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# New York Law School



# IN BRIEF

## LeFrak Fund Established

Each year the Fund for Higher Education presents its coveted "Flame of Truth Award" to a leader in business, government or education in recognition of service to society, the advancement of knowledge and significant individual achievement.

New York Law School Trustee Samuel J. LeFrak was the Fund's 1986 honoree, chosen for his exemplary role in civic and philanthropic causes and his major accomplishments in the real estate industry. Dr. LeFrak, who recently marked his 15th year of service on the Law School's Board of Trustees, generously chose to designate New York Law School as the beneficiary of dinner proceeds. Through the Fund for Higher Education, New York Law School will receive approximately \$125,000 to establish the Samuel J. LeFrak Fund. In addition, Dr. LeFrak will match the final proceeds with a personal contribution.

Nearly 700 of Dr. LeFrak's colleagues and friends gathered at the Fund's tribute dinner held for him at the New York Hilton in October. In his remarks prior to receiving the award, he sharply criticized "the growing web of regulatory agencies and legal tap-dancing we face today." Such over-regulation, he argued, builds into the system of government "a series of intolerable restraints on the implementation of new ideas."

Centers of higher education, he said, must attack the root of the problem and accept the challenges of a changing world. "Graduates from this institution must come out as leaders . . . The problem I find with graduate schools today is that they stress management, not leadership. Too often management tools take the place of

decision making . . . thus replacing responsible leadership."

Dean Simon responded with sincere thanks both to the Fund and its honoree for their generosity.

"I know that I speak for the entire New York Law School community in expressing our profound gratitude to Sam, not only for the generous support we are receiving here tonight, but for his guidance and



Dean Simon (r.) and NYLS Trustee Bernard Mendik '58 (l.) congratulate Dr. LeFrak, the 1986 recipient of the "Flame of Truth Award." Mr. Mendik and NYLS Trustee Arthur G. Cohen '54 served as Dinner Co-Chairmen.

"Sam and I have talked about the need for new ideas and innovative leadership in the law," the Dean said. "It would be wonderful if the proceeds of this dinner were used to establish an endowment in Sam's name that would stimulate original thinking and encourage commitment to law reform. With the LeFrak Fund we could bring experts to the Law School, fund research projects and symposia and offer scholarships, all with the overriding purpose of contributing to needed law reform."

involvement—past, present and future."

The Fund for Higher Education, which since 1970 has supported a wide range of projects at centers of higher learning in the U.S. and abroad, serves essentially as a bridge between educational institutions and philanthropic resources. Advised by distinguished academic and business leaders, the fund sponsors deserving projects in the name of corporate and government executives. Contributions for these projects by corporations and foundations are administered and distributed by the fund.

# Alumni Association Honors Joseph Solomon

Dr. Joseph Solomon '27 was the honored guest at the Alumni Association's Annual Dinner held October 29th at the Grand Hyatt Hotel. Dr. Solomon received the Association's Distinguished Alumnus Award, which since 1964 has been presented annually to alumni whose careers demonstrate the qualities of social and professional responsibility most valued by the Law School.

In addition to presenting the award to Dr. Solomon, Association President Richard M. Flynn '57, announced the initial \$15,000 installment of the Association's Scholarship Fund in memory of Benjamin Botner '29.

In a gracious acceptance speech, Dr. Solomon said that the highest aspirations of the legal profession could be eroded by what he views as an alarming degree of cynicism among new attorneys. "Though they are brighter than ever," he said, "they also show a growing cynicism about the law as a means to accomplish justice. Many seem to view law simply as a business which . . . should be conducted with one eye always on the bottom line."

While acknowledging that financial pressures on lawyers and law firms in major areas of practice are extremely high, he urged new attorneys to avoid "the siren call of greed." Viewing law exclusively as a path to princely salaries, he said, inverts the dictates of the profession. "The busi-



Dr. Joseph Solomon '27

ness side of the law . . . is nothing more than a means to allow us to fashion just results for our clients and our society," he said.

"Those who don't concern themselves with ethical performance put the entire profession at risk. The practice of law is more than Park Avenue and Wall Street addresses and a license from the courts," he concluded. "It is the hearts and minds of attorneys, their accumulated curiosity, wisdom and goodness."

Dr. Solomon's personal history bears out the authenticity of his remarks. Born on the lower east side to hard-working but impoverished Russian immigrants, he went to work at an early age without finishing elementary school. Subsequently, he secured his first full-time job, at a salary of ten dollars a week, in the law firm of Leventritt, Cook, Nathan & Lehman as a messenger.

Determined to become an attorney, he compensated for his lack of formal educa-

tion in one year of evening study, passing the State Regents qualifying examinations for admission to law school. For the next three years, he worked by day and attended the Law School at night, graduating from New York Law School in 1927. After serving the year of clerkship required by the rules of the Court of Appeals for non-college graduates, in 1929 he became a member of the legal staff of the firm which he had served as a messenger. In 1948 he became a partner, and in 1966 a senior partner, of that firm. Dr. Solomon is currently counsel to the law firm of Ohrenstein & Brown.

Highly regarded for his expertise in estate law, he has served as executor and legal advisor for many eminent artists, industrialists and philanthropists. A devoted patron of education, the arts, medicine and libraries, Dr. Solomon has been instrumental in providing substantial funding for several leading educational institutions. These include two endowed chairs at New York Law School, an endowed chair at Columbia University School of Law, and an endowed chair at Mt. Sinai School of Medicine of New York.

Dr. Solomon currently serves the legal profession as a member of the Committee on Character and Fitness for Admission to the Bar of the State of New York, Appellate Division, First Department. In addition, he serves on the Board of Editors of the *New York Law Journal* and the Board of Trustees of the Milton Helpern Library of Legal Medicine. Among many other honors and awards, he has been knighted by the Italian Government and has been the recipient of an Horatio Alger Award. He has also received an honorary Doctor of Laws degree from New York Law School in 1976; the first New York Law School Medallion for Distinguished Service; and was elected an honorary Trustee by the Law School's Board of Trustees in February, 1985. In 1986 he was honored by the Bar-Ilan University, which at its Academic Convocation conferred on him an honorary Doctor of Humane Letters degree.

