A Periodical of New York Court History

JUDICIAL NOTICE

Issue 8 ~ Spring 2012

The Historical Society of the Courts of the State of New York

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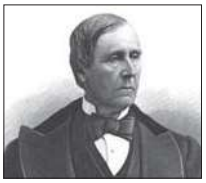
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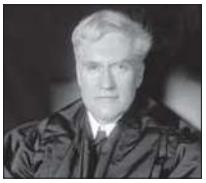
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FEATURED ARTICLES

DEPARTMENTS

FROM THE PRESIDENT

Dear Members

Membership in this Society brings with it not only the spoken word—in terms of our stellar programs and speakers—but the written word as well. We call this **Judicial Notice**, which, as a good deal more than a newsletter, has given our readers some wonderful articles. This issue is no exception, featuring four lively pieces.

The first has an alphabetical ring to it: *Kaye on Jay*, aptly named for an essay by former Chief Judge Judith S. Kaye on the domestic side of an uncommonly worldly man. The two have much in common beyond the ring of their names. Jay was our first Chief Judge and Kaye our last, before the present Chief, Jonathan Lippman. Beyond that, Jay and Kaye occupy prominent positions at 20 Eagle Street, as they face one another, by way of oil paintings, in the courtroom of the New York Court of Appeals. Family is family.

John D. Gordan, III, our in-house scholar, has unearthed an interesting chapter in Civil War history and jurisprudence as he describes the judicial journeys of a New York judge who for several years after a political tussle in 1856 was President Lincoln's appointee to the United States Provisional Court for Louisiana.

Our own Editor-In-Chief, Henry M. Greenberg, takes a fascinating look at politics in 1920 when the New York State Assembly expelled some members for "disloyalty" to the United States and the State of New York for their affiliation with the Socialist Party.

The issue concludes with a favorite author writing about a favorite judge as we present Professor Andrew L. Kaufman's introduction to Benjamin Cardozo's **The Nature of the Judicial Process**.

Read on…

Albert M. Rosenblatt, President

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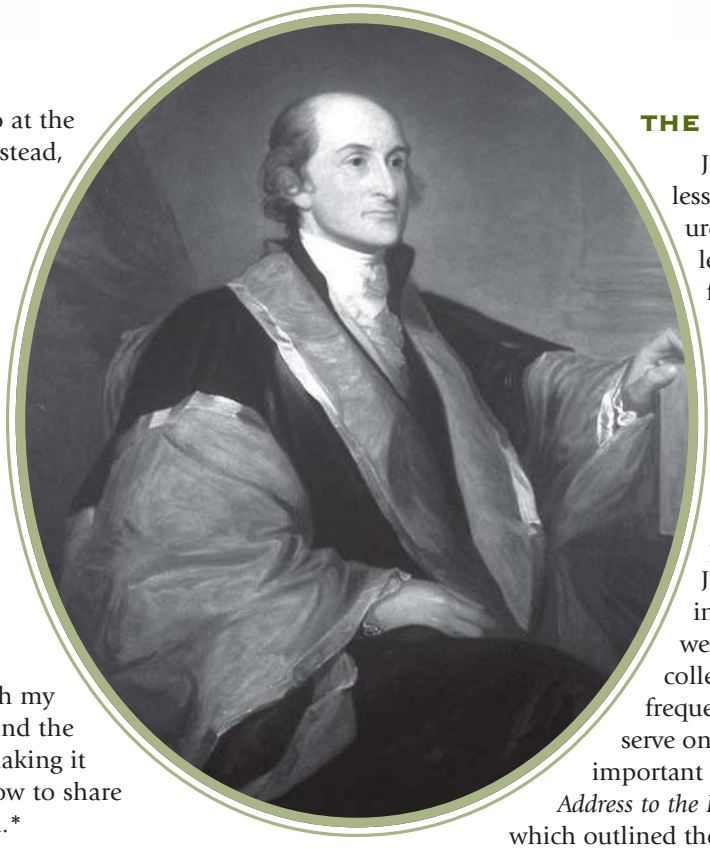
Kaye on Jay

NEW YORK'S FIRST CHIEF

THE FAMILY MAN

JUDITH S. KAYE

Several years ago at the John Jay Homestead, I had the privilege of delivering the Goodhue Lecture honoring the late Senator Mary Goodhue, with whom I worked to secure state and federally funded services for young children at risk of developmental delay. She was at the time the Chair of the Senate Committee on Children and Families, and I was the Chief Judge. I have over the years tinkered a bit with my script, and we have found the images you now see, making it a particular pleasure now to share these remarks with you.*



John Jay
New York Court of Appeals Collection

THE PUBLIC PERSON

John Jay was an endlessly fascinating *public* figure. Indeed, he played at least five key roles in the formation of our State and nation.

The first is as lawyer turned guerilla and spymaster. By the early 1770s, he had built one of the most successful private law practices in New York. Jay's superb reasoning and writing skills were well known to his colleagues, and he was frequently called upon to serve on committees and draft important documents, such as the *Address to the People of Great Britain*, which outlined the Colonists' grievances.[1]

* *I am especially pleased to publish this essay as a tribute to my beloved former Law Clerk Steven C. Krane, who was a member of the John Jay Homestead Board of Trustees from 2007 until his untimely death in 2010, and who inspired the Homestead's invitation to me. As his Eagle Scout project, Steve's son, Cameron, designed and built a Butterfly Garden at the Homestead honoring his father. I extend special thanks as well to John Jay College President Jeremy Travis. When I was recently at the College, President Travis spoke of John Jay as a person "who knew how to fight for New York," which caused me to dig out my remarks and polish this article for publication. My gratitude is boundless as well to the extraordinary Office of Court Administration lawyers who have assisted me in the preparation of this article, starting with another beloved former Law Clerk, Jeremy Feinberg; his colleague Laura Smith; and our phenomenal Court of Appeals Librarian, Frances Murray.*

His resourcefulness and enterprise brought him to the front lines in 1776. Jay headed a small band that sought to harass British ships on the Hudson River, and he rode to Connecticut to obtain cannons and ammunition, an assignment that drew heavily on his powers of persuasion. And as later immortalized in a novel by James Fenimore Cooper, Jay worked with spies to infiltrate and collect information on British loyalists. Jay's involvement in espionage likely exposed him to the risk of execution as a traitor at the time, but ultimately gained him (much belated) recognition by the CIA as one of the three Founding Fathers of American Intelligence.[2]

A second key role was as an architect of the original New York State Constitution, an extraordinary document that was largely Jay's work. That Constitution established our three discrete branches of government and spelled out their authority—including a bicameral legislature, a popularly elected governor to head the executive branch, and an independent judiciary. It included not only the structural framework of our State and nation but also such enduring values as the guarantee of religious freedom, the right to trial by jury, the right to counsel and the right to vote. Many of the core provisions of that 1777 document survive to this very day in our State and Federal Constitutions.[3]

Third, John Jay was a key advocate for New York's ratification of the United States Constitution. With the vote extremely close in the pivotal states of New York, Massachusetts and New Hampshire, narrow passage here was due in large part to Jay's advocacy. Jay argued forcefully that a single, united nation would be better able to demand respect from other nations; that a second effort was unlikely to produce better results; that the carefully negotiated compromise would allow the states to remain strong and united; and that the people "should give the proposed Constitution a fair trial" and "mend it as time, occasion and experience may dictate."[4] His *Address to the People of the State of New York* has been called "Jay's major contribution toward the ratification of the Constitution."[5]

Fourth, Jay was the very first Chief Justice of both New York's high court and the United States Supreme Court. Indeed, his portrait as New York's Chief sits front and center behind the bench, in salmon robes, leading the parade of judges' portraits that decorate the walls of our magnificent Court of Appeals courtroom. Regrettably, we know few details of the actual work of the Court back then, given the absence of reported decisions (in marked contrast to today). After the United States Constitution went into operation in 1789, Jay was given his choice of posts in the federal government, and opted for Chief Justice of the Supreme Court of the United States.[6] In his recent memoir, Justice John Paul Stevens states that, of the twelve Chief Justices who pre-dated his term of service on the U.S. Supreme Court, John Jay ranks among the five who "stand out as national leaders entitled to our highest respect."[7]

Finally, Jay was a shrewd diplomat for a powerless New World. Both under the Articles of Confederation and on behalf of the new United States, he was several times sent on tough diplomatic missions, including negotiation of Jay's Treaty, which was widely criticized in the United States.[8]

As we have seen, Jay amassed quite a record of public service, particularly for a person barely into his thirties at the time of the American Revolution. My focus, however, will be on the private side of this extraordinary individual.

THE FAMILY MAN

The constant backdrop for John Jay's many public roles was the push and pull of family obligations—not an unfamiliar tension for so many of us to this day. Jay was repeatedly called away from his family to attend to affairs of state, and at the same time he was called away from historic moments to support and comfort relatives in times of need. The importance of family is particularly striking in the life of John Jay, as is the importance of letter-writing to maintaining these close ties across the miles. A few of those letters accompany this article, and many more support the work of the historians and scholars I have cited. While we have far more communications options today, I was intrigued to see Jay's advice to his son Peter about written communications. Jay urged Peter to write frequently while they were apart, but also to be "always mindful" of the possibility that a letter might reach an unintended recipient, and thus

Peter should not, except at great need, write anything that "would give you concern" if the letter were to miscarry—a great lesson for the digital age!

Jay's father and grandfathers were successful merchants, well connected in the Colony of New York. In 1774, at the age of 29, Jay married into another notable family, the New Jersey-based Livingstons. By all accounts, it was a great match. Sarah Livingston's "gaiety and high spirits" were a perfect complement to her husband's sedate and reserved personality.[9]

"During the first decade of their married life, John and Sarah Jay were often separated by his official duties; even when they were together, they were often in rented rooms or houses."[10] Indeed, during the war, the British occupation of New York City, Kingston, and other areas of New York made it difficult for the new family to settle down. When they were apart, John and Sarah wrote three times a week, numbering their letters to one another.[11]

Sarah Jay and Children
Pastel drawing c. 1789 by James Sharples
JJ.1987.9

In January 1776, Jay left the Continental Congress in Philadelphia to be with his wife for the birth of their first child, Peter Augustus, and he lingered at home to help care for his wife and ailing father. In a letter to Robert Livingston two days after Peter Augustus was born, Jay noted that, although mother and child were well, "the precarious Situation of Life in such Circumstances makes me the Subject of many Fears and much anxiety."[12]

After a brief return to Philadelphia in March 1776, Jay resisted further calls from the Continental Congress and remained in New York in June and July 1776, thus missing the drafting and signing of the Declaration of Independence. Instead, to be near his family, he sat on the third Provincial Congress of New York. After the Declaration of Independence was ratified, when he became active in counterintelligence in the summer and fall of 1776, Jay also took the opportunity to move his family, including his parents, with him from New York City to the relative safety of Fish Kill.[13]

Jay's mother died in mid-April 1777 and, although he had largely drafted our State Constitution, he missed the final days leading to its adoption that month in Kingston, so that he could be with his father in Fish Kill. Later, after a year of service as New York's Chief Justice under that same Constitution, Jay submitted his formal resignation with the intention—not actually fulfilled for more than two decades—of returning to private life, noting that "[d]uring the continuance of the present contest I considered the public as entitled to my time and my services."[14]

Instead, however, in October 1779 John and Sarah Jay departed for a mission to Spain, leaving three-year-old Peter Augustus in the care of the Livingstons. Sarah was the only American diplomat's

Peter Augustus Jay (1776-1843), Print.
1797 by Charles Saint-Memin
JJ.1982.68

wife to travel with her husband on his diplomatic mission during the war. Their first daughter, Susan, was born overseas, but died weeks later; Jay's surviving daughters, Maria and Ann, were also born in Europe.[15]

In 1784, upon returning to New York, the Jays learned that John had been appointed Secretary for Foreign Affairs. Jay did not immediately accept the post, but consulted first with his family. Ultimately, he accepted, but only after negotiating with Congress about the terms of his service. The Jays had commenced construction of their "first real home" soon after they arrived in New York in July 1784; thus, one of Jay's conditions for accepting the position "was that Congress settle itself, preferably in New York City" because he "did not want to move his family from town to town, or be separated from them for long periods." The post provided a salary of several thousand dollars a year and, combined with Jay's New York City landholdings (which had appreciated substantially in value), made him among the wealthiest people in the State. In 1785, the Jays moved into their newly constructed home, a three-story stone house in New York City. There they entertained hundreds of people, including "[p]olitical leaders, foreign diplomats, lawyers, merchants, preachers, aristocrats, and democrats." Their son William was born in the summer of 1789.[16]

Anna Jay "Nancy" (1783-1856), Miniature on Ivory.
1801 by Gideon Fairman
JJ.1970.9

In 1790, John Jay became the first Chief Justice of the United States Supreme Court, and again his family loomed large in his career decisions. In the Judiciary Act, Congress had created a separate federal circuit court for each state. Each circuit court was formed by two Supreme Court Justices and one local district judge, and had to meet twice a year. This meant that the six Justices had to "ride the circuit" twice a year, to hold court far from home for several weeks or even months. In 1791, Jay took his wife and his son Peter Augustus with him as he set out from New York for the eastern circuit, including New Haven, Boston, Portsmouth, and Newport. Though at first "well pleased with the jaunt," by 1792 Jay was tired of riding circuit and tired of waiting for Congress to change the system.[17] As Jay wrote to his sister, the job of Chief Justice "[t]akes me from my family half the year, and obliges me to pass too uncomfortable a part of my time on the road, in lodging houses and inns."[18]

Jay's friends had been urging him for some time to run for Governor of New

Maria Jay (1782-1856), Print.
1798 by Charles Saint-Memin
JJ.1982.69

York. When he finally accepted the nomination in 1792, it appears that separation from family factored into the decision. Although a majority of the votes apparently were cast for Jay, he lost that election. It seems that the votes in Otsego County (a Jay stronghold) were delivered to the canvassers by a sheriff whose commission had expired, during a period of delay while the sheriff's successor was awaiting his commission. The canvassers voted seven-to-four along party lines to disregard the Otsego votes because they were not delivered by the proper official. Jay remained as Chief Justice; he accepted the disappointment in the gubernatorial election with good grace and urged his supporters to do the same. Sarah, however, knowing how much this election had meant to her husband, suggested he should take comfort that "you are the choice of the people."[19]

As if the Chief Justice's circuit-riding responsibilities were not sufficiently disruptive to Jay's family life, in 1794 President Washington selected Jay for a mission to Great Britain in an effort to avert war. Jay stated that "[n]o commission ever operated more unpleasantly upon me," but that "to refuse it would be to desert my duty for the sake of my ease and domestic concerns and comforts."[20] As Jay explained to Sarah: "The object [avoidance of war] is so interesting to our country, and the combination of circumstances such that I find myself in a dilemma between personal considerations and public ends." Jay further noted: "This [appointment] is not of my seeking; on the contrary, I regard it as a measure not to be desired, but to be submitted to." However, if he could help prevent the "evils and miseries incident to war," he and Sarah would "both have occasion to rejoice."[21]

On his return to the United States in the spring of 1795, Jay was elected Governor of New York, and was presumably able to spend time with his family during his two consecutive terms of office. In 1800, Jay was again nominated and confirmed as Chief Justice of the United States Supreme Court, an appointment he this time declined. As he told President Adams, he did not wish to serve again in a "system so defective it would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess." Instead, he retired to the place now known as the John Jay Homestead, which would be home to six generations of the Jay family.[22]

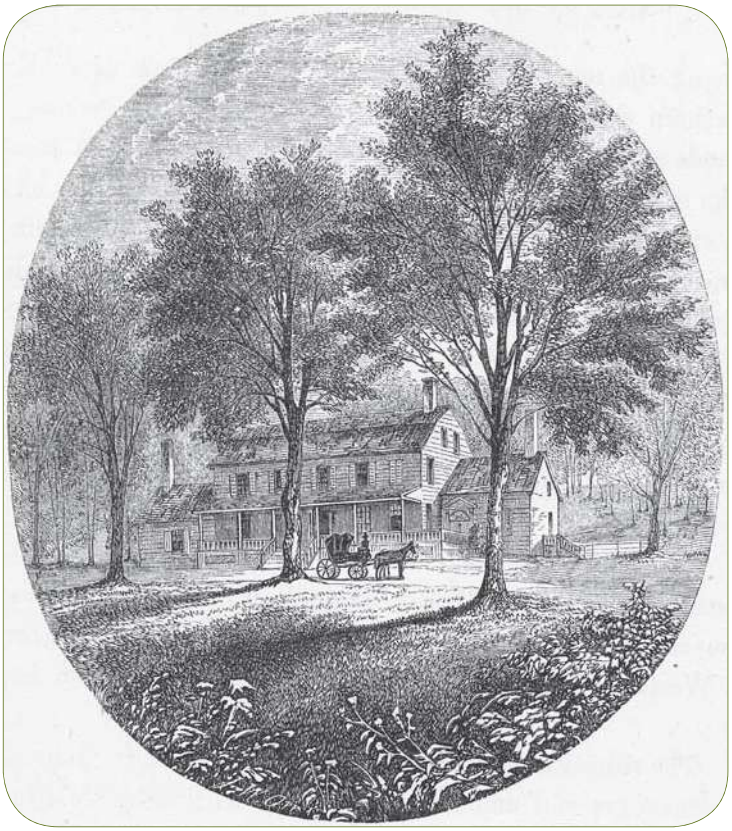
Sadly, Sarah passed away not long after Jay's retirement. Jay wrote: "Had Mrs. Jay remained with me, I should deem this the most agreeable part of my life."[23] Jay never remarried and lived quietly as a gentleman farmer for the rest of his life—almost three decades. Jay had, in his own youth, "resolutely determined that his 'ideas of filial duty' should be reconciled, whatever became of ambition."[24] As biographers have noted, in his own twilight years, Jay found "the same ideas of filial duty reproduced and exemplified in his children."[25]

Jay died on May 17, 1829. He instructed his children that he should have a simple funeral, and the money they would have spent should be given instead to a poor widow.[26] After Jay's death, his family learned that between 1792 and 1794 he had supported six indigent boys in New Rochelle, near where he was raised, and put them through school.[27]

A JAY FAMILY LEGACY

Jay's example of devotion to his family, and his commitment to the cause of freedom, clearly inspired his descendants as well. Beyond the family tradition of "filial duty" that Jay spoke of, an even greater

legacy was the family's opposition to slavery. When honoring Jay's son William for his own anti-slavery efforts in 1854, Horace Greeley said: "To Chief Justice Jay may be attributed, more than to any other man, the abolition of Negro bondage in [New York] state."[28] While the Jays began as compassionate slaveholders, they found themselves increasingly drawn to the abolition and manumission movements. Manumission of slaves, which involved the voluntary commitment of an owner to free a person from slavery, can be seen as a movement for cultural change that would gradually pave the way for the legal abolition of slavery.



Bedford House. Home of Chief Justice Jay.
Print from History of the City of New York *c. 1810 by A. S. Barnes*
JJ.1980.208

A March 1765 letter from Jay's father provides insight into the belief system of the slave-owning household in which Jay was raised. After naming certain slaves and describing their medical problems, Jay's father noted that because of "this distressed condition of my family, I cannot be spared from home to visit my friends in town." To Jay's father, the slaves he owned were part of his family.[29]

During his first gubernatorial campaign in 1792, Jay explained that "every man of every color and description has a natural right to freedom, and I shall ever acknowledge myself to be an advocate for the manumission of slaves in such way as may be consistent with the justice due to them, with the justice due to their master, and with the regard due to the actual state of society. These considerations unite in convincing me that the abolition of slavery must be gradual."[30]

In 1785, John Jay helped found the New York Manumission Society, and was elected its first President. The Society initiated lawsuits on behalf of slaves, organized boycotts against New York merchants and newspaper owners involved in the slave trade, warned newspapers not to accept advertisements for sale of slaves, and kept watch on persons who participated in or invested in the slave trade.[31]

Jay was also an early supporter of the gradual abolition of slavery, a position linked to his own commitment to the patriot cause and liberty. As he wrote, it was "very inconsistent as well as unjust and perhaps impious" for men to "pray and fight for their own freedom" and yet to "keep others in slavery."[32] Years later, Jay called slavery "repugnant to the following positions in the Declaration of Independence - viz. 'We hold these Truths to be self-evident: that all Men are created equal; that they are endowed by their Creator with certain inalienable rights; that among them are Life, Liberty and the Pursuit of Happiness.'" He also considered the authority of Congress to abolish slavery unquestionable, and argued so.[33]

Jay himself found opportunities to address the issue in several of his official roles, such as drafter of the New York Constitution, as Secretary for Foreign Affairs, and as Governor of New York. It took 22 years, however, for the anti-slavery position to bear fruit in the initially hostile soil of New York. Significantly, in April 1799, during Jay's second term as Governor of New York, the Legislature passed the Act for the Gradual Abolition of Slavery, providing for emancipation. Jay was largely responsible for the passage of this law through both houses of the Legislature—on the fifth attempt.[34]

Hand in glove with freedom, of course, was the need for education to equip former slaves to take their place in society. In 1787, Jay helped found New York's African Free School (managed by the Manumission Society) which he supported throughout his life. Within a year of its founding, the school had 56 students, and by 1834 it had educated more than 1,000 students. Writing to Benjamin Rush in 1785, Jay stated:

> *"I consider knowledge to be the soul of the republic. ... I wish to see all unjust and all unnecessary discriminations everywhere abolished, and that the time may soon come when all our inhabitants of every colour and denomination shall be free and equal partakers of our political liberty."*[35]

Not surprisingly, Jay's son William was one of the most ardent abolitionists of the nineteenth century. William eventually lost his position as a Westchester County Court Judge due to pro-slavery Democrats.[36]

William Jay began to write publicly against the extension of slavery during the Missouri controversy in 1819. In 1826, he wrote to the New York Legislature and to Congress about the necessity of reforming the slave laws of the District of Columbia. He was one of the founding members of the New York City Anti-Slavery Society and helped transport several people north on the Underground Railroad.[37]

John Jay II, William Jay's son, carried on the family legacy in one way that is especially significant for me: he served as co-counsel in New York Superior Court with Erastus Culver, a well-known anti-slavery lawyer in Brooklyn, on behalf of certain slaves in the politically charged case of *Lemmon v. People.*[38]

The eight *Lemmon* slaves had been brought here by their master, a citizen of a slave state, on their travels through New York. Happily, the decision to free the slaves was upheld at every stage of review by the New York courts. After affirmance by the Court of Appeals in 1860, an appeal was promptly filed to the United States Supreme Court, causing anti-slavery activists to fear that the Supreme Court would, based on its *Dred Scott* decision, take the opportunity to force the introduction of slavery into free states. The outbreak of the Civil War, however, left our Court of Appeals with the last word in the *Lemmon* matter.[39]

By setting the *Lemmon* slaves free, New York showed its commitment to the truths articulated in the Court of Appeals concurrence: that "liberty is the natural condition of men" and that "slavery is contrary to the spirit of the Constitution."[40]

CONCLUSION

Now, as my portrait faces John Jay's at Court of Appeals Hall, I have a far greater appreciation of him not only as a great statesman but also as a kind, caring, compassionate human being.

