Bicentennial Ceremony

UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW JERSEY
1789–1989

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United States Post Office and Courthouse Building
Courtroom Number 2
December 14, 1989

Proceedings

COURT CRIER CHARLES SMITH: Oyez, oyez, oyez. All persons having business in this United States District Court for the District of New Jersey, come now, give your attention and you shall be heard.

God save these United States and this honorable Court.

The Honorable John F. Gerry, Chief Judge of this United States District Court, presiding.

Please be seated.

JUDGE GERRY: That's me.

Can everybody hear in the back?

With that start, what do you think? Should we quit now?

JUDGE BISSELL: I think your remarks should be customarily brief in any event.

JUDGE GERRY: Welcome everybody on this happiest of occasions, the celebration of the 200th Anniversary of the United States District Court for the District of New Jersey.

There are so many celebrities and distinguished guests here that to recite all of them would take more time than is allotted to me.

So with everyone's indulgence we'll forego the usual practice of the court recognizing so many people.

However, I do want to mention the other side of that coin. A few of our judges are not here. Chief, ex-Chief Judge—I still call him Chief Judge—Clarkson Fisher is not here, and, of course, he was the one person who started this whole thing off. It was his concept to have a Historical Society, and it was he who appointed Judge Bissell and Judge Vincent Biunno, the patriarch of all this, to get together, consider ways and proper methods by which the court could prepare for this day. And so much credit is due to both of them for the tireless efforts that they expended on behalf of the court and which has consummated those efforts in today's proceedings.

I do want to thank each and every one of you for taking the time, I know, from your own busy schedules to be here and to help us and join with us in paying tribute to the court and this historic milestone.

Without more I would like to recognize at this time Mr. William Walsh, the Clerk of our court, and Mr. Walsh will be reading from the minutes of the first court session and the roll of attorneys first admitted into our court.

Mr. Walsh.

MR. WALSH: Thank you, Judge.

Minutes of the first session of the United States District Court for the District of New Jersey, New Brunswick, New Jersey, Tuesday, December 22, 1789.

"Whereas in conformity with the Third Article of the Constitution of the United States, the Honorable the Congress did at their last sitting in New York and on the 24th day of September last pass an act entitled 'An act to establish the judicial courts of the United States' in which it is among other things enacted—that the United States be divided into 13 districts, that a court called the District Court should be held in each of the districts, that the State of New Jersey should form one district, that the courts to be holden therein should have annually four sessions, the first of which to commence on the first Tuesday of November and the other three sessions progressively on the like Tuesday of every third calendar month afterwards, subject however to such orders for adjournment as the judge under certain restrictions should find it expedient to make. And whereas the Honorable David Brearley, Esquire, Judge for the District of New Jersey, thought fit in consequence of his indisposition, and in virtue of the powers vested in him to issue his order to the Marshal directing that the opening and holding of the said court should be adjourned to Tuesday the twenty-fourth day of November, which was accordingly done. And was pleased afterwards and prior to the said 24th of November to make out and send another order to the Marshal for the further adjournment of the opening and holding of the aforesaid District Court to Tuesday the twenty-second day of this present month, December, which was accordingly obeyed and done.

"Now therefore, be it known that, in consequence of the above mentioned orders and adjournment, the Court have this day met.

"Present, the Honorable David Brearley, Esquire, Judge, the proclamation being made, the Court was opened in due form. The commission of the Honorable David Brearley, Esquire, as Judge was openly read, and the commission of Richard Stockton, Esquire, as attorney, of Thomas Lowrey, Esquire, as Marshal, and of Jonathan Dayton, Esquire, as clerk were also severally read.

"On motion made the following gentlemen were admitted attorneys and counsellors at law of the Court, Viz:

"William Paterson, Abraham Ogden, Elias Bodine, Elisha Boudinot, John Dehart, Robert Ogden, Joseph Taylor, Robert Morris, Richard Stockton, Samuel W. Stockton, Matthias Williamson, Aaron Ogden, Frederick Frelinghisen, Andrew Kirkpatrick, Richard Howell, Aaron W. Woodrow.

"The Court adjourned according to law."

JUDGE GERRY: Thank you, Mr. Walsh.

I forgot to mention why Judge Fisher wasn't here; I noticed a few blank expressions out there. Judge Fisher has to attend the Judicial Resources Committee of the Judicial Conference today, and it's very important, of course, institutionally to the whole Court, and perhaps to our Court as well, that he is there. He sends his regrets, as does Judge Cohen. This is Judge

Cohen's kind of sabbatical every time this year, an all too short one, but he's down in Florida building up his batteries to come back and give everybody hell in Camden at the beginning of the new year.

Judge Lee Sarokin as well, and Judge Lee Sarokin, like Judge Fisher, is attending a mandatory kind of appearance for the Judicial Improvements Committee, another important function for the judges of our Court. They send their regrets.

At this time the Court recognizes the United States Attorney, Samuel Alito, who will move a resolution.

Mr. Alito.

MR. ALITO: Thank you very much, Chief Judge Gerry, and members of the Court and honored guests.

I move that the Court adopt the following resolution commemorating the historic events that we are celebrating this afternoon.

