZINE, January 1952, at 127.
[10] REX STOUT, TROUBLE IN TRIPLICATE 14 (1952).
[11] *Id.* at 52-53.
[12] *See* REX STOUT, THE SECOND CONFESSION (1949); *see also* MOLLY ZUCKERMAN, REX STOUT DOES NOT BELONG IN RUSSIA 33-47, 53-59 (2016).
[13] *See generally* MCALEER, *supra* note 8, *passim*; *see also* HERBERT MITGANG, DANGEROUS DOSSIERS: EXPOSING THE SECRET WAR AGAINST AMERICA'S GREATEST WRITERS, ch. XI (1988);
[14] Barrett, *supra* note 4, at 24.

and 1973.[15] In the *New York Times*, Stout once called Hammett "the best American detective story writer since Poe, who started the whole thing."[16] Stout would have been keenly aware in July and August 1951 that while he was typing his story, his distinguished professional colleague and competitor was sitting in a federal prison.

Back to ICOs. Just as John Barrett's article tells us how in-chambers applications were handled in the middle of the twentieth century, Ross Davies' piece tells us how things were done fifty years earlier, at the turn of that century.[17] It was a simpler time. If you wanted something from a Supreme Court Justice, you showed up at his home and asked him. The worst he could do was say no. And if you wanted to know the Justice's address and what time he was most likely to be home, the Court staff would tell you. Alas, things don't work that way anymore. Davies' article is accompanied, in small and large sizes, by another of the extraordinary maps with which he graces any branch of legal or literary scholarship that catches his special attention.

Next in this issue are two very brief opinions – or documents that did the work of opinions – in another famous case, that of Sacco and Vanzetti.[18] In August 1927, Justice Oliver Wendell Holmes, the Circuit Justice for the First Circuit who was spending the summer at home in Boston, denied two applications to halt the impending executions of Nicola Sacco and Bartolomeo Vanzetti, on the ground that there was no federal issue in the case. Holmes wrote a short opinion denying the first application and a somewhat longer one denying the second.[19] In the latter, he stated that the

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[15] *See* MCALEER, *supra* note 8, at 286-87, 549 (discussing lists prepared for Starrett in 1942, for *Ellery Queen's Mystery Magazine* in 1951, and for McAleer in 1973); Vincent Starrett, *Books Alive,* CHICAGO TRIBUNE, June 13, 1943, at 104; VINCENT STARRETT, BOOKS AND BIPEDS 82 (1947); ELLERY QUEEN, IN THE QUEENS' PARLOUR, AND OTHER LEAVES FROM THE EDITORS' NOTEBOOKS 96-97 (1957).

[16] Israel Shenker, *Rex Stout, 85, Gives Clues on Good Writing*, N.Y. TIMES, Dec. 1, 1971, at 58.

[17] Ross E. Davies, *Supreme Court Practice 1900: A Study of Turn-of-the-Century Appellate Procedure*, 7 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (2 J. IN-CHAMBERS PRAC.) 33 (2017).

[18] The literature on Sacco and Vanzetti is of course vast, but a law professor's recent account focused on Holmes and Brandeis, with a good discussion of the last-minute stay attempts, is BRAD SNYDER, THE HOUSE OF TRUTH: A WASHINGTON POLITICAL SALON AND THE FOUNDATIONS OF AMERICAN LIBERALISM, chs. 23-24 (2017). An interesting layman's recounting of the Sacco and Vanzetti case in the context of all the other momentous events of the year 1927 is BILL BRYSON, ONE SUMMER: AMERICA 1927 (2013).

[19] *See Sacco v. Hendry*, 1 Rapp 15 (Aug. 10, 1927) (Holmes, J., in chambers); *Sacco v. Massachusetts*, 1 Rapp 16 (Aug. 20, 1927) (Holmes, J., in chambers). *See, e.g.,* SNYDER, *supra* note 18, at 442-46, 450, 456-57 (Oxford 2017).

defense lawyers were free to seek a stay from another Justice and said he would be glad for them to try.[20] A stay was then sought from Justice Louis Brandeis, also in Boston, but Brandeis recused himself.[21] The defense team then sought stays from two other members of the Court. One group led by Arthur Hill travelled to Justice Harlan Fiske Stone's summer house on Isle au Haut, an island off the coast of Maine. Stone handed them a one-paragraph memorandum denying relief and stating that he agreed with Holmes. This writing may only have been a paragraph long, but it is a reasoned disposition of an application made out of Court to a single Justice (and on a momentous matter), so it counts as an ICO and is printed in this volume.[22]

Meanwhile, Michael Musmanno (later a Pennsylvania Supreme Court Justice) telephoned and then telegraphed to Chief Justice William Howard Taft, who was taking his own summer vacation in Canada. Musmanno asked if Taft would meet him at the border to hear a stay application. An annoyed Taft telegraphed back, collect, stating that he would not return from Canada to United States territory in order to entertain the application, which could be presented to Justices who were within the First Circuit, and which there was no jurisdiction to entertain anyway.[23]

Taft's telegram is included in *Rapp's Reports* in this issue. There should be no question that it qualifies for inclusion. ICO status does not depend on the form of a document. These volumes have included formal opinions, informal orders, handwritten scribblings, and letters to parties and counsel. Taft's telegram likewise explained, however briefly, the Chief Justice's reasons for denying the stay application, and thus served the purpose of an in-chambers opinion. To be sure, Taft disclaimed having any judicial jurisdiction while outside U.S. territory, and would have denied being in chambers (or any place that could have been a temporary chambers) at the time. The assumption that a Justice who temporarily was outside the country could not order a stay from abroad, shared by Musmanno and

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[20] *Sacco v. Massachusetts*, 1 Rapp at 17.

[21] *See, e.g.,* SNYDER, *supra* note 18, at 461-62.

[22] *Sacco v. Massachusetts*, 5 Rapp No. 11 (2 J. In-Chambers Prac.) 52 (1927) (Stone, J., in chambers); *see, e.g.,* SNYDER, *supra* note 18, at 463-66.

[23] *Sacco v. Massachusetts*, 5 Rapp No. 12 (2 J. In-Chambers Prac). 54 (1927) (Taft, C.J., in chambers); *see, e.g.,* SNYDER, *supra* note 18, at 466; MICHAEL J. MUSMANNO, AFTER TWELVE YEARS 351-57 (1939).

Taft in 1927,[24] has disappeared in more recent years. When needed, the Justices make decisions and cast votes regardless of where in the world they are at the time. The changing practice in this regard will be addressed in a future issue of this *Journal*.[25]

This issue also includes four documents that set forth Justice Wiley Rutledge's grounds for ruling as he did on four applications presented to him between 1946 and 1948.[26] In each of them, Rutledge laid out a detailed analysis of the facts and law in an in-chambers matter that he was deciding. However, the documents were never finalized and never issued to the parties, to counsel, or in one case, to a lower-court judge whose decision had been reversed and who asked why.[27] Although I speculated about the subject over a decade ago,[28] we still don't know why Rutledge prepared them – whether he planned to issue them as some sort of opinion but never got around to finalizing them, or wanted to have something in writing to bounce off someone else at the Court, or just wanted to make sure that he had the relevant facts and governing law and conclusion clear in his own mind before he ruled.[29] Quite possibly the fact that the opinions would not be published in the *United States Reports* helped deter Rutledge from polishing them further.[30]

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[24] MUSMANNO, *supra* note 23, at 352-53; *Sacco v. Massachusetts,* 5 Rapp No. 12 at 55.

[25] Anyone with insight or evidence on historical practice on this issue, or when and why it changed, should kindly contact the editors at imatetsky@ganfershore.com.

[26] *See* Memorandum in *Bisignano v. Municipal Court of Des Moines* (Oct. 1946), Wiley Rutledge Papers, Manuscript Division, Library of Congress ("Rutledge Papers"), Box 154; Memorandum in *Ex parte Standard Oil Co.* ("dictated March 18, 1947"), Rutledge Papers, Box 154; Memorandum in *Rogers v. United States* and two related cases, Rutledge Papers, Box 176 (Oct. 20, 1948); Memorandum in *Bary v. United States* and a related case, Rutledge Papers, Box 176 (Nov. 3, 1948).

[27] Ira Brad Matetsky, *The History of Publication of U.S. Supreme Court Justices' In-Chambers Opinions,* 6 J.L.: PERIODICAL J. OF LEG. SCHOLARSHIP (1 J. IN-CHAMBERS PRAC.) 19, 22 (2016) (citing Letter from Judge J. Foster Symes to Charles Elmore Cropley, Clerk of the Supreme Court, November 16, 1948, and letter from Mr. Cropley, by E.P. Cullinan, Assistant Clerk, to Judge Symes, November 18, 1948, in case file, *Rogers v. United States,* O.T. 1950 No. 20, National Archives Supreme Court case files, R.G. 267).

[28] Ira Brad Matetsky, *The Publication and Location of In-Chambers Opinions*, 4 Rapp supp. 2 at vi, viii-ix (2005).

[29] Again, anyone with insight or evidence on this issue – or, especially, any of the few remaining people who might have actual knowledge, such as Rutledge's clerks of the time – are most welcome to contact the editors.

[30] "[O]n one occasion, a law clerk to the late Mr. Justice Rutledge asked me whether such [in-chambers] opinions were published or could be published. I told him that the long-established practice was not to publish them in the United States Reports, and that I doubted my authority to do so. . . ."

In any event, since the documents never left Rutledge's chambers, they weren't in-chambers *opinions*, and therefore are ineligible for reprinting in *Rapp's Reports.* But they deserve greater attention and so they are included in this issue, albeit it in an Appendix ("Rapp App.") to *Rapp's Reports*. Why reprint them now? One reason is that while Rutledge was diligent in hearing in-chambers applications, he did not write ICOs in his six years on the Court.[31] These are a worthwhile substitute, especially given the detailed attention Rutledge gave the cases.[32] And also because two of these four "opinions" addressed – we end where we began – bail applications made in 1948 by five defendants who had been held in contempt of court for refusing to answer grand juries' questions about alleged Communist activities. The defendants argued that compelling them to answer would violate their Fifth Amendments privilege against self-incrimination, pointing as evidence to the then-recent Smith Act indictments in *Dennis*. Rutledge's "opinions" show that he acted thoughtfully, not reflexively, on these bail applications. But a student of Supreme Court history might guess without being told that Rutledge would be more likely than Reed to favor such an application. And so it proved, with Rutledge granting bail to all five applicants.

These four Rutledge "opinions" were located in the Rutledge Papers in the Manuscript Division of the Library of Congress. Library collections of Justices' own papers and chambers files – as opposed to official records of the Court itself – have also been the source of dozens of ICOs that the editors have located and reprinted in *Rapp's Reports*.[33] More broadly, the Justices' papers, including early drafts of opinions and communications

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Letter/memorandum from Walter Wyatt, Reporter, to Chief Justice Vinson, Aug. 27, 1951, Walter Wyatt Papers, Manuscript Group 10278-b, Albert & Shirley Smalls Special Collection Library, University of Virginia, Charlottesville, Va. ("Wyatt Papers"), Box 119, *reprinted in* 4 Rapp supp. 2, at xx, xxi.

[31] Thus far, *Rapp's Reports* contain only one "official" ICO by Rutledge: *Shearer v. United States*, 4 Rapp 1545 (1947) (Rutledge, J., in chambers). And that one barely qualifies: it is on the borderline between a mere form of order and an actual opinion. *Shearer* is, however, fascinating in that it reveals that in August 1947, Rutledge heard oral argument at his summer house in Ogunquit, Maine on a bail application by a defendant convicted in the Eastern District of Missouri. Two defense lawyers traveled to Maine for the argument, from Washington, D.C. and St. Paul, Minnesota respectively. The government, presumably not wanting to incur the expense or delay of transporting the lawyers who had handled the case from Missouri to Maine, had the U.S. Attorney for Maine and his Assistant cover the argument, although they must have known little about the case. Surely there is a story waiting to be told here, but for now the circumstances remain unknown.

[32] *See* JOHN M. FERRIN, SALT OF THE EARTH, CONSCIENCE OF THE COURT 406 (2004) (citing letter from Justice Rutledge to W. Howard Mann, March 1, 1949, Rutledge Papers, Box 32).

[33] *See, e.g.,* Matetsky, *supra* note 28, 4 Rapp. supp. 2, at xviii-xvix.

between the Justices about them, have shed important light on all aspects of the Court's work. They are often consulted and cited by legal academics, political scientists, and historians, and are a valued resource in all these fields. I was quite surprised, therefore, when a few months ago I read this:

> At the risk of seeming a complete philistine, however, I can't imagine why anyone would want to do anything with judges' or Justices' papers other than discard them. They are the equivalent of an artist's preliminary sketch of what becomes a painting, or the rough draft of a novel; they are superseded by the finished work; the judges' preliminary work on a case, such as it is, is superseded by the opinion. . . . [T]he best thing to do with such papers is to throw them out. There are about one thousand federal judges, Justices, etc. (not to mention law clerks and secretaries), and the amount of documentary junk they accumulate must be staggering, yet holds very little interest.[34]

The author of these words is not a philistine, complete or otherwise. He is Richard Posner, often described between 1981 and his recent retirement as the nation's most influential judge not on the Supreme Court, and still a leading scholar of law, law and economics, law and literature, and other fields. But Posner's suggestion (in his recent book *The Federal Judiciary: Strengths and Weaknesses*) that United States Supreme Court Justices or their heirs should throw away their papers – all the draft opinions, revisions, memoranda, and everything else that might shed light on how cases were decided and how important opinions that govern our lives came to be – is an ill-considered one. Many Justices or their heirs have indeed discarded or destroyed their papers – and many a legal historian has cursed them for doing it.[35]

Conversely, a great deal of important work has been done with the Justices' (and lower-court judges') papers that have been preserved. Posner

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[34] RICHARD A. POSNER, THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES 209 (2017).

[35] Twentieth-century justices who destroyed all or most of their papers included Owen Roberts, Benjamin Cardozo, James McReynolds, and Edward Douglass White among many others. Others, such as Hugo Black and Byron White, did not destroy everything but they did burn (Black) or shred (White) large portions of the files – likely the most interesting parts. *See* Kathryn A. Watts, *Judges and Their Papers*, 88 N.Y.U. L. REV. 1665 (2013), and sources cited therein; ALEXANDRA WIGDOR, THE PERSONAL PAPERS OF SUPREME COURT JUSTICES (1986); Jill Lepore, *The Great Paper Caper,* THE NEW YORKER, DEC. 1, 2014.

knows this perfectly well. In fact, there is an example in the same book in which he suggested throwing all the Justices' papers away. In his chapter on the Supreme Court, Posner discusses *Bolling v. Sharpe*,[36] the 1954 opinion by Chief Justice Warren that unanimously struck down racial segregation in the District of Columbia's public schools, on the same day that *Brown v. Board of Education*[37] struck it down in the states. Posner discusses the Court's rationale for its decision in *Bolling,* and then continues:

> But it's interesting to note that after certiorari had been granted in the *Bolling* case but before the case was argued, Chief Justice Warren had sent a memo to the other Justices suggesting that the case could be resolved in favor of forbidding racial discrimination in the District of Columbia public schools by reference to the due process clause of the Fifth Amendment. The key passage in the memo is that "segregation in public education is not reasonably related to any proper governmental objective, and it imposes on these children a burden which constitutes an arbitrary deprivation of liberty in violation of the Due Process Clause."[38]

I agree it is interesting that in this document – captioned a memorandum, but actually a first draft of an opinion in *Bolling* – Warren considered a rationale at some variance from that of his published opinion for the Court. Yet we wouldn't know anything about it – and about so much more of the legal history of cases such as *Brown* and *Bolling* – if the Justices' case files containing the memos and draft opinions had all been thrown away.[39] Elsewhere, there is more evidence that Posner does understand the importance of such materials for legal history and judicial biography.[40]

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[36] 347 U.S. 497 (1954).

[37] 347 U.S. 483 (1954).

[38] *Id.* at 90 (citing Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958,* 68 GEORGETOWN L. J.1, 93-94 (1979). Hutchinson's analysis of the "sea change" between the draft and final *Bolling* opinions is at pp. 45-50. Warren's memorandum is captioned "Memorandum on the District of Columbia Case" and was distributed to the Conference on May 7, 1954. Hutchinson located a copy in the Harold Burton Papers at the Library of Congress; there are copies in other Justices' papers as well.

[39] Among the most important works making use of these materials are RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975, 2004), and MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION* AND THE CIVIL RIGHTS MOVEMENT (2007);

[40] *See, e.g.,* Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 YALE L. J. 511 (1994) (reviewing GERALD GUNTHER: LEARNED HAND: THE MAN AND THE JUDGE

So if Posner ever reads this, I hope he will renounce the idea that Justices and judges' papers should routinely be discarded – and especially that he won't apply it to his own judicial papers![41]

And who knows? – maybe the Posner Papers will themselves yield some previously unpublished in-chambers opinions, whether by the Circuit Justice for the Seventh Circuit,[42] or even by Posner himself.[43] The latter would be well outside the scope of *Rapp's Reports*, but we'll gladly create *Rapp App. II* if need be.

We hope our readers find this issue interesting and informative, and that they will share with us any suggestions for where we might locate the still-missing in-chambers opinions of the Justices of the Supreme Court of the United States, or the details of how such opinions came to be.

(1994)) (noting Gunther's "ample quotations from [Hand's] pungent, humorous, candid preconference memoranda to the other judges on his panel"); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 145 n.1 (1990) (regretting that that "[t]he New York Court of Appeals [on which Cardozo served from 1914 to 1932] steadfastly refuses to make Cardozo's, or any other judge's, pre-argument memos available to scholars"). (Regarding the latter, New York, unlike the federal courts, has treated the Court of Appeals judges' memoranda to each other as public rather than private documents, consistent with Posner's (and many others') view of how they should be treated. POSNER, THE FEDERAL JUDICIARY, *supra* note 38, at 209-11.)

[41] We know from the notes and acknowledgements in William Domnarski's biography of Posner that there is a "Richard Posner Archive" at the University of Chicago Regenstein Library, but not whether Posner's judicial papers are or will be in it. *See* WILLIAM DOMNARSKI, RICHARD POSNER 257, 259 (2017)

[42] "[W]e once had a case that took four years to be decided and was not decided until our circuit justice (Justice Stevens at the time) issued a mandamus to our court." POSNER, THE FEDERAL JUDICIARY, *supra* note 38, at 9.

[43] While serving as a Seventh Circuit Judge, Posner wrote several significant in-chambers opinions that were published in the *Federal Reporter* and have been repeatedly cited. *E.g., Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542 (Posner, J., in chambers) (denying motion by Speaker of Illinois House of Representatives and President of Illinois State Senate to file *amicus curiae* briefs); *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (Posner, J., in chambers) (denying Chicago Board of Trade's request to file an *amicus* brief on appeal, and criticizing *amicus* briefs generally as duplicative of the parties' briefs and unhelpful to the judges); *Schurz Comms. v. FCC*, 982 F.2d 1057 (7th Cir. 1992) (Posner, J., in chambers) (denying motion to recuse himself from an antitrust appeal because he had provided an expert witness on a related issue in another case before becoming a judge). Given his 36 years of taking his turns as the motions judge, there must be more such opinions that went unreported. Incidentally, Posner is on record that he finds the word "chambers" an unnecessarily pompous term for a judge's office. *See* POSNER, THE FEDERAL JUDICIARY, at 7. But he has used the phrase "(chambers opinion)" in citations – *see Voices for Choices*, 339 F.3d at 545, citing *Ryan*, 125 F.3d at 1063) – and so we need not introduce the new citation form "(Posner, J., in his office)" into this publication.

JACKSON, VINSON, REED, AND "REDS"

THE SECOND CIRCUIT JUSTICES' DENIALS OF BAIL TO THE BAIL FUND TRUSTEES (1951)

John Q. Barrett[†]

On June 4, 1951, the Supreme Court of the United States announced its final decisions of the term and then began its summer recess.

The most notable decision that day was *Dennis, et al. v. United States*.[1] The Court, by a 6-2 vote, affirmed the criminal convictions and prison sentences of eleven leaders of the Communist Party of the U.S.A. for conspiring to teach and advocate the overthrow of the U.S. government.

In a related matter, the Court also announced that day that, by the same vote, it would not review *Sacher, et al. v. United States*, the cases of six attorneys who had represented *Dennis* defendants during their long, contentious trial in New York City.[2] Following the trial, the judge had summarily convicted those attorneys of criminal contempt for misconduct during the trial and sentenced them to prison terms.

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[1] 341 U.S. 494 (1951).

[2] 341 U.S. 952 (1951).

Chief Justice Fred M. Vinson, Justice Stanley Reed, and Justice Robert H. Jackson were three of the six Supreme Court justices who comprised the *Dennis* and *Sacher* majorities.

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Under an allotment order issued by the Court in 1946 pursuant to a federal law, Justice Jackson served as Circuit Justice for the Second Circuit (New York, Connecticut and Vermont).[3] This meant that emergency matters from the Second Circuit would be Jackson's initial responsibility. In the *Dennis* case itself, for example, Jackson as Circuit Justice had in September 1950 – *i.e.*, during the Court's 1950 summer recess – granted defendants' motion for continuation of their bail through the duration of their appeals.[4]

During the June 1951 first weeks of the Court's summer recess, Justice Jackson remained mostly in Washington, working in his chambers.

In the *Dennis* and *Sacher* cases, the Supreme Court's mandates – certified copies of its judgments and opinions – were scheduled to issue late that month. Those actions would formally return the cases to the lower courts for proceedings consistent with the Court's judgments. For each defendant, that soon would lead, very predictably, to the trial judge directing him to report to federal prison to begin serving his sentence.

The *Dennis* and *Sacher* defendants sought to stay the Supreme Court's issuance of its mandates. The *Dennis* defendants, who had filed separately a petition asking the full Court to rehear the case and reconsider the lawfulness of the convictions, sought to stay issuance of the mandate and to continue each defendant's bail until the Court decided whether to rehear the case. The *Sacher* defendants, who also were seeking the full Court's reconsideration of its decision not to review their convictions, sought to stay issuance of the mandate in their cases as well.

These matters were presented to the Second Circuit Justice, Robert Jackson. He heard oral arguments from counsel, including defendants' counsel and U.S. Solicitor General Philip B. Perlman, in chambers on June 21, 1951.

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[3] *See* Allotment of Justices, 329 U.S. iv (Oct. 14, 1946).

[4] *Williamson v. United States*, 184 F.2d 480, 1 Rapp 40 (1950) (Jackson, J., in chambers).

The next day, Justice Jackson issued his decisions. In *Dennis*, Jackson denied the stay request and continuation of bail.[5] In *Sacher*, he granted the stay.[6] Among his reasons: to insure that the *Dennis* defendants would have the full assistance of counsel as their cases returned to the trial court and they surrendered for incarceration.

By this point in the Supreme Court's second full week of summer recess, Justice Felix Frankfurter had left Washington on vacation. He thus was not in the building when Jackson, his colleague and close friend, as Second Circuit Justice, decided the *Dennis* and *Sacher* post-decision matters (and otherwise surely would have discussed them with Frankfurter). A month later, when Jackson was on his own vacation, he wrote to Frankfurter about what he had missed at the Court in late June:

> I had a mess of bail applications. I refused the defendants in Dennis a stay pending rehearing – it seemed so absurd after the time we took on the case. But I gave the [*Sacher*] lawyers a stay to press their contempt case on rehearing. At the argument Pearlman [sic] made a bitter attack on them for their contempt [during the trial]. I cut him off, but refrained from saying anything about the pot and the kettle. But the effort at self restraint almost overcame me.[7]

On July 9, 1951, Justice Jackson embarked on his vacation. He traveled by train from Washington to San Francisco. He stayed briefly at the Bohemian Club there and then was driven north to the Club's summer encampment – the Bohemian Grove – in Monte Rio, California.

Three years earlier, Jackson had visited the Bohemian Grove for the first time, as the guest of San Francisco lawyer Arthur H. Kent, his friend and former Treasury Department deputy. In 1949, the Club elected Jackson to honorary membership. He returned to the Bohemian Grove every summer in his six remaining years.

The Bohemian Grove offered two-plus weeks of relaxation, with high-powered and professionally diverse male company, in a setting of great natural beauty. On July 20, 1951, Jackson described some of this in a letter to his daughter at her home in McLean, Virginia:

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[5] *Dennis v. United States*, 1 Rapp 57 (1951) (Jackson, J., in chambers).

[6] *Sacher v. United States*, 1 Rapp 55 (1951) (Jackson, J., in chambers).

[7] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 23, 1951], at 4-5, in Felix Frankfurter Papers, Library of Congress, Manuscript Division, Washington, D.C. ("FF LOC"), Box 70.

> Dear Mary –
>
> Just a note to let you know I am in the land of the living and feel fine. Really never felt better – lots of fruit[,] swimming, canoeing and walking. . . .
>
> The [Bohemian Grove] program I was to appear on [as a speaker] went over fine. Quite by accident I ran upon a yarn by H.L. Mencken about judges and booze – a most ably written and amusing story.[8] With a few side remarks I read it [to the group] and it seemed to be most acceptable.
>
> Since I have already told you all that can be told about this place I simply say it seems more relaxing than ever before – probably because I am better acquainted. I sleep until 8:30 or 9 every morning and once until 10. College Presidents are a dime a dozen [here] and Herbert Hoover, mellow with age and experience[,] has been very companionable. A list of those who are Who's Who material would fill a book. The weather has been perfect – hot days and cold nights. . . . Will send a few post card views just to refresh your memories on what it is like out here.
>
> More at some later time. Love and good wishes
>
> Dad.[9]

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In the *Dennis* case, following Justice Jackson's June 22, 1951, denial of the motion for a stay, the Supreme Court's mandate issued and the defendants were ordered to surrender for incarceration on July 2. Seven of the Communist Party officials did surrender but four – Gus Hall, Henry Win-

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[8] The story, an account of New York judges visiting Baltimore for a formal dinner and then disappearing for days of drinking and whoring there, causing some of their worried daughters to search for the missing judges, is part of Mencken's "The Judicial Arm," first serialized in a magazine and then published as a chapter in his memoir of his days as a young Baltimore reporter. *See* H.L. Mencken, *Days of Innocence III – The Judicial Arm*, THE NEW YORKER, Mar. 29, 1941, at 20-21; H.L. MENCKEN, NEWSPAPER DAYS 194-199 (1941). I thank Mencken biographer and expert Marion Elizabeth Rodgers for immediately, generously guiding me from Jackson's slight description (above) to the relevant Mencken writing. *See* H.L. MENCKEN, THE DAYS TRILOGY, EXPANDED EDITION (The Library of America, 2014) (reprinting NEWSPAPER DAYS) (Marion Elizabeth Rodgers, ed.); *see generally* MARION ELIZABETH RODGERS, MENCKEN, THE AMERICAN ICONOCLAST: THE LIFE AND TIMES OF THE BAD BOY OF BALTIMORE (2005).

[9] Letter from Robert H. Jackson to Mary J. Loftus, "Friday" [July 20, 1951], in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. ("RHJ LOC"), Box 2, Folder 4.

ston, Robert Thompson, and Gilbert Green – did not. They jumped bail and became fugitives. Their fugitivity immediately was the leading news story in the United States.

During 1948 and much of 1949, Judge Harold R. Medina had presided at the lengthy trial in the Southern District of New York of the *Dennis* defendants. In 1949, following the jury's convictions of the defendants, Judge Medina had sentenced them to terms of imprisonment. He also had summarily convicted a number of their attorneys of criminal contempt for their behavior during the trial and sentenced those lawyers to prison as well. (Those persons became, in the Supreme Court, the *Sacher* petitioners.)

But in late June 1951, Judge Medina was appointed to the U.S. Court of Appeals for the Second Circuit. The *Dennis* case thus was reassigned to U.S. District Court Judge Sylvester J. Ryan; when the Supreme Court's mandate issued, it went to Judge Ryan in the District Court. On July 3, he ordered the bail of the four fugitives – $20,000 apiece – forfeited. He then commenced an inquiry to determine whether any of the bail-providers had information that could lead to the fugitives.

The *Dennis* defendants had been beneficiaries of a bail bond fund collected and administered by an organization called the Civil Rights Congress of New York. This fund, a successor to the 1930s International Labor Defense fund, was established to make bail available to persons whom the fund regarded as victims of politically-motivated prosecutions.[10] About 4,000 depositors contributed to the Bail Fund, which in July 1951 held $770,000.[11] The U.S. Attorney General, J. Howard McGrath, had designated the Civil Rights Congress a Communist subversive front organization.[12]

Judge Ryan ordered the Bail Fund trustees to appear in his court and answer questions. Frederick Vanderbilt ("Fred") Field, the fund's secretary-treasurer, appeared on July 3. He answered the Judge's questions about the fund and produced most of its books, but he refused, claiming a constitutional privilege against self-incrimination, to name the persons who had provided financial assets for the Bail Fund to use as collateral. On

[10] *See* VICTOR RABINOWITZ, UNREPENTANT LEFTIST: A LAWYER'S MEMOIR 141 (1996).
[11] *See id*.
[12] *See* Russell Porter, *Bail of 14 Reds Voided Again; New Bonds Required Today*, N.Y. TIMES, July 17, 1951, at 1.

July 5, Field, newly represented by attorney Victor Rabinowitz, a member of the National Lawyers Guild, reiterated his refusal. The next day, Judge Ryan, determining that Field's privilege claim was unfounded, judged him guilty of criminal contempt and sentenced him to ninety days in prison.[13]

On July 9, Judge Ryan ordered additional Bail Fund trustees to testify. Dashiell ("Dash") Hammett, acclaimed writer of mysteries including *The Thin Man* and *The Maltese Falcon*, was the fund's chairman. Dr. W. Alphaeus Hunton, formerly an English professor at Howard University and then a Council on African Affairs official, was another Bail Fund trustee.[14] Each refused to answer questions about the Bail Fund or to produce its records, claiming a constitutional privilege against self-incrimination.[15] Judge Ryan rejected these claims and, as with Field, convicted Hammett and Hunton of criminal contempt. The Judge sentenced each to six months in prison. They promptly were taken into custody by U.S. Marshals.[16]

Field, Hammett, and Hunton, through counsel, appealed their contempt convictions and sought bail while their appeals were pending. Judge Ryan denied their bail motions.

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[13] *See* Russell Porter, *Field, Bail Trustee for Missing Reds, Is Ordered Jailed*, N.Y. TIMES, July 6, 1951, at 1, 7.

[14] Hunton's great-nephew Stephen L. Carter, a professor at Yale Law School and a noted nonfiction and fiction writer, currently is writing a biography of his grandmother Eunice Roberta Hunton Carter. She was one of New York's first African American women lawyers and, in the 1930s, a prosecutor in the office of Manhattan District Attorney Thomas E. Dewey. The book will include material on her brother W. Alphaeus Hunton. A preview is Stephen L. Carter, *Why I Support Dissent: My Great-Uncle Who Wouldn't Name Names*, BLOOMBERGVIEW, Aug. 12, 2016, *available at* www.bloomberg.com/view/articles/2016-08-12/why-i-support-dissent-my-great-uncle-who-wouldn-t-name-names. I thank Professor Carter for generously emailing with me about his family and the Bail Fund litigation.

[15] For a complete transcript of Hammett's July 9, 1951, testimony before Judge Ryan, see RICHARD LAYMAN, SHADOW MAN: THE LIFE OF DASHIELL HAMMETT (1981), at Appendix pp. 248-62.

[16] *See*, *e.g.*, Russell Porter, *Dashiell Hammett and Hunton Jailed in Red Bail Inquiry*, N.Y. TIMES, July 10, 1951, at 1, 3. Later in the month, a fourth Bail Fund trustee, Abner Green, who Judge Ryan had held in contempt but not ordered sent to prison, was convicted twice of criminal contempt and sent to prison for concurrent six month sentences, first for his refusal to produce to a federal grand jury the records of another organization, the American Committee for the Protection of the Foreign Born, which the Attorney General had found, like the Civil Rights Congress, to be a Communist front, and then for refusing to try to locate Bail Fund records. *See* Russell Porter, *Red Bail Trustee Joins Three in Jail*, N.Y. TIMES, July 28, 1951, at 1, 5; Russell Porter, *Field, Green Ruled in Contempt Again; Get 6 Months More*, N.Y. TIMES, July 31, 1951, at 1, 12.

Field's lawyer Victor Rabinowitz and his colleague, attorney Mary M. Kaufman, then took an emergency appeal to U.S. Court of Appeals Chief Judge Thomas W. Swan. Chief Judge Swan, based in New Haven, Connecticut, heard oral argument on the afternoon of Friday, July 6, in an office at Yale Law School (where he had been a professor and, for a time, the dean).[17] After Rabinowitz and Irving H. Saypol, the United States Attorney for the Southern District of New York, had argued their positions, Chief Judge Swan granted bail to Field. In a separate proceeding, Swan's colleague Judge Learned Hand granted bail to Hammett and Hunton. But within days each Judge reversed course and revoked his bail order.[18]

The lawyers then filed emergency applications for bail at the Supreme Court. When Clerk's office informed the lawyers that the Second Circuit Justice, Jackson, was on vacation in California at the Bohemian Grove, the lawyers offered to travel to Jackson and make their arguments there. Jackson, apprised of this offer, declined to make himself available.

The lawyers, informed of this, then told the Clerk's office that they would take their applications to Justice Hugo L. Black. The Clerk's office reported this to Jackson and he passed the information to Chief Justice Vinson. It appears that Vinson did not like the idea of the attorneys appearing before Justice Black (who had dissented in *Dennis*). But Vinson, himself on vacation in New York State, also was not interested in handling these applications personally. So he designated Justice Stanley Reed to act as Second Circuit Justice in Jackson's absence, and thus to hear the bail applications of Field, Hammett, and Hunton.

At this time, Justice Reed was vacationing at his home in Maysville, Kentucky. Victor Rabinowitz, representing the three applicants, traveled from New York to Maysville. U.S. Government attorney Oscar H. Davis, an assistant to the Solicitor General, also traveled to Maysville. They argued before Justice Reed in a hearing that he convened in his house.[19]

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[17] *See Field Release Due Today; In Jail Over Weekend*, DAILY WORKER, July 9, 1951, at 3.

[18] *See United States v. Field*, 190 F.2d 554 (2d Cir. 1951) (Swan, C.J.); *United States v. Hunton, et al.*, 190 F.2d 556 (2d Cir. 1951) (L. Hand, J.).

[19] *See* Associated Press report, *Justice Reed Studies Briefs on Communist Bail Fund Trustees*, July 22, 1951. Reed's house, which he purchased around 1910, began as an eighteenth century log building on a ridge overlooking Maysville. *See* JOHN D. FASSETT, NEW DEAL JUSTICE: THE LIFE OF STANLEY REED OF KENTUCKY 20 (1994). Today it is called the Newdigate-Reed House, and it is on the National Register of Historic Places. *See id.*; npgallery.nps.gov/NRHP/AssetDetail?assetID=d0c053f5-7898-4c30-8129-07a843aaa544 (visited Apr. 28, 2017).

Rabinowitz, in a 1993 draft section that ultimately did not make it into the autobiography that he published in 1996, dictated or wrote his recollection that

> Reed was not the judge I would have chosen to hear the application. A Roosevelt appointee, he had shown some liberal tendencies in his first years on the bench, but by the time the 50's came along he had retreated into a dense fog of conservatism. He was clearly out of sympathy with my argument. I was vigorously and ably opposed by Oscar Davis, one of the most energetic and competent Assistant Attorneys General [sic], and it was clear to me after a very few minutes that I was not getting through to Reed.[20]

Meanwhile, back at the Bohemian Grove, Justice Jackson wrote on about July 23 to Justice Frankfurter, who was vacationing with his wife in Charlemont, Massachusetts. Jackson included this update:

> One thing I forgot. I flatly refused to make myself available to hear latest application for bail + stay in New York Commie cases. I told [U.S. Supreme Court Clerk Harold] Willey to let C.J. [Vinson] deal with them instead of their flying here – no doubt with great publicity. But C.J. was staying up at Joe Davies['s] for the summer[21] and said he "was just as unavailable as Jackson." The Commies wanted the cases sent to Hugo [Black] but C.J. sent them to Reed. Have not heard what he did with them.[22]

At about this same time, Jackson also wrote to his son, daughter-in-law, young granddaughter, and wife (a/k/a the visiting grandmother), who were together in Cold Spring Harbor, New York. Jackson recounted

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[20] VICTOR RABINOWITZ, A MEMOIR, VOLUME II, THE COLD WAR: BAIL FUND [7/30/93] at 258, in Victor Rabinowitz Papers (TAM 123), Archives of the Tamiment Library, New York University, Box 13, Folder 3. *Cf.* RABINOWITZ, UNREPENTANT LEFTIST, *supra* note 10, at 141 (publishing only that "I traveled to Maysville, Kentucky, to make an application for bail before Justice Stanley Reed of the Supreme Court; he denied my application a few days later.").

[21] Chief Justice Vinson apparently was a guest of former U.S. Ambassador to the U.S.S.R. Joseph E. Davies at Camp Topridge, the large, luxurious Adirondack mountain camp that his wife Marjorie Merriweather Post – heiress to the Post cereal fortune; she also built a grand estate, Mar-a-Lago, in Palm Beach, Florida – owned on Upper St. Regis Lake near Keese Mill, New York. *See generally* Deena Clark, *A Visit to 'Topridge' – Camp's By-Product Is Enjoyment*, WASH. POST, Sept. 20, 1953, at S6.

[22] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 23, 1951], at 6, in FF LOC, Box 70.

to them how he had ducked, and how Justice Reed now came to be handling, these bail applications:

> Dear Bill and Nancy + Miranda + Mother: -
>
> I have had a lot of bother with the Communists trying to reach me for bail and stays from [Judge] Ryan orders. I flatly refused to be "available" when they wanted to fly out here – with a lot of publicity – to present application. Then they wanted the cases sent to Black. I said let them go to the C.J. Well, he is up at Joe Davies['s] camp and didn't want any hot stuff so he sent them to Reed. I haven't heard what he did. But I suppose they are apt to renew the effort to get at me anytime. Not if I can help it![23]

Back in New York City, Field was transported on July 25 – before his attorney Rabinowitz had returned from his trip to Kentucky to seek bail from Justice Reed[24] – to testify before a federal grand jury investigating possible crimes of obstruction of justice and harboring the *Dennis* case bail-jumpers.[25] Before the grand jury, Field refused to answer questions about Bail Fund contributors or to produce Bail Fund records. Based on this, U.S. District Judge John F.X. McGohey convicted Field of criminal contempt and sentenced him to serve six months in prison, to run consecutively to Judge Ryan's ninety-day sentence on Field.[26]

Back in Kentucky, Justice Reed, after hearing the parties' oral arguments and studying briefs they had filed, wrote in longhand a thorough opinion.[27] It included, just for his convenience and not for publication, numerous citations to particular pages in the record of the proceedings before Judge Ryan.[28]

Justice Reed sent his opinion pages and ancillary material to his secre-

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[23] Letter from Robert H. Jackson to William E. Jackson, et al., undated [est. July 24, 1951] (in author's possession).

[24] *See* RABINOWITZ, UNREPENTANT LEFTIST, *supra* note 10, at 141-42.

[25] *See* Russell Porter, *Field, Green Ruled in Contempt Again; Get 6 Months More*, *supra* note 16, at 1.

[26] *See id*. at 12; United Press report, *Second Contempt: Field Given Six Months More in Jail*, WASH. POST, July 31, 1951, at 11.

[27] Justice Reed's longhand draft, filling ten single-spaced, yellow legal pad pages, plus various pages of notes and a page of detailed instructions to his secretary Helen Gaylord, is preserved in his archived papers. *See* Stanley Forman Reed Papers, 1926-1977, 81M3, Special Collections and Digital Programs, University of Kentucky Libraries, Lexington, Box 132. I thank Matt Harris and his colleagues at the Special Collections and Research Center, Margaret I. King Library, University of Kentucky, for assistance with this research.

