A PERIODICAL OF NEW YORK COURT HISTORY

in JUDICIAL NOTICE

ISSUE 18 ~ 2023

HISTORICAL SOCIETY *of the* NEW YORK COURTS

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Judicial Notice *accepts articles submissions on a continual basis throughout the year. Submissions are reviewed by members of the Board of Editors. Authors are not restricted from submitting to other journals simultaneously.* ***Judicial Notice*** *will consider papers on any topic relating to New York State's legal history. Submissions should be mailed to the Executive Director.*

From the Editor-in-Chief

Judicial Notice 18 articles take us back to New York events occurring in the latter part of 19th and early part of the 20th centuries. Judge Richard A. Dollinger describes the intersection of the lives of two diametrically opposite characters in Western New York: John Hazel, the old line G.O.P. loyalist who, in 1900, became the first Judge from the newly created federal district court for Western New York, and Emma Goldman, the famous if not notorious Russian immigrant and anarchist. Judge Hazel presided over the trial and sentencing of Leon Czolgosz, President William McKinley's assassin. Czolgosz claimed to have been influenced by the work of Emma Goldman, making her seem to be an unindicted co-conspirator, although the two never met and Goldman decried his act.

Professor Mary Noé recounts the amazing story of Harry Thaw, socialite and assassin of renowned architect Sanford White. Thaw, the scion of a wealthy New York family, was prosecuted twice for murdering White, but it seems the lawyers and judges involved in the prosecution ended up in as much trouble as did the defendant. In the second trial, his insanity defense prevailed, but Thaw was committed to Matteawan State Hospital until he was able to prove he was no longer insane.

Your editor has written an article about Samuel J. Tilden, a distinguished New York lawyer, governor, and statesman, who won the majority popular vote for president in 1876 and who could have rightfully claimed that the election was stolen; but who sought for the sake of the country not to challenge the result. Breaking up the notorious Tweed Ring and assuring the establishment of the New York Public Library are but two of things for which Tilden should be remembered.

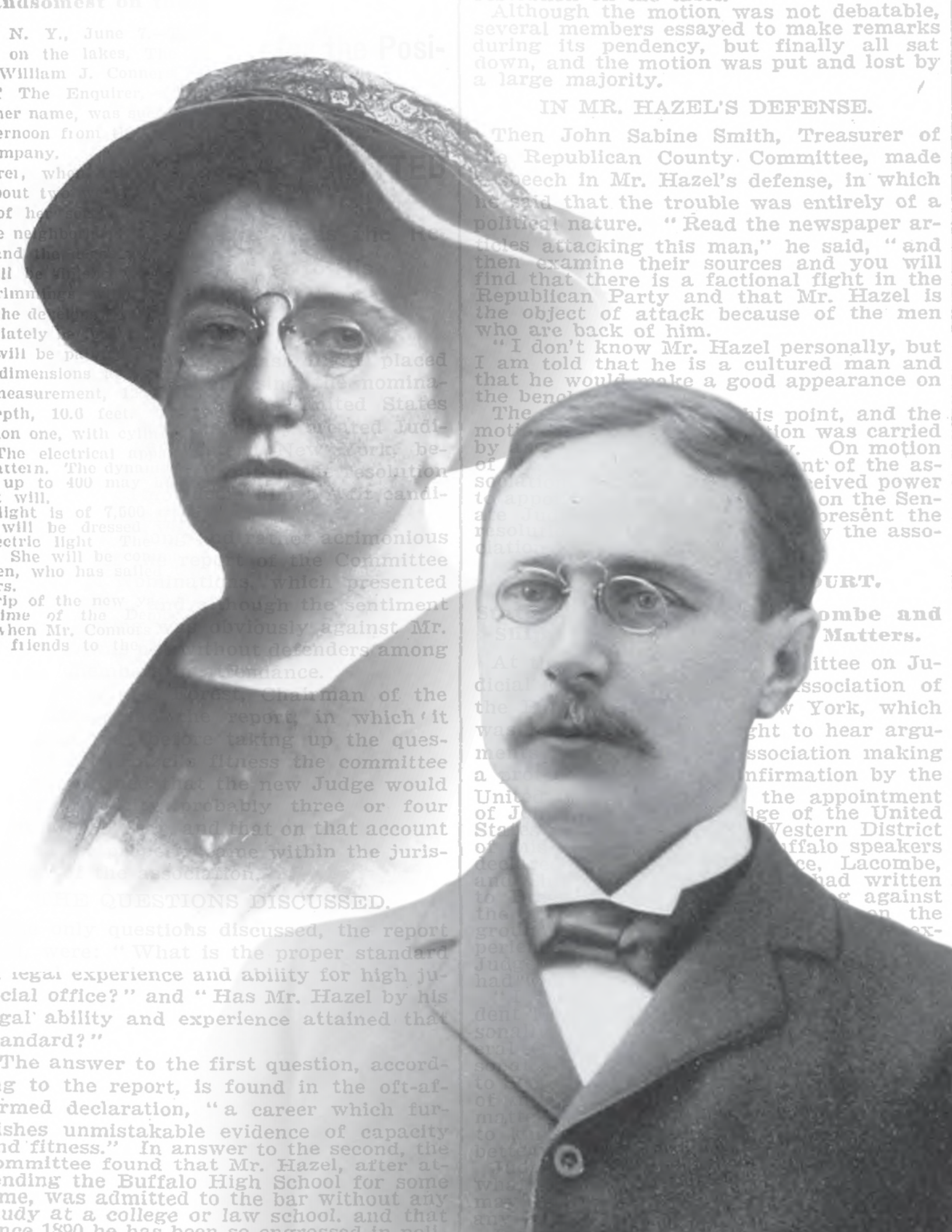
Although *Judicial Notice* has already featured a number of articles about New York Chief Judge and United States Supreme Court Justice Benjamin N. Cardozo, it seems there will never be too many.

Former *Judicial Notice* Editor and State Bar President Henry M. (Hank) Greenberg provides what he aptly describes as an "inspiring tribute" in "Washington, the Constitution Builder," that Chief Judge Cardozo delivered in 1932, one week after having been nominated by President Herbert Hoover to the United States Supreme Court. The speech was part of an Albany celebration of the 200th anniversary of George Washington's birth. Given during the heart of the Great Depression, it resounds with meaning for us today. In a short accompanying article, Greenberg speaks about Cardozo's significant extra-judicial writings that have contributed mightily to our understanding of American common law and jurisprudence and the development of the Rule of Law as a cornerstone of democracy.

In the "Angle of Repose," Professor John Q. Barrett describes a letter written in 1948 between Jacob Billikopf, an immigrant who became a prominent social worker, and Edward Lazansky, a first generation American who became a successful New York lawyer, New York's Secretary of State, and Presiding Justice of the Second Department. Both, as young Jewish men during the turn of the century, had become friends and admirers of Judge Cardozo. In the letter, written ten years after Cardozo's death, Lazansky assures Billikopf that the scholarly and judicial Cardozo also possessed a dry wit. It was demonstrated when Cardozo tried to enlighten a colleague about a case involving a bulkhead in Jamaica Bay and Mill Basin in New York. Professor Barrett followed up with a scholarly description of the actual case, which may be of particular interest to maritime lawyers.

As always, we are grateful to our authors for their scholarship and diligence. We again thank Marilyn Marcus as Managing Editor, Allison Morey as Associate and Picture Editor, David L. Goodwin as Associate and Style Editor, and Nick Inverso as Graphic Designer with the New York Unified Court System for all their hard work in producing *Judicial Notice* 18.

- Helen E. Freedman



BUFFALO V. ROCHESTER

The Judge and the Anarchist at the Dawn of the 20th Century

by Hon. Richard A. Dollinger (Ret.)

Hon. Richard A. Dollinger is a retired member of the New York Court of Claims, who served as an acting Supreme Court Justice in Rochester. He served in the New York State Senate and the Monroe County Legislature. He is a Rochester native who takes no position in the Buffalo v. Rochester affairs described in this article.

Part One - Elevation

They could not have been more different. The GOP machine boss, turned federal judge, from Buffalo. The Russian immigrant, self-taught "high-priestess of anarchy" from Rochester. John R. Hazel and Emma Goldman never met, but their lives, scripted in western New York, intersected twice at a critical time in America's emergence as a world power and amid changes in its law, politics, and culture.

John R. Hazel was emblematic of prosperous and thriving post-Civil War Buffalo, which by 1900 was the nation's eighth largest city. Born in 1861, Hazel became a self-taught lawyer. In the post-Civil War period, Republicans dominated New York's political landscape. Buffalo was no different. A young Hazel ran for the state Assembly in 1881 but lost. He remained in the GOP machine politics in Erie County. As the machine "boss," Hazel oversaw judicial and state legislative elections—a role that later, when he was nominated for the federal bench, came to his rescue.

Hazel became a state committeeman and attended the 1896 GOP national convention, where Buffalo's neighbor from Ohio, William McKinley, was nominated for President. Hazel campaigned for his near-state colleague and when McKinley won, Hazel assumed a greater role in state politics.

Before the 20th century and the dominance of candidate-raised money, state committeemen held substantial sway in the state's politics. Hazel could commit his Buffalo legislative delegation to support candidates for the United States Senate, who at the time were elected by votes of the state Senate and Assembly; direct election of United States senators did not become law until two decades later, upon passage of the 17th Amendment. Hazel's real skill was in the election of judges, especially state Supreme Court judges. A number of those whom he supported ascended to the bench by the late 1890s.

Hazel's political influence extended beyond Erie County. In 1898, Hazel worked to elect the Rough Rider hero Theodore Roosevelt as governor of New York. In his autobiography,[1] Roosevelt would credit Hazel as one of three sponsors of his nomination during the GOP state convention. Roosevelt's eventual electoral victory added to Hazel's political clout.

Portrait of Emma Goldman from *Anarchism and Other Essays*, c. 1910. Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-02894.

EMMA GOLDMAN NOW ALIEN.

Deprived of Rights of Citizenship by Disfranchisement of Her Husband.

Special to The New York Times.

BUFFALO, N. Y., April 8.—Judge Hazel, in the United States Court this morning, granted an order canceling the citizenship papers of Jacob A. Kersner. Through this order all rights of citizenship also are taken from Kersner's wife, who is none other than Emma Goldman, the woman leader of the Anarchists in this country, whose fiery teachings, it was charged by many, incited Leon Czolgosz to the assassination of President McKinley.

The order was granted upon motion of Special United States Attorney P. S. Chambers of Pittsburg, and the evidence upon which it was based was presented principally by Kersner's own father, who was subpoenaed from his home at Rochester.

Kersner obtained his citizenship documents in 1884, when the statutes governing such procedure were quite lax compared with the present laws. He was two years under age at the time. Three years later he married Emma Goldman. She was a foreigner herself, but by virtue of her marriage to a citizen she was clothed with the rights of citizenship. Emma was only a girl then, and had barely begun the career that later connected her so closely with the "Reds" in the public eye.

The New York Times, April 9, 1909. Copyright the New York Times.

Hazel's work continued. In the wake of the 1898 election, a new state legislature elected Chauncey Depew as a Senator from New York. Hazel's biography describes Depew as "a strong personal friend" of Hazel.[2] Depew was well-known in the Buffalo area as a former assemblyman, lawyer of Vanderbilt railroads, and president of the New York Central Railroad System. When a new village was incorporated in Erie County that held a terminal for the railroad, the village incorporators named it after the GOP standout and railroad stalwart Chauncey Depew. In this author's view, Depew no doubt had a soft spot in his heart for Hazel, as he was aware of Hazel's work with Roosevelt, his hands on the levers of the Erie County GOP machine, and his votes from the Buffalo-area GOP delegation in the recent Senate election.

In 1900, while seeking to expand Buffalo's representation on the federal bench, Congress created the Western District of New York, a 17-county region from the Pennsylvania state line into New York's central region. Senator Chauncey Depew sponsored its creation, and together with President McKinley, immediately began seeking a candidate for the district's first judgeship. He would not have to look hard.

As Hazel collected political chits in Buffalo, a different saga unfolded in Rochester. In 1887, a young Russian immigrant woman, Emma Goldman, arrived in Rochester to live with her sister. She was contemptuous of Rochester, claiming "it was too provincial to permit an interesting life."[3] She later declared that she experienced "joy" when she left Rochester a place where she "had known so much pain, hard work and loneliness."[4] But, as one author notes, "it was amid the tenements and factories of Rochester New York…that the radicalizing of Emma Goldman" occurred.[5]

Goldman began work as a seamstress in Rochester's booming garment industry, but when she had the temerity to ask the owner of her shop for a

THE ENQUIRER LAUNCHED.

W. J. Conners's Steam Yacht One of the Handsomest on the Lakes.

BUFFALO, N. Y., June 7.—The handsomest steam yacht on the lakes, The Enquirer, the property of William J. Conners, publisher and proprietor of The Enquirer, from which the vessel takes her name, was successfully launched late this afternoon from the yard of the Union Dry Dock Company.

The Enquirer, when fully completed, which will be in about two weeks, will be one of the finest craft of her sort afloat. The total cost will be in the neighborhood of $75,000. Her hull is of steel, and the decks of white pine, while the cabin will be finished in bird's-eye maple. The deck trimmings will be of brass. The Enquirer, if she develops the speed expected, cannot inappropriately be termed the "white flier," as her hull will be painted white from stem to stern. Her dimensions are: Length, 144 feet; water line measurement, 123 feet; beam, 17½ feet, and depth, 10.6 feet. The engine is a triple expansion one, with cylinders 10½, 17, and 28 by 16. The electrical apparatus is of the very latest pattern. The dynamos are automatic, and 1 light up to 400 may be lighted or extinguished at will.

The searchlight is of 7,500 candlepower, and the rigging will be dressed with 200 colored globes of electric light. The yacht is of 140 tons burden. She will be commanded by Capt. Samuel Golden, who has sailed the lakes for a score of years.

The first trip of the new yacht will be made about the time of the Democratic National Convention, when Mr. Connors will take a large party of his friends to the metropolis of the West.

The New York Times, June 8, 1896.
Copyright the New York Times.

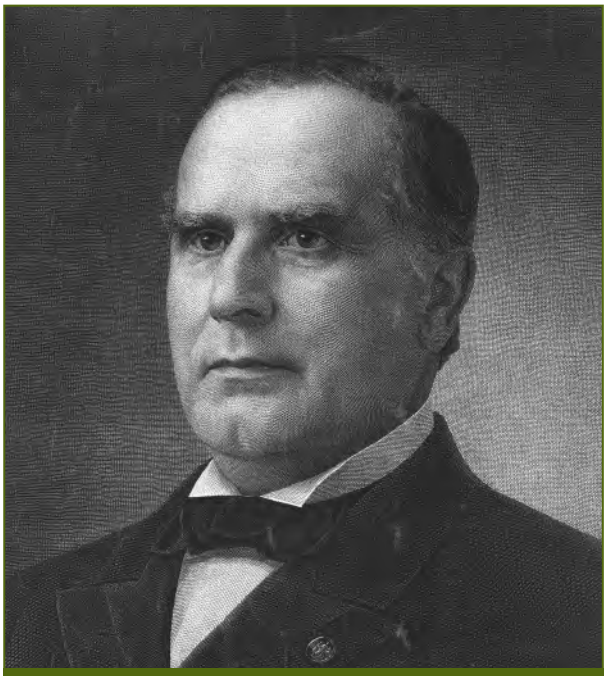
Portrait of Judge John R. Hazel, c. 1898. Originally published in *The Men of New York: A Collection of Biographies and Portraits of Citizens of the Empire State Prominent in Business, Professional, Social, and Political Life During the Last Decade of the Nineteenth* Century published by G. E. Matthews & Co., 1898.

raise, she was fired and changed jobs. Importantly, she married Jacob Kersner, a fellow garment worker, in 1887. At the time of their marriage, Kersner had become a naturalized citizen by claiming that he had lived for more than five years in the country. After her marriage, Goldman attended speeches by radicals who visited Rochester and argued for a utopian socialist vision for America. When some of those radicals were shot in the Chicago Haymarket massacre in 1887, Goldman was energized and began a lifelong commitment to anarchy as a solution for the ills of unjust capitalism.

When her marriage failed, she was divorced by a Jewish beth din (religious tribunal) and left Rochester for a time. She returned in 1888 and remarried Kersner. But when the second marriage had no greater success than the first, her family scorned her, and the Jewish community ostracized her. Without even considering a divorce, she left for New York City with just her sewing machine.

In New York City, the young and attractive Emma Goldman found love in a long-term relationship with fellow socialist/anarchist Alexander Berkman and her own voice for social justice. She quickly became proficient in English and developed a pointed and enthusiastic writing style. Jailed in 1893 for inciting a food riot, she spent a year in prison, where she worked a nurse. After her release, she published articles on anarchy and the need for social justice. She toured America giving speeches and by the spring of 1900, she was considered the "high priestess of anarchy in America."

Thus, while Goldman was on her way to becoming the "most dangerous woman" in America—as



Portrait of President William McKinley during his presidential campaign, 1896. Library of Congress, Prints & Photographs Division, LC-DIG-ppmsca-46746.

J. Edgar Hoover once reportedly described her[6]—Republican Senators Depew and Platt recommended John Hazel to President McKinley as the first judge on the newly created Western District.

The nomination, in May 1900, drew a storm of protest. The editor of the Buffalo Express, one of the city's vibrant newspapers, delivered a two-fold rebuke of Hazel. The first centered on the sale of a yacht owned by a Buffalo merchant to the United State Navy in 1898, at the commencement of the Spanish American War. Dubbed the "Enquirer," the yacht was sold to the Navy for $80,000; Hazel, as the attorney for the seller, received a $5,000 commission. The sale might have passed without mention, but a later Navy appraisal of the yacht set its value at only $20,000, suggesting that Hazel's politically connected client had been compensated handsomely for a yacht worth substantially less than what taxpayers had paid.

A detailed investigation reveals that another famous New Yorker—and, for that matter, both state and national politics—may have played a big role in the "yacht scandal" and its impact on Hazel's nomination. In May 1900, virtually simultaneous with Hazel's nomination to the bench, the United States Senate began an investigation into war-time defense spending and, particularly the purchase of yachts by the Navy at the outbreak of the Spanish American War. On May 31, 1900, the Washington Post published an article with the headline: "Yacht sold to Uncle Sam – Judge-elect Hazel helped to engineer the deal with great profit."

Former Congressman Rowland B. Mahany, a Democrat from Buffalo, had criticized Hazel in remarks made in September 1899 before his nomination. His comments were published by the Buffalo Express and then entered in the Congressional Record on May 31, 1900, during the Senate debate over naval appropriations during the war.[7] The Record transcript reveals Mahany's claim that Hazel, the well-connected GOP pol, had used "influence" to have the Navy overpay for the vessel, working together with a Republican Congressman D.S. Alexander. Mahany added: "as a member of Congress, my duty was to serve the people and not sell yachts for Democratic bosses." Mahany said that Hazel told him the owner of the vessel had received only $60,000 of the purchase price and that Hazel's commission, $5,000, left $15,000 in unaccounted-for dollars spent by the government.

Mahany also claimed that he asked Hazel, point blank, what happened to the remaining $15,000. According to Mahany, Hazel responded: "oh, come now, I can't tell you all about it." In his later remarks, Mahany added: "history does not record where the other $15,000 went."

In response to Mahany's allegations and the Washington Post article, Congressman Alexander, a Buffalo Republican, submitted an affidavit from Hazel into the Congressional Record detailing his role in the yacht sale. Significantly, in describing his work to secure purchase of the yacht, Hazel admitted that after the naval appropriations bill was passed, he contacted the "assistant secretary of the Navy" to consummate the purchase. He rebutted Mahany's allegation that the owner was paid only $60,000. The former owner of the vessel also defended the purchase by the Navy Department. Congressman Alexander, defending his role in the sale, admitted in the Congressional Record that Hazel had approached him to help secure the purchase of the yacht and that he too visited the "assistant secretary of the Navy" regarding the purchase before it occurred.[8]

Who was the "assistant secretary of the Navy" in early May 1898—lobbied by both Hazel and Congressman Alexander—when the Navy purchased the yacht? None other than Theodore Roosevelt served as the Assistant Secretary until May 10, 1898. It appears that just before Roosevelt left his office to form the Rough Riders and less than four months before he was nominated for governor, he was involved in the alleged $15,000-shortfall yacht purchase. Hazel admitted he talked to the assistant secretary of the navy about the purchase of the yacht. In an affidavit that he submitted to the Congressional Record, he never mentioned Roosevelt by name. Roosevelt, as the Assistant Secretary, would have been involved in the approval of the purchase of the yacht.

The plot thickens when the timing of the yacht dispute is cast against the backdrop of New York and federal politics both in 1898 and 1900.

In 1898, when the yacht was purchased, Roosevelt was already being considered as a possible Republican candidate for governor. Senator Thomas Platt, the statewide GOP boss, had abandoned the incumbent governor and was recruiting Roosevelt to succeed him. Hazel, with his substantial Buffalo political connections, was positioned to assist Platt in that quest. Roosevelt later acknowledged that Hazel was instrumental in securing his nomination for governor.[9] It seems that Roosevelt in 1898 had an interest in helping Hazel with his sale of the yacht while Hazel had an interest in promoting Roosevelt's claim to the governor's office. To some, turning a blind eye to the Navy's overpaying for a yacht in which a friend had an interest might be perceived as a small price to pay for helping secure a gubernatorial nomination.

The same political dynamic casts a shadow over the Senate investigation of the sale in 1900. McKinley's vice president had died, creating a vacancy for the vice president's job. Roosevelt, as the incumbent New York governor, was touted as the ideal vice president candidate; and, at the same time, Senator Platt, the GOP state party boss, was looking to dump the "too-independent" Roosevelt from the state ticket.[10]

Hazel, as a Roosevelt backer and friend of McKinley, must have known that Roosevelt could not be tied to the yacht sale scandal, brewing in Washington. Both Hazel and the yacht owner, in their affidavits to the Congress, minimized the "assistant secretary of the Navy's" involvement in the sale. The United States Senate, perhaps influenced by Senator Platt's desire to see Roosevelt booted from New York's governorship into the seemingly inconsequential vice presidency, never considered Roosevelt's involvement in the sale. A report from the Navy Department, released as Hazel's appointment was pending in the Senate, defended the Navy's decision to buy the boat for the agreed price, but the brevity of the report and its exquisite timing when Hazel's name was before the Senate suggested it was something of a fig leaf for Hazel, Roosevelt, and Senators Depew and Platt during the nomination process.

