

SPECIAL SESSION OF THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Bicentennial

1789-1989

November 3, 1989
4:00 p.m.
United States Court House
Room 506
Foley Square
New York, N.Y.

Present:
Southern District of New York

HON. CHARLES L. BRIEANT, JR.,
Chief Judge

HON. DUDLEY B. BONSAI

HON. VINCENT L. BRODERICK

HON. JOHN M. CANNELLA

HON. MIRIAM G. CEDARBAUM

HON. KENNETH CONBOY

HON. WILLIAM C. CONNER

HON. IRVING BEN COOPER

HON. KEVIN T. DUFFY

HON. DAVID N. EDELSTEIN

HON. GERARD L. GOETTEL

HON. THOMAS P. GRIESA

HON. CHARLES S. HAIGHT, JR.

HON. JOHN F. KEENAN

HON. WHITMAN KNAPP

HON. SHIRLEY WOHL KRAM

HON. MORRIS E. LASKER

HON. PETER K. LEISURE

HON. PIERRE N. LEVAL

HON. CHARLES M. METZNER

HON. CONSTANCE BAKER MOTLEY

HON. MICHAEL B. MUKASEY

HON. RICHARD OWEN

HON. ROBERT P. PATTERSON, JR.

HON. MILTON POLLACK

HON. LEONARD B. SAND

HON. JOHN E. SPRIZZO

HON. LOUIS L. STANTON

HON. CHARLES H. TENNEY

HON. JOHN M. WALKER

HON. ROBERT J. WARD

HON. INZER B. WYATT

HON. KIMBA M. WOOD

District Judges

Second Circuit Judges

HON. JAMES L. OAKES,
Chief Judge

HON. WILFRED FEINBERG

HON. LAWRENCE W. PIERCE

Eastern District of New York

HON. THOMAS C. PLATT,
Chief Judge

HON. MARK A. COSTANTINO,
District Judge

Western District of New York

HON. JOHN T. ELFVIN,
District Judge

Court of International Trade

HON. THOMAS J. AQUILINO, JR.

HON. BERNARD NEWMAN

Judges

United States Magistrates

HON. LEONARD BERNIKOW

HON. NAOMI REICE BUCHWALD

HON. MARK D. FOX

HON. JAMES C. FRANCIS IV

HON. NINA GERSHON

HON. SHARON E. GRUBIN

HON. BARBARA A. LEE

HON. KATHLEEN ANNE ROBERTS

Member of Congress

CONGRESSMAN BILL GREEN

*

Proceedings

THE CLERK (Raymond F. Burghardt): The Judges of the District Court for the Southern District of New York. Please be seated.

CHIEF JUDGE BRIEANT: Members of the Court, fellow Judges, fellow lawyers and friends:

What an honor and pleasure it is to open this Special Session of our Court two centuries after that day, on November 3, 1789, upon which United States District Judge James Duane, who subscribed and filed the same oath of office which all federal judges since then have taken, acting under a Commission from the President, in the same words as are found in each of ours, convened the first United States District Court session here in New York City. Our Court then embarked upon a history of two centuries of judicial service of which we are all justifiably proud.

I ask you at this time to rise as Mrs. Lynn Owen leads us in singing our National Anthem.

(National Anthem sung, led by Lynn Owen)

Thank you, Lynn.

I believe that the essence of a great judge, and a necessary qualification for a distinguished lawyer, is a love of history. By speaking of history I do not mean simply possessing a collection of names and dates, or knowing some trivia which others have forgotten. I have in mind instead the broad sweep of history; the unbroken flow of renewal and change reflecting human aspirations which brought our nation from then until now, and carries us onward into the future together. To know, love and understand history is an absolute requirement for a great judge and for a distinguished lawyer.

Nobody, in knowledge and interest, and appreciation of the flow of American history exceeds my colleague, whom I am about to call upon to address you the Honorable Constance Baker Motley, former Chief Judge of this Court, distinguished judge and my great friend, mentor, and sometimes critic. Judge Motley's appreciation for American history is, I think, enhanced by her own life's contribution, for she lived history, and she made history and continues to do so today. Her life, and indeed my own life, include one-third of the time period in which this District Court has served the nation.

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It was through Judge Motley's great interest and devotion, at a time when she was serving as Chief Judge of our Court, that our bicentennial celebration was conceived, and it has been under her leadership and direction that the proceedings which you attend today are being conducted, because she serves with such great resourcefulness as the Chair of our Committee on Court History.

At this time the Honorable Constance Baker Motley will address us with regard to this day we celebrate. Judge Motley.

JUDGE CONSTANCE BAKER MOTLEY: Thank you very much, Mr. Chief Judge.