[28] Letter from "SReed" to "H.G.", undated (headed "Directions"), in *id*.

tary, Miss Helen Gaylord, who was working in his chambers at the Supreme Court during its recess.[29] He instructed her to type the opinion, to save his handwritten pages (as she obviously did – they are archived in his papers), and to tell the Court's Clerk that he (Justice Reed) would sign a typed version of the opinion – to create an official typed version, it seems – when he returned to Washington.[30]

Justice Reed seems not to have mentioned anything about this bail application litigation when he spoke at a Maysville Rotary club meeting on the evening of July 24. According to local press, he said that past legal problems at the Supreme Court have evolved into the law of the land, and that today's legal problems will be resolved into the law of tomorrow. He also briefly described his fellow justices and the backgrounds that led to their respective Supreme Court appointments.[31]

The Supreme Court issued Justice Reed's opinion on July 25, 1951. It denied the Field, Hammett, and Hunton applications for bail pending appeal. Justice Reed found that Judge Ryan had legal authority to issue bench warrants for the *Dennis* fugitives, and to call witnesses to execute their judgments of imprisonment. This was especially true of the Bail Fund trustees, who by providing bail had become part of the court control process that was responsible for the defendants' required appearances. Justice Reed also affirmed that Judge Ryan had legal power to protect court work from obstruction by refusals to answer inquiries, including by holding persons in criminal contempt. And with regard to the Bail Fund records of its

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[29] Helen Gaylord, a former upstate New Yorker, began to work for Stanley Reed as his secretary in Washington in the early 1930s. *See* JOHN D. FASSETT, *supra* note 19, at 210. Gaylord moved with Reed as he was appointed to new offices, working for him at the U.S. Department of Justice when he became Solicitor General of the U.S. in 1935 and then at the Supreme Court when he was appointed a justice in 1938. Jack Fassett, a Reed law clerk during 1953-54, wrote later that Gaylord,

> [i]n addition to typing memos, communications, and opinions, … maintained Reed's docket books and his financial records, followed the status of activities of the Court, often communicated with other justices or their staffs with respect to Court matters, and, though not a lawyer, often acted as an additional law clerk, seeking requested information or research materials for Reed.

Id.; *accord generally* Interview with Helen K. Gaylord, Stanley F. Reed Oral History Project, Louie B. Nunn Center for Oral History, University of Kentucky (Mar. 18, 1981), *available at* https://nyx.uky.edu/oh/render.php?cachefile=1981OH035_Reed03_Gaylord.xml (visited Apr. 28, 2017).

[30] *See* Letter from "SReed" to "H.G.", *supra* note 28.

[31] *See Supreme Court Then And Now, Club Topic*, THE LEDGER INDEPENDENT, July 25, 2915, at 1. I thank Lisa Massey-Brown and her colleagues at the Kentucky Gateway Museum Center in Maysville for locating this article.

donors' names, Justice Reed held that the applicants had no constitutional privilege to withhold them, because the records were Civil Rights Congress property that they held as trustees, not their personal records. Justice Reed held that the refusals to provide the records had been contemptuous, and he affirmed the denials of bail pending appeal.[32]

• • •

Justice Jackson continued to vacation, giving some thought to *Dennis* case-related matters but not handling them.

On July 26, for example, Jackson, probably unaware of Justice Reed's decision the previous day, wrote again to his daughter:

> Dear Mariska:
>
> . . .
>
> Well, it was true that I was being heckled by all sorts of things from the office. But I told the Clerk's office to lay off, that I am simply not available out here and someone else could look after the stuff, that my shop is closed until after Labor Day. They then tried to switch some of my stuff to the C.J. but he sidestepped and let it fall on Reed. Anyway I'm out from under. . . .
>
> Am getting a daily swim and sun bath, walk more miles each day than in a month at home, sleep 9 hours a night[,] eat like a horse and am lazy as hell. Really have not felt better in God knows when. . . .
>
> It might be a good thing for you to change scene a little while. . . . You seem to be about the only one in the family who does not get a vacation.
>
> Anyway love and good wishes.
>
> Daddy.[33]

A few days later, Justice Jackson, still at the Bohemian Grove, wrote again to Justice Frankfurter in Massachusetts, including these comments on the "Communist" cases:

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[32] *See Field v. United States*, 193 F.2d 86, 1 Rapp 58 (1951) (Reed, J., in chambers).

[33] Letter from Robert H. Jackson to Mary J. Loftus, "Thursday" [July 26, 1951], in RHJ LOC, Box 2, Folder 4.

Dear Felix:

. . .

We have had [a] wonderful time in this unique camp. Soon have to give it up and go back to the job. But anyway I shall do so greatly refreshed. I have not been reading the Dennis record I assure you! But I continued their bail (the attys [Sacher, et al.]) so another look could be taken at it. I suppose the Clerk sent you copy of my [June 22] memo [opinion] on it. I do not know what, if anything[,] we should, or can[,] do about it at this stage. I will be interested in your conclusions when all considerations have been canvassed.

My best to Marion and
As ever
Bob[34]

• • •

Justice Jackson remained in northern California through most of August 1951. His wife joined him there and they traveled around, visiting friends including Jackson's former law clerk Phil Neal, then a professor at Stanford Law School. (While at Stanford, Jackson interviewed Neal's top student, William Rehnquist, for what became his 1952-53 clerkship with Jackson.) On August 23, in San Francisco, Jackson delivered the keynote lecture at the California State Bar Association's annual convention.

On August 28, Justice Jackson returned to work in his Supreme Court chambers, preparing for the term that would begin in October.

On September 14, a U.S. Court of Appeals for the Second Circuit panel heard oral argument on Field's, Hammett's, and Hunton's appeals from Judge Ryan's criminal contempt judgments against them, and on Field's appeal from Judge McGohey's order holding Field in criminal contempt for failure to testify and produce documents to a grand jury. At that time, the appellants applied again, this time orally, for bail pending appeal. The panel denied those bail applications.[35] And on October 30, it affirmed the contempt judgments.[36]

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[34] Letter from Robert H. Jackson to Felix Frankfurter, undated [est. July 29, 1951], in FF LOC, Box 70.

[35] *See* Russell Porter, *Freedom Denied 4 in Red Bail Inquiry*, N.Y. TIMES, Sept. 15, 1951, at 4.

[36] *United States v. Field*, 193 F.2d 92 (2d Cir. 1951). Judge Charles E. Clark wrote the panel's opinion. Judge Harrie B. Chase joined in the entirety of Judge Clark's opinion for the Court. Judge

The next day, Field, Hammett, and Hunton applied to the Court of Appeals for bail pending their filing of petitions seeking U.S. Supreme Court review. On November 5, without hearing oral argument on the applications, a Court of Appeals panel denied them.

Four days later, the three men each applied to the Supreme Court for bail pending their filing of applications for writs of certiorari in their respective cases and Court action on such petitions. By that date, Field had completed serving his two-month sentence from Judge Ryan and was serving the six-month prison sentence he had received from Judge McGohey. Hammett and Hunton still were serving the six month sentences that Judge Ryan had imposed on them. At the Supreme Court, the Clerk's office delivered these applications to the Second Circuit Justice, Jackson, for his consideration and adjudication.[37]

Field, Hammett, and Hunton subsequently did seek Supreme Court review of their contempt convictions. On December 3, the Court denied their petitions.[38] Justice Black and Justice William O. Douglas, the *Dennis* dissenters, noted that they were "of the opinion certiorari should be granted."[39]

At the same time that the full Court denied the Field, Hammett, and Hunton petition seeking review of their convictions, Justice Jackson, as Second Circuit Justice, denied their respective applications for bail, which had been filed on November 9. He wrote no opinion; on the front page of each application, he simply wrote, vertically in the left margin, "Denied," the December 3 date, and his name.[40]

For his crimes of contempt, Fred Field served two prison sentences, the ninety-day sentence imposed by Judge Ryan and then the six-month

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Jerome N. Frank dissented in part and wrote a separate opinion.

[37] *See* Application for an Order Admitting Appellant Field to Bail Pending a Petition for Writ of Certiorari, *United States v. Field*, filed by Victor Rabinowitz, Nov. 9, 1951; Application for an Order Admitting Appellants, Hammett and Hunton, to Bail Pending an Application for a Writ of Certiorari and Decision Thereon, *United States v. Hammett* & *United States v. Hunton*, filed by Charles Haydon and Mary M. Kaufman, Nov. 9, 1951. See also Memorandum for the United States in Opposition, *Field v. United States* & *Field* [sic], *Hammett* & *Hunton v. United States*, filed by Solicitor General Perlman, Nov. 9, 1951. Each of these pleadings is located in Record Group 267, Box 6762, National Archives & Records Administration, Washington, D.C. I thank Robert Ellis and his NARA colleagues for their assistance with this research.

[38] 342 U.S.894 (1951).

[39] *Id*.

[40] *See supra* note 37.

sentence imposed by Judge McGohey. Field, whose good behavior in prison earned time off his sentences, was released from the federal prison in Ashland, Kentucky, about 75 miles east of Justice Reed's home in Maysville, on February 26, 1952.[41]

Dash Hammett was incarcerated with Field in New York City, then in Lewisburg, Pennsylvania, then in Chillicothe, Ohio, and then in Ashland, Kentucky.[42] Hammett was released on December 9, 1951.[43]

Alphaeus Hunton also served slightly less than his six-month sentence. According to Field, Hunton, an African American, was sent to an all-Negro prison rather than to the Ashland federal prison (which he might have hated more because it was "Jim-Crowed" – "blacks were housed in separate cell blocks and sat at segregated tables in the mess hall"[44]). Hunton also was released, it seems, on or about December 9.

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[41] *See F.V. Field Out of Jail*, N.Y. Times, Feb. 29, 1952, at 8; *see generally* FREDERICK VANDERBILT FIELD, FROM RIGHT TO LEFT: AN AUTOBIOGRAPHY 239-56 (1983) (describing his time as, according to his chapter title, a "Guest of the Government").

[42] *Id*. at 227, 244, 247-51.

[43] *See* Associated Press report, *Hammett Freed From U.S. Prison; Field Still Held*, WASH. POST, Dec. 11, 1951, at B11.

[44] FIELD, FROM RIGHT TO LEFT, *supra* note 41, at 249.

SUPREME COURT PRACTICE 1900

A STUDY OF TURN-OF-THE-CENTURY APPELLATE PROCEDURE

Ross E. Davies[†]

Nowadays, "[a]n application addressed to an individual Justice [of the Supreme Court of the United States] shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief."[1] It hasn't always worked that way. Indeed, for most of the Supreme Court's history, litigants (or their counsel) who had business with individual Justices generally felt free to deal directly with those Justices, and the Justices generally reciprocated. This was partly a matter of law and partly a matter of practicality.

First, law's role. Action by individual Justices used to be required or permitted on many occasions, in response to litigants' applications of various sorts. For example, at the turn from the 19th century to the 20th (and for many years before and after),

> An appeal or a writ of error from a circuit court or a district court direct to [the Supreme Court], in the cases provided for in sections five and six of the [Evarts Act of 1891], may be allowed, in term time or in vacation, by any justice of this court, . . . and the proper security be taken and the citation signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.[2]

As Daniel Gonen has explained, "[t]he practice of allowing a single Justice to act [under Rule 36] rather than the full court was based on the point-

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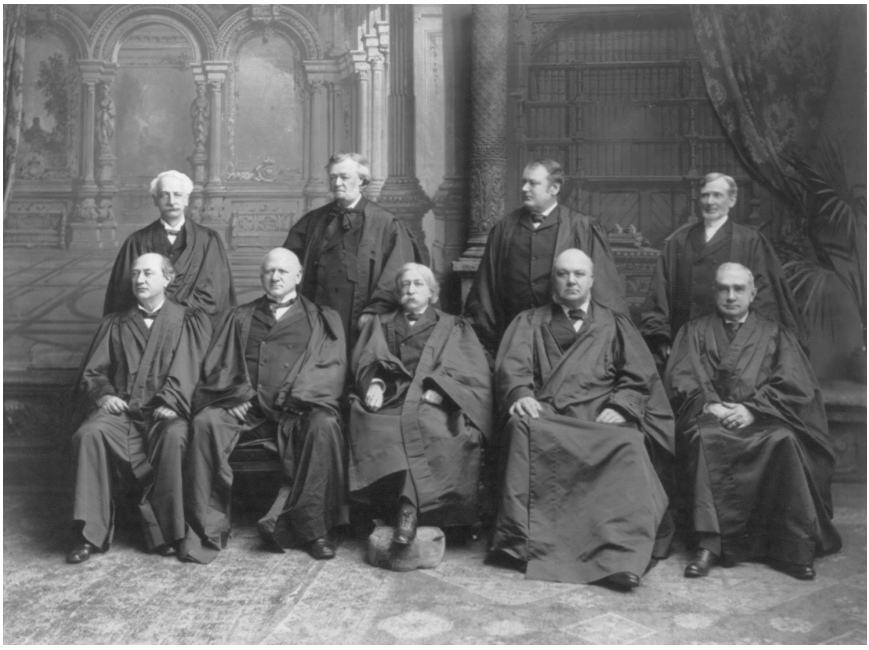
[†] Professor of law, Antonin Scalia Law School at George Mason University, and editor-in-chief, the *Green Bag*. A version of this article will be published, with more pictures and fewer words, by the *Green Bag* as a "Single Sheet Classic."

[1] S. Ct. R. 22 (2017).

[2] S. Ct. R. 36.1 (1893).



The Supreme Court of the United States. Front row, left to right: Justices David J. Brewer and John Marshall Harlan, Chief Justice Melville W. Fuller, and Justices Horace Gray and Henry Billings Brown. Back row, left to right: Justices Rufus W. Peckham, George Shiras, Jr., Edward Douglass White, and Joseph McKenna. Image source: Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56711 (1899).

lessness of burdening the full Court with these applications since there was little or no benefit from having more than one person process them."[3] (Sounds a bit like the rationale for the modern cert. pool, doesn't it?)

That does not, however, mean that single-Justice decisions about whether to allow a case onto the Court's docket were mere insignificant routine, though the Court's records (and much of the scholarly commentary on them) tend to foster that impression. Rather, those old allowances have a rubber-stamp aroma because there were so darn many of them, and because a record was rarely made or kept of any argument made at that

[3] *Judging in Chambers*, 76 U. CINCINNATI L. REV. 1159, 1223 (2008).

stage of litigation or of any explanation (such as an opinion in-chambers) for a Justice's decision. But those rare Rule 36 proceedings for which we do have a record, or an opinion, can be telling. Consider, for example, Justice John Marshall Harlan's rather chilling in-chambers opinion explaining his refusal to allow an appeal in a jury-and-race case:[4]

> Washington, D.C., August 24th, 1896.
>
> Dear Mr. Barrett:
>
> I have your letter of the 21st, in which it is said that you were specially desirous that I should act on the application for the allowance of an appeal in the case of Aleck Richardson from the order of the Circuit Court of the United States denying his application for the writ of *habeas corpus*. The members of our court do not, in the first instance, unless in some cases requiring immediate action, pass upon applications for writs of error or appeals in cases beyond their respective circuits. In accordance with that custom, the papers you sent to me were transmitted to the Chief Justice, who, as I learn from your letter, has refused to allow an appeal.
>
> You have the technical legal right to apply for your client to each one of the Justices of the Supreme Court, and I therefore take your letter to be substantially an application to me. Before the papers were sent to the Chief Justice, I examined them, and reached the same conclusion that he did. The only ground assigned in the papers sent by you for granting the writ is that your client was tried by a jury composed entirely of white men. It is not claimed that this resulted from any statute of the State excluding blacks from serving on juries, because of their race. If, therefore, any black man was, because of his race, excluded from the jury in Richardson's case, it was error on the part of the court in the trial, which was to be remedied by writ of error, not by *habeas corpus*. The Constitution of the United States does not secure to a black man the right to be tried by a jury composed in whole or in part of men of his race, nor does it secure to a white man the right to be tried by a jury composed in whole or in part of men of his race. The Constitution only secures to each person the right to be tried by a jury from which is not excluded, because of his race, any citizen, otherwise qualified, of the same race as that of the accused. *Ex*

[4] *In re Richardson*, 4 Rapp 1600 (1896).

> *parte Royall, 117 U.S. 241, 252, 252; In re Wood* [Publisher's note: "*In re Wood*" should be "*Wood v. Brush*"]*, 140 U.S. 278, 289; Gibson v. Missippii* [Publisher's note: "*Missippii*" should be "*Mississippi,*"] 162 U.S. 565. If you will read these cases you will perceive that there was not the slightest reason for the interference by the Circuit Court of the United States upon *habeas corpus* with the final action of the State Court, and therefore the application for an appeal from the order of the Circuit Court denying the application made to it ought not to be granted. I should feel otherwise about this application if I could perceive that there was any possibility whatever that the Supreme Court would entertain jurisdiction of the case and consider it upon its merits. If the appeal were allowed, it would be dismissed on motion. The careless allowance of appeals in such cases has no other effect than to interfere with the ordinary administration of the criminal laws of the State. If the State court in the trial of the case has denied to the accused any right secured to him by the Constitution and laws of the United States, his remedy is not by *habeas corpus*. *Pepke vs Cronan, 155 U.S. 100; Andrews vs Swartz, 155* [Publisher's note: "*155*" should be "*156*"] *U.S. 272* [Publisher's note: There should be a period at the end of this sentence.]
>
> Yours truly,
> /s/ John M. Harlan
>
> Mr. C.P. Barrett,
> Spartanburgh, S.C.

The plain, counsel-to-Justice-to-counsel nature of this communication is reflected in the typescript (not printed) original opinion, formatted as a letter addressed to Richardson's counsel, with Harlan's signature in his own hand at the end.

Second, practicality's role: During the 18th and 19th centuries, the Justices were basically solo operators, except when they were together on the bench or in conference. They had no office space at the Court. They had little or nothing in the way of administrative support for correspondence or research or errand-running or opinion-writing or anything else. They held court in a stately but not very big room in the Capitol, with a bit of space nearby for the clerk, the marshal, a small library, and some files.

The Justices did most of their work at home, where they also main-

tained their own libraries. So, if counsel wanted to correspond or meet with a Justice, the best place to write to or visit would often be the Justice's home address in Washington when the Court was in Term, or the Justice's address on circuit (or on vacation) when it was not. So, that is what counsel did, especially when time was of the essence. Consider, for example, John L. Semple, counsel to Theodore Lambert of New Jersey. Semple traveled from Philadelphia to Washington on January 2, 1895 — the day before Lambert was set to be executed for murder — to visit Justice George Shiras and apply for relief. The next day, Shiras explained his decision in the case:

> "I did not interfere with the State court in granting Lambert's counsel the provisional writ of error, which has operated as a stay of execution. In the haste with which the original application for writ of habeas corpus was urged no record was made in Judge Dallas's court. Without this record I could not interfere, although in criminal cases the defendant is entitled to the writ of error, which is merely a formal proceeding. When Lambert's counsel called upon me last night there was no time to send him back to Judge Dallas's court. His client would meanwhile have been hanged. Therefore I issued to him a writ of error contingent upon completion of the record in the court. I did not take into account the merits of Lambert's case, which was not before me. I merely made it possible for the condemned man to avail himself of such advantages as, had the proceedings been regular, he would have been clearly entitled to."[5]

Lambert eventually had his day — two days, actually — in the Supreme Court.[6] He had no success there, and his sentence was carried out on December 19, 1895.[7] But the combination of Semple's exertions on the road and Shiras's decision at home, in chambers, did extend Lambert's life by almost a year.

The Marshal of the Supreme Court made counsel-Justice contact of this sort easier by providing a useful card for counsel (which was also handy for social callers), titled "Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States." The edition for 1900

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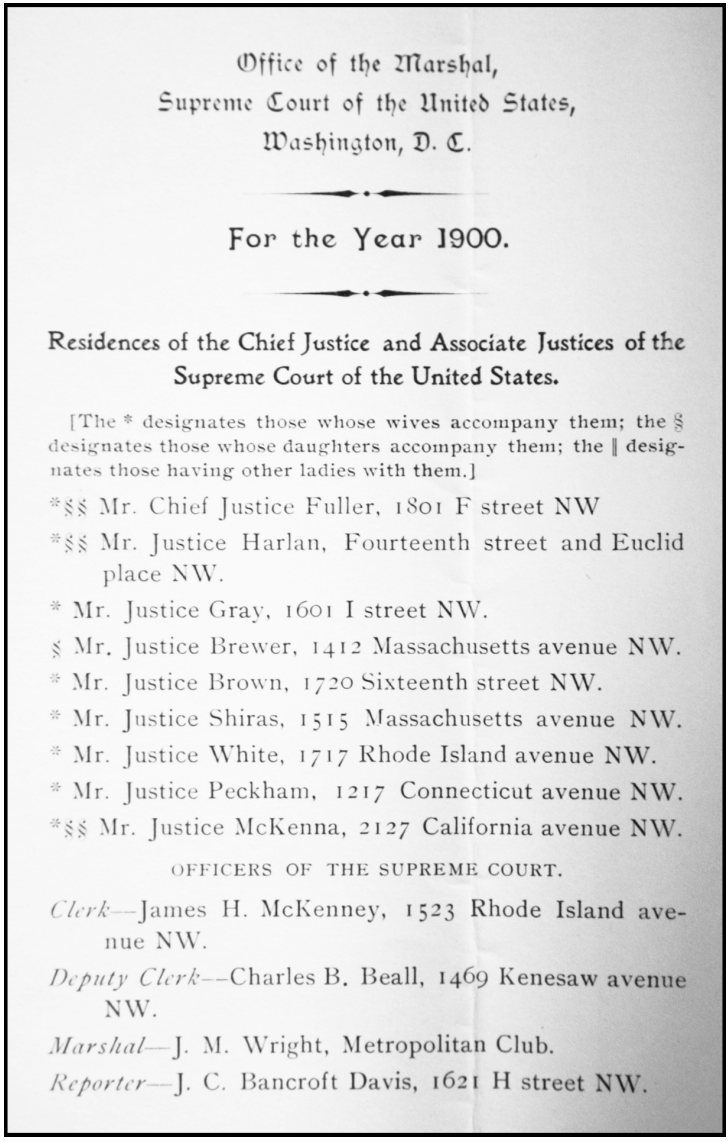
[5] *Reprieve at the Last Hour*, BALTIMORE SUN, Jan. 5, 1895, at 7.
[6] *Lambert v. Barrett*, 157 U.S. 697 & 159 U.S. 660 (1895).
[7] *Lambert Hanged at Last*, WASHINGTON EVENING TIMES, Dec. 19, 1895, at 1.

is reproduced here. And we've done the Marshal one better by providing a pair of illustrated and annotated maps that might have been useful to counsel in 1900. They might also be useful to law-tourists in 2017.



Office of the Marshal,
Supreme Court of the United States,
Washington, D. C.

For the Year 1900.

Residences of the Chief Justice and Associate Justices of the Supreme Court of the United States.

[The * designates those whose wives accompany them; the § designates those whose daughters accompany them; the ‖ designates those having other ladies with them.]

*§§ Mr. Chief Justice Fuller, 1801 F street NW

*§§ Mr. Justice Harlan, Fourteenth street and Euclid place NW.

* Mr. Justice Gray, 1601 I street NW.

§ Mr. Justice Brewer, 1412 Massachusetts avenue NW.

* Mr. Justice Brown, 1720 Sixteenth street NW.

* Mr. Justice Shiras, 1515 Massachusetts avenue NW.

* Mr. Justice White, 1717 Rhode Island avenue NW.

* Mr. Justice Peckham, 1217 Connecticut avenue NW.

*§§ Mr. Justice McKenna, 2127 California avenue NW.

OFFICERS OF THE SUPREME COURT.

Clerk—James H. McKenney, 1523 Rhode Island avenue NW.

Deputy Clerk—Charles B. Beall, 1469 Kenesaw avenue NW.

Marshal—J. M. Wright, Metropolitan Club.

Reporter—J. C. Bancroft Davis, 1621 H street NW.

Image source: National Archives, RG 267, Entry 72, box 3 (1900).

Today, lawyers — indeed, all people — have it much easier. No matter the time of year or the nature of our business, when we want to communicate with a Justice we simply address our filings or other papers to the Supreme Court's house at 1 First Street NE, Washington, DC 20543 (and also file briefs electronically[8]). But while we have been freed from much complicated and costly rigmarole, we never come to a Justice's home, or chambers.[9]

NOTES ON RESIDENTIAL WORKPLACES OF MEMBERS OF THE U.S. SUPREME COURT IN WASHINGTON, DC

Chief Justice Melville W. Fuller, 1801 F Street NW.

The Chief Justice and his family were the latest in a long line of formidable occupants — Tobias Lear, Tench Ringgold, John Marshall, Joseph Story, William Johnson, Gabriel Duvall, Smith Thompson, John McLean, Henry Baldwin, Sally and William Carroll — of the building now known as the Ringgold-Carroll House.[10]

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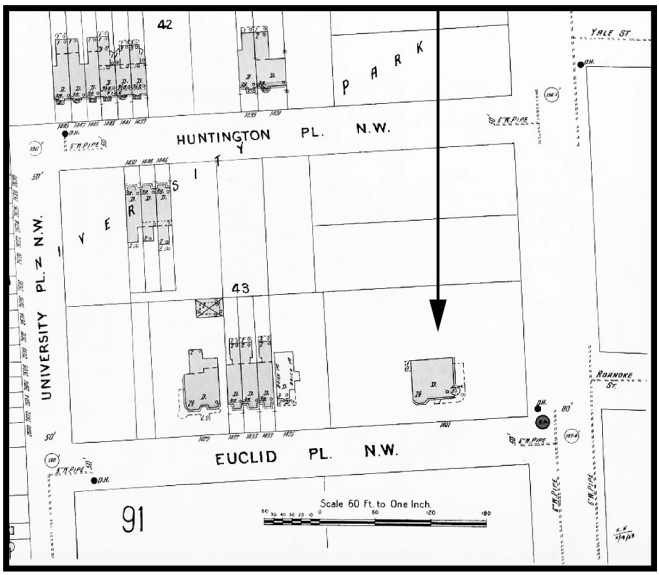
[8] *See* S. Ct. R. 29.7 (2017).

[9] *Cf.* J.R.R. TOLKIEN, THE FELLOWSHIP OF THE RING, book one, ch. XI (2d ed. 1965).

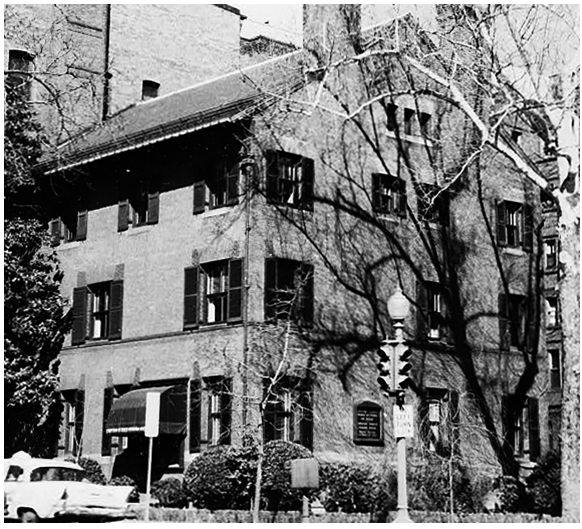
[10] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,34--6 (n.d.); see also History of 1801 F Street, dacorbacon.org.



Justice John Marshall Harlan, 1401 Euclid Place.

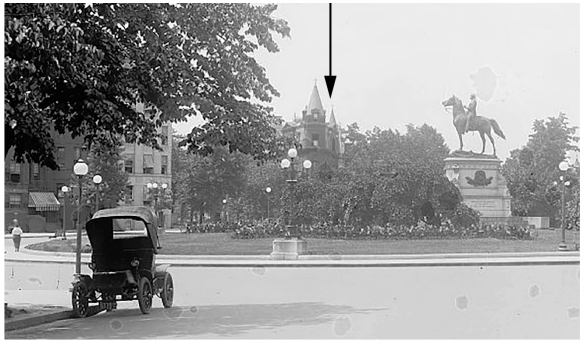
As this detail from a contemporary street plan shows, the Harlans did not have many neighbors out in the boondocks, just off what was then called "Fourteenth Street, Extended" (see the downward-pointing arrow). Harlan's commute to the Supreme Court's chamber in the Capitol was longer than any other Justice's, but what was then a barely suburban home suited his lifestyle well. It was conveniently located between the three central Cs of his life: Church (the New York Avenue Presbyterian at 1313 New York Avenue NW, for faith), Course (the Chevy Chase Club in Bethesda, Maryland, for golf), and Court (the Supreme, at the U.S. Capitol, for law).[11]

[11] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903); *see also* MALVINA SHANKLIN HARLAN, SOME MEMORIES OF A LONG LIFE, 1854-1911 at 117-18 (2002); James W. Gordon, *Religion and the First Justice Harlan*, 85 MARQ. L. REV. 317, 333-36 (2001); Ross E. Davies, *The Judicial and Ancient Game*, 35 J. SUPREME COURT HISTORY 122, 124-25, 131, 137-39 (2010).



Justice Horace Gray, 1601 I Street NW.

Gray's residence on the northwest corner at the intersection of Sixteenth Street and I Street NW would be, if it were still standing today, next door to the offices of O'Melveny & Myers LLP, the bobbleheadquarters of the Green Bag. Alas, the Gray residence is long gone.[12]



Justice David J. Brewer, 1412 Massachusetts Avenue NW.

From his home on the west side of Thomas Circle (with its equestrian statue of General George Henry Thomas), Brewer had a lovely view of the

[12] *See* Library of Cong., Prints & Photographs Div., repro. no. HABS DC,WASH,154--1 (n.d.).

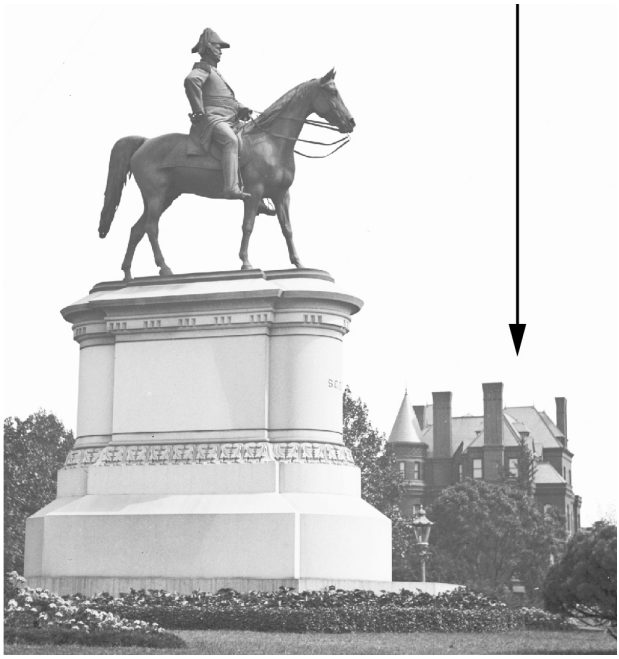
park-like circle and the Luther Place Memorial Church beyond. (The church still stands, where Vermont Avenue and Fourteenth Street meet at the circle.) The Brewers' home is in the background of this photograph (see the downward-pointing arrow), which was snapped from the east side of the circle, on Massachusetts Avenue.[13]

Justice Henry Billings Brown, 1720 Sixteenth Street NW.

After he was elevated to the Supreme Court in 1890, Brown bought a lot and commissioned an enormous (and enormously expensive) new house to fill it — now known as the Toutorsky Mansion — for himself and his spouse, Caroline. There they lived until their deaths in 1913 and 1901, respectively. Brown did not, however, insist on moving about the city in comparable splendor. He frequently rode the buses (aka "herdics") that rolled up and down Sixteenth Street.[14]

[13] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-31843 (ca. 1910-1925).

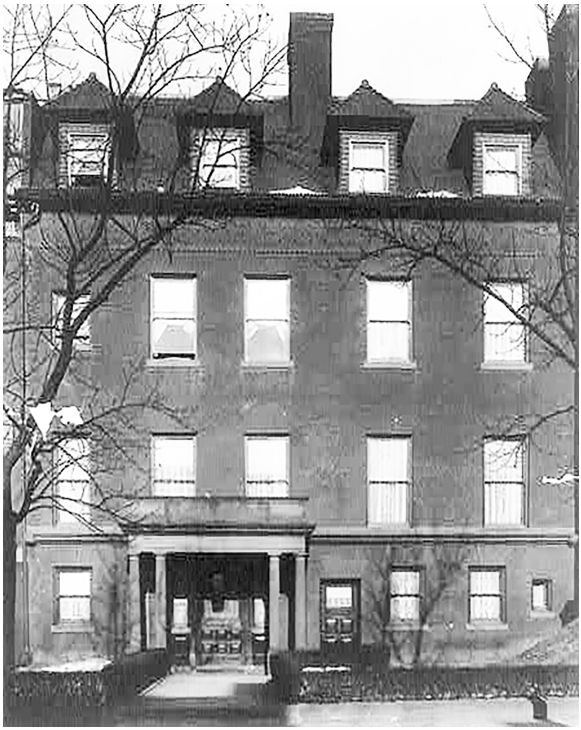
[14] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62-56822 (1895); *see also Justice Brown in the Lists to Solve Herdics Problem*, WASHINGTON TIMES, May 27, 1911, at 3.



Justice George Shiras, Jr., 1515 Massachusetts Avenue NW.

"The large house at the junction of N Street and Massachusetts Avenue" — visible in this photograph, to the right of the south-facing equestrian statue of General Winfield Scott (see the downward-pointing arrow) — "is the residence of Supreme Justice Shiras," according to the 1901 edition of Rand, McNally & Co.'s Pictorial Guide to Washington and Its Environs. Shiras lived across the street from the famous "Louise Home," which occupied the entire block on the south side of Massachusetts Avenue between Fifteenth Street and Sixteenth Street.[15]

[15] *See* Library of Cong., Prints & Photographs Div., repro. no. LC-DIG-npcc-00115 (ca. 1918-1920); *see also* Historical Sketches of the Charities and Reformatory Institutions in the District of Columbia, House Report No. 1092, 55th Congress, 2d Session 144-48 (1898).

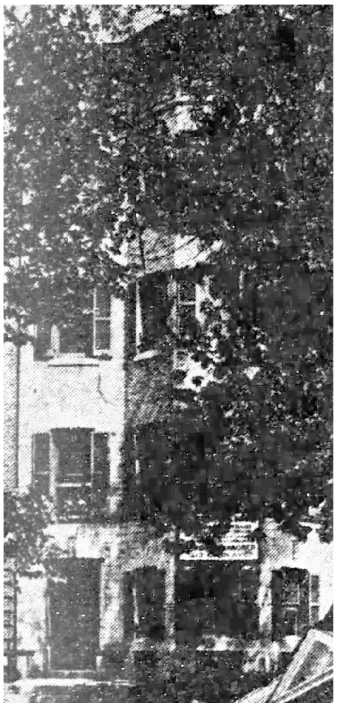


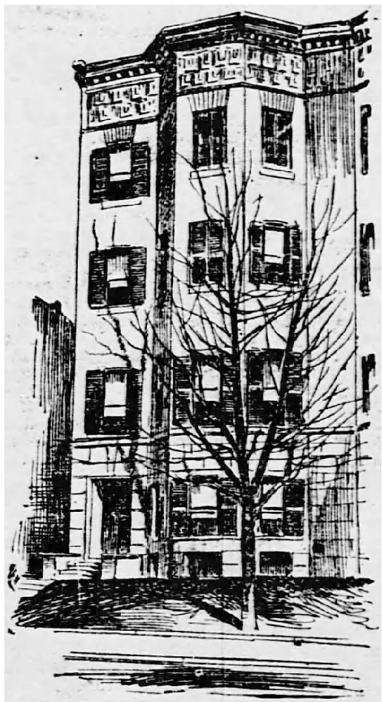
Justice Edward Douglass White, 1717 Rhode Island Avenue NW.

White was reputedly an extraordinarily congenial colleague on the Supreme Court and generally a very nice person, as this effusive profile, published when he became Chief Justice in 1910, suggests:

> An invitation to the home of the Justice is a chance to get acquainted with real hospitality. The Justice enjoys good company and he always has the latch string out for his friends. Furthermore, he is accessible to those persons who might want to talk to him on public business out of hours.
>
> A caller at the White House, whether he is a belated messenger boy hunting a number or a dignified Senator, is received with equal consideration. If the Justice himself answers the door, as he often does, the graciousness of the greeting to the caller is habitual and not measured by the social stature of the person he greets.[16]

[16] ST. LOUIS POST-DISPATCH, Dec. 18, 1910, at 10; *see also* Library of Cong., Prints & Photographs Div., repro. no. LC-USZ62- 86851 (1910).

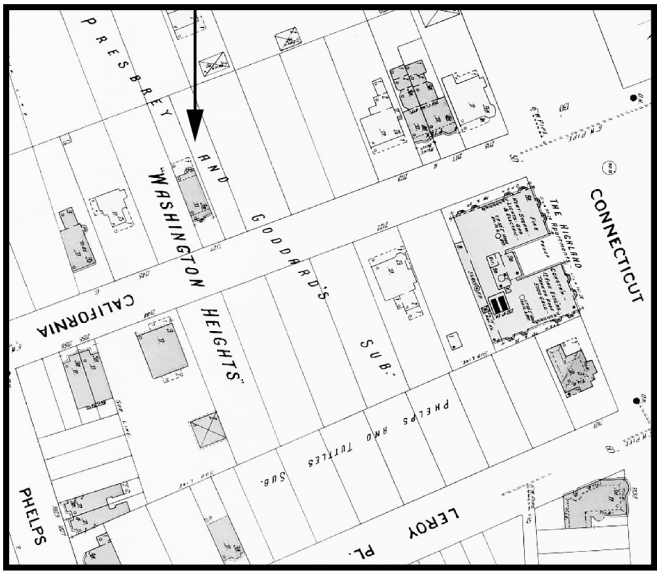




Justice Rufus W. Peckham, 1217 Connecticut Avenue NW.

The four-story home of the Peckham family, two blocks south of Dupont Circle, had been adjacent to greatness. Alexander Graham Bell built his Volta Laboratory at 1221 Connecticut Avenue, but Bell moved the lab to 2020 F Street NW before the Peckhams moved in at 1217 Connecticut Avenue. Lacking a good photograph of the Peckham residence, what we have here is a bad photograph of it taken when some trees in front of the house were leafy (left) and a not-bad sketch drawn when the trees were bare (right).[17]

[17] *See* WASHINGTON TIMES, Sept. 9, 1911, at 4; WASHINGTON EVENING STAR, Feb. 13, 1897, at 13; *see also* Raymond R. Wile, *The Development of Sound Recording at the Volta Laboratory*, 21:2 ARSC J. 208 (1990).



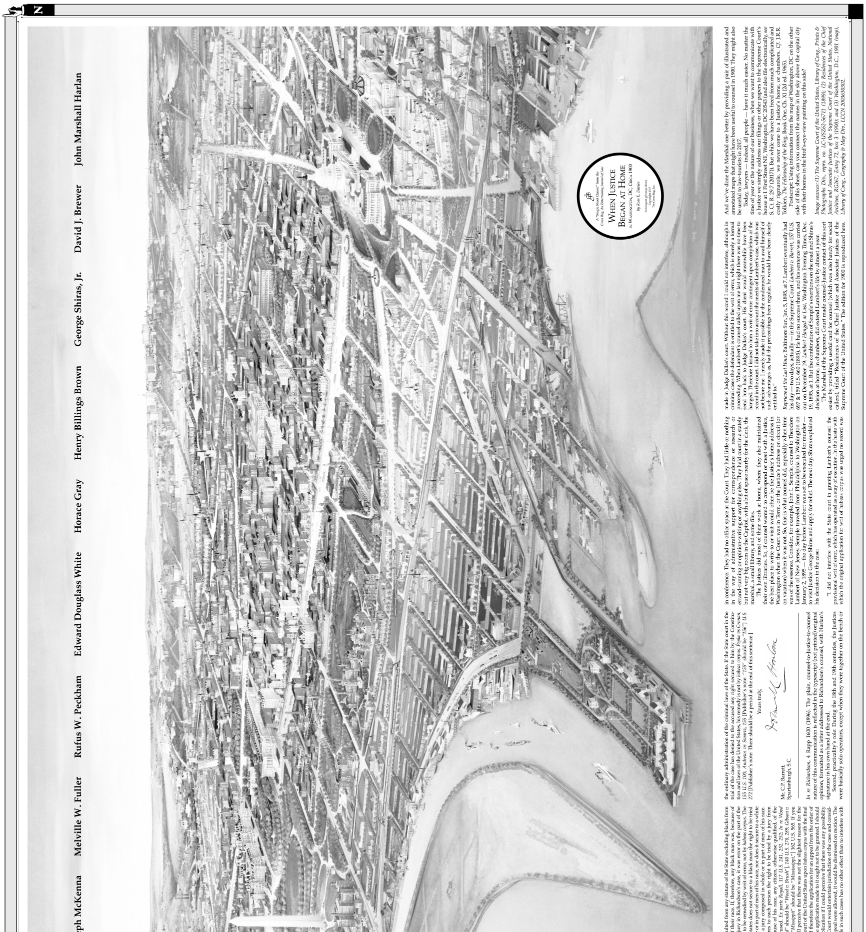
Justice Joseph McKenna, 2127 California Avenue NW.

