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SUPREME COURT SLUGGERS: SAMUEL A. ALITO OF THE PHILADELPHIA PHILLIES AND MARVIN MILLER OF THE MLBPA

Ross E. Davies,
George Mason University School of Law

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SUPREME COURT SLUGGERS

SAMUEL A. ALITO OF THE PHILADELPHIA PHILLIES AND MARVIN MILLER OF THE MLBPA

Ross E. Davies[†]

The *Green Bag*'s Justice Samuel Alito trading card displays two of the established features of a *Supreme Court Sluggers* card: (1) imagery on the front, in the form of a portrait of the Justice in a sporting environment dotted with entertaining details, and (2) facts on the back, in the form of numbers – and a few words, if there is enough space – relating to the Justice's work. The Alito card has a couple of additional features that will, I hope, appear from time to time on future cards as well: (1) facts on the front, in the form of numbers relating to the Justice's own involvement in sports, and (2) imagery on the back, in the form of graphics that make it easier to make sense of some of the judicial statistics. I review all four of these features below, and then conclude with a note about a special-edition Marvin Miller *Sluggers* card we put out last year.

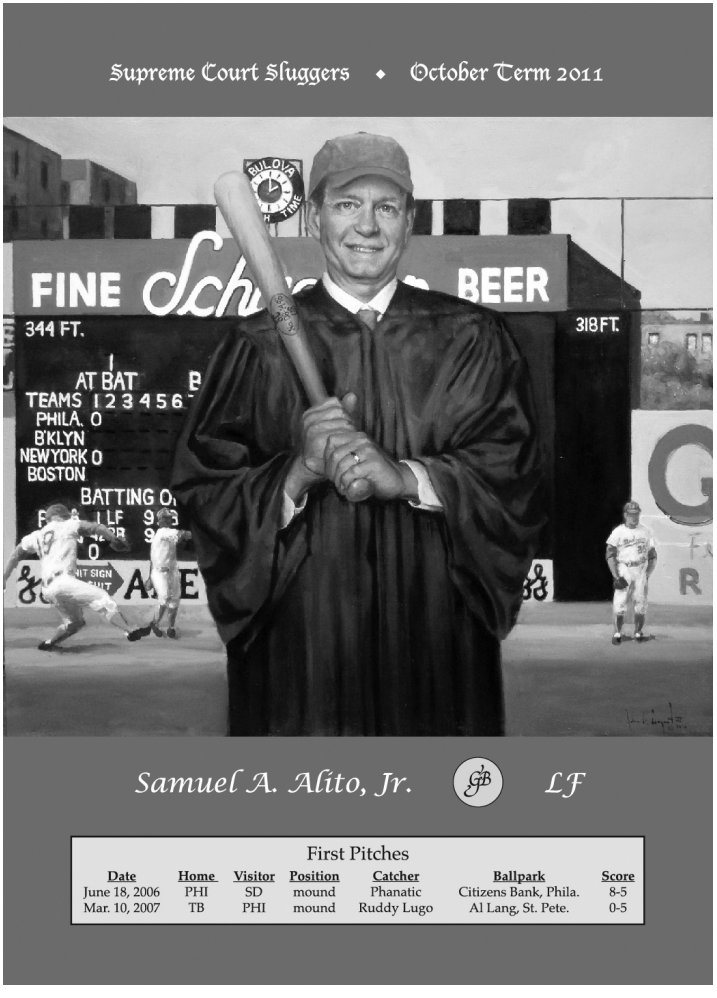
I.
JUSTICE SAMUEL ALITO, ILLUSTRATED

John Sargent painted the full-color portrait that graces the front of the Alito card and is reproduced in black-and-white on the next page.[1] It is inspired by a classic 1954 Don Richard "Richie" Ashburn trading card.[2] (The Ashburn card is not pictured here because we could not get permission from all possible copyright holders.) Why Ashburn? Because:

[†] Professor of law, George Mason University; editor-in-chief, the *Green Bag*.

[1] John A. Sargent III, *Supreme Court Justice Sam Alito* (2012) (oil on canvas). *See John A. Sargent III*, www.johnasargent.com (vis. Apr. 17, 2013); *Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html (vis. Apr. 17, 2013).