On behalf of the Committee on Court History, I would like to thank each of you for having taken the time from your very busy schedules to join us on this historic occasion. Inspired by programs and events of the past two years in connection with our nation's observance of the Bicentennial of the Constitution, the committee has worked over a period of many months to make this a memorable year in the life of our Court.

The Committee wishes to publicly acknowledge those who contributed to the success of our bicentennial events, particularly Clifford Kirsch, our District Executive, and his staff, the GSA and its Court Liaison, Linda Peters, Fraunces Tavern Museum, and those Bar associations and others who made financial and other contributions to us and whose names are listed in the program.

I personally would like to thank Circuit Judge Damon Keith of the Sixth Circuit, who is Chairman of the Bicentennial Committee of the Judicial Conference of the United States, and our own Circuit Judge Frank Altamari of the same Committee for their strong support of our efforts.

Finally, I want to thank personally the artists, including our own colleague, Richard Owen, who are volunteering their musical talents for this occasion.

Selected cases illustrating the great diversity of our dockets during the 200-year history of this Court are on exhibit at Fraunces Tavern Museum and in the main lobby of this building. I would like to publicly thank Jeffrey A. Kroessler, our special curator, for the fine work which went into that exhibit and to the success of the exhibit.

The cases which have come before this Court closely parallel the history of the nation and evidence our experience, our diversity and our complexity as a nation. We were the first federal court in the nation to organize. Because of our location here in the Port of New York, we have become the largest federal trial court in the country. Our full bench complement is presently 27 judges, and we presently have 17 senior judges. We also lead the nation in setting judicial

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precedent, fashioning American justice, and promoting excellence in advocacy.

In the early years of this Court, as the exhibit shows, most of our cases involved admiralty issues. The first published opinion of Judge James Duane, the Court's first judge, was an admiralty case. Some of these admiralty cases are among the more famous in our archives.

I want to tell you briefly about one of those admiralty cases, because we are about to hear from Lynn Owen, who will sing a selection from Judge Richard Owen's opera about Abigail Adams, which was written for the 200th Anniversary of the drafting of the Constitution in 1987. As the program indicates, the selection is Abigail Adams' letter to her son, John Quincy Adams, which has been set to music.

In the early part of the 19th century, the admiralty cases included disputes over slaves aboard cargo vessels. Three of these admiralty cases involving the slave trade were the subject of an exhibit in this courthouse a couple of years ago. One of those cases which arose in this Circuit in 1839 is being celebrated this year on its 150th Anniversary because of its significance in the long struggle for equal justice under law. It is the case of the Spanish slave trading vessel, *The Amistad*.

That case involved a mutiny on board *The Amistad* in Cuban waters, Spanish territory, by a group of Africans who had been seized in Africa and brought into Cuba to be sold as slaves, in clear violation of Spanish law outlawing the slave trade. After the mutiny, the vessel was seized off the coast of Long Island when the slaves came ashore to purchase provisions for the vessel. The Africans on board the vessel believed that the ship was being navigated in such a way as to reach Africa, but they did not realize that the vessel was being navigated toward Africa by day and toward the United States by night by their captive navigators. The Navy seized the strange vessel which had been anchored off Long Island in New York waters for several days and brought it into the port of New London, Connecticut, instead of the Port of New York, for apparently political reasons.

The Navy personnel and two New Yorkers had claimed salvage due them for bringing in the vessel in the District Court for the District of Connecticut. The Spanish navigators aboard the vessel had claimed possession of the slaves as cargo. The Africans claim they were not legally slaves but free persons.

The Africans were represented by lawyers hired for them by abolitionists. Among these lawyers was Roger Sherman Baldwin of New Haven, a Yale graduate and a descendant of Roger Sherman, a signer of the Declaration of Independence and the Constitu-

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tion, and John Quincy Adams, a former President of the United States who, at that time, was a representative in Congress from a district of Massachusetts.

The case eventually went to the United States Supreme Court, which freed the Africans in early 1841, after two years of litigation and imprisonment in a jail on the New Haven green. John Quincy Adams, who was then 74 years of age, argued on behalf of the Africans over a period of two days in the Supreme Court. Now I think if you go to the Supreme Court they allow you a half hour and then they cut you down on that. (laughter) Before the case went to the Supreme Court, an appeal had been taken to the Circuit Court of Connecticut, which of course later became a part of the Circuit Court for the Second Circuit.

John Quincy Adams was about 20 years of age when the Constitution was drafted and about 11 years old when the Declaration of Independence was written. He had been President of the United States from 1825 to 1829. We can safely conclude that he was, therefore, infused with knowledge of the history of the country, the Constitution, and the intent of its framers. During his argument in the Supreme Court, he pointed to the two copies of the Declaration of Independence which hung on the walls of the courtroom.

When John Quincy Adams was a young man, he went to France with his father, John Adams, also a former President of the United States from 1797 to 1801. It was during this time that John Quincy's mother, Abigail Adams, wrote her famous letter to her son which you are about to hear sung by Mrs. Owen.