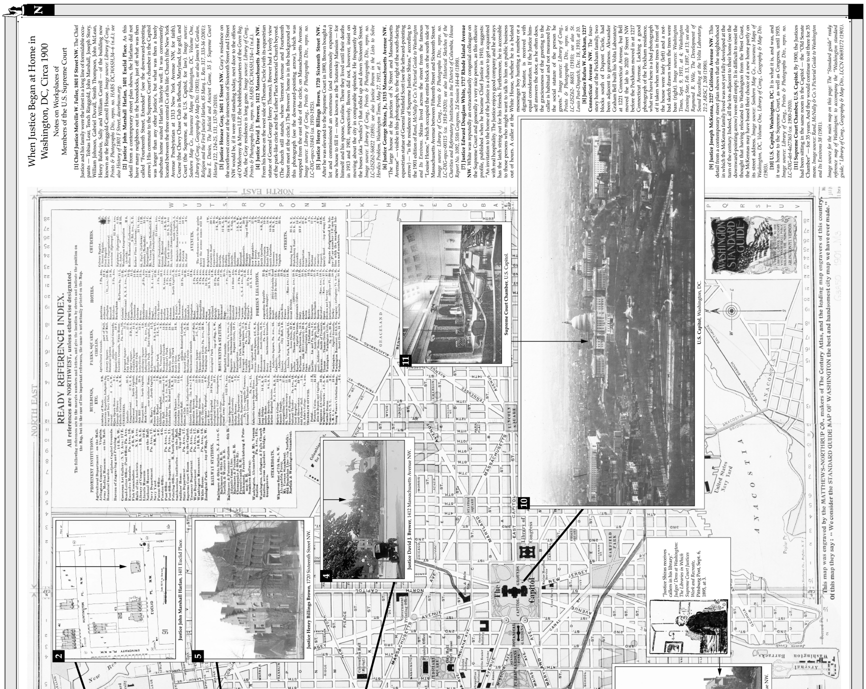
This detail from a contemporary street plan shows that the neighborhood in which the McKenna family lived was not yet fully developed at the turn of the century. Indeed, all the lots adjacent to their home (see the downward-pointing arrow) were still empty. It is difficult to resist the thought that having relocated to Washington from the West Coast, the McKennas may have based their choice of a new home partly on its street address.[18]

[18] *See* SANBORN MAP CO., INSURANCE MAPS OF WASHINGTON, DC, vol. one, Library of Cong., Geography & Map Div. (1903). (Today, by the way, California Avenue is a Street.)

APPENDIX

THE "SINGLE-SHEET CLASSIC" VERSION OF THIS PAPER (REDUCED)


Joseph McKenna
Melville W. Fuller
Rufus W. Peckham
Edward Douglass White
Horace Gray
Henry Billings Brown
George Shiras, Jr.
David J. Brewer
John Marshall Harlan
When Justice Began at Home



"Justice Shiras receives callers in his library." *Judges' Dens at Washington: The Libraries in Which Supreme Court Justices Work and Recreate*, PITTSBURG POST, Sept. 6, 1895, at 3.

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

5 Rapp no. 11 (1927)

SACCO V. MASSACHUSETTS

HEADNOTE

by Ira Brad Matetsky

Source: 5 N. SACCO *ET AL.*, THE SACCO-VANZETTI CASE 5534 (2D ED. 1969).

Opinion by: Harlan Fiske Stone (noted in source).

Opinion date: August 22, 1927 (noted in source).

Citation: Sacco v. Massachusetts, 5 Rapp no. 11 (1927) (Stone, J., in chambers), 2 J. In-Chambers Practice 52 (2017).

Additional information: In August 1927, Justice Oliver Wendell Holmes, the Circuit Justice for the First Circuit, denied two applications to stay the impending executions of Nicola Sacco and Bartolomeo Vanzetti. *See Sacco v. Hendry*, 1 Rapp 15 (Aug. 10, 1927) (Holmes, J., in chambers); *Sacco v. Massachusetts*, 1 Rapp 16 (Aug. 20, 1927) (Holmes, J., in chambers). When he did so for the second time, Holmes added that "although I must act on my convictions I do so without prejudice to an application to another of the Justices which I should be very glad to see made, as I am far from saying that I think counsel was not warranted in presenting the question raised in the application by this and the previous writ." *Sacco v. Massachusetts*, 1 Rapp at 17. The defense lawyers then asked Justice Louis Brandeis, also located in Boston, for a stay, but Brandeis recused himself. Defense attorney Arthur Hill and three colleagues next traveled 200 miles by car and boat from Boston to Justice Harlan Fiske Stone's summer house on Isle au Haut, an island off the coast of Maine. Stone denied relief in a one-paragraph memorandum, quoted below. The text is found in the five-volume compendium of the record of the case, cited above, as well as in various contemporary newspapers. (For the rest of this story, at least insofar as in-chambers practice is concerned, see the next opinion.)

OPINION

Application considered and denied without prejudice to application to any other Justice. I concur in the view expressed by Justice Holmes as to the merits of the application and action of counsel in presenting it.

5 Rapp no. 12 (1927)

SACCO V. MASSACHUSETTS

HEADNOTE

by Ira Brad Matetsky

Source: MICHAEL J. MUSMANNO, AFTER TWELVE YEARS 356-57 (1939); William Howard Taft Papers, Library of Congress, Manuscript Division, Reel 294.

Opinion by: William Howard Taft (noted in source).

Opinion date: August 22, 1927 (noted in source).

Citation: Sacco v. Massachusetts, 5 Rapp no. 12 (1927) (Taft, C.J., in chambers), 2 J. In-Chambers Practice 54 (2017).

Additional information: The Sacco-Vanzetti defense team also asked Chief Justice William Howard Taft to stay the impending executions. Taft was at his summer house in Canada, and everyone assumed that he would have to return to United States territory before he could take any judicial action. Defense lawyer Michael Musmanno (later a Pennsylvania Supreme Court Justice) telephoned and then telegraphed to Taft, asking him to travel to the border and grant relief. Taft's telegram in response, which is quoted and discussed in Musmanno's book about the case, is given below. We are treating it as an in-chambers opinion, although in deference to Taft's view that he could not act as a justice while outside the United States, perhaps it should be called an out-of-chambers opinion.

OPINION

Quebec, Canada
August 22, 1927

M. A. Musmanno
Attorney, Sacco-Vanzetti Case
Boston, Mass.

You advised me by telephone at nine last night that you wished to apply to me for a stay of execution upon a petition for a writ of certiorari filed in

the United States Supreme Court in the Sacco-Vanzetti Case. Communication was difficult and I requested you to submit what you had to say in a telegram. At 2 a.m. your telegram reached me as follows: "Would Your Honor consider crossing the border to pass upon question of stay of execution of Sacco and Vanzetti scheduled to be executed midnight August twenty-second. Please wire at what point you will hear presentation of case and I will meet Your Honor there." The authority to grant such stay is given to a justice of our court. Under the statute and our rules there is no specific authority giving the right to apply to more than one justice. By telephone you advised me that you had made such an application to Mr. Justice Holmes, to whom disposition of such matters in the first judicial circuit has been regularly assigned by the court and that Mr. Justice Holmes had refused your application but expressed no objection to your applying for a stay to any other member of our court. Mr. Justice Brandeis and Mr. Justice Stone are now within the First Judicial Circuit, yet you request me, who is not within the jurisdiction of the United States at all and could hardly order a stay from here, to proceed to the border and there hear your application. Compliance with your request would involve a day's journey by rail from here and I could not reach the border leaving here by first train in the morning until a short time before midnight when the present stay of execution expires. Were application to be presented to me under such circumstances I would feel constrained to defer to Justice Holmes' decision who is advised as to the whole case having heard two applications on it. The defendants have had the benefit of the fullest consideration according to Associated Press dispatch purporting to give the text of the decision of the Supreme Court of Massachusetts in this case handed down Friday last which reached me Saturday night. The absence of jurisdiction in our court to grant the writ of certiorari in this case seems to be apparent. The unusual character of your request justifies this reference to that decision as reported as added reason for my not going to the border.

W. H. Taft

APPENDIX TO

RAPP'S REPORTS

VOLUME 5

IN THE JOURNAL OF IN-CHAMBERS PRACTICE

Introductory Note

The four documents that follow were all apparently dictated by Justice Wiley Rutledge, between 1946 and 1948, in connection with applications that were made before him as a single Justice of the Supreme Court. They cannot be called in-chambers opinions, because as far as the editors have been able to discover, they were never issued as opinions. But they reflect Rutledge's detailed reasoning in ruling on four significant in-chambers applications, and they also shed light on contemporary in-chambers practice, including the Justice's hearing applicants' counsel orally and (in one case) conferring with another Justice before ruling. They therefore merit reprinting, albeit in this Appendix to, rather than the body of, *Rapp's Reports*. The four "opinions" were located in the Wiley Rutledge Papers in the Manuscript Division of the Library of Congress, Boxes 154 (*Bisignano* and *Standard Oil*) and 176 (*Rogers* and *Bary*). They are typed on ordinary paper and unsigned. Some very minor handwritten corrections have been implemented without notation of the fact. For more information on these documents, please see the introductory essay to this volume, 2 J. In-Chambers Practice at 14-15.

5 Rapp App. no. 1 (1946)

BISIGNANO V. MUNICIPAL COURT OF DES MOINES

Application for Stay
Hearing on October 9, 1946

Al Bisignano vs. Municipal Court of the City of Des Moines, Iowa, and Harry B. Grund, Respondents.

The application presented to me on Wednesday, October 9th, by counsel for petitioner Bisignano in person was for a further stay pending the filing of a petition for certiorari in this Court and action thereon. Upon denial of petitioner's petition for rehearing by the Supreme Court of Iowa, that court issued a stay order, this action being taken en banc. The order was conditioned several ways, one of which was that the petitioner should file in this Court his petition for certiorari within twenty days. The time for filing petition for certiorari and therefore the stay expires on October 13th, since the stay order was issued September 23d. The order was made in exact accordance with the petitioner's request, including the twenty-day condition. The request was made, according to counsel's statement, in the belief that printed copies of the record were available and could be procured for filing here. However, after the order was entered it was discovered that the seventeen copies of the record which had been filed in the Supreme Court of Iowa had been distributed to various law schools and others interested after that court had taken its final action on the ease. Counsel apparently were relying upon having these copies made available for filing here. They did not anticipate having to have the record printed again. Upon discovery of the fact that the existing copies had been distributed and would not be available, counsel found it impossible to secure a printer who could do the work of printing the record in time for the required number of copies to be filed here within the twenty days allowed by the stay. Thereupon counsel applied to Chief Justice Garfield of the Supreme Court of Iowa on October 2d for an extension of the time for operation of the stay. According to counsel's statement made to me in chambers, Justice Garfield denied the stay for the reason that, although he had power to extend the time for its operation, he did not feel that he should

do so since the entire court had acted upon petitioner's original application and had granted the relief thereby sought in exact accordance with the terms of the application. It was stated to me that Chief Justice Garfield did not state any other reason for his denial of the application for extension, either orally or formally in his order of denial.

The sentence which was imposed in this case was a fine of $500 and six months imprisonment. The time for filing the petition for certiorari in this Court will not expire until sometime in December, around the 13th. Further time will be required for action by this Court and if the petition should be granted and the cause set for argument it is entirely possible that unless the extension is granted petitioner would have served his full term before the cause is finally disposed of here.

In my judgment the petition raises a substantial federal question, although I have some doubt whether the question was raised in time in the courts of Iowa. An examination of the record and of the various papers upon which the case was considered in the Supreme Court of Iowa discloses that if the federal question was raised as such in the contempt proceedings before the Municipal Court of course it was more incidentally with reference to the state grounds argued there than as independent and distinctive separate federal grounds. There are suggestions in the record of violation of federal rights, but the assignments with respect to them were certainly not clear and definite.

The same thing is true also with reference to the original application for certiorari, that is, the petition, which was filed in the Supreme Court of Iowa. Most of the specific assignments of error relate to alleged deviation from state statutory and constitutional requirements. The latter include the alleged deprivation of the right to trial by jury pursuant to the provision of the Iowa constitution cited in this respect. There are suggestions also in this petition that the effect of the proceeding may be to have denied petitioner's federal constitutional right as a matter of due process and also perhaps as one of equal protection of the laws. However, these suggestions seem to have been made as incidental to and supporting reasons for the basic and clearcut assignments with reference to alleged deviations from state law. And at the end of the petitioner's brief in argument before the Supreme Court of Iowa it is said that that court should reverse the decision and thus secure to the petitioner his alleged right to trial by jury under the Iowa constitution, in order that he may not be required to

rest his case upon his federal constitutional rights to due process and equal protection. It is thus doubtful whether the federal questions were squarely raised either in the Municipal Court or by the original petition for certiorari and the briefs in the Supreme Court of Iowa.

However, the petitioner filed various other papers in the Supreme Court of Iowa, including a reply to the brief of the respondents, and also filed a petition for rehearing and later an amended petition for rehearing. The amended petition for rehearing clearly and squarely raised the federal question. It is not clear that the original petition for rehearing was basically different in this respect from the original petition for certiorari. Moreover, in its opinion denying certiorari the Supreme Court of Iowa does not squarely rule on the federal constitutional questions. But it does not appear from the record at any rate by any positive evidence that in passing upon the petition and the amended petition for rehearing it did not rule on these questions. Nothing in the order granting the stay of procedure or in the further order of Chief Justice Garfield denying an extension of the stay suggest that the court did not pass upon the federal constitutional question, at any rate in disposing of the petition for rehearing. On the contrary, it would seem that when the court en banc allowed the stay order in exact accordance with the petitioner's application for that relief it in effect and implicitly confirmed the fact that federal questions had been presented and determined in the court's action. Justice Garfield's action in refusing to extend the stay does not negative this in any way, nor do his asserted reasons for taking that action do so.

In short, I am not too clear that the petitioner raised his federal questions clearly and distinctively as such appropriately and in time in the state court. I am inclined to think that if the Supreme Court of Iowa had denied his stay or refused to extend the time for the stay to operate on the ground that he had raised the federal question too late, that is, on his amended petition for rehearing, I would feel bound by their action under our authority in that respect. But in the absence of anything to indicate that the Iowa Supreme Court acted on this ground, I am inclined to think that the question has been timely raised and, if so, I have no doubt that the matter is of sufficient importance that the petition for certiorari will be at least sufficiently meritorious to be presented to this court for its action and, as presently advised, I would think that the petition should be granted and set for argument here.

In short, I think that in all probability the petition for certiorari should be and will be granted, and if any question should be raised by the respondent as to the timeliness of the raising of the federal question that question also should be set down for argument here.

Being of these views, it seemed to me that the stay order should be extended in order to allow the petitioner sufficient time to perfect his application here and that a failure to extend the order might in substance have the effect of rendering the case moot, if not entirely, then at any rate so with respect to the application of the portion of the penalty which requires imprisonment. It is my judgment also that, inasmuch as the Supreme Court of Iowa felt that bond should be given to indemnify the respondent on account of costs and so forth, a similar condition should be imposed here. Accordingly, I have today signed an order for extending the time for operation of the stay, conditioned upon the filing of a satisfactory bond in the sum of $2000 and upon the filing of the petition for certiorari within the statutory time.

5 Rapp App. no. 2 (1947)

EX PARTE STANDARD OIL CO.

Ex parte STANDARD OIL CO.

> Application for leave to file Petition for Writ of Mandamus or in the alternative Writ of Prohibition.

The application made to me March 17, 1947, was for a stay of an order of the District Court of the Western District of Missouri entered by Judge Collett on January 29, 1947, in the case of Smithey v. Standard Oil Company of Indiana.

The material facts are as follows. The suit was one brought under the Fair Labor Standards Act, originally in the state courts. Motion for removal to the federal court was denied in the state court, but after the denial the defendant Standard Oil Company removed the case to the Federal District Court pursuant to the statutory procedure providing for such action. The plaintiff in the state court suit moved in the federal court to dismiss the proceeding or to remand to the state court for want of jurisdiction in the federal court. Judge Collett entered an order remanding the cause. In doing so he stated that the district courts of the country are divided on whether there is jurisdiction in the federal court in such cases, splitting about 60-40 against the jurisdiction. (The theory against jurisdiction seems to be that the Fair Labor Standards Act, by giving the plaintiff a choice to sue either in the federal or in the state court, impliedly repeals the applicability of the general removal statute to such cases, a theory which seems to me as I am presently advised without substantial foundation.) Judge Collett went on to say in his order that his own view was that the federal district court has jurisdiction in such cases, but a majority of the judges of the United States District Court for the Western District of Missouri hold the contrary view. He then went on to say that there should not be two conflicting rules of law working out of the same courthouse and accordingly, though he thought the motion to remand should denied and that there was jurisdiction, still in view of the position held by the majority of his brethren he would order the remand. He expressly stated that this action would constitute an invitation for mandamus. Nevertheless he entered an order for remanding the cause to the state court, but in doing so suspended its effectiveness for twenty days, this obviously to enable the

defendant to apply for review of his action to the Circuit Court of Appeals or here by way of mandamus. The Standard Oil Company applied to the Eighth Circuit for such relief.

As of the time the case came to me for application for stay the suspension of the effectiveness of Judge Collett's order had been extended to Tuesday, March 18. The Eighth Circuit Court of Appeals in the meantime had heard the matter, had also indicated to counsel that its view that Judge Collett's order of remand is not reviewable and had further indicated it would hand down its decision to that effect on Tuesday, March 18.

In these circumstances counsel for Standard Oil applied to me for a stay order directed either to suspension of the proposed action of the Circuit Court of Appeals or to the going into effect of Judge Collett's order of remand pending application here for a writ of mandamus or in the alternative of prohibition or in the alternative of certiorari. Mr. R. F. O'Bryen, of St. Louis, and Mr. Robert F. Schlafly, also of St. Louis, appeared in person in my chambers at three o'clock in the afternoon of Monday, March 17, to present their application. After hearing them I denied the application without prejudice to further application to another Justice of this Court.

My reason for doing so was as follows: This Court has held repeatedly that orders of federal district courts demanding causes removed to state courts are not reviewable under 28 USC § 71. United States v. Rice, 327 U. S. 742, 751; Employers Reinsurance Corp. v. Bryant, 299 U. S. 374, 378-381; Metropolitan Casualty Co. v. Stevens, 312 U. S. 563, 568-569; McLaughlin Bros v. Hallowell, 228 U. S. 278; Missouri Pacific Ry. Co., 160 U. S. 556, 582-583. In entering my order of denial I cited the *Metropolitan Casualty* case as direct authority and the *Rice* case cf.

Before reaching final conclusion I discussed the matter with Justice Reed. Together we examined the authorities and came to the conclusions (1) that a federal court's order remanding a removed cause is not reviewable either directly or indirectly, that is, by certiorari or appeal or by extraordinary procedure such as mandamus, prohibition, etc. (2) It was our conclusion that the only available mode of review for denial of the right to remove, under the authorities cited above, is by the following procedure. When the defendant (party seeking to remove) moves for an order of removal in the state court proceeding and it is denied, he then has the choice of one of two courses. In the first place, he can then follow the statutory procedure and remove the cause to the federal court by filing the proper

application in that court. If the court then sustains the removal the litigation continues in the federal court and the question of the validity of the court's action in allowing the removal comes to this Court with the case on the merits. If then this Court determines that the removal was properly allowed, that is the end of the matter. If it determines that the order sustaining removal was improperly granted then the case may be reversed on that ground alone and the cause goes back to the state court for further proceeding, the question of removal having thus been finally determined.

On the other hand, if the federal district court concludes that removal is not proper and enters an order remanding the cause to the state court, that also ends the matter of removal. Under the authorities that action is not reviewable and the state court is bound by the federal court's actions. If the state court does nothing more than follow that action (that is, does not again deny removal but on different grounds from those first raised), and the cause then proceeds through the court of last resort of the state to this Court, the state court's action in following the federal court's decision presents no federal question and this Court in this situation will assume that the removal was proper and proceed to determine the cause on the merits. Metropolitan Casualty Co. v. Stevens, supra. Thus by removing the cause to the federal court and securing there an adverse decision upon the right of removal, the party removing actually forecloses his right to have review of the question of the propriety of the removal, either by the Circuit Court of Appeals or by this Court. In my opinion the foreclosure is effective against extraordinary modes of review, e. g., mandamus, just as it is against normal review procedures.

The only way therefore in which a person wishing to secure review by this Court of his right of removal can do so is by exercising his right to remove to the federal court after the state court denies his motion to remove. When that denial occurs the party must choose between going to the federal court on his own motion and running the risk that he will be foreclosed of review on removability if that court finds that removal is improper and, on the other hand, saving his exception to the state court's denial, proceeding with the cause on the merits through the state courts and then bringing to this Court along with the merits the question of the validity of the state court's action in denying removal. In this way it is the state court's judgment that removal is not improper rather than the federal court's which comes under review here.

This apparently has been the law since 1910, when the removal statute was amended following the decision in 213 U. S. by Justice Day in _____ v. _____. [Publisher's note: Blanks in original. The case referred to was probably *Chesapeake & Ohio Railway Co. v. McCabe*, 213 U.S. 207 (1909).]

In my judgment the statute as it is now interpreted constitutes something of a trap. Thus in this case I suspect that Standard Oil elected to remove to the federal court without realize [Publisher's note: "realize" should be "realizing"] that in doing so they were running the risk that its adverse decision would foreclose their right of review on removability. Nevertheless, I think that clearly is the law under repeated decisions and for that reason I was unwilling in this case to grant the stay. It should be added perhaps that, although I think the applicant here must now go forward with the cause in the state court, he may possibly preserve his question and secure a reconsideration of it by assigning error in that respect if and when the cause comes here on the merits. This would mean, however, that we would have to overrule the prior decisions, especially the Metropolitan case, in order to give him relief at that time.

The applicant made a further point, namely, that Judge Collett, by accepting the views of the majority of his brethren rather than his own expressly stated contrary ones, acted arbitrarily and not judicially and that this additional ground gives ground for the relief sought. I do not think it can be said that Judge Collett either substituted his personal judgment for his judicial judgment or that he acted arbitrarily. He was simply giving effect in his judicial action to a majority view of the law with which he disagreed. Although he was not at the time he acted bound by any decision of a higher court on the question, I think he did exercise a judicial judgment and I could not hold to the contrary on these facts.

Wiley Rutledge
Dictated March 18, 1947.

5 Rapp App. no. 3 (1948)

ROGERS V. UNITED STATES

Jane Rogers vs. The United States of America
Nancy Wertheimer vs. The United States of America
Irving Blau vs. The United States of America

APPLICATION FOR BAIL PENDING APPEAL

This is an application for bail pending appeal by the three persons named in the caption made upon a single record of proceedings in the District Court. Each of the three was called before a federal grand jury sitting in Denver, was required to answer certain questions, refused to do so, and thereafter was cited to the United States District Court for the District of Colorado for contempt on account of such refusal. After hearing, the District Court committed each for contempt, imposing sentences upon Mrs. Rogers and Miss Wertheimer of imprisonment for four months and upon Mr. Blau for six months. At the same time the court denied bail in each case.

Thereupon an appeal was noted in each case to the United States Court of Appeals for the Tenth Circuit. Thereafter application for bail and for habeas corpus was made in succession to Chief Judge Orie Phillips, sitting as a district judge; to Circuit Judge Bratton; to myself; and finally to the United States Court of Appeals for the Tenth Circuit. In succession each of these applications was denied. The application to myself was made prior to application to the Court of Appeals, on October 8th. It was denied on October 12th, without prejudice to a further application to the United States Court of Appeals for the Tenth Circuit and without prejudice to a further application to myself. Then followed the application to the Court of Appeals, followed by hearing and denial of the application on October 21st. The appeals have been set for argument on the merits and as I understand, on application for habeas corpus on November 29, 1948.

In my opinion Rule 46 (a) (2) of the Federal Rules of Criminal Procedure is still controlling to authorize the application which is now submitted to myself as Circuit Justice of the Tenth Circuit. Ordinarily the greatest weight would be given on such an application to the decisions of the various judges and the Court of Appeals which have preceded this application. However, under Rule 46 (a) (2), in my opinion, I am required to exercise

my own independent judgment, particularly concerning the question whether the case which is pending on appeal "involves a substantial question which should be determined by the appellate court." In this case, notwithstanding the weight properly to be given to the previous determinations, I have concluded that such a question is presented by the appeal and therefore that bail should be allowed.

I have had the benefit of reading in full the record upon which the judgment of the Court of Appeals denying bail was entered. I have not had an opportunity of examining a copy of the formal judgment or order of that court denying bail. I am informed, however, that the action was taken without the filing of an opinion and merely upon the formal finding that no cause had been shown for relief in the opinion of that court.

The record does not disclose the nature of the grand jury's inquiry except in the following statement made by Mr. Goldschein, Assistant Attorney General aiding the Grand Jury in its investigation, to the District Court in presenting the case to that court at the time of the citation:

"This grand jury is not interested in what the political beliefs of these witnesses who came before the grand jury are; they are not interested in who they believe in or what their political philosophy is; they are interested in whether or not these particular witnesses hold an office in the Communist Part [Publisher's Note: the word "Part" should be "Party"] and whether or not they have in their possession any books or records which show a matter of interest to this grand jury, a matter of inquiry for violation of a federal statute – not a theory, a belief or a politicalism." (R. 17.)

The record is not identical in its disclosures concerning the facts relating to the three applicants. Nor is it entirely clear cut concerning the particular questions for refusal to answer which each petitioner was cited and sentenced. However, it does show that Miss Wertheimer declined to answer an inquiry whether she was a member of the Communist Party and other questions relating to possible affiliation with and activity in connection with or on behalf of that party. Mrs. Rogers admitted that she had been a member of the Communist Party in Denver and had been treasurer of the Denver Communist organization until the beginning of the year 1948. She also admitted that until that time she had had possession as treasurer of books and records of the party. She declined, however, to answer the question asked her concerning the identity of the person in possession of those books at the time of the grand jury hearing. Mr. Blau de-

clined to answer whether he was a member of or affiliated with the Communist Party, together with other questions relating to his possible connection with it, and also declined to answer the question asked of him concerning the whereabouts of his wife.

In refusing to answer, Mrs. Rogers and Miss Wertheimer declined on the ground that their answers would tend to incriminate them, contrary to the provision of the Fifth Amendment. Mr. Blau declined to disclose the whereabouts of his wife on the ground that his knowledge of his wife's whereabouts had been obtained as the result of a confidential communication between husband and wife under Colorado law, to which it was added that a disclosure of this fact by him might tend to incriminate Mrs. Blau. (The record is somewhat dubious upon his connection of the two bases, but the District Court apparently considered them both as having been joined in his objection and for present purposes I so consider the fact.)

At the hearing in the District Court counsel for the present applicants disclosed to the court the pendency of an indictment in a federal court in New York City against eleven persons pursuant to § 2 of the Act of June 28, 1940, 18 U. S. C. § 10, commonly known as the Smith Act. This charge was a charge of conspiracy to violate that Act. Counsel for the applicants also disclosed at that time the pendency of eleven indictments against the same persons named in the conspiracy indictment for violation of §§ 10 and 13 of Title 18, U. S. Code. None of the persons under either of these indictments included any of the present applicants. The conspiracy indictment shortly charged the defendants with unlawfully conspiring to organize the Communist Party of the United States, describing it as "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence." The substantive indictments charge in effect that the Communist Party has been "a society, group and assembly of persons who teach and advocate the overthrow and destruction of the Government of the United States by force and violence."

In view of the pendency of these indictments and of the terms of the statute pursuant to which they were drawn, statutes which in essential substance now constitute 18 U. S. Code § 2385 (approved June 25, 1948, and effective September 1, 1948), the question is with reference to Miss Wertheimer and Mr. Blau whether their refusal to answer flat inquiries whether they are members of the Communist Party or have been gives

basis for reasonable belief that answering those questions affirmatively might incriminate them. In view of the same considerations the same question arises concerning Mrs. Rogers' refusal to identify the person or persons in possession of the books of the Communist Party to which she referred in her testimony. In view of the pendency or the indictments in New York and of the terms of the statutes pursuant to which they have been returned, I cannot honestly conclude that no substantial question would be presented in case an indictment or indictments or similar character should be returned either now or later and whether in Denver or elsewhere against Miss Wertheimer and Mr. Blau for alleged violation of the statutes. Nor can I conclude that they could have no possible or reasonable ground for fearing that such indictments might be returned in the event of their answering affirmatively the questions relating to their membership in the Communist Party and possible affiliation or other activities in connection with it. In consequence I cannot conclude that these applicants had no reasonable basis for fearing that their responses to the questions might incriminate them.

Upon the authorities the applicants are not the sole and final judges of whether their responses may have a tendency to incriminate them. That function is the courts' in the final analysis. On the other hand, the boundaries between the scope of the privilege against self-incrimination and that of the right of the Government to secure evidence from citizens are not sharply defined or precise. The test in my view is whether, on the particular circumstances presented, responding to the question may be regarded as reasonably having a tendency to incriminate the witness. It is not necessary that criminal or penal proceedings be presently pending against him. Nor is it necessary that upon the facts and disclosures available the answer be shown to be one which certainly would have a tendency to incriminate. It is enough, as I construe the authorities, that upon the total showing the answer might or might not incriminate. If the showing is not made in good faith and so found on sufficient evidence, the witness may be required to answer. There is no contention in this case that the claim of privilege is not advanced in good faith. Nor in my opinion is it frivolous. My conclusion in respect to the responses of these two applicants is the same as that reached by Judge David Pine, of the United States District Court for the District of Columbia, in the case of *In re Emil Costello* decided by him June 27, 1948. There is therefore conflict between Judge Pine's opinion in a substantial

sense and that of the judges who have preceded me in hearing applications for bail in this case. This furnishes an added ground for believing that a substantial question is presented by the appeal in this case.

It is true that Mr. Blau was committed in the face of a dual claim of privilege for refusing to answer questions, some which in my opinion he reasonably regarded as tending to incriminate him, and others on the ground of confidential communication between husband and wife, coupled with the suggestion that his disclosure of her whereabouts would tend to incriminate her. It is not necessary in this application for me to decide whether the latter ground alone would be sufficient. As I understand the record, the single sentence of six months was imposed upon Mr. Blau for refusing to answer both types of question and as against the claim of both types of privilege. In short, the sentence is indivisible and in my judgment the claim of privilege against self-incrimination was sufficient in the circumstances of the case to raise a substantial question requiring his release on bail pending outcome of the appeal.

The case of Mrs. Rogers is somewhat more doubtful. It is not claimed that she is now in possession of the books. Even if she were, it would seem that her privilege against self-incrimination would not be good. *United States* v. *White*, 322 U. S. 694. On the other hand, she does not refuse to surrender books of the organization in her possession. She merely declines to disclose who presently has possession of them. The White case does not squarely rule such a situation. It is entirely possible that, although she is willing to admit affiliation with or membership in the Communist Party, she may also know that the books will contain further evidence of activities by her of an illegal sort which, if produced, would incriminate her. Although I regard the ground she asserts for her privilege under the facts as weaker than that claimed by the other two applicants, I feel also that her claim as made presents more than a merely frivolous contention and there is no finding that it is not put forward in good faith. Accordingly, I have concluded that in all three applications bail should be granted pending determination of the appeals by the United States Court of Appeals for the Tenth Circuit.

[October 20, 1948]

5 Rapp App. no. 4 (1948)

BARY V. UNITED STATES

Arthur Bary vs. United States
Paul Meir Kleinbord vs. United States

Applications for Bail Pending Appeal

These applications arise out of the same grand jury proceedings as those which produced the applications of Rogers, Wertheimer and Blau, in which bail recently was granted by myself pending appeal.

Bary is the chairman of the Commist [Publisher's note: "Commist" should be "Communist"] Party in Colorado and Kleinbord is a district organizer. There cases are somewhat different from those involved in the other three applications. The applications of Bary and Kleinbord relate to commitments for *civil contempt*, whereas the other three applications related to commitments for criminal contempt. Bary and Kleinbord have been committed to bail [Publisher's note: "bail" should be "jail"] for refusal to answer questions concerning their connections with their activities in the Communist Party until such time as they may purge themselves by obeying the District Court's order to answer the questions. Moreover, the present cases are unlike those of Wertheimer and Blau in that each of the present applicants voluntarily admitted that he was a member of the Communist Party, an officer in it, and each testified voluntarily to numerous questions relating to these activities and connections. Their cases therefore are more nearly like the case of Mrs. Rogers, than those of Miss Wertheimer and Mr. Blau.

Notwithstanding their admissions of membership and holding office, as well as their answers to other questions, Bary and Kleinbord each declined to answer a large number of questions going into details concerning their activities in the party; the identity of other members and officers; the number of clubs, cells or subdivisions of the Party in Colorado; the officers of each club, cell or subdivision; the names of members who collect dues; the names of individuals known to be members who can furnish information about the collection of dues; the witness's attendance at meetings of the Communist Party during the years 1947 and 1948.

At one point in the record before the District Court and before the Court of Appeals (which I have had an opportunity to read in full) Klein-

bord refused to answer questions relating to the identity of other members and officers on the ground that he did not wish to incriminate them. However, prior to his commitment and obviously acting under the advice of counsel, he grounded his refusal on the basis that to discloses [Publisher's note: "discloses" should be "disclose"] these names would tend to incriminate himself. There is no finding specifically made by the District Court that this claim was made in bad faith.

The short of the situation, therefore, is that each of the present applicants has admitted his membership in the Communist Party of Colorado, has admitted being an officer, and has testified in further detail concerning a considerable number of his activities in these connections.

However, each has, after going thus far, refused to testify to numerous other questions relating to the identities of other members and officers, to their own attendance at Communist meetings, and to other activities which the witness in each instance felt or claimed might tend to incriminate him.

On this record, as stated above, the District Court committed both Bary and Kleinbord to jail until they should purge themselves by answering the questions they had declined to answer. The District Court at the same time denied bail pending appeal. I am also informed that the Court of Appeals for the Tenth Circuit has refused to allow bail pending appeal. The application therefore comes to me as Circuit Justice after refusal of the two inferior courts to grant the relief sought. It may be added also that the record in the present case discloses what was not shown by the record in the three prior applications, namely, that the general subject of the grand jury's investigation is to ascertain whether federal employees, presumably in the Rocky Mountain region, have violated their loyalty oaths prescribed by 60 Stat. 480 [Publisher's note: the citation "5 U. S. C. § 16" is struck through and "60 Stat. 480" substituted] the apparent authority or basis of the investigation being that some of these employees whose identity is not disclosed by the record either are or have been members of the Communist Party at the time of taking their loyalty oaths and thus have violated the statute requiring the administration of those oaths.

I have had all the difficulties in these cases which I found in the case of Mrs. Rogers. Indeed, they have been somewhat magnified, both by virtue of the fact that these are civil rather than criminal contempt cases and by the fact that these applicants perhaps have gone farther both in answering

inquiries and in refusing to answer them than did Mrs. Rogers. On the other hand, the questions which Bary and Kleinbord refused to answer covered a considerably wider field than those which Mrs. Rogers declined to answer. So in my judgment the question presented by these applications comes down in shortened form to this: If we assume, as I felt in the other cases, that, until further clarification of the law by this Court and in view of the circumstances set out in my memorandum relating to Wertheimer and Blau, the present applicants might have claimed their privilege against self-incrimination by refusing to answer at the threshold of inquiry the question whether they were Communists and therefore all others which would tend to indicate that they were, does their admission that they are Communists and their responses made to other questions as shown by this record constitute a waiver of their privilege in toto so that they were precluded by such a waiver from asserting the privilege as to the questions they refused to answer and for which refusal they were committed to jail? There is also a preliminary question whether Rule 46 (a) (2) of the Federal Rules of Criminal procedure, which was applicable to the applications of Rogers, Wertheimer and Blau, is likewise applicable in these applications to authorize myself as Circuit Justice to grant bail pending appeal.

The latter question is discussed in the memorandum which has been prepared for my use in these cases. Although there may be some question concerning this, I have come to the conclusion that, notwithstanding the technical differences between civil and criminal contempts (whatever they may be), they are not such as ought to preclude the granting of bail under Rule 46 (a) (2) by any of the officers or tribunals authorized by that section to grant bail, merely because the committing court chooses to send the person to jail in the one instance for a fixed term and in the other for a term coextensive with the witness's continuance of refusal to answer. In both cases the citizen is imprisoned, being deprived his liberty. In the one he cannot escape continuance of the imprisonment during the fixed period of the sentence even if he should change his mind and indicate his willingness to answer. It is beyond his power to end the period of his incarceration by his own action. In the other situation it is true that he can recant and terminate the period of imprisonment by answering the questions. On the other hand, if his claim of constitutional privilege is well grounded he cannot terminate his imprisonment except by surrendering that claim. That is a price which in my opinion it was not intended to require of the

citizen if he should be improperly committed. Accordingly, for the purposes of applying Rule 46 (a) (2) my present opinion is that it applies insofar as jurisdiction to grant bail is concerned to both civil and criminal contempt.

In this view I am forced to answer for myself the question whether under the circumstances of the present commitments I think a substantial federal question has been presented by the appeals from the District Court's commitments, in which event it becomes my duty to grant bail pending the determination of those appeals. Resolution of this question in the present circumstances again turns on whether, by responding to the questions which the applicants have answered, they have waived their privilege and their right to stand upon it with reference to the questions which they have refused to answer.

In view of the number and variety of these questions, it may be that responding to some of them would have no tendency to incriminate the witnesses. However, the commitments in both of the present applications were not for refusal simply to answer some of the questions which the applicants declined to answer. They were committed to remain until they had purged themselves by answering all of the questions which they refused to answer. In this case, therefore, the civil commitments were in this respect like the criminal sentences imposed in the three prior cases, namely, a single commitment for refusal to answer numerous questions rather than merely some. As I understand the District Court's order, neither of the present applicants could purge himself unless he should answer all of the inquiries which he declined to answer before the jury and special hearing in court.

Upon the question of waiver, I find no case exactly in point. I do find cases bearing on the problem which indicate to me that there is a large degree of indetermination concerning how far a witness may go toward incriminating himself and still have the right to refuse to answer further incriminating inquiries. The cases bearing most directly on the problem which have come to my attention are *Arndstein* v. *McCarthy*, 254 U. S. 71, and *McCarthy* v. *Arndstein*, 262 U. S. 355, together with *United States* v. *St. Pierre*, 132 F. 2d 837 (CCA 2). As I read the Arndstein cases, they stand for the proposition that a witness before a grand jury does not waive or forfeit his privilege against self-incrimination merely by refusing to assert it at the threshold of inquiry. The bankrupt called for examination before the grand

jury had declined to answer numerous inquiries about his assets. He did this, asserting his constitutional privilege. The District Court upheld the privilege and denied a motion to punish for contempt. Thereafter under the court's direction the bankrupt filed schedules under oath purporting to show his assets and liabilities. The schedule showed only a single item of assets. When interrogated concerning his assets he again set up his constitutional privilege and refused to answer many questions about them. Thereupon he was committed to jail. As stated by this Court, per McReynolds, J.,

"The writ [of habeas corpus] was refused upon the theory that by filing schedules without objection the bankrupt waived his constitutional privilege and could not thereafter refuse to reply when questioned in respect of them. This view of the law we think is erroneous. The schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. [Citations.] It is impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. The writ should have issued." 254 U. S. 71, 72.

The cause was remanded for further proceedings to the District Court. On remand that court vacated its former order and issued the writ of habeas corpus. To this the marshal made return exhibiting the transcript of the entire proceedings before the commissioner. This disclosed that the bankrupt before refusing to answer the questions in issue "had … testified of his own accord, without invoking any privilege, to the very matters with which these questions were concerned, thereby waiving his privilege upon further examination concerning them." *McCarthy* v. *Arndstein*, 262 U. S. 355, 357.

Upon hearing, the report states "the District Court was of opinion that … the conclusion to be drawn from the decision of this Court in reference to the schedules was that his denials or partial disclosures as a witness did not terminate his privilege so as to deprive him of the right to refuse to testify further about his property, and that he was at liberty to cease disclosures, even though some had been made, whenever there was just ground to believe the answers might tend to incriminate him; …." Accordingly, the Court sustained the writ and discharged the petitioner from cus-

tody. The marshal appealed again to this Court. It affirmed the order sustaining the writ and discharging Arndstein. The Court repeated the language quoted above from the first *Arndstein* opinion. It also referred to state cases and the English case of *Regina* v. *Garbett* and then said "since we find that none of the answers which had been voluntarily given by Arndstein, either by way of denials or partial disclosures, amounted to an admission or showing of guilt, we are of opinion that he was entitled to decline to answer further questions when so to do might tend to incriminate him." 262 U. S. 355, 359-360. "In short, it is apparent not only from the language of the former opinion, but from its citations, that this Court applied to the non-incriminating schedules the rule in the cases cited, namely, that where the previous disclosure by an ordinary witness is not an actual admission of guilt or incriminating facts, he is not deprived of the privilege of stopping short in his testimony whenever it may fairly tend to incriminate him." 262 U. S. at 359.