Kaye on Jay

Hartford 29th. Oct. 1791~

My dear Son

You will probably be in Town as soon as this Letter, and I do myself the pleasure of writing to you now, as I expect to be on the Road to Boston before another post-Day.

I flatter myself that your Excursion has been beneficial to your health, and that our friends at Rye regretted your leaving them. You will also recieve a few lines from me by this opportunity - I wish to number him and you among my Correspondents and to recieve frequent Letters from you both.

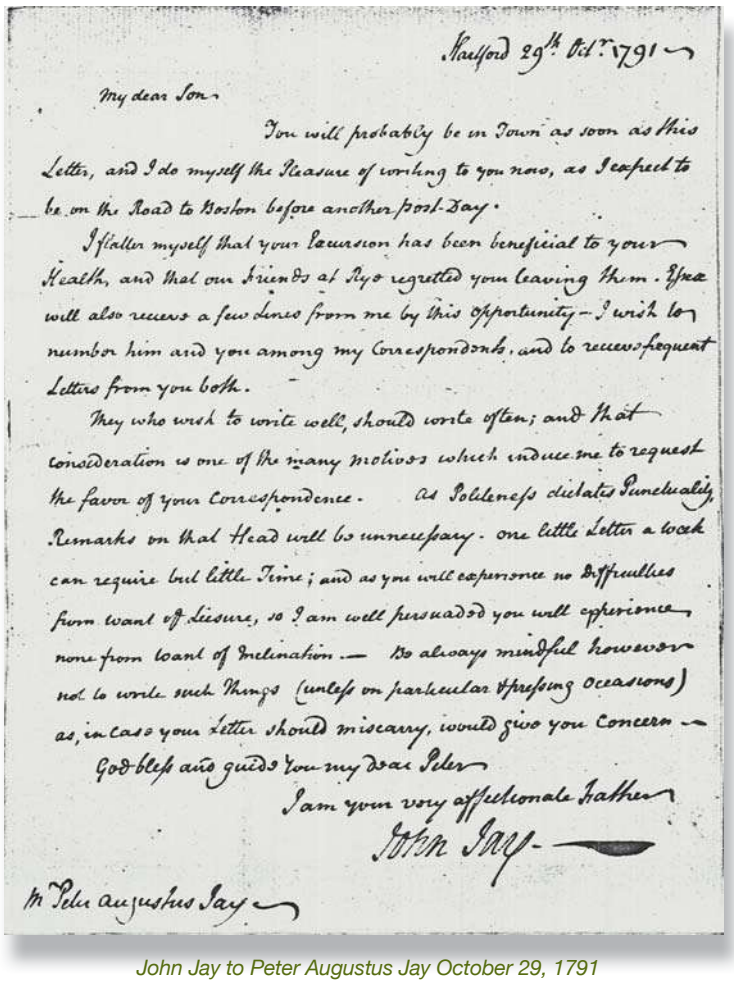
They who wish to write well, should write often; and that consideration is one of the many notions which induce me to request the favor of your correspondence. As Politeness dictates Punctuality, Remarks on that Head will be unnessecary. One little Letter a week can require but little Time; and as you will experience no Difficulties from want of leisure, so I am well persuaded you will experience none from want of Inclination - As always mindful however not to write such things (unless on particular + pressing occasions) as, in case your letter should miscarry, would give you concern

God bless and guide you my dear Peter

I am your very affectionate father

JOHN JAY

Peter Augustus Jay



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God bless and guide you my dear Peter~

I am your very affectionate Father~

John Jay~

Mr Peter Augustus Jay~

John Jay to Peter Augustus Jay October 29, 1791

John Jay Papers
Rare Book & Manuscript Library
Columbia University in the City of New York

Tuesday, --- 15 April 1794

My Dear Sally.

I was this ev'g fav'd with yours of the 14 hr post. It is now between 8+9 oc'k and I am just returned from court- as yet I am uninformed whether the Miss Allens are arrived.

I expect my dear Sally to see you sooner than we expected- there is here a serious determination to send me to England, if possible to avert a war-the object so interesting to our country, and the combination of circumstances such, that I find myself in a dilemna between personal considerations and public ends. Nothing can be much more distant than every wish on my own acct. I feel the impulse of duty strongly, and it is probable that if on the investigation I am now making my mind should be convinced that it is my Duty to go, you will join with me in thinking that on all occasions so important, I ought to follow its dictates and commit myself to the care and kindness of that Providence in which we have both the highest reason to repose the most absolute confidence-this in not of my seeking-on the contrary I regard it as a measure not to be desired but to be submitted to.

A thousand reflections crowd into my mind, and a thousand emotions into my heart. I must remember my motto Deo Duce Perseverandum-The knowledge I have of your sentiments on these subjects affords me consolation.

If the nomination shd take place it will be in the course of a few days, and then it will appear in the papers-in the meantime say nothing on the subject, for it is not impossible that the business may take aother turn, tho' I confess I do not expect it will.

My dear, dear, Sally, this letter will make you as grave as I am myself-but when we consider how many reasons we have for resignation and acquicsence I flatter myself that we shall both become composed.

If it should please God to make me instrumental to the continuance of peaace and in preventing the effusion of blood and other evils and miseries incident to war, we shall both have reason to rejoice, whatever may be the event, the endavours will be virtuous and consequently consolatory. Let us repsose unlimited trust in our maker. It is our business to adore and to obey. My love to the children.

with very sincere and tender affection I am

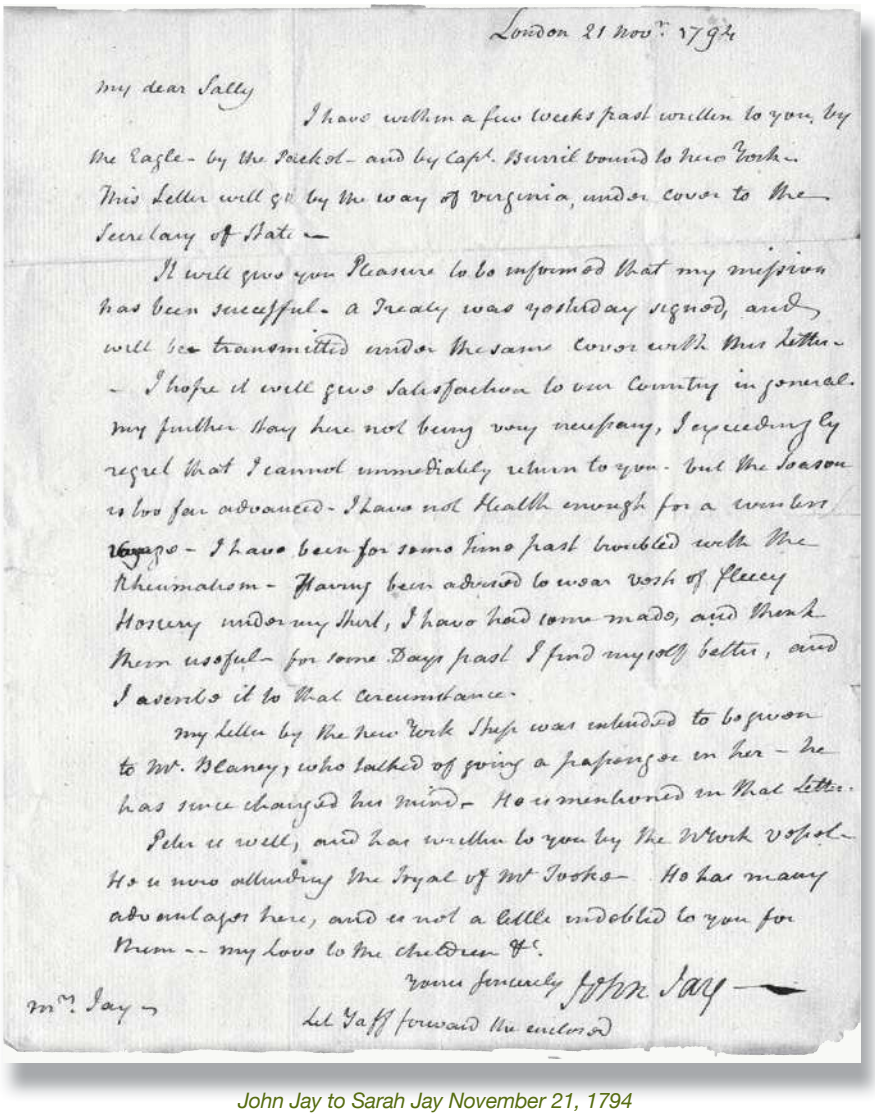
my Dear Sally

Ever Yours,

JOHN JAY

Mrs. Jay

P.S. It is supposed that the object of my mission maybe compleated in time to return in the fall.



London 21 Novr 1794

my dear Sally

I have within a few weeks past written to you, by the Eagle - by the Packet - and by Capt. Burril bound to New York. This Letter will go by the way of Virginia, under cover to the Secretary of State -

It will give you Pleasure to be informed that my mission has been successful - a Treaty was yesterday signed, and will be transmitted under the same cover with this Letter - I hope it will give Satisfaction to our Country in general. my further stay here not being very necessary, I exceedingly regret that I cannot immediately return to you - but the Season is too far advanced - I have not Health enough for a winter voyage - I have been for some time past troubled with the Rheumatism - Having been advised to wear vests of fleecy Hosiery under my Shirt, I have had some made, and think them useful - for some Days past I find myself better, and I ascribe it to that circumstance -

My Letter by the New York Ship was intended to be given to Mr. Blaney, who talked of going a passenger in her - he has since changed his mind - He is mentioned in that Letter -

Peter is well, and has written to you by the N York vessel. He is now attending the Tryal of Mr Tooks. He has many advantages here, and is not a little indebted to you for them -- my love to the children &c.

Yours sincerely John Jay

Mrs. Jay -

Let Gaff forward the enclosed

John Jay to Sarah Jay November 21, 1794
Courtesy Westchester County Historical Society

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Yours sincerely

John Jay

Mrs. Jay

Let Gaff forward the enclosed

ENDNOTES

Images of Sarah Jay, Peter Augustus Jay, Anna Jay, Maria Jay, and the Bedford House are in the collection of the John Jay Homestead Historic Site, New York State Office of Parks, Recreation and Historic Preservation.

1. Walter Stahr, *John Jay: Founding Father* 40-42, 253-54 (Hambledon Continuum 2005).
2. P.K. Rose, *The Founding Fathers of American Intelligence* (Central Intelligence Agency 1999), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/the-founding-fathers-of-american-intelligence/art-1.html; Stahr, *supra* note 1, at 65-72, 72 n.*; *John Jay: The Making of a Revolutionary, Unpublished Papers 1745-1780* 295-303 (Richard B. Morris ed., Harper & Rowe 1975) (hereinafter "Unpublished Papers").
3. Charles Z. Lincoln, *The Constitutional History of New York* 496-98, 589-93 (Lawyers Co-operative 1906); Frank Monaghan, *John Jay: Defender of Liberty Against Kings and People* 96 (Bobbs-Merrill Co. 1935); George Van Santvoord, *John Jay, in* 1 *Sketches of the Chief Justices* 18-20 (3d ed., Green Bag 2001) (1854); N.Y. Const. of 1777, art. VI. *Compare* N.Y. Const. of 1777, arts. XIII, XLI, XXXVIII, *with* N.Y. Const. art. I, §§ 1-3.
4. Justice Harry A. Blackmun, *John Jay and the Federalist Papers*, 8 Pace L. Rev. 237, 238, 246 (1988); William H.V. Hackett, *Sketch of the Life and Character of John Jay*, 2 Am. Rev. 59, 62 (1845); Van Santvoord, *supra* note 3, at 52, 53, 58-59; Stahr, *supra* note 1, at 254 (quoted).
5. Gottfried Dietze, *Jay's Federalist - Treatise for Free Government*, 17 Md. L. Rev. 217, 217 (1987).
6. Richard Dean Burns & Richard D. Yerby, *John Jay: Political Jurist*, 13 J. Pub. L. 222, 222-23 (1968); Herbert A. Johnson, *John Jay: Lawyer in a Time of Transition, 1764-1775*, 124 U. Pa. L. Rev. 1260, 1264-66 (1965); Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 Chi.-Kent L. Rev. 11, 17 & nn.38-39 (1998); Oliver William Bourne Peabody, *Life of John Jay*, 37 N. Am. Rev. 315, 335 (1833); Van Santvoord, *supra* note 3, at 60-63.
7. John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* 37 (Little, Brown, and Co. 2011).
8. Van Santvoord, *supra* note 3, at 35-44, 87-98. *But see* James Brown Scott, *John Jay, First Chief Justice of the United States*, 6 Colum. L. Rev. 289, 320 (1906) (noting Lord Sheffield's comment that Britain had been "perfectly duped by Jay" into signing a "most impolitic" treaty).
9. Unpublished Papers, *supra* note 2, at 123.
10. Stahr, *supra* note 1, at 223.
11. Richard Brandon Morris, *Witnesses at the Creation: Hamilton, Madison, Jay and the Constitution* 57 (Henry Holt & Co 1996).
12. Unpublished Papers, *supra* note 2, at 223 (quoted); Stahr, *supra* note 1, at 55.
13. Monaghan, *supra* note 3, at 65-66; Stahr, *supra* note 1, at 68; Unpublished Papers, *supra* note 2, at 263, 269 n.1; Van Santvoord, *supra* note 3, at 14-15.
14. Scott, *supra* note 8, at 303.
15. Morris, *supra* note 11, at 57; Stahr, *supra* note 1, at 116-17, 223.
16. Monaghan, *supra* note 3, at 229; Stahr, *supra* note 1, at 197, 223, 224 (quoted); Van Santvoord, *supra* note 3, at 45-46.
17. Stahr, *supra* note 1, at 274, 281 (quoted), 283; Van Santvoord, *supra* note 3, at 66.
18. Stahr, *supra* note 1, at 280.
19. Peabody, *supra* note 6, at 335; Stahr, *supra* note 1, at 283, 287 (quoted); Van Santvoord, *supra* note 3, at 23, 46, 99; *cf. Bush v. Gore*, 531 U.S. 98 (2000).
20. Scott, *supra* note 8, at 319; Van Santvoord, *supra* note 3, at 92.
21. Letter from John Jay to Sarah Jay (Apr. 15, 1794), *available at* http://www.columbia.edu/cuilweb/digital/jay (Jay Paper # 1036) (multiple portions quoted); *see also* Hackett, *supra* note 4, at 68-69; Scott, *supra* note 8, at 319; Van Santvoord, *supra* note 3, at 91.
22. *John Jay*, 1 Chi. L. Times 215, 223 (1887) (hereafter "Chicago"); Peabody, *supra* note 6, at 337; Scott, *supra* note 8, at 322 (quoted).
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25. *Id*.
26. *Reminiscence of Governor John Jay*, The Nat'l Era, Oct. 24, 1850 171.
27. Hackett, *supra* note 4, at 68.
28. Jake Sudderth, *Jay and Slavery* (Colum. Univ. 2002),

available at http://www.columbia.edu/cu/lweb/digital/jay/JaySlavery.html.

29. Stahr, *supra* note 1, at 5.
30. Stahr, *supra* note 1, at 284.
31. Sudderth, *supra* note 28; Stahr, *supra* note 1, at 237.
32. Stahr, *supra* note 1, at 237.
33. Letter from John Jay to Elias Boudinot (Nov. 17, 1819), *available at* http://wwwapp.cc.columbia.edu/ldpd/jay/item?mode=item&key=columbia.jay.08767 (quoted, with punctuation modernized).
34. Hackett, *supra* note 4, at 70; Peabody, *supra* note 6, at 323; Scott, *supra* note 8, at 322; Stahr, *supra* note 1, at 78, 204; Unpublished Papers, *supra* note 2, at 401, 402 n.4.
35. Letter from John Jay to Benjamin Rush (Mar. 24, 1785), *available at* http://wwwapp.cc.columbia.edu/ldpd/jay/item?mode=item&key=columbia.jay.09450 (quoted, with modern capitalization).
36. *History of the Bench and Bar in New York* 372 (David McAdam ed., N.Y. Hist. Co. 1897); John D. Gordan, III, *The Lemmon Slave Case*, 4 Hist. Soc'y Cts. State N.Y. 1, 9 (2006).
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38. Gordan, *supra* note 36, at 9.
39. Gordan, *supra* note 36, at 11-12; David L. Lightner, *The Supreme Court and the Interstate Slave Trade: A Study in Evasion, Anarchy, and Extremism*, 29 J. Sup. Ct. Hist. 229, 250 (2004); William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. Am. Hist. 34, 57 (1978); *cf. Dred Scott v. Sanford*, 60 U.S. 393 (1856).
40. *Lemmon v. People*, 20 N.Y. 562, 617 (1860) (Wright, J.).

NEW YORK JUSTICE IN CIVIL WAR LOUISIANA

JOHN D. GORDAN, III

Introduction

Recent debates about alternatives to Article III courts in wartime contexts have overlooked one of the most unusual courts in our history—the United States Provisional Court for the State of Louisiana, established after the fall of New Orleans by a proclamation of President Abraham Lincoln dated October 20, 1862, which also named its judge, Charles A. Peabody.[1] The grant of jurisdiction to that court as a "Court of Record for the State of Louisiana" was virtually universal—full civil and criminal jurisdiction, state and federal, enforced by the military, its judgments "final and conclusive." Moreover, to facilitate its exercise, three months after the Provisional Court convened, the military governor of Louisiana appointed Judge Peabody to serve simultaneously as the Chief Justice of the Louisiana Supreme Court. The Provisional Court sat until late July 1865 and was formally abolished by Congress a year later.

The disappearance of the Provisional Court from the recollections even of legal historians is not surprising, given that in the professional literature of the last hundred years it has earned merely three pages from Professor Surrency in an early issue of *The American Journal of Legal History* and a small place in a 1988 article on the judicial complexity of occupied New Orleans.[2] In its time, however, the court was the subject of several contemporaneous articles in what is now the University of Pennsylvania Law Review and, in the thirty years thereafter, three more written by Judge Peabody himself.[3] The U.S. Supreme Court sustained the Provisional Court's legitimacy as an appropriate exercise of the powers of the President as commander-in-chief in territory previously dominated by the "insurgent organization."[4] Finally, two of Judge Peabody's opinions in the Provisional Court—one in two criminal cases and the other dealing with the negotiability of interest coupons on bonds held behind enemy lines—survive.[5]

Charles A. Peabody
Sketches of Successful New Hampshire Men: Illustrated with Steel Portraits
(John B. Clark: Manchester, 1882), p. 209
Reproduced from digital copy accessed at Google Books database

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Prior to his two-and-a-half years in New Orleans, Judge Peabody had been twice appointed by the Governor of New York to fill vacancies on the Supreme Court of the State of New York, where he sat from December 1855 to March 1856 and from November 1856 to the end of 1857. His failure to prevail in an election to that court in the fall of 1855 led to a series of farcical confrontations in the courtroom between Judge Peabody and his rival who had the better claim to the single seat.

Early Adventures on the New York Bench

Little information is available about the early career of Judge Peabody. He was born in Sandwich, New Hampshire, and claimed descent on his mother's side from Sir Matthew Hale, one of England's greatest judges. His legal training started in 1834 at the office of Nathaniel Williams, United States District Attorney for the District of Maryland. Thereafter, he attended Harvard Law School, graduating in the class of 1837. He moved to New York City to practice law, but his activities are visible only from 1855, when he participated in the convention at which the Republican Party was formed. Peabody had a close relationship with William H. Seward, sometime Governor of New York, United States Senator and future Secretary of State in the Lincoln Administration.

Probably in connection with those activities, Peabody was one of several candidates in the Fall 1855 election to complete the term on the Supreme Court of the State of New York of an incumbent who had suddenly died two weeks earlier. Peabody came in last behind Henry E. Davies, later Chief Judge of the New York Court of Appeals, and three other candidates. However, on December 3, Governor Myron H. Clark voided the election for want of statutory notice to the Secretary of State. An incumbent Justice, Edward P. Cowles, with just 27 days left in his term, resigned his existing seat, and Governor Clark then immediately appointed him to fill the longer term opened up by the voiding of the election. Next, the Governor appointed Peabody to complete Justice Cowles's remaining 27-day term.

Davies, however, did not take his ouster lying down. The Attorney General commenced a *quo warranto* proceeding in the court on which Cowles was sitting, challenging his right to be there. Although the suit was dismissed both at Special and General Term, it was reinstated by the Court of Appeals at a Special Term in January, 1856, and remanded for the filing of an answer by Justice Cowles.[6]

For reasons not articulated, on February 4, 1856, two of the incumbent justices of the Supreme Court, James I. Roosevelt and Thomas W. Clerke, advised Davies that the votes he had received "were irregular and void" and that they considered that Peabody had been elected.[7] A wrestling match for the third seat then ensued at General Term of the Supreme Court, with Davies on one side, supported by the decision of the Court of Appeals, and Peabody on the other, supported by the other justices of the court. Although Cowles appears to have dropped out of the Attorney General's lawsuit, evidently Peabody's actions were intended to thwart Davies' election, despite the ruling of the Court of Appeals, to be followed by Peabody's resignation and the Governor's reappointment of Cowles, also a Republican.[8] George Templeton Strong's diary for February 13, 1856 supplies the most entertaining vignette:

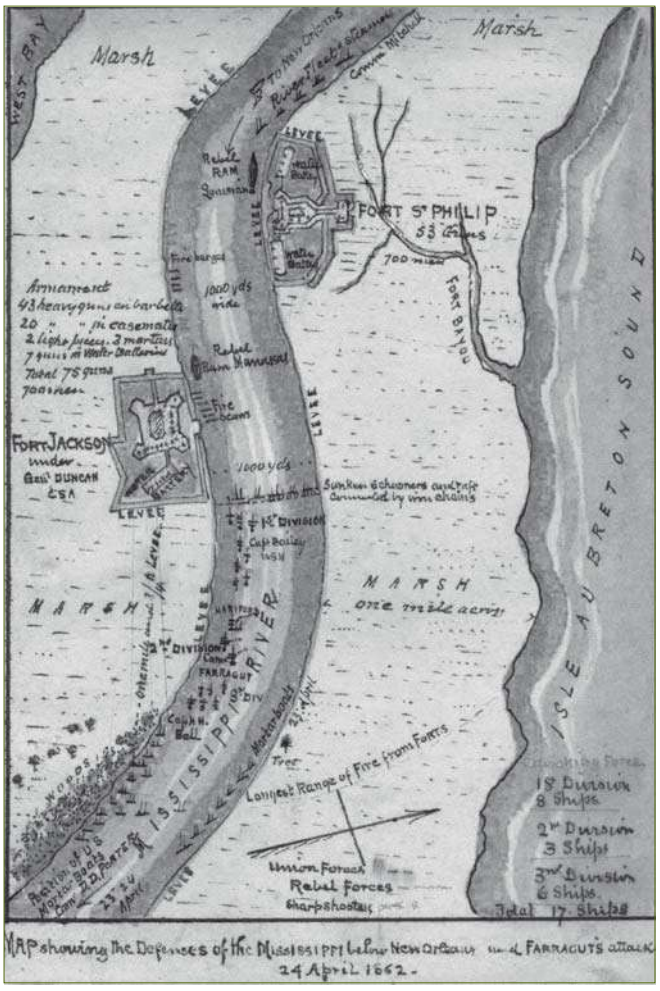
> *The general term room was pretty well filled this morning, chiefly by the bar, in eager anticipation of a particularly good session. At five minutes before eleven, Peabody, Judge, was in his seat looking uncomfortable. At eleven, Davies, Judge, entered blandly and took his seat beside him, trying to look nonchalant. A few minutes thereafter, Roosevelt and Clerke walked in together, looked astounded, took their seats, and the court was opened… .*
>
> *Roosevelt didn't commit Davies, Judge; he began calling the calendar, called several cases twice, picked up papers, and turned them over incoherently, and showed himself disconcerted and unhappy. Evarts submitted one of the batch of Harper insurance camphene cases* pro forma. *Everyone hoped he'd hand up only three copies of his points and so bring matters to a crisis, but he was weak enough to furnish four. Then there was some more calendar-calling, without anybody ready, and then Roosevelt and Clerke walked out, and*

it was generally supposed that they'd come back with the power of the county at their heels and commit Davies to close custody, but they returned unattended… . It seems they only went downstairs to frame an order that this court recognizes only Roosevelt, Clerke and Peabody as justices, and that clerk and officers must act accordingly. Their spirited performance of the court's comic functions stimulated everybody's faculty of facetiousness. It was "a very general term"—"four judges out of three in attendance"… .[9]

This situation could not continue and, in March 1856, Peabody withdrew in favor of a new *quo warranto* proceeding which the Attorney General promised to institute. When the Attorney General reneged, Peabody, acting through Henry Laurens Clinton led by Charles O'Conor, instituted a mandamus proceeding in the Supreme Court for Albany County to require the Attorney General to act. His application was denied on July 29, 1856 by Justice (and future United States Senator) Ira Harris, on the ground that the court had no power to make such an order.[10] The matter ended there.