While the yacht scandal surfaced while Hazel awaited confirmation, an objection raised by the

THE BAR OPPOSES HAZEL NOMINATION

Criticises His Fitness for the Position of Judge.

POLITICAL ABILITY ADMITTED

His Selection Condemned as the Reward of His Services to His Party.

The Bar Association last night placed itself on record as opposing the nomination of John R. Hazel as United States District Judge for the newly created Judicial District of Western New York, because, as was pointed out in the resolution adopted, it did not deem him a "fit candidate" for the office.

There was a long and rather acrimonious discussion of the report of the Committee on Judicial Nominations, which presented the resolution, and although the sentiment of the meeting was obviously against Mr. Hazel, he was not without defenders among

The New York Times, June 1, 1900.

Buffalo Express resounded in the New York legal community. Hazel had spent most of the last decade working in GOP politics; he was seldom seen in a courtroom and acknowledged during the debate over his nomination that he had been involved in only four courtroom matters in the decade before his nomination. While the editor of the Buffalo Express ignited this controversy, bar associations in the new western district and beyond debated the merits of Hazel's claim to the office.

The Buffalo Bar Association debated Hazel's fitness and eventually passed a resolution supporting his nomination. The most powerful support accorded Hazel came from a likely source: the region's state judges. Almost all the Republicans who had Hazel's support when running for election strongly attested to Hazel's character and swayed the Buffalo Bar Association.

In Rochester, the bar association convened a special meeting to discuss Hazel's fitness. It was described as "a more largely attended gathering of the Rochester bar and the interest at all times was intense."[11] The Buffalo judges appeared and backed Hazel, but Rochester's legal community expressed skepticism. After a fierce debate, the association took no position.

The New York City Bar Association took a more forceful stance, opposing Hazel's appointment, finding him unfit for the job, and suggesting that McKinley find another candidate. The City Bar concluded: "political ability…[is] not [a] qualification for judicial office unless accompanied by legal ability and experience, which Mr. Hazel does not possess."[12] Chicago admiralty attorneys, concerned that Buffalo was a major center for admiralty law because of the numerous issues related to Great Lakes shipping, objected to his nomination because he had no experience in that field and their protest to Washington concluded that he was "not competent" and "his appointment was made by Senator Platt, who wanted to reward him for his political work."[13]

The opposition went to Washington. Five western New York lawyers testified before the Senate Judiciary Committee in opposition to Hazel's nomination, arguing that he had practically "no legal experience." However, a Republican Congressman and State Senator, as well as three attorneys, testified in support of the nomination. While admitting Hazel "had no experience as a trial lawyer," they added that his experience as a political leader "demonstrated that he would grow on the bench."[14]

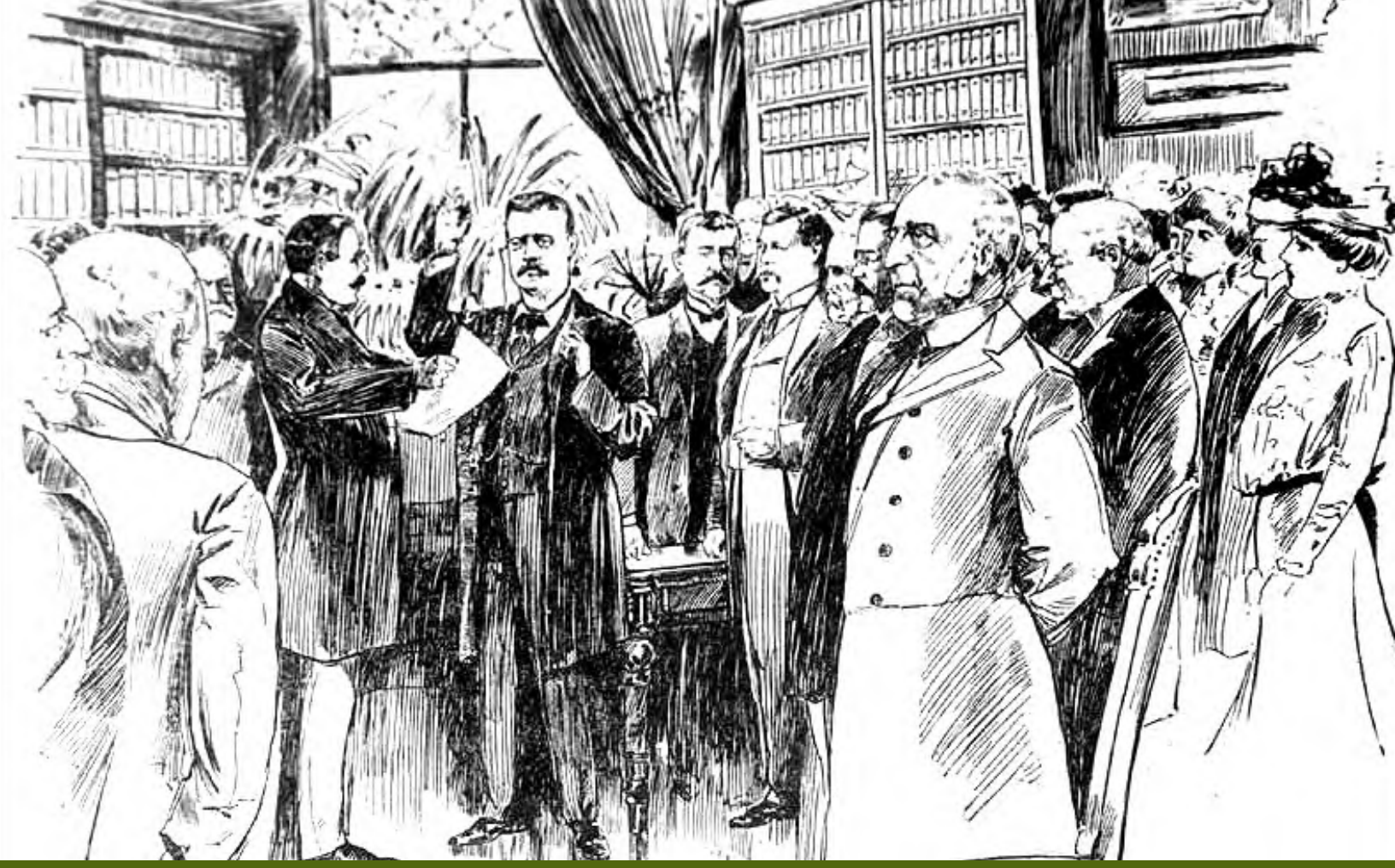
The New York Times declared on May 29, 1900, that Hazel was "eminently lacking in the qualities needed to make a good judge in United States courts" adding "it would be an insult to the bar of Western New York to call him a representative of it." The Times editorial said that both the Secretary of War and the Attorney General had objected to the appointment of Hazel. The editorial also cautioned Senator Depew:

> *It is incredible that he does not know what a judge ought to be or what a disgrace and misfortune it is to put a man on the bench who is not fitted for its duties.*[15]

The Buffalo Express noted in an editorial that the nomination was now referred to as "Now Notorious Hazel Appointment," and claimed that President McKinley had heard from the opposition and asked the objectors to take their complaints to Senator Depew for reconsideration.

The New York Times eventually took President McKinley to task over the Hazel appointment, writing:

> *This is a very shameful position for the President of the United States. It is a position politically so uncomfortable and so unpleasant morally that we do not believe Mr. McKinley will continue to occupy it. No one will much longer have the hardihood to defend the appointment. Hazel has been known only as a political worker. He has been seen in court only four times in the last 10 years. He was not ashamed to take a broker's commission in a transaction in which it is asserted that the government was cheated roundly. Mr. Depew's statement about his extraordinary recommendations prove nothing as to Hazel's fitness. It simply shows what is perfectly well-known before, that letters of recommendation are given with a reckless freedom. The President himself has virtually confessed that he now knows that Hazel is not fit to be a judge. How can he expect to escape the severest criticism if he permits the Senate to confirm the appointment?*[16]



President Theodore Roosevelt's inauguration in Buffalo, where Judge John R. Hazel swore him into office. Nashville, Tennessee News, October 13, 1901.

The nomination attracted letters to the editor. One to the Times, published on June 3, 1900, noted that another philanthropist had donated his yacht to the war effort and added: "is it strange that patriots of the [philanthropist] type are rare while those of Hazel variety are as thick as blackberries?"[17]

Senators Depew and Platt were unswayed. During the Senate confirmation process, one Senator—referenced but unnamed in the New York Times—suggested that "in order to get rid of a very unpleasant difference of opinion and to relieve the President of the embarrassment into which he has been drawn," Hazel's nomination should be withdrawn.

It is unclear whether Roosevelt, who was then the Governor of New York, joined forces but, given his relationship with Hazel it seems inconceivable to this author that Governor Roosevelt did not help Hazel attain the confirmation.

On June 4, 1900, the Senate Judiciary Committee approved Hazel with one dissenting vote from Alabama Senator Edmund Pettus, for whom the famous Selma, Alabama bridge is named. Pettus expressed doubts over Hazel "lacked the legal training and practice to qualify him for a seat on the bench."[18] Hazel's nomination passed through the Senate less than a month after his selection. Senator Platt, backed by a substantial Republican majority in the Senate, had the last word: "Hazel is an honest man and he will make a good judge."[19] So, after weathering a storm of accusations and challenges, but backed by his political friends, John R. Hazel took the federal bench in Buffalo on June 8, 1900.

Meanwhile, Emma Goldman barnstormed through the United States with a message of social compassion and justice, and a suggestion that anarchy was the only solution to America's ills. She wrote extensively in newspapers and other periodicals. She campaigned for free love and opposed marriage.

Her moment to collide with Federal District Court Judge John R. Hazel was right around the corner.

Part Two – Deportation

In the early summer of 1901, while Hazel was ending his first year on the bench, a Polish immigrant picked up one of Goldman's writings about the challenge of the capitalist society evolving in America. He was determined to hear Goldman speak, and had his chance in Chicago. He later said her speech set him "on fire."[20] He tried to meet and talk with Goldman but, although they were together for a short time during a meeting in Chicago, they never actually conferred. Spurred by her words and emboldened by her crusade, Leon Czolgosz decided it was his duty to assassinate the president of the United States.

In August 1901, Goldman returned to Rochester to visit her sister and spent a month in her American hometown. In September 1901, President McKinley went to Buffalo. He met with Judge Hazel and other dignitaries and traveled to view Niagara Falls on September 6 before attending the Pan-American Exposition.

When McKinley was receiving visitors in Hall of Music that afternoon, Leon Czolgosz fired two shots at close range.

In the ensuing melee, Czolgosz was arrested immediately. In short order, when asked why he had shot the President, Czolgosz told investigators that he had been inspired by reading and listening to Emma Goldman.

A pursuit ensued. Goldman was seen in Rochester several days before the shooting. She was in St. Louis when she heard of the shooting, but returned to Chicago where she was living at the time. Buffalo police immediately demanded Goldman's arrest, seeing a conspiracy to kill the president.

When confronted by the Chicago police, Goldman initially said she was an illiterate servant but, when pressed, admitted her identity. She was taken into custody to await McKinley's fate and the confession of his assassin.

The President's fate and Goldman's hung in the balance. A legal paradox arose. Based on his familiarity with both McKinley and Roosevelt, there is little doubt in this author's mind that Hazel wanted Goldman to be charged with federal offenses, which would allow him to try her—who most Americans believed had orchestrated the shooting—in his own courtroom. But Czolgosz had committed no federal offense. At the time, shooting a president was not a federal crime unless it occurred on federal property. Interestingly, Congress considered several bills after the McKinley assassination to make shooting the president a federal crime, but the bills were never enacted until after the assassination of President John F. Kennedy more than 60 years later.

The only crime committed by Czolgosz was a state penal law offense of assault or murder. Czolgosz could only be tried in state court.

Goldman was another matter. Federal law did provide that conspiracy to kill a federal employee was a federal crime. Therefore, if Goldman had conspired with Czolgosz, she could be tried in federal court in Buffalo, with Hazel presiding.

With McKinley's life in the balance, authorities in Buffalo grilled both Czolgosz and police in Chicago questioned Goldman. They both denied ever having discussed the shooting of McKinley. Czolgosz, while acknowledging Goldman's influence, conceded that he had never discussed McKinley with her. And when asked whether she approved the shooting, Goldman said:

> *Certainly not. What a foolish question to ask me. We have hearts; we are grieved to see persons suffer, whether they suffered from assassin's bullets or from starvation due to the greed of capital.*[21]

Still, resentment against Goldman inflamed Americans near and far.

When the president died, Hazel, still hoping to avenge the death of his sponsor, temporarily put aside his interest in Goldman. On September 14, 1901, in the Ansley Wilcox House, he swore in his political ally as McKinley's successor. John Hazel's friends now included not only Senators, elected state officials, and judges, but also the President of the United States.

By contrast, Goldman had hardly a friend in America. Sitting in a police jail and reviled for her incitement of the assassin, Goldman faced an onslaught of investigators, including federal officials, seeking to tie her to Czolgosz's crime. There are no known letters or papers from Hazel regarding Goldman's involvement in the assassination. But, in this author's view, Hazel was personally and profes-

President William McKinley's assassination when Leon Czolgosz shoots him at the Pan-American Exposition by T. Dart Walker, c. 1905. Library of Congress, Prints & Photographs Division, LC-DIG-ds-09329.

sionally hoping to tie Goldman to the crime, especially because if the charge was federal conspiracy, the anarchist-provocateur would be tried in his court in Buffalo. There is no evidence that Hazel ever opined that Goldman was responsible for the president's death but it is an easy speculation to this author that he harbored such antagonism.

The wheels of justice quickly dispatched the hapless assassin. Czolgosz was tried less than three weeks after the crime. The prosecutor was District Attorney Thomas Penny, who had been appointed to the job two years earlier by the then governor of New York Theodore Roosevelt. Two former state senators and retired Supreme Court Justices—Loran L. Lewis, a Republican, and Robert C. Titus, a Democrat and former district attorney himself—represented Czolgosz. Both would have been well known to Hazel. Certainly, Penny and Lewis, who were Republicans when Hazel was the Erie County "boss," would have been closely aligned politically with Hazel.

Representing a presidential assassin, neither attorney mounted much of a defense in the face of eyewitnesses and Czolgosz's confession. Insanity was the only option, but a series of experts who interviewed Czolgosz opined that he was sane. The defense never presented any witnesses to the contrary. Following a two-day trial that cost less than $5,000, and needing no longer than 40 minutes of deliberation, the jury found him guilty. Less than six weeks later and without an appeal, he was electrocuted in the Auburn Prison.

But on his death bed, Czolgosz absolved Goldman of any role in the crime. He admitted that he had read her writings and listened to her speeches, but she had never told him or encouraged him to assassinate McKinley.

Faced with no evidence and Goldman's assertion that she could not be penalized for her free speech, state and federal authorities decided she could not be prosecuted under any state laws or the federal conspiracy statute. In this author's view, John Hazel,

sitting in the federal bench, no doubt experienced the frustration that Rochester's Emma Goldman's anarchist speeches, translated by a lowly immigrant into justification for assassination, had escaped the law. But, while he may not have known it, he would have his chance to exact some form of revenge eight years later.

After the McKinley assassination, Goldman was "spiritually dead," in her own words.[22] She went underground, shunned the public light and avoided speechmaking. It did not last. In 1904, she returned to Rochester speaking to garment workers on behalf of the Free Speech League. In 1905, she founded *Mother Earth* magazine as a forum for her anarchist views. Over the next few years, as she toured the country, she was arrested frequently as a "suspicious person," for "inciting a riot" and producing "incendiary statements."[23] She was refused forums in Washington State, arrested in California for "conspiring against the government," and arrested in Oregon for violating the Comstock laws by distributing information on birth control. She toured the west, touting such speeches as "Women under Anarchism" and "The Relation of Anarchism to Trade Unionism."[24]

Emma Goldman's America in the first decade of the 20th century was unlike the nation today. While some extolled the virtues of thriving American capitalism, most barely eked out a living. Infant mortality soared. Child labor was not uncommon. Minimum wages were non-existent. Workers compensation was part of the public debate but without government support. Workers could be required to work more than eight hours a day. Overtime pay was virtually unheard of. Women could not vote in federal elections.

Immigrants, who flooded the country, were exploited. Blacks were segregated. *Plessy v. Ferguson*—separate but equal—was the mouthed slogan, but the reality was a pervasive and deep-seated racism throughout the country. Governments at all levels and a cautious and conservative Supreme Court stood idly by while most Americans struggled. Against this landscape, Goldman's words suggested that anarchy alone was the only tool to change the deplorable status of most Americans.

As she evaded local laws, her speeches gathered more crowds, and her following grew. In response and as part of a broader initiative to curb the growing power of new immigrants, the federal government in 1907 under President Theodore Roosevelt enacted new immigration laws to streamline the process for deporting illegal immigrants. Almost simultaneously, Goldman traveled to the anarchist Congress in Europe. Federal officials saw an opening. The Immigration Service was ordered to detain her from re-entering the country until her citizenship could be verified.

Goldman outwitted them. Aware that she might encounter problems re-entering the country, she traveled to Montreal and returned to New York by train, escaping a challenge at the border. The Secretary of Commerce issued an arrest warrant for her, but wary that any arrest would only spark protests and raise significant contributions for the anarchist movement, withdrew the warrant in November 1907.

Meanwhile, the Congress, concerned by the huge influx of immigrants and the status of women married to non-citizens, passed the Expatriation Act of 1907, which provided for the loss of citizenship by American women who married aliens.

In short, by 1908, governments at all levels were out to get immigrants and anarchists; and Emma Goldman, an immigrant and anarchist, was a prime target. Federal immigration officials began an investigation of her citizenship in mid-March 1908. As it proceeded, the government concluded that Goldman's claim to citizenship could not be derived from her father and rested solely on her marriages to Kersner. An 1855 immigration act had permitted a woman who married an American citizen to acquire American citizenship. Government investigators went to the records in the Monroe County Clerk's Office for further investigation. President Roosevelt, with the investigation of Emma Goldman obviously in mind, said in April 1908:

> *"When compared with the suppression of anarchy every other question sinks into insignificance. The anarchist is the enemy of humanity, the enemy of all mankind, and his is a deeper degree of criminality than any other. No immigrant is allowed to come to our shores if he is an anarchist; and no paper published here or abroad should be permitted circulation in this country if it propagates anarchist opinions."*[25]

Roosevelt, in another moment, called Goldman "a madwoman…a mental as well as a moral pervert."[26] J. Edgar Hoover, the soon-to-be director of the Federal Bureau of Investigation, later claimed that Goldman's activism made her among "the most dangerous anarchists in America."[27]

By the end of May 1908, federal investigators had concluded that Kersner had been improperly accorded citizenship because he was less than 21 years old at the time it was conferred.[28] If Kersner was not a citizen, then Goldman was not a citizen either. But removing citizenship required more than government investigation. It needed a federal court order annulling Kersner's citizenship.

On September 24, 1908, the government filed the petition in the appropriate federal court: the Western District of New York, where Judge John R. Hazel—the same man who was in Buffalo when McKinley was shot and had sworn-in Roosevelt—now held Goldman's citizenship, obtained through her marriage, in his hands.

Several unusual turns occurred in the legal proceeding to strip Kersner of his citizenship. First, the government could not find Kersner to serve him with the papers to initiate the proceeding. It was reputed that Kersner had gone underground and moved to Chicago. To acquire jurisdiction, the federal prosecutors published the notice of the pending claim in the Rochester newspapers. Kersner never appeared in the action.

Second, the prosecutors debated whether to join Goldman in the action. Ultimately, the Attorney General and the Secretary of Commerce concluded that Goldman should not be joined in the action because it would reveal the government's true intent: to strip Goldman of her citizenship. Goldman became aware of the pending action, but she never sought to intervene.

The case went to trial, without Kersner or Goldman, on April 8, 1909. Kersner's father and his former employer both testified to Kersner's age at the time of his supposed naturalization. He was only 17 and not an adult, as the law required.

Hazel heard all the testimony and, while considering the government's application, he well knew that the real target of the government's efforts was Emma Goldman. He knew that by stripping Kersner's citizenship, he left Goldman without American citizenship and an inability, under then current law, to return to the country if she left its shores.

After more than seven years, there is little doubt in this author's mind that Hazel now knew he could finally affect the life of the provocateur that changed America. The court order removing her former husband's citizenship was filed. A New York Times article on April 9, 1909 described Goldman as "the woman leader of the anarchists" in America and said the evidence presented to strip Kersner of his citizenship because he was underage at the time of his naturalization was "presented principally by his own father," who had been subpoenaed from Rochester.[29] The New York Times left no doubt who was the target of the federal court, identifying the subject, "as none other than Emma Goldman, the woman leader of the anarchist in this country, whose fiery teachings, it was charged by many incited Leon Czolgosz to the assassination of President McKinley."[30]

Goldman knew that her future was changed by Hazel's court order. She confided in a letter that she was "worried to death over it,"[31] and later wrote a famous pamphlet "Woman without a Country" to document her disillusionment.[32]

Hazel's order did not affect Goldman for a decade. She still toured the country, spoke, and wrote about her beliefs in anarchy. In 1911, she published *Marriage and Love*, in which she extolled love as "the strongest and deepest element in all life" but characterized marriage as a "poor little state and Church-begotten weed."[33] The same year, she offered a fierce critique of capitalism as a speaker at the inauguration of the Ferrer School, which later became the Modern School in New York City. In 1916, she was among the first American women to broach the subject of birth control. She was arrested, convicted and offered either jail or to pay a $100 fine. When she chose jail, her supporters in the court room cheered. The Little Review Magazine said Goldman was sent to jail for "advocating that women need not keep their mouths shut and their wombs open."[34]

When World War I began in Europe, Goldman spoke at a gathering of almost 1800 in Rochester against the war. She spoke elsewhere during that time on subjects as varied as education, Russian literature, birth control, sexuality and anarchism.