[2] *Richie Ashburn, Philadelphia Phillies*, No. 15 (Bowman 1954).



- Most importantly, he played for the Philadelphia Phillies. Alito is a big Phillies fan. Indeed, it is Alito's enthusiasm for the Phillies that is behind the statistics on the front of his *Sluggers* card. Alito has twice thrown the ceremonial first pitch at a Phillies game – a regular season game against the Tampa Bay Devil Rays in 2006 and a spring training game against the Rays in 2007 – and his team has won both games.[3]

[3] Ken Mandel, *Alito lives out a lifelong 'dream': Supreme Court Associate Justice throws out first pitch*, PHILLIES (June 18, 2006), philadelphia.phillies.mlb.com/news/article.jsp?ymd=200

- Ashburn was a great player in the outfield and in the batter's box for the Phillies from 1948 to 1959, and he remains in the team's all-time top ten in almost every major non-pitching statistical category. (He finished his career with short stints on the Chicago Cubs and New York Mets.)[4] He was the second player (after pitcher Robin Roberts) honored with a plaque on the Phillies Wall of Fame, his uniform (#1) is one of nine retired by the team, and he was elected to the National Baseball Hall of Fame in 1995.[5]
- In addition, Ashburn's status as the long-serving and much-loved voice of the Phillies for many fans – he was a Philadelphia baseball radio and television commentator from shortly after his 1962 retirement from playing until the day before his death in September 1997 – makes him a natural choice for a human symbol of Alito's team of choice.[6]

With Ashburn in place as the model for Alito the Supreme Court Slugger, the best choice for the setting is Ebbets Field in Brooklyn, New York on April 23, 1948, the best day of Ashburn's outstanding rookie season (after which he was named the *Sporting News* Rookie of the Year).[7] That day, the Phillies played the first game of a three-game series against the Brooklyn Dodgers. Thus, warming up from left to right on the *Sluggers* card behind Alito-as-Ashburn are Dodgers starters for the April 23 game: pitcher Joe Hatten, second baseman Jackie Robinson, and first baseman Dick Sisler. The famous

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60618&content_id=1512055&fext=.jsp&c_id=phi; Ben Walker, *Supreme Court Justice Trades Robe for Jersey*, [Mobile, Ala.] PRESS-REGISTER, Mar. 11, 2007, at B6. Note that the *Sluggers* card misidentifies the 2006 opposing team as the San Diego Padres. We will correct that error in the next edition of the card, and the error will surely make the first edition even more of a collector's item than it would otherwise be.

[4] *Richie Ashburn*, RETROSHEET, www.retrosheet.org/boxesetc/A/Pashbr101.htm (vis. Apr. 12, 2013).

[5] *Wall of Famers*, PHILLIES, mlb.mlb.com/phi/history/wall_of_fame.jsp; *Philadelphia Phillies Team History & Encyclopedia*, BASEBALL-REFERENCE.COM, www.baseball-reference.com/teams/PHI/; *Ashburn, Richie*, NATIONAL BASEBALL HALL OF FAME AND MUSEUM, baseballhall.org/hof/ashburn-richie (all vis. Apr. 12, 2013).

[6] *See* Frank Fitzpatrick, *A Phillie for the Ages, Richie Ashburn Dies*, PHILA. INQUIRER, Sept. 10, 1997, at A1; *see generally* FRAN ZIMNIUCH, RICHIE ASHBURN REMEMBERED (2005).

[7] *Richie Ashburn*, RETROSHEET, www.retrosheet.org/boxesetc/A/Pashbr101.htm (vis. Apr. 12, 2013).