In 1978, after 60 years, Public School 109 of Manhattan presented Dr. Solomon with its elementary school diploma. ■

## New York Law School In Brief

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## Judge Tsoucalas Appointed to Court of International Trade

Culminating a distinguished career of some 18 years on the Bench, Hon. Nicholas Tsoucalas '51 took a seat on the United States Court of International Trade on June 7, 1986. The Judge was nominated by President Reagan in September, 1985, and was confirmed by the full Senate in early June, 1986.

A life-long resident of New York City, Judge Tsoucalas served in the U.S. Navy after his graduation from DeWitt Clinton High School. He earned his B.S. from Kent State University in Ohio in 1949 prior to attending New York Law School.

After several years in private practice, the Judge was appointed to serve as Assistant U.S. Attorney for the Southern District of New York, Civil Division. He served in that position from 1955 to 1959, at which time he returned to private practice. He received his first judicial appointment in April, 1968 when he took a seat



on the Criminal Court of the City of New York. In January, 1975 he was appointed as Acting Supreme Court Justice for Kings County. Three years later he assumed the same position in Queens County where,

among many significant cases, he presided over the David Berkowitz ("Son of Sam") cases. In January, 1982 he returned to the Criminal Court until his appointment to the Court of International Trade. ■

## D.C. and Greenwich Receptions

If enthusiasm is an index of success, then the first alumni receptions of the year in Connecticut and Washington, D.C. would have to receive the highest ratings.

More than 50 alumni, including one of the School's oldest, Ernest Lofgren '18, attended the reception at the Indian Harbor Yacht Club in Greenwich on September 16. After comments by Dean Simon on significant developments at the School and the central role alumni have played in them, U.S. Attorney Stanley Twardy addressed the group on the ramifications

of recent Congressional proposals to control drug trafficking. The reception was hosted by Lloyd N. Hull '51.

Well attended, also, was the Washington, D.C. reception in October, hosted by Myles Ambrose '52 in the offices of his firm, O'Connor & Hannan. Congressman Benjamin Gilman '50, pictured below, took time out his busy schedule to attend, as did Hon. Marshall Breger, an NYLS associate professor on leave, now serving as chairman of the Administrative Conference of the United States.



Attendees at the Washington, D.C. reception included (l. to r.) Judge Roger Miner '52, Myles Ambrose, Congressman Benjamin Gilman, Dean Simon.

## Student Clothing Drive



Sorting donated clothes are Mr. Manny Gonzalez (far l.), Student Bar Association President Michael Cintron, Ms. Sandra Van Essche and Ms. Ellen Rosner.

In the early fall, Justice Francis T. Murphy '52 issued a call to the New York legal community for a clothing drive to help mitigate the plight of the homeless this winter. Students at the Law School responded generously, donating hundreds of items of warm clothing. By November, the clothes had been sent to the Human Resources Administration in New York City for distribution to local shelters. Justice Murphy, a Trustee of the Law School and past president of the Alumni Association, is Presiding Justice of the Appellate Division, State Supreme Court, First Department.

# Conflict and Leadership on the U.S. Supreme Court from Marshall to Rehnquist

James F. Simon

*The following article is based on a lecture delivered by Dean Simon at Franklin and Marshall College on September 24. The Dean's address was the third in a series of eight lectures entitled "The John Marshall Lectures on the Constitution, the Supreme Court and the Justices," which marks in 1987 the bicentennial of the signing of the U.S. Constitution as well as the founding of Franklin College. The lectures, given by leading scholars on the Supreme Court, examine the role of recent Justices in shaping the interpretation of the Constitution in the areas of racial justice, criminal justice and federalism.*

William H. Rehnquist has been confirmed by the Senate as the nation's 16th Chief Justice, and it seems an opportune time to ask the question: What are the qualities of leadership for a justice of the U.S. Supreme Court? Put more boldly: Will the new Chief Justice be able to lead the Rehnquist court?

To answer the questions, I plan to discuss four justices who have led or attempted to lead the institution in our history, beginning with Chief Justice John Marshall. I will then discuss three justices of the modern era—Chief Justices Charles Evans Hughes and Associate Justices Hugo Black and Felix Frankfurter—before addressing the qualities of leadership exhibited by Chief Justice William Rehnquist. In discussing all five justices, I will refer to qualities of leadership that Chief Justice Rehnquist has himself endorsed in his own writing.

The Chief Justice, whether John Marshall or William Rehnquist, holds only the most tenuous reins of court leadership. He presides at judicial conferences, states the facts and legal issues of the cases and assigns the opinions when he is in the majority. For the extraordinary Chief Justice, even those modest duties afford him the subtle instruments for leadership. More often than not in our constitutional history, however, Chief Justices have found the tools inadequate to lead their fiercely independent colleagues.



*Dean Simon spoke with reporters, students and fellow scholars after the lecture. Photo courtesy of Intelligencer Journal, Lancaster, PA.*

Our new Chief Justice, William Rehnquist, has made the point this way: "The Chief Justice presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them."

Even one of the most successful Chief Justices, Charles Evans Hughes, often had his problems with his colleagues. It was Chief Justice Hughes' policy to convene court precisely at the noon hour. One day at noon all of the justices stood ready except the crusty septuagenarian, Justice James McReynolds. Hughes sent word to McReynolds' office that the court was ready to convene. The attendant returned from McReynolds' office with the message: "Mr. Justice, McReynolds says he doesn't work for you."

Not surprisingly, scholars have placed the mantle of greatness on precious few Chief Justices in the nation's history. It is significant that most Chiefs placed in that

rarefied category have come to the court from positions of political leadership, often in high national office. Chief Justice Marshall, for example, was John Adams' Secretary of State. Roger Taney served as Andrew Jackson's Secretary of the Treasury. Charles Evans Hughes was nominated for the presidency by the Republican party in 1916. Earl Warren was elected Governor of California.

Each of them possessed a special quality of leadership that comes from a sure political instinct, an ability to deal successfully with men of all backgrounds, intellects and temperaments. Chief Justice Rehnquist has written: "The Chief Justice must be not only a jurist, but interlocutor of the judicial minstrel show, a planner, and occasionally a statesman. Surely training in the rough and tumble of politics is no hinderance to the performance of these tasks."

