Newsletter of the Historical Society of the District of Columbia Circuit

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Appreciation - Steve Pollak

by Jim Rocap - Society President

For sixty years, Steve Pollak served the public as few have. His career in public service began in the early 1960s, during the Kennedy and Johnson administrations, where he was at the center of the birth and enforcement of seminal civil rights initiatives, including enforcement of the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act of 1968. He even found himself beside Deputy Attorney General Ramsey Clark arranging security for civil rights marchers upon their arrival in Montgomery, Alabama, after having crossed the Edmund Pettus Bridge on their march from Selma. Later, Steve served as the Advisor to President Johnson for National Capital Affairs and was a key architect of home rule for Washington, D.C.

The list of his accomplishments, including high profile representations (Geraldine Ferraro, Billy Carter, Hamilton Jordan), drafting the regulations for Section 504 of the Rehabilitation Act of 1973, President of the D.C. Bar and D.C. Bar Foundation, a leader of the Washington Lawyers' Committee, Board member, President and Chair of the

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Seventy Years after *Bolling v. Sharpe* and *John R. Thompson Co v. District of Columbia*

Seventy years ago, on May 17, 1954, the United States Supreme Court finally rejected the decades-old notion that "separate but equal" passed constitutional muster in the field of education. It did so through two historic decisions, *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), which commenced in the District Court for the District of Columbia.

As recently as 1950, the United States Court of Appeals for the D.C. Circuit had upheld such segregation against attack, holding both that segregation was not inherently unconstitutional and that the unequal conditions suffered by black children in the school system were not due to their race. *Carr v. Corning*, 182 F.2d 14 (D.C. Cir. 1950) (2-1 decision,

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Upcoming Program on the Hinckley Case

For forty years, the District Court handled one of the most unique cases in federal court history. In June 1982, Judge Barrington Parker presided at the criminal trial of John Hinckley for the attempted assassination of President Ronald Reagan. The trial ended in a verdict of not guilty by reason of insanity, which in turn led to significant changes in the law on the insanity defense. Following the verdict, Hinckley was confined at or under the supervision of St. Elizabeth's Hospital until September 30, 2021, when Judge Paul L. Friedman signed a consent order unconditionally releasing Hinckley from custody. The post-NGRI litigation spawned multiple opinions by the District Court, and at least one by the Court of Appeals, in a context previously unseen, and unlikely to be repeated.

On June 27, 2024, the Society will present a program on this historic litigation, in the Ceremonial Courtroom of the E. Barrett Prettyman Courthouse. Save the date for what should be a fascinating reflection by participants in the litigation on how the judicial system handled this once-in-a-lifetime case.

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Remembering Hon. Arthur L. Burnett Sr.

The Honorable Arthur L. Burnett Sr. passed away on November 20, 2023. Judge Burnett served in many capacities throughout his career, including as a judge on two separate courts. From June 1969 to November 1975, and later from January 1980 to November 1987, Judge Burnett served honorably and well as a Magistrate Judge for the District Court of the District of Columbia. Thereafter, he served as an Associate Judge of the Superior Court of the District of Columbia from 1987 to 1998, and thereafter as a Senior Judge.

In his summary of Judge Burnett's rich oral history, Board member Bill Marmon notes, "As a black man growing up in the segregated South, Judge Burnett suffered all the indignities and injustices of the era...[b]ut throughout his life retained a remarkable grace and equanimity – making the best of a situation rather than raging against it," while "at the same time maintaining a commitment, developed early in life, to remedy injustice."

Judge Burnett was born in Spotsylvania, Virginia in 1935 and served as a key figure in the Civil Rights Movement. He was a graduate of Howard University and New York University (NYU) Law School. In 1954, Burnett was asked by leaders of the NAACP to apply to the University of Virginia Law School in an attempt to integrate the school. Burnett was denied admission but was ultimately reimbursed by Virginia for his tuition and expenses associated with attending NYU Law School.

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Society Hosts 19th Annual Mock Court Program

On March 1, 2024, Chief Judge Srinivasan welcomed 165 D.C. high school students and their teachers for the Nineteenth Annual Mock Court Program hosted by the Historical Society. After his welcoming remarks, the students went to assigned courtrooms in the E. Barrett Prettyman Courthouse and the Bryant Annex, to present arguments to participating judges, followed by an opportunity to discuss the law and legal profession with the judges.

