



United States District Court for the Southern District of New York

Its Impact on the Law

Hon. Edward Weinfeld
District Judge

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There is an old saying that sometimes it is better to be seen than to be heard. If I had the wisdom to follow that old adage, I would not have had the task that brings me before you this afternoon.

At a meeting of the Historical Committee to which Judge Oakes referred, I suggested that it would be desirable that a study be made of the Southern District Court's contribution to the jurisprudence of our nation. Judge Oakes, bringing to bear his best tennis technique, aided and abetted by other members of the committee, quickly and readily agreed that advantage should be taken of the suggestion, with the result that they not only unanimously agreed it was a good idea but also decided that I was the one to make this first annual lecture. But it has been a pleasurable task.¹

A preliminary observation about our District Court. It was not always, as it is today, the sole federal trial court in the Southern District. From 1789 until 1911 it shared original jurisdiction with the Circuit Court, which functioned both

at the trial and appellate level. As Judge Oakes indicated in his introductory remarks, the Circuit Court usually consisted of a Justice of the Supreme Court of the United States—and that is how the Chief Justice instructed that grand jury—and a District Court Judge, who jointly tried cases.

It was not until 1869 that separate Circuit Judges were appointed, and not until 1891 that the Circuit Court of Appeals, as we know it today, was established. Only in 1911 did Congress abolish the old Circuit Court and thereby confirm the birthright of the District Court as the principal trial court in federal system.

In this talk, when I refer to the federal courts of New York, I include both the District and the Circuit Court when it functioned on the trial level.

For well over a century the federal trial courts in this District—as I have already noted, the District Court and, until 1911, the Circuit Court—have labored under the heaviest caseload in the nation. This massive quantity of litigation makes study of the Southern District Court's history a challenging assignment.

Prior to 1880, when federal cases from New York were first published in the *Federal Reporter*, more than twenty-five volumes of cases had already been published² mainly by individual judges when they thought their opinions merited public attention. The number of reported cases during the past century is so great that I would not venture to estimate its total.

Fortunately, however, I am not the first to report on the history of the Southern District. The distinguished Charles M. Hough, and later my own colleague, Richard H. Levet, have published excellent studies, and their efforts made it possible for me to add to the already solid foundation of information which they left us.

Judge Hough and Judge Levet focused their attention on the changing jurisdiction of the District Court and, in large measure, on biographical references to many of the judges of the court. I will focus instead on the nature of the litigation in the Southern District, with some references of a biographical nature.

I will try to document what I have long believed, and so many of you have heard me proclaim, perhaps in hyperbolic terms, that the Southern District of New York has always been, and remains, one of the foremost courts of the nation—indeed, that it is a national institution. Then, I will suggest a number of reasons for the unusual workload and importance of our court. In my historical survey, I will consider only matters prior to 1950, the year of my own appointment to the bench.

The Southern District of New York has long enjoyed special recognition. It has been, for example, the venue in which the Government has brought proceedings of often great interest. Some of the cases have been against prominent political figures, while others have been targeted against persons whom the Government viewed as threats to its continued existence.

I am sure that most in the audience will recall the prosecution, several years ago, in this Court of a former United States Attorney General. Those of my generation know that this was not the first instance of a former Attorney General facing criminal charges in this Court.

One highly publicized prosecution was brought in 1926 against Harry M. Daugherty, the Attorney General under President Warren G. Harding, who resigned in 1924 under a cloud that followed in the wake of the Teapot Dome Scandal.

The charge—conspiracy to defraud the Government—arose out of the alleged receipt by Daugherty and others of a bribe to induce them to return German-owned properties that had been seized during World War I by the Alien Property Custodian. Daugherty's first trial, when he was defended by one of the most skillful cross-examiners of all times, the redoubtable Max D. Steuer, ended in

a deadlocked jury, and upon a retrial in 1927 the outcome was the same. He was never tried again³. His co-defendant was convicted on retrial.

Although some of you undoubtedly recall the Daugherty prosecution, I suspect few have ever heard of an earlier proceeding which the Government brought against an even more prominent political figure—Samuel J. Tilden. The proceeding against Tilden, which was civil rather than criminal in nature, was instituted by the Administration of Rutherford B. Hayes in 1877, the year after the election of 1876, in which Hayes had defeated Tilden for the Presidency by a single electoral vote.

The claim by the Government was that Tilden had failed for a long period of time, going back to the 1860s, to report his income accurately or to pay in full the Civil War income tax. The case dragged on for five years, until Tilden retained a new attorney, Elihu Root, the distinguished constitutional lawyer, who negotiated a settlement resulting in the Government's discontinuance of the case.⁴

The Government has also brought many prosecutions in the Southern District against dissidents whose political activities were thought to threaten national security. The most familiar case in recent decades was *United States v. Dennis*, in which charges were brought under the Smith Act against the leadership of the American Communist Party. The *Dennis* case, which lasted nine months and was presided over by our venerable Harold Medina, resulted, as all of you know, in convictions that were ultimately affirmed by the Supreme Court.

Three decades earlier the Government had brought similar prosecutions against the well-known radicals, Emma Goldman and Alexander Berkman, and against others accused of aiding the German cause during World War I, and many of these prosecutions led to convictions.⁵

Proceedings against alleged Confederate sympathizers also were heard in the Southern District of New York during the course of the War between the States. Two such cases were reported. In both of them, persons who had been im-

prisoned on charges of aiding the Confederacy sought judicial remedy or relief in this court.

One case⁶ was brought by a person who had been arrested in 1862 under an order of President Lincoln. After his release, he brought a damage action in the state court for false imprisonment, but the federal authorities removed the case into this Court by virtue of an 1862 act authorizing such removals and further declaring Presidential orders of arrest valid.