It is worth noting that Chief Justice Rehnquist says that part of a Chief's political task is to serve as judicial statesman. I agree. To be a successful leader of the Court, a Chief must be equipped with political skills not only to deal effectively with his independent colleagues on the Court but also to exercise statesmanship in presenting the Court to the nation.

History suggests, therefore, that Chief Justice Rehnquist will succeed as leader of the court only if he is adept at the political aspects of the job. First, he must be able to work effectively with his colleagues. Second, he must understand that to lead he must identify the long range Constitutional goals of the nation and be able to lead the court and the nation towards those goals. He must, in other words, be a judicial statesman.

John Marshall is considered "The Great Chief Justice" as though it would be biologically impossible to create another of his talents. Without denigrating the wonders of genetic engineering, I think we would be hard pressed to imagine a more effective leader of the Supreme Court in the first third of the nineteenth century. Of course, Marshall enjoyed a distinct

advantage over his successors. In Marshall's day the justices resided in the same boardinghouse, wined and dined together and trundled en masse to and from their courtroom in the Capitol basement. Quite naturally, Marshall's dominant personality and sure political instincts began to have their effect on his colleagues. During his thirty-four years as Chief Justice, Marshall wrote more than half of the Court's opinions. He only dissented nine times.

Equally important to his greatness, Marshall had a clear vision of the Constitutional needs of the nation. He believed firmly in a strong national government and a critical role for the U.S. Supreme Court in our Constitutional system. Marshall presented his vision in opinion after magisterial opinion, beginning with *Marbury v. Madison* in 1803 which established the Court's authority to declare an act of Congress unconstitutional. In *Marbury* as in so many later opinions defining the contours of our Constitutional government, Marshall not only showed the instincts of a politician but the vision of a judicial statesman.

Let me turn the clock forward approximately one hundred years to the term of Chief Justice Charles Evans Hughes. Like Marshall, Hughes has been considered one of the great Chief Justices by scholars and colleagues alike.

In making that point, Chief Justice Rehnquist has referred to Hughes' political skills within the Court as well as his ability to represent the Court as an institution to the outside world. As to his internal political skills, it is conceded that Hughes was without peer, at least in this century, in presenting the facts and legal issues to his colleagues in judicial conference. He had a talent for narrative and also showed consummate skill in moving his colleagues, even the most contentious ones, along in meaningful discussion.

Chief Justice Rehnquist has written approvingly of the ability of a chief to move discussions in judicial conference ahead expeditiously. "Certainly conference discussion should not be throttled," he has written. "Even the most junior Justice should be given the impression that he is entitled to make the fullest statements of his views. But the realistic alternatives are not gag rule or full and free discussion. Instead, the choice is between

orderly, relevant discussion, on the one hand, and stream of consciousness reflections or seriatim lectures, on the other." Our new Chief Justice has left no doubt that he favors the first choice.

More than his effectiveness with his colleagues, Chief Justice Hughes is remembered for his reverence for the Court as an institution and his ability to project that reverence to the nation. He was Chief Justice in the mid-thirties, a time of crisis in the Court's history. It was Hughes' difficult task to try to give some semblance of authority to a philosophy articulated by a five-man conservative majority that declared one piece of New Deal legislation after another unconstitutional. Rather than make the Court appear unnecessarily divisive, Hughes chose to support the majority view. When President Roosevelt introduced a so-called reform plan that would have packed the Court and overwhelmed the conservative majority, Hughes wrote a letter to the Senate Judiciary Committee considering the legislation countering, point by point, every argument that the President had made.

I think it is fair to say that Hughes was not particularly interested in preserving the philosophy of the conservative majority. His purpose, rather, was to protect the Court as an institution from the impingement of another co-equal branch. And he was successful; FDR's Court-packing plan failed. The fact that Hughes supported a later Court majority that rejected the Anti-New Deal conservative majority's earlier opinions lends further credence to the view that Hughes placed the prestige of the Court as an institution above any individual opinion that he might have held.

Like Marshall, Charles Evans Hughes' skills as Chief Justice transcended his talents as an opinion writer, though those talents were considerable. Both Marshall and Hughes understood the inner workings of the Court, were sensitive to their colleagues' strengths and weaknesses as jurists and were able with political as well as intellectual talent, to effectively lead the Court. Besides dealing effectively with their colleagues, each kept a steady eye on the Court's role in promoting the essential Constitutional needs of the nation.

Neither Hugo Black nor Felix Frankfurter was Chief Justice and, therefore, did

not have the modest tools of authority that Marshall and Hughes possessed. They are included in this discussion, nonetheless, because their debate over the proper role of the Court in protecting civil liberties has special relevance today in assessing the leadership potential of Chief Justice Rehnquist.

Given their backgrounds, it was assumed that Frankfurter, a champion of civil liberties and well known Constitutional scholar, would lead the liberal wing of the Court after his appointment. But, as we will see, Hugo Black replaced Frankfurter as leader in a very short time. To understand that surprising result we must look to the political skills of the two justices, skills that may be as relevant today as in the nineteen-forties.

Felix Frankfurter immigrated from his native Vienna in 1894 at the age of twelve, not speaking a word of English. But Frankfurter learned the English language quickly and well, graduating third in his class at City College. He then entered the Harvard Law School, where he ranked first in his class all three years.

As a young lawyer, Frankfurter worked for Henry Stimson, first as an Assistant U.S. Attorney in New York and later as Counsel for the Bureau of Insular Affairs in the War Department when Stimson was Secretary of War. Under Stimson, Frankfurter was arguing cases before the U.S. Supreme Court before he was thirty years old. In 1914, Frankfurter was called to the Harvard law faculty and became a nationally recognized scholar in the fields of Constitutional and Administrative law. At the same time Frankfurter was establishing a reputation as one of the country's most prominent civil libertarians. He was best known as the Public Defender of Sacco and Vanzetti, publishing a devastating attack on the criminal justice system in which the two Italian immigrants were convicted and sentenced to death.