Contemporary accounts of Justice Peabody's tenure on the Supreme Court typically stop at this point, but there is more to the story. One of the other justices elected to a full 8-year term in November 1855 was James R. Whiting, District Attorney for New York County. He resigned from the court on November 1, 1856, in anticipation of being elected Mayor of the City of New York (but lost), leaving a vacancy for the balance of 1856 and all of 1857, which Governor Clark promptly filled by reappointing Charles A. Peabody.[11]

Justice Peabody's 14-month service on the Supreme Court under this appointment was no sinecure. December 1856 found him in Newburgh in Orange County, presiding at the sensational second trial, after a change of venue, of Louis Baker for shooting William Poole to death in a melee in March 1855 at a newly-opened bar called Stanwix Hall at 579 Broadway. Many other participants had been arrested, but the case was not a strong one.[12] At the Orange County trial and again at a third trial, the jury hung, and the charges were dismissed.



Map showing the defenses of the Mississippi below New Orleans and Farragut's attack, April 24, 1862
Library of Congress, Geography & Map Reading Room, gvhs07 vhs00197

Justice Peabody ran for a full term on the court in 1857 but lost the election once again. At the very end of his tenure he was part of the (virtually unique) five-judge panel at General Term which, on December 30, 1857, affirmed Judge Elijah Paine, Jr.'s, decision to free the slaves in the celebrated *Lemmon Slave Case*.[13] But a bigger challenge lay ahead in the second year of the Civil War.

The Occupation of New Orleans

The strategic importance of New Orleans led to an early and successful effort by Union forces to capture it. This was no easy task, as the only feasible approach to the city was by water, up the Mississippi River from the Gulf of Mexico, a passage guarded by

Rear Admiral David Farragut
Library of Congress,
Prints and Photographs Division
LC-DIG-cwppb-05211

Fort Jackson and Fort St. Philip, less than a mile from each other on opposite sides of the river. In addition, as the Union fleet neared, the Confederate command placed chains and hulks to block the passage and prepared fire rafts to send down the river against the Union ships. The C.S.S. *Louisiana*, an ironclad ram under construction in New Orleans with engines not yet operational, was towed down the river by tugs and moored above the forts; a small number of armed Confederate vessels, primarily of the River Defense Fleet, were also in the river to resist the Union fleet, which was composed of seventeen ships, including three large warships. An additional fleet of vessels with mortars mounted on them accompanied the Union warships.

After six days of bombardment of the two forts by the mortar fleet, a little after 2:00 A.M. on April 24, 1862, the Union warships began their passage past the forts in complete darkness. Shadowy forms moving on the river were observed by soldiers manning the water battery in front of Fort Jackson, which opened fire. Soon both forts, the River Defense fleet, the Confederate naval vessels and the Union fleet were pouring shot and shell on each other, lighting up the river. Flag Officer Farragut chose to direct the Union fleet from a perch atop the mainmast of his flagship, the *Hartford*, and had to be talked down by his subordinates. The *Hartford* began to pass the forts shortly after 4:00 A.M., ran aground and was set ablaze by a fire raft which the *Hartford's* signal officer managed to blow up; the fire was brought under control and the vessel managed to pull free.

By morning, the Union fleet, with only one vessel lost, was beginning to anchor at the Quarantine Station below New Orleans. All but four of the gunboats on the Confederate side were lost, and the C.S.S. *Louisiana*, her commander mortally wounded, was set afire by her crew to avoid capture, blew up and sank. General Mansfield Lovell, commanding the Confederate land forces defending New Orleans, retreated from the city. The soldiers at Fort Jackson mutinied and spiked their guns; both forts surrendered. The Union fleet continued up the river, meeting no resistance. On April 25, two naval officers landed at New Orleans and demanded its surrender. The following day the mayor capitulated.[14]

On May 1, the soon to be notorious Major General Benjamin F. Butler, commander of the Department of the Gulf, landed with troops and established his headquarters at a commandeered hotel. The civilian courts were closed. Butler estab-

General Benjamin Butler circa 1864.
Seated on the porch of a Southern mansion flanked by other Union Officers
Engraved by H.B. Hall after a drawing by Thomas Nast
www.Photos.com

lished a Provost Court, presided over by Major Joseph M. Bell, a former partner of Rufus Choate in Boston, from where Butler also came. Although Butler soon reopened three state trial courts with jurisdiction in civil actions arising within the city proper, the Provost Court was the sole court in New Orleans with criminal jurisdiction. However, Butler also felt entitled to impose, personally and summarily, lengthy periods of incarceration in military installations on recalcitrant secessionists.

The occupation of New Orleans was also the occasion for Butler's infamous General Orders No. 28 of May 15, 1862, which directed that a woman insulting a Union soldier should be treated as a prostitute "plying her avocation."[15] The depth of Butler's hostility is evident in his private correspondence:

> *We were two thousand five hundred men in a city seven miles long by two to four wide, of a hundred and fifty thousand inhabitants, all hostile, bitter, defiant, explosive, standing literally in a magazine, a spark only needed for destruction. The devil had entered into the hearts of the women of this town to stir up strife in every way possible. Every opprobrious epithet, every insulting question was made by these bejeweled, becrinolined, and laced creatures, calling themselves ladies, toward my soldiers and officers, from the windows of the houses and in the street.*[16]

Secretary of State William Seward
Library of Congress,
Prints and Photographs Division
LC-USZ62-21907

Butler's aggressive tactics in the pursuit of property of the Confederate government or in aid of its belligerency led him to search the persons and premises of foreign consuls, notably the consul for the Netherlands.[17] The consul's protests, reiterated by the Dutch ambassador to Secretary of State Seward, who was trying to maintain friendly relations with the European powers in order to forestall their intervention, led to Seward's censure of Butler in June 1862 for violating the law of nations.[18] Seward emphasized to the foreign diplomats that the War Department was appointing a separate military governor for the State of Louisiana, Colonel, later General, George F. Shepley.[19]

But Lincoln and Seward did more. They also appointed Reverdy Johnson, a United States Senator from Maryland, confidante of Lincoln and trial lawyer almost without peer, to go to New Orleans to address what Postmaster Montgomery Blair characterized in a letter to Butler as "your Consular Embroglio."[20] Johnson spent much of July as a "Commissioner," effectively overruling Butler's actions in three major cases over Butler's howls, ordering that:

1. $800,000 in coin that had been seized from the Dutch consul be returned either to the consul or those for whom he was holding it;
2. $716,196 in coin seized from the French consul be returned to the parties to whom it was to have been shipped; and
3. sugar seized by order of General Butler from Messrs. Covas and Negroponte, Greek merchants, residents of New Orleans, be returned to them because there was not "a scintilla" of evidence that they were part of "an association of Greek merchants" converting Confederate money to bullion for arms purchases.

Johnson also directed the return of property seized by Butler in several other instances before sailing on July 27.[21] In his essays on the history of the Provisional Court, Judge Peabody attributed its formation to the need for local and immediate adjudication of disputes involving foreign interests of the kind discussed above in order to avoid their escalation into diplomatic issues between the United States and foreign governments.[22]

The Establishment of the Provisional Court

After the Provisional Court was established and Judge Peabody appointed by the Presidential proclamation on October 20, 1862, Judge Peabody,

with his Clerk, Marshal and Prosecuting Attorney, "proceeded by Government transport, under convoy, from New York to New Orleans…, [a]rriving there in early December 1862." Less than three weeks after his proclamation, President Lincoln had relieved Butler from command of the Department of the Gulf, appointing General Nathaniel Banks in his place, and by mid-December Butler had left New Orleans. Major Bell, who had been the judge of the Provost Court, left then also. The Provisional Court convened for the first time on December 31, 1862, and sat week by week until its first four-month recess began on July 3, 1863. Its last sitting was July 25, 1865, with Judge Peabody presiding.

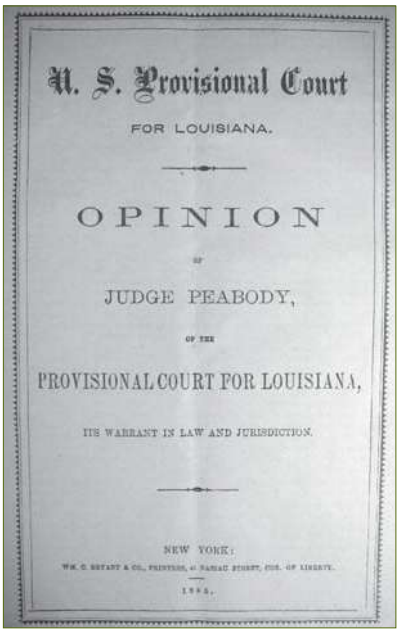
New Orleans Custom House, where Judge Peabody presided as Judge of the U.S. Provisional Court for the State of Louisiana

McPherson & Oliver, No. 132 Canal Street, New Orleans, ca. 1864

LSU Libraries, Marshall Dunham Photograph Album, Mss. 3241

By the President's proclamation, the Provisional Court's jurisdiction extended to "all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States," and Judge Peabody exercised that authority and more.[23] During his first term alone, the docket included cases of treason, murder and manslaughter; cases under the Confiscation Acts;[24] seizure and sales of enemy property, particularly cotton; commercial litigation, particularly arising out of the consequences of change of government; contested divorce proceedings and alimony enforcement actions.[25]

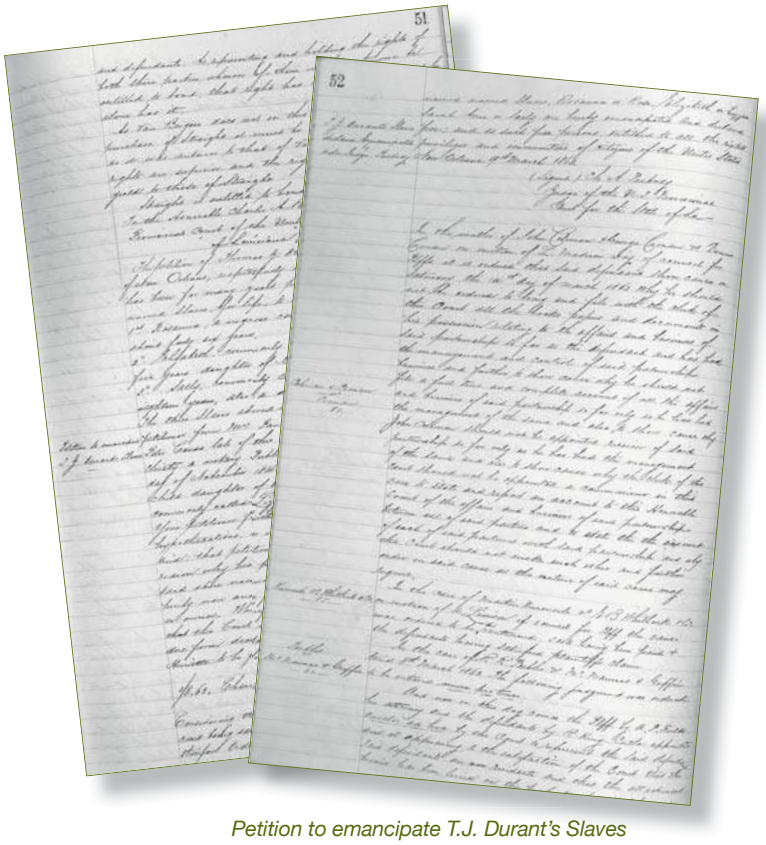
Judge Peabody's two surviving opinions and those of other courts concerning judgments of the Provisional Court illustrate the docket of the Provisional Court. *The Grapeshot*, *supra* note 4, was an admiralty action on a bottomry bond.[26] Other cases involved actions in debt or a suit on a promissory note.[27] *United States* v. *Reiter*, *supra* note 5, was an opinion filed in two separate cases in which the defendants, convicted after trials for murder and arson, respectively, unsuccessfully challenged the legality of the establishment of the Provisional Court. *Union Bank of Louisiana*, also *supra* note 5, established the right of the bank owning New Orleans bonds to collect the periodic interest due even though the original bonds and interest coupons were in the possession of a Louisiana state official behind enemy lines.



Cover of Judge Peabody's Opinion in U.S. v Auguste Reiter

(Wm. C. Bryant & Co.: New York, 1865)

The minutes of the court contain additional judgments by Judge Peabody on similar sorts of issues. One improbable case, *Francisco Riancho* v. *Farragut*, was an action to recover "from the admiral… Confederate money … and obligations of the Confederate States captured by the naval forces of the United States;" Judge Peabody held: "The Confederate money was



Petition to emancipate T.J. Durant's Slaves
Minutes of the United States Provisional Court, 51-52
National Archives at Fort Worth

contraband and forfeit, [and] other property of the same owner captured with it would be subject to the same disabilities…" In *Ribas* v. *Avendano Bros.*, the defendants managed Ribas's real properties in New Orleans and collected his rents in Confederate currency; they had previously advanced Ribas a loan in United States currency in anticipation of his rents. Ribas sought to offset the now worthless collections in Confederate currency against his debt to the Avendano brothers, but Judge Peabody held that the two transactions were separate and that Avendano Bros. were to recover their loan from Ribas with interest and then deliver to him the Confederate currency they had collected on his behalf.[28]

The most legally dramatic of the Provisional Court's activities was its granting of manumission petitions by slaveholders. Starting on February 3, 1863, the law firm of Durant & Horner began presenting such petitions to Judge Peabody. The first was filed for a free black woman who had purchased her own sister from the previous owners. Its second petition, on March 9, 1863, was filed on behalf of Thomas Jefferson Durant, the first named partner in the firm. It recited:

> *The petition of Thomas J. Durant who resides in the city of New Orleans, respectfully shows that he is now and has been for many years the owner of the following named slaves, for life, to wit:*
>
> *1st Rosanna, a negress, commonly called Rose, aged about forty six years,*
>
> *2nd Elizabeth, commonly called Lizzie, aged about twenty five years, daughter of Rose,*
>
> *3rd Sally, commonly called Sarah Ann, aged about eighteen years, also a daughter of Rose.*
>
> *The three slaves above named were purchased by your petitioner from Mrs Pauline Maria St. Jean widow of Peter Conas late of this city, by Public Act before William Christy a notary public of New Orleans, on the fourth day of November 1845, and 4th Henrietta an infant child daughter of the slave above mentioned as Elizabeth commonly called Lizzie and aged about 16 months.*
>
> *Your petitioner further shows that there are no mortgages, hypothecations, or encumbrances on said slaves, of any kind that petitioner is out of debt, and there is no reason why his petition should not be granted and said above named slaves declared to be free and he hereby and forever renounces all claims to them as owner.*
>
> *Wherefore petitioner prays, the premises considered, that the Court may be pleased to pass an order in due form declaring said slaves Lizzie, Sarah Ann & Henrietta to be free.*

The order made by Judge Peabody states:

> *Considering the allegations of the within petition and the court being satisfied with the*

correctness thereof, it is therefore Ordered, adjudged & decreed that the within named Slaves, Rosanna or Rose, Elizabeth or Lizzie, Sarah known as Sally are hereby emancipated and declared free; and as such free persons entitled to all the rights, privileges and immunities of citizens of the United States.

At the time Judge Peabody began granting these applications, Louisiana law no longer permitted manumission: originally expansive, a slave owner's right to manumit slaves had become increasingly restricted until 1857, when the right was abolished by statute.[29] Second, although President Lincoln had issued the Emancipation Proclamation on January 1, 1863, it applied only to "the States and parts of States…in which the people, respectively, shall be in rebellion against the United States" and specifically excluded from its operation the City of New Orleans and surrounding Parishes occupied by Union troops. Finally, in the opinion for the Court in *Dred Scott* v. *Sandford* (60 U.S. 393, 403-404 (1857)), Chief Justice Roger B. Taney—who in March 1863 was still Chief Justice just as *Dred Scott* was still good law—had written:

The question is simply this: Can a negro whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, granted by that instrument to the citizen…

We hold that they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.

It thus appears that in granting these petitions as he did, Judge Peabody was exercising a power unavailable under state law, freeing slaves which the President's Emancipation Proclamation expressly excluded and granting them the privileges of citizens of the United States which the Supreme Court had recently and authoritatively held the Constitution did not extend to them. On what basis he did so, other than the personal enlightenment reflected by his vote at General Term in the *Lemmon Slave Case*, does not appear. However, there are two hints in the historical record.

The first is found in Judge Peabody's reminiscences of the Provisional Court. Its boldest statement appears in the 1878 edition:

Commissioned broadly to administer justice, and no rule or law for its action being prescribed, it was left to the court to decide by what law it would be governed. It decided, naturally, to adopt as the rule of its action the law theretofore of the State of Louisiana, as it seemed probably that that law, having had the sanction of the previous government, would be found best suited for the business, wants and interests of the State. This, however, the court announced would only be the general rule, and the court would decide in each case whether any reason existed for a departure from the law of the State, and would make exceptions whenever sufficient reasons for it existed. Exceptions had to be made frequently in the altered condition of things brought about by war and conquest, and the power to make them was one of the most beneficent possessed by the court.

A footnote in the 1878 version also records Judge Peabody's post-war dinner table conversation with Chief Justice Salmon P. Chase and Secretary of State Seward, where Seward teased the Chief Justice with the claim that the Supreme Court "has some power in time of peace, no doubt, but it is limited to appellate jurisdiction always, and that in a very small class of cases, and in those it is bound by law prescribed for its guidance," but "Peabody, all the power of his court is not a circumstance to what you had in Louisiana, and I made you judge there." In addition, according to the footnote:

> *Chief Justice Chase had always told Judge Peabody, familiarly, while the court was in existence, that he did not approve of the act of the President giving him such unlimited powers as he had, and that he would never have consented to give any one such powers if he had been consulted.*

Second, Judge Peabody's willingness to grant these applications may have been supported by the advocacy of the counsel and, in the case discussed, the applicant, Thomas J. Durant, who was active in the Provisional Court from its inception. Born in Philadelphia but moving to New Orleans at an early age, Durant had been United States District Attorney in the Polk administration and a state senator. Although he remained in Louisiana after its secession, he was committed to the Union and both recognized as such by General Butler and his colleagues and relied on by President Lincoln until their political rupture in January 1864.[30] In June 1863, General Shepley, the Military Governor, appointed Durant Attorney General of Louisiana. Durant was an opponent of slavery and a vigorous advocate of suffrage for freeborn Blacks in the reorganization of Louisiana, and doubtless the same zeal was demonstrated in his appearances before Judge Peabody.[31]

Judge Peabody's Other Judicial Duties in New Orleans

Early in his tenure, Judge Peabody announced that he would accept transfer to the Provisional Court of cases filed in the United States Circuit and District Courts prior to their secession; *The Grapeshot* was such a case. But he went further, announcing on January 27, 1863:

> *That in consideration of the fact that the late Supreme Court of this State, to which appeals were heretofore taken from the other and lower courts; that a large number of such appeals are now pending many of which appeals are apparently taken more for the purpose of delay; and considering that the powers of this court are ample for affording the needed relief; that in view of these facts the Court will fix an early term in which such appeals may be heard before the bar of this Court, in cases where the amount involved shall exceed $300 and proceedings had according to law, to hear and finally determine the rights of the respective parties to such suits.*

This assertion of state appellate jurisdiction was not well received by the lower state civil courts, which refused to send up their records, or by the Bar, which in early March petitioned General Shepley to reestablish the Louisiana Supreme Court.[32] With remarkable pragmatism, in April General Shepley conferred on Judge Peabody the additional position of Chief Justice of the Supreme Court of Louisiana and appointed two additional justices.

Quite apart from these duties, the departure of Major Bell left the Provost Court without a judge. Until July 1863 Judge Peabody also presided in the Provost Court. Thus, in contrast to the New York Supreme Court in 1856, where Judge Peabody was at best a supernumerary, here he was simultaneously a federal judge, a state Chief Justice and a military judge, doubtless a record.

Unfortunately none of this played well in New Orleans. Feelings were pretty raw, and the Unionists, encouraged by General Butler's bumptiousness, thought they were entitled to payback for what they had endured when the Confederates were in charge. They complained about Judge Peabody to President Lincoln; a broadside letter dated May 7, 1863, stated in part:

> *The undersigned,* loyal *citizens of the United States and the city of New Orleans, most respectfully ask for the removal of Judge Peabody from his present position among us. This we solicit solely for the good of the Union cause.****
>
> *When Judge Joseph M. Bell was here, Union men were protected from secession insolence and abuse, and* traitors *were made to know their places.*
>
> *But now, alas ! the scene is changed, and such a change !*

*Secessionists and traitors no longer fear to be insolent, and to give vent and expression to their pent-up wrath, and we are sorry to say that this is owing to the course pursued by Judge Peabody on the bench.****

Punishments have been of such a trifling nature and character when Judge Peabody has been on the bench, that Union men have been discouraged from prosecuting secessionists for expressing disloyal sentiments publicly in the streets, while, on the other hand, rebels and traitors feel and act as though they had a friend and protector in Judge Peabody, and well they might.