The plaintiff argued that the statute was unconstitutional and moved to remand the case to the state court. The Circuit Court held that a claim of unconstitutionality could not properly be determined on a motion to remand but must await determination at a plenary consideration of petitioner's case on the merits. That plenary consideration, if it ever occurred, was never reported.

The second case⁷ was brought by a prisoner held on a charge of participating in a conspiracy to burn New York City. The only evidence against the prisoner was the fact that he had been associated with another person who had been executed by the Union forces for attempting to burn the city, together with statements made by other alleged co-conspirators after the conspiracy had ended. Since those post-conspiratory statements were not admissible in evidence against the prisoner, the court ruled that the evidence was insufficient to hold him for a grand jury, and accordingly it granted his release on habeas corpus.

The cases I have mentioned, and others like them, have been important not only for the public interest they aroused, great as that has been, but even more for the part they had played in the history of American civil liberties.

For example, in *Masses Publishing Co. v. Patten*⁸ who was a postmaster, one of the World War I cases, our revered Chief, Learned Hand, then a District Court Judge, held that, unless a speaker intended to incite his listener to an imminent criminal act, his speech was protected by the First Amendment. Interestingly, the Court of Appeals disagreed with Judge Hand's formulation and reversed his ruling. However, many years later, Hand's incitement standard was

adopted by the Supreme Court and combined in *Brandenburg v. Ohio*⁹ with the more famous Holmes clear and present danger test to create today's standard for protecting First Amendment liberties.

Civil liberties' issues were also of crucial importance in the government's tax proceeding against Samuel J. Tilden. Tilden's lawyers, not surprisingly, viewed the proceeding in language we often hear from lawyers today, as "a mere fishing suit, brought for a general inquisition into the private affairs of the defendant."¹⁰

It is impossible at this juncture to know whether those attorneys were correct in their view, but one fact that is clear is that the government sought to obtain a great deal of privately held information in its effort to prove its case.

The government, for example, took the deposition of Tilden's stockbroker, and, when he could not remember the details of the Tilden stock purchases, sought to compel the broker to produce all his firm's records over a ten-year period. The court held that the government could obtain the production of books and papers that would be competent evidence, but denied it access to all the witness' books and records merely for the purpose of refreshing his recollection.¹¹

The government also sought to compel a vice president of the Chicago & Northwestern Railroad to produce its books and records in order to determine whether Tilden owned shares in the railroad. But when the vice president argued that the books in question were not in his custody in New York, but were at the railroad's main office in Chicago, the court quashed the subpoena.¹²

Although the government accordingly failed to obtain all the evidence it sought, it did prevent the defense from obtaining access to its evidence—or, indeed, from determining whether the Government had any evidence—when the Court denied a defense request for a bill of particulars.¹³ The court also denied Tilden's request to seal all pretrial proceedings even though it recognized that public knowledge of those proceedings could result in significant injury to Tilden's reputation.¹⁴

I think we may pause to well ponder on that, in view of the rather frequent applications that currently are made in private litigation to seal files and papers.

The cases I have mentioned were not the only ones to come before the Southern District involving political dissidents or politically prominent personages. Nor have civil liberties' issues been the only concern of New York's federal courts during their history. Our courts not only have protected private citizens facing the power of government prosecutors but also have provided remedies for powerless individuals threatened by larger and stronger business entities.

Judicial enforcement of the federal securities laws provides a current example of the court's role in adjudicating conflicts between dominant groups in business corporations and opposing minority interests. However, such litigation is not new: it has been fairly common in the Southern District for well over a century. Significant litigation was generated, for example, by the notorious machinations of James Fiske and Jay Gould during the 1870s in the affairs of the Credit Mobilier and of the Erie and Union Pacific Railroads.¹⁵

Two other cases were brought even earlier to prevent dissolution of partnerships, one of them for the publication of Charles Dickens' works¹⁶ and the other for the exploitation of exclusive privileges granted by the Chilean Government.¹⁷ Other cases involved the internal governance of partnerships. One held, for example, that, although two out of the three trustees of a mercantile enterprise for carrying mail to California could conduct business without the third, the third had a right to examine the books and to enjoin the others from acting alone if he could show a breach of trust on their part.¹⁸

Even more important to the future were the Southern District cases that have contributed to the emergence of a new body of corporate law. As early as the mid-nineteenth century, the court heard such matters as a suit involving construction of a stock option contract and a suit to enjoin a railroad from raising capital to lay tracks west of Des Moines, Iowa.¹⁹

The Circuit Court also heard a suit by a corporation against a director for an allegedly fraudulent sale of its assets²⁰ and another suit by a trustee who held 53,000 shares of Pacific Mail stock and wanted to ensure that the shares could be voted in a forthcoming election that would determine corporate control²¹—a precursor of today's tender offer and merger spirited controversies.

Finally, the court heard cases determining the distribution of corporate assets among creditors and shareholders in cases of insolvency.²²

The federal courts of the Southern District also considered conflicts between individual and dominant business groups in a series of nineteenth century cases involving railroads and other common carriers. In particular, the courts heard cases involving attempts by carriers to limit their liability for loss or damage to goods—attempts toward which the Circuit Court was plainly hostile.²³ Thus the court held that language on the back of a freight receipt would not suffice to limit liability²⁴ and that, while an endorsement on a baggage claim check might seem to limit liability, such endorsements were to be strictly construed against the carrier.²⁵

In a third case, the court sustained a \$10,000 verdict against the New York Central for loss of the plaintiff's antique lace wearing apparel.²⁶ The size of the verdict takes on special significance when it is noted that that damage award was rendered 105 years ago.