Frankfurter always had two-hundred best-friends from the time he was a young man at City College and, as it turned out, many of those best friends became very prominent in government. One was Franklin Delano Roosevelt. When Roosevelt was elected Governor of New York, Frankfurter became an unofficial but very insistent and welcomed advisor to Roosevelt. And when Roosevelt was elected President of the United States, he looked

to Frankfurter for ideas and advice on a regular basis.

Frankfurter was appointed to the Court two years after President Roosevelt's first nominee, Hugo LaFayette Black of Alabama. Black had none of the polish of a Harvard Law School education nor had he advised presidents in any informal capacity. Hugo Black, nonetheless, was a man of remarkable background and talents. He was born in the Raw Hill country of northern Alabama, the eighth child of William and Martha Black. Hugo attended Clay County, Alabama schools and then completed a two year course at the University of Alabama Law School, where he graduated with honors in a class of twenty-three.

Shortly after graduation Black sought his legal fortunes in big, booming Birmingham. Slowly, Black began to build a clientele primarily among the laborers in Birmingham's steel industry who had been injured at their work place. "I'll take the jury in the box," he would tell the judge, so sure of his powers of advocacy that he expected to persuade any man of the rightness of his cause. And he usually did.

In 1925 Black declared his candidacy for a seat in the U.S. Senate. Relatively unknown, Black, nonetheless, defeated three more experienced politicians in the race. He did it by taking a stand for the common man against the established corporate and political interests in the Democratic party.

By his second term in the Senate, Black was also one of the most skilled legislators in the U.S. Senate in support of Roosevelt's New Deal. And he was one of the Senate's most feared investigators, uncovering widespread waste and corruption in the shipping and public utilities industries.

Black's appointment to the Supreme Court by FDR predated Frankfurter's by two years, and yet, almost every knowledgeable observer of the Supreme Court, including Felix Frankfurter himself, expected that Frankfurter, the celebrated libertarian and Constitutional scholar, would lead the liberal wing of the court after his appointment.

At first, all seemed to go according to script. In the first dramatic challenge to Frankfurter's leadership in 1940, the former Harvard professor prevailed impressively. The case involved two elementary

school children of William Gobitis, a Jehovah's Witness in Minersville, Pennsylvania. Gobitis and his children were raised to believe that the worship of false idols condemned them to eternal annihilation. When the Minersville School Board insisted that all public school children salute the American flag before each school day, the Gobitis children refused, saying that it was a violation of their religious beliefs. The children were expelled from school and their father later brought suit against the School Board, arguing that the policy was a violation of their first amendment rights of expression and the free exercise of religion.

At the judicial conference on the Gobitis case all of the Roosevelt appointees—Black and William Douglas, Stanley Reed and Frank Murphy, looked to Frankfurter for leadership. And he spoke passionately—but not on behalf of the Gobitis children's first amendment rights. Rather, he emphasized the need for patriotism, particularly on the eve of World War Two. He also stressed his philosophy of judicial restraint, of the limited role that the Court must play in the Constitutional process. The First Amendment claim, he said, must fail.

Seven members of the Court, including every Roosevelt appointee, voted with Frankfurter. Frankfurter wrote the majority opinion for the Court. It would be the last major opinion he would write in the First Amendment area in which he carried all of the Roosevelt appointees.

Two years later, Black publicly rejected the position he had taken in *Gobitis* and said that the First Amendment rights to the free exercise of religion and expression must take precedent. In 1943 the Court explicitly reversed the holding of *Gobitis*. Felix Frankfurter dissented. He no longer led the liberal wing on the court.

In two other First Amendment cases, Hugo Black openly and aggressively took the reins of liberal leadership away from Felix Frankfurter. The first case involved the radical longshoreman leader, Harry Bridges, who had threatened in a telegram that was later published, to call a strike if a state court judgment in a labor dispute was upheld. The second case involved the *Los Angeles Times* which in a series of editorials demanded a state court judge's harsh sentence in the roughest verbal terms. The question in both cases was

whether the California courts, which had cited for contempt both Bridges and the *Times* for their threatening expressions, violated the First Amendment's rights to free expression.

Justice Black wrote the majority opinion overturning the contempt citations. The California courts had no right to inhibit speech, said Black. "The assumption that respect for the Judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." With his *Bridge's* opinion, Black, in effect, announced his view that First Amendment rights were preferred freedoms under the Constitution. That conviction would grow in the years to come.

Felix Frankfurter dissented in *Bridges*, declaring that the contempt power had been a necessary tool for courts to protect the integrity to the judicial process through centuries of Anglo-American law. It was, he said, a matter of balancing First Amendment rights against those of the state. Unlike Black, Frankfurter refused to recognize that First Amendment freedoms held a preferred position in the Constitutional hierarchy.

*Bridges* came down two years after the Court appointment of Felix Frankfurter. Within that relatively short span, Frankfurter had not only lost his liberal majority and leadership but he had been unceremoniously replaced in that position by Hugo Black. How, we must ask, did this happen so quickly?

To answer the question I would like to return to my discussion of the qualities of leadership on the Court. First, consider Black and Frankfurter's political effectiveness with their colleagues. Both Frankfurter and Black had the powerful intellects to take a leadership position on the Court, though Frankfurter was slow to recognize that Black's intellect was as formidable as his own. Others on the Court did so less grudgingly.

So when Black began to carve out his own strong position on the First Amendment, colleagues like Douglas and Murphy were naturally drawn to Black's arguments. They listened to Frankfurter's lectures on the balancing of Constitutional demands, but they voted with Hugo

Black. They voted with him not only on principle but also because Black, with his political skills, was better equipped to influence his colleagues. True, Frankfurter had been an advisor to presidents. But Hugo Black had worked in the trenches, speaking plainly to juries and Alabama's voters as well as to U.S. Senators. He knew how to talk to them persuasively without lecturing them as a Harvard professor might.

It was also a nasty Frankfurter habit of talking deprecatingly about colleagues who did not agree with him. In conversations with his colleagues and friends, he belittled Frank Murphy for his limited intelligence and castigated both Black and Douglas for what he perceived to be their bald political maneuvering. For his part, Hugo Black never tired of promoting his view of the First Amendment but he did so directly and relied on the force of his argument, not personal insults.