Bulova clock above the Ebbets Field scoreboard behind right-center field[8] shows that the 2 p.m. game is about to start, and so leadoff hitter Alito-as-Ashburn is ready to go. He is standing with his bat on his shoulder in the on-deck circle in front of the visitors' dugout on the third base side. In the game as it was actually played, Ashburn hit a leadoff single in the top of the first inning, and then advanced to second on a bunt by Emil Verban and to third on a single by Bert Haas. Ashburn then stole home, in his fourth game as a major-leaguer – the first of his 32 stolen bases that season and 234 in his career. He had two more hits in that game, two more scores, and a run batted in. The Phillies won, 10 to 2.[9]

The bat Alito-as-Ashburn is holding is, however, unlike the one Ashburn swung in 1948. If you look closely you might be able to make out the details of its unique logo:

And that logo might prompt you to re-read Alito's concurring opinion in *Brown v. Entertainment Merchants Association*, in which he observes that

> Persons who play video games also have an unprecedented ability to participate in the events that take place in the virtual worlds that these games create. . . . [T]he means by which players control the action in video games now bear a closer relationship to the means by which people control action in the real world. While the action in older games was often directed with buttons or a joystick, players dictate the action in newer

[8] *See* BOB MCGEE, THE GREATEST BALLPARK EVER: EBBETS FIELD AND THE STORY OF THE BROOKLYN DODGERS 184-85 (2005).

[9] *Philadelphia Phillies 10, Brooklyn Dodgers 2: Game Played on Friday, April 23, 1948 (D) at Ebbets Field*, RETROSHEET, www.retrosheet.org/boxesetc/1948/B04230BRO1948.htm (vis. Apr. 12, 2013).

> games by engaging in the same motions that they desire a character in the game to perform. For example, a player who wants a video-game character to swing a baseball bat – either to hit a ball or smash a skull – could bring that about by simulating the motion of actually swinging a bat.[10]

Finally, to anticipate the obvious question about an obvious absence from such a Phillies-friendly baseball card: Yes, we attempted to ask the Phillies for permission to portray Alito in a cap with the Phillies "P" on it, but Major League Baseball said no.

II.
JUSTICE SAMUEL ALITO, QUANTIFIED

In one sense the biggest news about the numbers on the back of the Alito *Sluggers* card is no news at all. The sophisticated and comprehensive processes for gathering and sorting judicial statistics that *Sluggers* editors Adam Aft and Craig Rust have developed (and which they describe in earlier articles about the *Sluggers*[11]) ran quite smoothly for the Alito card. Aft and Rust – with assistance from Justin Du Mouchel, Jeremy Greenberg, Tashina Harris, Daniel Rodriguez, and Sarah Snider – have put together what appears to be (subject to correction by attentive readers) a complete statistical profile of Alito's judicial opinion-writing and opinion-joining production. The results of their research are summarized on the back of the Alito card (which is reproduced on the next page), and are available in their entirety on the *Supreme Court Sluggers* website.[12]

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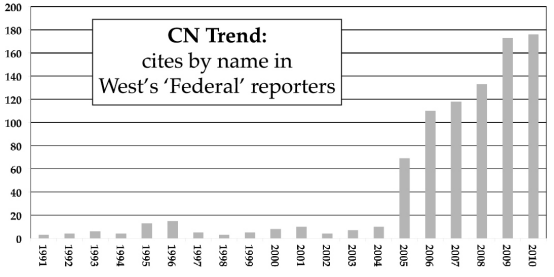
[10] 131 S.Ct. 2729, 2749 (2011) (Alito, J., concurring in the judgment) (footnote omitted).

[11] *See, e.g.*, Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: Introducing the Scalia, Fortas, and Goldberg/Miller Trading Cards*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) 155, 166-70 (2012); Ross E. Davies, Craig D. Rust and Adam Aft, *Justices at Work, or Not: New Supreme Court Statistics and Old Impediments to Making Them Accurate*, 14 GREEN BAG 2D 217, 226-28 (2011); Ross E. Davies, Craig D. Rust and Adam Aft, *Supreme Court Sluggers: John Paul Stevens is No Stephen J. Field*, 13 GREEN BAG 2D 463, 475-80 (2010); Ross E. Davies and Craig D. Rust, *Supreme Court Sluggers: Behind the Numbers*, 13 GREEN BAG 2D 213, 219-26 (2010).

[12] *See Sluggers Home*, GREEN BAG, www.greenbag.org/sluggers/sluggers_home.html (vis. Apr. 17, 2013).

