

# Introduction: The Centennial Celebration of the Second Circuit Court of Appeals

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# INTRODUCTION

## THE CENTENNIAL CELEBRATION OF THE SECOND CIRCUIT COURT OF APPEALS

JAMES L. OAKES\*

Technically it is correct to date the courts of appeals from the Judiciary Act of 1891,<sup>1</sup> when Congress gave them appellate jurisdiction over both the district courts and the old circuit courts which thereby lost their appellate jurisdiction but anomalously remained alive until the Act of March 3, 1911.<sup>2</sup> But we should not overlook the fact that the first linking of New York, Connecticut, and Vermont into the "Second Circuit" was by the ill-fated Judiciary Act of February 13, 1801,<sup>3</sup> the Act that created the "midnight judges" as history has come to know them. Unfortunately, that reform, which it certainly was, became connected in the public's eyes because it was adopted by the Federalist Congress, with the Federalist judges' prior enforcement of the Sedition Act.<sup>4</sup> But the outstanding individuals whom President Adams had appointed to the Second Circuit should not be forgotten: Egbert Benson of New York, a former Attorney General and successful lawyer who had helped effectuate the settlement between New York and Vermont of their long-standing dispute over claims to Vermont land and paved the way two hundred years ago for Vermont to become the fourteenth state; Oliver Wolcott, Jr., Adams' Secretary of the

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<sup>1</sup> Act of Mar. 3, 1891, ch. 517, 26 Stat. 826 (1891).

<sup>2</sup> ch. 231, 36 Stat. 1087, 1167 (1911).

<sup>3</sup> ch. 4, 2 Stat. 89 (1801).

<sup>4</sup> E. SURRENCY, *HISTORY OF THE FEDERAL COURTS 19-25* (1987); *see also* Sedition Act, ch. 58, 1 Stat. 570 (1798) (authorized President to direct confinement of alien enemies).

Treasury and later Governor of Connecticut; and Samuel Hitchcock, a fine district judge from Vermont. Note that each state in the circuit had representation on the court. But the court helped bring about its own demise (along with the other circuits) on September 23, 1800, when it held invalid President Jefferson's order to pay the proceeds of a condemnation sale to the French claimant. The Supreme Court overruled the decision in December 1801,<sup>5</sup> and Congress abolished the circuits and their judgeships by the Act of March 8, 1802.<sup>6</sup>

But this is not to write about the first Second Circuit but to celebrate the centennial of the Evarts Act<sup>7</sup> as it was properly and rightfully known.<sup>8</sup> In a very real sense the Evarts Act served to free up the Supreme Court from deciding private disputes so that it could devote more of its time to policy issues, even while the work of the district courts was given more careful supervision than had previously been possible. One hundred years later the Act is still functioning well, and while there may be some who think that there are too many unresolved conflicts among the circuit courts of appeals, I do not join them. I think that a little conflict here and there gives the Supreme Court time and analysis over which it can chew to the ultimate benefit of all.

It is true that the business of the circuit courts has grown a great deal in the hundred years that have elapsed. Marvin Schick, in *Learned Hand's Court*, tells us that for the first ten years of the Second Circuit Court of Appeals the yearly case load varied from 120 to 160, with the judges having nice long recesses and the opportunity for eight or ten weeks a year of jury trials in the district court!<sup>9</sup> Today, of course, with the criminal law revolution of the Warren Court, well over a hundred acts of Congress in the last twenty years creating grounds for relief, and the "litigation explosion" that has taken place,<sup>10</sup> the court's case load has reached 3,400 per year and appears to increase at a rather steady seven or eight percent per year. But we now have thirteen judges. Each ac-

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<sup>5</sup> See *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 107 (1801) (relying on treaty ratified by the President on February 18, 1801).

<sup>6</sup> See ch. 8, 2 Stat. 132 (1802).

<sup>7</sup> See ch. 517, 26 Stat. 826 (1891).

<sup>8</sup> William M. Evarts, a leading New York lawyer, the first president of the Association of the Bar of the City of New York, and a United States Senator with many connections to Vermont, was the person who introduced the 1891 legislation.

<sup>9</sup> M. SCHICK, *LEARNED HAND'S COURT* 55 (1970).

<sup>10</sup> See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 15-54 (1973).

tive judge is entitled to three law clerks (though not all use their entitlement) and the chief judge four. Two secretaries plus computer-assisted legal research and a computer terminal at each law clerk's (and some judges') desk, assure that the resources are there to get the work done. In the case of the Second Circuit, we still manage to file the opinions an average of just over six months from the date of the filing of an appeal, and our backlog is only 1300 or so cases at any given time, most of those not being in a state ready to be heard. So we are not doing badly quantitatively speaking, and justice does not, except in infrequent instance, suffer from being delayed.<sup>11</sup> Its quality I will have to leave for others less biased to judge. On average, I would say the Supreme Court hears about twelve cases a year from the Second Circuit and reverses about eight, usually by a divided and very seldom by a unanimous Court, though the Supreme Court, as Justice Jackson once reminded us, is not final because it is infallible but infallible because it is final.<sup>12</sup>