But Black's success with his colleagues was only half of the story. He, like Marshall, had a sense of institutional mission. For Black, the Court's primary role was to protect the individual liberties guaranteed in the Bill of Rights. In this respect Black—more than Frankfurter—understood the elemental Constitutional needs of the American people in the modern era. Central to those needs in a time of big government and high technology is the protection of individual liberties.

This brings us to William Rehnquist and the question: Does the new Chief Justice have the political skills of a Marshall or a Hughes or a Hugo Black to lead the Court? These political skills, as I have discussed, have to be demonstrated in two arenas, one within the Court, the other outside.

In their own distinct ways, Marshall, Hughes and Black worked effectively with their judicial colleagues to develop broad support on important Constitutional issues. Marshall and Hughes, in particular, willingly gave up their own ideological positions, upon occasion, in the interests of broader Court agreement. They were, in other words, willing to compromise and saw compromise as a part of leadership.

We have no indication that Chief Justice Rehnquist will emulate Marshall or Hughes in this respect. In his writing Rehnquist has noted, with less than total admiration, Chief Justice Hughes' ten-

dency to shift doctrinal directions to accommodate shifting court majorities. Compromise, so far, does not seem to be a word in Chief Justice Rehnquist's vocabulary.

At his confirmation hearings in 1971, when Chief Justice Rehnquist's record was being reviewed for his appointment as an Associate Justice of the Supreme Court, the point was made that the nominee had an undiluted record as a conservative ideologue. As a private attorney and later as a high level official in Richard Nixon's Justice Department, William Rehnquist had consistently favored government interests over those of individual rights and liberties. Moreover, he had been critical of judicial decisions protecting individual rights and liberties and was likely, it was suggested, to continue that criticism as a member of the Supreme Court.

Since his appointment to the Court in 1971, Justice Rehnquist has fulfilled the predictions perfectly. He has been precisely the conservative ideologue on the Court that he had been in the Justice Department before his appointment. He has consistently favored government interests over individual rights and liberties and has often done so in outspoken and sometimes lone dissent. His dissents have often attacked Court majority opinions that have protected civil liberties and interpreted the Fourteenth Amendment's equal protection clause to prevent race and sex-based discrimination.

Based on the new Chief Justice's past record, it is likely that he will lead the Court only if his colleagues are brought closer to his ideological views. The model, then, for his internal leadership on the Rehnquist Court may, ironically, be that of civil libertarian, Justice Hugo Black. For Black developed a very strong libertarian position for himself in his early years on the Court and was able to persuade other liberal colleagues to follow his lead. Moreover, he was successful in influencing more moderate members of the Court to come closer to his philosophical position. As a result, the Court majority gradually moved toward Hugo Black's position on many civil liberties issues as well as his position that the Bill of Rights were incorporated through the 14th Amendment to the Constitution and applied to the states.

It may be that William Rehnquist will

be able to accomplish a similar task. By force of his extraordinary intellect and his ability to articulate his views, he may well be able to bring a majority of the Court toward his conservative position. He will, of course, be greatly assisted if President Reagan is allowed one or two more appointments to the Court.

And what of Chief Justice Rehnquist's chances of leading the Court in the eyes of the nation? Is he likely to be a court leader who can defend the institution to the outside world and understands, in defending it, that the Court should play a crucial role in setting an example to the nation? Marshall and Hughes understood this well. So did Hugo Black. Marshall knew that the task at hand was to build a nation with a strong national government that included a critical role for the Supreme Court. Hughes was sensitive to the threat from both extremes of the political spectrum—first, from the anti-New Deal majority that was trying to impose its views on a more liberal electorate, but also from an immensely popular president, Franklin Roosevelt, who wanted to impose his will on the Court.

Hugo Black correctly saw that an essential purpose of the Supreme Court was to protect individual rights and liberties in this country. In doing so, Black showed that he, more than Felix Frankfurter, understood the pressing Constitutional needs of the American people in the modern era.

Will William Rehnquist fulfill the role of national leader as Chief Justice of the United States? To answer the question, we must look to the dominant Constitutional values in the country today and what they are likely to be in the last fourteen years of this century. It is true that we have a very popular conservative president of the United States. It is also true that we have had a Supreme Court majority, following the liberal Warren Court majority, that it was commonly presumed would cut back on liberal judicial initiatives. Since Warren Burger replaced Earl Warren as Chief Justice in 1969, thirteen of the seventeen years have been under Republican presidents.

And yet, neither the American people's choice of Republican presidents nor President Nixon's choice of Warren Burger as Chief Justice has caused the Supreme Court majority to backtrack on individual



rights and liberties. There has been no retreat, for example, from *Brown v. Board of Education*. In fact, the Burger Court has issued decisions allowing busing to promote desegregation and has introduced some Constitutionally-protected forms on affirmative action. And the Burger Court majority has sometimes tread where the Warren Court did not. It has, for example, established a Constitutional test that has given greater protection against sex-based discrimination than ever existed during the Warren Court years. Moreover, this Court, which was expected to be more cautious than its predecessor, announced in 1973 that a woman's control of her own body was a Constitutionally protected right of privacy.

I am not suggesting that those decisions were necessarily correct or that they perfectly reflected the dominant Constitutional values in the country. I am suggesting, however, that the pattern is unmistakable and noteworthy: the Court majority has affirmed an expectation that has dominated Supreme Court jurisprudence for almost fifty years—that our Constitution and our people place individual rights and liberties very high in the hierarchy of Constitutional principles.

A Chief Justice who leads a Court majority in the opposite direction does so at considerable institutional risk. For the

court has never, for very long, been able to resist the dominant political values in the nation. When it attempts to do so, its own prestige and power are placed in considerable jeopardy. That was true with the Court's Dred Scott decision in the last century and the anti-New Deal Court decisions in the earlier part of this century. The lessons of history, it seems to me, still apply and Chief Justice Rehnquist, to be the leader of the Court, must acknowledge those lessons.

Each of the Court leaders I have discussed—Marshall, Hughes and Black—were successful, largely because they were able to anticipate the long-range Constitutional needs of the nation. Perhaps the new Chief Justice will follow in this tradition. To do so, I believe he will have to put the Court's and nation's interests above his own ideological convictions. It is too early to tell whether he will do so. On the face of the present Rehnquist record, it is not a prediction that I would make with full confidence. But if he does, it is entirely possible that Chief Justice William Rehnquist will become the true leader of the Rehnquist Court.