In that letter she said, among other things, "I am pleased with the strict regard you have for truth. Now, my son, add justice, and every manly virtue, do honor to your country" Mrs. Owen.

(Musical selection, Abigail Adams' Letter to John Quincy Adams, 1780, composed by Richard Owen and sung by Lynn Owen:)

ABIGAIL: My Dear Son:

I hope you have not repented your voyage with your Father to France. An author I have met compares a traveler to a spring, which running through rich veins of minerals, improves its qualities passing along. Much will be expected of you, favored with advantages.

This is the time, my son, that a genius would want to live. 'Tis not in the calm of life that great men are formed. Wisdom is the fruit of experience, not the lesson of leisure. A vigorous mind will come from contending with difficulties. Would Cicero have shone, if not roused by tyranny? Great needs call forth great virtues—the hero and the statesman. Exert your mind, my son. Nothing is wanting. Nature has not been deficient.

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I cannot close this letter without reminding you of a failing you must correct—your temper. A vice in youth grows stronger with the years, and is your conqueror.

I am pleased with the strict regard you have for truth. Now, my son, add justice and every manly virtue. Do honor to your country, and render your parents supremely happy, especially your ever affectionate Mother.

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JUDGE MOTLEY: It was the determination of the Committee that the speaker chosen for this occasion should be one of the leaders of the Bar who regularly appears before this Court and who exemplifies the highest degree of professional skill in New York's diversified legal community and who has served this Court as a member of its bar over the years. The Committee decided that the lawyer who met these standards best was Bob Fiske.

Robert B. Fiske, Jr., is a Senior Litigation Partner in the firm of Davis Polk & Wardwell. He graduated from Yale University in 1952 and the University of Michigan in 1955, where he was a member of the Order of the Coif and an Associate Editor of the Michigan Law Review.

After law school, Mr. Fiske went to work for Davis Polk Wardwell Sunderland & Kiendl. Two years at the firm were followed by four years at the United States Attorney's Office in the Southern District as Assistant Chief of the Criminal Division and head of the Special Prosecutions Unit on Organized Crime.

Mr. Fiske returned to Davis Polk & Wardwell in 1961 where he became the litigation partner in 1964, specializing in securities and antitrust litigation.

Mr. Fiske was appointed United States Attorney for the Southern District of New York on March 1, 1976. During his four-year term as United States Attorney, Mr. Fiske handled a number of important cases personally, including the conviction of narcotics kingpin Leroy "Nicky" Barnes, the labor racketeering conviction of Anthony Scotto and Anthony Anastasio, and the representation of Attorney General Griffin B. Bell in connection with contempt proceedings in the Socialist Workers Party litigation. After completing his term as United States Attorney, Mr. Fiske returned to Davis Polk & Wardwell on March 24, 1980, where he has since handled a number of significant cases, including, in this Court, the defense of Babcock & Wilcox, the manufacturer of the nuclear reactor at Three Mile Island, in a \$4 billion damage suit brought by General Public Utilities and, as cocounsel, the defense of the National Football League in the antitrust suit brought by the United States Football League.

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From April 1977 to April 1980, Mr. Fiske was a member of the Attorney General's Advisory Committee of United States Attorneys, serving as its Chairman from April 1978 to April 1979. He is a Regent in the American College of Trial Lawyers, a former Chairman of the American Bar Association Standing Committee on Federal Judiciary, and a past president of the Federal Bar Council.

It gives me great pleasure to present to you, on behalf of the committee, our guest speaker, Bob Fiske. (applause)

MR. ROBERT B. FISKE, JR: Thank you very much, Judge Motley.

Chief Judge Brieant, members of the Court, distinguished guests:

It gives me great pleasure, it is a great honor, to be asked by the Court to appear here and address all of you on this historic occasion. I would like to express appreciation also to James Liss, a senior attorney in our firm, who has helped me a great deal with the research and analysis which went into the remarks that I am about to deliver.

Over the past several years, our institutions of government have, one by one, reached their 200th birthdays. These milestones have provided opportunities for celebration and for public recognition. More significantly, the bicentennial observances have also given us the opportunity to pause in the rush of everyday business, and to reflect on the fundamental nature of our institutions, their history, how they have changed, and how they have remained the same.

This opportunity to take a broader view is particularly welcome and appropriate on the 200th anniversary of the first sitting of the United States District Court for the Southern District of New York. This institution, "the Mother Court," for the bar as well as the bench is our "home" court, the center of our professional lives. While we go along in our daily tasks with the knowledge and satisfaction that this has been and continues to be one of the great courts of the world, the demands of today deprive us of the chance of reflecting about how the court has evolved in the past 200 years.