In reaching these judgments, the court observed that carriers could not "change their liabilities by a sweeping custom,"²⁷ and that "If carriers are unwilling to assume . . . liabilities" for the transportation of goods, "they must resort to such regulations, in regard to the transportation of baggage, as are sanctioned by law, or appeal to the legislature for protection."²⁸

In all these cases, decided more than 100 years ago, of course the federal courts found themselves involved in setting standards of due care—an important task in which they have always been engaged.

*Monteith v. Kirkpatrick*²⁹ was an early case in which the court set a standard of care. The case arose out of a shipment of flour from Ontario, Canada, to New York City—a shipment that today would probably travel by rail. In 1855, however, the flour in question was shipped across Lake Ontario to Oswego, taken by canal to Albany, and then floated down the Hudson River to New York. Upon inspection of the flour in New York, it appeared to have been partially damaged as a result of having gotten wet sometime previous to its arrival at Albany. The defendant, who received the flour at New York, sought to abate the freight charges claimed by the libellant by making a deduction for the damage to the flour, but the court ruled he could not do so since the libellant had merely shipped the flour from Albany to New York and was not responsible for damage that had occurred to it prior to its arrival at Albany. The defendant also sought to avoid paying the freight charged for transporting the goods from Ontario to Albany, which the libellant had advanced upon arrival of the goods in Albany. Here again, however, the court ruled against defendant, on the ground that libellant had advanced the freight to the earlier carriers “according to the established usage of the shipping of goods from the port of Oswego to New York.” There was nothing special for the mid-nineteenth century either about the facts of this case or in the court’s determination of liability on the basis of mercantile custom, but, since it involved a carriage of goods by sea rather than by land, this quite ordinary case and others like it found their way into federal instead of state court.

Probably the best known case setting a standard of care was the *T.J. Hooper*,³⁰ where Learned Hand authored a leading opinion on appeal. The issue in the case, as some of you will recall, was whether the owners of a tugboat were negligent in failing to provide the tug with a radio on which to receive storm warnings. The owners took the position that it was not customary to equip tugboats with radio receivers and that their behavior was in accordance with the prevailing custom of the trade and hence could not constitute negligence. Judge Hand, like his predecessors in the nineteenth century railroad cases, held that the law could not be straitjacketed by the practices of businessmen. Hand’s language reflects better than anything else I can cite the majestic role which our courts have played in the development of the law:

In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required.³¹

I could go on at great length telling you of other significant types of litigation heard by the courts of the Southern District throughout their history, which have influenced our federal jurisprudence, but time precludes me from doing so. Indeed, a volume could well be written on the subject.

I now turn to the second part of what I proposed to discuss this afternoon: the question of why the federal courts of the Southern District have heard and determined cases which have had such a significant impact on the law. Several reasons can be suggested.

One obvious factor in the caseload of the courts is that their jurisdiction encompasses the commercial and financial capital of the nation—New York City.³² Although it had not been the nation's largest city when the federal courts were established in 1789, it soon became that; in fact, by the time of the Civil War, New York was not merely the largest of American cities, but it overshadowed in financial and commercial strength its rivals—Baltimore, Boston and Philadelphia.

The nineteenth century business community of New York, like the business community of today, generated a considerable quantity of litigation. In the early years, the chief business of the federal courts consisted of condemnation proceedings, vessel seizures, customs cases and general admiralty cases. We must not underestimate the economic significance of this litigation. Consider, for example, the law of admiralty. In the early nineteenth century, admiralty cases were of great economic importance. Until the period after the Civil War, when railroads became the principal carriers of the nation's domestic trade, most American commerce was carried in ships, and hence most disputes arising out of commercial carriage of goods were disputes heard on the admiralty side of the court. Given New York City's importance as the nation's commercial capital and as its leading port city, the city's federal courts heard a large number of lawsuits by virtue of their admiralty jurisdiction.

A second factor contributing to the large quantity and high level of litigation in the Southern District was its extraordinarily illustrious bar. Several members of this bar, for instance, went on to become national political figures, such as Samuel J. Tilden, who served as Governor of New York and who ran for the Presidency in 1876;

Charles Evans Hughes, who conducted the famous New York State Insurance Company investigations, was elected Governor, served as a Justice of the Supreme Court, and, following his resignation to run for the Presidency, which he did not achieve, later served first as Secretary of State, and finally as Chief Justice of the United States;

William H. Seward, who was both Governor of and Senator from New York and Secretary of State;

Elihu Root, already mentioned, who served in the United States Senate, in the cabinet of President McKinley as Secretary of War, also in the cabinet of Theodore Roosevelt, as Secretary of State and upon his return to practice as counsel to the former Root, Clark, Buckner firm;

William N. Evarts, an Attorney General of the United States, who also served in the cabinet of President Grant;

Evarts' partner, Joseph H. Choate, of national fame as a gifted after-dinner speaker and who served as Ambassador to the Court of St. James.

This roster of outstanding lawyers who practiced at our bar and then rendered conspicuous public service is far from complete but time bars the mention of many others. However, it would be wanting if several others were not referred to. These include: Henry L. Stimson, who served as United States Attorney in this District, under whose tutelage Felix Frankfurter experienced his initial public service as an Assistant United States Attorney. Stimson served as Secretary of War, first in the administration of President Taft and, after his return to practice as head of Winthrop, Stimson, he again served thirty years later as Secretary of War during World War II in the administration of Franklin D. Roosevelt and continued in that post under President Truman;

John W. Davis, who was Solicitor General in the Woodrow Wilson Administration, and after service as Ambassador to Great Britain, entered the practice of law in this city as the head of Davis, Polk & Wardwell, which at that time was known as Stetson, Jennings & Russell;

John Foster Dulles of Sullivan & Cromwell, who served as Secretary of State under President Eisenhower.