[1]The Numbers (as of June 28, 2011)

Court	Term	TO	MO	UO	PO	CO	DO	PC	JN	OO	IC	CN
[2]3d Cir.	1989	1	1	1	0	0	0	0	3	0	0	0
3d Cir.	1990	25	17	15	0	1	7	0	32	0	0	0
3d Cir.	1991	28	18	15	0	3	7	1	39	0	0	3
3d Cir.	1992	20	12	11	0	4	4	0	32	0	0	4
3d Cir.	1993	32	22	20	0	1	9	0	45	0	0	6
3d Cir.	1994	14	10	7	0	2	2	2	33	0	0	4
3d Cir.	1995	20	12	10	0	2	5	0	24	1	0	13
3d Cir.	1996	26	13	11	0	1	12	0	29	0	0	15
3d Cir.	1997	17	13	9	0	2	2	1	26	0	0	5
3d Cir.	1998	30	23	20	0	4	3	0	38	0	0	3
3d Cir.	1999	27	18	15	0	3	6	2	25	0	0	5
3d Cir.	2000	23	19	15	0	3	1	0	29	0	0	8
3d Cir.	2001	27	23	17	0	1	3	5	84	0	0	10
3d Cir.	2002	24	22	21	0	2	0	0	117	0	0	4
3d Cir.	2003	33	25	24	0	5	3	0	147	0	0	7
3d Cir.	2004	15	9	9	0	2	4	0	112	0	0	10
[2]3d Cir.	2005	2	2	2	0	0	0	0	37	0	0	0
Tot.		**364**	**259**	**222**	**0**	**36**	**68**	**11**	**852**	**1**	**0**	**97**
Avg.		**24**	**17**	**15**	**0**	**2**	**5**	**1**	**54**	**0**	**0**	**6**
[2]S. Ct.	2005	9	3	1	0	3	2	9	26	1	0	69
S. Ct.	2006	16	6	3	1	5	4	7	52	0	0	110
S. Ct.	2007	18	7	1	0	4	7	6	48	0	0	118
S. Ct.	2008	24	7	3	0	9	6	9	52	2	0	133
S. Ct.	2009	24	6	1	0	10	6	17	52	1	0	173
S. Ct.	2010	20	7	1	0	6	5	6	61	2	0	176
Tot.		**111**	**36**	**10**	**1**	**37**	**30**	**54**	**291**	**6**	**0**	**779**
Avg.		**20**	**7**	**2**	**0**	**7**	**6**	**9**	**53**	**1**	**0**	**142**



[1]Full acronym definitions and backup for **The Numbers** are at www.greenbag.org. [2]These are partial Terms, thus the low numbers and therefore we did not use them when calculating averages.

Made by the Green Bag, with GMU Sch. of Law support. Portrait by John A. Sargent. Numbers by Justin Du Mouchel, Jeremy Greenberg, Tashina Harris, Daniel Rodriguez, Sarah Snider, Craig Rust, Adam Aft.

Samuel A. Alito, Jr.
Associate Justice
Oath: Jan. 31, 2006

Term=yr. starting 1st Mon. in Oct.; **TO**=MO+PO+CO+DO+OO+IC; **MO**=majority opinions; **UO**=MOs w/no other opinions; **PO**=plurality opinions; **CO**=concurrences; **DO**=dissents; **PC**=per curiams joined; **JN**=non-PCs joined when not writing (max. 1/case); **OO**=opinions relating to orders; **IC**=in-chambers opinions; **CN**=cites by name in West's 'Federal' reporters

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To the extent there is big news on the back of the Alito card it has to do not with new data but with the graphical presentation of another kind of data – citations by name – that Aft, Rust, and company have been gathering about every Justice for every *Sluggers* card. The "CN" statistic – the number of citations by name to a Justice per

year in West's "Federal" reporters (the *Federal Appendix*, *Federal Reporter*, and *Federal Supplement* series) is an "attempt[] to quantify how influential or popular [a Justice] has been, by recording . . . the number of times he [or she] was cited by name in a federal court opinion (which could, of course, include jabs as well as lauds)."[13]

The Alito card is the first to feature a year-by-year "CN Trend" graph for a sitting Justice.