For instance, secessionists have been fined from two and a-half dollars to three dollars for hurrahing for Jeff. Davis & Co. in the streets. But when a "secesh" calls a United States officer a d—n Yankee, with other opprobrious epithets, and is knocked down for his politeness, Judge Peabody fines the United States officer one hundred dollars, and sentences him to three months imprisonment in the Parish Prison.[33]

Unionist denunciation was more than matched by the outrage expressed over Judge Peabody's appointment as Chief Justice of the Supreme Court, despite—or perhaps because of—the fact that he apparently never conducted judicial business in that capacity.[34] According to a report made to the Louisiana Constitutional Convention in 1864:

As to the Hon. Charles A. Peabody, your committee are of opinion that he never was chief justice of the state of Louisiana, for the irresistible reasons that neither the military authorities, nor the civil powers of this State, ever created a Supreme Court since the arrival of the honorable gentleman in this State, nor was he eligible to a seat on the bench of the one created previous to his arrival, because he was not, and is not, a citizen of the State of Louisiana. And, further, because he was and is a judge created by the president of the United States to preside over a court created by the same authority, "the United States Provisional Court for the State of Louisiana." That as a judge of said court he has been receiving a salary from the United States government—and therefore, he has received the sum of $3,541.66 from the treasury of the State of Louisiana, as salary, under the pretense of being the chief justice of the State, without any authority and in open violation of the constitution and laws of the State of Louisiana.[35]

Epilogue

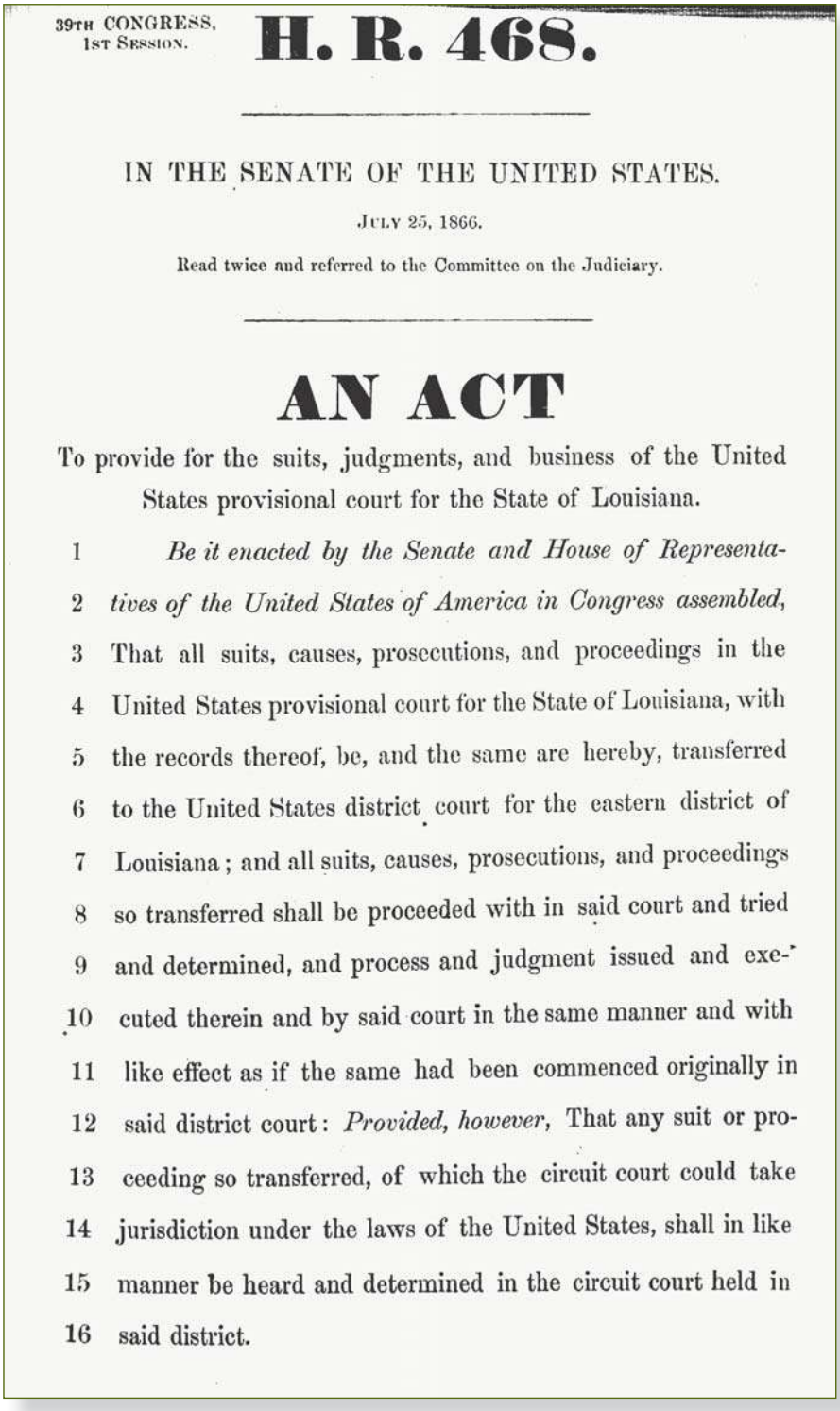
In the summer of 1863, while Judge Peabody was away, the original Provost Court was abolished, and the United States District Court for the Eastern District of Louisiana was reopened with a newly appointed District Judge. Business began to gravitate there instead of the Provisional Court; for example, the confiscation proceedings against the property of John Slidell, the Confederate emissary to France captured by a Union gunboat in the celebrated Trent affair, seem to have migrated from the Provisional Court to the District Court.[36] In January 1865, President Lincoln nominated Judge Peabody to be the United States District Attorney for the Eastern District of Louisiana. This new appointment, accepted by Judge Peabody, presumably contemplated relinquishment of his judicial position, but whether he ever actually took up his newest position is unclear.

Congress abolished the Provisional Court by statute on July 28, 1866. All pending cases were transferred to the District Court for the Eastern District of Louisiana except for those of which the Circuit Court "could take jurisdiction," in which case they went there. Existing judgments of the Provisional Court "shall at once become the judgments…of said district court, or said circuit court, unless the same are inconsistent with the rules and proceedings thereof and may be enforced by those courts." However, under Section 2, in pending cases "which could not have been instituted in said circuit

or district court, the record shall remain in said district court without further action therein." And, in *Edwards* v. *Tanneret*, 79 U.S. 446 (1870), Durant prevailed in the Supreme Court on the issue which Section 2 of the statute obviously left open—the unenforceability in the Circuit Court of a preexisting judgment of the Provisional Court in an action "which could not have been instituted there."

Judge Peabody returned to New York City and resumed the practice of law in his family firm, Peabody, Baker & Peabody. Treated as a senior statesman, his extracurricular professional focus was in international law. He died in early July 1901, just days before his 87th birthday.

The author thanks Conrad K. Harper, Kent Newmyer, Judith K. Schafer and Christian G. Fritz for their help and encouragement.



39TH CONGRESS, 1ST SESSION.

H. R. 468.

IN THE SENATE OF THE UNITED STATES.

JULY 25, 1866.

Read twice and referred to the Committee on the Judiciary.

AN ACT

To provide for the suits, judgments, and business of the United States provisional court for the State of Louisiana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all suits, causes, prosecutions, and proceedings in the United States provisional court for the State of Louisiana, with the records thereof, be, and the same are hereby, transferred to the United States district court for the eastern district of Louisiana; and all suits, causes, prosecutions, and proceedings so transferred shall be proceeded with in said court and tried and determined, and process and judgment issued and executed therein and by said court in the same manner and with like effect as if the same had been commenced originally in said district court: *Provided, however,* That any suit or proceeding so transferred, of which the circuit court could take jurisdiction under the laws of the United States, shall in like manner be heard and determined in the circuit court held in said district.

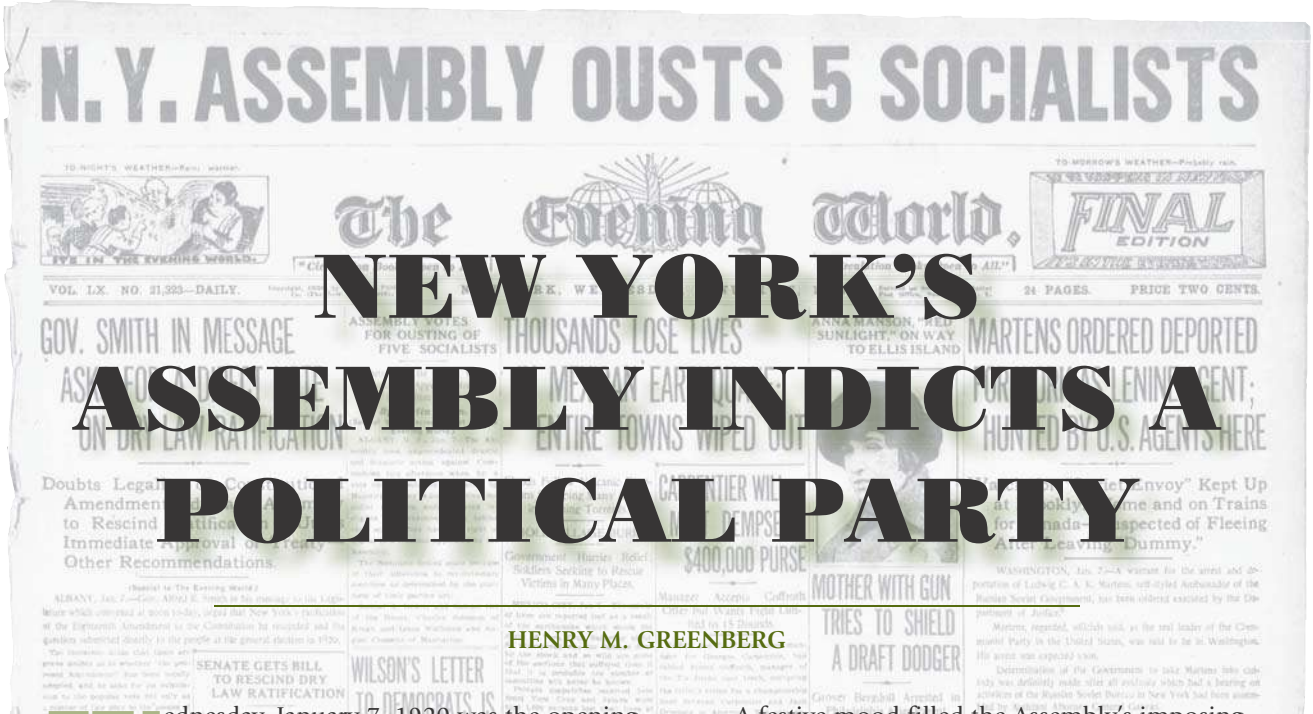
ENDNOTES

1. The court is not completely unique. In 1899, following the Spanish-American War, the commander of the American forces of occupation in Puerto Rico established a court in some ways similar to it as the United States Provisional Court for the District of Puerto Rico. Guillermo A. Baralt, *History of the Federal Court in Puerto Rico: 1899-1999* (Publicaciones Puertorriquenas 2004). I am grateful to the Honorable Jose Cabranes, a leading historian of the federal courts in Puerto Rico, for bringing this court to my attention.
2. Erwin C. Surrency, *The Provisional Court in Louisiana*, 2 Am. J. Legal Hist. 86-88 (1958); Thomas W. Helis, *Of Generals and Jurists – The Judicial System in New Orleans under Union Occupation, May 1862-April 1865*, republished in *A Law Unto Itself –Essays in the New Louisiana Legal History* 117-140 (Warren M. Billings & Mark F. Fernandez, eds., LSU 2001).
3. *United States Provisional Court for the State of Louisiana*, 13 Am. Law Reg. 65-74 (1864); *Provisional Judiciary of Louisiana*, 13 Am. Law Reg. 257-269 (1865); *The Authority of the "Provisional Court" of Louisiana*, 13 Am. Law Reg. 385-390 (1865). Judge Peabody's first and last articles about the Provisional Court are signed by him; the second is not, but it contains much the same text as the first and the third and is catalogued with him as its author. Charles A. Peabody, *Provisional Judiciary of Louisiana*, 3 Alb. L. J. 348-353 [1871]; *The United States Provisional Court for the State of Louisiana*, 5 Int'l Rev May-June 1878, 313-325; Charles A. Peabody, *United States Provisional Court for the State of Louisiana, 1862-1865* in Annual Report of the American Hist. Assn. For the Year 1892, 197-210 (GPO 1893).
4. *The* Grapeshot, 76 U.S. 129, 132 (1869); *Burke v. Miltenberger*, 86 U.S. 519 (1873).
5. *United States v. Reiter*, 27 F. Cas. 768 (No. 16,146) (1865); *Union Bank of Louisiana v. City of New Orleans and First Nat'l Bank of New Orleans*, 24 F. Cas. 550 (No. 14,351) (1866 [sic]). Federal Cases dates the latter 1866, which is clearly wrong. However, Judge Peabody had *Reiter* printed in New York, apparently for distribution, and copies of it survive outside the Provisional Court record in that form; although it is undated, the Provisional Court docket indicates that a "printed opinion" was filed on Feb. 6, 1865.
6. *People ex rel. Davies v. Cowles*, 13 N.Y. 350 (1856).
7. The secondary sources ascribed the justices' reasoning to the holding of the Court of Appeals. Henry Laurens Clinton, Extraordinary Cases 210 (New York 1896).
8. 2 The Diary of George Templeton Strong 254-255 (Allan Nevins ed., 1952).
9. *Id.* Justice Clerke also vacated one of Davies' orders on the ground that Davies was not a judge.
10. *People (ex rel. Charles A. Peabody) v. Attorney General*, 3 Abb. 131(22 Barb. 114; 13 How. 179) (1856). *See generally* Laurens Clinton, supra note 7, at 209-218. Norman Kee, *Henry Ebenezer Davies* in The Judges of the New York Court of Appeals: A Biographical History 72-77 (Albert M. Rosenblatt ed., Historical Society of the Courts of the State of New York, 2007).
11. *See* Volumes 21 (1856) and 22 (1863) of Barbour's Reports at iv.
12. *People v. Baker*, 10 How. Pr. 567 (1855). Baker, however, had fled.
13. *Lemmon v. People (ex rel. Napoleon)*, 26 Barb. 270 (1857), *affd sub nom People v. Lemmon*, 20 NY 562 (1860). Other decisions by Justice Peabody appear in that same volume 26 of Barbour's Reports at pages 10, 16, 23, 39, 46, 55, 61,78, 122, 177, 262 and 267.
14. Charles L. Dufour, The Night the War Was Lost (Doubleday 1960); Chester G. Hearn, The Capture of New Orleans 1862 (LSU 1995); Michael D. Pierson, Mutiny at Fort Jackson – The Untold Story of the Fall of New Orleans (UNC 2008).
15. 1 Private and Official Correspondence of Gen. Benjamin F. Butler During the Period of the Civil War 490 (The Plimpton Press, Northwood MA . (1917) (hereinafter "Butler").

16. Butler, *supra* note 15, vol. 2, at 35.
17. Butler, *supra* note 15, at 466-471, 566. The British ambassador also complained to Seward. Chester G. Hearn, When the Devil Came Down to Dixie 142- 160 (LSU 1997).
18. Butler, *supra* note 15, at 556-558.
19. Butler, *supra* note 15, at 552. However, this gesture was merely a ruse, because Shepley was Butler's subordinate and on his staff. *See* Hearn, *supra* note 17, at 151.
20. Butler, *supra* note 15, at 553, 581. Blair's letter continues: "I objected to the appointment to Gov. Seward, and told him that Johnson had lied to you when you were at Baltimore [Butler's first command]. Seward answered, "'Yes; but he was paid for that. Now he is paid to lie the other way.'" *Id*. at 580.
21. Message of the President of the United States transmitted December 22, 1862. Ex. Doc. 16, U.S. Senate, 37th Cong., 3d Sess. *See also* Butler, *supra* note 15, at 605-607; Butler, *supra* note 15, Vol 2, at 80-82.
22. Judge Peabody makes express reference to Reverdy Johnson's mission but misdescribes the complaining Greek merchants as "Rodocorachi & Franghiadi". There was a firm in London which traded at the time in New Orleans called *Franghiadi and Rodocranachi*, but its problems were with the legendary Confederate raider the "Alabama", not General Butler. *See Burnand v. Rodocranachi*, 5 CPD 424 (1880), *revd* 6 QBD 633, *affd* 7 A.C. 333 (H. L. 1882). General Butler released the sugar claimed by Covas and Negroponte on September 16, 1862, on orders of the State Department, according to his letter of that date to the Greek consul. Butler, *supra* note 15, Vol. 2, at 300.
23. The text of President Lincoln's proclamation in pertinent part is as follows:
The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and the judicial authorities of the Union, so that it has become necessary to hold the State in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a Provisional court, which shall be a Court of Record for the State of Louisiana; and I do hereby appoint Charles A. Peabody, of New York, to be a provisional Judge to hold said Court, with authority to hear, try and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings so far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive.
24. *See generally* Daniel W. Hamilton, The Limits of Sovereignty – Property Confiscation in the Union and the Confederacy during the Civil War (Chicago 2007).
25. *Freitas v. Freitas* was frequently on his calendar. The wife accused her husband of adultery and of having her arrested and taken to the Provost prison in the pouring rain. He accused her of habitual drunkenness and of threatening to kill their child. Judge Peabody awarded a divorce and alimony to the wife, but getting her ex-husband to pay was a task that often required Judge Peabody's intervention.
26. *The Grapeshot*, *supra* n. 4, also illustrates another facet of the Provisional Court's exercise of jurisdiction. It had been tried and decided in the District Court in New Orleans and was on appeal to the Circuit Court when the war broke out. On January 13, 1863, the parties stipulated to its transfer from the Circuit Court to the Provisional Court, where Judge Peabody enforced the bond.
27. *Edwards v. Tanneret*, 79 US 446 (1870); *Burke v. Tregre*, 22 La. Ann. 629 (1870), *affd* 86 U.S. 519 [1873]; *Cocks v. Izard*, 5 F. Cas. 1154 (No. 2, 934) (C.C.C.D. La. 1871).
28. Minutes of the Provisional Court, May 7, 1863 (National Archives, Southwest Region, Fort Worth, Texas); *see also* 3 American Annual Cyclopedia and Register of Important Events in the Year 1863, 770-776 (New York 1872).
29. Judith Kelleher Schafer, Becoming Free, Remaining Free: Manumission and Enslave-

ment in New Orleans, 1846-1862 (LSU 2003); *see also* Judith Kelleher Schafer, Slavery, the Civil Law and the Supreme Court of Louisiana (LSU 1994).

30. Butler, *supra* note 15, at 567, 573; Butler, *supra* note 15, Vol. 2, at 488-489; Butler, *supra* note 15, Vol. 3, at 560-563. LaWanda Cox, Lincoln and Black Freedom – A Study in Presidential Leadership 46-139 (USC 1991); 2 Samuel P. Chase Papers 322-324 (Kent State 1994) (hereinafter "Chase Papers"). Chase himself wrote: "Mr. Durant is very honest, very earnest & very able – taken for all in all, I think, about the ablest man on our side in the gulf States." *Id.*, Vol. 4, at 234.
31. Cox, *supra*, note 30; Carl J. Guarneri, The Utopian Alternative – Fourierism in Nineteenth-Century America 262-266 (Cornell 1991); Chase Papers, *supra* note 30, Vol. 4, at 207, 234. Ironically, when president of the Free State General Committee, Durant noted that the President himself had said that the legality of the Emancipation Proclamation would have to be tested in civil actions in the courts. *Id.* at 257-259. After the Civil War Durant practiced law in Washington, D.C. and was counsel in most of the Supreme Court decisions cited above. He was also counsel for the prevailing parties in *The Slaughterhouse Cases* (83 U.S. 36 [1873]) opposing former Justice John A. Campbell, who had moved his practice to New Orleans after his release from confinement at Fort Pulaski.
32. Helis, *supra* note 2, at 130-131.
33. Alfred Whital Stern Collection of Lincolniana.
34. Henry P. Dart, The History of the Supreme Court of Louisiana, *in* An Uncommon Experience: Law and Judicial Institutions in Louisiana 1803-2003, 566, 590-92 (J.K. Schafer and W. M. Billings eds., USL 1997).
35. Debates in the Convention for the Revision and Amendment of the Constitution of the State of Louisiana 512-520 (New Orleans 1864).
36. *The Confiscation Cases: Slidell's Land*, 87 U.S. 92 (1873).



NEW YORK'S ASSEMBLY INDICTS A POLITICAL PARTY

HENRY M. GREENBERG

Wednesday, January 7, 1920 was the opening day of New York's Legislature.[1] That morning the public woke—as it so often had the past year—to front-page newspaper stories warning of a radical conspiracy threatening the state and nation.[2] The *New York Tribune* reported that there were 20,000 aliens in New York State who were "openly organized for the overthrow of the government."[3] In a similar vein, the *New York Times* covered a speech delivered the night before at the Waldorf Astoria Hotel in New York City by U.S. Senator Warren G. Harding of Ohio. A recently announced candidate for the Republican nomination for President, Harding lashed out at American-born radicals, calling them the "worst disloyalists and effective conspirators masking as citizens." "[T]here isn't room anywhere in these United States," he said, "for anyone who preaches the destruction of the Government."[4]

In the wake of the media maelstrom, the members of the Legislature's Lower House, the Assembly, gathered at the State Capitol in Albany for the start of the legislative session. The previous November the voters elected to the Assembly 110 Republicans, 35 Democrats, and five Socialists from New York City Districts heavily populated by Jewish and Russian immigrants.[5] All but three of the 150 members were present for the opening-day ceremonies, along with hundreds of family-members, friends and spectators.[6]

A festive mood filled the Assembly's imposing Moorish-Gothic chamber, with its fifty-six-foot-high ceiling.[7] Lawmakers crossed aisles to socialize with one another. The leader of the Democrats, Charles D. Donohue, even tried to make common cause with the Socialists: August Claessens, Samuel A. DeWitt, Samuel Orr, Charles Solomon and Louis Waldman. "You have five," Donohue told them, "we [Democrats] have thirty-five, so we will have forty to fight that [Republican] crowd."[8]

The Clerk of the Assembly called for order at 12:00 P.M. After the members took their oaths of office, the Assembly turned to the election of its highest official, the Speaker, customarily chosen from the ranks of the majority party.[9] The Republicans nominated a manufacturer from Oswego County, Thaddeus C. Sweet;[10] the Democrats nominated Donahue; and the Socialists nominated the senior member of its delegation, August Claessens, beginning his third term in the Assembly. The roll was called and the three men each received their respective party's vote. As a result, the Republicans, who enjoyed a huge majority, elected Sweet, giving him all 110 of their votes.[11] Entering his seventh term as Speaker, Sweet was then the longest serving presiding officer in Assembly history.[12]

Sweet presided from a raised rostrum at the front of the members' desks arrayed in a two-thirds circle. Immaculately dressed, with white hair, mustache and

Background photo: The Evening World (New York), January 7, 1920, at 1. Library of Congress, Chronicling America

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The Five Socialist Assemblymen
Left to right, standing: Samuel Orr, Samuel DeWitt
sitting: Charles Solomon, August Claessens, Louis Waldman
Charles Solomon Photographs,
Tamiment Library, New York University

glasses, the 48-year-old Sweet cut a prim figure. Upon being elected, he rose to deliver a short speech, in which he expressed gratitude for his election (which was a foregone conclusion). He also reviewed his priorities, the first of which was to promote legislation to "meet the insidious Bolsheviki"—the extreme faction of Socialists that in 1917 seized power in Russia and abolished all other political parties and factions. "I trust and hope," he concluded, that the House would discharge its duties "in a truly patriotic manner, being guided only by the desire to do the right from the standpoint of principle, forgetting self in the interest of all."[13]

In an unusual move for the first day of the legislative session, Sweet descended from the rostrum and retired to his private office.[14] Louis N. Martin, a Republican from Oneida County, took Sweet's place on the rostrum. Under Martin's direction, the Assembly continued to organize itself, with the Socialist members participating in each decision, including the selection of the Clerk, the Sergeant-at-Arms, and other officers.[15]

The Assembly heard a reading of Governor Alfred E. Smith's annual message to the Legislature.[16] In sharp contrast to Sweet's remarks, Smith tried to tamp down reactionary sentiment. He understood that during the recently-concluded First World War, in the interest of national unity and common defense, the nation took the "Constitution, wrapped it up and laid it on the shelf and left it there until it was over."[17] But "[n]ow that the war was over" the State needed to "return to a normal state of mind, . . . keep [its] balance, and an even keel." He counseled "calm consideration and cool judgment" in responding to radicalism. In so doing, he took a swipe at the State's publicity-generating legislative committee for the investigation of sedition—the so-called Lusk Committee, headed by Senator Clayton R. Lusk from Cortland County—noting that Bolsheviks were "at present receiving an unnecessary amount of advertising on which they thrive."