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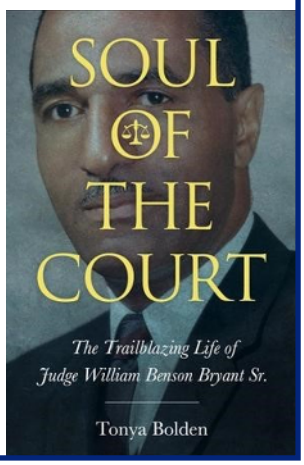
Judge Mehta with his Outstanding Advocate, Riley Gayle, from School Without Walls

Now Available for Pre-Sale Judge Bryant Biography

As previously announced, the first full-length biography of D.C. attorney and judge, William Benson Bryant, ***Soul of the Court: The Trailblazing Life of Judge William Benson Bryant Sr.*** sponsored by the Society and authored by Tonya Bolden, is available for pre-sale. This biography presents the story of Judge Bryant's remarkable, pioneering life in the law. Bolden narrates the story of a life of compassion, unparalleled integrity, and unwavering belief in the dignity of every human being. Bolden has authored, coauthored, and edited more than fifty books, winning numerous awards.



More information about ***Soul of the Court: The Trailblazing Life of Judge William Benson Bryant Sr.***, can be found here. Pre-orders can be made on Bookshop, Amazon, and Barnes & Noble.

Publication is expected in November 2024.

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Historical Society over the past 30 years, and so much more, only begins to tell the story of Steve Pollak. I began working with Steve on Historical Society matters in 2012, when he first asked if I would serve on the Society Board. In 2018, Steve asked if I might be interested in succeeding him as President of the Society. After a deep breath, I said yes, because it would have been very difficult to say no to Steve, who never declined a request that he serve for the good.

And I am certainly the better for having said yes. For the past 5 years, Steve tutored, counseled and mentored me in this job with grace, wisdom and patience. He had nurtured the Society from the early 1990s, and in his 30-year partnership with Linda Ferren, molded it into a signature Historical Society among the federal courts. When working with Steve, one began with the warmth of his smile and the gentle command of his presence. He never insisted or demanded, instead seeking and providing counsel and advice until a suitable end was in sight. His judgment was unparalleled. These are skills that Steve must have displayed and perfected throughout his career, given the enormous challenges he faced in the 1960s, but they were also innate to him. One does not perform as Steve performed without a gift for education and leadership. By his 90s, Steve had perfected those skills. And all of us who have served the Society are better for having done so within his sphere. He will be missed, but his legacy within the Society will serve us well for many years to come.

Do you have an idea
for an article you'd like to share?
Let us know: info@dcchs.org

Chronicling the District of Columbia U.S. Attorneys

A book by former Society Board member K. Chris Todd and his colleague Jim Thunder, chronicling the lives of the forty-nine U.S. Attorneys for the District of Columbia, is nearing completion. The Society looks forward to its publication in the Fall 2024, and it will be available for ordering on our website at that time. For a past article on just one of the book's fascinating chapters focused on Francis Scott Key, click here.

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Burnett became one of the first African Americans to enter the Honors Program of the U.S. Department of Justice. He was also the first African American U.S. Magistrate Judge, working with Chief Judge Sirica on the Watergate investigation.

Other positions Burnett held included service in the U.S. Army, staff attorney in the Criminal Division of the U.S. Department of Justice, and Assistant U.S. Attorney for the District of Columbia. He also worked with Marion Wright Edelman at the Children's Defense Fund and was an adjunct professor at Howard University Law School. In addition, Burnett was a tireless volunteer for the American Bar Association.

After retirement from the bench, Burnett became the Executive Director of the National African American Drug Policy Coalition and focused on equity in drug enforcement. Burnett was a strong advocate for criminal justice reform most of his life.

To read more about Judge Burnett's life, read his oral history here.