Remember, when Earl Warren was appointed Chief Justice, he was best known as the popular middle-of-the-road Republican Governor of California. ■

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I certify that the statements made by me above are correct: Kenneth Simons, Director of Communications.

Due to press deadlines, the following individuals were omitted from the listing of 1985-86 Harlan Fellows published in the Fall issue of *In Brief*. The Law School extends its appreciation to them and to all of the Harlan Fellowship.

Arthur N. Abbey, Esq. '59,  
Abbey & Ellis

Mrs. Barbara K. Debs,  
Manhattanville College

David Finkelstein, Esq.

Patrick J. Foley, Esq. '61, American  
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Phillips & Hull, P.C.

Bayless Manning, Paul, Weiss,  
Rifkind, Wharton & Garrison

# Panel Assesses Cable TV



Participants in the Media Center's first colloquium of the year take questions from an audience of students, alumni and practitioners. From left to right: Dean Monroe Price; Professor Michael Botein and Professor Eli Noam.

"Cable and Its Competitors—What's the Score" was the topic of a Communications Media Center colloquium held at the Law School this November. Panelists were NYLS Professor Michael Botein, Professor Eli Noam of the Columbia University Graduate School of Business and Dean Monroe Price of Yeshiva University's Cardozo Law School. New York Law School visiting Professor Ralph S. Brown organized the program.

While the panelists took substantially different approaches to analyzing the prospects of cable television, all agreed that the promise of a "wired nation" made fifteen years ago by the Sloan Commission has not been fulfilled. In effect, the colloquium focused largely on a range of discrepancies between the initial promise of cable and the realities of its development.

Professor Botein introduced his remarks by recalling that each communications system wants "nothing more than an unfair advantage over all the others." One example he gave is that local governments sought incrementally greater benefits from cable operators during the late 1970s and early '80s, the period of greatest cable growth, escalating their demands, in some cases, to levels that now seem unreason-

able. At the same time, it is possible that cable operators agreed to conditions that they could not reasonably have expected to fulfill in order to win franchises. Now, he said, in response to the crisis that confronts cities and customers with cable systems obligated to provide more service than they can afford, counter pressures have developed, culminating in the Cable Communications Policy Act of 1984, which legislates boundaries among the competing interests.

In an overall effort to establish an economic context for assessing cable tv, Professor Noam began by describing what he called "economic instruments for analysis." For example, he ranked various modes of distributing programming according to the prices they command in the marketplace. Conventional films are placed at the top end of this array, with other modes following, roughly in the order of pay tv, pay-per-view cable tv, pay cable, ordinary cable, and basic over-the-air television. To maximize profits, program material should be released in each of these media sequentially, with release first in movie theatres and last through over-the-air television. In theory, the timing of these releases could be accom-

plished best by an entity that owned outlets of each kind. This explains the incentives to put production and many modes of distribution together under one roof.

Relating these analytical tools to the current operations of major media companies, Professor Noam concluded that the scrambling of signals now being done by programming suppliers to foil the use of backyard satellite receiving dishes by individuals is an indication of the market power possessed by the large multi-system cable companies. The home users of satellite dishes are a threat to the cable companies, not to the suppliers of programming, since those program suppliers could add commercials to their programming to capitalize on the existence of large numbers of dish owners, if the use of those dishes continued to grow. The suppliers' decision to invest in scrambling equipment suggests to Professor Noam that "MSOs," multisystem operators, have applied pressure to impede development of backyard dishes beyond the current 1.5 million users, because dishes were spreading beyond areas not served by cable into areas where their users would likely be viewers who would otherwise have subscribed to cable services.

Looking well into the future, Professor Noam concluded that cable television system operators are likely to continue to consolidate their power and attain greater influence. However, he suggested that fiber optic technology will eventually make telephone companies efficient competitors with cable systems. Within the next forty years, he said, it is probable that telephone lines will be able to carry the kind of signals that cable television lines now provide. When that occurs, since it will also incorporate interactive possibilities, there is strong reason to expect significant shifts of market share from the current cable systems to these newly equipped telephone companies. The market will resemble, naturally, a common carrier model, with individualized program choices and individualized billing.

Dean Price approached the colloquium's topic from a slightly different direction, asking whether communitarianism and nationhood can ever be shaped or achieved by law, and suggesting that mass media may be capable of making a signifi-

cant contribution to those goals. He used the World Series as a metaphor for the overall issue of whether government should act to preserve the availability on free tv of any centrally American experience. During the question period, he posed a related question with a quip, "Do you think that shopping clubs are going to drive Christian broadcasting off the air?"

To Dean Price, there has been a trend toward weakening the power of networks. During the Nixon administration, he said, the explosive growth of cable television and its associated market power may have been seen as a device to accomplish that weakening. But there is evidence of growing competitiveness among the networks now, and the possibility that they may regain influence through newer styles of competition. He suggested that the decision by the New York City ABC network outlet to reschedule the network news from 7:00 to 6:30 p.m., may be a kind of watershed, showing a new willingness of stations to meet their local markets' needs without regard for the networks' overall policies, while at the same time possibly strengthening the staying power of the networks in the long run.

Professor Botein specializes in communications law, and has been a consultant to the Federal Communications Commission and the Rand Corporation. Additionally, he has served on a number of bar committees related to communications law. Professor Noam is the director of the Columbia University Business School's Center for Telecommunications and Information Studies. He recently edited and contributed to *Video Media Competition: Regulation, Economics and Technology*, published in 1985. Dean Price served in 1970 as deputy director of Sloan Commission on Cable Television and was a major contributor to its widely noted report, "On the Cable." He is the author, with Daniel L. Brenner, of a new treatise, *Cable Television and Other Non-broadcast Media: Law and Policy*, published this year. ■

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## Ira M. Berger

The New York Law School community observes with the deepest sadness the death of Ira Berger, Associate Dean for Public Affairs since January, 1985. Dean Berger died of cancer on November 18 at the age of 46. He will be sorely missed by his colleagues and many friends.