In 1917, at the dawn of America's involvement in World War I, she agitated against conscription, in a somewhat personal fashion because her nephew was an accomplished violin prodigy who served in the Army and was later killed in France. In Washington, President Wilson signed the Espionage Act of 1917, which prohibited interfering with the draft. On the day of its enactment, federal agents arrested Goldman for conspiring to violate the new law. Less than a month later, she was found guilty and jailed.

She served almost two years. Then, in September 1919, she was arrested again while still in jail and subject to deportation. The Hazel order stripping Kersner of citizenship, immigration officials had concluded, canceled her citizenship as well.

Almost simultaneously, and despite his antagonism to Goldman, Hazel was given another chance to deal with anarchists. In 1919, the government prosecuted an anarchist society in Buffalo for publication of a pamphlet that advocated anarchy and communism. In what can only be considered a surprising decision, Hazel dismissed the case, holding that the federal law "does not make it an offense to circulate or distribute literature of this kind." Whatever antagonism Hazel bore to Goldman, his fealty to the First Amendment—the very free speech that Goldman espoused—had prevailed.

J. Edgar Hoover led the prosecution to deport her. Goldman was deported to Russia. She later fled Russia and, despite her misgivings about marriage, married a Welsh miner in 1925. She only met him twice and never lived with him. As a result of the marriage—the institution she fled in Rochester and criticized throughout her life—she obtained citizenship in the British Commonwealth and ended up in Canada.

On one occasion, with the intervention of Theodore Roosevelt's cousin, President Franklin D. Roosevelt, she obtained a visa and returned to Rochester under her married name—Mrs. James Colton—and spoke to Rochester's City Club. She told the assembled crowd:

> *Please don't feel that I have made sacrifices, that I'm a martyr. I have followed my bent, lived my life as I chose, and no one owes me anything. I'm no more respectable than I ever was. It's you who have become a little more liberal.*[35]

The crowd gave her a standing ovation. She added that her mission was "to make people thinkers…I don't want converts to my credo – I want thinkers. I am not an agitator: I am an educator."[36] Two local newspapers noted her transformation after her speech:

> *The Rochester radical not only embraced the terrifying cult of anarchism, but took provoking delight in the title of "Red Emma." Shocking Conservatives was her specialty.*[37]

Another piece added:

> *Some of the radical views of the Red Emma of a generation ago, which aroused the natives, now appear as shocking as the daring bathing suits of that time.*[38]

Another noted:

> *Rochester welcomed…the stocky gray haired woman. Red Emma no longer scares the little boys nor fidgety old men. She's just a nice old lady.*[39]

As the articles note, the America and Rochester that greeted Emma Goldman in 1934 was changed. Minimum wages, a ban on child labor, limits on working hours, Social Security, and recognition of unions were all part of the public discourse. By the end of the decade, most had become law.

Both Hazel and Goldman lived to see the transformation. Hazel retired from the federal bench in 1931. Goldman died in 1940 in Toronto and is buried in Chicago, near the site of the victims of the Haymarket Massacre. Hazel died in Buffalo in 1951 at age 90.

In an evolving nation, the clash between Buffalo's political son and Rochester's adopted radical daughter encapsulated the changes and turbulence that heralded the new American century.

Buffalo v. Rochester - Endnotes

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Portrait of Harry K. Thaw as a young man, c. 1895.
Library of Congress, Prints & Photographs Division, NYWT&S Collection, LC-DIG-ds-10586.

MURDER AT MADISON SQUARE GARDEN

A Dream Team's Insane Game of Judicial Cat and Mouse

by Prof. Mary Noé

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Harry Kendall Thaw had a problem: if a jury found him guilty of murder, he would likely be executed in an electric chair at Sing Sing. That outcome seemed entirely possible, even probable. Six months prior, in the presence of thousands of people, Thaw had murdered the renowned architect Stanford White, shooting him twice in the face and once in the shoulder with his 22-caliber gun. The scene of the crime: a performance of the musical comedy *Mamzelle Champagne* on the rooftop of Madison Square Garden, a building White had designed. In fact, along with his partners McKim and Mead, White had created some of New York's architectural treasures, such as Pennsylvania Railroad Station, Washington Square's triumphal arch, and the Metropolitan Club.

So on a cold January day in 1907, Thaw was escorted from "The Tombs" via "The Bridge of Sighs," the elevated cast-iron bridge that spanned Franklin Street to connect with the Criminal Court at Centre, Franklin, and Elm (present-day Lafayette) Streets.[1] The courthouse was a five-story neo-Classical and Renaissance revival building erected on Collect Pond with an ostentatious entrance adorned with Roman arches, statutes, columns, and classical pediments.

It bears mention, at this point, that the accused was no obscure, lost soul; Harry Thaw's father, William Thaw, had been one of the wealthiest men in America. At the time of the elder Thaw's death in 1890, his estate was valued at $12 million (today approximately $400 million). Thaw's reserves would prove very useful indeed. According to the *New York Tribune*, the nine-year legal battle that was to follow cost Harry Thaw more than $1,000,000 (approximately $28 million today).[2] Despite all the family wealth, during the litigation, Harry Thaw protected his inheritance by filing for bankruptcy.

Waiting for Thaw in the courtroom was an unusual jurist, Presiding Justice Hon. Thomas W. Fitzgerald of the Court of Special Sessions of the City of New York for the Second Division. How Justice Fitzgerald came to preside over this high-profile case remains a mystery. Five months before the trial, Justice Fitzgerald had been held in contempt for failure to respond to his creditors in court.[3] The Justice's problems stemmed from his private-practice days; he represented a widow and refused to provide an accounting of the decedent's estate. The widow was awarded

Portrait of Stanford White, Harry K. Thaw's victim, c. 1900. Library of Congress, Prints & Photographs Division, NYWT&S Collection, LC-DIG-ds-10592.

a judgment of $2,000. Justice Fitzgerald had amassed other debts as well: $73.22 for law books, $79.00 for taxes, and a default judgment for a tailor's bill. Three months before the trial, the Justice was missing and living at the Globe Hotel, until its proprietor evicted him for nonpayment of his rent bill. No less a figure than New York City Mayor McClellan had called for Judge Fitzgerald's resignation.

Nevertheless, on January 23, 1907 Justice Fitzgerald was sitting in his courtroom—which, according to the press, was "the news center of the world,"[4] with telegraph companies running "trunk line" wires to transmit every word uttered. The trial had attracted so much attention that only 50 of the 200 reporters, sketch artists, and special correspondents were allowed in the courtroom. Others tucked into courthouse nooks and crannies. Special telephone booths were set up for newspaper reporters. One hundred messengers and telegraph boys were running messages and copy from the courthouse. The trial would be reported in papers throughout the nation as well as London, Paris, Berlin and Tokyo.

The lead prosecutor was William Travers Jerome, the District Attorney of New York County, a foe of Tamany Hall, and a cousin of Winston Churchill.[5] He was assisted by Francis Garvan. On the defense side, Harry Thaw's dream team was led by Delphin Delmas—known as the "Napoleon of the California Bar"[6]—along with attorneys John Gleason, Clifford Hartridge, Daniel O'Reilly, Henry McPike, and A. Russell Peabody,

The prosecution presented a simple, straightforward case about cold-blooded murder. Thaw intended to murder White in front of hundreds of witnesses and did so. There was no need for a retinue of trial witnesses. White's son, the coroner, and several members of the audience were thought to be sufficient.

Delmas portrayed Thaw as the defender of his wife's honor against a lecherous and depraved White. Evelyn Nesbit, Harry's wife, claimed that White had raped her. According to author Simon Baatz of *The Girl on the Velvet Swing, Sex, Murder and Madness,* Evelyn testified that "When I woke up all my clothes were pulled off me and I was in bed."[7] When she had relayed the story to Thaw before they were married, he "bit his nails, he tore his hair. His face got very white.… He sat there and he cried."[8] It was reported that when Evelyn Nesbit testified at trial, women bowed their heads and hid their faces upon hearing the salicious details.

Delmas argued that Thaw was suffering from "dementia Americana." Delmas defined this psychiatric ailment as a "species of insanity which makes every home sacred … and whoever stains the virtue [of a husband's wife,] has forfeited the protection of human law."

To the prosecution, this lawyer-invented condition was of dubious validity. And, as part of the prosecutor's rebuttal case, Jerome offered into evidence a "photographic copy" of an affidavit purportedly executed by Evelyn denying any rape. In an eyebrow-raising detail, she instead described Thaw thrashing her with a dog whip. But when cross-examined by the prosecutor, Evelyn denied she provided the information in the affidavit.

Jerome then called the attorney who drafted the affidavit to testify about its execution. Attorney Abraham H. Hummel's known criminal behavior preceded the trial: in 1872, he had been disbared for brib-

The Roof Garden at the Madison Square Garden Theatre, c. 1900.
Byron Company (93.1.1.10864) Museum of the City of New York.

ery,[9] and by the time of trial he had also been convicted of "conspiracy to illegally, falsely, and fraudulently procure and obtain an order in the Supreme Court."[10] As a result, he had been disbarred a second time, an apparent possibility in those days, and a subornation of perjury charge was still pending at the time of Thaw's trial. Hummel persuaded Jerome that in return for his testimony bolstering Evelyn's affidavit, the charges would be dropped. But Judge Fitzgerald would not allow Hummel or his stenographer to testify as to the affidavit and possibly save the prosecutor's case. The Justice excluded the testimony as extrinsic evidence to impeach Evelyn on a collateral matter.

On April 12, 1907, the jury deadlocked and was discharged. Thaw's first trial was over. It would be far from the final proceeding in this case.

In the aftermath, fate came swiftly for many of the players. Six months after the trial, the Appellate Division, Second Department removed Justice Thomas Fitzgerald from office based on a finding of "utter unfitness for office."[11] Fitzgerald died shortly afterwards, alone in a hotel in Newark, New Jersey under the assumed name of J. F. Cary.

Several of Thaw's defense attorneys also suffered cruel fates. Clifford Wayne Hartridge had a great beginning that ended badly. Of a distinguished legal heritage, Hartridge was related to two Justices of the U.S. Supreme Court, James Moore Wayne (served 1835–67) and Nathan Clifford (served 1851–87). He graduated from Columbia Law School in 1889, and when he joined the Thaw defense team, it was said he never lost a case. Hartridge received a $100,000 fee for his services in Thaw's trial.

But in a twist worthy of the trial itself, he sued Harry Thaw's mother for an additional $90,000, claiming that she directed him to pay prostitutes and other victims of Thaw's whipping "to suppress their evidence and prevent the district attorney from procuring their testimony."[12] Hartridge lost and the matter was referred to the Disciplinary Committee. His testimony placed him in checkmate: if the money was paid to the victims as he testified, he had obstructed justice; if the money was not paid, he perjured himself. In March 1914, he was disbarred, and his wife left him, taking "money and diamonds with her."[13]

Another of Thaw's defense attorneys, Daniel O'Reilly, was convicted on May 24, 1911 of receiving stolen property and sentenced to 5 months in jail. He died at age 44 in 1913.

Photograph of a crowd outside of the Tombs Prison during the Harry K. Thaw trial, c. 1907.
Library of Congress, Prints & Photographs Division, LC-DIG-ggbain-00094.

Three other members of the dream team found it necessary to sue Thaw for unpaid fees. This occurred regularly throughout Thaw's legal representation.

A hung jury, of course, is not an acquittal. Harry Thaw's second trial began almost a year after the first, with the same prosecutors but a different lead defense attorney

Martin Littleton grew up in Texas, working as a rail-splitter and brakeman on the railroads, then a typesetter in a printer's office and a clerk in the prosecutor's office. He studied law, passed the bar, and moved to New York. Prior to representing Thaw, he was an Assistant District Attorney in Brooklyn and became the Borough President. Years later he served in the U.S. House of Representatives.[14]

At the second trial, Littleton abandoned Delmas's "dementia Americana" theory in favor of a more traditional insanity defense. The testimony at the second trial provided the jury with a litany of Thaw's "insane" behaviors from childhood to adulthood. Although the law presumed that Thaw was sane, once Littleton offered evidence that Thaw was not guilty by reason of insanity, the burden shifted to the prosecution to prove beyond a reasonable doubt that Thaw was sane.[15]

The prosecution did not meet its burden in the eyes of the jury. Less than one month from the start of the trial and after twelve hours of deliberation, the jury found Harry Thaw not guilty by reason of insanity. The Justice immediately committed him to Matteawan State Hospital for the Criminally Insane in Beacon, N.Y.

Thaw's commitment set into motion endless petitions before the courts. First, he appealed the Justice's commitment order, asserting a violation of due process. Fourteen months later, the Appellate Division ruled "[i]f the defendant's plea was insanity and it had prevailed, it would follow that insanity was litigated at the trial."[16] The Court of Appeals affirmed.[17]

Thaw's stream of successive attorneys were only beginning to move into action. The *New York Tribune* opined that "[t]he Thaws set out deliberately to make a mockery of the law." The writs of habeas corpus began immediately after he was committed. After the first writ was denied, an appeal was taken and, before a decision was issued, a *second* writ was filed. Each writ requested a hearing to determine if Thaw was sane; some of the requests were for a jury, and raised a constitutional objection to the statute.

At the eventual writ hearings, Thaw's alienists (the term for psychiatrist) testified he was sane, while Matteawan's alienists testified the opposite. In almost every instance, the judge would find Thaw insane, but that never deterred his attorneys from filing successive writs and appeals to the Appellate Division, Court of Appeals and, at times, the U.S. Supreme Court (on a writ of errors).

One appeal to New York State's highest court was successful and the case was sent back. This hearing proved to be sensational. New testimony came from

Portrait of Evelyn Nesbit, Harry K. Thaw's wife, c. 1901. Library of Congress, Prints & Photographs Division, LC-USZ62-113758.

Photograph of Evelyn (Nesbit) Thaw taking the stand at her husband's trial, c. 1907. Library of Congress, Prints & Photographs Division, LC-DIG-ggbain-07120.

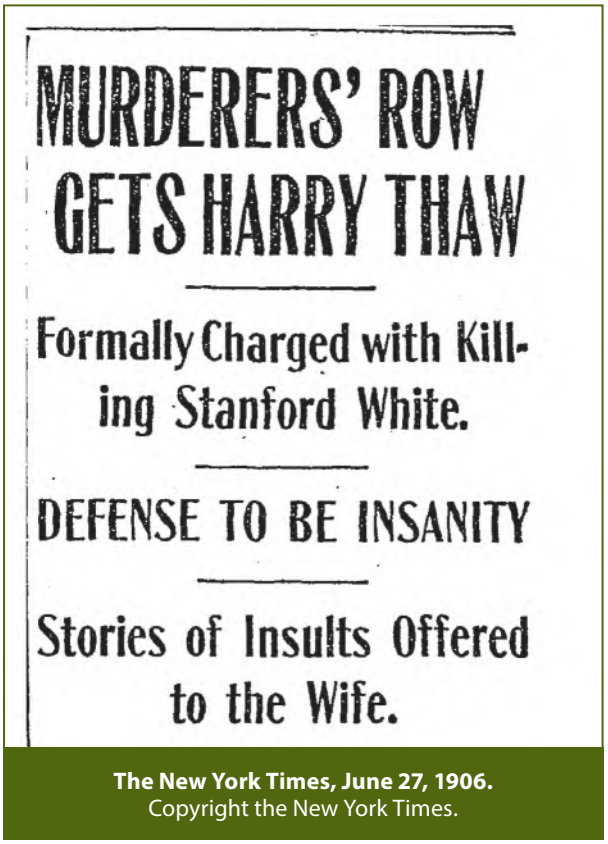
a woman who rented rooms to Thaw, allegedly for the purpose of thrashing young women who were later paid for their silence. Moreover, in the interim, Evelyn's allegiance to Thaw had shifted. She reappeared to testify that her husband told her while he was at Matteawan that he would shoot her next. The judge decided that "[t]he insanity with which Harry K. Thaw was inflicted on June 25, 1906 at the time he committed the homicide, was of the kind known as chronic, delusive insanity or paranoia."[18] Thaw was, once again, deemed legally insane.

Two years into the incessant writs, the Thaw circus caught the ire of the New York State Bar Association. A Committee of the Bar Association found the case a "standing disgrace to the administration of the criminal law" and that "he [Thaw] plans to get free upon successive writs of habeas corpus, which he purposes to apply for so long as his purse will enable him to pay zealous counsel and unscrupulous experts." The Committee noted that during Thaw's successive proceedings he spent "long and pleasant vacation from an asylum in the eleven-room apartment in the county jail … that put a blot on this state that will not easily be effaced."[19]

Around this time, one of Thaw's attorneys, John N. Anhut, followed in the footsteps of his unfortunate predecessors. Caught attempting to bribe the Matteawan superintendent to secure Thaw's release, Anhut received a prison sentence of two to four years.[20]

Six years and six writs after he was committed, Thaw adopted a self-help strategy ingenious in its simplicity. He escaped. Thaw made his way north and crossed over the Canadian border, where he was arrested as a "fugitive from justice" fourteen miles north of Vermont in Coaticoat, Quebec. A New York arrest warrant was issued for the crime of conspiracy to escape—alas, *not* an extraditable offense.

Manhattan's District Attorney Travis Jerome moved quickly to be appointed New York State Deputy Attorney General for the sole purpose of bringing Thaw back to New York. Meanwhile, Thaw had New York authorities stumped about his legal status: if he was insane, how could he form the *mens rea* necessary for the crime of conspiracy to escape?



MURDERERS' ROW GETS HARRY THAW

Formally Charged with Killing Stanford White.

DEFENSE TO BE INSANITY

Stories of Insults Offered to the Wife.

The New York Times, June 27, 1906.
Copyright the New York Times.

Thaw's Canadian attorneys managed to tangle the Canadian judicial system into knots, with writs designed to exploit many different legal issues. Thaw's attorney filed a Canadian writ of habeas corpus for his release. Canadian immigration authorities were ready to deport Thaw as soon as he was released from jail, but were prohibited from doing so while the writ was pending. Realizing they might win, Thaw's attorneys applied for a discontinuance of the writ with a right to renew. In a stroke of fortune for Thaw, the Canadian Court refused to allow New York attorney Jerome to appear in the action. Thaw was safe in a Canadian jail and looking forward to a long stay.

Thaw had also become something of a folk hero: a man who had avenged his wife's honor. When his application was granted, men in the courtroom lept to their feet, threw their caps in the air and the crowd roared "three cheers for Thaw."

Undeterred, Jerome and the Crown prosecutor dashed to Quebec to ask the Provencial Attorney General to "quash summarily the faulty commitment [of Thaw] as a fugitive from justice … in order to clear the way for deportation proceedings." The Canadian charges against Thaw were tenuous at best.[21]

The local Chief of Police submitted a writ to the Canadian Court requesting Thaw's release. The Quebec Attorney General, meanwhile, opined that jail was not a boarding house for violators of the Dominion's immigration statutes. The Attorney General importuned the judge to make a decision on the pending writ.

The Court discharged Thaw, opening the path to removal from Canadian soil. Thaw's attorneys believed they would be able to halt deportation by appealing to the Minister of Interior and presenting Thaw's case before the Canadian Board of Inquiry. Thaw testified before the Board the very next day. And, after the Board denied his request, Thaw's attorneys filed an appeal and a writ of habeas corpus and prohibition. In a strange twist of fate, Jerome was arrested for unlawfully engaging in a game of poker and spent an hour in jail until he posted $500 bail. The Canadian Minister of Justice and Acting Minister of the Interior ordered Thaw's deportation. And engaging in what might be called "extraordinary rendition," four Canadian police officers entered Thaw's cell and expeditiously transferred him into a car. Once over the border, they opened the car door and told Thaw to get out and never return to Canada.

The next stop for Thaw was a prison cell in a small town in New Hampshire. Crowds poured into town to welcome the fugitive. Meanwhile, Jerome successfully secured an indictment from a grand jury in Manhattan for conspiracy to escape and a new warrant for Thaw's arrest, along with a request for extradition.

Thaw was not done, of course. His attorney filed a writ with the New Hampshire federal court in an attempt to halt extradition efforts. The court would not rule on the writ until New Hampshire's governor decided New York's extradition request. The governor signed the extradition warrant, and he was arrested. Thaw's attorneys filed a new writ and a request for a bail hearing. The federal judge withheld a decision on bail until a report from the New Hampshire Lunacy Commission. According to the federal judge, New York's request for extradition of a man who may lack the *mens rea* to commit a crime would require a ruling from the U.S. Supreme Court.[22]

Photograph of the exterior of Matteawan State Hospital, where Harry K. Thaw was committed in 1907, 1913.
New York State Archives, Education Dept. Division of Visual Instruction, Instructional lantern slides, 1911-1925, A3045-78, DnBdZ.

Photograph of Harry K. Thaw with police and immigration officers, likely during the time of his deportation from Canada after escaping Matteawan State Hospital, c. 1913.
Library of Congress, Prints & Photographs Division, NYWT&S Collection, LC-DIG-ds-10591.

On December 22, 1914, the U.S. Supreme Court ruled, "it is for the New York courts to decide, as it is for a New York jury to determine whether, at the moment of the conspiracy, Thaw was insane in such sense as they may be instructed would make the fact a defense.… the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place. We regard it as too clear for lengthy discussion that Thaw should be delivered up at once."[23] In other words, New Hampshire needed to release Thaw to the New York authorities so that the New York courts could decide his fate.

By mid-January, Thaw was back in the Tombs, charged with the crime of conspiracy to escape Matteawan Hospital for the Criminally Insane. His audacious defense: he was sane, and therefore illegally held at Matteawan, with the *right* to leave.