Both the *Arndstein* opinions are very short and neither is too clear in the scope of the ruling made. The second opinion, by Sanford, does refer to "the non-incriminating schedules" (p. 359) but previously it states (p. 358) that "the sworn schedules were, impliedly at least, assimilated to evidence given by the bankrupt as a witness …" and the Court repeated the statement of the first *Arndstein* opinion by McReynolds that "the schedules standing alone did not amount to an admission of guilt or furnish clear proof of crime."That opinion had also stated, as quoted above, it is" impossible to say that mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity."

The latter statement seems to me inconsistent with McReynold's [Publisher's note: "McReynold's" should be "McReynolds'"] rationalization and disposition of *Mason* v. *United States*, 244 U. S. 362, and if the quoted language is to be taken as specifying the test it leads me to the conclusions in the present circumstances, first, that by testifying to facts which may not be wholly incriminatory but may have some tendency in that direction when connected with other facts, the witness may stop short of going forward to testify to such other facts; second, that in the circumstances of the present application it cannot be said with certainty that answering the questions which the applicants refused to answer could have been done in the light of all the circumstances with entire impunity.

Even though the witnesses admitted their Communist affiliations both as members and as officers, and even went further to relate some of their activities in connection with the party, it does not follow that answering the questions which they refused to answer would have no further or greater tendency to incriminate them. It is difficult of course to see how answering such further questions could have any greater tendency toward proving that they were members or officers of the Party, but it would almost certainly tend to prove particular types of activity both by the Part and by themselves and to tie them more tightly into the web of any criminal activities which the Party or others belonging to it may have engaged in. Moreover, to identify the other persons asked about conceivably could furnish evidence or links in the chain of evidence which might be used either to tie the present applicants into such criminal activities or indeed into proving beyond the mere charge of belonging to and being an officer in the Communist Party that they had advocated the overthrow of the Government by force, contrary to the Smith Act.

The ramifications of the possible application of that statute, broad as are its terms; the presumption which usually applies in favor of the validity of congressional enactments; the tendency of admissions of membership in the Communist Party to form a link in the chain of proof of violation of the statute; the possible tendency of answering the questions refused by the applicants to connect them individually and beyond mere membership in the Party to violations of the statute; all combine to make me feel that the questions posed by the witnesses' refusal in this case are not merely frivolous and without substance. There is no finding, as stated above, that these claims were made in bad faith. I do not consider it my function in this application to make such a finding in the absence of one by the District Court or the Court of Appeals. It may be that the applicants were simply or primarily seeking to protect their comrades from disclosure. On the other hand, it may be that they were also seeking to protect themselves from disclosures tending to incriminate them which might be made by those comrades once their identity and activities had been drawn out.

I have also given careful attention in considering these problems to the majority and dissenting opinions of the Court of Appeals for the Second Circuit in United States v. St. Pierre, supra. Although the majority there ruled that when St. Pierre admitted that he had embezzled funds and later transported them in interstate commerce he could not stand on his privi-

lege to decline to identify the name of the person from whom the funds were taken. There was a vigorous dissent by Judge Frank which seems to me clearly to show that the question the court determined was not an insubstantial one. It is perhaps as close to the present case as any I have seen, though not of course directly in point. The majority does not assert that in all cases where a witness gives testimony which may have some tendency to incriminate himself go further and disclose all of his knowledge which would complete the chain of incrimination.

It seems to me, therefore, that beyond the questions which I considered substantial in the cases of Miss Wertheimer and Mr. Blau this case presents additional substantial questions involving what constitutes a waiver of the privilege, whether testifying to facts disclosing some links in a possible chain of criminality outs off the privilege to refuse to testify to others, and more especially the application of those questions to the larger problems presented by the circumstances of this case. Accordingly, until these issues are determined by this Court I feel that the questions presented concerning the waiver of the privilege are in themselves sufficiently substantial to require the granting of bail pending the determination of the appeal.

I may add that the manner in which I have read the *Arndstein* decisions, as well as the consideration which I have given to the problem presented by the *St. Pierre* case, seemed to me to be in line in a general way with this Court's decision in *Counselman* v. *Hitchcock,* 142 U. S. 547. This is not so much on the problem of waiver but in the aspect of the general problem that forcing a witness to answer questions which would draw out clues, that is, not only evidence tending to incriminate, but evidence which would supply sources for securing incriminating evidence, would be in violation of the constitutional privilege.

[November 3, 1948]

This is the "Ethereal Version" of the Green Bag's

2017

ALMANAC & READER

of useful and entertaining tidbits for lawyers
and exemplary legal writing from the year just passed

celebrating

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and featuring our

Legal Writing Honorees

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M. Kevin Underhill

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This year's *Almanac Excerpts* consists of more than mere excerpts –
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ETHEREAL VERSION

THE GREEN BAG

ALMANAC

OF USEFUL AND ENTERTAINING
TIDBITS FOR LAWYERS

&

READER

OF EXEMPLARY LEGAL WRITING
FROM THE YEAR JUST PASSED

2017

EDITED BY

ROSS E. DAVIES

&

CATTLEYA M. CONCEPCION

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There are two versions of the 2017 *Almanac & Reader*: the *Material Version* (it features videos in an ink-on-paper format, aka flipbooks), and the *Ethereal Version* (it features videos in an electrons-on-internet format, aka URLs). Each eligible *Green Bag* subscriber should receive one version or the other, but maybe not both.

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Contents

★ *Law Review Articles of 25 Years Ago* ★

We'd hoped to honor a third article, but the author, a professor at a prominent Connecticut law school, never responded to our polite (we hope) and persistent (we know) pursuit of permission to republish. We view his non-response and the non-response by the Delaware lawyer (see above) as (a) denials of permission and (b) healthy reminders of the *Green Bag*'s insignificance in the eyes of at least some (and maybe more than some) VIP lawyers.

★ *Books* ★

★ *Tweets* ★

ALMANAC OF USEFUL & ENTERTAINING TIDBITS

▼ *Last Year* ▼

▼ *This Year* ▼

▼ *Videos* ▼

[1] From the "Hearst Metrotone News Collection" at the UCLA Film & Television Archive.

PREFACE

SELECTING SELECTORS AND FLIPPING BOOKS

Ross E. Davies

This is the 12th *Green Bag Almanac & Reader*. For an explanation of why we at the *Green Bag* think the world is a better place with the *Almanac & Reader* than without it, read the "Preface" to the 2006 edition. It is available on our website (www.greenbag.org).

Having kept the series afloat for a dozen years, we figure the *Almanac & Reader* is here for the long haul, if not forever. That is why we've added it to our basic *Green Bag* subscription, starting with this edition.

I.
EXEMPLARY LEGAL WRITING

Our Tinkering Continues

Last year (and the first month of this year) was supposed to be our second round of conducting an open, two-step process for picking our "exemplary legal writing" honorees.[1]

First, we invited everyone to nominate works throughout 2016 in fields in which they were active: judges could nominate judicial opinions; supreme-court litigators could nominate briefs filed in state supreme courts; law review authors could nominate law review articles; tweeters could nominate tweets.

Second, anyone who nominated in any category could vote at the end of the year (in January 2017, actually) in every category.

The idea was to (1) harness the expertise of practicing specialists to build a ballot of credibly exemplary nominees in each category, and then (2) rely on the generalist sensibilities of a wide range of thoughtful reader-nominators to identify those works that impressed both non-specialists and specialists.

Unfortunately, it did not work out very well. Our best guess is that we were victims of our own success. In recent years, some legal writers have begun to value recognition in the *Green Bag Almanac & Reader*. We had some inkling of this pleasing trend, but developments during the 2016 nomination process really brought it home. Here are a few examples:

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[1] *See Preface*, 2016 Green Bag Alm. 1-5.

In 2016, we received more nominations of briefs than ever. And for the first time, every single one was nominated by a lawyer on the brief. A few admirably forthright nominators even volunteered that they were nominating their own best briefs, rather than the best briefs they had seen. At least one added "nominated for Green Bag award for excellence in legal writing" to his online c.v. after nominating his own brief. (Don't bother looking for it. It's not there anymore.)

In 2016, we received, as always, a healthy number of nominations of judicial opinions. For the first time, however, most opinions were nominated by judges sitting on the same courts as the authors of the nominated works.

In 2016, we received plenty of nominations of law review articles too. For the first time, most — and in this category it was a vast majority — had a hometown flavor. More than 80% of nominators nominated works written by scholars (or published in law reviews) based in the nominators' home institutions. Tweeters self-nominated at about the same rate.

There is nothing wrong with what might be called the parochial promotional pursuit of prizes. Indeed, that approach may well be the norm. There are quite a few famous prizes and awards that seem to work pretty much that way. And then there are the habits of mind developed by players of the *U.S. News & World Report* game.

But we at the *Green Bag* were thinking of our system differently. We imagined experts who read widely and wrote seriously in their day jobs — judges, litigators, law professors, and so on — applying their wisdom and experience to identify and honor the best legal writing they found anywhere. We did not imagine them focusing on putting their own work (or the work of their closest associates) in the spotlight.

We could be wrong. Maybe the connections between nominators and nominations are coincidences. Or maybe the experts — more worldly than the naïfs at the *Green Bag* — know that "read global, nominate local" is the best way to operate in this context. Or maybe, in the real world, experts don't have time to read outside their own circles. Or maybe something else.

Wrong or right, though, we felt we had failed at the nominations stage of our process in 2016. So, we called off the vote and set to tinkering again. And we were fortunate to have a ready fix at our fingertips.

Our New New System for Last Year — 2016

The fix is a black box.

First, some background. Every year we get unsolicited (but welcome) advice from a variety of first-rate legal writers. Most (but not all) are *Green Bag* authors or subscribers or advisers. In the course of our cordial (and often

constructively critical) back-and-forths with these folks, they opine from time to time about what we ought to publish in the *Almanac & Reader*. They ignore our limits on who is allowed to nominate what sorts of works, probably because their main interest is simply the exchange of ideas about interesting writing, not the placement of particular pieces in a particular book. In the past, we've read and enjoyed and learned from their comments, and then, with regret, ignored them when the time came to run our process for picking exemplary legal writing to honor in the *Almanac & Reader*. We had a process, and we stuck to it.

Now — and you can probably guess where this is headed — a bit more about our new black box.

For this *Almanac & Reader*, we reversed ourselves. We abandoned the process we had planned to use and instead adopted our correspondents' cranky (and thoughtful, and good-spirited) freelancing as our process.

We enlisted a bunch of them — more than a dozen, less than a hundred — to be the voters for our 2016 "Exemplary Legal Writing" honors. We are not going to disclose the name of any voter to you or to anyone else (including other voters), ever. We are hoping that a combination of electoral anonymity and editorial resistance to parochial promotion might foster impartiality about exemplariness. You will just have to rely on the *Green Bag*'s willingness and ability to build a good ballot, select a good electorate, and administer the vote honestly.

We sent each voter a ballot listing some of our correspondents' jawboning suggestions and some non-parochial nominees from the nomination process we'd planned to use. They did their reading and their voting. Then we did our tallying. We think the results — most of which appear in this *Almanac & Reader* — are, well, exemplary.

Our New New System for This Year — 2017

We like our new system. To us, it feels pure (or at least not yet noticeably corrupt) and sturdy (or at least hard to corrupt) and fair. But then, we feel that we are honest and diligent and fair-minded, and that the voters on our secret panel are too. We might be wrong about some of that. Our readers will, of course, salt to taste, and we will carry on as best we can.

So, we will select exemplary legal writing from 2017 for publication in the 2018 *Almanac & Reader* using pretty much the same system we ended up using for this one. We are recruiting some knowledgeable, thoughtful, good-spirited, and sometimes nicely cranky people to do the choosing. They will make their choices from a ballot provided by the *Green Bag*.

And that brings us to the one big change: nominations. For 2017 — meaning starting now — anyone can nominate anything published in 2017 in any of the categories we intend to honor in the 2018 *Almanac & Reader*. To nominate something (this is the only way to do it), send an email to editors@greenbag.org with this information in the body of the message:

- full name(s) of the author(s)
- full title of the work
- full citation or a working hyperlink
- full name of the nominator
- working email address for the nominator

If you send us less than all of that, then you are giving us a research assignment that we will not do. Instead we will delete your message.

And here are the categories for 2017:

- judicial opinions
- briefs filed in a state or federal appellate court
- law review articles published in 1992
- tweets
- regulations issued by a state or federal agency

Our respectable authorities (whose number may grow) will continue to recommend good books. Let the nominating begin!

II.
THE FLIPBOOKS

We are publishing two versions of this, the 2017 *Almanac & Reader*. One version — the *Material Version* — features videos in an ink-on-paper format (aka flipbooks). The other — the *Ethereal Version* — features videos in an electrons-on-internet format (aka URLs). Please adjust your outlook to match the version you are viewing.

If you page through the *Material Version*, you will see that it is about 50% pictures. If you do your paging quickly enough, you will see that the pictures move. How does that work? No idea. Here at the *Green Bag* we do not know how flipbooks work their magic, but we do know that they are fun. And that's enough for us, because we believe enjoyable content improves the odds that you will keep an *Almanac & Reader* long enough, and open it often enough, to get through much of the good, meaty material inside.

Similarly, if you copy-and-paste or type the URLs from the *Ethereal Version* into your web browser you will see on your computer screen the same

moving pictures that are in the *Material Version*. But you won't have to do any work to make the moving happen — no flipping of pages for you! Viewing videos on the web can be great fun too. But, once those URLs are in your browser, you will be able to have that kind of fun without holding onto the *Almanac & Reader*, so I guess we will just have to hope that you'll find other reasons to come back for more of the good, meaty material inside.

Let's return to the flipbooks for a moment. Why do they still exist at all? Why are they still popular? (If you doubt their popularity, search for "flipbook" at amazon.com and browse the 10,208 — the count as I write this — products that pop up.) Shouldn't flipbooks have been superseded a long time ago by ever-cheaper and ever-easier video recording (think smartphones) and playback (think YouTube)? But they persist. YouTube, for example, is well-stocked with, of all things, digital video recordings of old-fashioned, ink-on-paper flipbooks being flipped by old-fashioned, flesh-and-bone human hands. It's weird. Or maybe it isn't.

We are corporeal beings, connected to the physical world in ways that are sometimes hard to define and explain, and yet, for some folks in some contexts, easy to dismiss. Maybe they shouldn't. Consider this episode from the *Green Bag*'s own ongoing engagement with worlds both physical and digital:

The Case of the Environmentally Friendly Bobblehead

Several years ago, I was engaged in a friendly email back-and-forth with a *Green Bag* subscriber. He was arguing that we should abandon ink-on-paper and go pure-digital. He gave two excellent — and, I believe, correct — reasons: (1) it would reduce the *Green Bag*'s production costs and (2) it would reduce our environmental impact. Manufacturing ink and paper, processing them, moving them around, and returning them to the earth all cause wear and tear on our home planet, and all cost money. I made a few countervailing arguments in favor of ink-on-paper (I won't waste ink and paper on them here), which he rejected as insufficient to overcome the moral imperative to reduce the *Green Bag*'s environmental impact.[2]

As our cordial chitchat was progressing, the *Green Bag* was producing a bobblehead doll of Justice Ruth Bader Ginsburg.[3] When the Justice Ginsburg bobbleheads arrived, Cattleya Concepcion made a video of the bob-

[2] Being a smart aleck, I also suggested that we will know when the best legal minds have concluded that ink-on-paper publishing is truly a bad idea because the great courts and best law schools will stop doing it, and he will stop placing his own work in ink-on-paper publications. That got me a smiley.

[3] Manufactured by the best bobblehead makers in the world, Alexander Global Promotions.

bling doll for the *Green Bag* and we posted it on the web.[4] I emailed my correspondent a link to the video, with a note explaining that the *Green Bag* was giving him the digital Justice Ginsburg bobblehead rather than the usual ink-on-paper certificate to redeem for a paint-on-ceramic doll, thus saving the *Green Bag* some money and reducing the environmental impact of the bobblehead project. He got the joke, and replied with a "haha" and a request for an ink-on-paper certificate. I declined, citing his imperative morality and convincing economics. He was not so amused. But we did manage to move on, on friendly terms.

The point is probably obvious: None of us should underestimate our own attachment to the material world. Nor should we ignore the possibility that our own material-vs.-digital preferences reflect no principle more sound than our own tastes and self-interest.

Anyway, in an attempt to honor the values and celebrate the joys of both the physical world and the digital world, we are publishing this, our first *Material & Ethereal Almanac & Reader*. And we also have two more reasons for publishing the material/ethereal flipbook/URL parts.

First, it was 50 years ago today that President Lyndon Johnson announced that he was about to nominate Solicitor General Thurgood Marshall to be an Associate Justice of the Supreme Court of the United States. That moment, that act, and the lawyer at the center of the action deserve celebration. So, the main flipbook feature of this *Almanac & Reader* is the Hearst newsreel report of Johnson's announcement. (We, and you, have the generosity of the UCLA Film & Television Archive to thank for that.)

Second, the flipbooks printed in the *Material Version* may eventually become useful examples for courts, their reporters of decisions, and people who write about courts and their reporters.

Here's why: Using video recordings in courtrooms and judicial opinions is still controversial — *Scott v. Harris*[5] (a case involving a car chase that ended in tragedy) is a prominent example — but the practice seems to be here to stay. The practicalities, however, are more up in the air. There are, for example, at least four reasons to worry about how videos that appear in judicial opinions are reported: (1) inequality of access (not everyone has access to the web, or to the software needed to view videos in whatever formats a court or reporter might choose to use); (2) link rot and software obsolescence (keeping things up-to-date is notoriously difficult, and notoriously neglected); (3) security (neither Article III nor a state equivalent bestows

[4] *See Ruth Bader Ginsburg bobblehead opera*, GBRC1 (2012) (Cattleya Concepcion, producer and director), www.youtube. com/watch?v=ITiR7Vg38eo.
[5] 550 U.S. 372 (2007).

immunity from hacking and other nefariousnesses); and (4) integrity (the temptation to secretly, or at least sneakily, revise documents post-publication can be difficult to resist, and tinkerings of that sort are easier to engage in, and may be harder to detect and police, when everything involved is digital-only). Are these concerns legit? Could ink-on-paper flipbooks be useful tools for dealing with any of them? Maybe. All we are trying to do now is demonstrate the ease with which even a low-budget independent publisher can put such things in print.

III.
OTHER BUSINESS

Homer's Nodding

More than a decade of practice producing a big book in a hurry has made us better at making mistakes, not better at catching them. Fortunately, we have kindly readers who help us with the catching. And so we have a bundle of corrections to last year's *Almanac & Reader* — the 2016 edition, that is — to share with you.

First, from Harold Kahn (a judge with the kind of temperament many of us can only, but should always, aspire to):

Page 45:

> I was the trial judge in the *Pao v. Kleiner Perkins* sex discrimination and retaliation trial which ended in a jury verdict in favor of Kleiner Perkins on all claims. As the trial was in a California state court, it was not a "federal jury" that rendered the verdict, as stated in the March 27 entry on page 45. I suspect that this is an error that only the trial judge might care about, and even he is untroubled by it.

Second, from Shannon Sabo at W.S. Hein & Co. (operators of the superb HeinOnline database):

Page 146, footnote 87:

> Replace "Luanne von Schneidemesser" with "Lynne Murphy" — she is the author of the blog post cited there.

Third, from our friend Ira Brad Matetsky (who is better at catching his own mistakes than we are) we have a handful of corrections:

Page 153, footnote 91:

> In the second paragraph, replace "195" with "168" in the citation of *Bram v. United States*.

Page 228, footnote 11:

> Remove the comma between "note" and "2".

Page 231, footnote 21:

> Replace the text with this: "Alternatively, a few sources speculate that it may have been the printed magazines themselves, rather than the printing plates, that crossed the Atlantic. This appears not to have been the case during the bulk of the American *Strand*'s existence, but has not been wholly ruled out for the earliest years."

Pages 232:

> Replace "[footnote here]" with the call for footnote 25.

That's all for now. There is surely more to come.

Arthur Conan Doyle's Pigs

In the 2016 *Almanac & Reader* we invited readers to pick up a pen and try a Victorian fad in which Arthur Conan Doyle and many other celebrities participated: drawing a pig with eyes closed (the artist's eyes, not the pig's).[6] We heard from a lot of readers who did, and enjoyed it. But only nine were brave (or foolish) enough to share their artwork with us so that we could share it with you. And so the fine porcine portraits by Ben Baring, Ross Campbell, Timothy Delaune, Kevin Elliker, Paul Kim, Jack Metzler, Sutton Smith, Jason Steed, and Maggie Wittlin appear on the calendar pages of the first nine months of this *Almanac & Reader*. The last three months feature related pigs.

Our pig project did provide an unanticipated benefit for the study of detective fiction. Rachel Davies wrote to us to flag a connection of a sort (there are many) between Sherlock Holmes (and his creator, Arthur Conan Doyle) and Nero Wolfe (and his creator, Rex Stout):

> Just read on page 7 of Stout's *And be a Villain*: "By Sunday he [Nero Wolfe] had finished the book of poems and was drawing pictures of horses on sheets from his memo pad, testing a theory he had run across somewhere that you can analyze a man's character from the way he draws a horse."

Our Goals

Our goals remain the same: to present a fine, even inspiring, year's worth of exemplary legal writing — and to accompany that fine work with a useful and entertaining potpourri of distracting oddments. Like the law itself, the 2016 exemplars in this volume are wide-ranging in subject, form, and style. With any luck we'll deliver some reading pleasure, a few role models, and some reassurance that the nasty things some people say about legal writing

[6] *Arthur Conan Doyle's Pig, and Yours*, 2016 Green Bag Alm. 537.

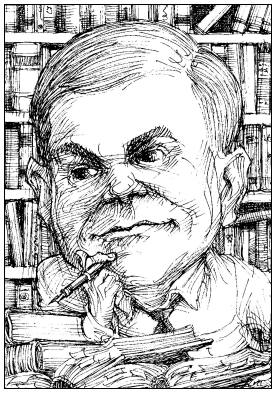
are not entirely accurate.

Our Thanks

We always end up owing thanks to many good people for more acts of kindness than we can recall. And so we must begin by saying "thank you" and "we're sorry" to all those who deserve to be mentioned here but aren't. We cannot, however, forget that we owe big debts of gratitude to the generous, anonymous friends of the *Green Bag* who stepped up late in the game to bear the burden of selecting the exemplary writing honored here; to O'Melveny & Myers LLP (especially Nadine Bynum and Greg Jacob); to the Scalia Law School; to Kara Molitor and Danielle Faye of the UCLA Film & Television Archive; and to Ira Brad Matetsky — author, editor, and all-around literatus — who never fails to make any work he touches better.

Finally, the *Green Bag* thanks you, our readers. Your continuing kind remarks about the *Almanac & Reader* are inspiring.

Ross E. Davies
June 13, 2017



Bryan A. Garner[†]

THE YEAR 2016

IN GRAMMAR, LANGUAGE, AND WRITING

JANUARY

In Lancashire, England, the BBC reported on a terrorism investigation after discovering that a 10-year-old schoolboy had written that he lived in a "terrorist house." Under the 2015 Counter-Terrorism and Security Act, U.K. schoolteachers must notify authorities of any suspected terrorist activity. After a brief investigation, police — and the boy's teacher — discovered that the boy had merely made a spelling error. The boy and his family informed the investigators that he meant to say that he lived in a "terraced house." Upon this revelation, the police and county council released a statement informing the public that no further concerns had been identified and that "no further action was required by the agency." The matter was then referred to the spelling authorities. ● In a move that may seem woefully late, the American Dialect Society announced the 600-year-old pronoun *they* as its Word of the Year for 2015. But this isn't just any *they*; it's the singular *they*, long decried

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[†] Bryan A. Garner is the author of more than a dozen books about words and their uses, including *Garner's Dictionary of Legal Usage* (Oxford, 3d ed. 2011) and *Garner's Modern English Usage* (Oxford, 4th ed. 2016). He is editor in chief of *Black's Law Dictionary* (West, 10th ed. 2014) and the author of the chapter on grammar and usage in the *Chicago Manual of Style* (Chicago, 16th ed. 2010). He coauthored two books with Justice Antonin Scalia: *Making Your Case* (2008) and *Reading Law* (2012).

by grammarians yet used daily by everyone else in the English-speaking world as a gender-neutral alternative to *he or she*. As NPR reported, changing conceptions of gender identity have granted the singular *they* new cultural legitimacy: in November 2015 *The Washington Post* style guide accepted its use for people who think of themselves as neither male nor female, and Facebook, other social-media platforms, and even major universities now allow users to select it as their personal pronoun of choice for automated communications. Although your high-school English teacher will still balk at the usage, they may just have to get accustomed to it. • Though the ADS may have settled on *they*, *The New York Times* reported on the continuing search for other gender-neutral pronouns. Along with the singular *they*, the *Times* listed these new candidates — *ey*, *ze*, *E* — in use among U.S. universities. The *Oxford English Dictionary* also added *Mx.* (pronounced "mix") as a genderless prefix. (The *x* functions like an *x* in algebra equations — representing an unknown.) *Trans**, with an asterisk, now refers to "non-cisgender" identities. While Mount Holyoke decided that *The Vagina Monologues* now presents too straitened a view of gender to be suitable for production, Columbia University replaced the play altogether with *Beyond Cis-terhood*. • Parents, take heart: your teenager's slang and texting shorthand may not be ruining the language after all. According to a study published by Mary Kohn of Kansas State University, teens' role in language change is overstated. The study, based on a corpus of annual recordings of 67 children's speech from infancy though their early 20s, found that while individual speakers' vocabulary and pronunciations changed as they entered adolescence and sought to define themselves as individuals, linguistic change in this period was no more significant than in any other — say, when they entered their 20s and sought to blend in with a professional environment. "Very commonly, people think that teenagers are ruining language because they are texting or using shorthand or slang," Kohn explained. "But our language is constantly developing and changing and becoming what it needs to be for the generation who is speaking it." So parents who are worried about their teenagers' speaking habits should get with it, remember their own groovy teenage slang, and don't have a cow, man.

FEBRUARY

Education Week reported that the Common Core standards may cause a resurgence in grammar education by returning the subject to the "high-stakes tests" that American students face annually. (Grammar wasn't separately tested under No Child Left Behind.) Whether or not any such grammatical renaissance occurs, the possibility has stirred up the old debate about how

grammar should be taught. "We are asking kids to dive into complex texts and understand them, so we need to teach them how to read complex sentences," one veteran teacher said, adding that this requires a solid grasp of grammar. • The Académie Française, established in 1635 as curator and guardian of the French language, sparked a furor when it announced spelling changes to about 2,400 words. Many words borrowed from English, such as *le week-end* and *le strip-tease*, will lose their hyphens, and a slew of native words will be changed to better reflect pronunciation — *oignon* ("onion"), for instance, will become *ognon*. By far the most controversial change was the broad elimination of the circumflex, the accent affectionately known as "the hat" appearing in words such as *hôtel* and *tête-à-tête*. Public defense of the endangered diacritic was vitriolic and swift: the hashtag #JeSuisCirconflexe (a play on the #JeSuisCharlie rallying cry expressing solidarity after the *Charlie Hebdo* attacks) went viral on Twitter. Hold on to your hats. • Even young royals get bedtime stories. A piece in *The Telegraph* (U.K.) described how the Prince of Wales's passion for literature had been instilled in him at an early age. One of his favorite works is Henry Wadsworth Longfellow's *The Song of Hiawatha*. In an appeal for funds by the Friends of the National Libraries, Prince Charles wrote: "I can remember the electrifying moment the first time I heard Longfellow's words, which he uses like music in a mesmerising rhythm that runs throughout the epic poem." His love of literature also led to an appreciation for good grammar. He noted that correct grammar lets the reader be sure of what the writer means. "If we stop using commas, or even full stops, I do wonder how we can hope to make sense of the world. Grammar matters!" Who better to defend the Queen's English? • ScienceDaily.com reported that reading and listening to music at the same time affects how you hear the music. Specifically, the complexity of the grammar makes a difference in how complete you perceive the chord sequences to be. Language scientists and neuroscientists from Radboud University and the Max Planck Institute for Psycholinguistics asked people to read both simple and complex passages while listening to a short piece of music. The study showed that the readers found the music less complete with the grammatically difficult sentences than with the simple sentences. Because language and music are processed by the same part of the brain, handling both simultaneously overloads the region known as Broca's area, located under the left temple. The report's lead author, Richard Kunert, stated: "Previously, researchers thought that when you read and listen at the same time, you do not have enough attention to do both tasks well. With music and language, it is not about general attention, but about activity in the area of the brain that is shared by music and language."

MARCH

As the 2016 presidential campaigns swung into high gear, Carnegie Mellon University's Language Technologies Institute studied about 40 speeches by all the major candidates for their readability scores. Donald Trump scored lowest on grammar — at a fifth-grade level — while other candidates scored at sixth- through eighth-grade levels. On vocabulary scores, Bernie Sanders topped the field with an 11th-grade level. Ted Cruz's vocabulary was put at a ninth-grade level, and the frontrunners, Trump and Clinton, were both on an eighth-grade level. ● *The New York Times* reviewed *You Could Look It Up: The Reference Shelf from Ancient Babylon to Wikipedia* by Jack Lynch, a professor of English at Rutgers University and a scholar of lexicography. The *Times* calls it "a lively and erudite history" of society's passion for putting things in order. Lynch says: "I'll argue — with only a small bit of exaggeration — that the reference book is responsible for the spread of empires, the scientific revolution, the French Revolution, and the invention of the computer." ● *The New York Times* suspended "After Deadline," its weekly mea culpa of stylistic and grammatical oversights that made their way onto the Gray Lady's pages. Among the final week's catches: *sprung a leak* for the past-tense *sprang a leak*; the redundant *from whence* misused to mean "of which"; *women employees* where *Times* style prefers *female employees* or a rewrite; *each . . . were* for *each . . . was*; *grabbing his podium* for *grabbing his lectern*; and *no-holds-bar* for *no-holds-barred*. "After Deadline" editor Philip B. Corbett promised to continue occasional posts to the online "Times Insider." ● The U.S. Patent and Trademark Office published a patent filing by Facebook for "social glossary" software. According to the application, the algorithm aims to identify, "slang, terms of art, portmanteaus, syllabic abbreviations, abbreviations, acronyms, names, nicknames, repurposed words or phrases, or any other type of coined word or phrase" by mining users' posts for words and usages not yet associated with a known meaning. By collating these usages with data such as a user's language and location, the glossary software could detect emerging linguistic trends among particular demographic groups — even predicting slang before it catches on in those groups or the general population. Imagine a world in which parents might know the newest slang before their teenagers do.

APRIL

Who owns the copyright to the English language? That's easy — no one does. But what about the Klingon language? According to *The Hollywood Reporter*, CBS and Paramount say it's their intellectual property, and they're

suing the makers of a Star Trek fan-funded movie. In an amicus brief, the Language Creation Society argues that the alien language "has taken on a life of its own," far beyond what was incorporated into Star Trek movies. "Thousands of people began studying it, building upon it, and using it to communicate among themselves." Boldly, no doubt. • Researchers in the linguistics and psychology departments at the University of Michigan published a study correlating social disagreeability with the tendency to notice and comment on grammatical gaffes. Participants were asked to look through e-mail responses to an ad seeking a roommate. Some e-mails were error-free, while others contained common mistakes such as swapping *they're*, *their*, and *there*; *your* and *you're*; and *then* and *than* — along with everyday typos such as *abuot* for *about*. Those who had a "more agreeable" personality type (as determined by a five-factor personality test) tended not to notice the errors; "less agreeable" types were significantly more likely to be bothered by the substandard grammar. So their. • A new dictionary app, as reviewed on TechCrunch.com, should appeal to the linguistically curious. Cocreator Tony Tao said that *Miss D* is intended to create curiosity about learning other languages. In fact, the app simultaneously translates a chosen term or phrase into ten other languages: French, Spanish, German, Japanese, Russian, Chinese, Italian, Portuguese, Korean, and Polish. Tao says, "Our target audience should be people using apps like Google Translate, and we position our app as something between a comprehensive dictionary app and traditional translation app." The search result may even give you an appropriate emoji or the Wikipedia entry (in English) for the term.

MAY

Do Texas Republicans really think most Texans are gay? Probably not — but arguably their party platform suggested as much. As the *San Antonio Current* pointed out, the relevant plank approved at the 2016 state convention led off: "Homosexuality is a chosen behavior that is contrary to the fundamental unchanging truths that has been ordained by God in the Bible, recognized by our nation's founders, and shared by the majority of Texans." The 2014 platform had been identical except that it used *have* instead of *has*, so that the ending series of phrases (including "shared by the majority of Texans") clearly attached to *truths* instead of *behavior*. What a difference two years make. • The Scripps National Spelling Bee raised the bar this year — or tried to. After the competition ended in ties in both 2014 and 2015, its organizers decided to introduce longer rounds and harder words to match competitors' advanced skills. In particular, they expanded the list of "cham-

pionship words" from 25 to 75 and gave judges the discretion to increase the difficulty of the words given if necessary. All this seemingly in hopes of avoiding yet another tied bee — and all ultimately in vain: Jairam Hathwar, 13, and Nihar Janga, 11, were declared this year's cochamps. • Where are past winners of the Scripps National Spelling Bee now? Olivia Waxman of *Time* set out to find the answer. She talked with eight former champions from 1954 to 2002 and asked them how the spelling bee had influenced their lives. The oldest winner she spoke to — William Cashore, 76, of Rhode Island — is a neonatology specialist and professor emeritus at Brown University's Alpert Medical School. Mr. Cashore credits the Bee with giving him confidence in public speaking. The winning word for Molly Dieveney Baker in 1982 was *psoriasis*. It came back to haunt her 20 years later at a doctor's appointment when she was diagnosed with the chronic skin disease. Current occupations of the other champions Waxman interviewed ranged from software engineer to professional poker player to psychologist to, of course, spelling-bee coach.

JUNE

The Huffington Post reported that searches for *faute de mieux* jumped 495,000% in Merriam-Webster's online dictionary after Justice Ruth Bader Ginsburg of the U.S. Supreme Court used the French phrase in her majority opinion in *Whole Woman's Health v. Hellerstedt*. The surge of interest in the phrase, which means "for lack of something better," is characteristic of the relationship between language and current events, according to Merriam-Webster editor at large Peter Sokolowski. For instance, searches for *androgynous* jumped after the deaths of paragons David Bowie and Prince; *presumptive* and *caucus* predictably rose this year (as they do every election cycle); and *plagiarize* always spikes in early September, when the school year starts. • *CBS News* asked its readers to spot the problem with New York City's

Verrazano-Narrows Bridge, connecting Brooklyn and Staten Island. The bridge is named after Italian explorer Giovanni da Verrazzano — with two *z*'s. Yet the bridge has only one. After the bridge opened in 1964, the error wasn't corrected. This month, a college student started a petition to fix the misspelling on the bridge honoring Verrazzano, the first European to explore the Atlantic Coast. But the Metropolitan Transportation Authority, which operates the span, refused, explaining that correcting the spelling on all signage would cost $4 million. There still seems to be some debate about whether the omitted *z* was truly a typographic error or an intentional result

of the strong urge to Anglicize the name.

JULY

The seventh Star Wars installment, *The Force Awakens*, debuted in December 2015, but it wasn't until six months later that a couple of commas — or their absence — spawned a new fan theory that Princess Leia has another brother besides Luke. The movie's traditional opening scroll tells audiences that Leia (aka General Organa) "is desperate to find her brother Luke and gain help restoring peace and justice to the galaxy." Savvy fans recognized the restrictive appositive when they saw it (because *Luke* isn't framed by commas) and deduced that there must be at least one other brother around, right? Not so, said producer J.J. Abrams: "I take full responsibility for any punctuation errors." ● According to a story in *The New York Times*, the Academy of the Hebrew Language works to update the ancient Hebrew language for the digital era. Recent additions announced on Twitter were Hebrew words for *shaming* (*biyush*: an outgrowth of an existing verb, "to shame"), *hashtag* (*tag hakbatza*: literally, "group tag"), and *big data* (*netunei atek*). Recently the Academy tried to come to the rescue of Israel's health minister after he made a powerful enemy in the fast-food industry. He had declared that his own word for junk food was *McDonald's*. The Academy suggested the alternative *zlolet*, a combination of *zlila*, or "gluttony," and *zol*, which means "cheap." ● The world's most popular word-processing software got a little smarter. Microsoft rolled out two new features in its ubiquitous Word application: Researcher and Editor. The former allows users to do research from within Word itself, offering reliable sources on a given topic, vetted by Microsoft's search engine, Bing — even automatically adding citations for the sources used. The latter, described as "spell check on steroids," combines machine learning with input from linguists to offer not only spelling and grammar corrections, but also stylistic suggestions, along with explanations for all of the above. Whether users will see this automated advice as a godsend or the most obnoxious feature since Clippy (the animated-paperclip "assistant" whose attempts to be helpful never actually were) remains to be seen.

AUGUST

"Severe misuse" halted a survey promoted by Oxford Dictionaries on its website to find the most disliked English word. Only one day after the launch of the #OneWordMap feature, Oxford had to close it after being flooded with "a mixture of swearwords and religiously offensive" vocabulary. Although Oxford intended it to be a positive experience with language (interesting to

think that searching for the least favorite word would be positive), according to Dan Stewart, the head of international marketing at Oxford Dictionaries, the misuse made the results unusable. ● It took the University of Texas half a century to erect a memorial to the students and others shot by Tower sniper Charles Whitman on August 1, 1966. But as *Spectrum News* of Austin reported, the memorial's text contained a prominent error: the Latin word *interfectum* should have been *interfecti*, according to the Classics department chair, Lesley Dean-Jones. "This is a mistake that a student who passed the first semester of Latin with a C would have found," she said, suggesting that planners may have relied on Google Translate instead. A University source said the monument would be corrected. ● *The Guardian* (U.S. edition) reported on the making of a Hollywood drama about the creation of *The Oxford English Dictionary*. The film is based on the bestselling novel *The Surgeon of Crowthorne: A Tale of Murder, Madness and the Love of Words* by Simon Winchester. Oscar winner Mel Gibson is set to portray Professor James Murray, who started compiling the dictionary in 1857. Another Oscar winner, Sean Penn, is being considered for the role of retired army surgeon W.C. Minor, who submitted over 10,000 dictionary entries to Murray while imprisoned at an asylum for the criminally insane. The working title is *Professor and the Madman* (following the book's American title). ● Scripps Spelling Bee cochampion Jairam Hathwar got the rare opportunity to challenge one of his heroes, golfer Jordan Spieth, at his own game — and win. When AT&T, one of Spieth's sponsors, heard that the PGA star was Hathwar's favorite athlete, the company put the two on the putting green for a little friendly competition. But first, a miniature spelling bee determined ball placement: each word spelled correctly moved the speller's ball closer to the hole; each spelled wrong moved it away. From *zoysia* (a type of grass often found on golf courses) to *logorrhea*, Spieth's ball moved ever farther back toward the edge of the green, while Hathwar's flawless spelling earned the Scripps champ an easy tap-in. When Spieth's 30-foot, uphill putt went wide, his loss was official. Hathwar's advice to the golfer: read the dictionary cover to cover — twice.

SEPTEMBER

An article in BusinessWeek.com featured a high-school teacher who had decided not to mark the singular *they* as incorrect in student papers. Steve Gardiner of Montana, a teacher for 38 years, argued that the prohibition of the singular *they* outlived its relevance: "I have burned up hundreds of red pens, and hours of time, correcting this grammatical usage based on a traditional gender binary of *he* and *she*. It's time to move on." ● Once again, the

latest update to the revered *Oxford English Dictionary*, final authority for all die-hard snoots, sent the more hidebound of its faithful into fits. Among the 1,200 new words or senses were mundane additions such as *spanakopita* (a Greek pastry dish) and *kare-kare* (a Filipino stew), as well as a handful of whimsical terms coined or popularized by author Roald Dahl, whose 100th birthday was this year — including *witching hour*, *Oompa Loompa*, and *scrumdiddlyumptious*. As always, however, the most controversial additions were those taken from popular slang: *YOLO* (You Only Live Once), *squee* (an expression of extreme delight, primarily found on the Internet), *moobs* (man boobs), and *biatch* (and seven other alternative spellings of *bitch*). • *The Independent* (U.K.) reported that confusion over a comma let an important clue in a murder case go unnoticed for 21 years. In 1993, Stephen Lawrence was killed in an unprovoked and presumably racially motivated attack. One item found at the scene was a purse strap, which the crime-scene examiner's handwritten field notes placed about five yards away from Lawrence's body. The person who transcribed those notes, however, misread a critical comma and mistakenly grouped the strap with the next item the examiner listed — about 100 yards away. Police now think that the strap may have been used as part of an adapted weapon, and new DNA swabs of it have linked an unknown woman to the scene, providing a lead to a previously unknown and potentially crucial witness.