It seems to me that there are two related themes which are central to the history of this great Court. One is the consistent, almost relentless change and growth which has marked the Court's history almost from the outset—a reflection of the growth of the federal court system in general. Indeed, this Court is, in many ways, the best mirror of changes in the system as a whole.

The other theme is unique to this Court: no other court over the years has had the same breadth and diversity of cases. The words of Judge Thomas B. Thacher, speaking at the 150th anniversary of this Court, are as true today as they were in 1939:

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I venture to say “that no other District court in this country, or any other court in any other land exercises a jurisdiction comparable in scope and importance with the jurisdiction exercised by this Court.”

On September 26, 1789, President Washington appointed, and the Senate confirmed, James Duane as the first Judge of what was then known as the District of New York. As Chief Judge Brieant has indicated, the ceremony was very much the same as today’s and the Commission contained virtually the same language used in the Commission appointing judges to this Court today.

The first session of the Court—the 200th anniversary of which we celebrate today—was held on November 3, 1789, in the building then known as “The Exchange,” which was located in the middle of Broad Street at the intersection of Water Street. One early event from those first few days, recounted by Judge Levet at the 175th Anniversary Celebration, is worth mentioning again: In February 1790 Judge Duane charged the first grand jury of this court. He said, “Gentlemen of the Grand Jury, in a charge to the first Grand Inquest convened for this District, I tread an unbeaten path. We are now become emphatically a nation. A new Constitution pervades the United States.”

When they met again two days later the grand jury in turn presented an address to Judge Duane expressing thanks for his charge, in which “the nature of our duty, and the judicial system of the United States are described in the clearest manner, and recommended by the most cogent reasons.”

The grand jury said that it had nothing to offer the Court nor had any business before them and at their request they were discharged. Federal crime had not yet commenced. (laughter)

It may seem trite to reflect that if Judge James Duane would be able to observe his court today, he would be overwhelmed by the changes.

First he would be surprised to find that the District Court is the sole federal trial court, since for more than 120 years, up to 1911, trial jurisdiction was divided between the District Court and the Circuit Court, which had both trial and appellate responsibilities. Indeed, much of the trial jurisdiction over major matters was in the Circuit Court.

This structural change, however, would undoubtedly pale for Judge Duane in comparison with the tremendous metamorphosis in the nature and volume of the Court’s business, and the size of the Court as an institution. In 1789, and for many years thereafter, as Judge Motley has indicated, the District Court was essentially a maritime and petty crime court, to which the Circuit Court’s docket added some relatively more substantial crimes. As attested to by

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"The Story of the Silver Oar" which is in the printed program, the admiralty jurisdiction was particularly important; the backbone of the nation's and of New York City's economy was ocean trade, and the collection of customs duties was a major source of government revenue. Otherwise, the relatively narrow breadth of this Court's business was commensurate with the limited reach of the national government in general, and the federal courts in particular, into the everyday life of its citizens.

Litigation in the federal courts did not have a large, let alone pervasive, impact on the public in general. The old warning, "Don't make a federal case out of it," may now have an archaic ring to it, but it reflects the fact that for a very long period of time, litigation in the federal courts was far from an everyday occurrence. This was particularly true in the early years of the Republic when there were very few federal statutes, no administrative agencies, and little government expenditure. Needless to say, things are different now.

Although statistics for the early years of the Court are hard to come by and not particularly reliable, only several hundred cases passed through this Court during its first decade, which is the equivalent of only several weeks of activity in the Court today. Judge Duane was the only judge on the District Court and the Court then covered the entire state. He went about his work with minimal support staff; magistrates, court clerks, the clerk's office and the other personnel so essential to today's court were decades, even centuries away.

In the years following 1789, the business of this Court did begin to grow, and it quickly became the busiest court by far in the federal system. Perhaps prophetically, as Professor Morris has noted in his book on the history of the courts of the Second Circuit, the growth of business in the Southern District did not lead to an increase in authorized judgeships, until 1903. By 1909, it increased to four—the fourth being Judge Learned Hand. For 120 years—more than half its life—this Court operated with only one judge. There was one exception: an unhappy experiment in which two judges, Tallmadge and Van Ness, who apparently did not get along with each other, sat together on the bench of the District of New York, fretfully, from 1812 to 1814.

This fractious relationship had a happy ending: they gave each of them his own district. The Northern District of New York was carved away in 1814, with Judge Tallmadge assigned to the Northern District and Judge Van Ness to the Southern District. Ironically, because of Judge Tallmadge's ill health, Judge Van Ness ended up doing almost all of the work in both districts. Then, in 1865, the Eastern District was separated and a new district judge, Judge Benedict, was appointed to preside over that court.