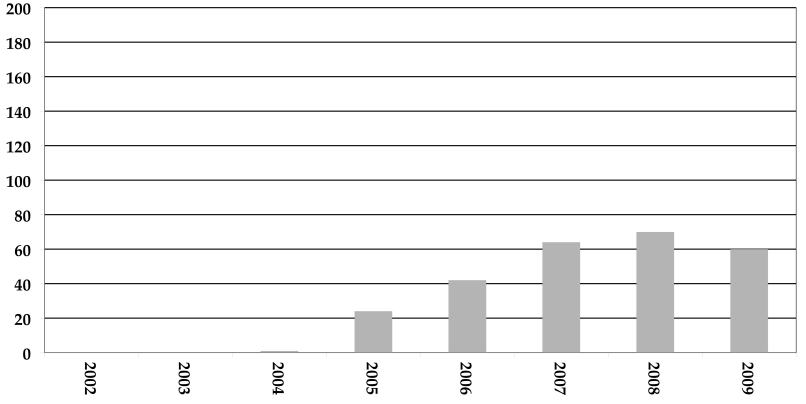
The Abe Fortas *Sluggers* card was the first to feature a decade-by-decade "CN Trend" graph for a historical figure. The main idea behind that kind of presentation is to give the viewer a quick-look sense of the ups and downs of the long-term legacy of the individual Justice.

The main idea behind the year-by-year presentation on the Alito card – and, I hope, on future cards of active and recent Justices (including updates to old cards) – is to give viewers a quick-look sense of the extent to which individual Justices are in the sights of their judicial colleagues. Graphs of this sort will probably inspire a lot more questions than answers, but they may be the kind of questions that will inspire additional research or at least reflection.

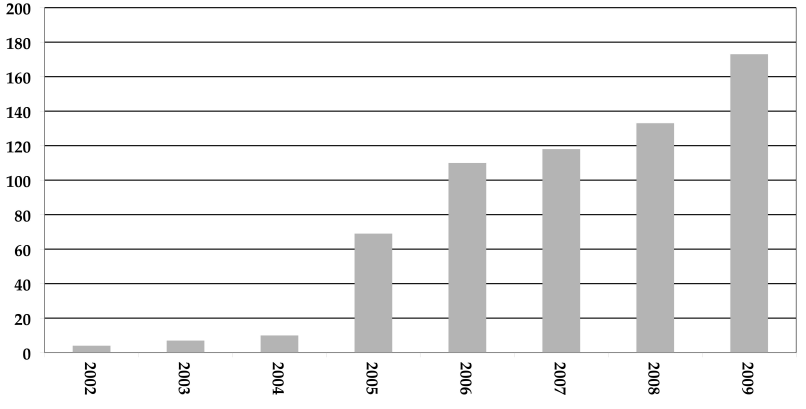
Consider, for example, the CN Trends from 2002 to 2009 for Alito and his colleague Chief Justice John Roberts. Before you turn to the next page, consult your intuition: How will their CN numbers compare? Bear in mind that these two had a lot in common at the start of their careers on the Court. They joined at close to the same time (Roberts in September 2005, Alito in January 2006), they were appointed by the same president (George H.W. Bush) and confirmed by the same Senate (the 109th), they were elevated from seats on eastern federal appeallate courts, they had served lengthy tours of duty as government lawyers, and so on. If we had included a CN Trend graph in our 2010 update to the back of Chief Justice Roberts's *Sluggers* card, it would have given reader-collectors a chance to easily (if only summarily) compare the extent to which, since the fall and winter of 2005-06, their colleagues on the federal bench have mentioned them by name in their reported opinions:

[13] Davis & Rust, *supra* note 11, at 223.