OCTOBER

The next time you eat out, pay closer attention to the adjectives in the restaurant's menu. According to Daniel Jurafsky, professor of linguistics and computer science at Stanford University, less-expensive restaurants usually use vague adjectives such as *delicious*, *flavorful*, and *terrific*, whereas middle-priced restaurants tend to use sensory adjectives such as *zesty*, *rich*, *crispy*, and *creamy*. His study, conducted in collaboration with Carnegie Mellon researchers, showed that the higher-toned restaurants have more succinct menu descriptions because patrons expect superior quality food and so don't need such tasty testimonials. • *Quartz* reported the launch of a new online slang dictionary. Jonathon Green has been collecting slang words for 35 years and compiled them into *Green's Dictionary of Slang*, published in 2010. This month *Green's* went online with over 132,000 entries. Searches for a word and its etymology are free to all; paying subscribers have access to a broader range of citations and a usage timeline. One of Green's rules of slang is that a word is "always a bit older than you think it is." For example, the verb *to dis* was first mentioned in an Australian newspaper in 1905 — 75 years before its popularization in 1980s hip-hop. Why does he find slang so

interesting? Green said that when we use slang words — for sex, body parts, or insults — we're talking in our "most honest and most human way." ● *The Daily Mail* (U.K.) reported that Oxford University Press, publisher of the *Oxford English Dictionary*, refused to remove the term *Essex girl* despite a petition that garnered 3,000 signatures. Essex residents Natasha Sawkins and Juliet Thomas, who started the campaign to remove the term, objected to the "appalling stereotype" expressed in the *OED*'s definition, which reads: "Essex girl *n.* [after *Essex man n.*] *Brit. derogatory* a contemptuous term applied (usu. *joc.*) to a type of young woman, supposedly to be found in and around Essex, and variously characterized as unintelligent, promiscuous, and materialistic." An OUP spokesman explained: "Oxford Dictionaries set out to describe the language as it's used rather than specify how words should be used. . . . We can't make changes as a result of a petition as this would go against our descriptive editorial policy and undermine the evidence-based approach that our dictionaries are built on."

NOVEMBER

In *The New York Times*, Lynne Truss reviewed *The Word Detective: Searching for the Meaning of It All at the Oxford English Dictionary* by lexicographer John Simpson, who joined the dictionary in the mid-1970s and retired in 2013 after many years as editor in chief. Truss describes the book as a "charmingly full, frank and humorous account of a career dedicated to rigorous lexicographic rectitude." It may be worth the read just to find out the workplace stories behind "dictionary tea" and his run-in with a chocolate orange. ● What's in a name? After four years of researching meanings and origins, the four-volume *Oxford Dictionary of Family Names in Britain and Ireland* may have the answer — at least for 50,000 or so U.K. surnames. As reported by *The Guardian* (U.S. edition), about half the 20,000 most common names are locative (derived from places); a quarter are relationship names, such as Dawson ("Daw's son"); and a fifth are nicknames. Each entry includes the name's meaning, its frequencies in 1881 and 2011, its primary location in Britain and Ireland, its language or culture of origin, and, if available, the historical evidence for it. Peter McClure, the dictionary's chief etymologist, gives this example: "Edgoose (historically a south Lincolnshire surname) has nothing to do with geese but is a 16th-century pronunciation of the name Edecus, a rare pet form of Edith." ● Oxford Dictionaries announced its Word of the Year: *post-truth*. The lexicographical outfit cited a 2,000% increase in usage compared to 2015 "in the context of the EU referendum in the United Kingdom and the presidential election in the United States." Though Oxford

identifies the term's first use as being in a 1992 essay about the Iran-Contra scandal, *post-truth* had, in fact, appeared earlier — but always meaning "after the truth was known," rather than implying that truth has become irrelevant. Often the publisher's U.S. and U.K. branches will choose different terms, but this year the choice was the same on both sides of the pond. "It's not surprising that our choice reflects a year dominated by highly charged political and social discourse," said Oxford Dictionaries president Casper Grathwohl. "Given that usage of the term hasn't shown any signs of slowing down, I wouldn't be surprised if *post-truth* becomes one of the defining words of our time." Among the runners-up were *alt-right*, *Brexiteer*, and *coulrophobia* (the fear of clowns). • Comedian Stephen Colbert took issue with Oxford's Word of the Year choice, complaining that *post-truth* ("relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief") was "clearly a rip-off" of *truthiness* ("the belief in what you feel to be true rather than what the facts will support"), which he coined a decade ago on *The Colbert Report* — and which, incidentally, was Merriam-Webster's 2006 Word of the Year. Responding with a new coinage of his own, Colbert described his feelings about the alleged linguistic theft as "pre-enraged."

DECEMBER

The BBC looked back on a big year for the neologism *Brexit*: "the political word of 2016." Coined in 2012 to parallel *Grexit*, the possible split of Greece from the European Union, the term was often rendered *Brixit* at first before *-exit* became standard. The BBC quoted the linguist David Crystal on the rarity of a new suffix shared in different contexts (e.g., *Frexit* for *French exit*). "A previous example was *-gate* after Watergate," he said. Collins Dictionary editor Mary O'Neil said of the sudden spurt, "It was talked about a bit last year, but not nearly as much as it was in 2016." • Like Oxford's Word of the Year, Merriam-Webster's was a sign of the times: *surreal*. Citing search spikes after such events as the Brussels bombings in March, the July terrorist attack in Nice, and the summer's attempted coup in Turkey, the publisher explained: "'Surreal' is one of the most common lookups following a tragedy." It's perhaps a telling counterpoint to Oxford's Word of the Year, *post-truth*. Both choices seem to reflect the modern world's increasingly fraught conception of reality: Oxford's describes a world in which facts are increasingly irrelevant; Merriam-Webster's speaks to one in which the facts are almost too strange to be believed. And speaking of surreal, the Australian National Dictionary Centre's Word of the Year? *Democracy sausage*.

Gregory Jacob, Rakesh Kilaru,
Kristi Gallegos & Brian Quinn[†]

The Year in Law

2015-2016

November 2015

November 2: The Obama Administration announces that the Office of Personnel Management will be taking action to "ban the box" in federal employment — that is, delay inquiries into criminal history until later in the hiring process, so that applicants with prior criminal histories have a better chance of competing for federal employment.

November 3: A report indicates that over $15.8 million have been spent on Pennsylvania's seven-way Supreme Court election, making it the costliest state supreme court race in history.

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November 6: The Supreme Court grants review in *Zubik v. Burwell*, a challenge to the accommodation for nonprofit religious groups that object to the Affordable Care Act's contraceptive mandate (see May 16 entry).

November 9: By a 2-1 vote, the U.S. Court of Appeals for the Fifth Circuit upholds a district court's injunction halting President Obama's executive actions on immigration. • The University of Virginia's Phi Kappa Psi chapter files a defamation lawsuit against *Rolling Stone* magazine and its publisher over the magazine's retracted story regarding an alleged gang rape at one of the fraternity's parties.

November 10: New York State Attorney General Eric Schneiderman orders popular daily fantasy sports companies DraftKings and FanDuel to stop accepting bets from New York residents, claiming the games constitute illegal gambling.

November 13: The Supreme Court grants review in *Whole Woman's Health v. Hellerstedt*, a challenge to two provisions of a Texas law requiring physicians who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics to be equipped similarly to ambulatory surgical centers (see June 27 entry).

November 18: Judge Anne-Christine Massullo of San Francisco Superior Court rules that a divorced couple's embryos must be destroyed, per an agreement they signed during their marriage. The former wife had argued that she should be allowed to use the embryos, because she would otherwise no longer have the chance to bear biological children.

November 20: The Obama Administration files its petition for certiorari in *United States v. Texas*, seeking review of a decision enjoining President Obama's executive actions on immigration (see November 9, 2015 and June 23 entries). • United-Health Group announces that it is considering discontinuing its participation in the Affordable Care Act's exchanges in 2017.

November 30: Joseph Anthony Caputo, who wrapped himself in an American flag and then jumped over the White House fence on Thanksgiving, pleads not guilty to criminal charges and is released pending further proceedings.

DECEMBER 2015

December 3: Texas files suit against the Obama Administration, seeking to stop the resettlement of Syrian refugees in the state.

December 4: Prosecutors in Manhattan declare that they are planning to reprosecute several former leaders of Dewey & LeBoeuf LLP, a law firm that

dissolved into bankruptcy proceedings. The trial of those leaders, for grand larceny, had ended in a mistrial. • The U.S. Court of Appeals for the D.C. Circuit hears oral argument on the legality of the FCC's most recent "net neutrality" order (see June 14 entry).

December 7: The Supreme Court denies review in *Friedman v. City of Highland Park*, a case challenging an Illinois town's ordinance that bans the possession of assault weapons or large-capacity magazines. The Seventh Circuit had upheld the ordinance. Justices Antonin Scalia and Clarence Thomas dissent from the denial of review.

December 9: The Supreme Court hears oral argument in *Fisher v. University of Texas*, a challenge to the University of Texas at Austin's use of race in college admissions. This argument is the second in the case's history — the case was before the Court two Terms earlier, and culminated in a decision remanding the case to the Fifth Circuit for further proceedings (see June 23 entry).

December 14: The Army announces that it will try Sergeant Bowe Bergdahl on charges that he deserted his unit in Afghanistan and endangered the lives of soldiers who searched for him. Bergdahl was captured by the Taliban after he left his unit, and returned to the United States in a prisoner exchange in 2014. If convicted, Bergdahl could be sentenced to life in prison.

December 15: The U.S. Court of Appeals for the D.C. Circuit overturns a decision striking down a revised District of Columbia gun ordinance, ruling that the judge lacked authority to issue the decision. U.S. District Court Judge Frederick Scullin, Jr., of Syracuse, New York had been appointed to resolve a challenge to an earlier version of the law, and when the law was revised, the subsequent challenge was automatically assigned to him as well. The D.C. Circuit ruled that Scullin's assignment to decide a case outside his ordinary jurisdiction ended when the first case ended.

December 16: Baltimore Circuit Judge Barry Williams declares a mistrial in the prosecution of Baltimore Police Officer William G. Porter for his role in the death of Freddie Gray. Gray died after suffering serious injuries in the back of a police van, and Porter was the first of six officers to be tried in connection with Gray's death.

December 20: In an interview with CBS's "60 Minutes," Apple, Inc. CEO Tim Cook defends his company's policy of keeping some iPhone data encrypted, notwithstanding suggestions that such data could be used to combat terrorism.

December 21: The Pennsylvania Supreme Court upholds Governor Tom

Wolf's decision to impose a moratorium on the death penalty while awaiting a report on the way the penalty is administered in the state.

December 29: A grand jury in Cleveland, Ohio decides not to indict the police officer who shot and killed Tamir Rice, a 12-year-old boy who was carrying a toy gun. The incident was one of several in 2015 that generated nationwide scrutiny of interactions between law enforcement and African Americans.

December 31: Chief Justice John Roberts issues his year-end report on the federal judiciary, in which he discusses recent changes to the Federal Rules of Civil Procedure and urges "a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice."

JANUARY 2016

January 4: President Obama announces a series of executive actions designed to expand background checks for the purchase of firearms, increase enforcement of federal gun laws, enhance mental health reporting to the background check system, and explore new gun safety technology.

January 6: Alabama Chief Justice Roy Moore issues an order requiring state probate judges to enforce the state's same-sex marriage ban, citing "confusion" over the interaction between a March 2015 decision by his court upholding that ban, and a June 2015 decision by the Supreme Court holding that the U.S. Constitution guarantees marriage equality.

January 11: The U.S. Court of Appeals for the Fourth Circuit issues its decision in *Bauer v. Lynch*, reversing a ruling invalidating the FBI's gender-normed physical fitness standards. The lawsuit had been filed by a male applicant who completed 29 of the required 30 pushups for male trainees, and claimed it was unlawful for the FBI to require female trainees to complete only 14 pushups. The Fourth Circuit remands the lawsuit for further consideration by the district court. • The Supreme Court hears oral argument in *Friedrichs v. California Teachers Association*, a case seeking reversal of long-standing Supreme Court precedent allowing public sector unions to collect fees from all employees. Press coverage suggests that the Court is ready to overrule that precedent after repeatedly calling it into question in recent decisions (see March 29 entry).

January 14: Citizens United, the advocacy group involved in the Supreme Court's landmark *Citizens United v. FEC* decision, files a lawsuit seeking Chelsea Clinton's correspondence with State Department officials during her mother's tenure as Secretary of State.

January 15: The Supreme Court grants certiorari in *McDonnell v. United States*, a challenge to former Virginia Governor Bob McDonnell's public corruption convictions (see June 27 entry).

January 19: Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia rules that the Obama Administration must turn over to Congress documents about the "Fast and Furious" gun-tracking operation, despite the Administration's claims of executive privilege. Jackson also leaves open the possibility that some of the documents may be withheld for other reasons. • The Supreme Court grants review in *United States v. Texas*, a challenge to President Obama's executive actions on immigration. The Court also adds a question for the parties to address regarding whether the President's actions violate the Constitution's Take Care Clause (see November 20, 2015 and June 23 entries).

January 20: The Detroit, Michigan school district files a lawsuit to try to stop a massive "sick-out" by teachers protesting conditions in the city's public schools. The lawsuit is later dismissed.

January 25: The Supreme Court issues its decision in *Montgomery v. Louisiana*, holding that its 2012 decision in *Miller v. Alabama* is retroactive to cases on state collateral review. *Miller* held that juvenile homicide offenders cannot be sentenced to mandatory life without parole. • Trial begins in federal court in a challenge to North Carolina's voter ID law.

January 27: Ferguson, Missouri releases a proposed consent decree with the Justice Department that contains reforms to its police department and court systems in the hope of avoiding a federal lawsuit stemming from the Department's investigation of the city following the 2014 death of Michael Brown.

January 28: Governor Doug Ducey (R-AZ) issues a statement to the *Arizona Republic* supporting his state's removal from the Ninth Circuit Court of Appeals on the ground that it is "by far the most overturned and overburdened court in the country."

FEBRUARY 2016

February 3: Judge Steven O'Neill, a state court judge in Pennsylvania, rules that a former district attorney's promise not to prosecute Bill Cosby for sexual assault was not legally binding, thus allowing prosecutors to move forward with a case against him.

February 4: The U.S. Court of Appeals for the Fourth Circuit issues a decision in *Kolbe v. Hogan*, holding that the Second Amendment requires the

application of strict scrutiny in a challenge to Maryland's Firearm Safety Act. The court subsequently grants rehearing *en banc*.

February 9: The Supreme Court issues an order staying implementation of the Clean Power Plan — the EPA's carbon rule for power plants — pending the resolution of a legal challenge to the rule in the U.S. Court of Appeals for the D.C. Circuit. The Court's ruling is split 5-4, with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissenting.

February 10: The Department of Justice announces that it has filed a civil rights lawsuit against the city of Ferguson, Missouri, alleging that local law enforcement officials' conduct violates the First, Fourth, and Fourteenth Amendments as well as federal civil rights laws (see January 27 entry).

February 13: Justice Scalia passes away at age 79 while on a vacation at Cibolo Creek Ranch in Texas. Scalia had served on the Supreme Court for three decades after being appointed by President Reagan.

February 14: All current and retired Justices issue statements regarding the death of Justice Scalia (see preceding entry), describing him as a brilliant jurist and close friend.

February 19: The Supreme Court hosts a memorial service for Justice Scalia, during which his former clerks stand vigil over the Justice's casket. The casket is placed on the Lincoln Catafalque, the platform that held President Lincoln's coffin after his assassination. Thousands of mourners attend, including President Obama.

February 22: Judge Ann Nevins, a bankruptcy judge presiding over the bankruptcy proceedings for popular rapper 50 Cent, orders him to explain pictures posted on his Instagram account of him playing with stacks of money. 50 Cent later explains that the money was fake.

February 23: Senator Mitch McConnell (R-KY) announces that Republicans will not hold confirmation hearings for any nominee selected by President Obama to fill the vacancy on the Supreme Court (see February 13 entry).

February 24: President Obama authors a post on the popular Supreme Court blog, "SCOTUS-Blog" regarding the approach he will take in selecting a nominee to replace Justice Scalia on the Supreme Court. • The Utah Senate approves a resolution calling on Congress to repeal the Seventeenth Amendment to the Constitution and allow state senators to select U.S. senators.

February 29: A group of professors releases a law review article suggesting

that judicial law clerks tend to be "disproportionately liberal," particularly on lower courts. • Judge Tanya Walton Pratt of the U.S. District Court for the Southern District of Indiana issues a decision enjoining enforcement of an order from then-Indiana Governor Mike Pence barring state agencies from helping Syrian refugees resettle in Indiana. The court's opinion finds that the directive "clearly discriminates" against the refugees. • Justice Thomas asks a series of questions at oral argument in *Voisine v. United States*, breaking a decade-long silent streak at oral arguments.

MARCH 2016

March 2: The Supreme Court hears oral argument in *Whole Woman's Health v. Hellerstedt*, a challenge to two provisions of a Texas law requiring physicians who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics to be equipped similarly to ambulatory surgical centers (see November 13, 2015 and June 27 entries). Two days later, the Court stays enforcement of a similar Louisiana law pending its decision in the Texas case. • The Utah Senate narrowly votes to abolish the death penalty.

March 7: The Supreme Court denies a petition for certiorari filed by Apple, Inc. seeking review of a decision holding that the company violated antitrust laws in pricing e-books. • The Supreme Court issues a per curiam decision in *V.L. v. E.L.*, overturning an Alabama Supreme Court decision holding that the Constitution's Full Faith and Credit Clause does not require the Alabama courts to respect a Georgia same-sex adoption decree.

March 8: The Maryland Court of Appeals rejects Baltimore police officer William G. Porter's request not to testify against five fellow officers involved in the 2015 death of Freddie Gray.

March 10: Administrative proceedings begin in a dispute between the National Labor Relations Board and McDonald's over whether McDonald's is a "joint employer" with franchised restaurants and thus liable for labor law violations at the restaurants.

March 11: Judge Dan Pellegrini of the Pennsylvania Commonwealth Court dismisses a lawsuit claiming that Senator Ted Cruz (R-TX), one of the Republican nominees for President, is ineligible for office because he was born outside the United States.

March 16: President Obama nominates Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit to fill the Supreme Court vacancy created by the passing of Justice Scalia. The nomination is met with op-

position from Republicans, who had previously asserted that the vacancy should not be filled because it arose during an election year (see February 23 entry).

March 17: Chief Judge Richard Roberts retires from the U.S. District Court for the District of Columbia amid claims that he had an inappropriate relationship with a witness in his former career as a federal prosecutor.

March 21: The Supreme Court issues a per curiam opinion in *Caetano v. Massachusetts*, vacating a decision by the Supreme Judicial Court of Massachusetts upholding a law prohibiting the possession of stun guns. The Court rules that the state court did not correctly apply the framework for analyzing Second Amendment questions set forth in the landmark *District of Columbia v. Heller* decision. • The Supreme Court grants review in *Samsung Electronics Co. v. Apple*, a dispute over how damages should be assessed in Apple's lawsuit against Samsung for infringement of design patents for the iPhone. • Daily fantasy sports companies DraftKings and FanDuel comply with New York State Attorney General Schneiderman's order to stop taking bets in New York (see November 10 entry).

March 22: The Kansas State Senate passes a bill creating a list of impeachable offenses for Kansas justices and other elected individuals, which includes "attempting to usurp" legislative powers.

March 23: The Supreme Court hears oral argument in *Zubik v. Burwell*, a challenge to the accommodation for nonprofit religious groups that object to the Affordable Care Act's contraceptive mandate. Press coverage suggests that the Justices are divided on how to resolve the case (see May 16 entry).

March 24: A survey of recent law school graduates published by Access Group and Gallup reveals that only 38 percent of graduates reported having a good job upon graduation, and that only one out of every five recent graduates agreed that law school was worth the cost.

March 28: The ACLU of North Carolina and Equality North Carolina file a lawsuit in federal court challenging North Carolina HB-2, a bill requiring transgender people to use the public bathroom corresponding to their sex assigned at birth.

March 29: Sheldon Silver, the former speaker of the New York State Assembly, is disbarred following his conviction on federal public corruption charges. • The Supreme Court issues a per curiam opinion in *Friedrichs v. California Teachers Association*, affirming (by an equally divided Court) the decision below. The case had presented a major challenge to public sector union financing, and the 4-4 result leaves in place longstanding Supreme

Court precedent allowing such unions to collect fees from all employees (see January 11 and March 29 entries). • The Supreme Court asks the parties in *Zubik v. Burwell* to file supplemental briefs regarding potential alternatives to the Affordable Care Act's contraceptive accommodation process (see March 23 and May 16 entries).

March 31: George Mason University announces that it will be renaming its law school the "Antonin Scalia School of Law," in honor of recently deceased Justice Scalia. • Business groups file a lawsuit seeking to enjoin the Department of Labor's "Persuader Rule," which would require employers to file reports disclosing interactions with consultants who help the employer manage its message in response to union organizing campaigns.

APRIL 2016

April 1: For the first time in hundreds of years, Congress exercises its power under the Constitution to "grant Letters of Marque and Reprisal" to announce that all candidates in the 2016 Presidential Election can attack and capture each other on Twitter.[*]

April 4: The Supreme Court issues its unanimous decision in *Evenwel v. Abbott*, holding that states can apportion legislative seats by equalizing the total population of voters in each district. The plaintiffs in the case had alleged that the "one person, one vote" doctrine precluded using that metric, because it counts individuals who cannot vote.

April 5: Republican Senator Susan Collins (R-ME) urges her colleagues to meet Merrick Garland, and the Senate Judiciary Committee to grant him a hearing, after he visits her office (see March 16 entry). • George Mason University announces that it will be renaming its law school the "Antonin Scalia Law School," after posts on the internet suggest that the previously-proposed name ("the Antonin Scalia School of Law") will create an unfortunate acronym (see March 31 entry).

April 12: Merrick Garland has breakfast with Senate Judiciary Committee Chairman Charles Grassley (R-IA) (see previous entry).

April 13: The U.S. Court of Appeals for the Sixth Circuit holds that the government does not need a warrant to access "cell-site location information," or records of when cell phones check in with the nearest cell towers.

April 14: A three-judge panel of the California Court of Appeals reverses

[*] April Fools.

and remands L.A. County Superior Court Judge Rolf M. Treu's decision in *Vergara v. California*, in which he held that five sections of the California Education Code establishing a teacher tenure system violated the California Constitution's equal protection provisions.

April 18: The Supreme Court hears oral argument in *United States v. Texas*, a challenge to President Obama's executive actions on immigration. Most coverage of the argument suggests the Justices are evenly divided over how to resolve the case (see January 19 and June 23 entries).

April 19: Chief Justice Roberts welcomes 12 deaf or hard-of-hearing lawyers to the Supreme Court bar by using American Sign Language from the bench, marking the first time he has used a language other than English in an admissions ceremony. Roberts reportedly learned to sign the phrase "Your motion is now granted" prior to the ceremony. • Judge Barbara Bellis of the Connecticut Superior Court sets an April 2018 trial date in a lawsuit filed by families of victims of the 2012 Newtown school massacre against the manufacturer of the gun used by the perpetrator.

April 22: A lawsuit filed by advocacy organizations alleges that fees on the "PACER" system are illegally high. The system allows the public to access federal court documents over the internet.

April 25: City of Cleveland officials agree to pay $6 million to settle a civil rights and wrongful death lawsuit based on the 2014 death of Tamir Rice, a boy who was shot by police while carrying a toy gun (see December 29 entry). • The U.S. Court of Appeals for the Second Circuit reinstates New England Patriots quarterback Tom Brady's four-game suspension based on the "Deflategate" controversy. NFL Commissioner Roger Goodell suspended Brady based on his alleged role in a scheme to deflate footballs before the 2015 AFC Championship Game against the Indianapolis Colts. A district judge had previously overturned Brady's suspension. • In a 485-page opinion, Judge Thomas D. Schroeder of the U.S. District Court for the Middle District of North Carolina upholds North Carolina's strict voter ID law in *League of Women Voters v. North Carolina*, finding that North Carolina's law did not depart from "the mainstream of other states."

April 27: The Supreme Court hears oral argument in *McDonnell v. United States*, a challenge to former Virginia Governor Bob McDonnell's public corruption convictions. Based on the questioning from the Justices, press coverage universally suggests that the government will lose and McDonnell's conviction will be overturned (see June 27 entry).

April 28: A blog post on "Empirical SCOTUS" deems the *Harvard Law*

Review the most-cited law review in Supreme Court opinions issued since the April 2013 Term. Yale, Columbia, Chicago, and NYU round out the top five.

MAY 2016

May 3: U.S. District Court Judge Mark Goldsmith recuses himself in the Flint, Michigan water lawsuit because he drank Flint-River-sourced water during a four-month stint at the Flint Federal Courthouse in 2014.

May 4: A government transparency group obtains and releases testimony from a 2012 closed hearing of the Senate Intelligence Committee, indicating the Obama Administration had been making increased use of criminal laws to sanction government officials who are suspected of leaking classified information.

May 5: Arsenio Hall sues Sinéad O'Connor for libel based on a Facebook post in which O'Connor accuses him of supplying Prince with drugs "over the decades" and of drugging her years earlier at Eddie Murphy's house. In the post, O'Connor also claims she reported Hall to the Carver County Sheriff's Office, which is the agency investigating Prince's April 2016 death from an overdose. Hall seeks $5 million in damages.

May 6: Facebook loses its motion to dismiss a class action lawsuit based on allegations that its facial recognition technology violates an Illinois law that restricts the collection of certain biometric data from people without their consent. U.S. District Court Judge James Donato rejects Facebook's position that California law, which does not include such a restriction on the collection of biometric data, should apply, stating that doing so would completely negate Illinois' "biometric privacy protections."

May 10: The U.S. Department of Justice files suit to enjoin enforcement of North Carolina's transgender bathroom access law. • The FBI finds evidence that at least one Bangladesh Bank employee likely assisted computer hackers who stole $81 million from the bank's account at the Federal Reserve Bank of New York. The hackers allegedly logged the keystrokes of key bank employees to get the necessary passwords to authorize the transfers. The Federal Reserve Bank of New York blocked all but five of the 35 transfer orders sent by the hackers, who attempted to steal nearly $1 billion in the heist.

May 11: A federal judge blocks a proposed merger between Staples, Inc. and Office Depot, Inc., finding there "is a reasonable probability the proposed merger will substantially impair competition."

May 16: The Supreme Court issues a per curiam decision in *Zubik v. Bur-*

well, remanding the cases to the lower courts in light of the supplemental briefs filed by the parties regarding potential alternatives to the existing contraceptive accommodation (see March 29 entry). The Court instructs the lower courts to give the parties "an opportunity to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage" (quotations omitted).

May 17: Robert Shapiro breaks his 20-year silence and speaks with Megyn Kelly of Fox News about the 1995 O.J. Simpson double-murder trial. Shapiro states he knew the infamous glove would not fit Simpson because Shapiro had tried it on previously and that Simpson still owes him money from the trial. Shapiro claims that immediately following the verdict, Simpson whispered to him, "You had told me this would be the result from the beginning. You were right."

May 18: Republican presidential candidate Donald Trump releases a list of 11 potential candidates to fill Justice Scalia's Supreme Court seat.

May 19: A former Skadden Arps lawyer receives a five-year sentence for stealing $5 million in a Ponzi Scheme. • A Colorado jury finds Cinemark is not liable in connection with the mass shooting at their Aurora, Colorado theater in 2012. The personal injury and wrongful death suit was brought by victims and their families in state court. A similar suit involving different victims is pending in federal court (see June 27 entry).

May 20: Judge Andrew S. Hanen of the U.S. District Court for the Southern District of Texas orders Washington, D.C. Justice Department attorneys to attend an annual ethics course after the Department files a court-ordered brief detailing why its attorneys inaccurately told the court that no deportation deferrals had been processed after Hanen entered an injunction enjoining their use, when in fact the government processed more than 100,000 of them. • Citing personal safety concerns, Dallas County District Court Judge Eric V. Moye voluntarily recuses himself after the defendant in a lawsuit over which he was presiding was connected to the death of opposing counsel in a "suspicious" house fire.

May 23: Tony Gwynn's family files a wrongful death suit against the tobacco industry claiming that the Hall of Fame baseball player was manipulated into using the smokeless tobacco that eventually killed him. Gwynn died in 2014 from salivary gland cancer.

May 24: A Pennsylvania judge finds there is enough evidence to support

criminal prosecution against Bill Cosby for felony indecent assault stemming from a 2004 incident in which it is alleged that Cosby drugged a woman's drink and touched her. Approximately 50 other women have accused Cosby of similar conduct though most claims are barred by the statute of limitations.

May 27: The Connecticut Supreme Court rules that the state's 2012 abolition of the death penalty also applies to inmates who were on death row when the ban was passed.

May 31: The *en banc* U.S. Court of Appeals for the Fourth Circuit rules that law enforcement may request location data found in cell phone records without a warrant because there is no reasonable expectation of privacy in information voluntarily provided to a third party.

JUNE 2016

June 1: Republican presidential candidate Donald Trump's campaign settles a lawsuit with two photographers who claim the campaign used their photo of a bald eagle without permission. • A newly discovered species of praying mantis from Madagascar is named *Ilomantis ginsburgae* in honor of Justice Ginsburg.

June 6: Cravath, Swaine & Moore LLP increases associate salaries for the first time since 2007, leading other firms to follow suit. First-year-associate salaries increased by 12.5% to $180,000. • The Georgia Supreme Court rules that the owner of a tortiously injured dog cannot recover damages for the intrinsic value of the animal, which is "beyond legal measure."

June 9: The U.S. Court of Appeals for the Ninth Circuit rules that there is no Second Amendment right to carry concealed firearms in public. • The California End of Life Option Act takes effect, making California the fifth state to legalize physician-assisted suicide.

June 10: Gawker Media files for Chapter 11 bankruptcy protection following a ruling awarding Hulk Hogan $140 million in damages after the site posted a video in which he was having sex with his former best friend's wife. Peter Thiel, a co-founder of PayPal, secretly contributed $10 million to fund Hogan's suit against Gawker, sparking debate about whether such third-party funding of lawsuits could result in wealthy individuals suppressing the media's First Amendment rights.

June 11: *Law360* reports that some BigLaw partners are billing $2,000 per hour for high-stakes legal matters.

June 12: An American-born man claiming allegiance to ISIS opens fire inside an Orlando nightclub, killing 49 and injuring 53 before he is shot and killed by police. This is the deadliest mass shooting in U.S. history.

June 13: The Supreme Court issues its 5-2 decision in *Puerto Rico v. Franklin California Tax-Free Trust*, holding in an opinion written by Justice Thomas that Puerto Rico was preempted from enacting its own bankruptcy scheme to restructure the debt of its public utilities. Justice Sotomayor dissents, joined by Justice Ginsburg. Justice Samuel Alito takes no part in the decision.

June 14: The U.S. Court of Appeals for the D.C. Circuit rules that internet service providers ("ISPs") are subject to federal regulations just like other common carriers of utilities. The decision also keeps in place the FCC's 2015 Open Internet Order, which promulgated rules preventing ISPs from blocking or slowing down access to lawful content, and, conversely, from offering priority access to content for a premium.

June 18: *Law360* reports that 80% of AmLaw 200 firms have both equity and nonequity partners. Some equity partners report being "de-equitized," meaning they are removed from the equity track and relegated to a nonequity position.

June 20: The Supreme Court issues its decision in *Utah v. Strieff*, holding, by a 5-3 vote, that the Fourth Amendment's exclusionary rule does not require the suppression of evidence seized during an unconstitutional investigatory stop if, during the stop, the officer learns that the suspect is subject to a valid arrest warrant and seizes the evidence during a search incident to that arrest. Justice Thomas issues the opinion for the Court, which is joined by the Chief Justice and Justices Anthony Kennedy, Breyer, and Alito. Justice Sotomayor issues an impassioned dissent, citing social science research and criticizing the police practices at issue in the suit. • The Senate votes to reject four gun-control bills one week after the nightclub shooting in Orlando, Florida (see June 12 entry). The proposals were aimed, in part, at restricting gun sales to suspected terrorists.

June 22: NFL player Johnny Manziel's attorney mistakenly sends a text to the Associated Press indicating concerns that his client would not pass a urine test. The attorney later withdraws as counsel.

June 23: The Supreme Court issues its decision in *Fisher v. University of Texas at Austin*, holding that the university's limited use of race in college admissions decisions does not violate the Equal Protection Clause. Justice Kennedy authors the opinion of the Court, which is joined by only three

other Justices (Ginsburg, Breyer, and Sotomayor). The opinion states that "[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission." The Chief Justice and Justices Thomas and Alito dissent. Justice Kagan is recused (see December 9 entry). • The Supreme Court deadlocks 4-4 in *United States v. Texas*, issuing a one-sentence per curiam opinion. This preserves the U.S. Court of Appeals for the Fifth Circuit's decision concluding that President Obama likely exceeded his powers in issuing two executive actions — "Deferred Action for Childhood Arrivals" or "DACA" and the expansion of "Deferred Action for Parents of Americans and Lawful Permanent Residents," or "DAPA" — which shielded approximately 5 million undocumented immigrants from deportation (see April 18 entry).

June 24: A jury in California finds that Led Zeppelin, in its hit *Stairway to Heaven*, did not copy a guitar riff from the group Spirit's song, *Taurus*.

June 27: The Supreme Court, split 5-3, issues its decision in *Whole Woman's Health v. Hellerstedt*, a challenge to two provisions of a Texas law requiring physicians who perform abortions to have admitting privileges at a nearby hospital and requiring abortion clinics to be equipped similarly to ambulatory surgical centers. In his opinion for the Court, Justice Breyer states that both provisions place "a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution" (see March 2, 2016 entry). • In *McDonnell v. United States*, a unanimous Supreme Court invalidates McDonnell's public corruption convictions, ruling that the prosecution rested on an overly broad definition of "official act" in the public corruption statutes, and remands the case for further proceedings (see April 27 entry). The government later announces that it will not seek re-prosecution. • A federal judge dismisses a negligence suit filed against Cinemark in connection with the 2012 shooting at its Aurora, Colorado theater (see May 19 entry).

June 28: After holding a rehearing petition in *Friedrichs v. California Teachers Association* for several months, the Supreme Court denies it. The Court had previously deadlocked 4-4 in the case about public sector unions (see March 29 entry).

June 30: Adnan Syed, who was featured in season 1 of the *Serial* podcast, has his conviction vacated and is ordered to receive a new trial. Syed is serving a life sentence after being convicted of killing his ex-girlfriend, Hae Min Lee.

July 2016

July 1: Following a private meeting with former President Bill Clinton, U.S. Attorney General Loretta Lynch states she will accept the recommendations of the FBI and the Justice Department regarding whether to charge Hillary Clinton in connection with her handling of e-mails while serving as Secretary of State. Lynch claims the two did not discuss the e-mail investigation during the impromptu meeting on an airport tarmac in Phoenix, but expresses concern that the meeting could "cast a shadow" over the Department's reputation and cause the public to question its impartiality. Lynch does not formally recuse herself in the matter.

July 4: Former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit Abner J. Mikva dies following a battle with cancer.

July 5: The U.S. Court of Appeals for the Federal Circuit rules that the commercial marketing provision of the U.S. biosimilar statute is mandatory. The statute requires biosimilar makers to notify brand-name rivals 180 days before launching new products. Although intended to streamline patent litigation, it may also delay lower-cost biologics from entering the marketplace for an additional six months. • Alton Sterling, an African American man, is fatally shot by two white police officers in Baton Rouge, Louisiana. A video of the incident shows that Sterling is pinned to the ground by officers when at least one officer shoots him. Officers claim Sterling was reaching for a weapon when he was shot, but it is unclear whether he was armed (see July 8 entry).

July 6: Former *Fox and Friends* host Gretchen Carlson files suit in the Superior Court of New Jersey against Fox News CEO Roger Ailes, alleging wrongful termination and sexual harassment. • Attorney General Lynch announces her decision not to charge Hillary Clinton in connection with her handling of classified information while serving as Secretary of State, accepting the recommendation made the day before by FBI Director James Comey.

July 7: Philando Castile is shot and killed by police in St. Paul, Minnesota in the second fatal encounter between police and an African American man this week. Castile's girlfriend, Lavish Reynolds, who was in the car during the traffic stop, records the encounter with police and posts the video on Facebook. In the video, Reynolds states that Castile let the officer know he was licensed to carry and was carrying a firearm, and that Castile was reaching for his license as the officer requested when he was fatally shot (see July 8 entry).

July 8: Two snipers open fire at a Dallas police brutality protest, killing 5 officers and injuring 6 others. The protest follows the police shootings of Alton Sterling and Philando Castile (see July 5 and July 7 entries).

July 11: The U.S. Court of Appeals for the Ninth Circuit rules that an $11.25 million fraud suit by investors against Venable LLP and former Venable partner David Meyer can move forward. The suit alleges that Meyer made false claims that he represented an investor affiliated with billionaire Carlos Slim, when he actually represented a conman falsely claiming to have access to pre-IPO Facebook shares. • Justice Ginsburg publicly criticizes presidential candidate Donald Trump, calling him a "faker" and stating "I can't imagine what the country would be with Donald Trump as our president." She later apologizes, saying her remarks about Trump were "ill-advised" and that she regrets making them. She adds, "In the future I will be more circumspect."

July 13: The U.S. Court of Appeals for the Second Circuit denies a request for rehearing filed by the NFL Players Association and New England Patriots quarterback Tom Brady in connection with Brady's four-game "Deflategate" suspension (see April 25 entry).

July 15: The U.S. Court of Appeals for the Second Circuit holds that a class may be decertified after a jury verdict but before judgment.

July 16: *Law360* reports that Artificial Intelligence has entered the legal profession as virtual legal assistant "Ross" is licensed by BigLaw firms. Ross uses natural language processing to understand questions from lawyers and returns relevant court cases and legislation in seconds. Ross has already learned bankruptcy law and its creators plan to branch out into other practice areas.

July 18: Ohio Governor John Kasich's office states that he is unable to suspend Ohio's open carry law at the Republican National Convention as "Ohio governors do not have the power to arbitrarily suspend federal and state constitutional rights."

July 19: A Maryland judge acquits Lieutenant Brian Rice of all charges stemming from the 2015 death of Freddie Gray while he was in police custody. This is the fourth defeat for prosecutors in as many attempts to secure convictions against the officers charged.

July 21: The NBA cancels plans to hold the 2017 All-Star Game in North Carolina after passage of state legislation that removes discrimination protections for LGBT persons.

July 20: Merrick Garland sets the record for Supreme Court nominees awaiting a Senate decision on confirmation, breaking Louis Brandeis's 1916 record of 125 days.

July 22: The Virginia Supreme Court grants a writ of mandamus compelling the Virginia Commissioner of Elections to disregard executive orders issued by Governor Terry McAuliffe on April 22, May 31, and June 24, which purport to restore the right of all convicted felons in Virginia to vote, hold public office, and serve on juries, instructing instead that the Commissioner remove felons from the voter rolls. The court holds that because Virginia's Constitution requires the Governor to communicate the "particulars of every case" for a pardon to be valid, the blanket group pardon amounted to a de facto illegal failure to enforce the law.

July 26: A U.S. District Court Judge preliminarily approves a $15 billion settlement in the class action suit against Volkswagen for rigging diesel emissions tests (see October 25 entry).

July 29: The U.S. Court of Appeals for the Third Circuit holds that Senator Bob Menendez (D-NJ) must face criminal charges stemming from allegations that he accepted and failed to disclose receipt of gifts worth close to $1 million in exchange for unlawful assistance with legal matters in which the donor was involved. Menendez claims that his actions are protected under the Speech or Debate Clause because they are genuine expressions of legislative interest, not favors for the donor as alleged. • The U.S. Court of Appeals for the Fourth Circuit strikes down North Carolina's voter ID law.

AUGUST 2016

August 1: The U.S. Attorney's Office for the Southern District of New York and the Department of Justice in Washington, D.C. investigate whether Mossack Fonseca, the law firm implicated in the "Panama Papers" scandal, helped its clients to launder money or avoid paying taxes. • Randolph County, Illinois Judge Richard Brown sentences convicted murderer Drew Peterson to another 40 years in prison for his efforts to arrange the murder of Will County, Illinois State's Attorney James Glasgow. • An *en banc* panel of the U.S. Court of Appeals for the Third Circuit holds that the federal government is the lawful owner of several rare gold coins stolen from the U.S. Mint in the 1930s, ending a lengthy legal battle with the children of a jeweler who discovered the coins. • Pennsylvania Attorney General Kathleen G. Kane's lawyers file a "King's Bench" motion with the Pennsylvania Supreme Court seeking dismissal of perjury and other associated criminal charges (see August 15 and October 24 entries). • A trial involving Pricewaterhouse-

Coopers LLP and the bankruptcy trustee for Taylor Bean & Whitaker Mortgage Group begins in Florida state court, with Taylor seeking $5.5 billion in damages allegedly resulting from PwC's failure to detect a mortgage fraud scheme.