The judge charged the jury that Thaw's sanity was not an issue. Nevertheless, the jury acquitted him of the crime of conspiracy to escape. One juryman made it a point to tell a *New York Times* reporter that the jury was "unanimous in their belief that Thaw is sane." The judge ordered Thaw back to Matteawan.[24]

The old machinery sprang back to life, with another writ filed for Thaw's release. The Court of Appeals eventually granted Thaw a hearing on the issue of whether he was sane.

On June 22, 1915, eight years after Thaw's first trial, another jury would hear testimony and decide whether Harry Thaw was sane.[25] The jury took fifty minutes to find that he was. The crowd both inside and outside clapped and cheered. Thaw left for dinner at the Waldorf.

Thaw's freedom was short-lived. Seventeen months after his release, Thaw lured to his room at the New York Hotel McAlpin a nineteen-year-old Kansas boy, who was in search of a job and assistance with his education in mining engineering. Thaw kidnapped the boy, whipping his back with a dog whip while "he lay across Thaw's knee."[26]

Again indicted by a New York grand jury, Thaw vanished. He was nowhere to be found. Then, twenty-five days later, a cleaning person in a Philadelphia hotel found Thaw unconscious after a suicide attempt.

THAW'S PLEA FOR FREEDOM.

Says He Is Held Illegally Under an Unconstitutional Statute.

CONCORD, N. H., Nov. 28.—Harry K. Thaw filed in the United States District Court to-day his answer to the petition of the State of New York that Sheriff Holman A. Drew be made sole custodian of the Matteawan fugitive, with authority to deliver him to the New York officials under the extradition warrant issued by Gov. Felker. Action on the warrant was stayed by habeas corpus proceedings instituted by Thaw.

Thaw sets forth that custody under the extradition warrant is not legal because it was not founded on due process of law. Such custody, he contends, is illegal and oppressive for the reason that it is based upon an unconstitutional statute and an order of commitment without trial, and also because in effect it is worse than sentence to penal servitude, in that it excludes the possibility of Executive clemency and pardon.

He asks the court to sustain his petition for a writ of habeas corpus and to order his discharge from custody.

The New York Times, November 29, 1913. Copyright the New York Times.

The Pennsylvania Governor refused to release Thaw to New York until he was found sane. After months in a hospital, a Pennsylvania Lunacy Commission and the Pennsylvania Court of Common Pleas signed a decree committing Thaw to a hospital for the insane. Hush money offered to the Kansas victim was refused. Seven years later, a Pennsylvania jury found Thaw a "sane and normal man." Thaw submitted himself to the New York authorities. A civil suit between the Kansas boy and Thaw was settled for $25,000. In December 1924 Manhattan District Attorney Ferdinand Pecora recommended dismissing the charges. Pecora became a household name when eight years later he was council at the United States Senate Committee on Banking and Currency hearings cross-examining banking giants.

Two years after his release, Thaw wrote his memoir, *The Traitor.*

Thaw's endless stream of writs of habeas corpus after his successful insanity defense was his ticket out of Matteawan under the Code of Criminal Procedure

(§454)[27] where the defendant had the burden to prove he or she was no longer insane.

It was not until 1971 that New York's Criminal Procedure Law set forth a comprehensive regime following the acquittal of a defendant by reason of insanity. Generally, an insanity acquitee may be held for 30 days (extendable to 60 days) for an examination by two psychiatrists to determine if he is a danger to himself or to others.[28] With some exceptions, the Court must hold a hearing within 10 days of the report of examination at which the Commissioner of Mental Health (and the district attorney is also given the right to be heard) has the burden of proving a dangerous mental disorder. An insanity acquitee who continues to suffer from mentally illness but is found not to be a danger to himself or others may be subject to a Court-ordered treatment plan but not held at a secure facility. If the Court is persuaded of a dangerous mental disorder, then an order of commitment to secure facility follows. There are extensive due process protections built into the legislative scheme and the Court's initial findings are subject to rehearing and review. With a nod to the Thaw experience, the statute provides that "The defendant may be apprehended, restrained, transported to, and returned to the facility from which he escaped by any peace officer …" and places the "duty" on officers to assist in the apprehension.

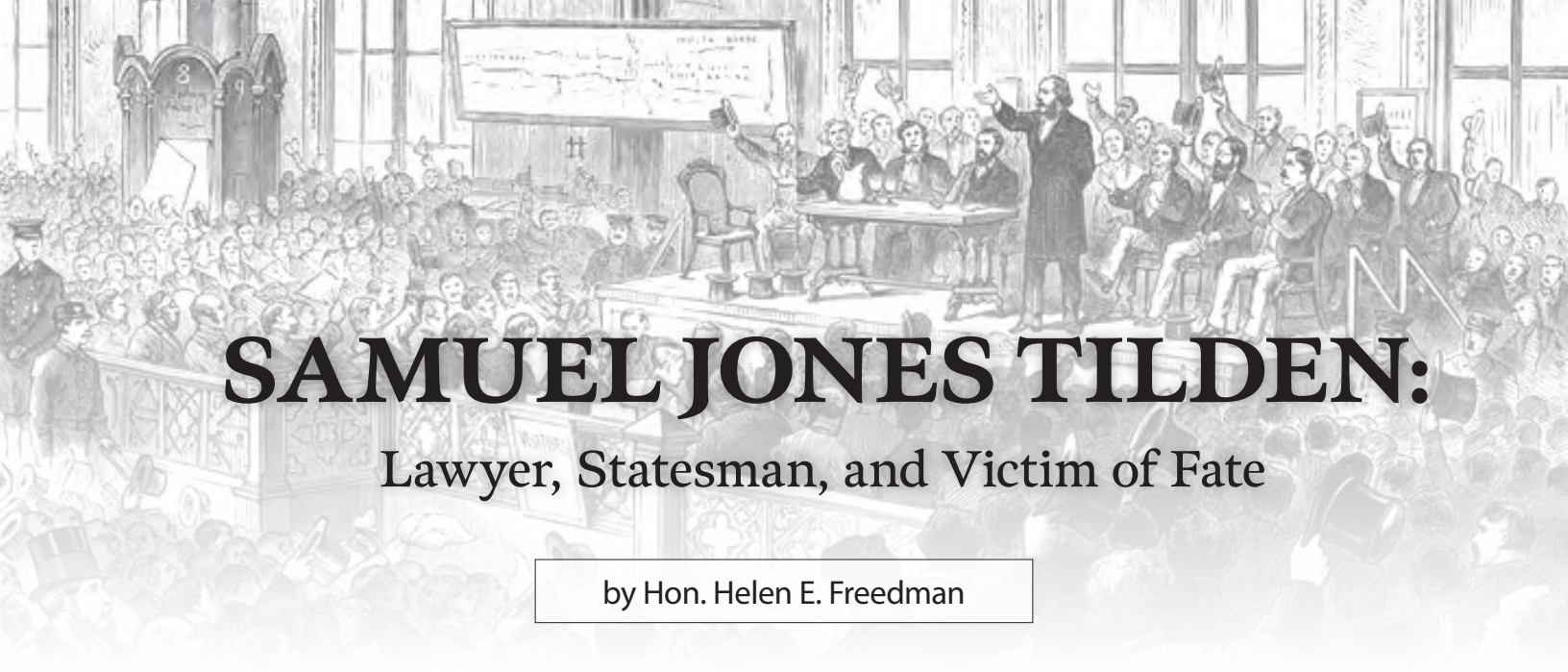
Matteawan closed its doors in 1977. Kirby and Mid-Hudson Psychiatric Center are currently New York's secure facilities.

Thaw's attempts to extricate himself from Matteawan sent the courts into the vortex of endless writs of habeas corpus. Despite the favorable change in the Mental Hygiene laws, some defendants are reluctant to advance the insanity defense because it is difficult to prove and, if successful, there is the possibility of an indeterminate sentence in a mental institution.

ENDNOTES

1. DAYTONINMANHATTAN http://daytoninmanhattan.blogspot.com/2021/10/the-lost-1894-criminal-courts-building.htm. The original Bridge of Sighs *Ponte dei Sospiri* was completed in 1603 in Venice and became known to the English through Lord Byron. The Tombs was mainly for detention except for those sentenced to be hanged. A gallows was temporarily constructed near the Bridge and then taken down after the hanging.
2. New York Tribune, July 15, 1915: 1.
3. New York Tribune headline read "Looking for Justice Fitzgerald, Jail Awaits Him for alleged neglect of Tailor's Bill." Oct. 4, 1906: 9.
4. The Sun Jan. 24, 1907: 2.
5. Cait Murphy, *Scoundrels in Law: the trials of Howe & Hummel, laywers to the gangsters, cops, starlets, and rakes who made the Gilded Ag*e (2010).
6. New York Times, Aug. 2, 1928: 21.
7. Simon Baatz, *The Girl on the Velvet Swing, Sex, Murder and Madness,* 141 (2018).
8. *Id.* at 141.
9. Murphy, *supra* note 5.
10. *People v. Hummel,* 119 A.D. 153, 154 (1st Dept. 1907).
11. *In re Fitzgerald,* 121 A.D. 911 (2nd Dept. 1907).
12. *Matter of Hartridge,* 162 A. D. 877, 878 (1st Dept. 1914).
13. Hearst News Service —Special to The Morning Times San Jose Times Star, Volume II, Number 364, 7 October 1907.
14. New York Tribune Dec. 20, 1934: 1, He later represented Harry Sinclair of Sinclair Oil fame in the Teapot Dome scandal.
15. *People v. Tobin,* 14 Bedell 278 (N.Y. Ct. of Appeals, 1903).
16. *People ex rel. Peabody v. Chanler,* 133 A.D. 159 (2nd Dept. 1909).
17. *People ex rel. Peabody v. Chanler,* 196 N.Y. 525 (1909).
18. New York Tribune, Aug. 13, 1909: 1.
19. New York Tribune, Jan. 22, 1910: 6.
20. *People v. Anhut,* 162 A.D. 517 (1st Dept. 1914).
21. New York Tribune Aug. 28, 1913: 1.
22. New York Tribune Dec. 10, 1913: 5.
23. *Drew v. Thaw,* 235 U.S. 432 (1914).
24. New York Times, Mar. 14, 1915: 1.
25. New York Times, July 3, 1915: 16.
26. New York Tribune, Jan. 10, 1917: 1.
27. Code of Criminal Procedure 454 was held constitution in *People ex rel. Peabody v. Chanler,* 133 App.Div. 159, affd. 196 N.Y. 525 (1909).
28. N.Y. Crim. Pro. L. § 330.20.

Portrait of Governor Samuel J. Tilden painted by Frank Fowler, c. 1876.
Courtesy of New York State Office of General Services/Hall of Governors.



SAMUEL JONES TILDEN:

Lawyer, Statesman, and Victim of Fate

by Hon. Helen E. Freedman

Honorable Helen E. Freedman (ret.) is currently a neutral with JAMS. She was an Associate Justice of the Appellate Division of the New York State Supreme Court from 2008 to 2014 and a Justice of the Supreme Court from 1984 to 2008. She served on the Appellate Term of the Supreme Court from 1995-99 and in the Commercial Division of the New York County Supreme Court for eight years.

Justice Freedman has been a member of the Pattern Jury Instructions Committee of the Association of Justices of the Supreme Court of the State of New York since 1994, is a member of the Advisory Council of the New York State and Federal Judicial Council, and is a Trustee of the Historical Society of New York Courts. She is the author of *New York Objections*, and of a chapter in the treatise *Commercial Litigation in New York State Courts* as well as numerous articles. She is a graduate of Smith College and of the New York University School of Law.

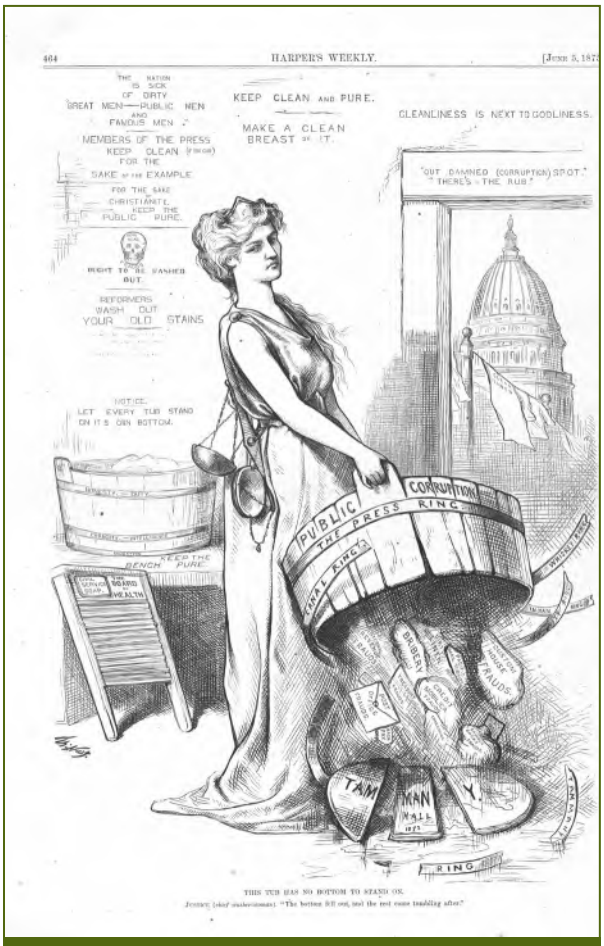
The Bar if it is to continue to exist, if it would restore itself to the dignity and honor which it once possessed, it must be bold in defence, and if need be bold in aggression.

Samuel Tilden, Organizational Meeting of the Bar Association of the City of New York, February 1, 1870

These are the words emblazoned on the wooden podium of the Great Hall of the New York City Bar Association. Although he is best known for having been the only person to have garnered a majority of the popular vote in a presidential election while still failing to become President,[1] Samuel Jones Tilden was a major legal and political figure in New York State and the United States during the second half of the 19th century. His role as a founding member of the New York City Bar Association, and the provision of his will that was critical to the establishment of the New York City Public Library, are but two of his great legacies. This article will recount many of his accomplishments in New York and briefly discuss the 1876 election that his supporters and some historians have characterized as "the Fraud of the Century."[2]

Early Years

Tilden was the son of Elam Tilden and Polly Younglove, whose families came from the Kent region of England in the middle 1600s. They settled first in Massachusetts, then Lebanon Connecticut, and finally New Lebanon in New York's Columbia County. Elam was a farmer and a storekeeper, selling Shaker furniture, seed combinations, and (later) patent medicines. According to at least one source, cannabis was the main ingredient of Tilden's Extract, one of the medicinal compounds the family produced.[3]



A political cartoon depicting Justice lifting a washtub of "Public Corruption" as it breaks before her, spilling the contents of "Bribery, Internal Revenue Frauds, Custom House Frauds, Credit Mobilier Frauds, Treasury Frauds, Post Office Frauds, Savings Banks Frauds, Pacific Mail Subsidy, Dirty Linen, [and] Embezzling," 1875. The rings of the tub that break are represented by "The Press Ring, Canal Ring, Whiskey Ring, Indian Ring, City Ring, and Tammany Ring" with the bottom labeled "Tammany Hall 1872." Library of Congress, Prints & Photographs Division, LC-DIG-ds-00955.

Samuel, born in 1814, was one of the four children, out of nine, to survive to adulthood. While the most prone to illness, Samuel was also the most intellectually gifted and successful. The young Tilden also shared his father's interest in politics. Ardent Democrats, both father and son were close friends of the "Little Magician," Martin Van Buren, then a local Columbia County hero who was later to become Senator, Governor, Vice President and President of the United States. Van Buren submitted young Tilden's work to various print media, and by the age of 18, Tilden had several articles published in the *Argus*, the Albany vehicle for the Democratic Party in New York.

Tilden later served as both Martin Van Buren's investment agent and lawyer. Tilden even drafted Van Buren's will after persuading Van Buren to leave his estate to his children rather than his grandchildren, which Van Buren had originally intended to do. The Van Buren-Tilden friendship would continue throughout the Van Buren's presidency (1837–1841) and until the Little Magician's death in 1862.[4]

Tilden also maintained a friendship with John Van Buren, Martin's son, who was a prominent New York lawyer in the 1840s and 1850s. Although John also relied on Samuel Tilden for financial and legal advice, Tilden declined his offer to become a law partner.[5]

In addition to assisting Martin Van Buren, Tilden worked in support of Azariah Flagg and Silas Wright, both political figures in the Albany Regency (the upstate Democratic counterpart to Tammany in New York City). Flagg was a newspaper publisher who became New York's Secretary of State and Comptroller. Silas Wright later served as New York State Comptroller and then Senator and Governor. In 1832, the young Tilden also met and spoke with Chancellor Kent,[6] a staunch Federalist and later Whig. Tilden respected Kent for his wisdom and legal sagacity, but the two rarely agreed politically.

Education: Becoming a Lawyer

Although Tilden's intellect made him one of the wealthiest and most sought-after lawyers and in New York State, if not the nation, his schooling was somewhat haphazard, in part because of his health issues (or, less charitably, hypochondriacal tendencies) and in part because his interest in politics distracted him from his studies.

Tilden started as a freshman at Yale in 1833 at the age of 19 as a classmate of William M. Evarts,[7] with whom he later both worked and sparred. But Tilden lasted only for about one semester at Yale. Despite

this, in 1875, the university would award him an honorary Doctor of Laws degree and enroll him as a member of the Class of 1837, citing his "eminent public service" and former connection to the university as warranting his becoming a Yale alumnus.[8]

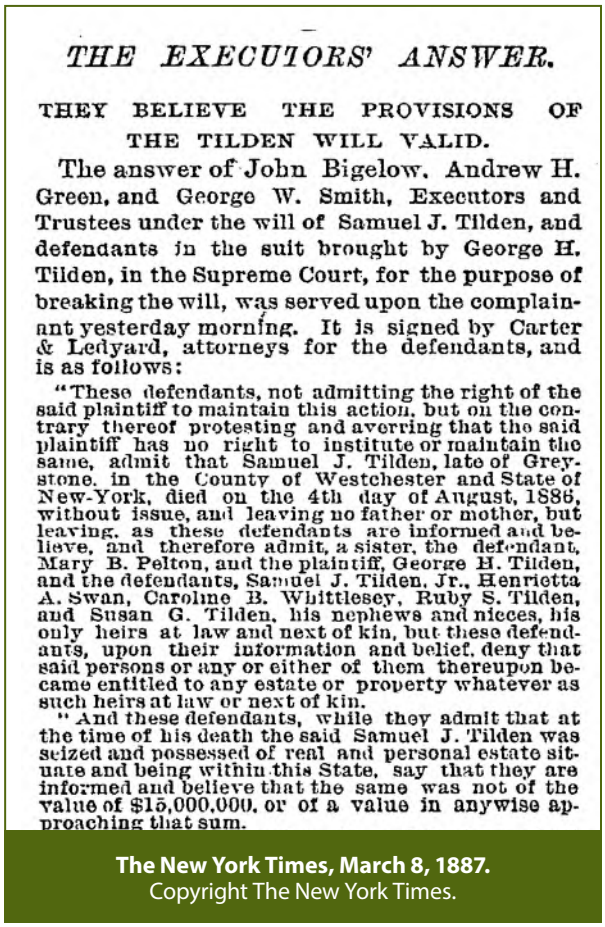
After leaving Yale, Tilden enrolled in New York University, a new and more egalitarian institution, in 1875. While he remained at NYU and studied law there, he kept taking leaves of absence—to campaign for Van Buren in 1836, to work in a law firm with John Edmunds, and to cater to his health needs. It is not completely clear whether he actually graduated from NYU despite being listed as a member of its first law school class, but Tilden's questionable status as a graduate has not stopped NYU Law, like Yale before it, from claiming him as one of its own. Most significantly, NYU named its most prestigious award, the Root-Tilden-Kern scholarship, after him and its other renowned early graduate Elihu Root.

Early Years as a Lawyer: 1840s

Tilden was admitted to the Bar in New York in 1841, becoming one of 2,390 lawyers in New York. He immediately hung out a shingle to practice law at 13 Pine Street in New York City. His practice consisted of debt collection, defending small businesses, and representing individuals receiving summonses for minor infractions. He also drafted wills for which he received $1. For court appearances, he received $10 or $15,[9] but he did not charge for providing legal advice to family members who were in businesses. Tilden also worked for Van Buren's unsuccessful campaign for re-election in 1840, so in 1841 Van Buren stopped off to visit Tilden in New York City on his way back to Lindenwald after his defeat.[10]

The next year brought a family tragedy. Tilden's father, Elam—his closest confidant and booster, who contributed financial support to Tilden's law practice by purchasing a large number of books—died unexpectedly in 1842. He was 61.

Tilden's professional fortunes, however, continued to improve. In 1843, the Common Council of New York City appointed Tilden, age 29, to the position of Corporation Counsel. In that year, Tilden tried 20 to 30 cases, prosecuting offenses like selling on



THE EXECUTORS' ANSWER.

THEY BELIEVE THE PROVISIONS OF THE TILDEN WILL VALID.