## FACULTY NEWS

**Professor Michael Botein** recently presented a paper on "Legal and Regulatory Trends in Telecommunications: The Impact on Educational Needs," at a conference on Educating the Telecom Professional, in Boulder, Colorado. In addition, he has co-authored *The Law of U.S. International Communications*, published by the Max Planck Institute in Hamburg, Germany.

**Professor B.J. George, Jr.**'s chapter "Immunities and Exceptions" was recently published in *International Criminal Law*, Volume II Procedure.

**Associate Dean Randolph Jonakait's** article, "The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony" was recently published in the *Case Western Reserve Law Review*.

**Professor Arthur Leonard's** article "AIDS and Employment Law Revisited" was recently published in the *Hofstra Law Review*. His earlier article, "Employment Discrimination Against Persons With AIDS," 10 *Dayton Law Review* 681 (1985), was cited as authority in a case of first impression, *Cronan v. New England Telephone Co.*, CA No. 80332 (Suffolk Superior Ct., Massachusetts, August 15, 1986), holding that a person with AIDS could maintain an action for wrongful discharge and invasion of privacy under Massachusetts Law.

**Professor Jethro K. Lieberman's** article, "Lessons from the Alternative Dispute Resolution Movement," was published by *The University of Chicago Law Review*.

**Professor William Natbony's** article, "Tax Shelters and Section 174: Research and Experimental Expenditures in the Tax Shelter Context" was published in *Journal of Taxation of Investments*.

**Professor Stephen A. Newman** recently published two articles: "Treatment Refusals For The Critically And Terminally Ill: Proposed Rules For The Family, The Physician, And The State," *New York Law School Human Rights Annual*, Fall 1985, and "Splitting It Up: A User's Guide To The New Divorce Law," *New York Magazine*, July 28, 1986.

**Professor Michael L. Perlin's** recent

and upcoming publications include a Book Review of Bursten, *Beyond Psychiatric Expertise* (1984), 14 *J. Psych. & L.*—(1986); "Four Years After: Responses to the Supreme Court's Right to Treatment Decision," *Directions in Psychiatry*, Volume 6, Lesson—(1986); "The Right to Refuse Treatment: *Quo Vadis?*" *Directions in Psychiatry*, Volume 6, Lesson 14—(1986); "Forensic Psychiatric Witnesses and Contingent Fee Arrangements: Ethical Implications from a Lawyer's Perspective," 11 *Newsletter Am. Acad. Psych. & L.* p. 25, (1986). In addition, he recently delivered a paper in Philadelphia before the American Academy of Psychiatry and Law on Psychiatric Testimony In Death Penalty Cases, and "The Power of Symbolism: Dulling The Ake In Barefoot's Achilles Heel."

**Professor E. Donald Shapiro** lectured during the summer at St. Cross College of Oxford University and at Hebrew University in Jerusalem on medical-legal topics. His recent publications include: "Single-Sex Families: The Impact of New Birth Innovations Upon Traditional Family Notions," *Journal of Family Law*, University of Louisville School of Law; "Overview," *New York Law School Human Rights Annual*; "New Innovations In Conception and Their Effects Upon Our Law and Morality," *New York Law School Law Review*; "Birth, Law, Medicine and Morality," *The Eleventh Sacks Lecture*, Oxford Center for Postgraduate Hebrew Studies.

**Professor Marjorie A. Silver's** discussion of *University of Tennessee v. Elliot*, a case involving the preclusive effect of state agency determinations, which is now pending decision before the Supreme Court, has been published in *Preview of United States Supreme Court Cases*, Issue No. 15.

**Professor Scott Taylor** gave a presentation to the Continuing Legal Education Division of the State Bar of New Mexico. The presentation was part of the Second Annual Fall Tax Series for the General Practitioner, and his topic was "A Summary of the Critical Provisions in the Tax Reform Act of 1986." Also recently published was volume II of Professor Taylor's treatise, "Planning Tax-Exempt Organizations," Shepard's/McGraw-Hill, Colorado Springs, Colorado.

## CLASS ACTION

1980

**Aibert H. Barkey**, is the author of "The Financial Articulation of Fiduciary Duty to Bondholders With Fiduciary Duties to Stockholders and the Corporation," *Creighton Law Review*, Vol. 20, No. 1, 1986.

**Thomas P. Casper** announces the formation of a new firm for the general practice of law, at 40 Radio Circle, Mount Kisco. The firm will be known as Scheffler, King & Casper.

**Bruce Egert** was recently appointed Chairman of the Speaker's Committee and member of the Executive Committee of the New York Regional Board of the Anti-Defamation League of B'nai Brith.

**Robert J. Owens** is employed as an attorney with the New York State Department of Environmental Conservation, Division of Environmental Enforcement, White Plains, New York.

**Arthur Schack** has been elected Chairman of Community Board Ten, where he has served on numerous committees and was Treasurer of the Board.

1981

**Carlos E. Cruz Jr.**, announces the formation of the firm Zuckerman & Cruz in White Plains, New York.

**Deborah A. DeLeo** was married to John J. Dooling of Great Kills.

**Lainie R. Fastman** has joined the law offices of John G. Hall, Staten Island, New York.

**Louise S. Horowitz** has become an Associate at the New York office of Budd, Larner, Gross, Picillo, Rosenbaum, Greenberg & Sade.

**Susan J. London** of Guttenberg, N.J. was married to Howard M. Goldman of Manchester, England.

**Walter F. Matystik** proudly announces the birth of his daughter, Jennifer Jean.

**Patrick M. O'Connell** was married to Mary Lynn Ringkamp of East Hampton.

1982

**Margaret A. Enloe** has joined Coopers & Lybrand as Counsel in the Office of the General Counsel.

**Ralph T. Gazzillo** is an Assistant District Attorney in the Suffolk County District Attorney's Office.

**Edward J. Larschan** recently co-authored the book *The Diagnosis Is Cancer: A Psychological and Legal Resource*

*Handbook for Cancer Patients, Their Families and Helping Professionals.*

**Steven Z. Mostofsky** is Law Assistant, Trial Part, to Judge Leon Deutsch of Family Court, Kings County.

**Linda E. Rosenberg** has joined Irving Trust Company as an Officer, where she will administer estates and trusts in its Personal Assets Management Division.