Other practitioners went to the bench after successful careers at this bar, including Simeon E. Baldwin, who became Chief Justice of Connecticut;

Samuel Blatchford, who served as a District Judge in the Southern District and later as Associate Justice of the Supreme Court;

Thomas D. Thacher, a member, and son of one of the founders, of Simpson Thacher & Bartlett who, following service as a District Court Judge, resigned to serve as Solicitor General of the United States in the administration of President Calvin Coolidge;

Robert P. Patterson, known to some of you, who served as a District Court Judge and on the Court of Appeals from where he was called to national service in World War II as Undersecretary of War; and

John Marshall Harlan, who served first on our Court of Appeals and later as Associate Justice of the Supreme Court.

Other practitioners before the court achieved prominence in specialized areas:

David Dudley Field gained fame as the great draftsman of New York's Code of Civil Procedure and as the proponent of further codification, while James C. Carter earned his place as Field's principal opponent and as a defender of the common law.

George Ticknor Curtis was a national leader in the post-Civil War movement for civil service reform, while William Kent, the son of Chancellor Kent, was a distinguished lawyer and legal scholar in his own right, as were:

Thomas A. Emmet, the distinguished immigrant from Ireland;

Frederic R. Coudert, a founder of the well-known firm; and

Charles F. Southmayd, perhaps the most distinguished appellate advocate of his day.

In more recent times, there are other giants of the bar whose names are familiar to some of you: Martin W. Littleton, Bourke W. Cochran, Louis Marshall, Samuel Untermeyer, Emory R. Buckner, George Z. Medalie, Lamar Hardy and Martin Conboy, to mention only a few of those who regularly practiced before this court.

These illustrious attorneys and many others who appeared before our courts made immense contributions to the judiciary's work. Those lawyers often demonstrated great brilliance and creativity.

Consider, for example, the 1865 case of *Cutting v. Gilbert*,³³ which concerned the scope of the equitable remedy of a bill of peace. An early case, *Peter v. Prevost*,³⁴ had indicated that a bill of peace would lie after a party had litigated an issue at common law in one, or perhaps several identical cases, and faced still fur-

ther litigation of the same issues in numerous other cases; under such circumstances, an equity court would issue a bill of peace that would determine the other cases in accordance with those already litigated.

Cutting was an effort to extend that remedy to any situation in which a number of prospective lawsuits—in this case, suits by banks questioning the legality of a stock transfer tax imposed by the Government during the Civil War—raised a common question of law. In short, *Cutting* was an effort by ingenious lawyers representing New York banks to anticipate what the Federal Rules of Civil Procedure would accomplish nearly a century later: the creation of the device of the modern class action as a tool for pooling resources so that legal claims too small to merit litigation when pursued individually could be brought to trial. The fact that the Circuit Court ruled against the effort is of less significance to understanding the importance of lawyers to the judiciary's work than is the fact that the effort was made.

The existence of an illustrious bar and of ingenuity and creativity on its part, while contributing to the greatness of the federal courts in the Southern District of New York, did not alone make those courts unique. After all, the same lawyers who practiced before the federal courts in New York City also practiced before the state courts, and those lawyers must have demonstrated the same brilliancy and creativity there.

The brilliance and creativity of the New York bar was of special importance in the growth of federal court litigation only because those qualities enabled New York's lawyers to utilize the procedures of the federal courts in ways that would maximize the advantages to their clients of litigating their cases here.

The single most important fact about the jurisdiction—particularly the diversity jurisdiction—of the federal courts has been that either a plaintiff or a defendant could choose to have his case tried in federal court if he thought that federal procedures would serve his advantage; all parties to a suit, on the other hand, had to agree to trial in state court in order to have a case remain there. The fact that either party could select a federal court for trial, whereas both had to

agree in order for a case to remain in state court, was a powerful force for the growth of federal litigation.

As it happened, there were two reasons why many litigants would find the federal courts to their advantage and thereby increase the workload and importance of these courts.

The first reason was the significant differences that existed between the procedural and substantive law applied in federal and state courts. One difference, of course, was that between the time of *Swift v. Tyson* and *Erie R.R. v. Tompkins*, federal courts would at times follow federal common law while state courts followed the rule of decision of their own state. State and federal courts might also apply different substantive law in other circumstances, as in *Perrine v. Town of Thompson*,³⁵ where the Southern District courts and the New York State courts came to opposite conclusions concerning the constitutionality of a state statute voiding irregularities in the issuance of municipal bonds whose proceeds had been paid to a railway. There have also been innumerable differences in rules of procedure. For example, an early New York long-arm statute, which authorized service of process in state court actions upon a foreign corporation doing business in New York, was held inapplicable to suits begun in the federal courts.³⁶ Another difference during most of the nineteenth century was that depositions taken out-of-court were routinely admitted by state courts as evidence in chief, but were not used in federal court.³⁷

On the other hand, the federal court had other rules for gathering of evidence that were more liberal than rules in state court: the federal courts early permitted pretrial discovery in suits at law to the same extent as in proceedings in equity,³⁸ and the federal courts also have had procedures for securing testimony from out-of-state witnesses.³⁹ There were, in short, significant differences between federal and state rules of substance and procedure,⁴⁰ and those differences encouraged lawyers who believed they could benefit from them to try their cases in the federal court.