The answer of John Bigelow, Andrew H. Green, and George W. Smith, Executors and Trustees under the will of Samuel J. Tilden, and defendants in the suit brought by George H. Tilden, in the Supreme Court, for the purpose of breaking the will, was served upon the complainant yesterday morning. It is signed by Carter & Ledyard, attorneys for the defendants, and is as follows:

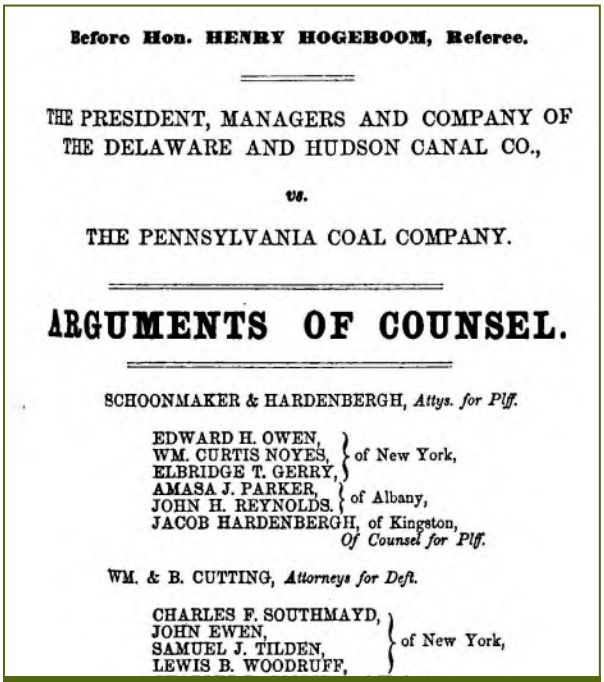
"These defendants, not admitting the right of the said plaintiff to maintain this action, but on the contrary thereof protesting and averring that the said plaintiff has no right to institute or maintain the same, admit that Samuel J. Tilden, late of Greystone, in the County of Westchester and State of New-York, died on the 4th day of August, 1886, without issue, and leaving no father or mother, but leaving, as these defendants are informed and believe, and therefore admit, a sister, the defendant, Mary B. Pelton, and the plaintiff, George H. Tilden, and the defendants, Samuel J. Tilden, Jr., Henrietta A. Swan, Caroline B. Whittlesey, Ruby S. Tilden, and Susan G. Tilden, his nephews and nieces, his only heirs at law and next of kin, but these defendants, upon their information and belief, deny that said persons or any or either of them thereupon became entitled to any estate or property whatever as such heirs at law or next of kin.

"And these defendants, while they admit that at the time of his death the said Samuel J. Tilden was seized and possessed of real and personal estate situate and being within this State, say that they are informed and believe that the same was not of the value of $15,000,000, or of a value in anywise approaching that sum.

The New York Times, March 8, 1887.

sidewalks without a license, casting coal ashes into the streets, selling liquor, operating a cab on Sunday, or driving at over 5 miles an hour.[11] For this, Tilden received a salary of $2,500 and additional small sums from litigation, netting him $2,000 after paying expenses including the cost of a $25 suit.

Tilden's tenure as Corporation Counsel lasted only a year, thanks to the election of a mayor from the opposite party. After he was relieved, Tilden returned to the practice of law. He was admitted to practice before the Chancery Court in 1846, the same year he was elected a member of the New York State Assembly from Columbia County. He also became editor of the *Argus*, the Albany Democratic newspaper, and remained active as a member of the Barnburner faction of the Democratic Party—the more radical wing of the party, in contrast to the more conciliatory Hunkers. The Barnburners opposed the extension of slavery into the territories.



Before Hon. HENRY HOGEBOOM, Referee.

THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL CO.,

vs.

THE PENNSYLVANIA COAL COMPANY.

ARGUMENTS OF COUNSEL.

SCHOONMAKER & HARDENBERGH, *Attys. for Plff.*

EDWARD H. OWEN,
WM. CURTIS NOYES,
ELBRIDGE T. GERRY, } of New York,
AMASA J. PARKER,
JOHN H. REYNOLDS, } of Albany,
JACOB HARDENBERGH, of Kingston,
Of Counsel for Plff.

WM. & B. CUTTING, *Attorneys for Deft.*

CHARLES F. SOUTHMAYD,
JOHN EWEN,
SAMUEL J. TILDEN,
LEWIS B. WOODRUFF, } of New York,

Title page of *NY Supreme Court, Ulster County, Before Hon. Henry Hogeboom, Referee: The President, Managers and Company of the Delaware and Hudson Canal Co., v. The Pennsylvania Coal Company* (1863). Courtesy of the New York Public Library via Google Books.

Foray into Electoral Politics in the 1840s

The two year term as a member of the State legislature, 1846–48, was the only elected office Tilden held before becoming Governor in 1874. During Tilden's term as an Assembly member, the Hudson Valley was beset by the anti-rent wars and tenant uprisings that followed the death of the indulgent Stephen Van Renssalaer, whose successors attempted to collect the $400,000 of debt allegedly owed by the manorial tenants.[12] Governor Silas Wright, whose campaign Tilden had supported from within the Assembly, appointed Tilden as Chair of the Committee to deal with the anti-rent war issue. Tilden brokered a compromise in which leases and rent arrearages were converted into mortgages and future leases limited to ten years.[13] Although he was offered positions as head of the Naval Office in New York and Collector for the Port Authority, a $20,000-per-year position, he turned both down and did not run for re-election to the Assembly.

Although no longer in elected office, Tilden remained a prominent party leader, serving as a delegate to the Constitutional Convention of 1846. He was then an active campaigner for Martin Van Buren, who, having been deprived both in 1844 and 1848 of nomination by the Democratic Party as its candidate for President, became the presidential candidate of the Free-Soil Party in 1848, for which John Van Buren was an organizer. The founding principle of the Free-Soil Party was opposition to the extension of slavery into territories or newly admitted states, so that white laborers would not be forced to compete with enslaved individuals.

During the late 1840s and early 1850s, Tilden also became a leader in the New York State Democratic Party's reform wing, whose main objectives were to destroy the Tweed Ring in New York City and the Canal Rings upstate, both of which had sorely corrupted both political parties. In these endeavors, he worked closely with two other widely respected lawyers, Charles O'Conor and William M. Evarts, his Yale classmate. We will return to the Tweed and Canal Rings later in this article.

Success as a Lawyer and Investor in the 1850s and 1860s

It was in the early 1850s that Tilden's law practice turned corporate, and he prospered not only from legal fees but from investments and participation in profitable corporate reorganizations. He was involved in several major enterprises, including merging of the Pennsylvania and Washington Coal Companies, reorganizing the Chestnut Iron Company, and uniting Dauphin and Susquehanna Coal with the Pequa Railroad and Improvement Company. His fee for this last endeavor was $175.[14]

Tilden was then employed to defend the Pennsylvania Coal Company when it was sued by the Delaware Hudson Canal Company for extra tolls because the canal allegedly had to be enlarged to accommodate larger vessels. During a seventy-day hearing before the esteemed Judge Hogeboom acting as referee, Tilden successfully proved that the enlargement was unnecessary and the claims were worthless

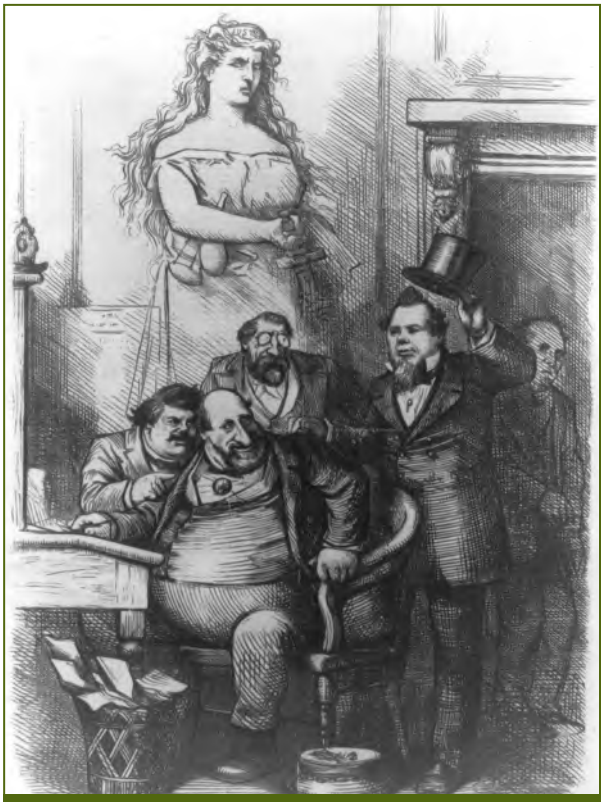
because the Coal Company did not increase the canal's utilization.

While his legal fees were fairly modest, Tilden invested in the companies he reorganized, leading to handsome profits. Tilden's success both as a lawyer and investor was attributed by biographers to his being an astute logician, a careful researcher, and a knowledgeable economist. He also charged legal fees only for work done.

Tilden also handled cases for his own family's businesses and for some individuals. He was known for careful preparation and the use of logic in representing individuals. Tilden received particular acclaim for his handling of the notorious Burdell case, involving a dentist who had been found murdered. Dr. Burdell's landlady, one Mrs. Cunningham, had been tried for and acquitted of the murder. Mrs. Cunningham then claimed that they had been married before the murder, and she was thus entitled to her ⅓ share of his estate. The dentist's heirs hired Tilden to contest her claim. Although Mrs. Cunningham produced witnesses, including a clergyman-officiant who attested to the marriage, Tilden's skillful cross examination of the witnesses, plus his careful research demonstrating Burdell was in Brooklyn at the time the alleged marriage took place in Manhattan, led him to victory.[15] Similarly, Tilden was credited with ably using logic and probability to help Azariah Flagg keep his 177 vote victory for New York State Comptroller.

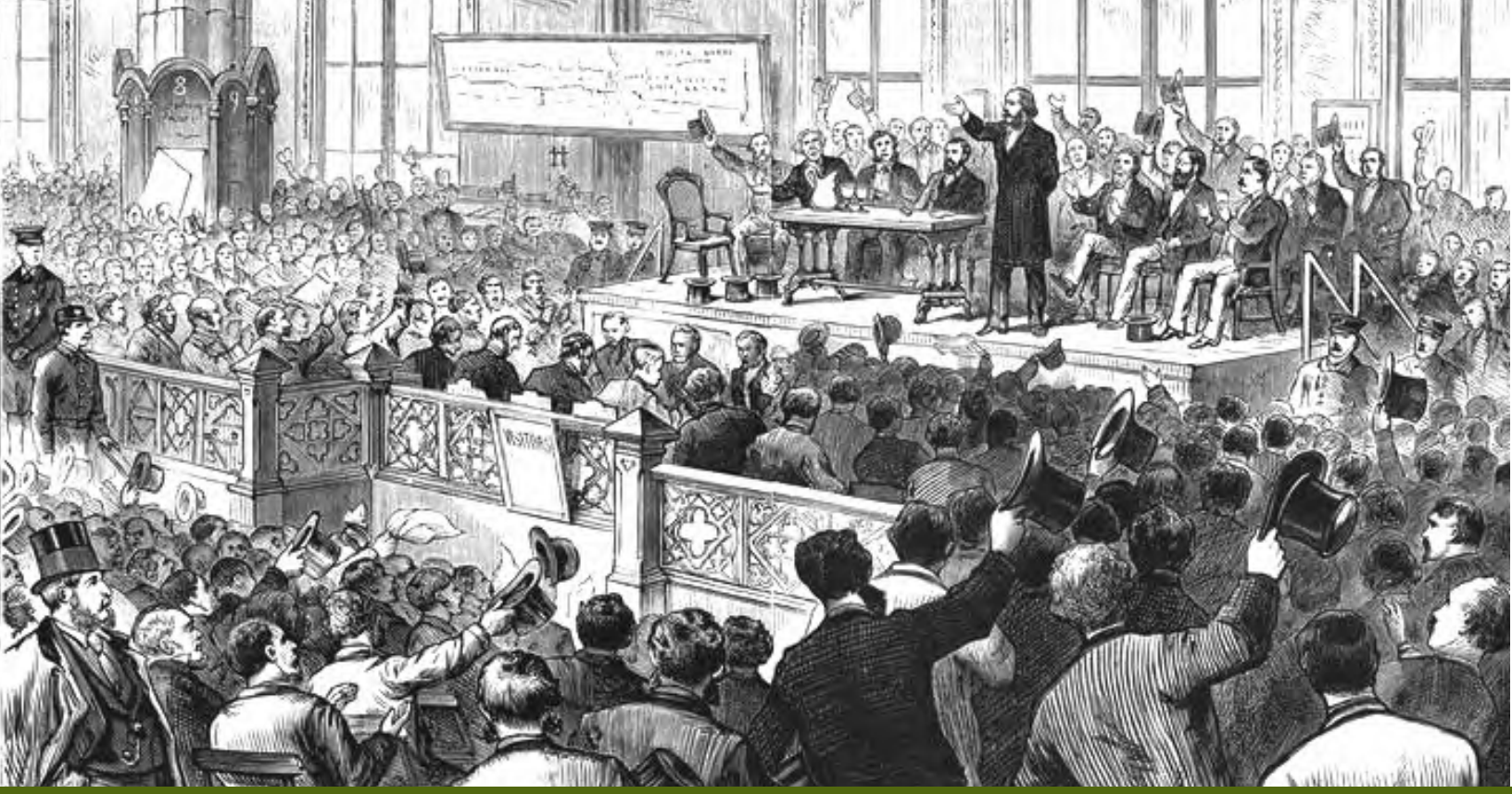
The Demise of the Tweed Ring

William M. Tweed, known as "Boss Tweed," was a member of the Assembly in the early 1850s and later a State Senator, who had gotten himself appointed to a number of boards and commissions where he perfected the art of corruption throughout the State. By enlisting both his own party elected officials and those of the opposition, Tweed controlled patronage. As a result, contractors paid three or more times the cost of municipal projects, the additional monies going to line the pockets of officials in both parties—and, most of all, his own. By creating jobs and service opportunities, he also ensured loyalty among voters. Many legislators, including those from suburban and rural districts, benefited financially from the corruption that permeated the political scene.[16] Estimates put the cost to the City and State of Tweed's thievery at anywhere from $75 to $200 million dollars.



A political cartoon depicting Sheriff Matthew Brennan greeting Boss Tweed rather than arresting him for his corruption, 1871. Library of Congress, Prints & Photographs Division, LC-USZ62-34148.

Tilden's 1869 speech at Cooper Union finally rallied good government forces against Boss Tweed. Ultimately, Tweed was arrested in 1871 and tried in 1873 for a huge number of crimes, including forgery, larceny, and theft. The first trial, in which Tweed was represented by Elihu Root, David Dudley, and six other prominent lawyers, resulted in a hung jury. Tilden's testimony helped lead to a conviction at the second trial and a sentence of 12 years in prison. Tweed later escaped from jail and fled to New Jersey, then Florida, then Cuba, then Spain. With the cooperation of Spain and with the aid of Thomas Nast's cartoon depictions of Tweed, Spanish authorities identified and apprehended Tweed and returned him to the United States. He died in jail in 1878.



Depiction of a mass-meeting of businessmen who support Governor Tilden's policies against canal frauds, 1875. The New York Public Library, Wallach Division Picture Collection.

Founding of the Association of the Bar of the City of New York

In February of 1870, Tilden joined forces with other prominent New York lawyers—Charles O'Conor, William M. Evarts, Joseph H. Choate, Henry Nicoll, and Wheeler Peckham—to found the Association of the Bar of the City of New York. Evarts was selected to be the first President of the Association and Tilden to be the Vice President. It was the first such membership organization in the United States. Tilden's words, cited at the beginning of this article, are embossed in gold on the podium of the Association's Great Hall on the second floor of 42 West 44th Street, the Association's home.

The stated purpose of the Association, the first of its kind in the United States, was to restore the dignity and honor to the bar which it once possessed. Eliminating the corruption that beset the New York City judiciary was of particular concern to the Association's founders. The Association's report on judicial corruption led to the 1873 removal of four "notorious" New York judges: Albert Cardozo,[17] John McCunn, D.P. Ingraham, and George Bernard.

Governor Tilden in 1875-76

Tilden's reputation as a Democratic leader and an effective reformer made him a natural candidate for Governor in 1874. He was nominated by former Governor and presidential candidate Horatio Seymour as the party candidate and, together with Lieutenant Governor candidate Dorsheimer, garnered 416,391 votes, defeating incumbent Governor John Adams Dix, a Civil War hero, by a plurality of 50,317 votes.[18] Dix had won in 1872 by 53,451 votes, so the extent of Tilden's victory was not anticipated. Tilden had not given many speeches, but made sure his accomplishments were known; Tilden is said to have managed his campaign by designing, paying for, and supervising distribution of a large number of campaign leaflets.

As Governor, Tilden supported Civil Service reform, final elimination of the influence of the Canal Rings, and return to hard money or specie. Hard money or specie in the post-Civil-War era was money or financing backed by silver, gold, or other precious metals. Soft money included Greenbacks, paper money printed during the Civil War on green-backed paper and backed only by the power of the government. Greenbacks were used to pay Civil War debts to contractors and soldiers and by farmers to pay for goods and services.

Tilden appointed William M. Evarts to Chair a Commission to study and report on tax allocations, as it was believed tax burdens fell disproportionately on New York City citizens. He ultimately introduced legislation to lower taxes. As Governor, he secured passage of amendments to the State constitution that punished bribery and corruption of State officials by making it a felony to receive or pay public money for false claims.[19]

The Canal Rings in upstate New York were similar to the Tweed Ring in New York City. Canal owners and contractors overcharged the state for "repairing" or "improving" the Erie and satellite canals and shared their "profits" with members of the State Assembly and Senate. As was the case with the Tweed Ring, a number of Supreme Court Judges partook of the bounty. While the Canal Rings operated more quietly, Tilden regarded them as being just as corrupt as the Tweed Ring, and worked to destroy their influence. As Governor, he obtained legislation authorizing the appointment of a Commission to investigate claims made for canal "repairs" that led both to indictments and substantial savings to the State. As it turned out, the State had paid more than four times the amounts due under contracts for repair work.[20]

While Governor, Tilden traveled around the country as a reformer, supporting civil service reform and the return to sound currency or hard money. President Grant had pledged to redeem Greenbacks in specie, but, following the Panic of 1873, many southerners and western farmers wanted to keep soft money or inflated dollars available to repay Civil War and other debts.[21]

Candidate for President-1876

Tilden's reputation as a reform Democratic Governor of New York and leader in the national Democratic Party made him a logical if not inevitable candidate to be the Party's nominee for President in 1876. The New York State Democratic Convention met in Utica and endorsed Tilden during its spring meeting. Although New York Democrats endorsed him unanimously at the convention, some expressed personal dislike because of what they perceived as his aloof or distant manner, and Tammany Democrats did not forgive him for ousting some of their own

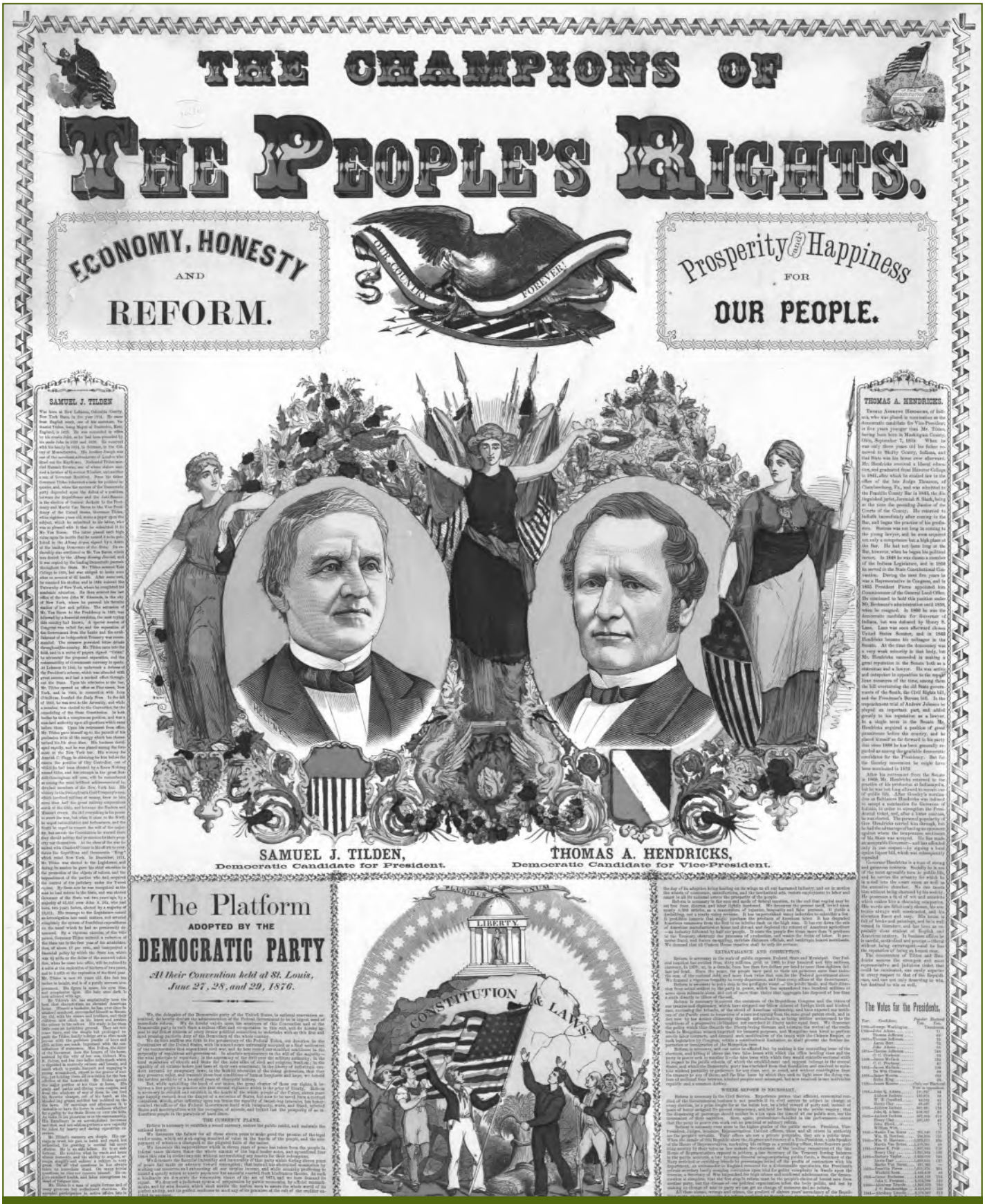
Portrait of Rutherford B. Hayes, Tilden's opponent in the 1876 election, c. 1879. Library of Congress, Prints & Photographs Division, LC-USZ62-64279.

from office.[22] In late June, the Republican Party met in Cincinnati and, on the seventh ballot, nominated Ohio governor Rutherford B. Hayes as its standard bearer. Two weeks later, the National Democratic Convention met in St. Louis and nominated Tilden to be its candidate on the second ballot. His main competitor at the convention, soft-money advocate Thomas Hendricks of Indiana, became his running mate.