**Michael H. Schwartz**, formerly with the Law Department of Xerox Corporation, has opened his own office.

1983

**Thomas R. Betancourt**, an Associate with the firm of Gallo, Geffner, Fenster, Farrell, Turiz & Harraka, has been named by the Board of Freeholders to become a Commissioner of the proposed Bergen County Improvement Authority. The authority, if approved by the state, will make low-interest loans to towns and school districts for capital improvements.

**Stephen P. Cohen** recently had his first book, *Heartless*, published by William Morrow & Company.

**Roy Deitchman** has joined NYNEX Material Enterprises Company in New York City, where he specializes in environmental law.

**John A. Gurdak**, of Counsel to the Clifton, N.J. firm of Feinstein, Bitterman & Schey, reports that he is now a Contributing Editor for *Legal Assistant Today*, and has written a book entitled *Computer Fundamentals for Paralegals*.

**David S. Neufeld** has become an Associate with the Washington, D.C. law firm of Cole & Corette, P.C. He also announces the birth of his daughter, Sara Hilary.

**Joel Schmelkin** of Great Neck, was recently married to Judy R. Charchat, also of Great Neck.

**Robert J. Smith** has joined Stark, Elman, Amron & Rosen as an Associate.

**Garry S. Smoke** announces the opening of his law office at 225 Broadway, in New York City.

**Teresa A. Szeliga** recently became an Associate with Skadden, Arps, Slate, Meagher & Flom.

**Jon P. Weyman** has been appointed an Assistant U.S. Attorney in the Eastern District of New York.

**Nancy J. Wilson** of Yonkers, was married to Robert A. McCarthy of Larchmont.

1984

**Thomas A. Carr** recently became an Assistant U.S. Attorney for the Eastern District of New York.

**James P. Anelli** of Parsippany, was married to Sheila J. MacDonald of Denville.

**Joel M. Berlant**, an Associate with Price Waterhouse & Company, has been transferred to their Fort Lauderdale office, Tax Department. He was married this past summer to Wendie Katz.

**Jacques Catafago** and **Nadienne Vincent**, also an '84 graduate, were recently married. He is an Associate with Demov, Morris & Hammerling. She is an Associate with Salon, Marrow & Dyckman.

**Abby Friedman Appelbaum** and her husband, Jerrold, announce the birth of their son, Seth Appelbaum.

**Jeffrey P. Freimark** has been named Senior Vice President for Finance and Administration, and Treasurer, of Pueblo International Inc., San Juan, Puerto Rico.

**Nicholas T. Kocian** of New Springville, was recently married to Ronda Yoskowitz of Cromwell, Connecticut.

**Andrew H. Lupu** and his wife, Susan, announce the birth of their son, Zachary Noah. Mr. Lupu is an Associate with Goldstein & Axelrod in New York City.

**Carolyn M. Penna** was recently appointed Director of the New York regional office of the American Arbitration Association.

**Rita M. Rizzo** recently won second prize for her drawing "The Water Pitcher" in the thirty-second Art and Photograph Exhibition sponsored by the New York City Bar Association.

**Andrew Rudyk** was selected to be an American Political Science Association Congressional Fellow for the recently completed second session of the 99th Congress. As a Congressional Assistant for Representative Charles A. Schumer, he assisted in drafting various pieces of legislation, among them, the "Employment Drug Testing Protection Act."

**Peter R. Schwartz** was recently married to Roberta L. Turkell of Woodbury, L.I.

**Philip R. West** has been appointed Attorney-Advisor to Judge Carolyn Miller Parr, U.S. Tax Court, after having served as a Trial Attorney in the Honors Program of the Justice Department's Tax Division. He is also working on a Master of Law degree in Taxation at the Georgetown University Law Center.

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# CLASS ACTION

Marc Whiten announces the birth of twin daughters, Kimberly Drew and Kelly Gaines.

**1985**  
Stephen Baum joined Shea & Gould as an Associate.

Roy G. Bromberg has joined the firm of Skadden, Arps, Slate, Meagher & Flom as an Associate in their Corporate Department.

Donna M. Cachia announces her Partnership with Robert De Gregorio, with an office at 18 West Carver Street, Huntington, New York.

Richard I. Ellenbogen was married to Dr. Debra S. Weissman of Glen Rock, N.J.

Gary A. Friedman of Scarsdale, was recently married to Marla Jo of Hillsdale, N.J.

Jonathan Gould announces the formation of Gould Equities Corporation in

New York City, a commercial real estate firm.

Drexel B. Harris announces his election as Assistant Vice President and Counsel of AIG Risk Management, Inc. In addition, he announces the birth of his first child, Drexel B. Harris, III.

Dean C. Hurley has joined First Jersey National Corporation as Vice President of Financial Planning in the Treasurers Department.

Fred J. Pisani married Pamela Gaye Fabri of Lawrenceville.

Pauline C. Reich has been named to the Commercial Arbitration Panel of the American Arbitration Association.

Suzanne Rhulen of Swinging Bridge Lake, Monticello, was recently married to Joseph P. Loughlin of Medina.

Janet Y. Schuttler reports her marriage to James H. Wassmuth, and her recent association with the law firm of Barry, McTiernan & Moor.

Peter N. Weiner, a member of the New York and New Jersey Bars, has successfully completed the Florida Bar Exam and is with the firm of Broad & Cassel in Miami. Broad & Cassel was founded by NYLS alumnus Shepard Broad '27.

**1986**  
Stephen Altman recently joined Proskauer, Rose, Goetz & Mendelsohn as an Associate.

Clara A. Marshall has joined the firm of Shearman & Sterling as an Associate.

Craig E. Parles has joined Fischetti & Pomerantz as an Associate.

Thomas F. Rossetter and Michael F. Rubin, two recent NYLS graduates, have joined the staff of Bronx District Attorney Mario Merola, as Assistant District Attorneys.

Colin J. Smith was recently married to Victoria J. Smith of Croton-on-Hudson.

Brian Trust has joined Simpson, Thacher & Bartlett as an Associate.

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