August 2: The U.S. Court of Appeals for the Second Circuit upholds a $400 million arbitration award confirmed by a lower court in a dispute between Pemex, Mexico's national oil company, and KBR, Inc., a U.S.-based engineering and construction company. • Maryland's Attorney General appeals Judge Martin P. Welch's decision (see June 30 entry) to grant Adnan Syed a new trial based on newly introduced evidence regarding the location of Syed's cellphone. • The U.S. Court of Appeals for the D.C. Circuit holds in *Pursuing America's Greatness v. FEC* that the Federal Election Commission could not prevent super PACs from using the names of candidates in pitch e-mails and web addresses. • The Delaware Supreme Court holds that the state's death penalty law is unconstitutional in *Rauf v. State of Delaware*. • North Carolina Attorney General Roy Cooper says that he agrees with a lower court's decision and will not defend the state's voter ID law at the appellate level, leaving outside counsel for Governor Pat McCrory and state legislative leaders to defend the law.

August 4: The Supreme Court stays a decision from the U.S. Court of Appeals for the Fourth Circuit invalidating a Virginia school board policy requiring students to use bathrooms that correspond to their "biological genders." Justice Breyer provides the fifth vote "as a courtesy" to preserve the status quo until the court decides whether to grant certiorari. • The U.S. Court of Appeals for the Eighth Circuit upholds a trial court decision affirming an arbitrator's decision in *National Football League Players' Association v. National Football League* confirming the NFL's discretion to fine Vikings running back Adrian Peterson in relation to a child abuse case.

August 5: An *en banc* panel of the U.S. Court of Appeals for the Fifth Circuit holds in *United States v. Gonzalez-Longoria* that the "crime of violence" definition incorporated by reference into the U.S. Sentencing Guidelines passes scrutiny under constitutional vagueness principles. • In *True the Vote, Inc. v. IRS*, the U.S. Court of Appeals for the D.C. Circuit reverses a lower court's dismissal of a lawsuit accusing the IRS of discriminating against conservative advocacy groups seeking tax-exempt status.

August 8: The U.S. Court of Appeals for the Second Circuit holds in *Chevron v. Donziger* that Steven Donziger, a U.S. attorney representing indigenous villagers from Ecuador, committed fraud and cannot enforce an $8.65 billion environmental judgment.

August 9: The U.S. Court of Appeals for the Third Circuit invalidates a New Jersey law aimed at expanding sports betting beyond Las Vegas to casinos and racetracks in New Jersey, handing four sports leagues including the NFL and the NCAA a victory and disappointing New Jersey Governor Chris Christie, who anticipated that expanded sports gambling would jumpstart the state's gambling industry. • The American Bar Association approves new rules classifying harassment or discrimination in the practice of law as professional misconduct subject to sanction.

August 10: In *Frank v. Walker*, the U.S. Court of Appeals for the Seventh Circuit stays a district court order requiring Wisconsin election officials to accept an affidavit from a voter that he or she had a reasonable impediment to obtaining one of the required IDs in lieu of the one of the required IDs. • In *State of Tennessee v. FCC*, the U.S. Court of Appeals for the Sixth Circuit holds that the FCC cannot block states from limiting the expansion of municipal broadband internet networks.

August 11: In *Laffitte v. Robert Half International*, the California Supreme Court approves percentage-based fee awards as a reasonable means of compensating attorneys who bring class action litigation, aligning California state courts with the prevailing practice in every federal circuit.

August 15: In *Constand v. Cosby*, the U.S. Court of Appeals for the Third Circuit declines to reseal documents unsealed by a district court. The documents revealed several damaging admissions that Bill Cosby made in a 2005 deposition when asked about his sexual behavior. • The U.S. Court of Appeals for the Ninth Circuit holds in *Democratic Party of Hawaii v. Nago* that Hawaii's open primary voting system is constitutional and does not violate the First Amendment associational rights of the Democratic Party. • North Carolina asks the Supreme Court to stay the decision of the U.S. Court of Appeals for the Fourth Circuit invalidating the state's voter ID law and allow the law to remain in effect during the upcoming presidential election. • A jury convicts Pennsylvania Attorney General Kane of charges including perjury and criminal conspiracy in relation to leaked grand jury testimony (see August 1 and October 24 entries).

August 16: A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit holds in ten consolidated interlocutory appeals and writs of mandamus that the federal government cannot spend money prosecuting individuals who grow and distribute marijuana in states where that activity is legal. • A unanimous three-judge panel of the U.S. Court of Appeals for the Third Circuit affirms the denial of class certification for a putative class of law students in *Harnish v. Widener University School of Law*. The students claimed

that they were defrauded by their law school via misleading statistics about employment.

August 18: The U.S. Court of Appeals for the Fifth Circuit issues a per curiam ruling in *Whole Woman's Health v. Hellerstedt*, invalidating key provisions of a 2013 Texas law addressing abortion, following the Supreme Court's earlier decision and remand order in the same case (see June 27 entry).

August 22: The California Supreme Court declines to take up a challenge to teacher tenure laws in *Vergara v. California*, preserving a lower court decision (see June 10, 2014 entry) maintaining traditional job protections for teachers. • In a unanimous opinion in *In re Reglan Litigation*, the New Jersey Supreme Court holds that federal law does not preempt state law claims regarding the adequacy of the warnings contained on the label of the prescription drug metoclopramide.

August 23: A divided three-judge panel of the U.S. Court of Appeals for the Sixth Circuit reverses a lower court opinion in *Ohio Democratic Party v. Husted*, reinstituting a "Golden Week" in Ohio, in which prospective voters can register to vote and vote on the same day. • A divided three-judge panel of the U.S. Court of Appeals for the Third Circuit affirms a district court holding invalidating Philadelphia's ban on "non-commercial" advertisements at the Philadelphia International Airport.

August 24: A unanimous panel of the U.S. Court of Appeals for the Ninth Circuit overturns a jury verdict in *Estate of Manuel Diaz v. City of Anaheim*, clearing Anaheim police of responsibility in the shooting of an unarmed man and ordering the retrial of a civil rights claim. • Pharrell Williams, Robin Thicke, and rapper T.I. appeal to the U.S. Court of Appeals for the Ninth Circuit, seeking reversal of a California district court's holding that their smash hit "Blurred Lines" infringed Marvin Gaye's copyright in the song "Got To Give It Up."

August 26: The U.S. Court of Appeals for the Ninth Circuit reverses a Washington district court's dismissal of Trader Joe's trademark infringement suit against "Pirate Joe's," a Canada-based grocery store that resold Trader Joe's products.

August 29: The U.S. Court of Appeals for the Ninth Circuit reverses a district court's denial of AT&T's motion to dismiss in *FTC v. AT&T Mobility LLC*, in which the FTC accused AT&T of throttling data speeds of customers who purchase an unlimited data plan.

August 31: The U.S. Court of Appeals for the Second Circuit vacates a

$655.5 million verdict against the Palestine Liberation Organization and the Palestinian Authority arising out of American families' damages from suicide bombings and terrorist machine gun attacks, finding that U.S. federal courts do not have jurisdiction over the case. • The Supreme Court splits 4-4 with regard to North Carolina's application to recall and stay a decision of the U.S. Court of Appeals for the Fourth Circuit striking down portions of its voter ID law, leaving the earlier decision in place in advance of the presidential election.

SEPTEMBER 2016

September 1: Republican lawmakers ask the Virginia Supreme Court to hold Governor McAullife in contempt for failing to adhere to that Court's earlier ruling invalidating McAullife's attempt to restore voting rights to ex-felons as unconstitutional (see July 22 entry).

September 2: The U.S. Court of Appeals for the Ninth Circuit holds in *Public Integrity Alliance v. City of Tucson* that Tucson's hybrid election process complies with the Equal Protection Clause's "one person, one vote" principle and imposes no "significant burden on the right to vote." • After losing at the U.S. Court of Appeals for the Seventh Circuit, Epic Systems, a Wisconsin-based medical software company, asks the Supreme Court to grant certiorari to resolve a circuit split as to whether mandatory arbitration agreements in employment contracts are enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act. • The California State Bar seeks temporary authority from the California Supreme Court to collect dues from its members to address emergency fiscal needs.

September 3: In *In re Missouri Department of Corrections*, a three-judge panel of the U.S. Court of Appeals for the Eighth Circuit issues a per curiam opinion ordering the State of Missouri to reveal the source of the lethal injection drug it intends to administer to an inmate to carry out a death sentence.

September 6: The Georgia Bar Board announces that it mistakenly informed 90 prospective lawyers who took the July 2015 or February 2016 bar exam that they had failed, when they had in fact achieved passing scores. • A Pennsylvania judge sets a June 2017 date for Bill Cosby's sexual assault trial. Cosby remains free after posting bail in the amount of $1 million. • 21st Century Fox announces that it has settled a lawsuit brought by former anchor Gretchen Carlson for an expected $20 million. Carlson accused former Fox News Chairman and CEO Roger Ailes of sexual harassment (see July 6 entry).

September 7: In *Mohamed v. Uber Technologies*, the U.S. Court of Appeals for the Ninth Circuit reverses and remands a trial court determination that Uber's mandatory employee arbitration agreement was substantively unconscionable, holding that Uber's arbitration terms are valid and enforceable under a California state law unconscionability standard.

September 8: EY (formerly Ernst & Young) follows Epic Systems's lead (see September 2 entry) and asks the Supreme Court to resolve a circuit split over the legality of mandatory arbitration terms in employment contracts under the collective bargaining provisions of the National Labor Relations Act and the Federal Arbitration Act.

September 9: The Justice Department announces that it will drop charges against former Virginia Governor McDonnell and his wife Maureen McDonnell after the Supreme Court held that the conduct in question did not amount to an "official act" in exchange for a bribe (see January 15, April 27, and June 27 entries). • In *League of Women Voters v. Newby*, the U.S. Court of Appeals for the D.C. Circuit blocks a new proof-of-citizenship certification requirement from appearing on federal mail-in voter registration forms. • The Supreme Court denies an application for a stay in *Johnson v. A. Philip Randolph Institute*, thereby allowing Michigan voters to "straight-vote" a party's entire slate of candidates with one ballot notation.

September 12: Paul Clement, Viet Dinh, and a team of appellate lawyers from Bancroft PLLC join the Washington, D.C. office of Kirkland & Ellis LLP. • Arguments begin in U.S. District Court in Portland, Oregon before Judge Anna J. Brown in the trial of Ammon Bundy and seven other occupiers of the Malheur National Wildlife Refuge. • A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit affirms District Court Judge Richard A. Jones's dismissal of a plaintiff's claim that Yelp!, Inc. was liable for a "one-star" review posted on the plaintiff's business's Yelp page in *Kimzey v. Yelp!*.

September 13: A review undertaken by the Justice Department's research arm reveals that prison populations in at least five states — Arkansas, Hawaii, Kentucky, New Hampshire, and Ohio — have rebounded after declining during the period from 2007 to 2014, likely due to an opiate epidemic and a series of high-profile examples of recidivism. • Eleven years after Eliot Spitzer filed financial fraud charges against former AIG CEO Maurice R. "Hank" Greenberg, trial begins before Judge Charles Ramos in New York Supreme Court in Manhattan. • The U.S. Court of Appeals for the Third Circuit rejects Senator Menendez's request for an *en banc* hearing to evaluate his claims that the Speech or Debate Clause of the Constitution shields him

from legal liability for conduct relating to legislative activities (see July 29 entry). • New York Governor Andrew Cuomo and New York's principal banking regulator propose first-in-the-nation rules that would require banks to adopt cybersecurity protection programs.

September 14: Federal prosecutors in the Southern District of New York and the Northern District of California investigate sales practices at Wells Fargo & Co. that gave rise to a $185 million fine by the Consumer Financial Protection Bureau. Wells Fargo employees secretly opened and funded more than two million new accounts for existing customers in an effort to generate fees, reach sales targets, and capture compensation incentives. • The American Beverage Association and other beverage industry groups ask the Philadelphia County Court of Common Pleas and the Pennsylvania Supreme Court to enjoin Philadelphia's soda tax, claiming that the tax is illegal under Pennsylvania state law. • Missouri lawmakers override Governor Jay Nixon's veto of a bill requiring voters to show government-issued photo identification, effective in 2017. On election day 2016, Missouri voters will pass a constitutional amendment by a 63-37 margin, overturning a decade-old Missouri Supreme Court decision prohibiting voter ID requirements, thus allowing the law to take effect.

September 15: In *Tyler v. Hillsdale*, an *en banc* panel of the U.S. Court of Appeals for the Sixth Circuit holds that individuals who are involuntarily committed to mental institutions cannot be permanently deprived of the right to own a firearm. • The former dean of the University of California, Berkeley Law School, Sujit Choudhry, files a federal discrimination lawsuit against the Regents of the University of California and UC President Janet Napolitano, alleging that administrators treated him differently during their investigation of sexual misconduct allegations because of his race.

September 16: A Swedish court of appeals holds that a Swedish prosecutor's request to detain WikiLeaks front-man Julian Assange should remain in force.

September 19: In *Lund v. Rowan County*, a divided three-judge panel of the U.S. Court of Appeals for the Fourth Circuit reverses and remands a district court determination that an invocation delivered at the beginning of public Rowan County Board meetings violates the Establishment Clause of the First Amendment, citing the Supreme Court's decision in *Town of Greece v. Galloway*. • The trial of Bridget Anne Kelly and Bill Baroni, formerly close advisors to New Jersey Governor Christie who were implicated in the "Bridgegate" scandal, begins in Newark, New Jersey before U.S. District Judge Susan D. Wigenton. • The U.S. Department of Transportation releas-

es the first guidelines regarding safety expectations and the importance of uniform rule-making with regard to driverless cars, including a 15-point safety standard for such vehicles.

September 20: The U.S. Court of Appeals for the Second Circuit vacates a $147.8 million jury verdict and orders dismissal of the price-fixing case, *In re Vitamin C Antitrust Litigation*, concerning the conduct of two Chinese producers of vitamin C. • The attorneys general of 21 states and more than 50 business groups file a series of lawsuits seeking invalidation of the Department of Labor's rule that would qualify millions of Americans for more overtime pay.

September 22: The U.S. Court of Appeals for the Fourth Circuit hears oral argument in *Lee v. Virginia State Board of Elections*, a challenge to Virginia's voter ID law. • U.S. District Judge Glen E. Conrad holds that trial can go forward (see November 9, 2015 and November 4, 2016 entries) after finding that a "reasonable jury could infer malice in light" of the record established in *Eramo v. Rolling Stone, Inc.*, which concerned inaccurate allegations about sexual misconduct at the University of Virginia that appeared in *Rolling Stone*'s story "A Rape on Campus," by Sabrina R. Erdely.

September 23: In *A. Philip Randolph Institute v. Husted*, a divided three-judge panel of the U.S. Court of Appeals for the Sixth Circuit reverses a district court determination and holds that Ohio's method of purging voters from its registration rolls violates provisions in the National Voting Rights Act of 1993 and the Help America Vote Act of 2002.

September 24: The National Museum of African American History and Culture opens, with the only reference to Clarence Thomas — the second African American Justice to sit on the Supreme Court — being found in a display on the story of Anita Hill, who claimed during Thomas's confirmation hearings that he had sexually harassed her.

September 26: The U.S. Court of Appeals for the Second Circuit reverses a lower court's holding that American Express violated Section 1 of the Sherman Act in *United States v. American Express Co.*, permitting AmEx to stop merchants from asking customers to pay with cards that charge lower fees. • In *International Union of Operating Engineers Local 139 v. Schimel*, U.S. District Court Judge J.P. Stadtmueller rejects a challenge to Indiana's "right-to-work" law banning labor contracts that require workers to pay union fees as a condition of employment.

September 27: The U.S. Court of Appeals for the Second Circuit upholds a $50 million judgment against Vivendi SA in *In re Vivendi SA Securities Liti-*

gation, a shareholder class action suit alleging that the company made false or misleading statements to investors regarding the company's financial well-being in the wake of its 2000 merger with Seagram Co. and Canal Plus. • The Supreme Court refuses Lynn Tilton's application for a stay in her administrative case at the SEC, where the agency claims she overcharged investors by $200 million. Tilton contends that the SEC's use of agency-specific administrative judges is unconstitutional. • Shawnee County (Kansas) District Judge Larry Hendricks orders Kansas Secretary of State Kris Kobach to work with county election officials to notify thousands of voters that their votes in the upcoming election will count even if they did not provide proof of their citizenship when registering.

September 28: The *en banc* U.S. Court of Appeals for the D.C. Circuit hears more than six hours of oral argument in a challenge to President Obama's Clean Power Plan in *West Virginia v. Environmental Protection Agency*. • The U.S. Court of Appeals for the First Circuit invalidates New Hampshire's ban on "ballot-selfies" (photographs that record a person's filled-out ballot), holding that the ban is unconstitutionally broad and unnecessarily restricts speech protected by the First Amendment.

September 29: The Supreme Court grants certiorari in *In re Tam* — in which an Asian American band named "The Slants" was denied trademark protection because of their allegedly disparaging band name — to determine whether the Lanham Act's disparagement provision, which denies trademark protection for marks that disparage "institutions, beliefs or national symbols," is constitutional. • Congress overrides President Obama's veto of the Justice Against Sponsors of Terrorism Act, which permits Americans to sue foreign governments for their involvement in terrorist attacks. • The Centers for Medicare and Medicaid Services conclude a rulemaking proceeding geared toward barring any nursing home receiving federal funding through Medicare or Medicaid from requiring residents to arbitrate disputes.

September 30: The Court of the Judiciary of Alabama suspends Alabama Supreme Court Chief Justice Roy Moore for the remainder of his term because of his violation of the Alabama Canons of Judicial Ethics. Moore's suspension arises from his instructions to Alabama probate judges to defy federal court orders regarding same-sex marriage (see January 6 entry). • California makes it a felony for a prosecuting attorney to "intentionally and in bad faith alter, modify, or withhold" any information "knowing that it is relevant and material to the outcome of the case."

OCTOBER 2016

October 3: After holding a rehearing petition in *United States v. Texas* over the summer, the Supreme Court denies it. In March, the Court had divided 4-4 in the case challenging President Obama's executive actions on immigration (see June 23 entry). • The Supreme Court rejects a petition for a writ of mandamus seeking to compel the Senate to vote on the confirmation of Merrick Garland to serve as a Justice of the Supreme Court. • The U.S. Court of Appeals for the Fifth Circuit grants Mississippi Attorney General Jim Hood's petition for a writ of mandamus to remove U.S. District Judge Henry Wingate of the Southern District of Mississippi from presiding over the state's fraud case against Entergy Corp. The petition was prompted by Wingate's numerous delays in the case, including taking 3½ years to rule on the state's motion to remand (denied in 2012), followed by more than four years to rule on Entergy's motion for judgment on the pleadings (denied two weeks earlier in an effort to moot the petition for reassignment). • The U.S. Court of Appeals for the Seventh Circuit enjoins Indiana Governor Mike Pence's order forbidding the state to fund the resettlement of Syrian refugees, holding that the order likely constituted unlawful discrimination on the basis of nationality (see February 29 entry).

October 4: The Supreme Court begins the October Term 2016 by hearing oral argument in two cases: *Bravo-Fernandez v. United States*, regarding the Double Jeopardy Clause, and *Shaw v. United States*, regarding the scope of the federal bank fraud statute. • The Massachusetts Supreme Judicial Court unanimously rules in *Partanen v. Gallagher* that an unmarried gay woman has the capacity to establish parental rights, including both legal and physical custody, to the biological children of an ex-girlfriend.

October 5: The Supreme Court hears oral argument in *Salman v. United States*, regarding the proof prosecutors must put forth to sustain an insider-trading prosecution. • Luis Rivera pleads guilty to second-degree murder for his involvement in the July 2014 killing of Florida State University law professor Daniel Markel. Police allege that Rivera and another man were hired to kill Markel by the family of attorney Wendi Adelson, Markel's ex-wife.

October 6: Kaplan Test Prep releases a survey showing that 65% of law schools agree it "would be a good idea if at least a few law schools closed," and 52% support prohibiting the ABA from accrediting new law schools for a period of one year, even though law school applications are up for the first time since 2009. • Carl Ferrer, the CEO of classified ads website Backpage.com, is arrested in Texas on California felony charges for pimping minors, because the website allegedly profits from escort advertisements, in-

cluding advertisements posted by those engaged in human trafficking.

October 10: During a presidential debate, Donald Trump tells Hillary Clinton that "If I win, I am going to instruct my attorney general to get a special prosecutor to look into your [missing e-mail] situation."

October 11: The Supreme Court hears oral argument in *Samsung Electronics Co. v. Apple*, a dispute over how damages should be assessed in Apple's lawsuit against Samsung for infringing on design patents for the iPhone (see March 21 entry). • The U.S. Court of Appeals for the Second Circuit throws out a lawsuit filed by the heirs of Bud Abbott and Lou Costello against the Broadway play "Hand to God," finding the heirs had no copyright interest in the comedians' 1930s "Who's on First" routine, as Abbott and Costello failed to renew their 1944 copyright. • A split panel of the U.S. Court of Appeals for the D.C. Circuit rules that the Consumer Financial Protection Bureau, created by the Dodd-Frank Act in 2010, is unconstitutionally structured because it is independent of the President yet lacks a compensating multi-member commission structure. The panel remedies the problem by striking down the CFPB Director's for-cause removal protection, thus subjecting the Director to the control of the President.

October 12: A survey published by Major, Lindsey & Africa finds that male law partners make on average 44% more than female law partners (in 2014, male partners made 47% more). Male law partners reported averaging $2.59 million in originated business, 50% more than the average of $1.73 million originated by female law partners. • McDonald's and the National Labor Relations Board agree to sever "joint employer" proceedings (see March 10 entry) before an Administrative Law Judge in New York from corresponding proceedings in Chicago and Los Angeles, and to stay the latter proceedings pending the outcome of trial in the New York matter.

October 14: Delaware car enthusiast Charles Williams uses crowdfunding (in combination with copious media attention) to raise more than $58,000 towards his $300,000 legal bill for his successful defense of a lawsuit filed by three neighbors attempting to shut down as a nuisance a non-commercial 1,920 foot car repair garage he built in his backyard with all required permits.

October 18: Justice Ginsburg presides over a moot court of *Bradwell v. State of Illinois*, 83 U.S. 130 (1873), jointly hosted by the *Green Bag*, the Newseum, and O'Melveny & Myers LLP, in honor of Belva Ann Lockwood, the first woman admitted to the bar of the U.S. Supreme Court (1879) and the first woman to run for President of the United Sates (1884). • A class-action lawsuit is filed against Samsung concerning its Galaxy Note 7 smartphones,

which were twice recalled (the second time recalling supposedly safe replacement units) for spontaneously bursting into flames, seeking reimbursement for lost data and voice plan charges.

October 19: Kentucky Fried Chicken removes to federal court a $20 million lawsuit filed by New York plaintiff Anna Wurtzburger, who claims that KFC engaged in false advertising by underfilling buckets of chicken (the $20 "Family Fill Up Meal") that TV ads portray as bountifully overflowing.

October 20: The *en banc* U.S. Court of Appeals for the D.C. Circuit rules 6-3 to affirm the conviction by military commission of Yemeni citizen Ali Hamza Ahmad Suliman al Bahlul, an Al Qaeda master propagandist who worked closely with Osama bin Laden to plot the September 11 attacks, for conspiracy to commit war crimes. The dissent argues that al Bahlul could only be tried by an Article III court because the international law of war does not recognizing an offense of conspiracy, and military commissions are limited to trying offenses recognized under international law. The fractured per curiam decision does not definitively resolve that question. • The ABA's Council of the Section of Legal Education and Admissions to the Bar votes to tighten the bar-passage requirements for accredited law schools, requiring that 75% of graduates pass the bar within two years of graduating (rather than five), and eliminating a variety of loopholes that made it easier for law schools to meet the 75% standard. • The Minnesota Supreme Court rules that BB guns do not count as firearms under Minnesota's felon possession statute.

October 24: Former Pennsylvania Attorney General Kane is sentenced to ten to 23 months in prison (*see* August 1 and August 15 entries) in relation to her convictions for perjury and criminal conspiracy for leaking, and then lying about leaking, grand jury records.

October 25: A federal judge approves a $15 billion settlement in which Volkswagen agrees to buy back the 475,000 U.S. diesel cars in which fraudulent software had been inserted to help the cars dodge emissions standards. • New York State Attorney General Schneiderman announces that New York has reached a $12 million settlement with daily fantasy sports companies DraftKings and FanDuel arising out of the companies' allegedly false and deceptive advertising practices.

October 28: FBI Director Comey sends a letter to Congress supplementing his earlier testimony that his e-mail investigation of Hillary Clinton's personal e-mail server was closed, stating that in connection with an unrelated case "the FBI has learned of the existence of e-mails that appear to be perti-

nent to the investigation," that "the FBI cannot yet assess whether or not this material may be significant," but that the FBI would be taking additional "appropriate investigative steps" to assess the importance of the e-mails. • The Supreme Court grants certiorari in *Gloucester County School Board v. G.G.*, a case challenging the validity of a Dear Colleague Letter issued by the U.S. Department of Education requiring recipients of Title IX funding to "generally treat transgender students consistent with their gender identity." • A split panel of the U.S. Court of Appeals for the Sixth Circuit overturns a district court injunction entered on October 24 that would have prevented Michigan from enforcing its 125-year-old law prohibiting voters from exposing their marked ballots to others. The dissent argued that the ability to take "ballot-selfies" and post them on social media is conduct protected by the First Amendment.

October 31: The Arizona Democratic Party files suit seeking an injunction preventing the Arizona Republican Party, the Trump Campaign, and the organization "Stop the Steal" from engaging in what the Democratic Party characterizes as voter intimidation in violation of the Ku Klux Klan Act of 1871. According to the complaint, one prominent example of voter intimidation was an Arizona GOP statement to poll watchers that "If you observe anything improper or illegal at the polls on Election Day please use this form to report it to the Arizona Republican Party. Submit any photos, videos, or other materials as evidence. Thank you for your service to ensure the integrity of elections in Arizona!" The U.S. District Court for the District of Arizona denies the requested injunction on November 4. • Similar lawsuits filed the same day by Democrats in Nevada, North Carolina, and Pennsylvania also fail to garner injunctions. A nearly identical Ohio lawsuit resulted in a district court injunction issuing on November 4. It was reversed by the Sixth Circuit on November 6.

NOVEMBER 2016

November 2: The U.S. District Court for the Northern District of California denies the ACLU's request to enjoin California's law prohibiting ballot-selfies. Two days later, the U.S. District Court for the District of Colorado grants an injunction prohibiting Colorado from enforcing its ballot-selfie ban.

November 4: A federal jury awards defamation damages (later set at $3 million) to a University of Virginia administrator against *Rolling Stone* and reporter Sabrina R. Erdely for their November 2014 article titled "A Rape on Campus." • The *en banc* U.S. Court of Appeals for the Ninth Circuit votes

7-4 in *Feldman v. Arizona Secretary of State* to reverse a 2-1 panel decision rendered the day before that would have blocked Arizona from enforcing its law requiring that ballots cast in the wrong precinct be discounted. The same court votes 6-5 to reverse a 2-1 panel decision rendered on October 30 and to issue an injunction preventing Arizona from enforcing a law that prohibits third parties (excepting election officials, family members, caregivers, and other similar parties) from collecting early ballots from other people.

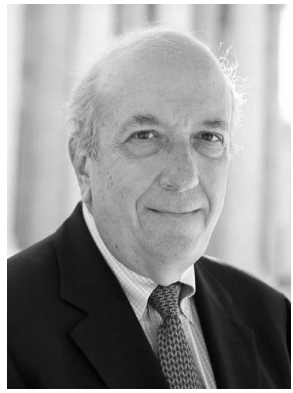
November 5: Justice Kennedy grants a stay of the injunction issued by the Ninth Circuit in *Feldman v. Arizona Sec'y of State*, pending final disposition of the appeal.

November 6: FBI Director Comey informs Congress that after review of the newly discovered e-mails related to Hillary Clinton's private server, he has reaffirmed his conclusion that Clinton should face no charges for her handling of classified information (see October 28 entry).

November 7: The Supreme Court hears oral argument in *National Labor Relations Board v. SW General*, a challenge to the President's ability to have certain government officials serve as nominees to offices requiring Presidential appointment and Senate confirmation while they are also serving in an acting capacity in those roles. • Former U.S. Attorney General Janet Reno, the first woman to serve in that post, dies at age 78. • Suffolk County (Massachusetts) Superior Court orders that three individuals who missed the State's 20-day voter registration deadline be allowed to vote provisionally (the court later orders the state to count their votes), holding that although the state went to great lengths to educate voters about the impending deadline, such educational efforts failed to account for "the need [of voters] to attend to other more pressing or immediate matters, the late-breaking awareness that the election does matter to them, or the like."

November 8: Donald Trump is elected President of the United States, having won the electoral college vote 306-232, but lost the popular vote by nearly 3 million votes. • Republicans retain control of the Senate (52-46-2) and House of Representatives (241-194), having lost two Senate seats and a net of six House seats. • Republicans make significant gains at the state level, holding 33 of 50 governor's seats, gaining a net of 43 state legislative seats, and controlling 68 State legislative chambers to Democrats' 31, with complete control of all branches of government in 25 states compared to Democrats' 6. • Voters in California, Maine, Massachusetts, and Nevada pass ballot initiatives repealing state laws against marijuana, while Arizona voters reject marijuana legalization. Medical marijuana access is legalized or expanded in Arkansas, Florida, Montana, and North Dakota. • Voters in Cali-

fornia (54% to 46%) and Nebraska (61% to 39%) vote to retain the death penalty, and voters in Oklahoma (66% to 34%) retain the death penalty without limitations as to methodology. Justice Kennedy groupies discern in the voting margins a trend indicating that all civilized people reject the death penalty as cruel and unusual. • Maine voters reject expanded gun background checks, while California and Nevada voters approve them. Nevada's measure is approved by fewer than 10,000 votes, having lost in 16 of 17 Nevada counties. • Oklahoma voters pass a ballot initiative reclassifying a variety of drug possession offenses as misdemeanors.



Tony Mauro[†]

A YEAR IN THE LIFE OF THE SUPREME COURT

2016

A summary of developments involving the U.S. Supreme Court, most of which are unlikely to be memorialized in the United States Reports.

Heads, You Win: Carter Phillips and Seth Waxman, titans of the Supreme Court bar, both wanted to argue the same side of two consolidated patent cases — *Stryker v. Zimmer* and *Halo Electronics v. Pulse Electronics* — set for argument in late February 2016. The court refused their request for divided argument, so they did what the National Football League does every game: flip a coin. Neither lawyer was present for the tie-breaking moment. A Sidley Austin LLP colleague of Phillips borrowed a quarter and flipped it while the two were on the phone, without knowing who had claimed heads and who had tails. It came up heads, which was Phillips's call. "Carter won the coin toss," WilmerHale's Waxman reported in a terse email. It was a costly coin toss, since the fee for the argument portion of litigating a Su-

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preme Court case can run between $100,000 and $200,000, or more. In the end, Phillips's side lost.

A Justice's Death: Justice Antonin Scalia's unexpected death on February 13 at age 79 shocked the nation and cast a pall on the operations of the high court. It also had the effect of inserting the court into the presidential campaign. Scalia, whose tenure on the court neared 30 years, died at Cibolo Creek Ranch in West Texas during a hunting trip. At the request of the family, no autopsy was performed. Local officials were satisfied that because of his medical history — including diabetes, sleep apnea, chronic pulmonary disease, smoking, and high blood pressure — he died because of "significant medical conditions." The absence of Scalia's larger-than-life personality made the court a "grayer place," several justices said. In a statement on behalf of the court, Chief Justice John G. Roberts, Jr. said, "He was an extraordinary individual and jurist, admired and treasured by his colleagues. His passing is a great loss to the Court and the country he so loyally served. We extend our deepest condolences to his wife Maureen and his family."

Thomas Speaks: On February 29, Justice Clarence Thomas asked questions during oral argument in *Voisine v. United States*, marking the first time in a decade that he had done so. The case challenged a federal statute banning firearm ownership for those convicted of a misdemeanor crime of domestic violence. Thomas's questions seemed to channel concerns that Scalia would have had — namely, that the ban implicated Second Amendment rights. The justice hasn't asked a question since, and the court upheld the ban.

Lights Out: In the midst of a routine oral argument March 1, the lights went out in the courtroom for unknown reasons. The case, *Nichols v. United States*, involved the registration of sex offenders who moved abroad. A quick-witted Chief Justice calmed the startled audience when he said, "I knew we should have paid that bill." With natural light still flooding the chamber, the argument continued.

Extended Vacancy: Acting quickly to name a replacement for Scalia, President Barack Obama nominated Chief Judge Merrick Garland of the U.S. Court of Appeals for the D.C. Circuit on March 16. Garland gamely met with senators, but there was an air of unreality to the nomination. That is because the Republican-led Senate held to an unprecedented pledge that majority leader Mitch McConnell made an hour after Scalia's death. McConnell said that there would be no hearings and no vote on any Obama nominee until after the presidential election. With the election of Donald Trump as president, that pledge extended through Inauguration Day.

Deaf Lawyers: In a historic first, 12 deaf or hard-of-hearing lawyers were sworn into the Supreme Court bar on April 19 by Chief Justice Roberts. The lawyers were members of the Deaf and Hard of Hearing Bar Association, founded in 2013. The association proposed the mass swearing-in ceremony and the court agreed, providing interpreters and necessary technology. The lawyers were allowed to bring their smartphones into the court chamber — also a first — so they could read what was being said as it was transcribed. As the ceremony ended, Roberts used American Sign Language from the bench to signify that they had been admitted to the bar.

Name that Justice: It used to be common for advocates — even veteran lawyers — to address "Justice Ginsburg" as "Justice O'Connor," or vice versa. But that embarrassing mistake ended when Sandra Day O'Connor retired in 2006 — or so it seemed. Jones Day's Noel Francisco called Justice Ruth Bader Ginsburg "Justice O'Connor" during arguments April 27, much to Ginsburg's amusement. "That hasn't happened in quite some time," she exclaimed. Francisco said he was "very, very, very sorry" and quickly moved on.

Confessing Errors: An investigative law review article by Harvard Law School professor Richard Lazarus in 2014 shed light on the court's practice of correcting or amending its opinions after they are issued — changes that were not announced to the public. The court in 2015 stated it would be more transparent about such changes, and that new policy was reflected with changes made in *United States v. Bryant*, a June 2016 Indian Major Crimes Act decision. In a letter, deputy solicitor general Michael Dreeben informed the court that the opinion, written by Justice Ginsburg, misstated the scope of the law in a way that could "give rise to misunderstanding" in subsequent cases. The court made the change in July and highlighted it on the court's website. Less important changes have also been posted in other cases.

Ginsburg Speaks Out: In a series of media interviews after the end of the high court term in June, Justice Ginsburg openly acknowledged her dislike for then-presidential candidate Trump. Among other things, she called him "a faker" and half-joked that moving to New Zealand would be an option if Trump won. "He says whatever comes into his head at the moment. He really has an ego," Ginsburg also said. Trump fired back on Twitter, calling her comments a "disgrace to the court" and adding for good measure, "Her mind is shot — resign!" Judicial ethics experts voiced concern that her remarks amounted to an unforced error that could encourage parties to request her recusal in cases that named or significantly involved Trump or his personal interests. Others also pointed to the Code of Conduct for U.S. Judges which says that judges should not "make speeches for a political candidate,

or publicly endorse or oppose a candidate for public office" or "engage in any other political activity." The code does not apply to Supreme Court justices, though high court members say they consult it in guiding their own conduct. Ginsburg soon issued a statement regretting her "ill-advised" remarks: "Judges should avoid commenting on a candidate for public office," she said.

Bar Merger: The staid Supreme Court bar was shaken up in September when the boutique firm Bancroft PLLC joined the much larger Kirkland & Ellis LLP. Former solicitor general Paul Clement, viewed as one of the top high court advocates of his generation, had turned Bancroft into the go-to firm for conservative causes. For both firms, the synergies seemed irresistible. "One plus one equals three!" Bancroft founder Viet Dinh said two months after the merger. "We came together very amicably and efficiently. We're doing the same thing, only more of it."

Bait and Switch Briefs: Twice in the fall of 2016 justices displayed their ire at Supreme Court practitioners who file petitions raising issues that win certiorari — but when it comes time to filing briefs on the merits, they pile on with new and different issues and arguments. During oral argument in *Moore v. Texas*, Chief Justice Roberts scolded Skadden, Arps, Slate, Meagher & Flom LLP partner Clifford Sloan for reciting a "long laundry list" of complaints about Texas death penalty procedure when "your question presented focused only on one." Before that, the court pulled two antitrust cases from its argument docket and dismissed them altogether. The reason, the court said, was that the petitioners had "persuaded" the court to grant cert on one issue but then "chose to rely on a different argument" in the merits briefing. The cases were *Visa v. Osborn* and *Visa v. Stoumbos,* and the brief at issue was by Neal Katyal of Hogan Lovells.

Healthy Justices: The health of presidential candidates and how public they should be about it was a hotly contested issue during the campaign. Scalia's untimely death raised interest in the well-being of Supreme Court justices as well, especially because the public was unaware of Scalia's numerous health problems until after his death. *The National Law Journal* asked each of the eight justices to disclose basic health details. But only one justice replied. Chief Justice Roberts, speaking on behalf the entire court, wrote a letter to the newspaper that was published in September. "You can expect to see an able and energetic Court when we reconvene in October." He pledged that the court would release justices' health information "when a need to inform the public arises."

Thomas Accused: A national conversation about sexual harassment of women by powerful men, spurred by taped comments by Trump, also ran

through the presidential campaign. Against that backdrop, new allegations surfaced against Thomas. *The National Law Journal* in October reported that an Alaskan attorney named Moira Smith claimed that Thomas groped her at a dinner party in 1999 when she was a Truman scholar in Washington, D.C. Her three former housemates and two other Truman scholars at the time recalled Smith telling them of the incident shortly afterward. Thomas said the allegation was "preposterous and it never happened."

Scalia Law School: Backed by $30 million in donations, Virginia-based George Mason University was quick to rename its law school to honor the late justice. Some faculty members voiced "deep concern" that the move would be polarizing and could discourage diverse views among applicants and students. But the change went forward, though its first proposed name — the Antonin Scalia School of Law at George Mason University — did not last long because of its unfortunate acronym: ASSLaw. Without missing a beat, university officials switched the name to Antonin Scalia Law School at George Mason University. Six Supreme Court justices from across the ideological spectrum traveled to the Arlington, Virginia law school on October 6 to attend ceremonies celebrating the renaming of the school. Justice Elena Kagan described Scalia as "one of the most important Supreme Court justices ever, and also one of the greatest."

Hail from the Chief: In past years, Chief Justice Roberts has sometimes used his annual year-end report to advocate for higher pay for judges, or to defend the ethics of his fellow justices. But his 2016 report, issued on December 31, had no sharp edges or fodder for controversy. Instead he spotlighted the "crucial role" played by federal district judges, asserting they "deserve tremendous respect" for performing the often thankless tasks of the job. "The district judge serves as the calm central presence to ensure fair process and justice for the litigants," Roberts wrote in his annual written report on the federal judiciary. "This is no job for impulsive, timid or inattentive souls."

M. Kevin Underhill[†]

A YEAR OF LOWERING THE BAR

2015-2016

NOVEMBER 2015

November 3: According to a spokesperson for the D.C. Lottery, "It is important to note that frequent wins by individuals . . . do not definitively mean improper activity has occurred." This follows a report that one individual has won 123 times in eight years, another has won 28 times in three years, and three of the top five recent winners also happen to sell lottery tickets. An expert says the odds of this happening randomly are about 10 billion to one.

November 10: A plaintiff who bought a vehicle at auction for $300,000 sues the seller in California, saying the vehicle was never delivered and was "damaged by the elements" after the auction. The complaint is vague, however, about how the "elements" damaged the vehicle, which is a Sherman tank.

November 18: Police in Perth, Australia, ask the public for assistance in locating nine individuals who were seen riding through town on two motor-

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ized picnic tables. Pictures suggest the individuals were drinking at the time, but police say picnic tables are not "roadworthy" vehicles anyway.

November 21: On the other side of the continent, police in Sydney receive numerous calls from citizens reporting high-pitched, hysterical screams coming from a nearby home, as well as a man's voice shouting "I'm going to kill you! Die! Die!" Police find not a domestic-violence incident but rather a lone man who sheepishly admits he had been screaming while desperately trying to kill a spider. "It was a really big one," the man explains.