Unlike later practice, candidates in the 1800s did not travel across the country to make speeches but relied to a large extent on surrogates.[23] Tilden began his campaign by designing leaflets and circulars and using letters to editors, some of which he personally wrote. He made his own significant campaign contributions, but he also raised considerable amounts from other wealthy Democratic donors, such as August Belmont, estimated to total about $500,000.[24]

Congressman Abram Hewitt was chosen by the Democratic National Committee to chair the campaign, but it was Tilden himself who ran what was considered a highly organized effort from his opulent home at 15 Gramercy Square, now the National Arts Club.[25] Tilden's nephew and a member of his household, Colonel William Pelton, ran the Speaker's Bureau and played a significant role in the campaign.

Ironically, Tilden and Hayes did not differ on most of the major issues of the day. Both were



"The Champions of the People's Rights" broadside depicting Tilden with his running mate Thomas A. Hendricks and identifying their platform, c. 1876. Library of Congress, Prints & Photographs Division, LC-DIG-pga-01431.

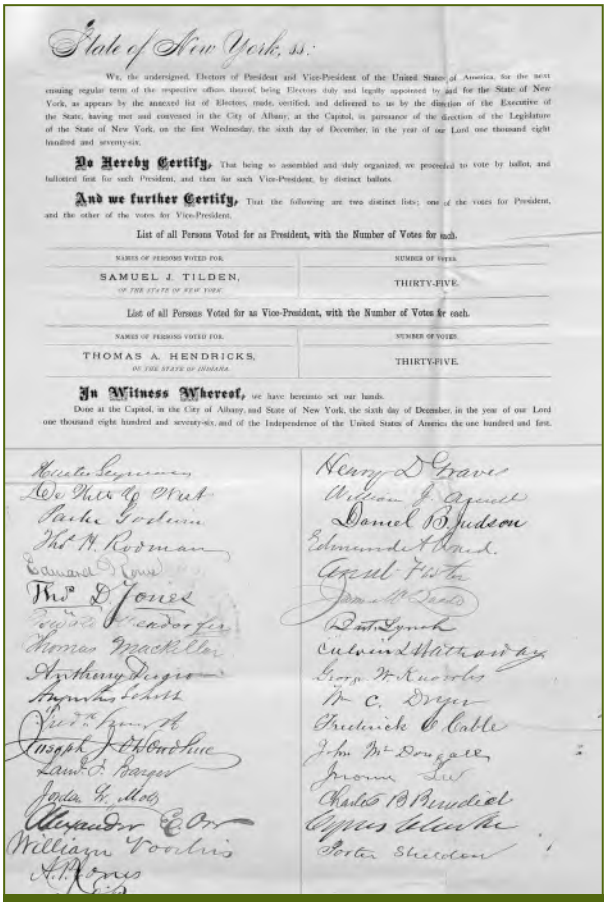
successful lawyers, Tilden the wealthier of the two; both favored hard money and return to specie, money backed by precious metals; and both advocated for civil service reform. Civil service reform or merit selection became a prominent issue in the aftermath of the scandals and corruption in the Grant Administration, as the country reeled from the lingering trauma of the Civil War.

As a Democrat, Tilden bore the cross of being associated with Southern Democrats during what was still a post-war period. Also, unlike Hayes, he did not have the advantage of having served in the Union Army.[26] However, neither candidate supported continuation of Reconstruction or the continued presence of military in the Southern States.

Meanwhile, the New York press was divided. *The New York Times* and *New York Herald* supported Hayes as the Republican standard bearer, while *New York Tribune*, the *New York Sun*, and the *New York World* supported Tilden. In Chicago, the *Chicago Tribune* accused Tilden of making a fortune by hurting sick railroads, but supporters responded that he had, in fact, rehabilitated the railroads. Both Tilden and Hayes were accused of filing fraudulent income tax returns or failing to report income under the new tax laws, but both redeemed themselves by paying what was due, in Tilden's case tax on $20,000 of income.

When the votes came in the week after the November 7, 1876 election, it was clear that Tilden had won the majority of the popular vote. The popular vote tally was 4,300,316 for Tilden and 4,036,016 for Hayes.[27] Tilden carried the formerly Republican states of New York, New Jersey, and Connecticut. He also carried Delaware, Indiana, and all of the Southern states except the three discussed below. Had Colorado not been admitted as a state in August 1876, Tilden would have had a clear majority of electoral votes, but Colorado's electoral votes all went to Hayes. The New England (except Connecticut) and Western states remained in the Republican column, with one electoral vote in Oregon in question. The total electoral vote was 184 for Tilden, 165 for Hayes.

Tilden needed just one more electoral vote to become President. The majority of newspapers declared Tilden the winner and congratulations poured into 15 Gramercy Square from all sides. However, nineteen electoral votes from the states of Florida, Louisiana, South Carolina, and Oregon were in dispute.



State of New York, ss:

We, the undersigned, Electors of President and Vice-President of the United States of America, for the next ensuing regular term of the respective offices thereof, being Electors duly and legally appointed by and for the State of New York, as appears by the annexed list of Electors, made, certified, and delivered to us by the direction of the Executive of the State, having met and convened in the City of Albany, at the Capitol, in pursuance of the direction of the Legislature of the State of New York, on the first Wednesday, the sixth day of December, in the year of our Lord one thousand eight hundred and seventy-six.

Do Hereby Certify, That being so assembled and duly organized, we proceeded to vote by ballot, and balloted first for such President, and then for such Vice-President, by distinct ballots.

And we further Certify, That the following are two distinct lists; one of the votes for President, and the other of the votes for Vice-President.

List of all Persons Voted for as President, with the Number of Votes for each.

NAMES OF PERSONS VOTED FOR.	NUMBER OF VOTES.
SAMUEL J. TILDEN, OF THE STATE OF NEW YORK.	THIRTY-FIVE.

List of all Persons Voted for as Vice-President, with the Number of Votes for each.

NAMES OF PERSONS VOTED FOR.	NUMBER OF VOTES.
THOMAS A. HENDRICKS, OF THE STATE OF INDIANA.	THIRTY-FIVE.

In Witness Whereof, we have hereunto set our hands.

Done at the Capitol, in the City of Albany, and State of New York, the sixth day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundred and first.

New York State's certificate of the Electors and their votes for President and Vice President, 1876. The New York Public Library, Manuscripts and Archives Division, Samuel J. Tilden Papers.

The Electoral Commission

The weeks following the election were filled with activity by different groups within each of the states in question. State Boards of Canvassers and State Returning Boards from each decided which electors had been chosen based on what appears to have been flimsy evidence.[28]

In Louisiana, the "Returning Boards" or Canvassing Boards, which were dominated by Republicans appointed by Federal troops to enforce Reconstruction policies, threw out votes of whole Parishes based on allegations that Negroes had been prevented from voting. In addition, Governor William Pitt Kellogg devised methods to intimidate Democratic voters and then "bulldozed" local officials to throw out votes of whole parishes.[29] There were

A depiction of the Electoral Commission meeting in the courtroom of the Supreme Court to investigate disputed electoral votes in the 1876 election between opponents Tilden and Hayes, 1877. Library of Congress, Prints & Photographs Division, LC-USZ62-97512.

similar although less-egregious examples of refusals to count votes from Democratic areas in South Carolina.

In Florida, 401 Key West votes for Tilden and 59 for Hayes were rejected because officials failed to complete the certificate of returns on Election Day. Although the Florida State Supreme Court ruled that its Canvassing Board had acted improperly by throwing out votes it determined were fraudulent, the Canvassing Board's decision was considered final. According to Tilden's friend and biographer Bigelow, Grant sent officials to Florida who conceded that Tilden had won the State, but the Canvassing Board refused to acknowledge the truth.

In each of these critical states, multiple Returning Boards reported different results, but it was the results from the Republican Boards that were certified by the states. Representatives of both candidates and of each party went to those states and allegedly promises were made and bribes were paid. Tilden instructed his representatives not to bribe delegates or canvassers. However, his nephew William Pelton was later charged with having made an offer, although nothing was ever paid.

There have been books and articles written about what occurred in the four states whose electoral votes were in question.[30] Tilden's biographers Bigelow and Flick believe Tilden was fraudulently deprived of the votes in at least the three Southern states. Michael F. Holt and Roy Morris, Jr., recent chroniclers of the 1876 election, agree.[31] The author of History Today, an on-line publication, also agrees.[32] Supreme Court Chief Justice William Rehnquist, in his readable volume *Centennial Crisis: The Disputed Election of 1876*, is a notable voice to the contrary.

While Article II, Section 1 of the United States Constitution provides that "if no person receives a majority of Electoral votes, the House of Representatives shall chuse, from among the five highest vote recipients with each state having one vote," the Senate, composed of a majority of Republicans, would not agree to invoke that constitutional provision, because Democrats held the majority of the states' Congressional delegations and Tilden would have been elected.

Ultimately, in order to prevent a return to civil strife, both houses of Congress agreed to establish an Electoral Commission composed of five Senators, five members of the House of Representatives, and five Supreme Court Justices to resolve the 20-vote issue. The Senate appointed three Republicans and two Democrats and the House appointed three Democrats and two Republicans to the Commission. The Supreme Court held the balance of power. Two Justices appointed were regarded as sympathetic to Republicans and two were viewed as sympathetic to Democrats. The fifth, Justice David Davis, who had been nominated to the Court by Abraham Lincoln, was regarded by both parties as independent. However, Davis then decided to accept the nomination of the Democratic Party in Illinois for Senate and removed himself from the Commission. Justice Joseph B. Bradley was appointed in his place. Bradley, a Grant appointee, was thought to be allied with the Republicans.

Both Tilden and Hayes declared the Commission unconstitutional, but reluctantly agreed to accept its decision.[33] The Commission did not meet until four weeks before the inauguration date of March 4, 1877. It then heard extensively from each of the states and the partisans of each party's candidate. Former Attorney General William M. Evarts,[34] Tilden's colleague in fighting corruption and establishing the Association of the Bar of the City of New York, represented Hayes before the Commission. Tilden was

represented by Charles O'Conor, also instrumental in the establishment of the City Bar Association.[35]

After hearing applications from each of the four states in which the electoral votes were in question, the Electoral Commission, by a vote of 8 to 7 in each case, gave all of the disputed electoral votes to Hayes, making him the winner by a single electoral vote—185 to 184. Because Bradley withheld his decision in the Florida case overnight, there has been widespread speculation that he had been unduly influenced. Historian Alan Nevins found Abram Hewitt's later account of undue influences in his "Secret History" credible. Hewitt, Democratic Party leader at that time, asserted that Bradley had planned to vote in favor of Tilden with respect to Florida's four electoral votes but changed his vote to Hayes after a group of Republicans visited him at home. Rehnquist heartily disagrees, opining that Hewitt's "Secret History" was published many years after the fact and is based on unreliable hearsay.[36]

The House of Representatives agreed to accept the determination of the Commission in return for Hayes's promise to withdraw federal troops from southern states.[37] Although Tilden rejected attempts by his many supporters to challenge the Commission's determination, Hayes, never comfortable with the idea of the Commission, remained anxious and had himself sworn in as President on March 3, 1877, the night before the "official" swearing in on March 4. Evarts was appointed Secretary of State on March 7, 1877.

At a testimonial dinner later in 1877 Tilden said to many disappointed followers:

> *"If my voice could reach throughout the country and be heard in the remotest hamlet, I would say be of good cheer. The Republic will live. The institutions of our fathers are not to expire in shame. The sovereignty of the people shall be rescued from this peril and be reestablished."*[38]

Hayes served one term as President and was succeeded by Republican James Garfield. Garfield was shot several months after his inauguration and died two months later. It was his Vice President, then successor, Chester A. Arthur of New York, who supported and finally achieved the Civil Service reforms advocated by both Tilden and Hayes.

Photograph of the author pointing to Tilden's tombstone, 2023. Courtesy of the author.

End Game

Tilden remained an influential figure in New York politics until his death in August of 1886 at the age of 72. New York's Democratic Governor Hill consulted him frequently and followed his advice, particularly in opposing attempts by the Canal owners to expand their power and in supporting "hard money." Although Tilden's many supporters urged him to seek the nomination to be the Democratic candidate for President in 1880 and again in 1884, Tilden refused to engage actively. By 1884, it was also clear that his health had deteriorated to the point that he could not have handled the office. In 1884, Grover Cleveland, Mayor of Buffalo and then Governor of New York, became the first Democrat to be elected President since the Civil War. As Governor, Cleveland had relied on Tilden's wisdom and advice, but as President charted his own course.

After the 1876–77 election, Tilden went on a grand tour of Europe, visiting his ancestral home in England. He then bought a large farm in Greystone, Yonkers. An inveterate reader, Tilden had amassed a large collection of books throughout his life. Although still living at 15 Gramercy Park, he moved substantial parts of his huge personal library and offices to Greystone, gradually settling there as his permanent home and selling his City residence.

After several years of declining health, Tilden died in 1886. He is buried in a cemetery in New Lebanon, New York, under a large tombstone engraved with the words, "I STILL TRUST THE PEOPLE."

Tilden's Will and the Second Disappointment by One Vote

Tilden died a bachelor. His estate, consisting of real estate, stock holdings and currency, was valued at about $6 million, with some estimates being closer to $10 million. Despite numerous requests and offers by women for themselves, their daughters or their nieces, many of which Bigelow was called upon to deflect,[39] Tilden's preoccupation with his health and politics kept him from forming romantic attachments.[40] Thus, after making individual bequests of up to $1 million to various individuals—including his sibling's children and a lady with whom he was closely acquainted—and making provisions for libraries in New Lebanon and Yonkers, Tilden left the bulk of his estate for the establishment of a Trust whose purpose would be to fund and maintain a free library in New York City and to fund educational and scientific projects.

The provision of the will establishing the Trust, Clause 35, stated as follows:

> *I request that [the executors] cause to be incorporated an institution to be called the 'Tilden Trust,' with capacity to maintain a free library and reading-room in the city of New York, and such other educational and scientific objects as you shall designate; and if you deem it expedient—that is, if you think it advisable and the fit and proper thing to do—convey to that institution all or such part of my residuary estate as you choose; and if you do not think that course advisable, then apply it to such charitable, educational, and scientific purposes as, in your judgment, will most substantially benefit mankind."*

The Trustees, of whom Bigelow was leader, incorporated the "Tilden Trust," and elected to convey the entire residue of the estate to the Trust. But Tilden's heirs, his sibling's progeny, and their creditors challenged Clause 35. They alleged that it was not charitable trust under New York law because no one could compel its performance.

While the trial court upheld the will in its entirety, including the Trust,[41] the first appeal resulted in a 2-1 reversal. In October 1891, the Court of Appeals, in a 4-3 decision, sustained the appellate court and ruled in favor of the heirs.[42] At least one commentator in the Harvard Law Review found the reasoning of the majority opinion "unfortunate."[43] Thus, once again, Tilden's aspiration was thwarted by a single vote![44]

Tilden's grandniece, Laura Pelton Hazard—the only surviving grandchild of Tilden's sister Mary Pelton, and the person who would have received fully half the shares to which the heirs would have been entitled—settled with the Trust before the final decision was handed down. In exchange for close to a million dollars, she gave up her rights to the Trustees. Thus the Trust received about two and a quarter million dollars, which the Trustees put to use to establish the library that they believed Tilden wanted.

While the $2.25 million in the Tilden Trust was insufficient to a construct a library, the Trustees persuaded the City of New York to give the site of the obsolete distributing reservoir at 40th-42nd Street and Fifth Avenue to the Trust and to cover the expense of constructing a free library. The Trustees then worked with the Trustees of two other existing libraries that were not open to the public or being significantly used, the Lenox Library and the Astor Library, to merge resources with the Tilden Trust and establish the New York Public Library.

It took Bigelow, as Trustee and President of the Corporation that established the library, five years to obtain the City's approval and another nine years to get the library constructed. The 20,000 books from Tilden's personal library as well as the books of the other two libraries constituted the first volumes contributed.

The library was finally opened to the public in 1911. A large full-length portrait of Samuel Jones Tilden graces the circular stairway leading from the first floor to the second floor of the recently renovated library in its majestic headquarters at Fifth Avenue between 40th and 42nd Street, between the famous lions. The Library's official name, used on its most recent tax return, is The New York Public Library Astor, Lenox and Tilden Foundations.[45]

Conclusion

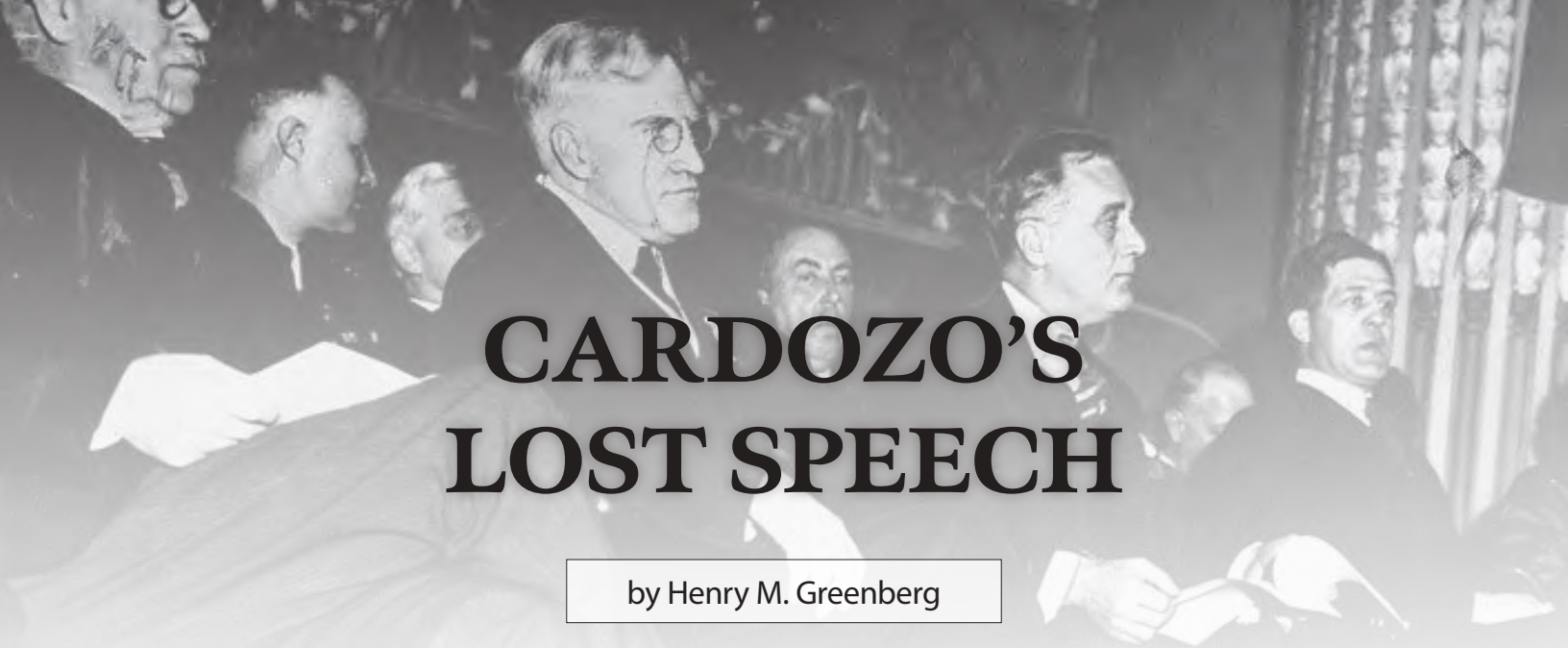
Tilden's two lasting legacies, namely the Bar Association and Library, clearly justify his admission to the pantheon of New York's great statesmen. In addition, his leadership, persistence, and success in rooting out corruption in both the City and State during the latter half of the 19th century were important achievements.

It is ironic that Tilden is best remembered for what has now become less unusual: winning the popular vote for President but losing the election. It is not clear that Tilden would have been a better President than the one-term Hayes. For example, both promised to end Reconstruction and both favored return to the gold standard. However, this author agrees that the Electoral Commission that put Hayes into office was created in violation of the United States Constitution, and that calling the election "The Fraud of the Century" was not an unfair characterization.