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In any event, the Southern District's growth, just like that of the area it serves, has been constant since 1789. The grant of diversity jurisdiction, one of the most important reasons for the creation of a separate federal court system, gained a new importance as the commercial life of the nation grew more complicated and significant commercial disputes between citizens of different states became more common. Moreover, federal question jurisdiction increased in increments as Congress passed new laws, as the local and the national economy expanded and grew more sophisticated and more interdependent, and as the federal government assumed a greater role in our lives. This has been the result of both dramatic turns in our history—the Civil War and the resulting industrial boom, the progressive era and its attendant growth in federal regulation and the Great Depression and the New Deal—and the constant, evolutionary process of growth.

As the nineteenth century proceeded, the caseload of this Court continued to expand. By the second half of the century, the proportion of the total business of all the United States federal courts transacted in the Southern District was staggering. In 1891, the year of the passage of the Evarts Act, which created the Circuit Courts of Appeals, more than one-third of the total business of the federal courts in the entire United States was transacted here. To put that statistic in perspective, for that to be the case in 1989, more than 80,000 cases would have to have been commenced in the Southern District of New York in that year.

While increases in this Court's business are not just a recent phenomenon, some of the most dramatic changes for the Southern District, as well as other federal courts, have come within the last twenty-five years. This can be illustrated by a comparison of the Court today with a relatively recent milestone and by reviewing the significant changes that have occurred since the ceremonies held twenty-five years ago in honor of the 175th anniversary of its birth.

First, there have been important changes in the composition of the Court. In 1964, the Court was entirely a white male preserve. Since then, starting with Judge Motley's appointment in 1966, the bench of the Southern District has been broadened and strengthened by the addition of five women and four black judges.

Second, there have been important changes in the geographical area covered by the Southern District and by the places where the Court does business, both of which have made the federal courts more accessible to lawyers and litigants. In 1978, Congress moved three northern counties, whose lawyers found it difficult to make the 100-mile trek to Manhattan, to the Northern District of New York. And to make the Southern District more accessible to lawyers in the remaining counties north of New York City, the White Plains Courthouse was opened in 1983. This has worked,

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and the result is an unquestionable increase in the volume of cases coming into the Court.

Third, there have been significant technological changes which have, at least to some extent, eased the burdens on the Court. Computers have substantially assisted the clerk's office. The advent of word processing makes it easier to get opinions out more quickly. Computers make the research side of the jobs of judges and law clerks more manageable. Also, mention should be made at this point of the creation of the District Executive's office in 1982, which has also helped greatly in dealing with the administrative management of the Court and, I might say, has also provided significant assistance in the preparation of this speech.

Finally, there have been significant changes in both the quantity and the nature of the cases which have come before the Court. With respect to the quantities, for the fiscal year ending June 30, 1964, according to the Administrative Office, 5,366 civil cases were commenced. The comparable figures for the fiscal year ending June 30, 1989, is 9,631—an increase of almost 50 percent.

There are a number of explanations for the increase, in addition to the White Plains Courthouse and the generally perceived notion that society as a whole has become increasingly litigious. One of the most important is the combination of a new attitude towards minority rights and civil rights in general and the opening of the doors of federal courts to litigation following *Monroe v. Pape*, which led to a continuing and dramatic increase in constitutional litigation in which this Court has been in the forefront in rendering a number of highly celebrated and highly significant decisions involving prison conditions, segregated housing patterns, foster care, pre-termination hearings for welfare recipients, detention of arrest suspects, minority set-asides, employment discrimination and school segregation, to mention only a few. Very much in the last twenty-five years this Court has continued the tradition so eloquently described by Judge Motley in her words about Abigail Adams.

In the area of federal question jurisdiction, new federal legislation provides another compelling example of the cause of increase in business. Consider even a partial listing of those statutes enacted since 1964, which have spawned substantial litigation—Title VII, ADEA, ERISA, the Fair Housing Act, the Environmental Protection and Clean Water Acts, and the new copyright and bankruptcy acts, not to mention RICO. Many of these statutes, either through their drafting or their subject matter, tend to yield litigation of tremendous complexity, which make particularly substantial demands on the Court, in terms of the intricacy of legal issues raised and the scope of litigation and attendant problems of case management.

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Substantive changes in the law have not been the only source of increasingly complex litigation. One of the most important contributors to this trend was a procedural innovation—the amendment of Civil Rule 23 in 1966 expanding the use of class actions, which has caused another substantial increase in the scope and complexity of matters coming before this and other courts. As in so many other areas, substantive and procedural, many of the most significant decisions establishing the interpretation and scope of Rule 23 have come from this courthouse.