CHIEF JUSTICE JOHN G. ROBERTS, JR.
CN TREND, OT2002-2009

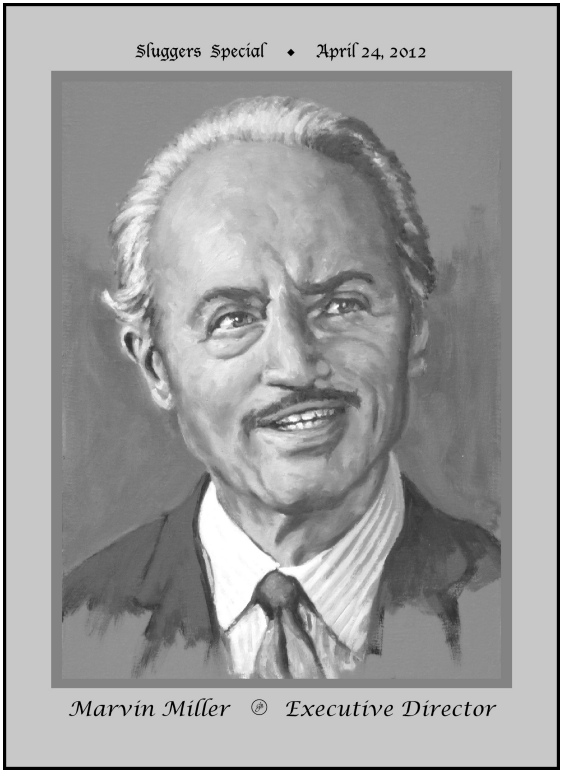


JUSTICE SAMUEL A. ALITO, JR.
CN TREND, OT2002-2009



I do not know why these graphs are so different. But I do know that I am not the only person who sometimes misses puzzlers like this unless there are pictures for me to read and wonder about. Perhaps some Bill James of judicial behavior will figure it out.[14]

[14] *Cf.* BILL JAMES, THE POLITICS OF GLORY: HOW BASEBALL'S HALL OF FAME REALLY WORKS (1994); Cass R. Sunstein, *Moneyball for Judges: The statistics of judicial behavior*, NEW REPUBLIC, Apr. 10, 2013 (reviewing LEE EPSTEIN, WILLIAM M. LANDES, AND RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2012)).



III.
UNEXPECTED IN MEMORIAM: MARVIN MILLER, 1917-2012

Last April, the *Green Bag* produced a special edition of the Marvin Miller portion of the Arthur Goldberg/Marvin Miller *Sluggers* card. It was for a law-and-baseball event at which Miller was the featured speaker, sponsored by the Center for Labor and Employment Law at New York University.[15] (Miller, the longtime baseball labor leader whose work led to his involvement with various interesting legal figures, institutions, and events, is featured on a *Sluggers*

[15] *A Celebration of Marvin Miller & Baseball Unionism: The Rise and Role of the Major League Baseball Players Association*, NEW YORK UNIVERSITY LAW SCHOOL, www.law.nyu.edu/centers/labor/scheduleofevents/BaseballUnionism/index.htm (vis. Apr. 13, 2013).

card with Justice Goldberg because of their long off-and-on working relationship – it began when both were employed by the United Steelworkers in the 1950s – that culminated in collaboration on the baseball, antitrust, and labor case of *Flood v. Kuhn* in the early 1970s.[16])

It was to the proceedings at New York University that Aft, Rust, and I were referring when we wrote in these pages last year that, "[W]e expect that in the not-too-distant future there will be another, better forum in which to describe the Goldberg-Miller card in full."[17] And the forthcoming volume 16 of the *New York University Journal of Legislation and Public Policy* – in which transcripts of Miller's NYU speech and the associated proceedings will be published – is that forum.

What we did not know at the time of the NYU event, but that Miller himself forecast, was that it would be his "last hurrah."[18] He delivered his speech on April 24, fell ill several weeks later, and died on November 27, 2012 at the age of 95. Which makes the Marvin Miller *Sluggers* card something of a commemorative token. Not that Miller needs our help. He left behind some footprints that are fairly firmly pressed on the sandlots of time.[19]

# # #

[16] 407 U.S. 258 (1972); MARVIN MILLER, A WHOLE DIFFERENT BALL GAME: THE INSIDE STORY OF THE BASEBALL REVOLUTION 187-201, 366-67 (2d ed. 2004).

[17] Davies, Rust and Aft, *supra* note 11, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP (1 J. LEGAL METRICS) at 176.

[18] Email from Peter Miller to Ross Davies, Nov. 27, 2012 ("This year's April symposium . . . at NYU proved to be exactly what my father, with his usual realism, said it would be: his 'last hurrah'.").

[19] Richard Goldstein, *The Bargainer Who Remade the Old Ball Game*, N.Y. TIMES, Nov. 28, 2012, at A1; *see also Hundreds turn out to celebrate the life and achievements of Marvin Miller*, MLBPA Press Release, Jan. 22, 2012, mlb.mlb.com/pa/releases/releases.jsp?content=012213.