ENDNOTES

1. Although Albert Gore in 2000 and Hilary Clinton in 2016 received a plurality of the popular vote, neither achieved an outright majority.
2. Roy Morris, Jr., *Fraud of the Century* (2004).
3. Martin Booth, *Cannabis: A History* 112–14 (2015).
4. Alexander Clarence Flick, *Samuel Jones Tilden: A Study in Political Sagacity* 113 (1939).
5. *Id.* at 113.
6. *Id.* at 16. Chancellor Kent is featured in several *Judicial Notice* articles.
7. *Id.* at 27. Evarts, founding President of the New York City Bar Association and US Attorney General, has been featured or a subject in a number of *Judicial Notice* articles.
8. 1 John Bigelow, *The Life of Samuel J. Tilden* 273 (1895), *available at* https://archive.org/download/lifesamueljtild02tildgoog/lifesamueljtild02tildgoog.pdf.
9. William H. Rehnquist, *Centennial Crisis: The Disputed Election of 1876* at 67 (2004).
10. *Id.* at 66.
11. *Id.* at 67; Flick, *supra* note 4, at 58.
12. 1 *Bigelow*, *supra* note 8, at 112; *see also* David Edelstein, *Joel Munsell: Printer and Antiquarian* 149 (1950).
13. Flick, *supra* note 4, at 72. John Van Buren prosecuted several of the Tenant leaders.
14. Flick, *supra* note 4, at 87; Rehnquist, *supra* note 9, at 70.
15. Flick, *supra* note 4, at 100; 1 Bigelow, *supra* note 8, at 136.
16. 1 Bigelow, *supra* note 8, at 184; Rehnquist, *supra* note 9, at 76–77; Flick, *supra* note 4, at 204–20.
17. Father of the eminent Benjamin Cardozo, featured in several issues of *Judicial Notice*.
18. Flick, *supra* note 4, at 251–52.
19. *Id.* at 260.
20. 1 Bigelow, *supra* note 8, at 259–62.
21. Rehnquist, *supra* note 9, at 78–79.
22. Flick, *supra* note 4, at 271.
23. Rehnquist, *supra* note 9, at 81.
24. *Id.*
25. Andrew Flick, speech to National Arts Club members in 1935.
26. Tilden was 47 years old at the beginning of the War in 1861, while Hayes was 39 years old.
27. 2 John Bigelow, *The Life of Samuel J. Tilden* 7 (1895), *available at* https://archive.org/download/lifesamueljtild04tildgoog/lifesamueljtild04tildgoog.pdf.
28. Flick, *supra* note 4, at 334.
29. 2 Bigelow, *supra* note 27, at 37–50.
30. Morris, *supra* note 2; Michael F. Holt, *By One Vote* (2008); Rehnquist, *supra* note 9.
31. Morris, *supra* note 2; Holt, *supra* note 30.
32. History Today, *The Presidential Election of 1876*.
33. *Id.*
34. Hayes appointed Evarts Secretary of State on March 7, 1877. 2 Bigelow, *supra* note 27, at 53.
35. Zachary Chandler leading the Republican Party and Abram Hewitt leading the Democratic Party were heavily involved.
36. Rehnquist, *supra* note 9, at 191–92.
37. Unofficially named the Wormley Agreement because it was concluded at the Wormley Hotel.
38. *Supra* note 2, at 256.
39. 2 Bigelow, *supra* note 27, at 156–67.
40. *Id.*
41. Carter and Ledyard represented the Executors and Trustees.
42. *Tilden v. Green*, 130 N.Y. 29 (1891).
43. J. B. Ames, "The Failure of the 'Tilden Trust,'" 5 Harv. L. Rev. 389, 389–402 (1892), criticizes the decision as based on an unfortunate interpretation of a chancery doctrine that should not have been applied to a charitable trust.
44. 2 Bigelow, *supra* note 27, at 365.
45. Form 990 tax return dated May 8, 2023, accessed on June 13, 2023, at https://drupal.nypl.org/sites-drupal/default/files/2023-05/NYPL%202022%20990%20Form.pdf.

Benjamin N. Cardozo photographed on the steps of Court of Appeals Hall, c. 1930.
Collection of the New York Court of Appeals.



CARDOZO'S LOST SPEECH

by Henry M. Greenberg

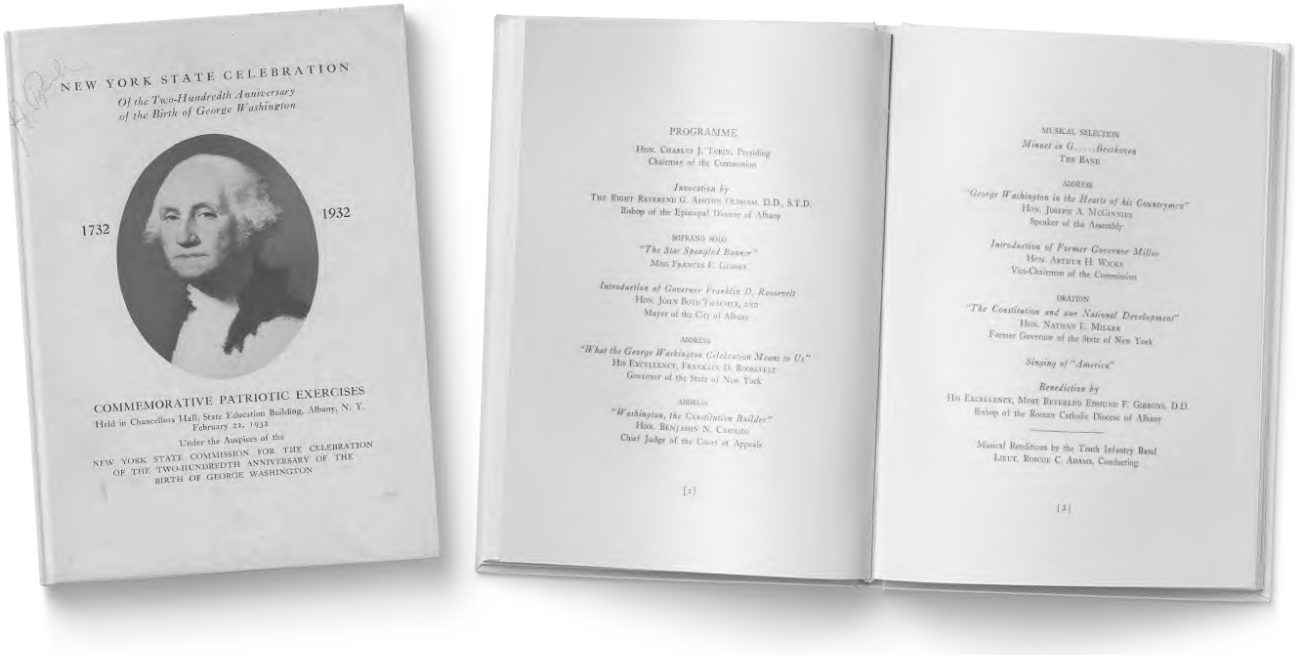
Henry ("Hank") M. Greenberg is a shareholder with Greenberg Traurig, LLP, and a past President of the New York State Bar Association. From 2007 to 2010, Hank served as Counsel to the New York State Attorney General. He also served as General Counsel for the New York State Department of Health (1995-2000), where he was the chief legal advisor to the Commissioner of Health and administered an office of more than 100 attorneys engaged in virtually all aspects of administrative law. Amongst the other government posts he has held, Hank served as Counsel to the Lieutenant Governor of New York State (1995), an Assistant United States Attorney for the Northern District of New York (1990-1995) and law clerk to Judge (later Chief Judge) Judith S. Kaye of the New York Court of Appeals (1988-1990). Hank currently serves as chair of the Commission to Reimagine the Future of New York's Courts, counsel to the New York State Commission on Judicial Nomination, and vice-chair of statewide programming for the Historical Society of New York Courts.

Benjamin Nathan Cardozo stands as a towering figure in the pantheon of great American jurists.[1] He served as an Associate Judge and later Chief Judge of the New York Court of Appeals (1914–1932) and a Justice of the United States Supreme Court (1932–1938). However, his greatest work was achieved in Albany rather than Washington. Long before he left the New York bench, he wrought it into the finest common law court of last resort in the nation. His opinions during the Court of Appeals period have become legal and literary classics.[2]

As great as Cardozo's judicial career was, his extra-judicial speeches and writings on the appropriate role of appellate judges are arguably his most enduring legacy. Between 1920 and 1928, Cardozo delivered three series of lectures in which he outlined his approach to the process of decision. These utterances, later published as *The Nature of the Judicial Process* (1921), *The Growth of the Law* (1924), and *The Paradoxes of Legal Science* (1928), were among the first efforts by a judge to articulate his function. They remain "the paradigm of judicial self-analysis."[3] Likewise, his seminal essay, *Law and Literature* (1925), helped form the foundation of a modern movement bearing the same name.[4] And several of Cardozo's other lectures and speeches were collected and published in a single volume in 1947.[5]

Thus, one might assume that all of Cardozo's notable writings have been published and are readily accessible today. But not so: the Cardozo speech heard by the greatest number of people has been lost to history. Until now.

On February 22, 1932, in Albany, New York, commemorative patriotic exercises were held in honor of the two-hundredth birthday of George Washington, at Chancellor's Hall in the State Education Building. The event was sponsored by the New York State Commission for the Celebration of the Two-Hundredth Anniversary of the Birth of George Washington. Cardozo, then-Governor Franklin D. Roosevelt, former Governor Nathan L. Miller, and others were tasked to deliver speeches on the life, times, and deeds of Washington.[6]



Program for the George Washington Bicentennial ceremonies, February 22, 1932. Both then-Chief Judge Benjamin N. Cardozo and then-Governor Franklin D. Roosevelt were speakers.
Courtesy of the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, New York.

Cardozo and Roosevelt were the headliners. Both men were national figures, poised to embark on new and higher responsibilities in American life. The week before, President Herbert Hoover had nominated Cardozo to fill the Supreme Court vacancy created a month earlier by the resignation of Oliver Wendell Holmes, Jr. Two days after Cardozo's speech, on February 24, the Senate confirmed his nomination.[7] As for Roosevelt, on January 22, 1932, he launched his candidacy to run for President of the United States.[8] In November, he defeated Hoover, and was sworn in on March 4, 1933.[9]

The audience in Chancellor's Hall included high state officials, members of the Legislature, Albany officials, and members of the Board of Regents. But countless others listened to the entire program, lasting one hour, over a nationwide radio broadcast.[10]

Cardozo's speech was his first public address since being nominated to the Supreme Court, and he selected a title befitting his future position and the occasion: *Washington, the Constitution Builder*. The address itself is a 950-word prose poem, written in the style that made Cardozo a legend, with inversions of standard word order and the use of metaphor and aphorism.[11]

Substantively, Cardozo delivered an inspiring tribute to the "deathless" constitutional heritage Washington gifted the nation. It bears noting, though, that when measured by contemporary standards, some of Cardozo's remarks may be viewed as provocative, even edgy. For example, proponents of original intent jurisprudence might be uneasy with Cardozo pointing out that the Constitution is an imperfect instrument:

> *Only pride and arrogance would dare to say that imperfections will not develop with the centuries — have not developed even now. Only stubbornness and folly would close the eye and mind against them.*

Similarly, Cardozo alluded to the miserable economic conditions and polarized political environment (it was the Great Depression) engulfing the nation in 1932, referencing "the vagaries of the market," "the crash of economic values," "the discontent of the hapless," and "the hates and loves and rivalries of sects and groups and factions." Not the usual fodder of judicial oratory.

In short, the speech is a gem. It deserves as wide an audience today as it received when given. Enjoy!

Washington, the Constitution Builder

By Benjamin N. Cardozo[12]

The heirs of a great tradition have gathered here today to proclaim their reverent pride in the splendor of a deathless heritage.

Deathless the heritage is, for the values it embodies are values of the spirit. In Independence Hall in Philadelphia there gathered in May, 1787, fifty-five men who took upon themselves the task of framing for the tottering Republic a new charter of government that would save the great experiment from ruin and collapse. The writs that summoned them, if narrowly interpreted, would have confined them to a mere revision of the articles of confederation in submission to existing forms. They did not hesitate long in resolving that something more than revision was the mandate of the hour. Revision would have meant that the Confederate Congress must confirm and that every state must ratify. If unanimous approval was to be exacted, the delegates might as well disband, and leave the confederation to its doom. They were not so faint-hearted or so lacking in resourcefulness as to accept that counsel of despair. Instead, they turned themselves into a constituent assembly. They ordained, not a mere amendment of existing articles, but a new constitution, which was to have the force of law whenever nine of the existing commonwealths should give it their approval. In the name of the People of the United States they established in the family of nations a new federal state, the ends of whose being they summed up in a majestic preamble that thrills us even now. This newcomer in the family of nations was organized "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty" for the generation then in being and the generations yet to follow.

What did Washington contribute to the great result? Let me not belittle the nobility of his contribution by cataloging the sections that he approved or disapproved. Services of that order could have been rendered by many another. The supreme contribution that he made can be summed up in a single word. He contributed his character. Men knew from the beginning the source and secret of his power. Men knew from the beginning that here was a force that was greater than reasoning; here was a persuasiveness more compelling than argument; here was the radiance of a great and unselfish spirit, illuminating the dark places with the inner light that was its own, and causing men to follow trustfully and humbly along its shining way.

They made him President of the Convention. The records show that he voted, but rarely joined in the debates. We know that on one occasion he apologized for speaking, expressing doubt whether his position as presiding officer imposed a duty of silence. What was needed of him was something deeper and richer, and more fruitful than words. In the uncertain days that followed, when no one knew whether the states would ratify or not, contemporary opinion is undivided that one of the decisive forces swaying the doubtful balance was the character of the man who had led his countrymen to victory and the faith inspired by that character in the charter of government, confirmed by his approving hand. Seldom has the spiritual influence of a great example, a generous and lofty nature, been shown forth to the world with more impressive and convincing power. "Believe me," said Charles W. Eliot, on an occasion when a vulgar placeman had told a group of students that it was a finer achievement to have built the Brooklyn Bridge than to have been the greatest poet of all time. "Believe me," said Eliot, standing up in wrath and majesty, "the supreme powers of this universe are not mechanical or material; they are hope and fear and love." No one has ever achieved greatly and beneficently in the long perspective of world history to whom that faith has been denied.

On this anniversary day the centuries crumple up like a scroll, and imagination seems to bring us into the visible presence of the man who did these mighty things, who set this great example, a century and a half ago. The benediction of that deathless heritage descends upon his countrymen assembled in this hall. Let us make high resolve to be worthy of our heirship. What is deathless in our heritage is not the structure of government builded by the fathers, durable and beneficent though it has proved itself to be. Only pride and arrogance would dare to say that imperfections will not develop with the centuries — have not developed even now. Only stubbornness and folly would close the eye and mind against them. What is deathless in our heritage is the faith and purpose that inspired it, a faith and purpose symbolized and made incarnate in the person of a man. Nothing can quench that. Not all the vagaries of the market nor the crash of economic values nor the discontent of the hapless nor all the hates and loves and rivalries of sects and groups and factions can rob us of that priceless boon. Here is an imperishable gift, this great effulgent figure standing far away at the daybreak of our history. Within the memory of men yet living it was said to a great statesman, "You have so lived and wrought as to keep alive the soul in England." Two hundred years ago today there was born in an English colony a man who did more than keep a soul alive. He so lived and wrought as to breathe into his country the soul that was his own.

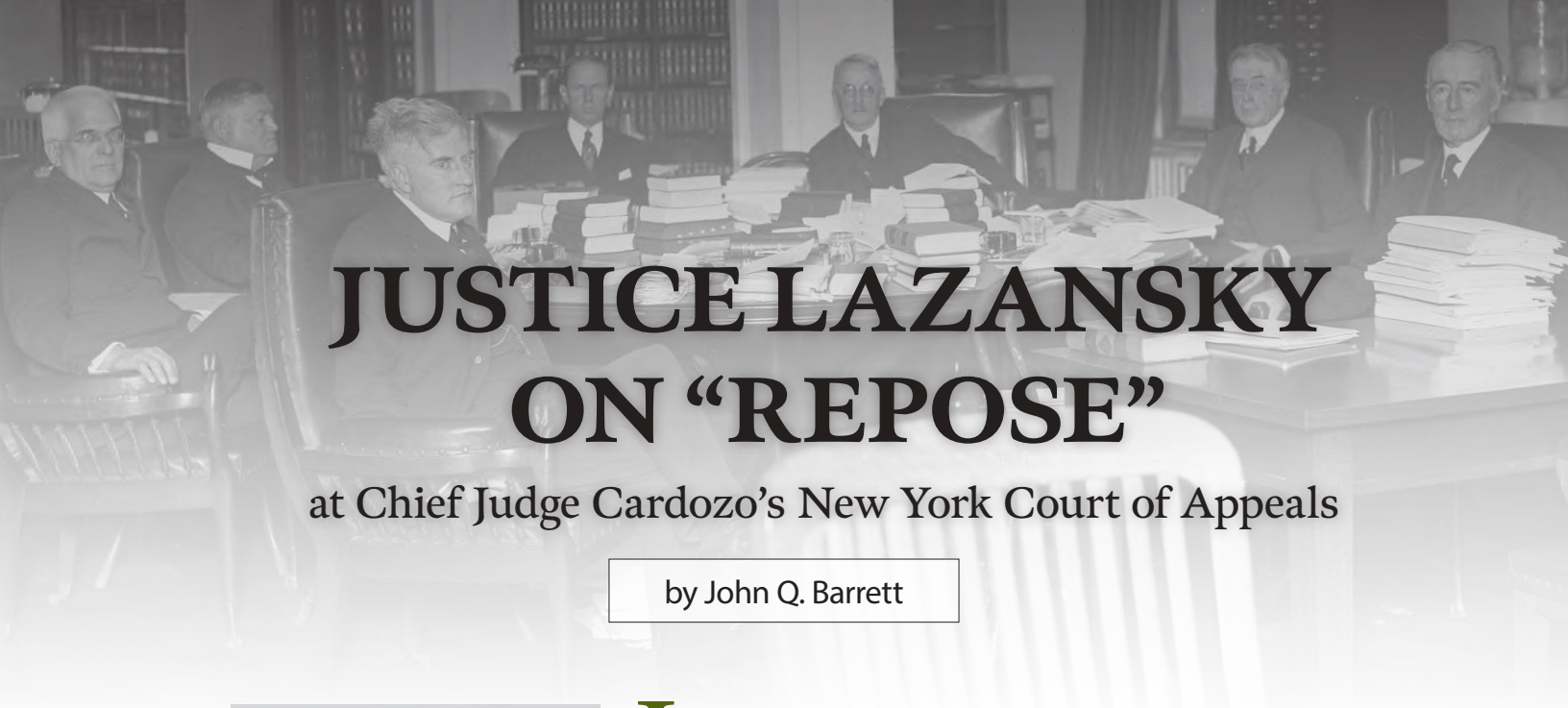
May we keep it undefiled through all the years to come!

Benjamin N. Cardozo and Franklin D. Roosevelt sitting together at the bicentennial celebration of the birth of George Washington held in Albany, New York, on February 22, 1932, at Chancellor's Hall in the State Education Building. Photo courtesy of the author.

Cardozo's Lost Speech - Endnotes

1. A vast literature is devoted to Cardozo's life, career and contributions to American jurisprudence. The definitive biography is Andrew L. Kaufman, *Cardozo* (1998). *See also* Richard Polenberg, *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (1997); Judith S. Kaye, *Benjamin N. Cardozo, in The Judges of the New York Court of Appeals: A Biographical History* 376 (Albert M. Rosenblatt ed., 2007); George S. Hellman, *Benjamin N. Cardozo, American Judge* (1940).
2. *See* Henry M. Greenberg, "The Judicial Philosophy of Benjamin Cardozo," N.Y. L.J., July. 21, 1988, at 2.
3. Frank Coffin, *The Ways of a Judge: Reflections from the Federal Bench* 12 (1980).
4. *See generally* Richard Posner, *Law and Literature, A Misunderstood Relation* (1988).
5. *Selected Writings of Benjamin Cardozo: The Choice of Tycho Brahe* (Margaret E. Hall ed. 1980). Prior to his ascension to the Court of Appeals, Cardozo published a comprehensive treatise on its jurisdiction. *See* Benjamin N. Cardozo, *The Jurisdiction of the Court of Appeals of the State of New York* (1903), *available at* https://books.google.com/books/about/The_Jurisdiction_of_the_Court_of_Appeals.html?id=7X5IAAAAYAAJ
6. Letter from Charles J. Tobin to Guernsey T. Cross, dated February 2, 1932, Franklin D. Roosevelt Papers FDR Presidential Library, Hyde Park, NY. Tobin was the Chair of the New York State Commission for the Celebration of the Two-Hundredth Anniversary of the Birth of George Washington; and Guernsey was Secretary to Governor Roosevelt.
7. Hoover nominated Cardozo on February 15, 1932; he was confirmed on February 24, 1938. *See* Andrew L. Kaufman, "Cardozo's Appointment to the Supreme Court," 1 Cardozo L. Rev. 23, 23, 51 (1979).
8. Nathan Miller, *F.D.R.: An Intimate History* 256 (1979).
9. The 37th Presidential Inauguration: Franklin D. Roosevelt, March 04, 1933, U.S. Senate Website, https://www.inaugural.senate.gov/37th-inaugural-ceremonies/ (last visited on June 15, 2023).
10. "STATE AND CITY OFFICIALS UNITE IN TRIBUTE TO WASHINGTON—CELEBRATION IN ALBANY GOES ON AIR—High State Officials, Others Gather at Chancellor's Hall for Ceremonies," Albany Times Union, Feb. 22, 1932, at 1.
11. For a thoughtful discussion and analysis of Cardozo's writing style, see Richard Posner, *Cardozo: A Study in Reputation* 10–11, 21–23, 51, 54–57, 92, 100, 134–35 (1979).
12. This address was delivered on February 22, 1932, as part of commemorative exercises celebrating the bicentennial of the birth of George Washington, held in Chancellor Hall, in the State Education Building. These exercises were conducted under the auspices of the New York State Commission for the Celebration of the Two Hundredth Anniversary of the Birth of George Washington.

Portrait of Hon. Benjamin N. Cardozo as a younger man.
Collection of the New York Court of Appeals.



JUSTICE LAZANSKY ON "REPOSE"

at Chief Judge Cardozo's New York Court of Appeals

by John Q. Barrett

Prof. John Q Barrett is the Benjamin N. Cardozo Professor of Law at St. John's University, Elizabeth S. Lenna Fellow at the Robert H. Jackson Center, and Trustee Emeritus of the Historical Society of the New York Courts. For excellent research assistance, he thanks Dana Herman, MK Brunson, and Elizabeth Hatton Zuelke at the Jacob Rader Marcus Center of the American Jewish Archives, plus Karen R. Kowalski, Saadia Iqbal, and especially Nadia E. Khan.

In 1948, Edward Lazansky of Brooklyn wrote a long letter to his friend Jacob Billikopf of Philadelphia. It included an amusing story that Lazansky had heard at some point about his friend Benjamin N. Cardozo, who had died ten years earlier. Billikopf liked the story. He retyped it and mailed it to prominent people who had known Cardozo.