Another interesting way to measure this increase in litigation, not unique to the Southern District, is the incredible increase in the published legal authority which it has produced. In the thirty-two years from the publication of the first volume of the Federal Supplement through 1964, that is, 1932 to 1964, approximately 225 volumes were published. In the ensuing twenty-five years, we have produced almost 500 additional volumes. In short, the number of volumes has more than tripled, and that does not even take into account the fact that the sheer size—and I might say weight—of individual volumes has grown from the late 1960s to today. Similar expansion can be found in other official reporters, but that is only part of the story. Hitherto unreported opinions are now available in looseleaf services, on computers through LEXIS and WESTLAW, and through the easier availability of Southern District slip opinions in the *Stare Decisis* volumes.

A 25-year comparison of the nature of this Court's criminal docket presents equally interesting, if somewhat surprising results. In 1964, 1,124 criminal cases, including felonies and misdemeanors, were commenced. In 1989, only 1,135 criminal cases were commenced, an increase of 11 over twenty-five years. Yet the number of Assistant United States Attorneys has increased significantly over that period, and no one would suggest that the present group is any less energetic than their predecessors. And certainly no one has the impression that crime rate has dropped in the 1980s.

How, then, do we explain those statistics? The basic explanation lies in the fact that Assistants are spending more time developing increasingly complex cases which produce increasingly lengthy trials. The most dramatic example of this is the mega-trial, discussed at length at last year's Second Circuit Judicial Conference and which has recently been the subject of new advisory guidelines in the Second Circuit *Pizza Connection* opinion. Long criminal trials and criminal cases with multiple defendants are not new phenomena, but it is fair to say that the criminal docket in the Southern District in recent years has had an unprecedented number of large cases and that the overall burden they place on the system cannot be measured by numbers alone. Combined with the advent of the Speedy Trial Act, requiring the Court to give priority to

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criminal cases, this has had an inevitable impact on the processing of civil cases.

Both the increase in the number of cases coming before this Court and the increasing complexity of individual cases have greatly increased the burden on this Court as a whole and on individual judges. In 1964, upon the occasion of the 175th Anniversary, Justice Harlan, then Circuit Justice for this Circuit, had this to say:

. . . Is it not plain that the Southern District is undermanned both in judges and supporting personnel? Has not the time come when the providing of more judicial and supporting manpower for the federal courts in the busy litigating centers, let alone the prompt filling of vacancies in the existing judicial roster, should be disencumbered of the unbusinesslike and crippling political expediencies which now attend them? And does not the peculiarly exigent situation of the Southern District provide an ideal crucible in which to stir a fresh approach to these matters?

In 1964, when Justice Harlan spoke, this Court had an authorized complement of 24 judges. Since then, in contrast to the Court's neighbors across both rivers which have had increases of 50 percent and 75 percent, respectively, there has been only one increase in the authorized number of judges—in 1970 when 3 new judgeships were created. This is at a time when the civil caseload had risen almost 50 percent.

It is against this background that we must measure the delay in filling vacancies on this Court. Statistics provided by the District Executive reflect that since 1983 it has taken an average of eighteen months—a year and a half—for *each* vacancy to be filled. Indeed, although there are today 27 authorized judgeships for the Southern District of New York, because of the failure to fill vacancies on a timely basis, this Court is now operating with a complement of active judges which actually is below the 1964 authorization of 24—let alone the current authorization. The current complement of active District Judges is 22, one of whom, a member of the committee responsible for these proceedings, is on his way to the Court of Appeals.

As so many others have noted, the system for appointing new judges, quite clearly, is not working the way it should. Something has to be done to speed up the process if this Court is not to be overwhelmed by the rising tide of increasingly complicated business. You are all familiar with the explanations that have been given for these delays—I will not try to discuss them all here. There is time, however, to reiterate a fairly simple suggestion that has been made before—that the United States Senators through their screening committees do some advance planning, and have in place a pool of candidates so that as vacancies occur, of which there

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can often be pre-notification, it is not necessary to start the whole time-consuming process from the ground up all over again.

Although I have, so far, sketched a picture of continuous change in the work of the Southern District, there have also been a number of constants which have marked its work from the outset and which would be recognizable even to Judge Duane and his immediate successors.

The first is that throughout these periods of change the fact is that it has continued its historic role as the premier commercial court in this country. While maritime and admiralty actions may have diminished since the day of John Paul Jones, modern industry and commerce have bred new controversies.

As the nation's economy grew, domestic manufacturing expanded and new varieties of litigation surfaced. As financial institutions—banks and the securities industry—grew larger and more sophisticated to keep pace with the growing manufacturing economy, suits involving them were added to the pot. As the transportation network expanded, it too became the subject of litigation in the Southern District, in particular a number of major struggles over the control of railroads during the second half of the nineteenth century. And as the federal government took a greater regulatory role in the economy, statutory actions, such as those under the securities, banking and antitrust laws, were added to the commercial docket. When companies need the protection of the bankruptcy laws, the bankruptcy wing of the court is often the chosen forum even for corporations whose headquarters are not in New York, such as Eastern Air Lines, LTV and Manville.