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Thirteen judges, seven local D.C. high schools, 165 students, and 40 attorney mentors are just the bare statistics for this year's Program. Far more important, the students enjoyed the remarkable opportunity to learn from attorney mentors and teachers about First and Fourth Amendment issues in the school setting, and then formulated arguments based on those issues to present to the judges. Chief Judge Boasberg remarked at the closing session how impressed he was with the arguments presented and the remarkable poise by the students, who were asked tough questions by the Judges.

The 2024 Program included, from the U.S. Court of Appeals, Chief Judge Srinivasan and Judges Rao, Pan and Garcia, and from the U.S. District Court, Chief Judge Boasberg, and Judges Contreras, Cooper, Mehta, Cobb, Reyes, AliKhan and Harvey. Judge William C. Bryson (Federal Circuit), a longtime participant in the program, returned for another year.

Forty attorney mentors from various backgrounds and law firms volunteered their time to assist the students in preparing their argument presentations, and helped to provide an outstanding experience.

At the end of the program, 13 Outstanding Advocates were selected, one by each participating judge. And as tradition dictated, everyone enthusiastically joined together in the courthouse Atrium for a pizza lunch! This event is truly exciting, and one that the Society looks forward to hosting every year.

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Edgerton, J. dissenting). When Spottswood Bolling filed his follow-on action in the District Court one year later in early 1951, his counsel (Howard University professor) James Nabrit attacked segregation directly, foregoing any alternative demand for equal (if also separate) treatment of black children. That strategy set *Bolling v. Sharpe* apart from the many other cases in which such "back-up separate but equal" relief had been sought. District Judge Walter Bastian promptly dismissed the *Bolling* complaint without an opinion, presumably in light of *Carr v. Corning* and other cases, but urged the plaintiffs to appeal.

Before their appeal could be heard, the clerk of the U.S. Supreme Court reached out to Professor Nabrit, advising him that Chief Justice Vinson wanted him to petition the Court to have *Bolling* addressed with the other school desegregation cases that had been accepted by the Court for review. On November 10, 1952, the Court granted *certiorari* and scheduled argument for December 1952. On May 17, 1954, after the 1952 arguments, reargument in 1953, the death of Chief Justice Vinson, and the appointment of Chief Justice Earl Warren, the Supreme court unanimously decided in *Bolling* that the Fifth Amendment's due process clause warranted the same relief that the equal protection clause of the Fourteenth Amendment required in *Brown* and the other state cases. "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500.

Bolling v. Sharpe was not the first case upholding racial segregation to reach the Supreme Court from the courts of the D.C. Circuit, only to be reversed. In January 1950, a group of black D.C. residents led by Mary Church Terrell entered Thompson's Cafeteria at 14th Street and New York Avenue, N.W. and demanded to be served. In a 2022 article in the Supreme Court Historical Society Journal, D.C. Circuit Historical Society Board member Charles J. Sheehan recounts in detail what happened next – a refusal of service "because we don't serve colored people here." Sheehan, Charles J., *"Lost Laws" to "Eat Anywhere": D.C. v. Thompson and the Road to Brown*, Vol. 47-3: 284-304, Journal of Supreme Court History (2022). But these residents had an additional, and unusual, argument to make. At the urging of the D.C. Commissioners, Sheehan explains, D.C. Corporation counsel filed charges against Thompson's for violation of the Equal Service Laws – statutes that had been passed during Reconstruction in 1872 by the D.C. Legislative Assembly, at a time when the District had been established as a territorial government. These laws stated that "any restaurant keeper . . . refusing to sell or wait upon any respectable well-behaved person, without regard to race, color, or previous conditions of servitude . . . as other well-behaved and respectable persons are served" committed a misdemeanor. The Municipal Court judge ruled at trial that the Equal Service Laws had been repealed by implication, but the Municipal Court of Appeals reversed. The case then headed to the U.S. Court of Appeals for the D.C. Circuit.

The Court of Appeals split 5-4, reversing the Municipal Court of Appeals. Judge Stephens delivered the lead opinion, to which he and 3 other judges subscribed, finding that the Equal Service Laws "were not within the power of the Assembly and that they were

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Please Support The Society

Programs of the Society depend on the financial support of the Courts of the District of Columbia Circuit, individuals, and law firms.