Smith declared his "faith in the truth of the American ideal triumphantly to resist Bolshevism . . ." He argued for the protection of the "fundamental" rights of "free speech and assemblage," without which "government by enlightened will of the majority is not possible." Repressive action, he said, would only drive discontented members of society towards Bolshevism. Instead, he offered the most progressive, far-reaching series of reform initiatives ever placed before the Legislature. His proposals included a minimum wage; an eight-hour work day for women; maternity insurance for expectant mothers; the appointment of State physicians and nurses in rural communities; State control and supervision of the milk supply; and the municipal operation of public utilities.[18]

To some, Smith's measures smacked of Socialism. Oswald Garrison Villard, the editor of the influential liberal weekly *The Nation,* quipped that if a Socialist "had offered a platform like this, the great New York dailies would have rent him limb from limb for his dangerous radicalism."[19] Just the year before, in fact, Sweet trashed Smith's legislative program as

"Bolshevik and socialistic."[20] But Smith was a brilliant political tactician. And he shrewdly packaged his new program as a prescription to defeat radicalism by making the discontented appreciate American ideals and feel at home.

Nevertheless, for one of the few times in Smith's career, his keen political ear failed him. New York, along with the rest of the nation, was in the throes of the Red Scare of 1919-1920.[21] A "monstrous social delirium"[22] held sway over millions who imagined the scourge of the Bolshevik Revolution in Russia lurking on domestic soil. The public was overrun by a "reign of terror," columnist Walter Lippmann observed, "in which honest thought is impossible, in which moderation is discountenanced, in which panic supplants reason."[23]

From coast to coast, political opportunists exploited the public's fear of the Red Menace. Some became overnight sensations. In 1919, Seattle Mayor Ole Hanson won fame and fortune (through a national lecture tour) by denouncing as a Bolshevik plot a general strike in which more than 60,000 workers participated.[24] Likewise, U.S. Attorney General A. Mitchell Palmer, who hoped to capture the Democratic Presidential nomination in 1920, raised his national profile by launching what came to be known as "Palmer Raids"—a series of mass arrests and deportations of immigrants suspected of radicalism.[25]

Thaddeus Sweet yearned for similar acclaim. It was an open secret he harbored gubernatorial ambitions.[26] Despite his long tenure as Speaker, however, he was largely unknown outside of his political base in Central New York. He needed a high-profile issue to catapult himself into the governor's mansion.[27]

And so, two and a half hours into the Assembly's proceedings, Sweet suddenly reappeared in the chamber. He climbed the rostrum and remained standing. At his elbow was Attorney General Charles D. Newton, who served as the Lusk Committee's Counsel. With an air of unquestioned authority, Sweet solemnly called on the Sergeant-at-Arms to present before him the five Socialist Assemblymen.[28]

A hush fell over the Assembly chamber. The carnival-like atmosphere of the opening ceremony came to a sudden halt. One by one, the Socialists were paraded down into the chamber's "well"—a depressed, wide circular space about six feet in front of the Speaker's rostrum. There, the five men were lined-up before Sweet.[29] The Sergeant-at-Arms, standing guard, announced: "Mr. Speaker, in accordance with your direction, I have presented the gentlemen that you have directed me to present."[30]

Noticeably tense, Sweet cleared his throat and theatrically pronounced: "You, whom I have summoned before the Bar of this House, are seeking seats in this body — you who have been elected on a platform that is absolutely inimical to the best interests of the State of New York and of the United States." Waxing warmer and warmer as he proceeded, Sweet charged that the Socialist Party was "not truly a political party," but rather, a subversive and unpatriotic "membership organization" committed to the violent overthrow of the government. Its members and elected officials agreed to be guided by the Socialist Party's constitution and platform, and were subject to suspension or expulsion for failure to follow the instructions of an executive committee composed of "aliens or alien members." Minors as well could participate in Socialist Party affairs, he said.

Sweet recalled that the Socialist Party had urged its members to refuse to fight during the War. He also suggested that the Party had sympathized with the Bolsheviks in Russia and their program of violence and civil war. Whetting his lips, Sweet supported these charges by quoting from the Party's 1917 national platform—"[a]s against the false doctrine of national patriotism we uphold the ideal of international working class solidarity;" and the *Communist Manifesto*—"[c]ivil war is forced upon the laboring classes by their arch enemies. The working class must answer blow by blow, if it will not renounce its own object and its future . . ."

Sweet found it "quite evident" that the Socialist Assemblymen were unfit for public office. They could not possibly fulfill their oaths to uphold the law, because they were obliged to abide by the instructions of Socialist party members dedicated to governments and organizations "diametrically opposed to the best interests" of the state and nation. Even so, acknowledging that every citizen was entitled to "his day in court," Sweet invited the Assembly to adopt a resolution suspending the Socialists pending a trial

Thaddeus C. Sweet
Library of Congress, Print & Photographs Division, LC-DIG-hec-21007

at which they would be given the opportunity "to prove [their] right to a seat in this legislative body."[31]

Cheers broke out in the chamber.[32] The five Socialists looked at one another in amazement. They were stunned and confused, amused yet resentful. Smiling bitterly, the thought crossed their minds that Sweet just attributed to them doctrines they opposed. None of them advocated the overthrow of the government by force, nor did their party.[33] In fact, several months earlier, the Socialist Party of America split apart on the issue of violence and violent doctrines, and Claessens, Orr, Solomon and Waldman successfully fought for their rejection as delegates at the Party's emergency national convention in Chicago.[34]

Also, it was unfair to lump together American Socialists with Russian Bolsheviks (who renamed themselves the Communist Party). For a brief time, the leaders of the Socialist Party supported the revolutionary dictatorship in Russia.[35] But the Socialist and Communist movements quickly became bitter adversaries. By March 1919, the Communist International—which Leon Trotsky called the "General Staff of the World Revolution"[36]—declared war on the Socialist Party of America for seeking social change through the ballot box. To the Communists, the abandonment of violence as a revolutionary tactic was an unpardonable sin.[37]

However, Sweet was unwilling to see the difference between a democratic Socialist and a totalitarian Communist. Radicalism in any form was painted red. As he put it, "[t]hey are all for one and one for all . . . with one object, one purpose, the overthrow of the United States government and with the red flag of anarchy floating from every state capitol and from the dome of the capitol in Washington."[38] Many New Yorkers similarly conflated the Socialist and Communist parties, given that both owed their original ideology to Karl Marx, celebrated May Day, and called fellow members "Comrade."[39]

Treated like prisoners in the dock, the Socialist Assemblymen fought back. Their floor leader, the irrepressible Claessens, spoke-up first, by asking Sweet a question: "Mr. Speaker, do I understand we have no rights until this body officially decides?" "If the House so decides," Sweet snapped.[40]

Louis Waldman clamored to be recognized. The chamber quieted.[41] A 28-year-old law student and the most outspoken of the five Socialists, Waldman invoked the Assembly's rules. He asserted that members could not be unseated unless charges were filed against them, a legislative committee issued a report following investigation, and the full Assembly voted to expel them. "Is it not true?" he asked Sweet.[42]

A master of parliamentary procedure, Sweet knew Waldman was right.[43] The applicable law authorized the Assembly to expel a member only *"after* the report of a committee to inquire into the charges against him shall have been made."[44] The Socialists had a right to participate in all Assembly proceedings until they were actually ousted. Sweet's "Alice-in-Wonderland performance of 'sentence first—verdict afterwards'"—was unprecedented.[45]

Sweet hesitated. Having no answer to Waldman's question, he ignored it and triggered a prearranged plan, by recognizing the Republican Majority Leader, Simon L. Adler. The Socialists returned to their seats, and Adler, a member of a wealthy clothing manufacturing family from Rochester, took the floor. With a smug smile of satisfaction on his face he waited for complete silence, and then moved the adoption of

a "privileged" resolution, drawn-up in advance by Attorney General Newton and his staff.[46]

The Clerk read out-loud Adler's resolution, which called for the Socialists' suspension pending a determination by the Assembly's Judiciary Committee "of their qualifications and eligibility to their respective seats." If adopted by the members, the resolution would empower the Judiciary Committee to adopt rules of procedure, subpoena witnesses and documents, and report back its findings to the Assembly.

After the Clerk finished reading the resolution, Sweet called for a vote on which no debate would be allowed.[47] All a member could do was vote "aye" or "no." But Waldman stood in the way of Sweet's steamroller, demanding answers to more questions:

> *[I]s it . . . not the rule of this House and the precedent of the State Legislature that when charges are filed against any member of this House the duly elected member is permitted to represent his district until the Judiciary Committee renders its decision and renders a report to the Legislature, whereupon the Legislature acts? Has that not been the precedent and is it not the rule?*[48]

Once again Waldman had a point,[49] but it only served to anger Sweet. He banged down his gavel and declared: "[T]he . . . House is the sole judge of the qualifications of its members and it may or may not grant a hearing. It is the purpose in this case that you shall be given a day in court." Members laughed at Waldman, and Sweet again called for a vote on the resolution.[50]

Still, Waldman would not be silenced. He asked Sweet if the resolution could be referred to a committee other than the Judiciary Committee. Waldman's goal was to take the matter out of Sweet's hands and refer it to the Assembly as a "Committee of the Whole." This would allow the members to immediately debate Adler's resolution.

The wily Sweet did not fall into Waldman's trap. Sweet brushed aside Waldman's question, ruling that the resolution carried "its own reference" to the Judiciary Committee. Unwilling to brook further interruptions, Sweet put the resolution to a vote with breakneck speed. The Clerk began calling the roll, in alphabetical order, starting with Adler, who voted "aye."[51]

Sweet caught the Assembly completely by surprise. Apart from Adler, he took no other member into his confidence. Not even the Republican colleagues who Sweet roomed with in Albany, at a boarding house they called the "House of Lords," had an inkling of the ouster plan.[52] Boxed in by Sweet's stunning charges—with no way to explain their votes or ask questions—the members were between a rock and a hard place. They could risk their political careers by defying Sweet and voting against the resolution, or indict an entire political party for disloyalty. Member after member took the latter course, voting "aye," until the Clerk reached the name "Mr. Evans."

William S. Evans was a Bronx Democrat who won his Assembly seat by defeating a Socialist opponent in a close race.[53] When Evans heard his name called by the Clerk, he said: "I wish to be excused from voting and briefly state my reasons." Under the Assembly's rules, Evans could decline to vote for good cause shown. But Sweet didn't give Evans the chance to explain himself, except to answer one question: "How does the gentlemen vote?" "I vote no," Evans replied.[54]

The roll call continued with a monotonous succession of ayes, except for no votes cast by four of the Socialists (Claessens, DeWitt, Orr and Solomon) and J. Fairfax McLaughlin. Like Evans, McLaughlin was a Democrat from a New York City Assembly district with a large Socialist bloc of voters. He also had a demonstrated capacity to buck the political tide. The year before, he was one of only eight Democrats who voted against the Lusk Committee's establishment.[55] Now, "as a matter of fair play and common justice," McLaughlin cast another courageous vote. "I do not believe in hanging a man first and trying him afterwards," he explained to a reporter afterwards.[56]

The roll-call drew to a close when the Clerk called out: "Mr. Waldman." In response, Louis Waldman stood mute, forcing Sweet to inquire, "How does Mr. Waldman vote?" "I refuse to vote," Waldman answered defiantly.

With that, the Clerk announced the result: the resolution passed by a vote of 140-6. In less than forty minutes, the Assembly temporarily ousted the Socialist Party without trial.[57]

Applause filled the chamber once more.[58] Undaunted, Charles Solomon made a last-ditch attempt to be heard. He rose to a point of personal privilege—a request to be heard rarely denied a member when their personal rights were in question. But Sweet gaveled Solomon into silence, declaring: "The gentleman who rises at this time has no privileges on the floor. The gentlemen involved will please retire to the back of the rail."[59]

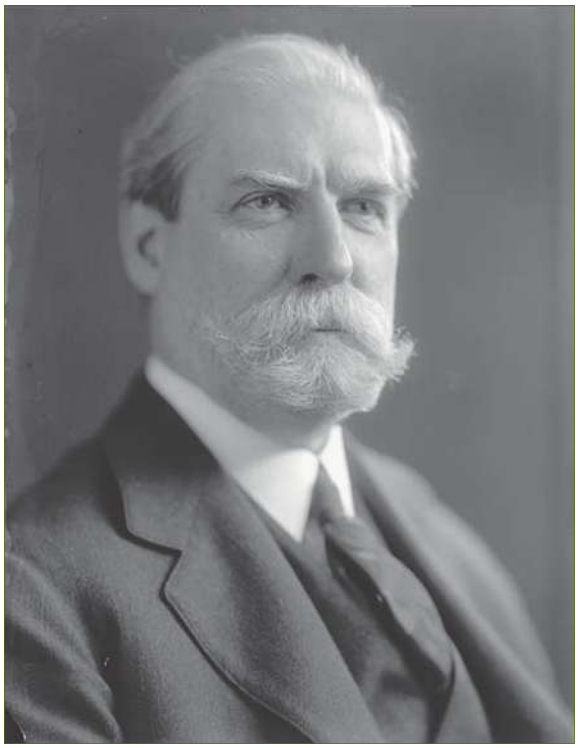
Now it was the Socialists' turn to ignore Sweet. They refused to budge from their seats. The chamber grew silent. All eyes were fixed on the Socialists. The only way to remove them was by force. And Sweet did not hesitate to use it. He commanded the Sergeant-at-Arms, Harry W. Haines, "to request the gentlemen to retire."[60] Haines approached the Socialists. After a conversation in whispers, Claessens, with a smile on his face, was escorted by Haines to the rear of the chamber. Haines next grabbed Waldman by the arm and hustled him out. Seeing the writing on the wall, Claessens, DeWitt and Orr picked up their hats, coats and papers and walked out on their own. As the Socialists passed up the aisle, the members turned their faces away from them. A few Democrats muttered under their breaths: "Sorry, boys, we couldn't help it."[61]

When the last Socialist exited the chamber, the Assembly gave itself a final round of applause.[62]

AFTERMATH

The day after the Assembly's stunning action, virtually every respected figure in New York remained silent. It took courage to stand up for one's principles during the Red Scare. People who held unpopular points of view courted ruin. That no one of stature might challenge Sweet seemed possible. But one of America's most distinguished lawyers stepped forward to make his voice heard. He was Charles Evans Hughes.

Hughes was a force to be reckoned with in 1920. At that time, he was the titular leader of the Republican Party by virtue of having been its unsuccessful candidate for President in 1916 against Woodrow Wilson. He was a former Governor of New York and Associate Justice of the U.S. Supreme Court. He also was under active consideration for high public office, including perhaps another run for the presidency. (He subsequently became Secretary of State and Chief Justice of the United States.)[63]



Charles Evans Hughes

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Though Hughes was unalterably opposed to socialism, he risked his reputation and career by publicly criticizing the Assembly. Within 48 hours of the ouster, in an open letter to Sweet reported on the front page of newspapers throughout the State, Hughes grasped the nettle:

> *[I]t is absolutely opposed to the fundamental principles of our government, for a majority to undertake to deny representation to a minority through its representatives elected by ballots lawfully cast. If there is anything against these men as individuals. . . they should have been charged accordingly. But I understand that the action is not directed against these five elected members as individuals but that the proceeding is virtually an attempt to indict a*

political party and to deny it representation in the Legislature. This is not, in my judgment, American government.[64]

Next, Hughes enlisted support for his position from the legal profession. After a fierce battle, he persuaded the Association of the Bar of the City of New York to condemn the Socialists' suspension and appoint a committee, which he headed, to appear before the Assembly's Judiciary Committee and safeguard the principles of representative government.[65] He then led the charge at the New York State Bar Association to beat back an effort to prevent it from taking a stand.[66]

By standing up for so unpopular a cause, Hughes acted in the highest and best tradition of the legal profession. His heroism was of a piece with the courageous defences provided by John Adams for the British soldiers charged with murder in the Boston Massacre and Clarence Darrow in the "Scopes' Trial." More, as John F. Kennedy wrote in his Pulitzer Prize-winning book, *Profiles in Courage,* Hughes was a key factor in "arousing the nation to its senses" and made it safe for others to criticize the Assembly.[67]

But the Assembly had gone too far to turn back. The "trial" of the five Socialists commenced before the Judiciary Committee on January 20, 1920. Marked by moments of high drama and farce, the proceedings were highly publicized, occupied 21 days, and created a record that fills more than 2,800 closely printed pages.[68] On March 30, the Judiciary Committee, by a vote of seven to six, recommended that all five Socialists be expelled from the Assembly.[69] The debate moved to the Assembly floor, where, on April Fool's Day, an overwhelming majority of the members voted to expel the five Socialists.[70] At one stroke, 60,000 New Yorkers were denied their legally elected legislative representation.[71]

In August, Governor Smith called a special election to fill the seats vacated by the expelled Socialists. Each of the Socialists ran for re-election against a "fusion" candidate representing the combined Republican and Democratic parties.[72] The election was held on September 16, and the voters returned to office all five Socialists.[73] A few days later, the Socialists presented themselves to the Assembly for a second time.[74] Following a bitter debate, by a 90 to 45 vote, Waldman, Claessens and Solomon were denied their seats. By a similar margin, 87 to 48, Orr and DeWitt were admitted as a compromise measure to placate critics.[75] Both men, however, resigned the Assembly in solidarity with their ousted colleagues.[76]

THE FIVE NEW MEMBERS OF THE ASSEMBLY.
—Walker in the New York *Call* (Socialist).

The Five New Members of the Assembly
January 24, 1920
Literary Digest *(Originally printed in the* New York Call*)*
Newman Library, Baruch College, The City University of New York

The Assembly was beyond saving, but its actions marked a national turning point. As Zechariah Chafee, Jr., the nation's leading scholar on civil liberties in the period, observed: "The American people, long bedrugged by propaganda, were shaken out of their nightmare of revolution. . . A legislature trembling before five men—the long-lost American sense of humor revived and the people began to laugh. That broke the spell."[77]

The final coda in this remarkable story was played out over the ensuing years by the Socialists themselves. In time, each of these men—once branded "little Lenins, little Trotskys in our midst"—were honored by society.[78] All went on to successful

careers and became respected members of their communities, befriended by powerful members of the establishment.[79]

For example, Samuel Orr and Charles Solomon ascended to the bench, serving for several years as New York City Magistrates. When Solomon died in 1963, *The New York Times* (which pilloried him four decades earlier) eulogized him as "an uncompromising fighter for social justice in all its forms."[80]

August Claessens devoted his career to advocating liberal causes, teaching, and lecturing around the country. He achieved a vindication of sorts in the fall of 1921, when he won re-election to the Assembly and was finally seated. Upon his death in 1954, over 1,000 people crowded into an auditorium to attend a memorial service in his honor, with hundreds more listening to the services outside over loud-speakers.[81]

Louis Waldman became an eminent labor lawyer, representing many powerful unions.[82] By the 1940s he was a pillar of the bar. He served as president of the Brooklyn Bar Association; vice-president of the Association of the Bar of the City of New York; chairman of the New York State Bar Association's Committee on Civil Rights; and chairman of the American Bar Association's Committee on American Citizenship. He remained active in politics, too, running three times for Governor on the Socialist line and becoming the State Party chairman. He ultimately resigned from the Party to help found the more inclusive American Labor Party, which, for a time, was New York's leading minority party.[83]

Samuel DeWitt remained active in liberal and left wing politics and organizations. His primary vocation, however, was business. He owned and operated a highly successful cutting tool company that made him a rich man. He also was an accomplished poet, publishing numerous books in that genre.[84] Drawing on his love of verse, DeWitt got the last word on the Socialists' ouster in a poem entitled To Thaddeus Sweet:

Yes — you stood quite imperious
Above the single five of us —
So prim, so trim, immaculate —
Marble with thin lips of hate —
And for a gluttoned half an hour,
You fed and drunk a fill of power;
But it was pitiful to see
A Caesar in stupidity.[85]

ENDNOTES

1. By law and tradition, the Legislature assembles on the first Wednesday of the first week in January. *See* N.Y. Const. Art. XIII, § 4 (which in 1920 was Art. X, § 4).
2. Zechariah Chafee, Jr., *Freedom of Speech* 33 (1920) [hereinafter cited as Chafee, *Freedom of Speech*].
3. *63 More 'Reds' Seized Here in 24-Hour Raid,* N.Y. Tribune, Jan. 7, 1920, at 1 (citing statement by State Senator Clayton R. Lusk).
4. *HARDING LASHES AMERICAN REDS,* N.Y. Times, Jan. 7, 1920, at 1, 3.
5. Thomas E. Vadney, *The Politics of Repression: A Case Study of the Red Scare in New York,* 49 New York History 56, 58 (1968) [hereinafter cited as Vadney, *Politics of Repression*].
6. Louis Waldman, *Albany: The Crisis in Government* 12 (1920) [hereinafter cited as Waldman, *Albany*]; *BARRED MEMBERS ARRAIGNED*, N.Y. Times, Jan. 8, 1920, at 1; David R. Colburn, *Governor Alfred E. Smith and the Red Scare, 1919-20*, 88 Political Science Quarterly 423, 431 (1973) [hereinafter cited as Colburn, *Governor Alfred E. Smith and the Red Scare*].
7. Daniel L. Feldman and Gerald Benjamin, *Tales from the Sausage Factory: Making Laws in New York State* 55 (2010).
8. Waldman, *Albany* xi, 3.
9. *Journal of the Assembly of the State of New York* [hereinafter cited as *Journal*], 143rd Session, Vol. I, 8 (1920).
10. Evelyn L. Sauers, *Thaddeus C. Sweet,* The Journal of the Oswego County Historical Society 82-87 (1976-77).
11. *Journal*, 143rd Session, Vol. I, 8-9.
12. *The New York Red Book* 167-168 (1920). Sweet was surpassed as the longest tenured Speaker by Republican Oswald D. Heck of Schenectady, who presided over the Assembly from 1937 to 1959. *See* Bruce W. Dearstyne, *No Gridlock in Oswald Heck's New York*, Times Union, October 22, 2011.
13. *Journal*, 143rd Session, Vol. I, 9-11.
14. Louis Waldman, *Labor Lawyer* 90 (1944) [hereinafter cited as Waldman, *Labor Lawyer*].
15. *Journal,* 143rd Session, Vol. I, 11-20; Waldman, *Albany* xi, 2.
16. Waldman, *Albany* 2-3.
17. *Quoted in* Arthur Schlesinger, Jr., *The Crisis of the Old Order: The Age of Roosevelt 1919-1933* 461 (1957).
18. *Public Papers of Governor Alfred E. Smith: 1920* at 30-38 (1921) [hereinafter cited as *Public Papers*]; Paula Eldot, *Governor Alfred E. Smith: The Politician as Reformer* 315-316 (1983).
19. Oswald Garrison Villard, *Prophets True and False* 11 (1928).
20. *Reconstruction in State Politics,* 108 *The Nation* 38, 38 (Jan. 11, 1919).
21. Todd J. Pfannestiel, *Rethinking the Red Scare: The Lusk Committee and New York's Crusade Against Radicalism, 1919-1923* (2003) [hereinafter cited as Pfannestiel, *Rethinking the Red Scare*]; Julian F. Jaffe, *Crusade Against Radicalism, New York During The Red Scare, 1914-1924* (1972).
22. Louis F. Post, *The Deportations Delirium of Nineteen Twenty* 147 (1923).
23. *Quoted in* Ronald Steel, *Walter Lippmann and the American Century* 167 (1980).
24. From his lecture tour, Hanson earned $38,000 in 7 months, 5 times his annual salary as Mayor. Robert Murray, *Red Scare: A Study in National Hysteria, 1919-1920* at 65-66 (1955).
25. Stanley Coban, *A. Mitchell Palmer: Politician* 217-267 (1963).
26. *See, e.g., Whitman Prepared to Support Hayward,* N.Y. Times, March 24, 1919 (stating that Sweet would be amongst the field of candidates seeking the Republican nomination for Governor).
27. Colburn, *Governor Alfred E. Smith and the Red Scare,* at 431.
28. *Legislative Documents of the State of New York* [hereinafter cited as *N.Y. Leg. Doc.*], 143rd Session, No. 35, Vol. II, 2053 (1920); *Five Members Suspended from Assembly by Special Resolution Because of Questioned Loyalty,* Democrat Chronicle [Rochester, NY], Jan. 8, 1920, at 1; Waldman, *Albany* 3; Pfannestiel, *Rethinking the Red Scare* 25.
29. Waldman, *Labor Lawyer* 90; Waldman, *Albany,* at 3.
30. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2053.
31. *Journal,* 143rd Session, Vol. I, 21-22; Waldman, *Labor Lawyer* 90-91.
32. *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
33. Waldman, *Labor Lawyer* 90; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
34. *Suspension of the Assemblymen: A Symposium,* 3 *The Socialist Review,* 176, 176 n.1 (1920); *New York Radicals Plan New Socialist Party if Defeated,* N.Y. Tribune, Aug. 23, 1919, at 6;

David A. Shannon, *The Socialist Party of America: A History* 142-149 (1955).