It is probably an obvious fact that the work of any court reflects, to a major degree, trends in business in the economy of the area in which it sits. This is readily illustrated by a few of its examples from the past.

During the Civil War, the Union blockade of the Confederacy led to a substantial number of prize cases to be brought in the Southern District. Indeed, during 1862, District Judge Betts heard prize cases exclusively for several months. In the 1920s and early 1930s, the enactment of the Eighteenth Amendment and Prohibition added a new and substantial category of cases to this court's docket. Similarly, the economic controls of the World War II era jammed the courts with litigation for many years.

What lends significance and variety to the Southern District's commercial docket is the fact that New York is more than the nation's commercial center; it is the center for a wide variety of activities, many of which generate substantial amounts of litigation which finds its way into this Court. As an illustration, a few years ago The New York Times ran a seven-part series called "The City

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As Leader” which highlighted New York City’s role as the national and international leader in seven separate fields, including finance, publishing, fine arts, the performing arts, food, fashion and architecture. Recent cases in this court indicate that The Times perhaps overlooked an eighth area—something less of a cause for civic pride—organized crime.

In this and in the more “conventional” areas, novel and complicated litigation has been generated, and the results in all of these fields, taken together, have lent a matchless diversity and importance to this Court’s business within the public limelight. Some of this litigation is “notorious”—perhaps best illustrated by the fact that television camera crews—on the steps of the courthouse but not yet in it—now appear to be a regular part of the Foley Square landscape. These cases, of course, have a high degree of interest to the public as well as to the individuals involved. Yet in a far broader sense the Southern District’s most important contribution lies in the legally significant cases which have been decided here or which have started their paths to the Second Circuit and/or the Supreme Court here. Again and again it has been in the forefront of developing legal issues.

On the criminal side, the centrality of this Court to financial litigation is almost too well known to require comment. In the last twenty-five years there has been an interesting evolution as potential wrongdoing has become more sophisticated. As a succession of United States Attorneys in this District have greatly expanded their reaches of white collar criminal prosecutions, this Court, has found itself on the cutting edge of a steady moving line between what was once regulated on a civil basis and what is now sought to be prosecuted criminally. A good example of this is the law of insider trading, which has been defined almost entirely from cases which were brought in the Southern District. Twenty-five years ago, insider trading was not even against the law. The first case making it illegal was the landmark SEC civil action in *Texas Gulf Sulphur* in 1965. Thirteen years later there evolved a series of criminal prosecutions in which the law was developed from *Chiarella*, which the Supreme Court found to be an initial false step, through *Newman* and, more recently, cases such as *Winans-Carpenter*.

On the civil financial side, this Court was from the outset in the forefront of development of both the substantive law arising from the Securities Acts of the 1930s and the procedural implementation of those laws under Rule 23. *Escott v. Bar-Chris* and *Eisen v. Carlisle & Jacquelin* are two of the leading examples. It has rendered some of the most significant antitrust opinions—the *Investment Banking* cases; *Bethlehem Steel*; *Alcoa*; *Berkey v. Kodak*—and most recently *USFL v. NFL*. And as another example

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of riding the crest of the legal wave, the takeover boom in the 1970s and 1980s much of it originating in the New York City investment banking and legal communities, has added a new type of complicated, compressed, high-pressure litigation to its docket in which another series of important, precedent-setting decisions have been rendered.

The presence of so much of Corporate America's headquarters in New York is, of course, a cause of much securities, antitrust and other commercial litigation of all types. With each of the major television networks, several national magazines and the leading publishing houses and advertising agencies all centered in New York, it is not surprising that this Court has had an exceptional number of highly significant and highly prominent First Amendment and libel cases—perhaps most visibly demonstrated, in the immediate wake of *Herbert v. Lando*, when people coming into the courthouse in the morning had to fight their way through the competing television crews covering the concurrent trials of *Sharon v. Time* and *Westmoreland v. CBS*.

In addition, copyright, trademark and false advertising cases form another significant and fascinating segment of the Southern District's commercial docket. On the copyright side, for example, the Court has heard cases dealing with the Gerald Ford memoirs, and the biographies of J.D. Salinger and L. Ron Hubbard—all of which cases involved the significant legal question of the parameters of the "fair use" doctrine. With respect to false advertising, there have been cases concerning the truthfulness of Tropicana orange juice ads; Wilkinson Sword razor blade ads which Gillette found objectionable; a battle to a stand-off between Chesebrough-Ponds and Procter & Gamble over competing claims as to the efficacy of competing skin lotions; and an extended series of actions between the manufacturers of Advil and Tylenol objecting to various aspects of the other's advertising campaigns. Finally, recent trademark cases, of which there are many, have ranged from the battle between Mead Data and Toyota over the "LEXIS" and "Lexus" names to a dispute over whether the trademarked cover design of the familiar Cliff Notes was infringed by a Spy Magazine inspired parody.