Probably an even more important factor that led lawyers to bring cases before the federal courts has been the extraordinarily high quality of the judges who have sat on the bench in the Southern District. Among those able judges was

John Sloss Hobart, who took office in 1798 and remained on the bench until his death in 1805. With him began the line of judges who, once appointed, found in their judicial work complete professional satisfaction and inspiration.

A truly great judge came to the Southern District in the person of Samuel Rossiter Betts, appointed in 1826. Judge Betts diligently sought to state and modernize admiralty practice, then the most important element in the Court's jurisdiction. His work promptly bore fruit in 1828, when he promulgated 180 rules and 30 standing interrogatories covering the whole ground of "prize" and "instance" jurisdiction. After working ten years under these rules, Judge Betts published the first treatise on American admiralty practice worthy of the name.

In Judge Samuel Blatchford, a worthy successor to Judge Betts was found. Under him, and the Circuit Judges appointed when the Justices of the Supreme Court practically retired from riding circuit in 1869, the business of the Court increased both in quantity and in importance, especially on the equity side.

Another major nineteenth century District Judge was Addison Brown, who was appointed in 1881. It is no exaggeration to suggest that the growth of the American admiralty law during the next twenty years was more largely due to Judge Brown than to any other one man or one court, not excluding the Supreme Court itself.⁴¹ Judge Brown's opinions were cited again and again by the Supreme Court, and it is no novelty to find them cited in current cases.

The District Judges whose illustrious careers have been traced were the mainstays of the federal courts in the Southern District, but they did not work alone. Until the appointment of Circuit Judges in 1869, Justices of the Supreme Court regularly came to New York to preside at trials with the District Judge on the Circuit Court. Three of those justices performed noteworthy service as trial judges in this Southern District of New York.

The first was Henry Brockholst Livingston, who was appointed to the Supreme Court in 1806 and had a distinguished career until his death in 1823. After playing a major role in Thomas Jefferson's 1800 Presidential electoral victory

and then serving four years on the New York State Supreme Court, Livingston moved up to the United States Supreme Court, where he gradually abandoned his earlier antifederalism, became an integral part of the Marshall court, and played a less prominent role than Jefferson had hoped.⁴²

Livingston's successor was Smith Thompson, a member of the Livingston family by marriage. He, too, served on the Supreme Court of the State of New York, his service there extending over sixteen years, four of which he served as Chief Justice. He was appointed to the Supreme Court in 1823. As a member of that court, he emerged as somewhat of a political figure, becoming identified as a dissenter from the predominant views of the Marshall court. However, Thompson was not a major figure on the Court, writing only 101 opinions in his twenty-year term lasting from 1823 to 1843.⁴³

Perhaps he did not play a major role on the Court for the same reason that his successor, Samuel Nelson, did not. At the time of his appointment in the Supreme Court in 1845, Samuel Nelson, then 53 years of age, was Chief Justice of New York and had served for twenty-two years on that bench. As a state judge, he had earned a reputation, according to his contemporaries, as "an excellent lawyer" who showed "an unusual degree of energy and industry, and is evidently working for a reputation."⁴⁴ However, he did not earn that reputation as a national figure, because he devoted most of his skill and energy to his judicial tasks in this Southern District, where he wrote about half of the opinions published in Blatchford's Reports during his tenure on the federal bench. Nelson's circuit opinions show he was an able, learned and thorough trial judge. The published volumes also suggest that Nelson's work on the Circuit Court was so extensive and so important to the legal life of New York that he probably had little time or energy left to act as a major force within the Supreme Court.

Many other distinguished judges have graced the bench of the Southern District during this century—too many to be mentioned individually. And for obvious reasons I do not refer to the contributions made by members of the District Court and the Court of Appeals after I came to the Court.

However, four judges whose service was largely prior to 1950 are especially noteworthy. The first is Charles Merrill Hough. He served as a District

Judge for ten years until he was elevated to the Court of Appeals in 1916, where he served for another eleven years until his death in 1927. Hough gained his greatest fame, like many of his predecessors, as one of the nation's outstanding admiralty judges.

Another was John C. Knox, who after serving as an Assistant United States Attorney, was appointed to the Court in 1918, sat longer than any other judge in its history, as an active judge for 37 years until 1955, and then as a senior judge for another nine years until 1964, when he retired. Much of his long career is eloquently chronicled in his 1940 book, "A Judge Comes of Age." I had the rare privilege of trying my first case in this Court before him and many thereafter until in the presence of family and friends he administered the oath of office to me in this very courtroom.

Finally, there were the Hand cousins. The older, Augustus N. Hand, sat on the District Court from 1914 to 1927, when he was appointed to the Court of Appeals. Augustus Hand was a distinguished jurist in his own right, but his career was eclipsed by his extraordinary younger cousin, Learned Hand.

I don't know how many of you were present, but I think some of you were, on the occasion soon after the retirement of the two Hands, that is, when they were no longer as active as they had been, that the Association of the Bar and the New York County Lawyers Association, as I recall it, tendered a dinner in their honor. The principal speaker on that occasion was Robert H. Jackson, who was the Circuit Justice. Jackson, with his rare eloquence, was attempting to describe the difference between the two Hands, paying great tribute to each one of them. He said—probably the story was apocryphal—that a former law clerk of his was soon to argue before a panel consisting of the two Hands and Swan. The former law clerk asked what could Justice Jackson advise him. "Very simple," he said: "Quote Learned, but follow Gus."

Well, even taking into account that rather shrewd observation, in my view Learned Hand is, along with Marshall, Holmes, Brandeis and Cardozo, one of the greatest judges ever to sit on an American court, and along with men like Edward Coke, Matthew Hale and Lord Mansfield, one of the great judges in the history of the common law. He sat on this District Court for fifteen years, from

1909 until 1924, and then served first as an active and later as a senior judge on the Court of Appeals until his death in 1961. As you all know, his judicial service spanned a period of 52 years.