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Online contributions to the Historical Society can be made at:

dcchs.org/donate

All memberships and contributions may also be mailed to:
The Historical Society of the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, NW, Room 4714
Washington, DC 20001-2866

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repealed by the 1901 Code." *John R. Thompson Co. v. District of Columbia*, 203 F.2d 579, 592 (D.C. Cir. 1953). Judge Fahy, joined by Judges Edgerton, Bazelon and Washington, disagreed, finding that the Equal Service Laws were validly passed and remained in effect. Judge Prettyman's concurrence in the judgment made the difference. He found that whether or not validly enacted, the two laws had been "abandoned" through 75 years of non-enforcement. "Here we have seventy-five years of disuse in the face of several enactments of licensing acts by Congress, promulgation of extensive regulations by the municipal authorities, issuance of thousands of licenses, and the daily conduct of many licensed businesses. If there be such a thing as a combination of time and circumstance which spell the abandonment of a regulation by the municipal authority which once promulgated it, this is it." *Id*. 596. Judge Fahy's dissenting opinion found the laws to be valid, rejected the notion of abandonment, and concluded with these words, which reflected the current trend in cities across the country in favor of equal, non-discriminatory treatment: "It is enough to point out that custom has not moved away from equal treatment, leaving these regulations derelicts of the past. Custom has moved toward equal treatment, as is shown by developments of recent years in the Government, in the armed services, in industry, in organized labor, in educational institutions, in sports, in the theatre, and in restaurants in the community, as examples. Neither time nor neglect should bar the legislative application to licensed restaurants in this community of the principle which opposes discrimination on account of race or color." *Id*. 607.

Justice Douglas began the Supreme Court's opinion on June 8, 1953 with these words: "This is a criminal proceeding prosecuted by information against respondent for refusal to serve certain members of the Negro race at one if its restaurants in the District of Columbia solely on account of the race and color of those persons." *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 102 (1953). The Court then proceeded – unanimously – to address and reject each of the holdings of the Court of Appeals, largely agreeing with Judge Fahy and his colleagues, ultimately ruling that the Laws were valid when passed, had not been repealed, and could not be "abandoned or repealed" by lack of use. "The failure of the executive branch to enforce a law does not result in its modification or repeal." *Id*. 113-14. While the Supreme Court's decision was framed in terms of the District of Columbia's "home rule" powers under Article I and does not address "separate but equal" or the Fourteenth Amendment, perhaps the absence of such debate is the point. In the Court's view, laws forbidding racial discrimination, even if unenforced for eight decades, remained valid and enforceable.

In his detailed and compelling article on *Thompson*, Sheehan notes that the day after the *Thompson* decision, June 9, 1953, the Supreme Court, after failing to reach a decision following the December 1952 arguments, placed the school desegregation cases "back on the docket". He also observes that the echo of Judge Prettyman's appeal – to custom and practice as precluding enforcement of validly passed anti-discrimination laws – was heard again in the arguments of advocate John W. Davis in the school desegregation cases. Sheehan quotes Davis's words, analogous to those of Judge Prettyman's statutory desuetude argument: "Somewhere, sometime, to every principle comes a moment of repose when it has been so often announced, so confidently relied upon, so long continued, that it passes the limits of judicial discretion and disturbance." *Lost Laws*, 300. For the good of the District, and the country, that argument found just as chilled a reception in *Brown* and *Bolling* as it did in *Thompson*. As Sheehan notes, "Thurgood Marshall immediately observed that *Thompson* represented a 'significant achievement in the drive [to] complete elimination of segregation in the United States'" and Chief Justice Earl Warren similarly observed in 1971 in "A Tribute to Judge Fahy" that *Thompson* "broke down segregation . . . prior to our decision in *Brown v. Board of Education*." *Lost Laws*, 301. Sheehan's thorough and insightful analysis of the *Thompson* litigation in the District of Columbia courts is found in the Journal of Supreme Court History, Vol. 47-3. And for another analysis of the impact of the D.C. Circuit courts on education in the District of Columbia, watch here the Society's 2014 program, "Sixty Years After *Bolling v. Sharpe*: Public Education and the D.C. Federal Courts."