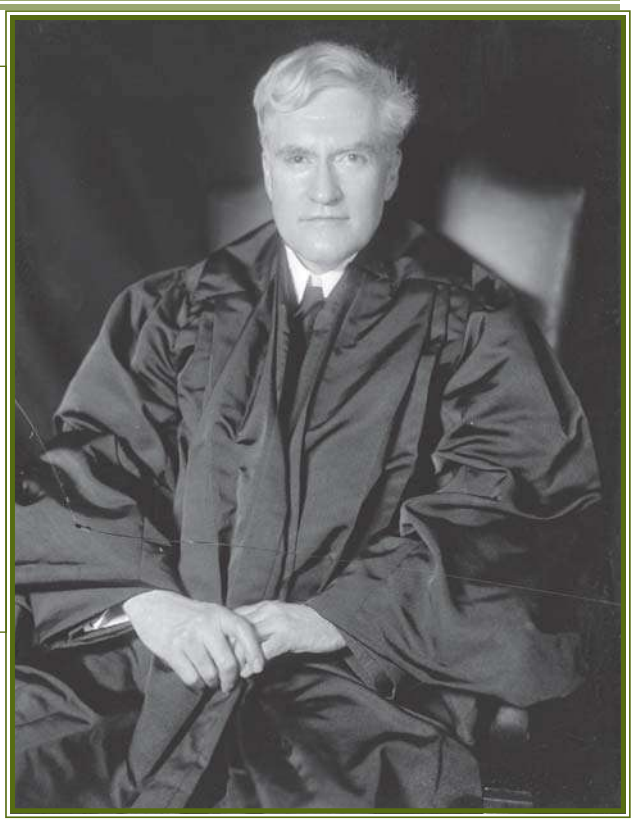
35. James Weinstein, *The Decline of Socialism in America: in America* 179-180 (1984).
36. Richard Pipes, *Communism* 93 (2001).
37. Louis Waldman, *Proceedings of a Special Meeting to Commemorate The Seventy-Fifth Anniversary of the Bar of the City of New York Held on March 16, 1946*, 90 *A.B.C.N.Y. Reports* 730: 25-26 [hereinafter cited as Waldman, *Proceedings*].
38. *Democratic Minority Delays Socialist Vote By Filibuster,* Oneonta Daily Star, April 1, 1920, at 1.
39. W.A. Swanberg, *Norman Thomas: The Last Idealist* 120 (1976).
40. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055.
41. *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
42. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055.
43. *SWEET, Thaddeus C.*, 21 The National Cyclopaedia of American Biography 231 (1931).
44. N.Y. Legislative Law § 3 (emphasis added).
45. Chafee, *Freedom of Speech* 334, 339.
46. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2055-57; Waldman, *Proceedings,* at 26; Colburn, *Governor Alfred E. Smith and the Red Scare,* at 430; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
47. *Journal,* 143rd Session, Vol. I, 24; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920
48. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2057; Waldman, *Albany* 11; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
49. Most of the members were intimately familiar with the precedent to which Waldman referred. It was the case of Lucas E. Decker, Jr., decided less than two years earlier by the Assembly. In November 1917, Decker, a Queens County Democrat, was elected to the Assembly, but his right to sit in the Legislature was questioned on the ground of disloyalty during the War. More specifically, Decker was charged with failing to register for the draft based on a fraudulent claim of exemption. Notwithstanding the gravity of this charge, the Assembly permitted Decker to take the oath of office and participate in all affairs of the House, pending the completion of an investigation by the Judiciary Committee. Additionally, while the Judiciary Committee ultimately confirmed that Decker was a draft dodger, it recommended he be allowed to retain his seat, reasoning that there was no evidence he failed to satisfy the constitutional requirements for service in that body (e.g., U.S. citizenship). With Sweet presiding as Speaker, and by a vote of 142-0, the Assembly adopted the Judiciary Committee's recommendation and dropped the matter against Decker. *See Journal,* 141st Session, Vol. I, 105-107 (1918).
50. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2057; Waldman, *Albany* 11; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
51. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *Labor Lawyer* 93.
52. *New York City 'Workers' Feel Rights Invaded,* Syracuse Journal, Jan. 8, 1920, at 1; *State, Nation Mourn Sweet, Funeral Friday in Phoenix,* Syracuse Herald, May 2, 1928, at 2; Vadney, *Politics of Repression,* at 59.
53. Evans, who ran on both the Democratic and Republican lines, received 7,881 votes; and the Socialist candidate received 6,936 votes or nearly 47% of the total votes cast. *Manual for the Use of the Legislature of the State of New York, 1920* at 832 (1920).
54. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *The Clerk's Manual of Rules, Forms and Laws for the Regulation of Business in the Senate and Assembly of the State of New York* 90-91, Rules 33 and 36 (1920).
55. *State Bolsheviki Inquiry to Begin Law Week in April,* N.Y. Tribune, March 27, 1919, at 8.
56. *Socialists Unite to Fight Ouster,* N.Y. Tribune, Jan. 9, 1920, at 13.
57. *Journal,* 143rd Session, Vol. I, 24-25.
58. *New York Socialists Plan Fight for Capitol Seats,* Syracuse Herald, Jan. 8, 1920, at 1, 15.
59. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; Waldman, *Albany* 12; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920.
60. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. II, 2058; *see also Journal,* 143rd Session, Vol. I, 25 (stating: "At the direction of the Speaker, the sergeant-at-arms escorted the suspended members from the floor of the House.").
61. Waldman, *Albany* 2-3; *Socialist Ouster Based on Tenets of Their Society,* N.Y. World, Jan. 8, 1920; *SPEAKER SWEET SPRINGS SENSATION BY DECLARING SOCIALISTS ARE DISQUALIFIED,* The Morning Herald [Gloversville and Johnstown, NY], Jan. 8, 1920, at 1.
62. *5 Socialists Are Denied Their Seats,* Capital Times [Madison, Wisc.], Jan. 7, 1920, at 1.
63. *See* Merlo J. Pusey, *Charles Evans Hughes* (1951).
64. *E.g., Hughes Urges Reseating of 5 Socialists,* N.Y. Tribune, Jan. 10, 1920, at 1.
65. George Martin, *Causes and Conflicts: The Centennial History of The Association of the Bar of the City of New York, 1870-1970* at 209-213 (1997).
66. New York State Bar Association, *Proceedings of the Forty-Third Annual Meeting Held at New York, January 16-17, 1920 and Charter, Constitution, By-Laws, Lists of Members, Officers, Committees and Reports for 1919* at 530-555 (1920); Deborah S. Gardner and Christine G. McKay, *Of Practical Benefit: The New York State Bar Association, 1876-2001* at 45-46 (2003).
67. John F. Kennedy, *Profiles in Courage* 255 (1964).

68. The trial record and related materials are contained in three volumes. *See N.Y. Leg. Doc.*, 143rd Session, No. 35, Vols. I, II and III.
69. *N.Y. Leg. Doc.*, 143rd Session, No. 35, Vol. III, 2673-2802.
70. The Assembly unseated Claessens, Solomon and Waldman by a vote of 116 to 28, and DeWitt and Orr by a vote of 104 to 40. *Journal*, 143rd Session, II, 1368-1370, 1387-1392.
71. Melvin I. Urofsky, *A Note on the Expulsion of the Five Socialists*, 47 New York History 41, 42 (1966) [hereinafter cited as Uroksky, *A Note on the Expulsion*].
72. *Public Papers* 582.
73. *Five Expelled Socialists Win Again at Polls*, N.Y. Tribune, Sept. 17, 1920, at 20.
74. *5 Socialists Seated; New Ouster Fails*, N.Y. Tribune, Sept. 21, 1920, at 1.
75. *See Journal*, 143rd Session, IV, 54-63; Waldman, *Labor Lawyer*, at 114.
76. *Assembly Ousts 3 Socialists; Two Resign; Expulsion Voted 90 to 45 After 11-Hour Debate*, N.Y. Tribune, Sept. 23, 1920, at 1.
77. Chafee, *Freedom of Speech* 338.
78. Foster Rhea Dulles, *The Rhode to Tehran: The Story of Russia and America, 1781-1943* 164 (1944) (quoting Assemblyman Louis A. Cuvillier).
79. Urofsky, *A Note on the Expulsion*, at 43.
80. *Charles Solomon, Unorthodox Magistrate Dies—Ex-Judge Was a Candidate for All Major Offices in State as Socialist*, N.Y. Times, Dec. 10, 1963.
81. *The New York Red Book* 104 (1922); *A. Claessens, 69, Ex-Assemblyman*, N.Y. Times, Dec. 10, 1954; Urofsky, *A Note on the Expulsion of the Five Socialists*, at 46.
82. Louis Waldman, *The Good Fight: A Quest for Social Progress* 204 (1975).
83. Urofsky, *A Note on the Expulsion*, at 46-47; Warren Moscow, *Politics in the Empire State* 102-119 (1948).
84. Urofsky, *A Note on the Expulsion*, at 43-44.
85. S. A. De Witt, *Harvest: Collected Poems* 53 (1937).

Forward to

The NATURE OF THE JUDICIAL PROCESS

by Andrew L. Kaufman



Honorable Benjamin N. Cardozo
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Why a new edition of *The Nature of the Judicial Process*? Presumably because in the world of law, Benjamin Cardozo still rocks, and his opinions and writings still send worthwhile messages as we near the 100th anniversary of his election to the bench. All law students and many academics continue to wrestle with a number of his common law opinions. Just this year Professor Lawrence Cunningham devoted many pages to comparing Cardozo's method of approach to decision-making to the more modern, economic-oriented approach of Judge Richard Posner and found Cardozo's method more helpful. (Cunningham, "Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions," 62 Fla. L. Rev. 667 (2010).) Cardozo's approach to constitutional law also continues to have many adherents on the bench and off; and, in a legal world filled with both strongly-held doubts and certainties, his nuanced, and I might say, ambiguous approach to the art of judging continues to beguile. *The Nature of the Judicial Process* was his major effort to address the subject of judicial decision-making out of the confines and constraints of a judicial opinion.

A new edition of *The Nature of Judicial Process* invites a new generation of readers to become familiar with a man who became one of the giants of twentieth century lawmaking by political accident after a most unpromising start. Benjamin Cardozo was born in 1870 into a political family. His father was a judge of the New York Supreme Court, New York's major trial court. His ancestors, the Cardozos and the Nathans, were prominent New York

Andrew L. Kaufman is the Charles Stebbins Fairchild Professor of Law and Vice-Dean for Academic Programming at Harvard Law School. He is considered to be the premier modern biographer of Justice Cardozo. His 1998 book, ***Cardozo****, was published by Harvard University Press.*

The Nature of the Judicial Process, *with new Foreword by Prof. Kaufman, is reprinted courtesy of Quid Pro Books, www.quidprobooks.com, an independent academic press. It joins other titles in their Legal Legends Series:* Holmes, The [annotated] Common Law *and* The Path of the Law, Warren & Brandeis, The Right to Privacy, *and three by a lawyer, political scientist, and Nobel Prize winner named Woodrow Wilson.*

Sephardic Jews, who had fled Spain and Portugal during the Inquisition and had arrived in New York prior to the American Revolution via Holland and England. Their synagogue, Shearith Israel, was already over 125 years old when the Revolutionary War was won, and their rabbi, Gershom Seixas, was the first Jewish trustee of the college that was to become Columbia University. Benjamin Cardozo would be the second. His uncle, for whom he was named, was a Vice-President of the New York Stock Exchange. In Benjamin's generation, one first cousin, Emma Lazarus, was the author of the poem that graces the base of the Statue of Liberty; another first cousin, Maud Nathan, was a well-known suffragette, social reformer, and president for thirty years of the Consumer's League of New York; and yet a third first cousin, Annie Nathan Meyer, was a playwright and the founder of Barnard College.

Albert Cardozo, Benjamin's father, earned a different kind of distinction. His judicial career was the result of political connections with two rival and notorious New York City Democratic politicians, Fernando Wood and Boss Tweed. Widespread accusations of wrongdoing against a number of New York judges in one of the periodic public outcries against Tammany Hall domination of politics led to legislative hearings to consider charges of corruption against three justices of the New York Supreme Court (the state's trial court). Albert Cardozo was one of them, and he resigned his position just before the legislature would surely have voted to impeach and convict him, as they did his two colleagues. The evidence of political favoritism and personal corruption was compelling. Benjamin Cardozo was two years old at the time. The family fortunes, literally and figuratively, declined, and the family moved out of its splendid brownstone home just off Fifth Avenue to lesser quarters several times before Albert, aided by his political connections, was able to revive the family situation.

Benjamin grew up with a twin sister and four older siblings under the cloud of the family disgrace. He was particularly close to his older sister Nellie, who helped raise him, and with whom he lived in the family homes for his whole life, taking care of her in a very long illness at the end of her life. He was home schooled, and the tutor who prepared him for his entrance examinations to Columbia was Horatio Alger, the popular author of rags to riches novels, whose early career as a Unitarian minister was marred by accusations of what today we would call sexual abuse.

Cardozo entered Columbia at the age of 15, where he was the youngest in the class. He lived at home with his sisters and an older brother, who was practicing law in their father's firm. Their father died during his first year at college. Benjamin did not participate much in the social life of the school. He worked hard, did very well, won several prizes, and went straight from college into Columbia Law School. The instruction there consisted mostly of lectures about the rules and doctrines of law without much analysis. The Socratic method of questioning students and analyzing doctrine critically that was associated with the Harvard Law School of Christopher Langdell arrived during Cardozo's second year. He did not much take to it. Columbia had recently added a third year of study, but Cardozo, along with two-thirds of the class, left at the end of his second year. He was not yet 21.

Cardozo was admitted to the bar as soon as he reached 21, joined his brother in their father's politically-oriented firm, and began practicing law. Almost immediately, he began to make a name for himself, arguing several cases in the New York Court of Appeals in the first years of his practice. The records from his years at the bar show a very active trial and appellate practice. As time went on and he demonstrated his ability, more and more lawyers referred their important or difficult matters to him. His practice was largely oriented toward commercial and family matters. His clients came from the Jewish community, and he often litigated their cases against lawyers from major firms.

The practice of law was very different then from what it has become. The bar was relatively small, and most major firms had just a few partners. A good lawyer could make his (and they were virtually all "his") way quickly, and Benjamin Cardozo established himself as a good lawyer very early in his career. Modern-style brief writing was not yet well established. Many, perhaps most, briefs consisted of conclusory arguments coupled with citation of, and quotation from, relevant cases. Cardozo immediately adopted

The New York Times Published: January 16, 1917 Copyright © The New York Times

10 THE NEW YORK TIMES, TUESDAY, JANUARY 16, 1917.

NEW MUSICAL PLAY SMARTLY STAGED

"Love o' Mike" a Mildly Amusing but Tuneful Successor to "Very Good, Eddie."

SONGS BY JEROME KERN

Beauties Abound Rather Than Song Birds in a Company for Which Hassell Supplies the Laughter.

'DOLLARS AND SENSE' ACTED

Alan Brooks Brings an Ingenious Playlet to the Palace.

WILFRID GIBSON APPEARS.

English Poet Reads His Works with a Monotonous Intonation.

GERTRUDE KINGSTON BACK.

She Substitutes a Slave Comedy in Her Program at Elliott.

WHITMAN NAMES JUDGES.

Cardozo Takes Seabury's Place on Appeals Bench.

Special to The New York Times.

ALBANY, Jan. 15.—Governor Whitman today announced his appointments and designations for the Court of Appeals and the Supreme Court. They are: Justice Benjamin N. Cardozo of the Supreme Court to be Associate Judge of the Court of Appeals succeeding Judge Samuel Seabury, who resigned last Summer to be Democratic candidate for Governor, and Justice Chester B. McLaughlin to be Associate Judge of the Court of Appeals succeeding Judge Frank Hiscock, now Chief Judge. Justice Frederick E. Crane of Brooklyn is designated as Supreme Court Justice temporarily assigned to the Court of Appeals succeeding Judge Pound, who has become Associate Judge.

When the nominations were sent to the Senate for confirmation tonight Robert F. Wagner, the minority leader, after paying a tribute to Justice Cardozo moved for the immediate confirmation of his appointment, a motion to which the Senate assented after Leader Brown had concurred.

Governor Whitman also sent to the Senate the nomination of General William W. Wotherspoon as State Superintendent of Public Works and of State Architect, Lewis F. Pilcher of Brooklyn, both of whom have been reappointed. Mr. Pilcher is a Democrat who received his first appointment from Governor Sulzer; General Wotherspoon received his first appointment from Governor Whitman two years ago. The Senate immediately confirmed the nominations.

the modern, more useful style that began with a statement of the facts and the questions to be decided and then went on to argument based on critical analysis of doctrine and policy supporting the desired result. When the policy arguments were not strong, Cardozo argued from the facts, and he could make technical arguments with the best. In short, he used the best ammunition to support his case that he could find, and he argued persuasively, and with style. No wonder other lawyers sought him out. His career seemed destined to carry on in that fashion although, with time, the matters he handled involved larger sums of money and his practice became more varied. He never, however, became a Brandeis-type lawyer taking on large social issues of great public importance.

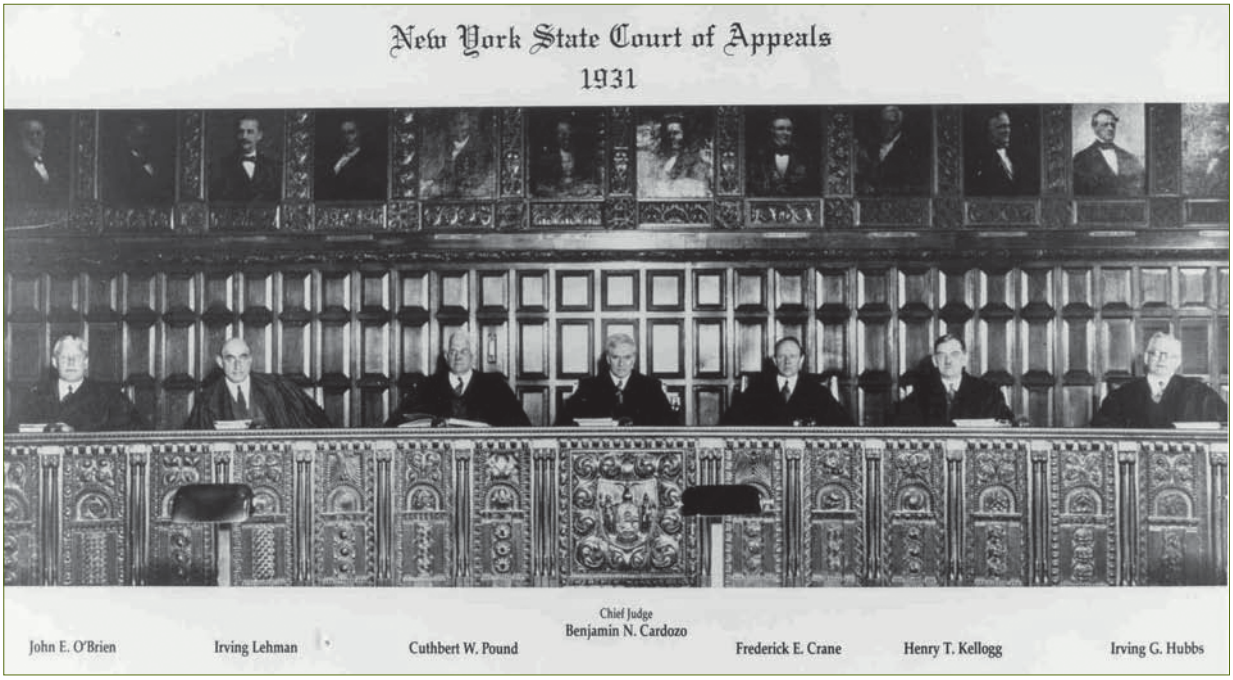
Judge Cardozo on the steps of the New York Court of Appeals
New York Court of Appeals Collection

Then chance intervened. 1913 was the occasion for a periodic convulsion in the New York political world. A diverse group of reformers, anti-Tammany Democrats, and Republicans united to produce a joint Fusion ticket in the local elections to try to wrest control of the local government from Tammany Hall. Putting together a ticket for the various executive and judicial positions required considerable negotiation among the different groups. A subcommittee on judges was looking for a Jew to balance the ticket. Cardozo's name was eventually suggested to the subcommittee chair, Charles Burlingham, well-known as a "judgemaker" and later thought by many to be the dean of the New York bar. Burlingham made the case for Cardozo to the Fusion group, and although the Fusion ticket was generally successful, Cardozo, running against an incumbent, barely squeaked through with the aid of some Bronx County dissident Tammany Democrats.