Four factors have thus combined to give the federal courts of the Southern District of New York a unique and preeminent standing among American trial courts. Two factors—the financial and commercial position of New York City and the extraordinary stature of its bar—gave the courts of the Southern District advantages possessed by no other federal trial courts, and indeed no courts in the nation other than the State of New York. The other two factors—the high quality of the federal judiciary and the different procedures of the federal courts that some litigants found beneficial—gave the courts of the Southern District advantages which even the state courts in New York City lacked. Taken together the four factors have fashioned the Southern District Court into one of the great judicial institutions in the common law's long history.

The Court, indeed, is a Great court—not because in its long history some cases have been *causes celebres* or have attracted national attention and involved public figures. Its stature is the reflection of the industry and learning which the judges, through the years, have brought to bear on all cases—whether publicized or unpublicized. It is the end result of the diligence, the scholarship and the dedication that each judge has brought to the daily grist of cases—by a recognition there are no small cases, there are no big cases, but that every case is equally important. As so eloquently stated in Biblical terms: “Ye shall not respect persons in judgment; ye shall hear the small and the great alike.”

May I conclude these remarks by saying that I am confident that my colleagues, young and old, aware that they are privileged to sit on one of the nation's great courts—an institution highly respected for almost two centuries—will continue by their dedicated service, not only to uphold its tradition, but add lustre to its name.

FOOTNOTES:

1. Fortunately, I was able to enlist the aid of a former law clerk, William E. Nelson, now a professor at New York University School of Law, who carried on the major research work, and I am much indebted to him for his assistance. A research memorandum written by Professor Nelson, entitled “The Courts of the Southern District of New York, 1820-1880,” is on file in the libraries of the Court of Appeals for the Second Circuit and of New York University School of Law.

2. See, e.g., Blatchford's Circuit Court Reports (24 vols., 1845-1887); Blatchford's Prize Cases (1 vol., 1861-1865); Paine's Circuit Court Reports (2 vols., 1810-1840); Van Ness' Prize Cases (1 vol., 1814); Blatchford & Howland's District Court Cases (1 vol., 1827-1837); Olcott's Admiralty Cases (1 vol., 1843-1847); Abott's Admiralty Cases (1 vol., 1847-1850); Benedict's District Court Cases (10 vols., 1865-1879).
3. See J. Knox, *A Judge Comes of Age*, 252-59 (1940).
4. See A. Flock, *Samuel Jones Tilden: Study in Political Sagacity*, 438-41 (1939).
5. See J. Knox, *A Judge Comes of Age*, 120-26 (1940). Issues of national policy also were litigated in a line of cases arising out of early American wars. See *Fisher v. Harnder*, Fed. Cas. No. 4819 (C.C.D.N.Y. 1812) (arising out of War of Independence); *Wilson v. Izard*, Fed. Cas. No. 17,810 (C.C.D.N.Y. 1815) (arising out of War of 1812); *Harmony v. Mitchell*, Fed. Cas. No. 6082 (C.C.S.D.N.Y. 1850) (arising out of Mexican War). Another case arose out of belligerent activities carried out in Nicaragua in 1854 in the absence of a declaration of war. See *Durand v. Hollins*, Fed. Cas. No. 4186 (C.C.S.D.N.Y. 1860).
6. *Murray v. Patrie*, Fed. Cas. No. 9967 (C.C.S.D.N.Y. 1866).
7. *In re Martin*, Fed. Cas. No. 9151 (C.C.S.D.N.Y. 1866). Other Civil War-era cases arose out of property seizures by military officers in the South. In one case, the plaintiff had crossed Union lines from rebel territory in an effort to withdraw funds by check from his account in a New Orleans bank; the Union commander had compelled the plaintiff to endorse the check to him and had thereupon cashed it and paid the funds over to the government. The suit against the Union commander, which was not brought until 1872, was held to be barred by the statute of limitations. See *Britton v. Butler*, Fed. Cas. No. 1903 (C.C.S.D.N.Y. 1872); Fed. Cas. No. 1904 (C.C.S.D.N.Y. 1873). Another case arose when a Union commander gave possession of realty claimed by the plaintiff to a third party; the court ruled that the commander had no authority to take the plaintiff's property and give it to another but that he could defend this suit by showing that the property in fact belonged to the third person. See *Whalen v. Sheridan*, Fed. Cas. No. 17,476 (C.C.S.D.N.Y. 1879). Other cases arose when a general arrested an individual in Savannah, Georgia; see *Lamar v. Dana*, Fed. Cas. No. 8005 (C.C.S.D.N.Y. 1872); when the government sought to condemn stock in an Illinois corporation held by a citizen of Alabama; see *United States v. 1756 Shares of Capital Stock*, Fed. Cas. No. 15,961 (C.C.S.D.N.Y. 1865), reversing Fed. Cas. No. 15,960a (D.C.S.D.N.Y. 1863) and Fed. Cas. No. 15,960b (D.C.S.D.N.Y. 1864); and when the government laid claim to the proceeds of cotton originally owned by the Confederate government and later sold by a private individual in New York on his own account. See *United States v. Stevenson*, Fed. Cas. No. 16,396 (C.C.S.D.N.Y. 1869).