November 25: Reuters reports that a British woman who tried to poison her husband has pleaded guilty to attempted murder. She called paramedics to say her husband was unconscious, and when they arrived gave them a note purportedly from him, saying he did not wish to be revived "as I would like to die with dignaty [sic] with my family by my side thank you." His name was typed at the end rather than signed. Given the chance to spell "dignity" by police, the woman misspelled it the same way.

December 2015

December 2: Michigan's legislature repeals more than 80 laws it has decided are antiquated or unnecessary, including laws against trespassing on a cranberry marsh, swearing in front of women or children, and singing "The Star-Spangled Banner" in a nontraditional or disrespectful manner. The latter also made it illegal to play the anthem as part of a medley, as an exit march, or for purposes of dancing, though it seems doubtful anyone has ever really tried to dance to the national anthem.

December 4: Reports say that a Turkish court considering defamation charges against President Recep Tayyip Erdogan has decided to seek advice from a group of experts on *The Lord of the Rings*. This is because the defendant is accused of comparing Erdogan to Gollum. The defendant's lawyer argues the comparison isn't sufficiently insulting to be defamatory, noting that Gollum in fact plays an instrumental role in defeating Sauron.

December 12: It seems very unlikely that nothing stupid happened between December 4 and 19, 2015, but that's what my records suggest.

December 19: A man is arrested in Manitoba, Canada, on suspicion of driving under the influence after he allegedly crashed the Zamboni ice machine he was driving into the boards of a hockey rink. It is at least the fifth Zamboni DUI case in the past decade.

December 21: In Montana, a man who allegedly threatened a Facebook friend with a gun is charged with felony assault. The friend allegedly dis-

closed details of the new Star Wars movie, *The Force Awakens*, without providing a spoiler warning.

December 26: A New York judge dismisses DWI charges against a woman after her attorney argues she unknowingly suffered from "auto-brewery syndrome," also known as "gut fermentation syndrome," in which alcohol is produced from sugar by microorganisms within a person's digestive tract. Fewer than two dozen cases of ABS have been reported worldwide, but this is apparently the second DWI case in which the defense has worked.

JANUARY 2016

January 6: In *Naruto v. Slater*, a court rules Naruto cannot claim copyright in a remarkable picture he took in Indonesia a few years before, because he is a monkey. (Slater set his camera up in the jungle, and Naruto took a "selfie" while playing with it.) The lawsuit was brought on Naruto's behalf by People for the Ethical Treatment of Animals. The court holds that Congress could extend the Copyright Act to animal art if it wanted to, but it hasn't. Therefore, as the defendant's motion argued, "[t]he only pertinent fact in this case is that Plaintiff is a monkey suing for copyright infringement."

January 21: The chairman of the Kansas Senate's Ethics Committee, who is a man, issues a "code of conduct" with instructions for women on how to look "professional" when testifying before the committee. "Low-cut necklines and mini-skirts are inappropriate," for example. According to the *Topeka Capital-Journal*, the chairman said he considered rules for men "but decided males didn't need supplemental instruction on how to look professional."

January 22: In a case entitled *New Zealand Transport Agency v. New Zealand Transport Agency*, a New Zealand court holds that a government agency can appeal its own decision.

January 25: A California jury awards over $7 million to one of the women suing Bikram Choud-hury, creator of "Bikram yoga," for harassment. The $6 million punitive award may arise from the contrast between Choudhury's testimony that he is too broke to pay any award and evidence that he owns a "palatial" Beverly Hills home and "30 to 40" luxury cars, among other assets. Upon hearing Choudhury testify that he built the cars himself with parts he found in junkyards, "several members of the jury quietly laughed."

January 26: The Kansas senator who issued professionalism rules for women apologizes and retracts them. The retraction appears to have followed "conversations with a lot of his colleagues" about the rules, says the President of the Kansas Senate, who is a woman.

February 2016

February 4: Maine's highest court holds that a prosecutor did not commit prejudicial error in a murder case by pretending to be asleep during the defense's closing argument. The conduct was "sophomoric" and "unprofessional," the court says, but could not have been prejudicial given the evidence against the defendant. A witness also claimed to have seen the prosecutor mouth the words "he did it" to the jury during the argument, but the court says if that did happen, the same analysis would apply.

February 8: The parties disputing Warner/ Chappell Music's right to charge royalties for "Happy Birthday to You" ask the court to approve a settlement under which Warner would pay $14 million — one-third of it to the class's attorneys — and the court would declare the song to be in the public domain.

February 9: Florida authorities have arrested the man who threw a live alligator through the window of a Wendy's drive-through last October. Neither the employee nor the alligator were harmed in the incident, but the man is charged with unlawful possession of an alligator, assault with a deadly weapon (the alligator), and petty theft (a drink he ordered but didn't pay for).

February 19: In Tennessee, a federal magistrate judge dismisses an officer's civil-rights lawsuit against the city that fired him for violating the department's firearms policy. The officer had been asked to help get a squirrel out of the local general store, and responded by trying to shoot it with his handgun.

February 24: The BBC reports that police who responded to calls about a man carrying a small child along the M60 motorway near Manchester have sounded the all-clear. The man was actually carrying a garden gnome.

March 2016

March 1: The New York Senate's Transportation Committee favorably recommends a bill requiring any driver involved in a collision to surrender any personal electronic devices to a police officer "solely for the purpose of field testing." The stated intent is to deter use of the devices while behind the wheel by allowing police to gather evidence at the scene. It goes without saying, of course, that there is no risk whatsoever police would look at anything else on the device.

March 2: The *Washington Post* reports that while testifying before the Utah Senate on a bill to legalize medical marijuana, a DEA special agent argued the proposal would be bad for wildlife. At one illegal field, he claimed to

have personally witnessed "rabbits that had cultivated a taste for the marijuana" and became addled as a result. "One of them refused to leave us," he testified, "and we took all the marijuana around him, but his natural instincts were somehow gone."

March 7: Prosecutors announce they have charged a former Brink's employee with stealing $196,000 from a federal reserve bank. This is more impressive than it sounds because it was all in quarters. The defendant allegedly stole all 784,000 quarters between January 1 and February 20, 2014, an average of 15,372 quarters (weighing about 192 pounds) per day. • The Supreme Court declines to review the Ninth Circuit's decision that the design of the Batmobile is protected by copyright.

March 11: In *United States v. Ragin*, the Fourth Circuit holds that "when counsel for a criminal defendant sleeps through a substantial portion of the trial," no separate showing of prejudice is necessary to establish ineffective assistance. While prejudice is normally required, the court says, "the buried assumption" in that analysis is that "counsel is present and conscious" for the vast majority of trial.

March 17: The Maryland Senate votes to amend the official state song, "Maryland, My Maryland." Some have objected that the song, which was originally a Confederate anthem, still contains lines such as "Huzza! She spurns the Northern scum."

March 22: The Supreme Court vacates a Ninth Circuit decision that precluded John Sturgeon from using his hovercraft to hunt moose in Alaska, saying the lower court misinterpreted federal conservation law.

March 23: A North Carolina man is arrested for failing to return a videotape he rented 14 years before. James Meyers said that after he was stopped for a broken taillight, the officer approached him and said, "I don't know how to tell you this, but there's a warrant out for your arrest from 2002. Apparently you rented the movie 'Freddy Got Fingered' and never returned it." The department claims it had no choice but to arrest and book Meyers because of the outstanding warrant for "failing to return hired property."

March 24: The Idaho Legislature passes S.B. 1342, which would permit the use of "religious texts, including the Bible," for "reference purposes" in a variety of subjects for which an understanding of such texts might be useful or relevant. Some believe this conflicts with the First Amendment as well as the state constitution, specifically the part that says "[n]o books . . . of a political, sectarian or denominational character shall be used" in Idaho schools. The sponsors insist, however, that the Bible is nonsectarian and nondenom-

inational. "The little Supreme Court in my head says this is okay," one reports.

April 2016

April 1: Missouri state Rep. Tracy McCreery introduces H.R. 1220, which urges House members to stop saying "physical" when they mean "fiscal," as in "fiscal year." "It happens pretty much daily," McCreery says. "It really does."

April 4: Welsh sources report that the gang members who stole £20,000 worth of "Jammie Dodger" shortbread biscuits in 2015 have been convicted and sentenced to several years in jail. "Anyone want a biscuit?" one shouts as he is led away, suggesting that he knows the whereabouts of at least one of the delicious treats, which have not been recovered. • The Tennessee Legislature passes H.B. 615, which designates the Bible as the "official state book."

April 5: Idaho's governor vetoes S.B. 1342 (see March 24), saying that although he personally has "deep respect and appreciation for the Bible," the law is clearly unconstitutional. This does not, however, affect existing code section 33-1604, which mandates daily Bible readings in Idaho public schools, and is still on the books although it was held unconstitutional in 1964.

April 14: Tennessee's governor vetoes H.B. 615, similarly saying that while he personally believes the Bible is a "sacred text," for that very reason it would be unconstitutional to make it the official state book.

April 20: In Boise, organizers of an annual event that includes a "dachshund race" say they have canceled the race because local authorities notified them that a state statute prohibits dog racing. It does ban "live dog racing," but was intended to end greyhound racing because of concerns about the dogs' welfare, not to prevent 30-yard dachshund dashes once a year.

April 26: The *Eugene Register-Guard* reports that a federal judge has ordered Oregon to pay $318,000 in attorney fees in a civil-rights case due partly to the state's trial tactics. Among other things, the judge notes that while the plaintiff was testifying, one of the state's attorneys "pretended to be asleep in his chair, his unconscious visage . . . broken only by an occasional loud sigh. [This] failed miserably to impress the jury and required repeated warnings from the court."

April 29: The National Labor Relations Board holds that a company may not have a rule requiring employees to "maintain a positive work environment by communicating in a manner that is conducive to effective working

relationships." The rule did not actually require a positive attitude, but the NLRB said it could be interpreted to allow punishment of anyone who did not appear sufficiently positive about working conditions.

MAY 2016

May 5: An American Airlines flight returns to its gate in Philadelphia after a woman reports concerns about her seatmate, who appears to be foreign and is intently focused on a notepad covered with a script she does not recognize. After the man is removed from the plane, he tells agents he is an Italian economist, and that the script the woman did not recognize is math.

May 9: An Arkansas judge resigns after learning investigators have recovered about 4,000 embarrassing images from his computer depicting defendants in cases over which he presided. A letter sent by investigators in the case stated: "The paddle appears in photographs and has been identified by witnesses as belonging to the judge. Please accept this as notice to your client to not destroy [or] otherwise dispose of this paddle or other devices used to cause the red marks in the photographs." The judge claimed he kept the photos only "to corroborate participation in community service."

May 18: Google is awarded Patent No. 9,340,178, entitled "Adhesive Vehicle Front End for Mitigation of Secondary Pedestrian Impact," which describes a method of making the hood of a car sticky enough that a pedestrian would not bounce off it in the event of a collision, causing further injury. "It is also desirable," the patent states, "to have the adhesive in the adhesive layer release after a short period of time to allow for the removal of the pedestrian from the vehicle."

May 24: The Associated Press reports that the TSA's assistant administrator for security operations has been fired after an oversight hearing on alleged "mismanagement." Kelly Hoggan was reportedly paid over $90,000 (almost half his base salary) in awards and bonuses during the previous 13 months, a period during which the TSA failed to detect about 95 percent of concealed weapons and explosives that testers tried to smuggle through checkpoints.

JUNE 2016

June 2: CNN reports that it has located Yusuf Abdi Ali, an accused war criminal who allegedly participated in torture and mass executions while he was a military commander during the Somalian civil war. It turns out Ali should not have been that hard to find, since he was working as a security guard at Dulles International Airport. Ali somehow managed to pass a fed-

eral background check although you can find details of his alleged crimes by Googling his name.

June 3: D.C.'s Board of Professional Responsibility agrees that former judge Roy Pearson acted unreasonably and interfered with the administration of justice when he pursued a $65 million lawsuit against a dry cleaner he accused of losing a pair of pants.

June 15: A 21-year-old Welshman pleads guilty to assaulting another man who he suspected of stealing a friend's imitation Viking battle axe. All three were members of the "Viking Society" at Trinity St David's University in Lampeter. The defendant said he confronted the victim about the missing axe, and lost his temper when the victim smirked in response.

June 23: Voters in the United Kingdom go to the polls to vote on the "Brexit" referendum. If it passes, Britain will leave the EU.

June 24: About eight hours after the polls closed, Google Trends reports it has detected a large surge in the number of searches for the phrase "what happens if we leave the EU."

July 2016

July 13: In *Reuth Dev. Co. v. H&H Reuth*, Judge John Sedia writes that he is compelled to grant the defendant's summary judgment motion because of the plaintiff's delay in responding to it. Specifically, the response was due on July 14, 1995, so it is just one day short of 21 years late.

July 21: A California federal court rules that it has admiralty jurisdiction over a shark-bite lawsuit. The plaintiff is suing a dive instructor she claims was intoxicated during the dive, allegedly contributing to the attack. The court finds that the bite had the "potential to disrupt maritime commerce" because another boat might have had to be diverted in order to offer first aid.

August 2016

August 2: In a letter to Gov. Jay Nixon, the director of Missouri's Public Defender System says he believes drastic measures are necessary due to budget cuts that have made it difficult for his office to do its job. Specifically, the director says he has noticed (1) that state law gives him authority to appoint "any member of the state bar" to represent criminal defendants if necessary, and (2) that Nixon is a member of the state bar. He therefore appoints Nixon to work on a case. Some speculate the director is just trying to make a point about funding and doesn't actually expect the governor to show up in court, but the letter is pretty specific.

August 12: The CBC reports that a trucking company is offering a $10,000 reward for the return of 20,000 liters of maple syrup stolen from a holding facility in Montreal. The shipment was headed for Japan. While shocking, the theft is far smaller than the 2012 heist in which 2.7 million liters were stolen from the Global Strategic Maple Syrup Reserve.

August 15: Michigan lawyer Robert Mol insists that his write-in campaign against Circuit Judge Kent Engle has nothing to do with the fact that Engle is presiding over a custody battle between Mol's wife and the father of her 10-year-old daughter. Coincidentally, Mol's wife has filed a petition asking that Engle be removed from the case on the grounds that her husband's candidacy means Engle has a conflict of interest.

August 19: In New York, a defendant hoping to fire his court-appointed lawyer insists that the lawyer has repeatedly lied to him, but can only think of one example and turns to his lawyer for help. "What else [did you lie to me about]? You remember?" he asks. "You're asking Mr. Pesserillo how many lies he's told you?" the judge asks. The exchange causes "chuckles in the courtroom," including from the defendant, the sort of levity that is rare in a murder case.

August 22: Police say no charges will be filed against a 53-year-old Nebraska man, or his children, after an incident in which the man accidentally ate four brownies containing an active ingredient other than sugar. According to the *Omaha World-Herald*, "Paramedics called to the scene [by the man's wife] found his vital signs to be normal. But they noted that he was displaying odd behavior — crawling around on the floor, randomly using profanities and calling the family cat a 'bitch.'" The man later admitted the profanity but denied any intent to insult the cat.

August 25: Katrina Pierson, spokesperson for presidential candidate Donald J. Trump, insists the candidate's statement that he would "not necessarily" deport all illegal immigrants is consistent with his earlier statements that he would indeed do that. Trump "hasn't changed his position on immigration," Pierson explains, he's just "changed the words that he is saying."

August 29: Multiple sources report that an Idaho woman is suing police for trashing her home during a 10-hour standoff in which they smashed doors and windows, fired tear-gas grenades, and created a large hole in her ceiling when one of the officers fell through it. The behavior is unusual because the woman had consented to a search and given officers the keys, and turned out to be unnecessary because the only person inside was a dog.

August 31: Calling it a "highly unusual situation," *North Carolina Lawyers Weekly* reports that a defendant in a case under grand-jury consideration has the same name as one of the grand jurors. This turns out to be because it is in fact the same person. "I asked him if he stepped aside" when it came time to vote, the judge says, "and he did not." Because grand-jury proceedings are secret, of course, there is no way to know whether the defendant voted to acquit himself, but if he did he was outvoted.

September 2016

September 2: In Sweden, *Skånska Dagbladet* reports that a man has successfully defended against a charge of knowingly operating an unregistered vehicle by claiming he suffers from a phobia of official correspondence. His phobia allegedly prevented him from opening letters from the government that would have informed him of the need to register.

September 7: According to the *Kansas City Star*, a 70-year-old man who robbed a local bank said he did so because he would rather go to jail than keep living with his wife. He got an undisclosed amount of money from the teller by handing over a note, and then sat down in the lobby to await police. Kansas law defines "robbery" as "knowingly taking property from the person or presence of another by force or threat of bodily harm," so that is probably still a robbery even if he didn't intend to get away with it.

September 21: Closing arguments are heard in the trial of a former employee of the Royal Canadian Mint, who is accused of smuggling out 210-gram "pucks" of nearly pure gold by inserting them into what one might call an internal smuggling compartment. After walking carefully out of the mint, the man would sell the pucks at a local gold-buying shop and then deposit the checks in a bank at the same mall. He was caught after a bank teller became suspicious and noticed that he worked for the mint.

September 29: Senate Majority Leader Mitch McConnell criticizes President Obama for a new law authorizing 9/11 lawsuits against Saudi Arabia, saying Obama should have done a better job explaining the law's pitfalls (such as potentially subjecting the U.S. to retaliatory lawsuits in foreign courts). The criticism is unusual given that Obama vetoed the bill for exactly that reason, a veto that McConnell and 96 other Senators had voted to override.

October 2016

October 5: An Australian lawyer prevails in his battle to be compensated by Domino's Pizza for its failure to deliver three (3) pizzas, two (2) garlic

breads and two (2) drinks in April 2015. Tim Driscoll said the branch manager promised to refund his $37.35 but never did, and that the board of directors also ignored him (though he is a shareholder). He sued after a year of being ignored, and won when Domino's failed to respond. Driscoll reportedly recovered his original $37.50 plus about $1200 in fees and costs.

October 7: The *Boston Globe* reports that in this year's "marijuana eradication operation," an annual joint exercise by the state police and National Guard, authorities managed to seize a total of 44 plants, including one from the backyard of an 81-year-old grandmother. A National Guardsman spotted the plant from a helicopter, and several police vehicles swooped in for the seizure. "I had been nursing this baby through a drought," said Peg Holcomb, "and I was pretty pissed to tell you the truth."

October 14: According to Courthouse News Service, the parties to the shark-bite lawsuit (see July 21) have settled for an undisclosed amount.

NOVEMBER 2016

November 8: The D.C. Circuit holds that officers who broke down a veteran's door without a warrant and arrested him after he accidentally called a suicide hotline are not entitled to qualified immunity. "I don't have time to play this constitutional bullshit," one officer allegedly said after the plaintiff refused consent, but the court says officers need to play it anyway.

November 9: The *Chicago Tribune* reports that Rhonda Crawford, currently under indictment for posing as a judge in Cook County, has been elected to be a judge in Cook County. Crawford won the Democratic primary and so had no real competition, but the state supreme court held she still should not have been allowed to "sit in" and rule on cases before actually taking the bench. • Justice Peter Doody holds that although circumstantial, the evidence supports the conclusion that Leston Lawrence did indeed smuggle gold nuggets out of the Canadian Mint by hiding them in his rectum (see September 21).

November 12: Three members of the gang who somehow stole 3,000 tons of syrup from the Global Strategic Maple Syrup Reserve in 2012 are convicted in Quebec. One wept on the stand, claiming he had been forced to participate at gunpoint, although evidence showed he had sent a text message to that person saying, "Come see me, my love, I miss you."

November 21: The FBI says it is looking for a bank robber it has nicknamed the "Spelling Bee Bandit" because in each of his four robberies he wrote "ROBERY" or "ROBERT" on the back of a withdrawal slip. It's not clear

why informing a teller your name is "ROBERT" would get you any money, but they handed over some in each case. • In *Nobody v. Ontario Civilian Police Commission*, the court rules that Adam Nobody has the right to appeal a finding that officers who beat him during the G20 protests in Toronto were not guilty of misconduct. The officers had argued Nobody missed the deadline. During coverage of the protests in 2010, Nobody admitted he had changed his name from "Adam Trombetta" because "it made for better puns." • A judge in Fort Bend County, Texas, grants Lan Anh Cai's anti-SLAPP motion against her former attorneys, who had sued her for complaining about them on Yelp. The order dismisses their suit and awards her $26,831 in attorney fees. The firm involved was the Law Offices of Tuan A. Khuu & Associates, in case they want to sue me for mentioning them.

November 26: Police in Forest Grove, Oregon, say they responded to a report of a "verbal altercation" — sometimes referred to as an "argument" — sparked by a man's alleged refusal to stop whistling the song "Closing Time" by Semisonic. The song hit #11 on the Billboard chart in 1998, but at least one woman did not want it whistled anywhere near her home in 2016.

November 28: Belgium and the Netherlands sign a treaty agreeing to swap three tiny enclaves that have been marooned on the wrong sides of their border since the Meuse River changed course slightly about 50 years ago. Nobody lives in the enclaves, but "antisocial behavior" has reportedly thrived there because the relevant authorities had to cross the river to police them.

November 30: DOJ officials tell Congress that for years the DEA has been paying U.S. transit employees — including TSA workers — millions of dollars in exchange for "tips" on travelers they find suspicious. Because the informants were paid if their actions resulted in seizures of drugs or cash, the payments gave them a clear incentive to conduct more searches. One informant was reportedly paid more than $1 million over five years, and an airline worker earned well over $600,000 in four years.

December 2016

December 2: *Ghana Business News* reports that the fake U.S. embassy in Accra has finally been shut down. The operators ran up the U.S. flag three days a week and sold stolen and counterfeit documents while posing as U.S. officials. According to the report, the scam had been in place for ten years.

December 5: Iowa announces it has completely disbanded its "interdiction" and civil-forfeiture team, although it has not yet changed the underlying laws that allow police departments to keep money they seize from suspects.

It also agrees to pay $60,000 to two poker players whose bankroll was taken by officers who pulled them over for an alleged traffic violation.

December 6: The *Guardian* reports that an Oxford graduate has sued the university for not giving him the top grade in a history class 16 years ago. The plaintiff, now a 38-year-old solicitor, alleges that the university has admitted it had a shortage of faculty then, and that both the teaching and grading were "appallingly bad." He alleges the second-class grade he received in Indian Imperial History has "denied him the chance of becoming a high-flying commercial barrister," and demands £1 million in lost earnings.

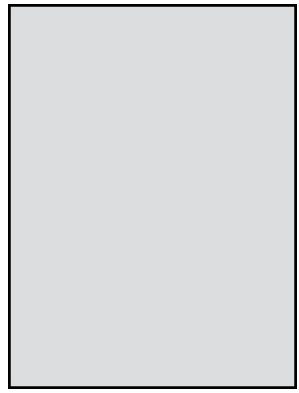
December 8: Canadian sources report that customers there have been perplexed by labels on snow globes warning that the products "may cause cancer." It turns out the labels are there to satisfy a California law requiring warnings on products that contain any of the hundreds of chemicals California says are dangerous, even if the levels in that product are actually safe. The glass in the globes apparently contains trace elements of lead.

December 12: A man suspected of being the "Spelling Bee Bandit" (see November 21) is arrested in Boston. The break in the case reportedly came after the suspect's mother recognized him in surveillance photos and called the FBI. "So that's what happened to my Patriots hat," she said after seeing one of the photos, although that wasn't until after she turned him in.

December 19: Though not at gunpoint, a majority of electors cast votes for Donald J. Trump, officially making him the President-elect. Eleven electors either refused to vote for Trump or tried to do so before being removed under state laws that make such defections illegal. The Supreme Court has never decided whether such laws are constitutional, though people who write legal-humor blogs think it's pretty obvious they aren't.

December 22: The *Washington Post* reports that Maine authorities have finally approved Phelan Moonsong's request to wear goat horns in his driver's license photo. • The DOJ sues Barclay Bank and several affiliates, alleging they engaged in a fraudulent scheme to sell overvalued residential mortgage-backed securities. Among the allegations: the banks allegedly told investors only "reliable" or "robust" loans were included in the program, though internal emails described some of the same loans as "craptacular," among other terms.

December 29: The *St. Louis Post-Dispatch* reports that a 28-year-old man fleeing from a probation violation spent Christmas Eve stuck in a hay bale. He fell into it while trying to hide in a barn loft, so that's how that happens.



Wendy Everette, Catherine Gellis, Fatima Nadine Khan, Eli Mattern & Whitney Merrill[†]

THE YEAR IN LEGAL INFORMATION/LEGAL TECH

HIGHLIGHTS FROM 2016

JANUARY

2016 opened with the Federal Trade Commission's inaugural Privacy Con, bringing together privacy and security researchers with FTC staff in Washington D.C. for a day of presentations on privacy, security, and usability. Panels included "Big Data and Algorithms: Transparency Tools Revealing Data Discrimination," which explored biases in online ad bidding systems, "Consumer Privacy Expectations," and "Security and Usability." Opening the afternoon session, then-FTC Commissioner Julie Brill lauded the "cross-disciplinary, richly detailed picture of consumers and how they make decisions about technology use" presented by the researchers and welcomed the commitment by schools to bring lawyers and technologists together to

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make interdisciplinary work on law, technology, and public policy "a core mission." • A recurring theme throughout 2016 was the use of data science to explore our legal system. In one such paper, *Emotional Judges & Unlucky Juveniles*, Ozkan Eren and Naci Mocan of Louisiana State University, analyzed publicly available data to determine whether football team losses or wins affected the sentences passed out by judges. (They did.) • Despite being charged with drafting bills on technical topics, Capitol Hill is not a bastion of computer experts. Enter Tech Congress, which sponsors fellows to spend a year offering their tech knowledge to our nation's lawmakers. 2016 marked Tech Congress's second year of bringing "talent, ideas and training to Congress" to build bridges between policymakers and the tech community. • Bernard Marr at *Forbes* reviewed *How Big Data Is Disrupting Law Firms and The Legal Profession*, noting that the use of analytics in the legal field had mostly been confined to billing and marketing functions until recently. He optimistically notes that "routine but time consuming procedures such as parking ticket appeals . . . could be settled by algorithms" but expects that it will be "some time" before algorithms replace judges. The automation of legal analysis is often known as computational law; this branch of legal technology seeks out legal disputes with discrete steps and develops software that can traverse these discrete paths. As Marr notes, automated legal analysis beyond routine procedures like parking tickets would require advances far beyond the types of software currently available. • File this one under The Art of Showing What's Possible. In 2014, David Zvenyach built a twitter account (*@Scotus_servo*) to track changes ("diffs" as they are colloquially known) to Supreme Court opinions on the Court's website. (See the 2015 *A Term in the Life of the Supreme Court* for the origin story.) A year later, the Court began publishing the diffs themselves, prompting Zvenyach to retire the account. When the DC Legal Hackers group gave a Le Hackie award to the Supreme Court in recognition for beginning to publish their own diffs, the Supreme Court didn't attend to accept their award, and Zvenyach accepted on their behalf. His acceptance speech noted the sweet joy that came from innovating himself out of a job.

FEBRUARY

Judge Jeffrey White allowed discovery to proceed in *Jewel v. NSA*, regarding the NSA's warrantless surveillance of American citizens. *Jewel* has been a long running case about a fiber optic splitter in AT&T's facilities sending a copy of all internet traffic passing by to the NSA. Rejecting the government's sovereign immunity and state secrets claims, Judge White found that the Foreign Intelligence Surveillance Act controlled instead. The case, origi-

nally filed in 2008, may still face standing challenges as it moves beyond the pleadings stage. • California Attorney General Kamala D. Harris used the release of the *California Data Breach Report* on February 19 to offer a definition of "reasonable" data security from the Center for Internet Security's Critical Security Controls. The controls are a list of twenty recommendations for organizations to implement, ranging from restricting unauthorized software on laptops or phones to automated scans for vulnerabilities or rogue actors within an organization's network. • On February 26, President Barack Obama signed the Judicial Redress Act, considered an important step towards the approval of the E.U.-U.S. Privacy Shield, which allows cross-border data transfers between Europe and the States. The Judicial Redress Act grants some non-U.S. citizens a private right of action for alleged privacy violations. • On February 22, Court Listener launched their new Supreme Court visualization tool, allowing visitors to the SCOTUS Mapping Project website to construct graphs displaying connections between cases cited in Supreme Court opinions. How has the Economic Liberty doctrine evolved between the *Slaughter House Cases* and *Lochner*? Enter your starting and ending cases, choose the type of graph, and the website will render a visualization.

MARCH

The 30th annual ABA Tech Show took place March 16-18 in Chicago, featuring a variety of sessions on legal automation, open data, social media, expert systems, and more. Keynote speaker Cindy Cohn, executive director of the Electronic Frontier Foundation, reflected on the state of computers when she began in the field 25 years ago: "Computers were something that only secretaries had back then." The upcoming 2017 show will feature, for the first time, 12 legal startups building products ranging from time-tracking software to managing pro-bono cases. Many of these startups focus on growing legal tech infrastructure to enable attorneys to work more efficiently. • 2016 saw the new Federal Rules of Civil Procedure take effect, with many wondering what impact they might have on e-discovery cases. In *Brown Jordan Int'l, Inc. v. Carmicle*, a district court applied the new FRCP 37(e)(2) to the case of an employee who destroyed evidence on both personal and work devices in his control. The court found that Carmicle acted with the intent to deprive Brown Jordan of the use of the data in litigation and allowed an adverse evidentiary inference, but refused to grant dismissal of the case or award attorney fees.

APRIL

A new tool for explaining the often dense legalese of online Terms of Service and Privacy Policies launched at tosdr.org. The name is a play on "tl;dr" ("too long; didn't read," a tag which originated on Reddit above summaries of long posts), and while the website does require some reading to make use of it, the site creators have developed an interesting and user-friendly style of display. • The Internet & Jurisdiction multistakeholder policy network launched their *Retrospect Database*, "an open access database to document jurisdictional trends on the internet and inform policy discussions." The cases within the *Retrospect Database* have been specially tagged by issues and actors, allowing interested parties to locate relevant cases of interest. This type of custom search engine also appears in the International Association of Privacy Professionals' *FTC Casebook*, which is a searchable database of FTC actions. The *Casebook* database allows searching by Industry, Remedies, and other attributes. Will these types of small, specialized search engines become more common as various legal niches develop custom tools? • The FTC launched the *Mobile Health Apps Interactive Tool* to guide application developers through the thicket of regulations and laws governing health data. The FTC's web application leads users through a series of questions, such as "Do consumers need a prescription to use your app?" to present a customized list of applicable laws for the application developer. • Data breach litigation stemming from the Sony Pictures 2014 hack settled on April 6. The case, *Corona et al. v. Sony Pictures Entertainment Inc.*, stemmed from a cyberattack allegedly perpetrated by North Korea on Sony Pictures in retaliation for the movie *The Interview*. • On April 21, three nonprofits (National Consumer Law Center, the Alliance for Justice, and the National Veterans Legal Services Program) filed a class action lawsuit alleging that the PACER system was charging too much for access to court documents and preventing public access. PACER launched on the internet in 1998 and charges 10 cents a page for federal court records. The suit alleges that "fees imposed for PACER access" are "excessive in relation to the cost of providing the access . . . higher than 'necessary' to 'reimburse expenses incurred in providing the services' for which they are 'charged'" under 28 U.S.C. § 1913. • Law firm computer security surfaced as an issue to watch in 2016 when 11.5 million files were leaked from the database of the world's fourth biggest offshore law firm, Mossack Fonseca. Whether the firm was hacked or an insider leaked the files, the episode highlights the incredible amount of confidential information that firms guard. Are law firms doing enough to guard client data? Do firms have an ethical obligation to their clients to upgrade their computer security systems and invest in expensive monitoring systems to detect ex-

filtration of data? • Communication can be key during a cybersecurity incident. A North American Electric Reliability Corporation (commonly known as "NERC") Cyber Threat Testing of the Power Grid showed the need for improved communication between incident response teams and law enforcement officials.

MAY

The ROSS AI, newly "hired" at BakerHostetler to assist bankruptcy attorneys, is hailed as the first "artificially intelligent system," and relies on natural language processing ("NLP"). NLP looks to the structure and meaning of text, rather than analyzing activity by users through the use of collaborative filtering, which is a methodology where the actions of many users are analyzed to derive connections between objects and is behind many software recommendation systems (attorneys may be familiar with collaborative filtering through WestlawNext's suggested documents). Although in its current incarnation ROSS is more of a tool than an attorney itself, it raises questions about artificial intelligence and the unauthorized practice of law. Might a system using artificial intelligence be smart enough one day to be guilty of unauthorized practice of law? Will artificial intelligence software be used by non-attorneys seeking legal advice or assistance? • On May 16, the Supreme Court held in *Spokeo Inc. v. Robins* that plaintiffs seeking standing must show injury, through "an invasion of a legally protected interest" that is "concrete and particularized," not just inaccurate data or a statutory violation. • May was a busy month for drones, as the FAA announced its Drone Advisory Committee on May 4 and the U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) released its Drone Best Practices Report on May 19. Traditionally, the FAA has regulated larger aircraft used in general and commercial aviation. The sudden emergence of lightweight autonomous airborne vehicles as popular consumer items has led industry and the FAA to seek solutions to support the safe operation of these vehicles, especially in crowded urban areas. The FAA released their new rules in June under Part 107 of the Federal Aviation Regulations, allowing drone operations by persons without a pilot license. This is likely not the last time that there will be the rapid emergence of a new technology that doesn't quite fit into an existing regulatory scheme. • Algorithmic bias was another emerging field in 2016. Pro Publica published their analysis of a computer algorithm used to predict likelihood of criminals to commit a second crime, and found it to be biased towards harsher penalties for people of color. "When a full range of crimes were taken into account — including misdemeanors such as driving with an expired license —

the algorithm was somewhat more accurate than a coin flip . . . We also turned up significant racial disparities . . . In forecasting who would re-offend, the algorithm made mistakes with black and white defendants at roughly the same rate but in very different ways."

JUNE

On June 2, the U.S. and the European Union signed an Umbrella Agreement to implement a comprehensive data protection framework for criminal law enforcement cooperation. The EU-U.S. Umbrella Agreement protects personal data exchanged between E.U. Member States and the U.S. by establishing guidelines for use, and granting E.U. citizens judicial redress rights in U.S. courts (U.S. citizens could seek redress in European courts even without the agreement). • The creator of "Chatbot lawyer" *DoNotPay*, which has overturned over 160,000 parking tickets and is growing their brand to assist homeless people, spoke with *The Guardian* in June about his creation. Joshua Browder is a self-taught software developer who found the "relatively formulaic" process of appealing parking tickets well suited to mapping legal decision making into software. • Relatedly, the FTC and DOJ joined together in June to endorse legal information websites to aid the public. "Websites that offer this type of interactive software may be more cost-effective for some consumers, exert downward price pressure on licensed lawyer services, and promote more efficient and convenient access to legal services." • DHS and DOJ issued final guidance on the *Cybersecurity Information Sharing Act of 2015* on June 15. The guidelines, in *Receipt of Cyber Threat Indicators and Defensive Measures by the Federal Government,* outline procedures governing the sharing of threat intelligence between the private and public sector, removing personally identifying information, and lay out the automated methods by which companies may share cybersecurity threat intelligence with the government.

JULY

Dynamo Holdings v. Comm'r of Internal Revenue addressed the e-discovery "myth of a perfect response" under Tax Court Rule 70(f), the equivalent to Federal Rule of Civil Procedure 26(g). Ruling on the search terms used for a document production, the court found that FRCP 26(g) "requires the attorney to certify, to the best of their knowledge formed after a 'reasonable inquiry,' that the response is consistent with our Rules, not made for an improper purpose, and not unreasonable or unduly burdensome given the needs of the case. . . . [W]hen the responding party is signing the response

to a discovery demand, he is not certifying that he turned over everything, he is certifying that he made a reasonable inquiry and to the best of his knowledge, his response is complete." • Startup incubator Y Combinator's Summer '16 class was set to include a new legal innovator, Legalist, launching with a new way to search state court records. But within a month, the startup had pivoted to litigation financing, using software to analyze promising cases to back. • The European Commission adopted the E.U.-U.S. Privacy Shield on July 12 to enable cross-Atlantic data flows. Privacy Shield replaces the earlier Safe Harbor protections that were invalidated by the European Court of Justice in 2015. • In London, SeedCamp and Next Law Labs partnered with the Dentons law firm to form the LegalTech accelerator. The project looked for "forward-thinking startups to come in and shake up the space and become the next generation of market-defining companies," and offered funding, training, and mentorship to participants. The first two companies chosen are Libryo and Clause. Libryo planned to focus on building software to help companies understand their regulatory obligations and receive updates on the relevant law, while Clause planned to spend their time on the creation of intelligent contracts.

AUGUST

Starting the month off with another e-discovery case, *Hyles v.City of New York* held that a party could not be required to use Tech Assisted Review ("TAR"), sometimes otherwise referred to as predictive coding, for document production. In deciding the case, Judge Andrew J. Peck wrote "it is not up to the Court, or the requesting party (Hyles), to force the City as the responding party to use TAR when it prefers to use keyword searching. While Hyles may well be correct that production using keywords may not be as complete as it would if TAR were used, the standard is not perfection, or using the 'best' tool, but whether the search results are reasonable and proportional." • In an August write-up of the Harvard Law School's Caselaw Access project, which is digitizing casebooks from the Harvard Law Library, managing director Adam Ziegler explained that the project seeks to increase the distribution of legal knowledge in order to promote access to justice, as well as to spur innovation, "to drive new insights from the law that we've never been able to do when the law was relegated to paper." The project estimated that they will have digitized 40 million pages from 43,000 casebooks before they are done. Zach Bodnar, digitization specialist on the project, shared that the machine which splits the spines of casebooks does so with "more force than a great white shark." • The Ninth Circuit found for AT&T after the FTC asserted "two claims against AT&T under section 5 of the

FTC Act, pursuant to which the FTC may 'prevent persons, partnerships, or corporations, except . . . common carriers subject to the Acts to regulate commerce . . . from using . . . unfair or deceptive acts or practices in or affecting commerce.'" In its opinion in *FTC v. AT&T Mobility LLC*, the court found that "The common carrier exemption in section 5 of the FTC Act carves out a group of entities based on their status as common carriers. Those entities are not covered by section 5 even as to non-common carrier activities. Because AT&T was a common carrier, it cannot be liable for the violations alleged by the FTC." • The American Bar Association's Commission on the Future of Legal Services released its 2016 Report with a survey of the current state of legal services delivery. The report contained recommendations from the Commission, some sweeping ("the criminal justice system should be reformed") and some more targeted ("all members of the legal profession should keep abreast of relevant technologies"). The Commission offered hope that practitioners would "pay particular attention to technology that improves access to the delivery of legal services and makes those services more affordable to the public." Commenting on the report, *Above the Law* criticized the composition of the Commission for not being nerdy enough, writing "without the active participation of technology innovators, entrepreneurs, and leaders, how can you hope to make recommendations on delivering the future of legal services?" • As new search tools develop, should we begin to think about research in new ways? In a provocative new paper, *New Wine in Old Wineskins: Metaphor and Legal Research*, Amy E. Sloan and Colin P. Starger wrote "[w]ords can facilitate our thoughts, but so too can they calcify our thinking . . . . When a primary challenge of research was physically gathering hidden and expensive information, metaphors based on journey, acquisition, and excavation helped make sense of the research process. But new, technologically-driven search methods have burst those conceptual wineskins." Recommended to any readers interested in the intertwining of legal theory and technological innovation. • The Congressional Research Service is tasked with supporting the special needs of Congress by, among other duties, developing research reports for Congressional staff. These reports have been available piecemeal from a variety of unofficial sources in the past. Stepping in to make a full set of the reports available to the public, everycrsreport.com launched in August. The site is searchable and offers bulk downloads and JSON (a.k.a. machine readable structured text) feeds with title, summary, and topic information for each report. • While many law reviews publish articles on their websites, little about the practice is standardized. Sarah Glassmeyer studied 591 student-edited law journals to determine how many published their articles online, what for-

mats they presented the content in, and how open the content was. She explained, "My personal definition of Open Access includes the rights of users to remix and reuse content — *libre* access, not just *gratis* access in the lingo used." Her results are available online in the "How Free & Open are Law Journals?" report on sarahglassmeyer.com.