As he took the bench in 1914, he had been a practicing lawyer for 23 years. I have earlier summarized the first 43 years of his life in the following paragraph:

Twenty-three years of practice had a major impact in preparing Cardozo for his judicial career. His college and law school education furnished a substantial amount of intellectual capital and the habits of reading and study that lasted his whole life. His work matured him socially, and his colleagues soon discovered not only his ability but the strength of his character and personality. Having lived a sheltered personal life, he used his work as his window on the world. A good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery, and deceit. A good litigator also learns a good deal about the subject matter of his cases. Cardozo read widely and was more familiar with new ideas than most practicing lawyers, but he came to the bench with a view of the judge's role as a resolver of disputes, not as a dispenser of legal theory. Even though his experience as a judge would enlarge his view of the judicial role, Cardozo never lost his lawyer's touch. (Kaufman, *Cardozo*, at 112-113.)

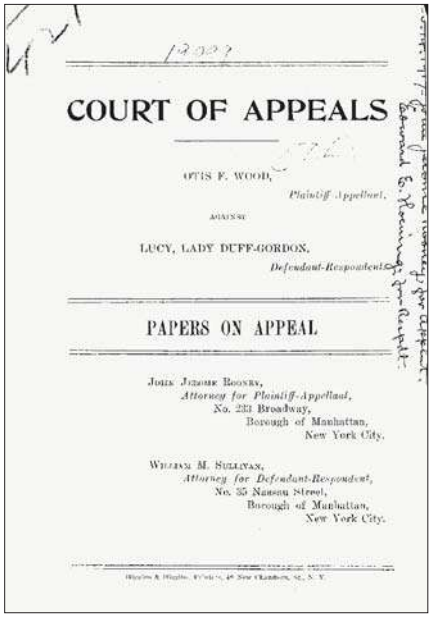
Cardozo tried cases as a Supreme Court Justice for just one month before he was appointed by the Governor to fill one of the temporary Court of Appeals positions that existed to help that court clean up its backlog. Three years later he was appointed and then elected to a regular term on the Court of Appeals, the state's highest court. Cardozo's first few years on the Court of Appeals were a time of legal ferment. The realist movement roiled the academic world, and its critique influenced judicial decision-making. Some of Cardozo's early opinions were instant hits. *Wood v. Lucy, Lady Duff Gordon* (222 N.Y. 88 (1917)), involving interpretation of a contract with an eye to the nature of business relationships, and *MacPherson v. Buick Motor Co.* (217 N.Y. 382 (1916)) found their way very quickly into law school curriculums. The latter especially was heralded as an



New York Court of Appeals Collection

example of adapting ancient common law doctrine to the needs of modern industrial society for its holding that an auto company was liable to a purchaser, through a dealer, of one of its cars for injuries resulting from an accident caused by a defective wheel even though the company had no direct contractual relationship with the purchaser.

In just a few years on the bench Cardozo made a name for himself. By 1921 his growing reputation was recognized in three distinct ways. He was selected to the Board of Overseers of Harvard University. He was invited to lend his support to a project of the Association of American Law Schools to organize what would become the American Law Institute, most known for regularly publishing "Restatements" of bodies of law such as contracts and torts.


COURT OF APPEALS

OTIS F. WOOD,
Plaintiff-Appellant,
against
LUCY, LADY DUFF-GORDON,
Defendant-Respondent.

PAPERS ON APPEAL

JOHN JEROME ROONEY,
Attorney for Plaintiff-Appellant,
No. 233 Broadway,
Borough of Manhattan,
New York City.

WILLIAM M. SULLIVAN,
Attorney for Defendant-Respondent,
No. 55 Nassau Street,
Borough of Manhattan,
New York City.

New York Court of Appeals Collection

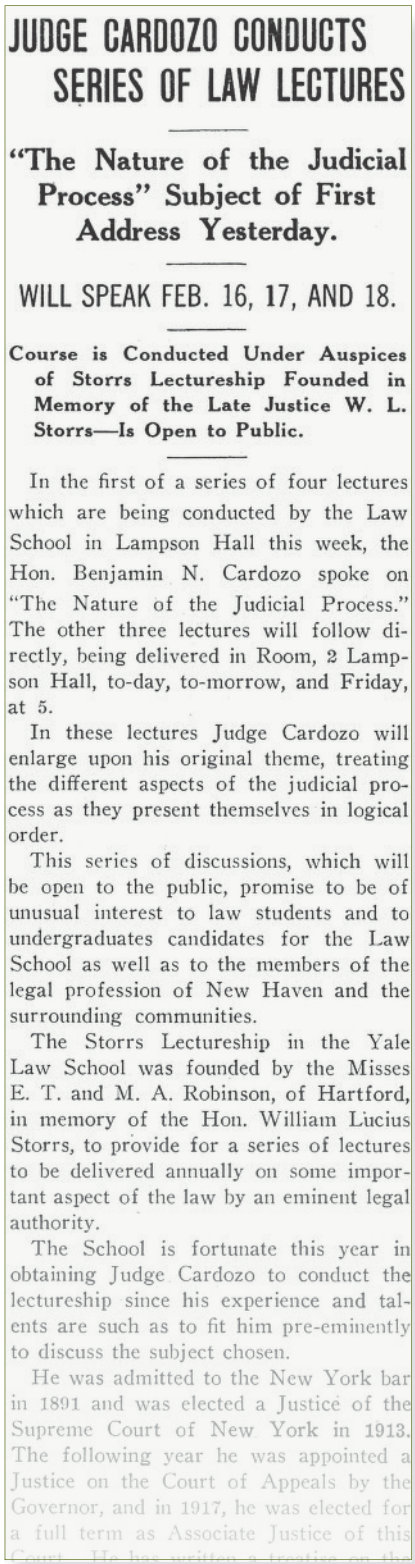
Finally, he delivered the Storrs Lectures at the Yale Law School. Those lectures have been read by hundreds of thousands in the succeeding years under the title of *The Nature of the Judicial Process*.

Dean Swan had issued the invitation the previous year and Cardozo had first declined on the ground that he had nothing to say. But the offer was renewed and Cardozo responded positively to the suggestion of a faculty member that he describe for his audience the process by which he decided a case. He spent many months working on the lectures and delivered them over four nights in February 1921. They were a spectacular success. The usual process is for audiences to diminish over the course of a lengthy lecture series. Not so with Cardozo's Storrs Lectures. Once word got around after the first lecture, the audience increased dramatically, and the series had to be moved from a room seating 250 to a hall seating 500. The latter room was completely filled for the remaining three lectures.

Although Cardozo read his lectures, he was a captivating speaker. The one known recording of his voice reveals the style of a nineteenth-century orator. Arthur Corbin, a leading realist member of the Yale faculty, reported that the substance of the remarks and the style of the speaker made an extraordinary impression. "Never again have I had such an experience. Both what he said and his manner of saying it

held us spell-bound on four successive days." Cardozo was then persuaded to let them be published. Cardozo was the first judge in modern times to try his hand at describing what judging was all about. Indeed, *The Nature of the Judicial Process* helped create what has become a cottage industry as interest in the subject of judicial decision-making has grown not only in the academy but perhaps more importantly among the general public. First, Cardozo himself, in subsequent efforts in the 1920s entitled *The Growth of the Law* and then *The Paradoxes of Legal Science*, and then other judges and judicial philosophers, have written in increasingly theoretical fashion about the subject. However, ninety years later Cardozo's initial effort is still being read, with profit.

When Cardozo delivered his lectures, the diverse academic movement known as "legal realism" was in full flower. A theme of that movement was its attack on what it portrayed as a formalist, mechanistic approach to judging. The previous half century had been characterized for its emphasis on judge-made law as having its own internal consistency, with doctrines derived from first principles independent of the politics of the day. Judges, it was said, "found" and did not "make" law, and they deduced the governing rules in a particular case from the decided precedents. The extent to which that portion of the realists' attack on their predecessor was based on inaccurate caricature is still a matter of some debate, but there is little doubt that one of Cardozo's purposes in delivering *The Nature of the Judicial Process* was to acknowledge the importance of sources beyond precedent for judicial decision-making as well as the inevitable element of "law-making" discretion that appellate court judges exercise in close cases.



JUDGE CARDOZO CONDUCTS SERIES OF LAW LECTURES

"The Nature of the Judicial Process" Subject of First Address Yesterday.

WILL SPEAK FEB. 16, 17, AND 18.

Course is Conducted Under Auspices of Storrs Lectureship Founded in Memory of the Late Justice W. L. Storrs—Is Open to Public.

In the first of a series of four lectures which are being conducted by the Law School in Lampson Hall this week, the Hon. Benjamin N. Cardozo spoke on "The Nature of the Judicial Process." The other three lectures will follow directly, being delivered in Room, 2 Lampson Hall, to-day, to-morrow, and Friday, at 5.

In these lectures Judge Cardozo will enlarge upon his original theme, treating the different aspects of the judicial process as they present themselves in logical order.

This series of discussions, which will be open to the public, promise to be of unusual interest to law students and to undergraduates candidates for the Law School as well as to the members of the legal profession of New Haven and the surrounding communities.

The Storrs Lectureship in the Yale Law School was founded by the Misses E. T. and M. A. Robinson, of Hartford, in memory of the Hon. William Lucius Storrs, to provide for a series of lectures to be delivered annually on some important aspect of the law by an eminent legal authority.

The School is fortunate this year in obtaining Judge Cardozo to conduct the lectureship since his experience and talents are such as to fit him pre-eminently to discuss the subject chosen.

He was admitted to the New York bar in 1891 and was elected a Justice of the Supreme Court of New York in 1913. The following year he was appointed a Justice on the Court of Appeals by the Governor, and in 1917, he was elected for a full term as Associate Justice of this Court. He has written a treatise on the

The Yale Daily News Wednesday, February 16, 1921

Some of the major ideas in *The Nature of the Judicial Process* relied on the earlier work of Holmes' *The Common Law* (1881), John Chipman Gray's *The Nature and Sources of the Law* (1909), and the writings of Roscoe Pound. Cardozo described four major sources of material for judicial decision-making — logic, history, custom, and public policy. He devoted a lecture to each of these. It seems apparent that history and custom are more specialized doctrines that will be powerful factors in deciding a matter only in those relatively few cases when there is enough evidence of either from which to dispose of the case. He regarded logic, the use of deductive analysis from principles already established, as having a certain presumption in its favor and as governing absent strong arguments from history, custom, or public policy. While logic as he defined it was backward looking, his incorporation of the notion of deciding by analogy also had a forward looking aspect.

Cardozo was not content with such subtlety. The bulk of his lectures consisted of analysis of the effect of public policy considerations — a norma-

tive approach based on contemporary values — on judicial decision-making. He both endorsed the importance of using law to achieve social justice and warned against the dangers that could accompany the abandonment of established principles, certainty, and order. Judges were agents of change, but not too much and not too often. The trick was to know when to innovate and when to refrain.

Cardozo was no revolutionary. His vision of the judicial role was a version of what English and American judges had done for centuries, reaffirmed and adapted for modern use. He believed that the major role in guiding social change in a democracy belonged to the legislature and the executive. Thus, he innovated most when the step to be taken was modest and when the innovation did not violate what he saw as the prerogatives of other institutions of government — and ideally when the legislative or executive branch had already pointed the way. While Cardozo often adapted law to new social conditions, he also often declined to make such adaptations. Fairness was important to him, but he did not believe that judges could always do what they thought was fair or just. Cardozo believed that he had to respect precedent, history, and the powers of other branches of government. Judging involved taking all these factors into account, methodically and as impartially as he could.

A common complaint, offered by judges, is that Cardozo's prescription does not help a judge to decide a particular case. Of course not. Indeed, in a way, a subtheme of Cardozo's lectures is that judicial decision-making involves a nuanced approach among different considerations, any one of which may be dominant with respect to a particular issue or in the context of particular facts. He was essentially an accommodationist, but the totality of the messages was ambiguous. That ambiguity, I think, has contributed to his enduring reputation. How one applies Cardozo to different situations depends on what strand of thought is emphasized in different contexts. Even judges who subscribe fully to his messages will put the elements of decision-making together in different ways in particular cases, each side citing different Cardozo words for support. As you will see from reading his lectures, Cardozo carried forth his prescription into the field of constitutional law as well, expressing the view that public policy considerations had their strongest justification in that field. Indeed, he outlined a controversial view, which he expounded as a Justice of the United States Supreme Court, that "the content of constitutional immunities is not constant, but varies from age to age." (Pp. 82-83.)

The Nature of the Judicial Process was not a work of philosophy. Although Cardozo was well read in works of philosophy and often quoted or cited philosophers to support a particular insight, he was not interested in attempting to set out a comprehensive theory of judging that was grounded in philosophy. His purpose was to explain the art of judging from his perspective as a judge and former practicing lawyer. In a sense, the guts of *The Nature of the Judicial Process* can be found buried in three printed pages (Pp. 112-114). All the rest is elaboration and, at the end of the Lectures, he issued a word of caution about everything he said. While he refused to quarrel with the notion that a judge reflects "the spirit of the age," he was skeptical about what that was. "The spirit of the age," he wrote, "as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or occupation or fellowship have given us a place." (Pp. 174-175.)

The years following the delivery and publication of *The Nature of the Judicial Process* saw the transformation of Benjamin Cardozo from a well-known judge to a judge with a national reputation. The academy lionized him even before he became chief judge of the New York Court of Appeals, and the court itself was seen as the outstanding state court in the country. It had several notable judges, Cuthbert Pound, William Andrews, and Irving Lehman, to name just three of Cardozo's colleagues, but it was Cardozo's opinions that caught the academic public's eye and were incorporated into casebooks throughout the country. This was a time when virtually all judges, and not their law clerks, wrote judicial opinions. Cardozo wrote in a distinctive style, with many one-liners that sharpened his meaning. Occasionally flowery and ornate, at its best the style was crisp and persuasive, and it constitutes a large part of the explanation for his continuing popularity in the legal academy. He had the knack of making a great case

out of what would have been humdrum in the hands of most judges.

Cardozo was induced to give two more Lecture series after *The Nature of the Judicial Process.* The first, *The Growth of the Law* (1924), was little more than a rehash of *The Nature of the Judicial Process.* The second, *The Paradoxes of Legal Science* (1928), was Cardozo's effort to place *The Nature of the Judicial Process* into more of a philosophical mode, but in essence it was *The Nature of the Judicial Process* once more. Cardozo also tried his hand at writing on such subjects as *Law and Literature and Other Essays and Addresses* (1931) and *What Medicine Can Do for Law* (1930), but the only other substantial piece of nonjudicial writing he did while a Court of Appeals judge was a long lecture entitled "Jurisprudence" that he delivered just before he joined the United States Supreme Court in 1932. There again he sought to deal with the phenomenon of legal realism, with which his approach had much in common, by playing down some of its more exuberant statements about the uncertainty and indeterminacy of legal principles as enthusiastic hyperbole.

All he achieved was to anger some of realism's leading exponents, notably Jerome Frank, a New Deal lawyer with academic pretensions who later became a judge of the U.S. Court of Appeals for the Second Circuit. Frank theretofore had been a strong admirer of Cardozo. Stung by Cardozo's talk, Frank wrote him a thirty-one page critique, with a thirty-page appendix, explaining his views, which he believed had been mischaracterized and misunderstood by Cardozo. Cardozo did not respond substantively, pleading the press of business associated with his appointment, and deprecating his own effort. Sixteen years later, after Cardozo had died, Frank published his criticisms of Cardozo's "Jurisprudence" lecture in a law review article that even criticized the title of *The Nature of the Judicial Process* for its emphasis on appellate opinions, as opposed to trials and fact-finding, which Frank took to be of greater significance to the law as it actually affected people's lives. ("Cardozo and the Upper-Court Myth," 13 Law and Contemp. Probs. 369 (1948).) Indeed, after Cardozo died, Frank, who was much influenced by Freudian psychology, published an anonymous critique with a psychological analysis of Cardozo. (Anon Y. Mous, "The Speech of Judges: A Dissenting Opinion," 29 Va. L. Rev. 625 (1943).) Frank portrayed a man who cloaked the disgrace of his father's career in the garb of an eighteenth century English gentleman writing in an alien style. Clearly, the years had not dulled Frank's anger at Cardozo's criticism of his boldest claims about the indeterminacy of the law.

Appointment to the United States Supreme Court ended Cardozo's extrajudicial writing. Unlike many current Supreme Court Justices who regularly expound their judicial philosophies in off-the-bench settings, Cardozo immediately felt constrained by the press of business, by the need to conserve his energy, and perhaps also by a sense that the Court at that time was already embroiled in sufficient controversy concerning the legality of New Deal legislation. But Cardozo had one further contribution to make to larger issues of judicial decision-making, and he chose, what was for him an unusual forum, a judicial opinion. The subject was what we would today call originalism, the binding effect of the Framers' intent in constitutional interpretation. As we have already noticed, Cardozo had indicated a view in *The Nature of the Judicial Process*. But it is one thing to express a view off the bench, quite another to do so in an opinion. That was something Cardozo rarely did. His job as judge was to decide cases, not to issue pronouncements on current issues of jurisprudence. But he did so early in his career on the Supreme Court in the context of a hotly-contested, major piece of litigation.

The Minnesota Mortgage Moratorium Case (*Home Bldg. & Loan Insurance Co. v. Blaisdell*, 290 U.S. 398 (1934)) involved the power of a state to delay foreclosure of a defaulted mortgage by permitting the mortgagor to substitute rent based on reasonable value for the mortgage payments that were due. The debt owed would have to be paid off in full eventually. A closely-divided Supreme Court upheld the state statute against an argument that it impaired an "obligation" of contract in violation of Article I, section 10 of the Constitution, known as the Contract Clause. Chief Justice Hughes circulated a draft majority opinion distinguishing between statutes that interfered with the creditor's right and those that interfered merely with the remedy. That was insuf-

ficient for Cardozo, who circulated an opinion that dealt with the basics of constitutional interpretation. His opinion spelled out the approach he first set forth in *The Nature of the Judicial Process*. Interpretation of a constitutional provision, even one as narrow and focused as the Contract Clause, was not limited by what the Framers understood at the time of the adoption of the provisions. Echoing John Marshall, Cardozo expounded at some length his view that the Constitution had been designed to meet the needs of an expanding future and its meaning could change as society changed.

But Cardozo's opinion went unpublished. When Hughes saw it, he incorporated some of its substance, briefly, in his own opinion and the ever-collegial Cardozo withdrew his concurrence. His draft opinion, however, was a stirring defense of an expansive approach to constitutional interpretation that still resonates in modern constitutional discourse and constitutes a nice conclusion to the exposition he first set forth in *The Nature of the Judicial Process*. (Substantial excerpts from the draft opinion are published in Kaufman, "Benjamin Cardozo and the Supreme Court," 20 Card. L. Rev. 1259 (1999).)

It was his final contribution to the subject of judicial decision-making. His career on the Supreme Court was all too short. He suffered a heart attack in late 1937, followed by a stroke shortly thereafter, and he died the following summer at age 68. But, as you will see in reading the following Lectures, he left behind, in *The Nature of the Judicial Process*, a series of insights and messages that still provide substance for anyone interested in the subject of how judges decide cases.

Andrew L. Kaufman
Cambridge, Massachusetts
July 2010

2011 Amelia Weimar

Triumph and Tragedy: How Frances Perkins Shaped the Labor Movement

With the generous support of Gloria and Barry Garfinkel, since 2008 the Society has offered annually **The David A. Garfinkel Essay Contest** established in memory of the Garfinkel's son David. This contest is open to students from community colleges across New York State, offering them the opportunity to submit essays on topics of New York legal history. The competition seeks to draw students with a wide range of interests in law, history, social science and general research writing. Prizes of $1,500, $1,000 and $750 are offered. The winners of the competition are honored on Law Day, held in the magnificent courtroom of the New York Court of Appeals in Albany. Their families and professors are invited to the courthouse for a memorable day, including the awards ceremony and a luncheon where they are graciously and warmly greeted by the Court of Appeals Judges.

Law Day 2011
Standing left to right: Frances Murray, Kevin Volk (2nd Prize Winner), Marilyn Marcus
Sitting left to right: Amelia Weimar (1st Prize Winner), Hon. Ann Pfau (Chief Admin. Judge), Hon. Fern Fisher
Not pictured: James Gerber (3rd Prize Winner)

In previous years, the Garfinkel Essay Contest has looked at a diverse array of legal history topics that has attracted a wide range of students who either built upon, or found a new interest in, the complexities and questions of legal history. A look back on topics in past years include *The Courts and Human Rights in New York: The Legacy of the Lemmon Slave Case* (2008); *The New Netherland Legal System and the Law of 21st Century New York* (2009); and *The Evolution of Justice Along the Erie Canal* (2010).

In 2011, the students were asked to submit essays on the topic of *The Legal Legacy of the Triangle Shirtwaist Factory Fire*.

The 2011 contest was the most successful to date, attracting 92 submissions from 16 schools statewide, with mentoring by 28 professors. The winning essay (reprinted here), *Triumph and Tragedy: How Frances Perkins Shaped the Labor Movement*, was written by **Amelia Weimar**, a student at Onondaga Community College.

Special thanks to the wonderful staff at the Court of Appeals for serving as our judges. They read the essays with great care…and much soul-searching. Those essays considered worthy are sent to Former Chief Judge Judith S. Kaye for final selection. We extend our gratitude to Frances Murray, our Trustee and Chief Legal Reference Attorney at the Court of Appeals, for preparing the wealth of materials offered to the students to support their research, and for her expert management of this project.

The Garfinkel Essay Contest would not reach the wide array of schools that it does without the efforts of the court system's liaison to education, its Office of Public Affairs. Our special and grateful thanks to Gregory Murray and Andrea Garcia for their successful outreach to schools across the State.

Triumph and Tragedy: How Frances Perkins Shaped the Labor Movement

AMELIA WEIMAR

FOR THE EMPLOYEES working at the Triangle Shirtwaist factory, Saturday was coming to a close like any other day. The weekend, always anticipated with much excitement, was almost at hand. In a bustling city like New York there was never a lack of things to do, even for those poor workers with little money. The workers, mostly women and young girls, began to shut down their machines, gather their few belongings, and put on their threadbare coats and wraps. It was near closing time, and soon they would hear the bell that signaled the end of the workday. Moments later, the mild calm of that spring day was shattered when fire broke out violently in the southeast corner of the eighth floor.