One economic consequence of the Civil War was to cut commercial relationships between North and South, and the break in those relationships gave rise to litigation in the Southern District. In one suit, the court held that failure to pay premiums on an insurance policy during the years when payment was rendered impossible by war did not invalidate the policy; see *Hamilton v. Mutual Life Ins. Co.*, Fed. Cas. No. 5986 (C.C.S.D.N.Y. 1871); while in another suit, the court decided that failure to pay a mortgage during the period when commercial intercourse was suspended did not give the creditor a right to foreclose. See *Kanawha Coal Co. v. Kanawha & O. Coal Co.*, Fed. Cas. No. 7606 (C.C.S.D.N.Y. 1870). Somewhat analogous to these two cases was *United States v. Riley*, Fed. Cas. No. 16,164 (C.C.S.D.N.Y. 1864), which held that the federal excise tax on liquor was not rendered unconstitutional for want of uniformity simply because the tax could not be collected in the Confederate States and hence was lower there than in the loyal states.

8. 244 Fed. 535 (S.D.N.Y. 1917) (granting preliminary injunction ordering postmaster to accept for mailing magazine entitled "The Masses"), 245 Fed. 102 (2d Cir. 1917) (injunction stayed), 246 Fed. 24 (2d Cir. 1917) (grant of preliminary injunction reversed).
9. 395 U.S. 444 (1969). The courts have not, however, always taken a consistent pro-civil libertarian stance in criminal proceedings brought by the government. Especially in the late nineteenth century, judicial changes in the rules of criminal procedure made the prosecution's task easier. In the early nineteenth century, for ex-

ample, the common law rule was that the slightest defect in an indictment would render it invalid, but by the post-Civil War era federal courts in the Southern District were upholding indictments, *see, e.g., United States v. Claffin*, Fed. Cas. No. 14,798 (C.C.S.D.N.Y. 1875), unless they failed to provide defendants with sufficient information to appraise them of the charges against them. *See United States v. Latore*, Fed. Cas. No. 15,567 (C.C.S.D.N.Y. 1871). Even when an indictment was quashed for insufficiency, the Southern District courts permitted the government to bring a new prosecution by a new indictment, *see United States v. Nagle*, Fed. Cas. No. 15,852 (C.C.S.D.N.Y. 1879), or, in an appropriate case, by information. *See United States v. Ronzone*, Fed. Cas. No. 16,192 (C.C.S.D.N.Y. 1876). On at least one occasion, those courts also abandoned the rule of strict construction of penal statutes. *See United States v. Stern*, Fed. Cas. No. 16,389 (C.C.S.D.N.Y. 1867). The courts also held that irregularities in the constitution of a grand jury were not grounds for quashing an indictment unless a defendant could demonstrate fraud, bad faith or prejudice. *See United States v. Tuska*, Fed. Cas. No. 16,590 (C.C.S.D.N.Y. 1876). In one case, the district court even held that proof that a petit juror was deaf did not constitute a basis for setting aside a verdict unless the defendant had raised an objection at the time the juror was impanelled. *See United States v. Baker*, Fed. Cas. No. 14,499 (D.C.S.D.N.Y. 1868). One of the few procedural rules to which the courts of the Southern District adhered was the rule prohibiting prosecution for a federal offense unless the offense was prohibited by a federal statute. *See United States v. Barney*, Fed. Cas. No. 14,921 (C.C.S.D.N.Y. 1866).

10. *United States v. Tilden*, Fed. Cas. No. 16,521 (D.C.S.D.N.Y. 1879), at p. 173.

11. *United States v. Tilden*, Fed. Cas. No. 16,522 (D.C.S.D.N.Y. 1879).

12. *In re Sykes*, Fed. Cas. No. 13,707 (D.C.S.D.N.Y. 1878).

13. *United States v. Tilden*, Fed. Cas. No. 16,521 (D.C.S.D.N.Y. 1879).

14. *United States v. Tilden*, Fed. Cas. No. 16,520 (D.C.S.D.N.Y. 1878). The Tilden litigation was not, of course, the only litigation in the Southern District concerned with questions of taxation and raising of revenue. Indeed, about ten percent of all nineteenth century litigation in the Southern District focused on such questions.

15. *See Erie Ry. v. Heath*, Fed. Cas. No. 4513 (C.C.S.D.N.Y. 1871), Fed. Cas. No. 4514 (C.C.S.D.N.Y. 1871), Fed. Cas. No. 4515 (C.C.S.D.N.Y. 1871), Fed. Cas. No. 4516 (C.C.S.D.N.Y. 1872); *Fisk v. Union Pacific R.R.*, Fed. Cas. No. 4827 (C.C.S.D.N.Y. 1869), Fed. Cas. No. 4828 (C.C.S.D.N.Y. 1871), Fed. Cas. No. 4829 (C.C.S.D.N.Y. 1871); Fed. Cas. No. 4830 (C.C.S.D.N.Y. 1873); *Heath v. Erie Ry.*, Fed. Cas. No. 6306 (C.C.S.D.N.Y. 1871), Fed. Cas. No. 6307 (C.C.S.D.N.Y. 1872).

16. *Sheldon v. Houghton*, Fed. Cas. No. 12,748 (C.C.S.D.N.Y. 1865).

17. *Griswold v. Hill*, Fed. Cas. No. 5835 (C.C.D.N.Y. 1825).

18. *Sloo v. Lutz*, Fed. Cas. No. 12,957 (C.C.S.D.N.Y. 1856). For other nineteenth century cases arising out of the operation and financing of large, often international business enterprises, *see Oscanyan v. Winchester Repeating Arms Co.*, Fed. Cas. No. 10,600 (C.C.S.D.N.Y. 1878); *Savage v. D'Wolf*, Fed. Cas. No. 12,303 (C.C.S.D.N.Y. 1848); *Baring v. Fanning*, Fed. Cas. No. 982 (C.C.D.N.Y. 1826). *See also United States v. Webb*, Fed. Cas. No. 16,655 (D.C.S.D.N.Y. 1876), a prosecution against a former American diplomat charged with bribing "influential Brazilians" in order to procure settlement of a dispute apparently arising out of business activities of Americans in Brazil.