This introduction to the centennial celebration would not be complete if it did not take into account some of the men (and one woman) who served the court with great distinction. These include E. Henry LaCombe who served from 1891 until 1916 and who, according to the late Charles E. Wyzanski, Jr., twice turned down appointments to the Supreme Court because he preferred to live in New York City.<sup>13</sup> Those who also must be included are three successive deans from Yale Law School, Henry Wade Rogers (1913-26), Thomas W. Swan (1927-53),<sup>14</sup> and Charles E. Clark (1939-63), the latter two founding fathers, in a sense, of a whole school of jurisprudence, legal realism. Charles Merrill Hough (1916-27) was considered one of the great judges of his day not only by his contemporaries like William Howard Taft, Charles Evans Hughes, and Learned Hand, but by Judge Wyzanski and Professor Karl Llewellyn; he was one of the great admiralty judges at the very least.<sup>15</sup>

Unfortunately, not all was distinction and glory on the Second Circuit; corruption reared its ugly head with a chief judge who went to prison for conspiracy to obstruct justice and defraud the United States.<sup>16</sup> The other judges who served with Judge Manton

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<sup>11</sup> See Marshall, 65 *ST. JOHN'S L. REV.* 645, 645 n.2 (1991).

<sup>12</sup> See *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

<sup>13</sup> See Wyzanski, *Augustus Noble Hand*, 61 *HARV. L. REV.* 573, 577 (1948).

<sup>14</sup> I am noting only the time of active service, not service as a senior.

<sup>15</sup> See M. SCHICK, *supra* note 9, at 60-62.

<sup>16</sup> See *United States v. Manton*, 107 F.2d 834, 850 (2d Cir. 1939), *cert. denied*, 309 U.S.

testified as witnesses at his trial and those I spoke to remembered that day as a low point in their lives as well as in the life of the court.

The Learned Hand court's brilliance, balance, and glowing reputation soon wiped out the stain if not the memories of the Manton days. The two Hands, Billings Learned (his wife called him "B") and his cousin Augustus Noble ("Quote Learned, but follow Gus") are so well known along with Swan and Clark, the founding father as reporter to the Advisory Committee of the Federal Rules, that they need no more encomia here. As one who worked on the issue of the Harvard Law Review dedicated to "L.H.," as his colleagues called him,<sup>17</sup> I would certainly rank him with Holmes, Brandeis, Cardozo, and Brennan—others might add another name or two to that list—as one of the most influential twentieth century jurists. The other two judges on that court, Jerome Frank and Harrie B. Chase, also require mention, however. Frank, himself a leading realist, was a prolific judicial superstar whose opinions often clashed with his more staid colleagues' but who was very persuasive to the Supreme Court; "must" reading is his dissent in *United States v. Antonelli Fireworks Co.*,<sup>18</sup> particularly the portion thereof dealing with prosecutorial overbearing in summation.<sup>19</sup> Harrie B. Chase, not the first Vermonter on the court but the first Second Circuit judge to have a law clerk become a judge on the court, was a balance wheel on the court, especially able in patent cases; he would have been a shining light on any court.

And we have the last four decades of the court: Harold R. Medina, Carroll C. Hincks, John Marshall Harlan, J. Edward Lumbard (still a very active senior judge at the age of 89), Sterry R. Waterman, Henry J. Friendly, Leonard Moore, J. Joseph Smith, Irving Kaufman (active as a senior), Thurgood Marshall, Paul Hays, Robert P. Anderson, Wilfred Feinberg (still active), Walter Mansfield, William Mulligan, and our other active seniors (William H. Timbers, Ellsworth Van Graafeiland, Lawrence W. Pierce)—each made his very special mark: Chief Judges Lumbard and Kaufman, especially as administrators though the latter has also been a widely read essayist; and Friendly as one of the great

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664 (1940).

<sup>17</sup> See 60 HARV. L. REV. 325, 325-422 (1947) (dedication to Judge Learned Hand).

<sup>18</sup> 155 F.2d 631, 642 (2d Cir.) (Frank, J., dissenting). *cert. denied*, 329 U.S. 742 (1946).

<sup>19</sup> *Id.* at 661-62.

judges of his time.<sup>20</sup> That Judge Friendly is held by his colleagues to have been on the same plane of judicial achievement as Learned Hand is evidenced by the fact that their two busts face each other across our courtroom as inspiration to us all. And, of course, Harlan and Marshall were to do the bulk of their great work on the Supreme Court.

Much more could be said about each of the judges on the court, including our newest arrivals, but conditions of space require me to leave the reader to Professor Jeffrey B. Morris's superb *Federal Justice in the Second Circuit*<sup>21</sup> for more in-depth evaluations. Suffice it to say that our court continues in the great traditions of the past. At least four of its members have been mentioned at one time or another as being on a short list to fill a Supreme Court vacancy. Judge Newman has a growing national if not international reputation for intellectual perspicacity in the Hand-Friendly tradition. In addition to being a superb judge, Judge Kearse is an international bridge authority and expert. Judges Winter and Pratt, as have others in the past, maintain tough teaching schedules in addition to keeping current on their caseloads. I could go on but will not, lest I offend someone by oversight or otherwise.

While the Second Circuit has no motto as such, a toast to its first hundred years that would surely be joined in by Learned Hand and Harold Medina and probably by most of the others, might be:

To excellence, to craftsmanship, to collegiality and to the spirit of liberty: may the next hundred years bring us more of the same.

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<sup>20</sup> See In Memoriam Honorable Henry J. Friendly 805 F.2d LXXXI, LXXXI-CI (1986) (Extraordinary Session of the Court of Appeals For the Second Circuit, June 9, 1986).

<sup>21</sup> J. MORRIS, *FEDERAL JUSTICE IN THE SECOND CIRCUIT passim* (1987).