THE TRAGIC FIRE

Like a ravenous lion, the fire roared through the work room, consuming the easy kindle—the finished shirtwaists that hung on lines above the workers' heads, the trimmings and cuttings that littered the floors beneath the machines, and tragically, the women themselves. It devoured the eighth floor, forcing women to jump from the windows in desperation as its searing flames and suffocating smoke surged around and accosted them. The fire pushed upward, forcing its way through the elevator shafts and stairwells, seeking the victims trapped on the ninth and tenth floors. Some managed to escape via the stairs before they were engulfed in flames. Others made it to the roof and escaped with ladders that students from the university next door pulled across the roof, but the remaining 146 employees, poor immigrant women and young girls, were either burned to death or fell to their death when they jumped from the factory windows eight and nine floors above.[1]

Among the throngs of onlookers who gazed up in horror at the rising column of heavy black smoke, the tongues of flame licking the upper floors of the Asch building, and the bodies of those who chose to leap to their death rather than burn, was a young woman named Frances Perkins. A labor rights activist, she had been at the home of a friend near Washington Place, the scene of the fire. In her own words, she described what they saw:

> *They began to jump. The window was too crowded and they would jump and they hit the sidewalk. The net broke, they [fell] a terrible distance, the weight of the bodies was so great, at the speed at which they were traveling, that they broke through the net. Every one of them was killed, everybody who jumped was killed. It was a horrifying spectacle*[2]*…a never-to-be-forgotten reminder of why I had to spend my life fighting conditions that could permit such a tragedy.*[3]

This tragedy was forever sealed on her mind and heart.

THE BEGINNING OF THE REFORM MOVEMENT

Although women in New York did not yet have the vote, nor were they permitted to participate in jury service and other civic roles,[4] Perkins threw herself into the work of improving conditions for laborers with a vigor that astounded many. With passions aroused over the senseless loss of life in the Triangle Factory fire, New Yorkers rallied around the cause of labor with new zeal. A fiery brunette born in Boston, Perkins knew that the enactment of legislation was the only solid way to protect working men and women and "right industrial wrongs." However, she knew this protection would not come easy or overnight. Her plan of attack? Organize. Unlike many women of her class, Perkins knew the great value and potential of working-class organization.[5] Already her life had been immersed in such organization. In addi-

tion to being active in the quest for woman's suffrage, she was the head of the New York Consumers' League.

Enraged at the inability of the law to hold anyone accountable for the deaths of the 146 Triangle Shirtwaist Factory victims, the people of New York announced a meeting. A few days before the funeral procession was to be held, reformers, civic leaders, teachers, religious leaders and many others gathered at the Metropolitan Opera. Though diverse in lifestyle, history and background, this company of folk came together through grief and passion for innocent lives lost. Out of this passion for justice came the establishment of the Committee on Safety. With Perkins at its head, the Consumers' League worked closely with this committee to promote worker protection, lobby for better working hours and conditions, and press for a thorough investigation of the Triangle Shirtwaist Factory fire.[6]

In short, the committee served as a central institution of information on fire safety. However, stretching beyond the imaginations of even those at its head, it was to become one of the most powerful and effective political forces the state had ever seen. It urged the state government to sponsor a thorough investigation of the tragedy. Galvanized to act, the committee took their plea for justice straight to Albany, advancing on the capitol. It was there that Perkins, along with two other lobbyists, brought the fight to New York State Assemblyman Alfred Smith. In Perkins' own words:

> *We decided to ask the legislature to create a commission and this is where Al Smith came in.*[7]

However, Al Smith was not the only man won over. Along with him came Robert Wagner, the state Senate Majority Leader and later U.S. Senator. In the face of the intensity of the lobbyists, they could see no other option but to act—and act swiftly. They also knew that legislation was the only solid way to protect working men and women from another catastrophe like this happening again. Moved by the first hand testimony of Perkins and the other New Yorkers, the two legislators immediately introduced bills that led to a law creating the Factory Investigation Commission. It passed on June 30, 1911, three months after the Triangle Shirtwaist Factory fire.[8]

THE INFLUENCE OF THE FACTORY INVESTIGATION COMMISSION

In addition to establishing the Commission, Smith and Wagner did something that would astound even those of the labor movement. Wagner appointed himself Chair of the Commission, with Smith his Vice Chair. As members of the state legislature, they could have appointed anyone they wanted to the Commission, and they appointed themselves. Their motive? Not pride. Not control. These men truly wanted to see what was happening. They knew that the power of legislation they held would be crucial in taking the labor movement from simple organization to solid laws capable of protecting the disparaged working class. Furthermore, they cast their eyes upon the array of characters that had come to them in Albany, and singled out none other than Frances Perkins to be the Chief Director of Investigations. In this station, Perkins had the power to directly testify before the commission, conduct and lead investigations, and run on-site factory inspections. With this power in her hands she forged ahead, determined to turn the tragic flames of the Triangle Factory fire into a torch that would illuminate the squalid state of the industrial work site for all to see. In an address given at Cornell University, Perkins described her work and her mission:

> *We went all over the state . . . I was a young person then and certainly not fit for service on any super commission, but I was the chief—I was the investigator, and in charge of the investigations and this was an extraordinary opportunity, you see, to get into factories to make a report and be sure it was going to be heard . . . we went on and kept expanding the function of the commission 'till it came to be the report on sanitary conditions and to provide for their removal and to report all kinds of unsafe conditions and then to report all kinds of human conditions that were unfavorable to the employees.*[9]

Indeed, the Factory Investigation would go far beyond just the Triangle Shirtwaist Factory—it would also look into fire hazards, unsanitary conditions, occupational diseases, effectiveness of factory inspec-

tion, tenement manufacturing, and many other matters. Fueled by the passionate conviction of Smith, Wagner, and Perkins, it would go on to conduct the most intensive study of industry ever undertaken in the United States.[10]

One of the investigation's main battles was the fight for child labor laws to prohibit employers from hiring young children. The need for this was especially impressed upon Perkins after reading this excerpt from the heart-wrenching poem "Little Toilers" by Sara Claghorn:

> *The golf links lie so near the mills,*
> *That nearly every day,*
> *The laboring children can look out*
> *And see the men at play.*[11]

How could this possibly be right? With children, some less than five years old, working long days in suffocating factories, and the men of that time playing golf only a stone's throw away, the poem presented a poignant picture of the injustice of the times.

The commission's tactic of "organization leading to legislation" slowly began to pay off. By 1913, a number of their recommendations became law, including prohibition of night work for women, fire prevention, and regulations for health safety. In fact, there would be a total of 33 laws passed through the commission's tireless efforts. As Perkins said: *It was, I am convinced, a turning point.*[12]

The year 1913 was also a triumph in another way: it was the year that Woodrow Wilson was inaugurated as President. In order to help workers, he proposed a new cabinet office: the United States Department of Labor, which Congress created that same year.[13] It would not be long before Perkins would be intimately bound to this new Department, much more than she could have imagined.

THE INDUSTRIAL COMMISSION, THE INDUSTRIAL BOARD AND THE DEPARTMENT OF LABOR

In 1916 she threw herself into her latest mission: campaigning for Al Smith, the vice chair of the Factory Investigation Commission, who ran for governor in 1917. Her passion was well applied for two reasons: that this was the first New York State election in which women could vote, and that in November of 1918, Al Smith won the election. His first order of business was to summon Perkins to Albany and ask her to be a member of the Industrial Commission of the State of New York. Recalling her shock at the suddenness of it all later, she later recalls that the invitation was *just like that, with no preliminaries, no dancing up to it, and no ifs, ands, or buts.*[14] No woman had ever served on the Commission. Despite the inevitable opposition that followed his decision, Smith never doubted his choice. He knew that he needed someone with extraordinary energy to shake up the dragging Commission, and that he could trust Perkins to do the right thing. Perkins did not disappoint him—with grit and determination she attacked her job, knowing that the mere fact that she was the sole woman among men would shake things up. After her first serious meeting with fellow commissioners, she noted with exasperation that:

> *In my observation . . . the habit of prolonged deliberation for no reason at all except that [male commissioners] haven't got the nerve to take action is more on the male side than it is on the female side . . . I remember thinking to myself, "Do men really behave like this?"* [15]

Despite resistance and setbacks, however, she set to work reviewing the staff's work, and galvanized the "hardly functioning" commission to be responsible and hold regular meetings.[16]

In 1920, a roadblock came that would bring her work with the commission to a screeching halt. Smith ran for reelection and was defeated. Some months later, Perkins' term expired and another commissioner replaced her. She would later describe this time in her life as *a drudgery and a keep-your-nose-to-the-grindstone period* that was difficult to endure, although she was still active with the labor movement.[17] The break in the drudgery came in 1922 when Smith again ran for governor and won in a landslide. In the wake of his election Perkins was appointed to the Industrial Board. By 1926, Smith had appointed her Chairperson. Perkins was officially dubbed the "First of Her Sex for Office in the Empire State" by the local newspapers that very day. Her fame was spreading, and many were particularly impressed with how she

handled workmen's compensation appeal cases. In response to a reporter's probing questions following her appointment, she stated:

> *Doing means digging your nails in and working like a truck horse. We make most of our own opportunities. They seldom make us.*[18]

It was two years later, in 1929, that she would begin her long history with a man whose presence and legacy still seems larger than life: Franklin Delano Roosevelt. He was elected Governor of New York that year, and going against the adage, "men will take *advice* from woman, but it is hard for them to take *orders* from a woman," he appointed Perkins to the chief post of the New York State Department of Labor.[19] Ever the master deal-maker, she began to pull New York into the forefront of progressive reform. The goal for concrete worker security was still legislation, and the means was still organization. As chief of the Department of Labor she expanded factory investigations, reduced the workweek for women to 48 hours and championed minimum wage and unemployment insurance laws.[20] Roosevelt, in turn, supported her efforts and various programs, insisting that she come to him whenever she needed help. The two of them developed a close working relationship during this time. Roosevelt learned to value her opinions, respect her judgment, and rely on her for information and advice; Perkins learned that Roosevelt understood problems better if she described them in "human terms"—not just statistics and charts.[21]

In 1929, devastating disaster struck the country. The stock market crashed, and in a few short weeks more than thirty billion dollars had blown into thin air. The Great Depression had begun, sweeping the country like an epidemic and destroying everything in its path. As President Hoover insisted that the worst was over, people continued to lose jobs and money, and businesses closed at an incredible rate. In New York, Perkins and Roosevelt began to study ways to put people back to work. Perkins encouraged Roosevelt to appoint a committee to study how to stabilize worker employment, and New York became the first state to formally study the problem of joblessness.[22] It was during this time that the idea of unemployment insurance was born.

UNITED STATES SECRETARY OF LABOR

On November 8, 1932, the tides began to turn. Roosevelt was elected President in a landslide victory. It was a vote against depression. It was a vote against rampant chaos. It was, in short, an overwhelming vote for a New Deal for the American people. The culmination of Perkins' efforts and years of fiery outspokenness came three months later, when Roosevelt announced that he was appointing her as his Secretary of Labor. Though she was reluctant at first to take the job, she realized:

> *the door might not be opened to a woman again for a long, long time, and that [she] had a kind of duty to other women to walk in and sit down . . . and so establish the right of others long hence to sit in the high seat.*[23]

With this position, she was not only the first woman ever to hold a cabinet position, but was also, by virtue of her office, the first woman in the presidential line of succession.[24]

The purpose of the U.S. Department of Labor was to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment. To Perkins' dismay, however,

> *the offices were dirty, files and papers were missing, there was no program or plan of work, there was an internal spy system, and everyone was scared of everyone else.*[25]

Not to be discouraged or deterred, she got to work without delay. She drew on her New York State experience as the model for new federal programs. Her ultimate goal was to bring the labor movement right into Roosevelt's New Deal, and make it the business of the federal government.[26] In her new seat as Cabinet Member, she put every ounce of her formidable energy into new programs and legislation, which would secure such things as the abolition of child labor, a minimum wage and unemployment insurance. With fiery resolve and methodical planning, she began weaving a safety net for a Depression-scarred society.[27] Her diligence was rewarded as her vision found concrete expression in new legislation, such

as the Fair Labor Standards Act and the Wagner Act (1935). The former established a minimum wage and maximum workweek, and the latter gave workers the right to organize unions and bargain collectively.[28] Also, 1933 was the year that Perkins announced she had created a nationwide system of free employment agencies, soon known as the United States Employment Service. Through this service, jobless people could seek assistance in finding jobs.[29]

Yet despite these victories, the bleak face of Depression still stared the American people wanly in the face. Banks were still closing. Crime was rising. Food riots were becoming more common. Yet Perkins, ever unafraid, was determined to deal with the crisis. *It is there to be done, so I do it*, she stated simply.[30] Undaunted, she worked closely with Roosevelt to develop many relief programs, including the Civilian Conservation Corps, the Federal Emergency Relief Administration, and the National Industrial Recovery Act. These various programs worked to give young men and women jobs, the basics of life, and also provide grants so the states could provide these basic necessities for unemployed people.

One especially strong step forward for the labor movement was the creation of the National Recovery Administration. This agency was responsible for stabilizing wages and prices and reviving production. For this purpose, it had the power to work with both industries and workers to develop codes that set standards for wages, prices, working conditions, and other issues. With her persuasiveness and strong advocacy for government intervention for the good of the public, every venture Perkins began on led to victory.[31] She was soon dubbed "Fearless Frances" by local newspapers and magazines.[32]

She would need to be fearless for the task yet to come. In 1934, Roosevelt finally appointed the Committee on Economic Security. This committee was composed of cabinet members, and their job was to develop a social security program that would include both unemployment and old-age insurance. At his insistence, Perkins was appointed head of the committee. He knew that this idea had been hers from the start, and that she would *put [her] back to it more than anyone else, and drive it through*.[33] The legislation that was developed and drafted by the committee was radical at the time, to say the least. The most insurmountable problem, however, was the question of how to pay for the social security system in a way that would not be declared unconstitutional by the Supreme Court. Perkins' answer to this quandary came from a very unlikely source: Harlan Stone, who was actually a Supreme Court justice at the time. He told her:

> *The taxing power of the Federal Government, my dear; the taxing power is sufficient for everything you want and need.*[34]

On August 10, 1935, Congress finally approved the Social Security Act. Not only did it provide insurance to the elderly and unemployed, but it also included programs to aid people with disabilities, and children under the age of eighteen in single-parent families. Although viewed as a radical departure at the time, the passing of this legislature is to this day known as Perkins' most important contribution as chairwoman of the Committee on Economic Security.[35]

Although tweaks to the program were still needed, Perkins savored the victory of achieving her lifelong goal of providing old age and unemployment insurance to American workers. Despite this victory, she did not forget that spark which had lit her life with passion. With her life's work, she had indeed turned the tragic flames of the Triangle Factory fire into a torch that had begun to illuminate the plight of the industrial worker for all to see.

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A look back...and forward

The Society has had an exciting round of events since our last publication. I hope many of you were able to participate. Our website now offers webcasts of several of these programs. Please take a moment to look back with us on past events…and forward to upcoming ones.

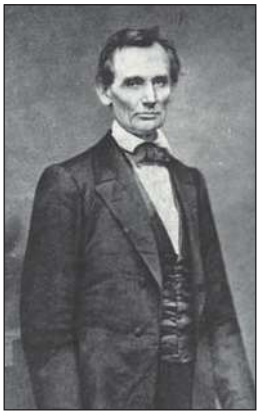
Marilyn Marcus, Executive Director

What's Happened Recently…

Nominated from New York: The Empire State's Contributions to the Supreme Court Bench Thurgood Marshall: "Mr. Civil Rights"

February 6, 2012 • The New York City Bar

This winter the Society was honored to present, in partnership with the Supreme Court Historical Society, the second installment in our series examining the contributions of New Yorkers to the Supreme Court bench. We were privileged to have had the participation of Supreme Court Justice Sonia Sotomayor, the Chief Judge of New York Jonathan Lippman, and the Society's founder and Former Chief Judge Judith S. Kaye. Supreme Court Justice Thurgood Marshall spent several decades as a civil rights lawyer for the NAACP based in New York City, and we can justly claim him as one of our own. The eminent historian and Harvard law professor Randall Kennedy gave a lecture on Marshall's contributions in the legal struggles over civil rights. Professor Kennedy, who clerked for Justice Marshall in 1983-1984, focused on a series of lesser known Marshall cases demonstrating the immense impact that Marshall had battling in the trenches leading up to *Brown v. Board of Education* on the development of civil rights law across America. The lecture was followed by a conversation between Professor Kennedy and Hon. George Bundy Smith, retired Judge of the New York Court of Appeals, who was himself involved in the struggle for civil rights as an activist and lawyer. We sold out the house with over 425 in attendance for this electric and memorable evening.



2011 Stephen R. Kaye Memorial Program
Lincoln, the Civil War & Freedom of the Press: New York Divided

November 30, 2011 • The New York City Bar

In the fall of 2011 the Society presented its annual Stephen R. Kaye Memorial Program on the subject of Abraham Lincoln and his efforts to control the press during the Civil War. For this program, we were proud to partner with the NYS Archives Partnership Trust. The evening opened with a welcome from Chief Judge Jonathan Lippman. The featured lecturer was Harold Holzer, one of today's most prominent Lincoln scholars and Chairman of the Abraham Lincoln Foundation. Mr. Holzer, presently writing a book on the topic, focused on some of President Lincoln's more controversial efforts to control the press during the Civil War. A roundtable discussion on the implications

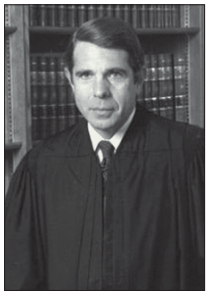
of Lincoln's actions followed the lecture with Mr. Holzer, Former Chief Judge Judith S. Kaye, and Hon. John M. Walker, Judge, U.S. Court of Appeals, Second Circuit. Hon. Richard C. Wesley, also Judge, U.S. Court of Appeals, Second Circuit, and a Trustee of the Society, then discussed the war-time suspension of the writ of *habeas corpus*. The event concluded with reading by Henry G. Miller…all in all a star-studded, fascinating evening. *This program appeared on C-Span.*

Nominated from New York: The Empire State's Contributions to the Supreme Court Bench John Jay: A Family Affair

May 4, 2011 • The New York City Bar

The Society proudly launched in the Spring of 2011 its series presented jointly with the Supreme Court Historical Society on the contributions of New Yorkers to the Supreme Court bench. What better place to start such a series than at the beginning, with a look at John Jay. The amazing John Jay was both New York's first Chief Justice and the first Chief Justice of the U.S. Supreme Court. We were privileged to have as participants Supreme Court Justice Ruth Bader Ginsburg, Chief Judge Jonathan Lippman, and Former Chief Judge Judith S. Kaye. The lecture was delivered by historian and working-lawyer Walter Stahr, author of *John Jay: Founding Father*, a book which has gone far to restore Jay's place among our great Founding Fathers. Mr. Stahr presented an original talk on Jay's New York roots as a lawyer and judge. The program also presented an entertaining reading of letters between Jay and his family prepared and read by Louise V. North & Janet M. Wedge, editors of a collection of Jay's letters titled *Selected Letters of John Jay and Sarah Livingston Jay*, with the able participation of our own President, Hon. Albert M. Rosenblatt.

ORAL HISTORY PROJECT



Our Oral History project has made great strides. We have captured the oral histories of all of the living retired Judges of the New York Court of Appeals, except for two which are scheduled in the coming months. We are proud to say that we have completed the histories of the two Former Chief Judges Judith S. Kaye and Sol Wachtler. We are also developing a video library of the histories of members of the New York Bar who stand as legal luminaries. This rich content will someday be made available to the public, and we are working hard to prepare these important resources.

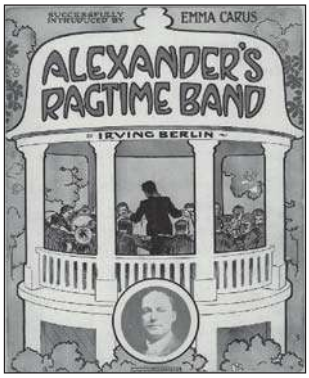
EDUCATION INITIATIVES

Grants to Bard High School Early College

In addition to the **David A. Garfinkel Essay Contest** which is separately presented in this issue, we have provided grants to Bard High School Early College, a public school with campuses in Manhattan and Queens, to develop classroom curriculum teaching its students about the role of the courts in a civil society…how to administer justice and preserve the rule of law. The curriculum is designed to reach a diverse population of New York City public students in

middle and high schools. The 2010-11 curriculum was developed for the students attending Bard High School Early College on its campuses. The 2011-12 curriculum was developed for middle-schoolers attending after-school classes at Bard, drawn from neighboring low-performing middle schools. This middle-school curriculum specifically targets difficult to reach, underprivileged students. Our Trustees have been welcomed to the school to observe the curriculum at work, and have made several trips.

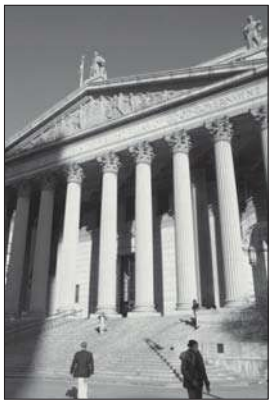
What's Ahead…invitations to follow



Litigation and the American Songbook: An Evening of Live Music and Copyright Law

May 23, 2012 • The New York City Bar

We are looking forward with much anticipation to a special Spring program, created by our President, Hon. Albert M. Rosenblatt. It will feature a lecture by Robert Clarida on copyright infringement cases illustrated with the live music of Ted Rosenthal on the piano.



2012 Stephen R. Kaye Memorial Program New York's Legal Landmarks

October 30, 2012 • The New York City Bar

This impressive and fun program will take a look at New York City landmark cases and its truly gorgeous courthouses. We will feature a slideshow presentation of New York City's legal edifices presented by Robert Pigott, followed by a look at important landmark cases with a distinguished panel: Robert Tierney, Chair, Landmarks Preservation Commission, and Leonard Koerner, Chief Assistant Corporation Counsel and Chief of its Appeals Division.

WEBSITE

I close with the good news that we are nearing the completion of a totally revamped website. We plan to launch the site in the coming months. Its access and tools are cutting edge and user friendly. It will expand on our current site to include a virtual library of NYS legal history, education resources, and a wonderful digital library of images. Our goal is to reach the largest possible audience, and we will enhance this opportunity by coupling the new website with our entrance into social media.

The Historical Society *of the* Courts *of the* State *of* New York

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Courthouse Art

Portrait of Former Chief Judge Judith S. Kaye now hanging in the courtroom of the New York Court of Appeals

Chief Judge Kaye wanted her portrait painted by a woman. At the time she commissioned her portrait, Laurel Boeck was the only woman artist on the list of Portraits Incorporated, the agency that the Court uses. Ms. Boeck met with Judge Kaye and took a series of photographs from which she executed the portrait. Judge Kaye very much wanted her portrait to be a "woman's picture," and so she specified that the pictures of her family be included. She also directed the red background.

Excerpted from the remarks of New York Court of Appeals Judge Susan Phillips Read on October 14, 2011 at a ceremony in the courtroom for the portrait presentation in its home at the back of the courtroom, facing the First Chief, John Jay, both in red.


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