19. *Wheeler v. Heimbold*, Fed. Cas. No. 17,496 (C.C.S.D.N.Y. 1867).

20. *Emma Silver Mining Co. v. Park*, Fed. Cas. No. 4467 (C.C.S.D.N.Y. 1878).

21. *Rosen v. Swift Mail S. Co.*, Fed. Cas. No. 2025 (C.C.S.D.N.Y. 1867).

22. *St. John v Erie Ry.*, Fed. Cas. No. 12,226 (C.C.S.D.N.Y. 1872); *Stevens v. New York & Oswego Midland R.R.*, Fed. Cas. No. 13,406 (C.C.S.D.N.Y. 1876).
23. This hostility is inconsistent with the view expressed in M. Horwitz, *The Transformation of American Law, 1780-1860*, at 69-71 (1977).
24. *Ayres v. Western R.R.*, Fed. Cas. No. 689 (C.C.S.D.N.Y. 1876).
25. *Hopkins v. Westcott*, Fed. Cas. No. 6692 (C.C.S.D.N.Y. 1868).
26. *Fraloff v. New York Central R.R.*, Fed. Cas. No. 5026 (C.C.S.D.N.Y. 1875).
27. *Hopkins v. Westcott*, *supra* n.25, at p. 497.
28. *Fraloff v. New York Central R.R.*, *supra* n.26, at p. 656.
29. Fed. Cas. No. 9721 (C.C.S.D.N.Y. 1855).
30. 60 F.2d 737 (2d Cir. 1932).
31. *Id.* at 740.
32. The significance of New York's standing as the nation's financial center can be seen from the case of *Cadle v. Tracy*, Fed. Cas. No. 2,279 (C.C.S.D.N.Y. 1873), even though that case limited the significance somewhat. Throughout much of the nineteenth century, most banks in the United States maintained deposits in New York City banks; indeed, it was those deposits that made New York the nation's financial center. Those deposits had legal significance because each bank's funds in New York constituted a *res* which could be attached in order to give a court in New York, state or federal, jurisdiction over nearly any lawsuit that could be brought against a bank. If such deposits were recognized as a device for conferring jurisdiction, that would mean that virtually all lawsuits in which banks were defendants could be brought in some court in New York City, thus throwing an immense quantity of business into the courts there. *Cadle v. Tracy* refused to recognize such an extensive jurisdiction in New York courts, for it held that any bank incorporated as a national bank under the National Banking Acts of 1863 and 1864 could be sued only in the district in which it was located. Only national banks had this protection, however, with the result that state-chartered banks, businesses and individuals with deposits in New York City banks were subject to suit there. Their subjugation to suit was only one of the many ways in which the special financial and commercial position of New York City contributed to the extraordinary mass of litigation in the Southern District.
33. Fed. Cas. No. 3519 (C.C.S.D.N.Y. 1865).
34. Fed. Cas. No. 11,032 (C.C.S.D.N.Y. 1813).
35. Fed. Cas. No. 10,977 (C.C.S.D.N.Y. 1879).
36. *Pomeroy v. New York & New Haven R.R.*, Fed. Cas. No. 11,261 (C.C.S.D.N.Y. 1857).
37. *Beardsley v. Latell*, Fed. Cas. No. 1185 (C.C.S.D.N.Y. 1877).
38. *Finch v. Rikeman*, Fed. Cas. No. 4788 (C.C.S.D.N.Y. 1851).
39. *Ex parte Judson*, Fed. Cas. No. 7561 (C.C.S.D.N.Y. 1853).

40. As a result of the peculiar wording of the Judiciary Act of 1789, which provided that federal courts were to follow state procedure as it existed at the time, see *Brewster v. Gelston*, Fed. Cas. No. 1853 (C.C.D.N.Y. 1825), a major divergence arose between New York, after it adopted the Field Code in 1848 and ceased to abide by common law procedure, and the federal courts, which continued to follow the common law. See *Martin v. Kanouse*, Fed. Cas. No. 9162 (C.C.S.D.N.Y. 1846). This anomaly was not corrected until the 1870s, when the federal courts again began to follow state procedure. See *Lewis v. Gould*, Fed. Cas. No. 8324 (C.C.S.D.N.Y. 1875). But even then procedural synchronization between state and federal courts remained imperfect as federal judges, concerned with protecting the Seventh Amendment right to trial by jury, refused to permit the same merger of law and equity as did state courts, see *LaMothe Mfg. Co. v. National Tube Works Co.*, Fed. Cas. No. 8033 (C.C.S.D.N.Y. 1879); *Montejo v. Owen*, Fed. Cas. No. 9722 (C.C.S.D.N.Y. 1877), or to permit trial by referees in lieu of trial by jury. See *Howe Mach. Co. v. Edwards*, Fed. Cas. No. 6784 (C.C.S.D.N.Y. 1878). For an early antecedent, see *United States v. Rathbone*, Fed. Cas. No. 16,121 (C.C.S.D.N.Y. 1828).

41. See C. Hough, *The United States District Court for the Southern District of New York*, 11-29 (1934).

42. I L. Friedman & F. Israel eds., *The Justices of the United States Supreme Court*, 387-97 (1969).

43. See 1 *id.* at 475-91.

44. Quoted in 2 *id.* at 825. See generally 2 *id.* at 817-829.