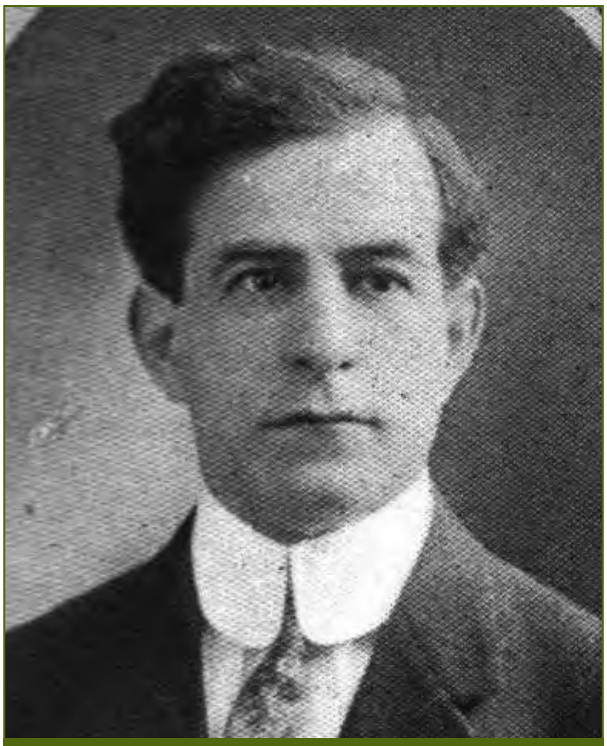
Lazansky and Billikopf had it right. The story, which generally checks out, should be shared. It gives a glimpse of Cardozo's talents and virtues, including his judicial sense of humor.

Lazansky & Billikopf

Edward Lazansky was a lifelong Brooklynite. Born to immigrant parents in 1872, he attended public schools and became interested in Democratic Party politics and in the law. Lazansky attended Columbia College, earning an A.B. degree in 1892; later, he ran for election to a Brooklyn seat in the New York State Assembly, losing by only fifty-three votes.

Lazansky attended Columbia Law School, earning his degree and then admission to the bar in 1897. It was the beginning of an illustrious law career. At various times, he was an assistant corporation counsel and a lawyer in private practice in Brooklyn. In 1910, he was elected the State of New York's secretary of state. In 1917, he ran for and won a fourteen-year term as a New York State Supreme Court justice (a trial court judge). In 1926, New York State's governor designated Justice Lazansky to serve as an associate justice of the Supreme Court's Appellate Division, Second Department (the first-level appellate court). The next year, the governor named Lazansky that court's presiding justice. He was reelected in 1931 and served as "P.J." until the end of 1942—fifteen years total—when he had reached the mandatory retirement age of seventy.[1]

Lazansky's friend Jacob Billikopf was born in Vilna, Russia—today, Vilnius, Lithuania—in 1882. As a boy, he immigrated to the U.S., settling in Richmond, Virginia, going to school there and learning English. He attended Richmond College and then the University of Chicago, earning a Ph.B. (Bachelor of Philanthropy) degree.



Portrait of Edward Lazansky when he served as New York's Secretary of State, c. 1911. Originally published in *The New York Red Book* (Williams Press, 1911).

Portrait of Jacob Billikopf. Courtesy of The Jacob Rader Marcus Center of the American Jewish Archives, Cincinnati, Ohio at americanjewisharchives.org.

Billikopf had an illustrious career in the field of social work. Early on, he was superintendent of the Jewish Settlement House in Cincinnati. He later lived in Kansas City, Missouri, where he headed the United Jewish Charities, assisted in forming its municipal board of pardons and paroles, and helped to create and then served on its public welfare board. In 1917, Billikopf moved to New York City, where he directed America Jewish Relief Committee efforts raising $20 million to aid European Jews displaced by the Great War (now called World War I). In 1920, he moved to Philadelphia, where he became director of the Federation of Jewish Charities, served other public and private welfare agencies, and arbitrated labor-management disputes.[2]

At some point, Lazansky and Billikopf met and became friends. It probably happened in New York City during the later nineteen-teens. They had much in common, including smarts, energy, involvements in politics, interests in public issues, and work in Jewish charities. Their paths must have crossed.

Their Friend Cardozo

In time, both Lazansky and Billikopf came to know and admire lawyer and then judge Benjamin Cardozo.

According to Lazansky's late-life recollection, he met Cardozo in 1897. Lazansky, then age twenty-five, was a new graduate of Columbia Law School. He found work, probably unpaid, in the Cardozo Brothers law firm where "Ben," six years out of Columbia, was practicing law with his older brother Albert, Jr.[3]

Fifty years later, Lazansky recounted to Billikopf an occasion when he (Lazansky) had been working in that law office, researching a legal problem. He could not find any relevant authority in New York law books. When he mentioned his difficulty to Cardozo, Cardozo referred Lazansky to a court decision from Pennsylvania and another from Massachusetts. Lazansky said that Cardozo used his "marvelous" memory for cases like he was "picking stars out of the sky."

Court of Appeals Bench, 1931: Judges from Left to Right: J. O'Brien, Lehman, Pound, Chief Judge Cardozo, Crane, Kellogg, Hubbs. Collection of the New York Court of Appeals.

By the time that Billikopf moved to New York City in 1917, Cardozo had become a judge. In 1913, he was elected a justice of the New York State Supreme Court. Just five weeks later, New York's governor designated Cardozo to sit on the New York Court of Appeals, the State's high court. In 1917, Judge Cardozo was elected to a regular term on the Court, and then he was elected its chief judge in 1925. Billikopf met Cardozo during these years. Thereafter, including after Cardozo became a U.S. Supreme Court associate justice in 1932, they corresponded and sometimes saw each other in person.[4]

Lazansky's Cardozo Story

In February 1948, Edward Lazansky, who was retired from the bench and practicing law in Manhattan, dictated a long letter to his friend Jacob Billikopf. In this letter to "Dear Billie," Lazansky rambled through various topics, including the situation in Palestine and thoughts about a judge whose brother, a rabbi in Brooklyn, Lazansky knew. He commented that he as a judge had also served in leadership positions in the Jewish community. He contrasted himself, in this regard, with the late Cardozo:

> *Judge Cardozo was rarely active in extra judicial concerns. He gave his life to matters juridical. I have no doubt that it was a matter of choice. However, I think in his case it was largely due to disposition. He was always mild-mannered and gentle, never aggressive, and was not equipped for public philanthropic service, as we know it.*

Lazansky then told (as quoted above) of first meeting Cardozo in 1897, and of his memory for court decisions.

And then, as if to negate any implication that Cardozo had been a humorless legal robot, Lazansky shared another story, this one about Cardozo at the New York Court of Appeals:

> *He was not without a sense of humor. There is a story told of an incident that took place at one of the daily secret conferences of the Judges of the Court of Appeals. The case under consideration was an appeal from a determination of the Court of which I was then Presiding Justice. It involves the building of a bulkhead, which, on the shore side, required a dirt fill to support the bulkhead. The fill was to be placed at a certain angle, called "the angle of repose". One of the judges asked what was meant by "the angle of repose" and Chief Judge Cardozo said: "If you will keep your eyes on the Bench at 4 o'clock this afternoon, you will readily learn what the angle of repose is."*

Lazansky finished his remembrance of Cardozo with an epitaph: "He is one of two great men who left me with 'a sense of awe and reverence', to which, for my part, must be added warm affection."[5] (And then Lazansky continued dictating his letter for what became two more typed pages!)

Billikopf plainly loved this Cardozo story. He drew a bracket on Lazansky's letter around the long paragraph about Cardozo, plus the very short next one that praised former Chief Justice Charles Evans Hughes. Billikopf apparently did this marking-up for his secretary, who then retyped, through carbon papers that produced multiple copies, Lazansky's letterhead and then his bracketed words. Billikopf sent one of the carbons to U.S. Supreme Court justice Owen J. Roberts, who had served on that Court with Cardozo. When Justice Roberts, as Billikopf had been requested, returned that document, Billikopf

Photos of pier under construction at the foot of Flatbush Ave., Mill Basin at left, May 12, 1922.
Irma and Paul Milstein Division of United States History, Local History and Genealogy, The New York Public Library.

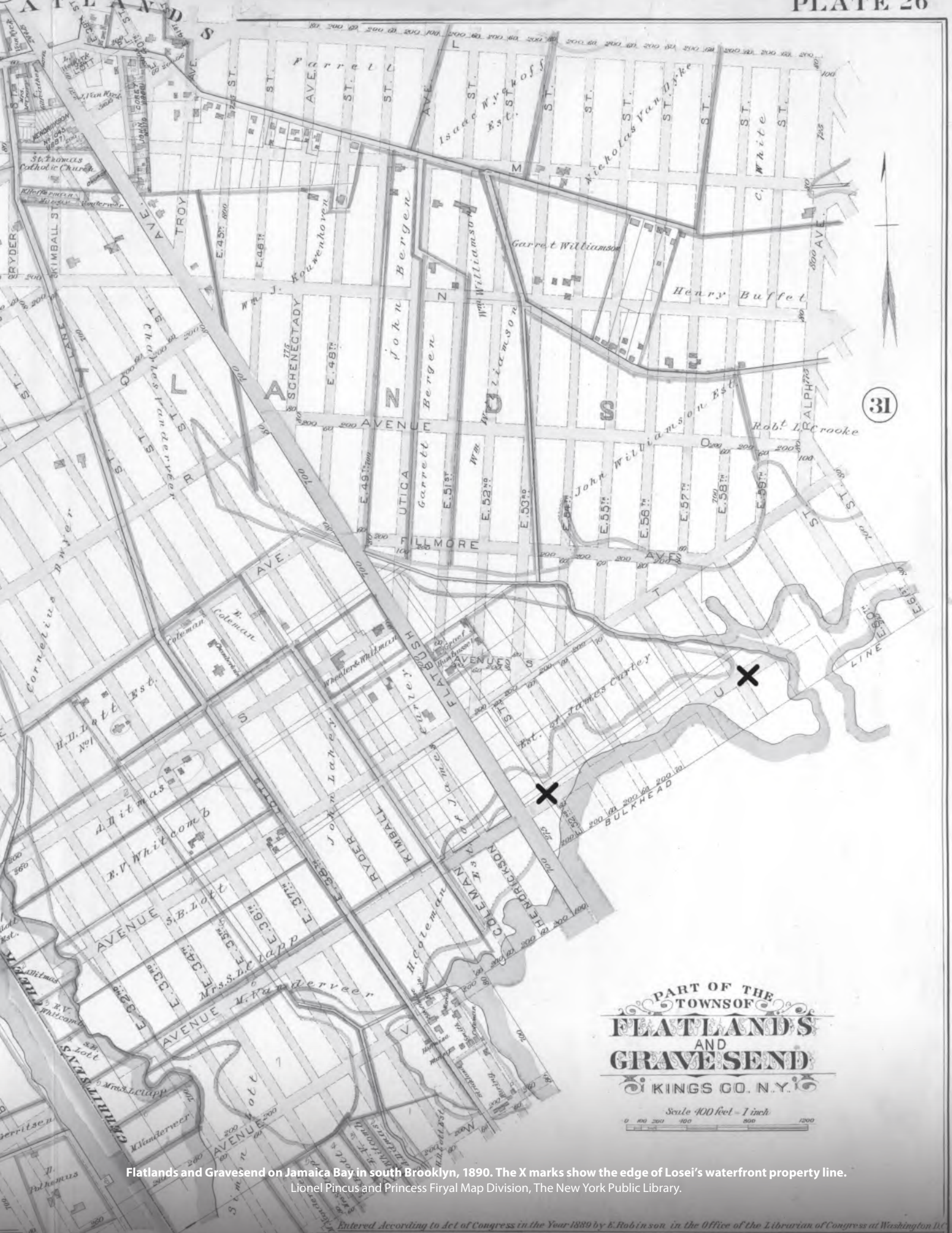
noted on it that he also had sent copies to Charles Evans Hughes, Jr. (son of the former chief justice and Cardozo's law clerk during his one month as a New York State Supreme Court trial judge), and to U.S. Supreme Court justices Robert H. Jackson (a Cardozo admirer and protégé who had argued cases before him at both the New York Court of Appeals and the U.S. Supreme Court) and William O. Douglas (another Cardozo admirer).[6]

Cardozo's "Repose" Case

Lazansky's memory of the alleged Cardozo "angle of repose" case is mostly correct.

The case is *City of New York v. Losei Realty Corporation*. In the mid-nineteen-teens, the City and Losei owned adjoining lands on Mill Creek and Mill Basin in south Brooklyn. The lands were under and inland from Jamaica Bay. The City's land was to the southwest, and Losei's was to the northeast. The City, pursuing grand development plans, built on its land a pier that extended from the south end of Flatbush Avenue into the bay. But people seeking to access the pier from the east would need to cross Losei land to get there.

In 1916, the City entered into a contract with Losei. The City obtained from Losei the underwater land next to the Flatbush Avenue pier. The parties also drew an inland bulkhead line. Losei agreed that it would build on its land a bulkhead (i.e., a wall) thirty feet inshore from that line. The City agreed to dredge from the bulkhead line outward into the bay, to a depth of eighteen feet. It also agreed to dredge inward from the line to Losei's bulkhead, in an "even slope of natural repose," so that water at the bulkhead would



Flatlands and Gravesend on Jamaica Bay in south Brooklyn, 1890. The X marks show the edge of Losei's waterfront property line.
Lionel Pincus and Princess Firyal Map Division, The New York Public Library.

1922 NYCA judges seated at their conference table. Reading or around the table, left to right: Judge Benjamin N. Cardozo, Judge Cuthbert W. Pound, Judge Chester B. McLaughlin, Judge Frederick Crane, Judge Andrews, Chief Judge F.H. Hiscock, and Judge John W. Hogan. Collection of the New York Court of Appeals.

be five feet deep at mean low tide. The City also agreed to deposit dredged material inside Losei's bulkhead, so as to create a uniform land surface averaging ten feet above mean low tide. And, finally, the City agreed that it would "at all events fill in the lands of said Losei Realty Corporation to grade aforesaid with due diligence." Overall, as the New York Court of Appeals summarized it years later, "[t]he purpose of the contract was to improve the city water front and to give [Losei Realty] a usable property with a proper depth of water."[7]

That did not happen for years. Losei promptly built its bulkhead, but the City did not promptly perform its promised work. Indeed, its dredging contractor did the work improperly, breaking Losei's bulkhead. The land inside Losei's bulkhead was not filled, in part because the City could not, during the Great War, find a fill contractor to do the work. So Losei sued the City in 1920, seeking to recover for the bulkhead damage, for the costs of having to complete the filling work itself, and for the City's delay in completing all of the promised work.

After a bench trial in Brooklyn, New York State Supreme Court Justice Harry E. Lewis awarded Losei monetary damages for its bulkhead repairs and its fill costs.[8] But he also held that it was not entitled to damages for the City's years of delay because it (Losei) knew that the City was failing to perform its obligations under their contract and Losei did not take action for years.

On appeal, a panel of five Second Department justices, in a two-sentence memorandum opinion, largely affirmed that judgment. It was indeed, as Presiding Justice Lazansky recalled a decade later to Billikopf, a decision of his court. More than that, Lazansky was a member of the panel.[9]

The case then went to the New York Court of Appeals. It was briefed and then argued orally to the court in spring 1930. That is when the judges, in their conference discussion, must have talked about the complex physical facts of the case. It also makes sense

that one of the judges would have, during that discussion, puzzled about meaning of the City's contractual obligation to dredge under Jamaica Bay toward Losei's bulkhead in an "even slope of natural repose." And it makes sense that Chief Judge Cardozo would have, with charm and wit, answered that question by quipping about judges falling asleep on the bench during late afternoon oral arguments.

In May 1930, the New York Court of Appeals affirmed, by a 6-0 vote, the lower court damage awards to Losei Realty for bulkhead damage and fill costs. The Court also held, however, that the lower court holding, affirmed by the Second Department, that Losei was not entitled to damages for the City's delay was legally erroneous. The Court remanded the case for a new trial on that issue.[10]

It seems likely that on some occasion not too long thereafter, Chief Judge Cardozo (or it could have been another Court of Appeals judge) saw Presiding Justice Lazansky and, in the course of conversation, mentioned this case and the Cardozo conference comment. (I suspect that the speaker was Cardozo himself, including because of the comment's precise focus on the word "repose," which he indeed used when communicating with his judge-friends about court work.[11])

* * *

Notice that although Lazansky's story generally checks out, his 1948 recollection of the 1929-1930 case was imprecise. In the contract at issue, New York City's obligation concerned a specific angle of repose: "an even slope of natural repose." (Not every angle brings repose.)

Lazansky's recollection also was, in another detail, incorrect. Pursuant to the contract, the City was supposed to create the even slope of natural repose under water as it dredged, not above ground as it poured dry material behind a bulkhead.

But Lazansky had known since way back in 1897 that he, at least in recalling court cases, was no Cardozo.[12]

ENDNOTES

1. These details come from his 1955 obituary, "E. Lazansky Dies; A Former Justice," N.Y. Times, Sept. 13, 1955, at 31, and from William H. Manz, *The* Palsgraf *Case: Courts, Law, and Society in 1920s New York* 55–56 (2005); *see also* Justice Lazansky's biography page on the Historical Society of the New York Courts website, https://history.nycourts.gov/biography/edward-lazansky/ (visited July 12, 2023). (Future researchers: These sources are not entirely consistent.)
2. These details come from his 1951 obituary. *See* "Dr. Billikopf Dies; Social Worker, 67," N.Y. Times, Jan. 1, 1951, at 17, *available at* https://www.nytimes.com/1951/01/01/archives/dr-billikopf-dies-social-worker-67-leader-in-jewish-philanthropy.html. See also, with appropriate caution, his Wikipedia entry and other online sources.
3. *See* Andrew L. Kaufman, *Cardozo* 54 (1998).
4. *See, e.g.,* Letter from Justice Benjamin N. Cardozo (in Washington, DC) to Jacob Billikopf, Dec. 28, 1933, at 2 ("Your visit was a bright spot in the life of a forlorn exile."), in Jacob Billikopf Papers, American Jewish Archives, Cincinnati, OH, Box 4, Folder 4.
5. Typed letter from Edward Lazansky to Dr. Jacob Billikopf, Feb. 9, 1948, at 3 (original five-page letter), in Jacob Billikopf Papers, American Jewish Archives, Cincinnati, OH, Box 15, Folder 10.
6. *See* Jacob Billikopf handwritten notes on retyped one-page excerpt from letter from Edward Lazansky to Dr. Jacob Billikopf, Feb. 9, 1948, in *id*.
7. *Losei Realty Corp. v. City of New York*, 254 N.Y. 41, 47 (1930).
8. *See* "Gets $32,518 Judgment Against City," N.Y. Times, July 13, 1927, at 41.
9. *See Losei Realty Corp. v. City of New York*, 226 A.D. 685, 685 (2d Dept. 1929).
10. *Losei Realty Corp. v. City of New York*, 254 N.Y. 41, 49 (1930).
11. *See, e.g.,* Letter from Justice Benjamin N. Cardozo, U.S. Supreme Court, to Chief Judge Cuthbert W. Pound, New York Court of Appeals, June 23, 1932, at 2 ("Being a slave of toil, unfitted for anything else, I have no love of repose. Two huge bags of certiorari petitions received here [at Cardozo's Manhattan home] yesterday are a reminder that I may have some labors to fill my [Supreme Court summer recess] waking hours."), in the possession of the New York Court of Appeals.
12. Kaufman, *supra* note 3, at 569: "Cardozo's record and reputation have made him a point of comparison for other judges, usually in terms of a judge or judicial nominee falling short of the mark, as being 'no Cardozo." Regarding Cardozo's "photographic memory, often startling people," see *id*. at 144.

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History-Making Judicial Appointments

Chief Judge Rowan D. Wilson

The First Black Chief Judge of the New York Court of Appeals

On April 10, 2023, Governor Kathy Hochul nominated Rowan D. Wilson to serve as Chief Judge of the Court of Appeals and the State of New York, and the Senate confirmed his nomination on April 18, 2023, making Chief Judge Wilson the first Black judge to serve as New York's top jurist.

Chief Judge Wilson was first appointed to the Court of Appeals as Associate Judge in 2017. Prior to this, he was an attorney at Cravath, Swaine and Moore LLP, starting as an associate before becoming the firm's first Black partner in 1992. He also served as a judicial law clerk to Hon. James R. Browning, Chief Judge of the U.S. Court of Appeals for the Ninth Circuit. Chief Judge Wilson earned his A.B. degree from Harvard College and J.D. degree from Harvard Law School.

Upon his nomination, the then-Associate Judge stated, "Serving as Chief Judge of the Court of Appeals would be the honor of my career... Protecting the right of New Yorkers is my top priority, and I look forward to working with Governor Hochul and our partners throughout the judiciary system to manage our courts and deliver justice."

History-Making Judicial Appointments

Presiding Justice Dianne T. Renwick

The First Black Woman Presiding Justice
Appellate Division, First Department

On June 21, 2023, Governor Hochul made another historic appointment when she named Society Vice Chair Dianne T. Renwick Presiding Justice of the Appellate Division, First Department. Presiding Justice Renwick became the first woman of color to serve as Presiding Justice of the First Department since its establishment in 1894.

She was first appointed to the court in 2008 where she became the first woman of color to serve on the First Department as an Associate Justice. Prior to this, Presiding Justice Renwick was elected to the New York State Supreme Court and served in the Civil Term for Bronx County from 2002 to 2008. She has also served as a Civil Court Judge; Housing Court Judge; Staff Attorney in the Federal Defender Services Unit, EDNY, for the Legal Aid Society; and a staff attorney in Bronx County. She earned her J.D. from the Benjamin N. Cardozo School of Law at Yeshiva University and B.S. from Cornell University.

Upon her appointment, Governor Hochul stated, "New Yorkers deserve a thoughtful, attentive and independent leader of the First Department… With her extensive experience and diverse background, I'm confident that Justice Renwick will bring honor and integrity to New York State's judiciary and serve New Yorkers with fairness and impartiality."

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