Unfortunately—or perhaps fortunately for an overburdened court—this works both ways. As noted earlier, for many years admiralty was the backbone of the Court's docket—witness once again the Silver Oar—producing not only a high volume of cases but some of the most famous cases in the Court's history as recently as the *Andrea Doria* case in 1956. Today the story is somewhat different. As New York's formerly preeminent role as a commercial port has eroded, the flood of admiralty cases has receded.

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What we see, then, looking back—and I would say looking ahead as well—is a high volume of civil and criminal litigation which—perhaps appropriately for the “Mother Court”—is unmatched in any other court in the country for its combination of diversity, newsworthiness to the public, and importance to the precedent-setting evolution of the law and individual rights and liberties. An important reason for that, of course, is reflected in what I have been saying here in the last few minutes: what is here, and what goes on, in New York City. Another important reason over the years has been the traditionally high quality of the judges in this Court. To once again quote from the 150th Anniversary, using the words of Chief Justice Hughes:

The courts are what the judges make them, and the District Court in New York, from the time of James Duane, Washington’s first appointment, has had a special distinction by reason of the outstanding abilities of the men—[and I am glad to now add “and women”]—who have now been called to its service.

I could not close without taking note of a very special characteristic of the Southern District: the sense of collegiality which pervades the relations among the judges, and between the judges and the lawyers who practice before this Court. This esprit de corps is remarkable and something we can all be proud of. The Federal Bar Council, whose hospitality we are about to enjoy, has done much to foster this relationship, but in a larger sense this partnership—this kinship—is the heritage of our predecessors. We honor their achievements today and hope that all of us in the years to come can continue to contribute to the distinction of this great institution. (applause)

CHIEF JUDGE BRIEANT: Thank you so very much, Mr. Fiske, for such a magnificent overview of our two centuries of growth and service in the execution of the judicial power of the United States in this place.

At this time Mrs. Lynn Owen, who gives so freely of her marvelous talents whenever judges and lawyers are gathered together, will lead us in singing, “God Bless America”. Mrs. Owen.

(“God Bless America,” led by Lynn Owen) (applause)

CHIEF JUDGE BRIEANT: As these memorable commemorative proceedings now draw to a close, I am permitted to add my own personal thanks and appreciation, and to mention the donors and the workers who have made this great event possible. I do this with some fear lest I leave out somebody. It is the first time within my memory that this Court has received such enthusiastic financial support for a historical presentation. The support of our donors, all of whom are mentioned in the program which you have, has made possible our Bicentennial Court History Exhibits now open to

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the public at the Fraunces Tavern Museum on the corner of Broad and Pearl Streets, and also on the first floor of this courthouse. None of this money has been used for entertainment or for bread and circuses. For the first time these exhibits have been assembled and coordinated by a professional curator, Professor Jeffrey A. Kroessler of the History Department of Baruch College, who was mentioned by Judge Motley.

Special acknowledgments are also indicated in your program for the Committee on the Bicentennial of the Constitution, which is part of the Judicial Conference of the United States, chaired by Judge Damon J. Keith of the United States Court of Appeals of the Sixth Circuit, and to Judge Frank X. Altamari of the United States Court of Appeals for the Second Circuit, who represents the courts of this region on that committee. His enthusiastic interest has been just marvelous, and we have also had the cooperation and support, as these matters were in preparation, of Chief Judge James L. Oakes of the Second Circuit Court of Appeals, and his predecessor, Chief Judge Wilfred Feinberg.

Here with us today is L. Ralph Mecham and Mrs. Mecham. Mr. Mecham is Director of the Administrative Office of the United States Courts in Washington, D.C. His own organization this year celebrates fifty years of service in keeping this great judicial army of ours on the march. We are delighted with his support and his and Mrs. Mecham's presence with us here today.

The National Archives and Record Center at Bayonne, Dr. Robert Morris and his associates, assisted in the preparation of the exhibits and helped us find and retrieve some of our ancient documents which are on display here and at the Fraunces Tavern Museum. The General Services Administration, Region Two, Mr. William Diamond, Administrator, assisted in many ways, far too many to mention, and the Honorable Romolo J. Imundi, our United States Marshal, and his staff, whose institution here in this district is exactly as old as our own, has also cooperated and supported us in conducting these proceedings—and there are many more.

I am grateful to all of you for your presence here today, to help the judges of the Court commemorate this great day in our history and the history of our nation.

It is my pleasure to announce that there will be a reception sponsored by the Federal Bar Council which will take place in the corridor on the fifth floor of this courthouse immediately following the conclusion of these proceedings.

The Clerk of the Court is now directed to adjourn sine die.

THE CLERK: This Court stands adjourned sine die. All rise.