SEPTEMBER

In a ballot selfie case before the First Circuit, *Rideout, Langlois, and Ross, v. Gardner*, amicus curiae, Snapchat, filed a brief with a footnote offering a broad definition of a selfie as "a photo where the photographer is also a subject. But the term has also been used to describe all smart-phone pictures shared online, including those here." The explanation made it into footnote two in the court's opinion, and was picked up by Sean Marotta on Twitter, who shared the footnote with the caption "One of my favorite footnotes I've written, defining 'selfie' for Article III judges, made the final opinion." • The ABA launched a free virtual legal advice clinic on September 22, offering a chance for low-income users to ask non-criminal law questions of pro bono attorneys. The ABA hoped that the online format's flexibility would boost participation. • Does learning to code make you a better lawyer? An article under that title in the *ABA Journal* explored some ways in which software development skills assist attorneys. Paul Ohm, who teaches a *Computer Programming for Lawyers* class at Georgetown University that was covered in this article, hopes that the students' new skills will be useful "in a profession that is increasingly data driven." • Meanwhile, posting on the Lawfare Blog on September 26, Paul Rosenzweig asked *Do Lawyers Understand Technology?* and posited the inverse as well, "[m]ost technologists don't understand law and policy." The post prompted a spirited debate on Twitter about the level of expertise needed by attorneys working in areas involving technology. • Also on September 26, the Free Law Project shared some progress on their search tool for PACER, fed by documents that come from the RECAP browser plugin. To be searchable, all the text in their archive must first be cataloged and in a format that computers can parse. Optical Character Recognition ("OCR") is used to find and generate text from image format files, such as pages containing handwritten content, briefs written in cursive, or typed forms that overlap lines on the page. The Free Law Project's blog showed examples of both of these types of work, which their software had to tackle to extract the document text. • On September 29 Florida became the first state to make tech CLEs mandatory. Starting in 2017, lawyers admitted to the Florida Bar will take three hours of technology-related CLEs in each three-year cycle. The Florida Supreme Court also noted that attorneys could

retain non-lawyer advisers with "established technological competence" to assist in providing competent representation in areas involving cybersecurity and protection of sensitive data.

OCTOBER

Recognizing the "proliferation and widespread adoption of cloud computing solutions," the Department of Health and Human Services released their cloud computing guidance on October 6. The guidance makes cloud services providers, as business associates, directly liable for misuse or breaches of health information. • On October 10, the Royal Swedish Academy of Sciences granted the Nobel Prize in Economics to Oliver Hart and Bengt Holmström for their work on contract theory. Their research investigated the optimal allocation of control rights in a contract, given that it is impossible for any contract to specify every possible outcome. • A team of computer scientists at University College London published *Predicting Judicial Decisions of the European Court of Human Rights: A Natural Language Processing Perspective*, in the journal PeerJ Computer Science on October 24. The paper presented a predictive model that is capable of guessing the outcomes of European Court of Human Rights cases with 79% accuracy. The scientists hoped their model would prove useful in "rapidly identifying patterns in cases that lead to certain outcomes." • Georgetown Law's Center on Privacy & Technology released their Perpetual Line-Up project on October 18, wrapping up a yearlong effort to collect records from police departments on facial recognition and analyze the existing laws and regulations governing the use of biometric data. Researchers requested records from 106 state and local law enforcement agencies in the U.S., and received "substantive" responses from 90 agencies. The records and extended phone interviews formed the basis of the Perpetual Line-Up report, which included a Face Recognition Scorecard as well as an analysis of accuracy and transparency issues in the use of facial recognition by domestic law enforcement agencies. • Does a corporate IT policy to monitor email affect the attorney-client privilege? A court in New York found that the answer could be yes. The court held that Disney's policy of monitoring employee emails meant that Ike Perlmutter, the chairman of Marvel Entertainment, did not have a "reasonable expectation of privacy" in emails he sent from his work account, thus waiving the attorney-client and work-product privileges. • Although limited to foreign defendants at the moment, a federal court allowed service of process via Twitter under FRCP 4(f)(3), citing the defendant's "active Twitter account," and failure to serve him via other methods. The case, *St. Francis Assisi v. Kuwait Fin. House*, allowed for the use of a social media platform to contact

the defendant as an alternative to more traditional means of service. Unfortunately, FRCP 4(f) covers only international service, so #legaltwitter, please hold your memes and animated gifs for now.

NOVEMBER

Will "robot lawyers" be a big trend in legal technology? In *Law Technology Today*, Nicole Black noted that AI software could "supplement" some attorney skills, but automation within the legal industry would likely follow larger trends by making inroads in areas involving repetitive and simple tasks. Black offers tracking and billing time as an area ripe for automation and innovation, and as users of timekeeping software currently available, we agree and hope it arrives quickly. • On November 20, members of the Asia-Pacific Economic Cooperation ("APEC") group reaffirmed the implementation of the APEC Cross-Border Privacy rules. The rules are a regional cross-border privacy protective framework. • Meanwhile on Twitter, inside baseball comments from past SCOTUS insiders continued to entertain and inform us. Lawrence Tribe (a former Justice Potter Stewart clerk) tweeted on November 27 about the *Katz v. United States* opinion and a lawyer's role. In response to a tweet by *@ArsLaw* that discussed the attorney who argued *Katz* before the Supreme Court, Tribe shared, "As the law clerk who drafted that decision for Justice Stewart I can vouch for the vital role this advocate played." • The Wisconsin State Bar named Colleen Ball a Lifetime Innovator as part of the 2016 "That's a Fine Idea: Legal Innovation Wisconsin" awards. Ball's most recent project was to set up the Appellate Help Desk for pro se civil claimants seeking help with appeals before the Wisconsin Court of Appeals. Ball noted that the "appellate process is befuddling and intimidating" to pro se litigants, causing many to give up their claims because they can't figure out the best steps to take to have their case heard. The virtual helpdesk features volunteer attorneys answering questions regarding appellate procedure over email, by SMS, or over the phone through Google Voice. The virtual nature of the helpdesk allows volunteer attorneys anywhere in the state to assist litigants who similarly may be scattered around Wisconsin.

DECEMBER

Ravel Law announced their State Court Analytics research tool on December 5. Ravel, which has been pairing with Harvard Law School on their casebook digitization project, launched their Judge Analytics project last year. The *Wall Street Journal* calls analytics tools like these "moneyball for

judges." • Police in Bentonville, Arkansas served Amazon.com with a warrant seeking voice recordings from an Amazon Echo device inside a home where a murder allegedly occurred. The case raised questions about the privacy implications of smart home devices. Police in this case have already used timestamped data from a water meter to show high usage over the night in question, suggesting that the data indicates that there may have been a cleanup effort to wash away evidence in the home that night. • A change to the Federal Rules of Criminal Procedure Rule 41 granted the DOJ the ability to seek warrants for search and seizure of electronic devices when the location has been masked ("concealed through technological means"), as when a location masking service such as Tor is used, or if the case involves computers in more than five districts. Critics fear that the rule change granted the FBI greatly expanded mass hacking powers. • In what U.S. Attorney Preet Bharara called "a wake-up call for law firms around the world," three Chinese hackers were indicted for stealing law firm credentials and using them to access internal emails. The information was used in an insider-trading scheme that is alleged to have reaped $4 million.

JANUARY

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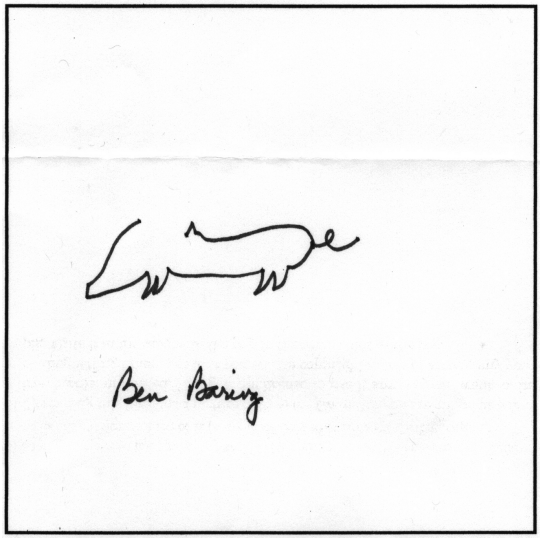
GREEN BAG PIG FORM



Pig. Drawn by Ben Baring with eyes closed. Why? See 2016 Green Bag Alm. 537.

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FIVE RECOMMENDATIONS

Lee Epstein[†]

Michael J. Graetz & Linda Greenhouse
The Burger Court and the Rise of the Judicial Right
(Simon & Schuster 2016)

Toward the end of the Burger Court years, Justice Lewis Powell declared, "There has been no conservative counterrevolution" in his Court — and commentators seem to agree. The tamely titled *The Burger Court: The Counter-Revolution that Wasn't* is the most prominent volume about the era. Not so fast, say Graetz and Greenhouse. True, the Burger Court didn't overrule *Miranda* and *Mapp*; it only eviscerated them. And true, the Burger Court established the fundamental right to abortion — but then allowed the government to place many burdens on it. Along the way, the Burger justices paved the wave for *Citizens United* in *First National Bank of Boston v. Bellotti*, protected commercial speech, required proof of an actual purpose to dis-

[†] Ethan A.H. Shepley Distinguished University Professor, Washington University in St. Louis.

criminate, rewound Warren Court decisions favoring unions against business, and on and on. The counter-revolution that wasn't, well, was. Even if you aren't convinced by Graetz and Greenhouse's thesis, *The Burger Court* is a great read: all the (well-told) behind-the-scenes stories, and all the reminders of things past — including a Court whose key players didn't all come from the federal appellate bench or receive law degrees from Harvard or Yale but did serve in the military, win political elections, play professional sports, and even "flirt" with journalism.

Nancy Maveety
Picking Judges
(Transaction Publishers 2016)

Speaking of Linda Greenhouse: Five years ago she contributed an excellent volume on the U.S. Supreme Court to Oxford's *Very Short Introduction* series (not just short but very small too!: 7x4); I recommend it regularly. Maveety's book is in the same vein. It too is concise; and it too is a book I'll recommend. But not because I like how the press framed it: as a "presidential briefing book" designed to offer strategic advice to presidents confronted with obstructionist senators. That's a little hokey. The book's strength rather lies in Maveety's ability to boil down and analyze the vast literature on the appointment of federal judges. Well showing off that skill is Chapter 1, where Maveety charts the history of appointments, delineating various mileposts along the way. Those who think "the confirmation mess" started with Bork will be surprised to learn of the truly vicious battles of earlier eras; and those who treat Bork as the culmination of a trend long in the making are also in for some surprises — notably the huge structural break his nomination caused.

Ryan C. Black, Ryan J. Owens,
Justin Wedeking & Patrick C. Wohlfarth
U.S. Supreme Court Opinions and their Audiences
(Cambridge University Press 2016)

To many legal academics, political scientists are simpletons. We reduce vast swaths of law to little more than dichotomies: the court affirmed or reversed, the judge voted in the liberal or conservative direction, the business party won or lost, and on and on. I plead guilty as charged. But the authors of this book: not so much. Rather than focus on the usual bottom line of opinions, they study opinion content. The central idea is that Supreme Court justices write more (or less) clear opinions to boost support for their decisions. Not all lawyers will like Black et al.'s approach and measures, but most will appreciate their effort to take a systematic look at the Court's major

work products. As for my colleagues in political science: *U.S. Supreme Court Opinions* is a great start; it's just the kind of original thinking our corner of the discipline so desperately needs.

Susan B. Haire & Laura P. Moyer
Diversity Matters: Judicial Policy Making in the U.S. Court of Appeals
(University of Virginia Press 2016)

Yet another exception to the political-scientists-as-simpletons rule — though not in the first few chapters. There the material is kinda standard fare in my field: Are black judges more likely to find for plaintiffs in cases of race-based employment discrimination, and are female judges more plaintiff-friendly in gender discrimination litigation? (Yes and yes.) But from there the book lives up to its title, taking some interesting turns. We learn that opinions written by female judges are more likely to a seek a "middle ground" and that the more diverse the panel, the more thorough the deliberative process. There are circuit effects too — for example, the larger the fraction of female judges, the lower the dissent rate (perhaps reflecting their taste for middle ground). Some of the findings seem predictable; some unexpected. Either way, *Diversity Matters* pushes us to think beyond the simple vote dichotomies that have long ruled empirical work in this field.

Yuhua Wang
Tying the Autocrat's Hands
(Cambridge University Press 2016)

I believe in the power of graphs, and the one on page 2 is a good example of why. On the horizontal axis is a measure of the degree of democracy in 157 countries; the vertical axis shows rule-of-law scores for each country. If you can visualize that, you'd probably think that the relationship between the two is linear: the higher the level of democracy, the stronger the rule of law. You'd be wrong. Yes, the rule of law tends to be stronger in democracies but in some authoritarian regimes it's strong too and in others, weaker. In other words, this simple graph raises great questions: Why do some authoritarian leaders advance the rule of law, and how do they do it without losing power? Focusing on China (though with implications for many authoritarian regimes), Wang's answer centers on the interest of rulers in "tying their hands" in the commercial context. Somewhere the late great Doug North and the noted political scientist Barry Weingast are smiling. Drawing on evidence from 17th century England, they made a version of this argument years ago. It's apparently held up quite well.

FEBRUARY

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GREEN BAG PIG FORM

Pig. Drawn by Ross Campbell with eyes closed. Why? See 2016 Green Bag Alm. 537.

March

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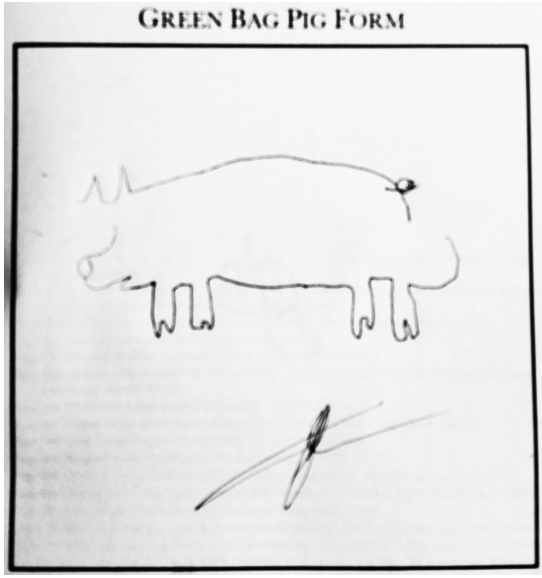

Pig. Drawn by Timothy Delaune with eyes closed. Why? See 2016 Green Bag Alm. 537.

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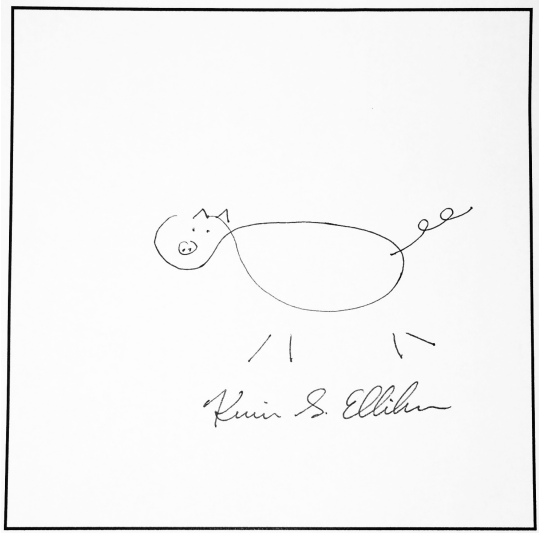
Green Bag Pig Form



Pig. Drawn by Kevin Elliker with eyes closed. Why? See 2016 Green Bag Alm. 537.

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FIVE RECOMMENDATIONS

Femi Cadmus[†]

Richard A. Posner
Divergent Paths: The Academy and the Judiciary
(Harvard University Press 2016)

In *Divergent Paths*, Judge Posner reflects, from his firsthand perspective as a federal judge and former law professor, on the widening gulf between academia and the bench. He discusses the challenges and deficiencies of the judiciary and the extent to which the legal academy could ameliorate or provide improvement. At the same time, he acknowledges that the current writings of law faculty about the judiciary are not always particularly useful to the bench and the legal academy supplies law clerks lacking adequate preparation to provide helpful insights to judges. Change, he observes, may come from the outside with the call for more practice-ready law graduates but challenges

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[†] Edward Cornell Law Librarian, Associate Dean for Library Services, and Professor of the Practice, Cornell Law School.

will continue to persist because of the entrenchment of traditions both in the judiciary and in law schools which may hinder significant changes.

Ruth Bader Ginsburg
My Own Words
(Simon and Schuster 2016)

This first and engaging personal biographical account by Justice Ginsburg is crafted through her own words as conveyed in speeches, legal briefs, and law journal articles, with accompanying narratives from her two authorized biographers. The biography covers her journey from childhood through college, to her work as a law professor and on the bench. Also included are tributes to those who influenced her career, and reflections on her fondness for opera, the lighter side of life on the Supreme Court, and more serious issues like gender equality and judging and justice.

Nicole Dyszlewski & Raquel Ortiz,
with illustrations by Liz Gotauco *What Color is Your CFR?*
(CALI eLangdell Press 2016)

Books on legal research are almost never of the coloring book variety. In *What Color is Your CFR?* the authors, two law librarians and an illustrator, take a decidedly non-traditional approach on how to research the law. Whimsical animal drawings and accompanying text cover the basic essentials of legal research, including how to find relevant primary and secondary sources of the law. Humorous and serious at the same time, the coloring exercises end with advice on connecting with the ultimate legal information resource: "How to Contact a Law Librarian."

Kevin Ring
Scalia's Court
(Regnery Publishing, 2016)

A selection of memorable opinions by the late Justice Antonin Scalia, which the author acknowledges are not necessarily the most important, but rather what he describes as "the most powerful, colorful and entertaining opinions ever written by an American jurist." Scalia's judicial philosophy, specifically his textualist and origin-alist approach, are analyzed in the introductory chapter. Ensuing chapters cover Scalia's opinions relating to a variety of subjects including race, abortion, gun rights, death penalty, illegal immigration, and sexual equality. A brief historical and constitutional background of each case with highlights of Scalia's perspectives precedes a full text of the

opinion. The book concludes with quotes from colleagues on the Supreme Court, constitutional scholars, and critics.

Paul W. Kahn
Making the Case: The Art of the Judicial Opinion
(Yale University Press 2016)

Kahn discusses the essential skills vital to the preparation of students to become successful lawyers. Students must be able to analyze the full text of opinions and not merely rely on excerpts from casebooks. In order to develop a persuasive case, the entire legal opinion must be examined because the law is contextual, embedded in the facts, and does not exist in the abstract as legal doctrine. He also discusses other issues of interest to scholars and students alike, including legal opinions as self-govern-ment through the law, the role of narrative and voice, and the development of doctrine.

May

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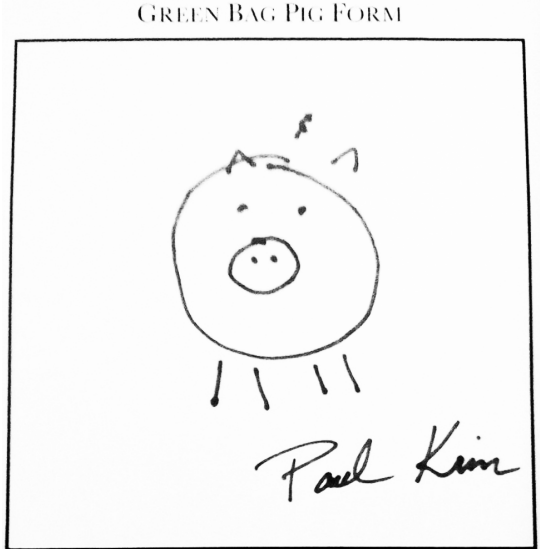

Pig. Drawn by Paul Kim with eyes closed. Why? See 2016 Green Bag Alm. 537.

June

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GREEN BAG PIG FORM

Pig. Drawn by Jack Metzler with eyes closed. Why? See 2016 Green Bag Alm. 537.

July

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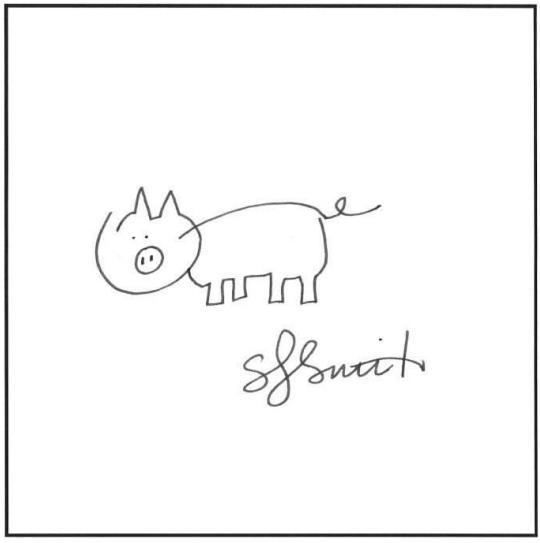

Pig. Drawn by Sutton Smith with eyes closed. Why? See 2016 Green Bag Alm. 537.

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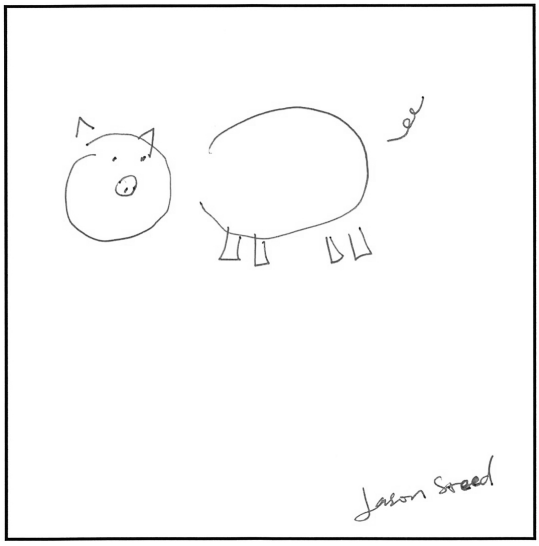

Pig. Drawn by Jason Steed with eyes closed. Why? See 2016 Green Bag Alm. 537.

September

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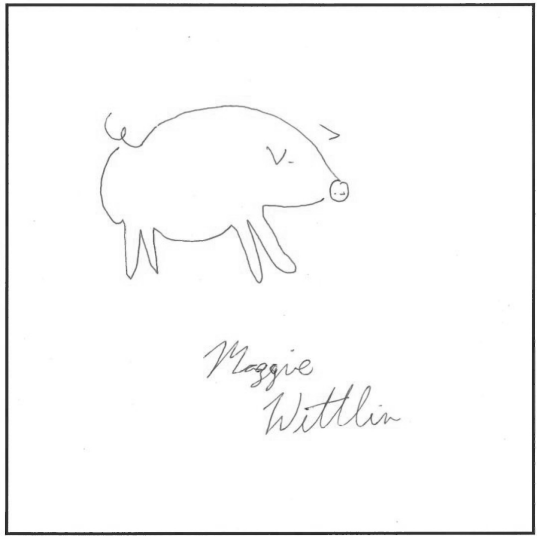

Pig. Drawn by Maggie Wittlin with eyes closed. Why? See 2016 Green Bag Alm. 537.

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FIVE RECOMMENDATIONS

Cedric Merlin Powell[†]

Justin Krebs
Blue In a Red State: The Survival Guide to Life In the Real America
(The New Press 2016)

Shattering prevailing political conventions and traditional conceptions of American democracy, a billionaire populist was elected the 45th President of the United States. The true irony is that an electoral majority voted for a candidate who may be directly opposed to their interests. Not many saw this political seismic blast coming, but there were many important political, cultural, and social cues that were obscured or ignored. Justin Krebs unpacks these undercurrents in the American polity.

Canvassing the United States, Krebs offers a compelling and original view of a diverse, complex, and contradictory landscape of the American political psyche. This unique book reads like a long-form essay with powerful

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[†] Professor of Law and Associate Dean for Research and Faculty Development (2015-17), University of Louisville Brandeis School of Law.

narratives voiced by citizens who live in places as disparate as Tuscaloosa, Alabama, Milford, Massachusetts, and Idaho Falls, Idaho. What is striking about this book is that it illustrates the futility of labels based on place, race, or social status. The real question, which remains unanswered, is how do we reach across these lines to find the commonality that unites us all as Americans? *Blue in a Red State* offers an important place to start this fragile and complex unification.

Steve Phillips
Brown is the New White: How the Demographic Revolution Has Created a New American Majority
(The New Press 2016)

Advancing a bold and comprehensive critique of the progressive movement, Steve Phillips gives an insightful analysis of the limitations inherent in the current colorblind political strategy that is designed primarily not to alienate White swing voters. This ostensibly neutral strategy is doomed to failure, Phillips argues, because it overlooks the New American Majority, a citizenry of color that "numbered more than 104 million people in 2008." It is this demographic revolution, as Phillips terms it, which was the foundation of the Obama coalition that won the presidency in 2008 and 2012.

In an eerily prescient passage, Phillips all but predicts the improbable demise of the Democratic Party in the 2016 Presidential Election: "Too often, people in power in the progressive movement in general and the Democratic Party in particular have not seen the New American Majority as a political force to advance a progressive agenda and expand the terms of debate. Instead, they tend to see people of color and progressive Whites as nuisances who need to be silenced for fear of alienating White swing voters." As political commentators strain to rationalize President-Elect Trump's hateful rhetoric as mere hyperbole to advance the cause of forgotten White citizens, Phillips' authoritative book proffers facts, figures, and piercing analysis to rebut the alluring appeal of post-racial populism. Our transformative demo-graphics should be a gift to the promise of America; Phillips compellingly illustrates how inclusion is the key to the future of the American polity.

Susan E. Eaton
Integration Nation: Immigrants, Refugees, and America at Its Best
(The New Press 2016)

Building upon her previous work on busing and school desegregation, Susan E. Eaton provides a comprehensive and evocative analysis of the American identity and immigration in *Integration Nation*. Engaging diverse

communities across the country, this book connects the rapidly transforming demographics of America to a social and political conception of inclusion. The choice of integration over exclusion is at the very core of American history and culture, and this book provides a powerful counter-narrative to the prevailing discourse of fear, hatred, and exclusion; America is at its best when it embraces the multiplicity of its diversity to form a pluralistic society of inclusion.

There is an important conversation that is taking place across America in small communities, away from the politically tinged rhetoric of "protecting our borders" and "preserving American values." What these community stories represent is the choice of citizens across the country to embrace inclusion. *Integration Nation* is an important contribution to discussions on race because it lays bare the many obstacles that block the discussion — much as the rhetorical obstacles that are deployed to the "Other" in discussions of immigration policy — and offers an approach to breaking down the barriers of exclusion through the choice of inclusion as an American value.

Michael D. White & Henry F. Fradella
Stop and Frisk: The Use and Abuse of a Controversial Policing Tactic
(New York University Press 2016)

Terry v. Ohio is a seminal decision in American constitutional criminal procedure jurisprudence. It stands for the proposition that a police officer may lawfully initiate an encounter with a person on the street based upon reasonable articulable suspicion. The difficulty has been how to define this standard so that there is a constitutional balance between effective law enforcement and limitless intrusions on a citizen's constitutional rights. This issue is at the core of current public discourse and Justice Department investigations about the use of excessive force against people of color.

In the first comprehensive historical, legal, and sociological analysis of stop, question, and frisk (SQF), White and Fradella posit a thoroughly insightful critique of SQF as a policing tactic. New York City is often heralded as being resurrected through effective policing that dramatically reduced crime in its five boroughs. White and Fradella unpack this misleading urban myth to illustrate that not only has SQF been disproportionately misused, it also has not contributed significantly to the dramatic drop in crime in New York City. This book will be a canonical work because it links the New York City SQF tactical experience to other cities like Philadelphia, Baltimore, and Chicago to underscore strategic commonalities and differences; it reconceptualizes SQF as a tactic focused on the deterrence of crime; and it explores how racial injustice, such as stereotypical profiling, has been a promi-

nent feature of policing. What is particularly valuable is the authors' careful discussion of how SQF can be used with appropriate constitutional limits, clearly defined police discretion, and sensitivity to citizens' constitutional rights and concerns.

Richard A. Rosen & Joseph Mosnier
Julius Chambers: A Life in the Legal Struggle for Civil Rights
(The University of North Carolina Press 2016)

This long overdue biography of Julius LeVonne Chambers, a pivotal figure in American constitutional law jurisprudence and the struggle for civil rights, will be an essential historical text in chronicling the legal campaign to dismantle structural inequality. What is unique and powerful about this book is that it integrates a legal and historical perspective relying upon the expertise of Richard Rosen, a law professor, and Joseph Mosnier, a historian. Combining their divergent and complementary perspectives, Rosen and Mosnier present a well-researched blend of social science, historical narrative, and primer of social change through the life, times, and struggles of Julius Chambers.

Chambers' sterling legal career is a cavalcade of firsts: he was the first African-American editor-in-chief of the prestigious *North Carolina Law Review*, graduating first in his class; in 1963, he was the NAACP Legal Defense and Education Fund's (LDF) first civil rights intern; he founded the first integrated law firm in North Carolina; and twenty-one years after his LDF internship, he would succeed Jack Greenberg to become LDF's third counsel-director, following in the footsteps of its first counsel-director, Thurgood Marshall. The book firmly establishes Chambers as one of the great Supreme Court practitioners of the twentieth century by highlighting his major wins before the high Court. For example, the 1971 case of *Swann v. Charlotte-Mecklenburg Board of Education*, a landmark decision in which the Court embraced the broad equitable powers of federal courts in fashioning desegregation remedies in public school systems, is treated in great depth to illustrate not only its jurisprudential and societal significance, but Chambers' central role in securing this transformative victory. Unfortunately, some of Chambers' most impactful victories, like *Swann*, have given way to retrogression as schools become re-segre-gated throughout the nation. This book is invaluable as documentary evidence of the illusiveness of substantive equality; it is a true testament to Chambers' life in the legal struggle for civil rights.

OCTOBER

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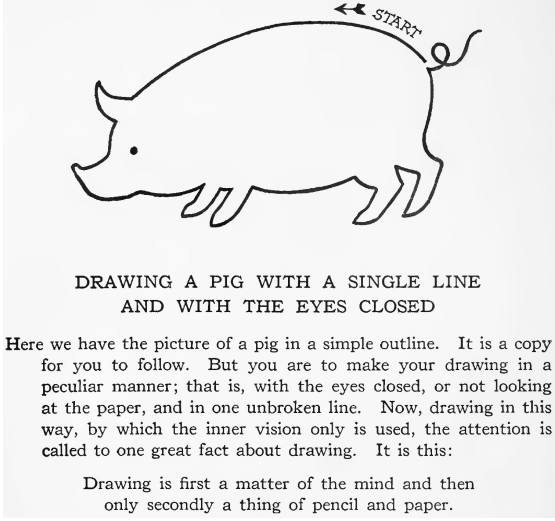

DRAWING A PIG WITH A SINGLE LINE
AND WITH THE EYES CLOSED

Here we have the picture of a pig in a simple outline. It is a copy for you to follow. But you are to make your drawing in a peculiar manner; that is, with the eyes closed, or not looking at the paper, and in one unbroken line. Now, drawing in this way, by which the inner vision only is used, the attention is called to one great fact about drawing. It is this:

Drawing is first a matter of the mind and then only secondly a thing of pencil and paper.

From E.G. Lutz, Drawing Made Easy 48

EXEMPLARY LEGAL WRITING 2016

• BOOKS •

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RESPECTABLE AUTHORITIES

(SEE ALSO PAGES 170, 176 & 184)

FIVE RECOMMENDATIONS

Susan Phillips Read[†]

Guido Calabresi
The Future of Law and Economics: Essays in Reform
(Yale University Press 2016)

I was shocked to discover that Guido Calabresi began drafting his first major contribution to the field of the law and economics in 1956-57, when he was still just a student at Yale Law School. In this series of short and lucid essays, Judge Calabresi, now senior judge on the United States Court of Appeals for the Second Circuit, sums up his nearly 60 years of subsequent thinking about the relationship between economic theory and the legal system. He divides law and economics scholars into two camps: Economic Analysis of the Law, whose advocates use economic theory to analyze aspects of the legal world and, where they find a lack of fit, consider the law to be "irrational" and argue for reform; and Law and Economics, whose supporters, amongst whom he counts himself, consider whether economic theory

[†] Of Counsel, Greenberg Traurig, LLP; Associate Judge (ret.), New York Court of Appeals.

can explain the legal world as it is and, where it cannot, ask if traditional economic principles may be expanded enough without distortion to explain why this is the case. Judge Calabresi's book is a must-read for anyone interested in acquiring a deeper understanding of one of the most vibrant fields of legal scholarship of our lifetimes.

Adam Cohen
Imbeciles, The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck
(Penguin Press 2016)

Most of us probably remember only one thing about the United States Supreme Court's 1927 decision in *Buck v. Bell*: Mr. Justice Holmes's declaration that "Three generations of imbeciles are enough." The decision, which held that a Virginia statute permitting involuntary sterilization of certain mentally defective inmates of state-supported institutions did not violate the Fourteenth Amendment, cleared the way for the sterilization of Carrie Buck. Born into poverty in Charlottesville, Virginia in 1906, Carrie Buck was taken into a foster family at the age of four and attended grade school, where she successfully completed the sixth grade. At that point, Carrie Buck's foster family pulled her out of classes, probably to free her up to perform more housework for them and to hire her out during the day for paid housework for neighbors. Then Carrie Buck became pregnant at the age of 17, likely as a result of a rape committed by her foster mother's nephew. Given the stigma of out-of-wedlock childbirth and the nonconsensual circumstances of this particular pregnancy, the foster family was only too eager to get rid of their foster daughter, who was in short order adjudged to be feebleminded or epileptic and shipped off to the state-run Colony for Epileptics and Feeble-Minded in Lynchburg, Virginia. There, she unfortunately attracted the attention of the colony's superintendent, a true believer in the "science" of eugenics, who was looking to set up a test case to validate Virginia's new eugenic sterilization law and establish a national precedent at a time when most state courts were refusing to uphold these kinds of statutes. Weaving together biographies of Carrie Buck, the colony's superintendent, its lawyer, its eugenic sterilization expert, and Holmes, the author paints a vivid portrait of a miscarriage of justice perhaps best understood as the product of the genuine although wholly misguided fear that eugenic measures were necessary to save the nation from being "swamped with incompetence."

Charles F. Hobson
The Great Yazoo Lands Sale: The Case of Fletcher v. Peck
(University Press of Kansas 2016)

Published as part of the University of Kansas's estimable *Landmark Law Cases and American Society* series, this book tells the story of the Yazoo lands sale and the litigation that it spawned. In 1795, the State of Georgia sold its western territory, encompassing most of present-day Alabama and Mississippi, to four land companies. Reacting to obvious signs of bribery and corruption in the sale of these lands, commonly called "Yazoo" after the river that later figured prominently in the Vicksburg campaign of the Civil War, a newly elected Georgia legislature in 1796 revoked the sale and all contracts made under it, and reclaimed the territory. Then in 1802 Georgia ceded the Yazoo lands, still mostly inhabited by Native Americans, to the United States. Of course, by this time the companies had long since sold Yazoo tracts to numerous third-party purchasers, many of them New Englanders who doggedly and simultaneously pursued redress in Congress and the federal courts. These purchasers ultimately obtained a partial indemnity from Congress in 1814, but key to their lobbying success was the United States Supreme Court's 1810 decision in *Fletcher v. Peck*. There, the Court for the first time applied the still new Constitution (the contract clause) to invalidate state legislation (the 1796 Georgia statute). The author, the longtime editor of *The Marshall Papers*, masterfully blends the Yazoo saga in all its delicious detail (shortly after the Georgia legislature rescinded the 1795 statute, the official record of this "usurped act" was burned in a carefully choreographed public ceremony in the state-house square; John Quincy Adams agreed to represent Peck in the high court after two months of negotiation to set an acceptable fee; oral argument was twice postponed because of the unexplained absence of Fletcher's able lawyer, nicknamed "Lawyer Brandy Bottle") with his observations about the Marshall Court's treatment of the contract clause, the primary constitutional restraint on state interference with vested property rights before this role was largely taken over by the Fourteenth Amendment.

Michael J. Klarman
The Framers' Coup: The Making of the United States Constitution
(Oxford University Press 2016)

This book presents a richly detailed and thoroughly accessible account of the why and how of the Constitution's making, the contest over ratification, and the creation and adoption of the Bill of Rights. While these topics are

hardly unexplored in the vast legal and historical literature devoted to the Founding Era, this volume surely ranks at or near the top of the class. In general, the author unspools the story of the Constitution's creation through the participants' own words without much in the way of editorializing. He does, however, admit to a desire to demythify the Framers, who "although extremely impressive . . . were not demigods" but rather, like all human beings, "had interests, prejudices, and moral blind spots. They could not foresee the future, and they made mistakes." He also provocatively portrays the Framers (and Madison in particular) as thorough-going elitists who, in a sense, miraculously got away with incorporating many anti-democratic features in the Constitution (hence the "coup" of the book's title).

Gillian Thomas
Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work
(St. Martin's Press 2016)

The section dealing with equal employment opportunity in the bill that would become the 1964 Civil Rights Act originally prohibited discrimination "because of" race, color, religion, and national origin. On the last day of debate on the bill in the House of Representatives, Congressman Howard W. Smith, an 80-year-old avowed segregationist from Virginia, offered an amendment to insert the word "sex" after the word "religion." One of his (few) female colleagues, sought to boost the amendment's prospects by warning that without it, the bill conferred more rights on black women than on white women. Whatever Smith's motives, which the author says are argued about to this day, his "little amendment" passed the House by a vote of 168 to 133 and survived in the Senate. And so it came about that among the 1964 Civil Rights Act's provisions was a ban on employment discrimination "because of sex." Each of this book's 10 chapters profiles a single case in which the United States Supreme Court fleshed out what this unadorned phrase meant for women dealing with various real-life workplace dilemmas defined by their sex. The book's special charm lies in the behind-the-scenes narratives of the individual plaintiffs' and their lawyers' struggles and strategies, and its portrayal of the plaintiffs' lives in the aftermath of their Supreme Court victories.

November

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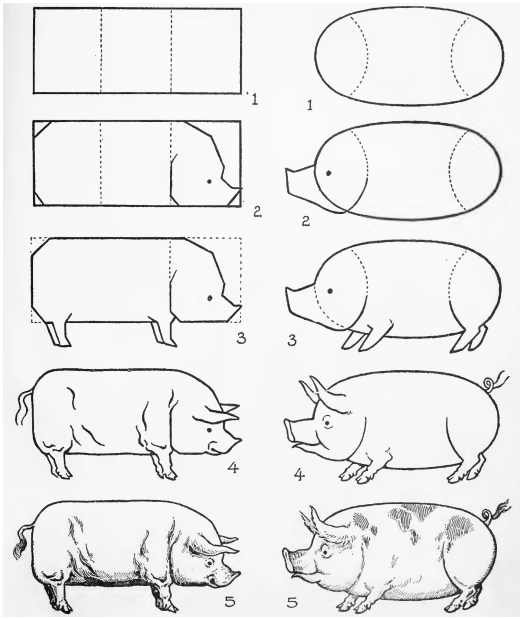

From E.G. Lutz, Drawing Made Easy 49 (1921).

December

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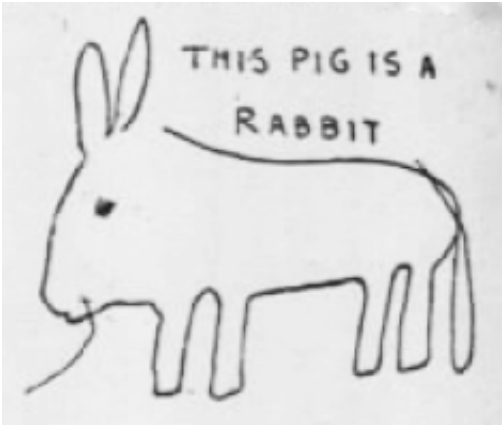

From Chicago Tribune, Feb. 23, 1896, at 26.

TRANSCRIPTS

Thurgood Marshall Nominated to Supreme Court (June 13, 1967)

Music: In the introduction, and in the background throughout.

Commentator (Peter Roberts): Historians will note this hour at the White House. In a Rose Garden ceremony, a 58-year-old great-grandson of a slave is nominated by President Johnson to be a Supreme Court Justice. He is Solicitor General Thurgood Marshall, acknowledged the best-known Negro lawyer of the century. The President also calls his nominee "best qualified."

U.S. President Lyndon Johnson: I have just talked to the Chief Justice and informed him that I shall send to the Senate this afternoon the nomination of Mr. Thurgood Marshall, Solicitor General, to the position of Associate Justice of the Supreme Court made vacant by the resignation of Justice Tom C. Clark of Texas.

Commentator (Peter Roberts): Thus, the highest court in the land, with the vacancy owing to the stepping down of Justice Clark, has named to its august body Thurgood Marshall, the first of his race so honored.

A Story Without Words: The Yankee Cop (1897)

No transcript. Silent original.

CREDITS

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Exemplary Legal Writing

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Pigs

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