Whereas the Judiciary Act of 1789 created 13 Federal District Courts including the District Court for the District of New Jersey, and whereas President Washington appointed the Honorable David Brearley, one of the framers and signers of the Constitution to be the first judge of this Court, and whereas the Court first convened in December 1789 in New Brunswick at which time Judge Brearley, after taking the oath of office, administered the oath to the first United States Attorney Richard Stockton, a signer of the Declaration of Independence, the first Marshal, Thomas Lowrey, and the first Clerk, Jonathan Dayton, a delegate to the Constitutional Convention, and whereas the Court then admitted 16 attorneys to the Bar of this Court, including a future Judge of this Court, three future United States Senators, three future Governors and a future Chief Justice of the New Jersey Supreme Court, and whereas this Court and its Bar during the next two centuries have faithfully preserved the same dedication to the Constitution and the rule of law as the distinguished individuals who participated in the first court session in 1789, now therefore be it resolved that this day, December 14, 1989, be commemorated as the official celebration of the Bicentennial of the United States District Court for the District of New Jersey, and that in commemoration of this occasion all of the Judges, officers and attorneys of this Court and citizens of the State be urged to contemplate the vital role that this Court and its Bar have played in the life of the State during the past two centuries and the critical role that they should play as they confront the challenges of the present and of the decades ahead.

JUDGE GERRY: Thank you, Mr. Alito.

Hearing no objection it is so ordered.

Ladies and gentlemen, it is my pleasure now to turn the program over to Judge John W. Bissell of our Court who is the principal architect of today's celebration.

JUDGE BISSELL: Thank you, Jack.

If there is any credit to be given, let's give it to Bill Walsh. Any blame to be taken, I'll take it. I think under those ground rules let's go ahead with the main part of our program.

I would like to introduce as our first speaker from the sitting judiciary today the Honorable Garrett E. Brown, Jr. Judge Brown sits with distinction on this Court in our Trenton vicinage, and quite appropriately his remarks will be directed to David Brearley and his time on this Court, a man whose name you've already heard about this afternoon, the first Judge of the U.S. District Court for the District of New Jersey.

Judge Brown.

JUDGE BROWN: Thank you, Judge Bissell.

I have been asked to speak concerning Judge David Brearley, who, as Judge Bissell stated, was the first Judge of our Court.

He also sat in Trenton, albeit almost 200 years ago. He presided over the first session of the Court on December 22, 1789, almost 200 years ago, which was in New Brunswick.

Unfortunately, the session was adjourned twice because of Judge Brearley's ill health, or indisposition, as they stated, and as a matter of fact, he only sat less than eight months until his death August 16, 1790 at the age of 45.

During that time he sat three more times in the District Court in Burlington and New Brunswick and on the Circuit Court in Trenton. The Circuit Court at that time was a trial court which consisted of the District Judge and one or more Supreme Court Justices.

Now, who was Judge Brearley? Unfortunately, his service with our Court was quite brief, but before that he had served ten years as the Chief Justice of the Supreme Court of New Jersey.

While so serving as its Chief Justice he decided the case of Holmes versus Watson, in which Watson had obtained a favorable verdict handed down by a jury of six in accordance with state law. The Chief Justice granted a writ of certiorari, and after argument ruled the statute contravened the provisions of the New Jersey Constitution which preserved the right of trial by jury and set the judgment aside.

This is the earliest instance of a judicial decision ruling a statute unconstitutional in this context and set a precedent for the development of the doctrine by John Marshall, the Chief Justice of the United States Supreme Court, in Marbury versus Madison.

Now, David Brearley was born in Spring Grove, New Jersey, near Trenton, in 1745. He was descended from a family which had emmigrated from Yorkshire in England. He was admitted to the Bar at age 22 and practiced at Allentown in Monmouth County.

Later he was awarded an Honorary Master of Arts degree from Princeton, which was then known as the College of New Jersey.

He was an ardent patriot. As a result of his activities at the First Constitutional Convention in New Jersey, the British arrested him for treason.

His imprisonment was short term because a group of his friends and patriots freed him shortly thereafter.

He then joined the Continental Army and served as Lieutenant Colonel of the Fourth and then the First New Jersey Regiments. He so served until he was elected as the Chief Justice of the Supreme Court of New Jersey. In those days they were elected. He assumed this position, as I stated, for ten years.

While performing his duties he also served on one of the Special Courts established under the old Articles of Confederation and dealt with a dispute between Pennsylvania and Connecticut. He ruled in favor of Pennsylvania.

As Chief Justice he was appointed as a delegate to the 1787 Constitutional Convention along with William Paterson who was then Attorney General and later Supreme Court Justice of the United States.

Paterson and Brearley were the ones who devised, submitted and argued for the so-called New Jersey plan, the small state plan as opposed to the Virginia or large state plan.

This became the basis for the Connecticut compromise in which each state had an equal vote in the upper House, the United States Senate, thus assuring the adoption and ratification of the Constitution.

Brearley then returned to New Jersey and led the discussions in New Jersey concerning ratification. He was the only person to sign both the Constitution and the ratification thereof from New Jersey. He was appointed by President Washington and was typical of the appointees by Washington to the first 33 judicial appointments.

He was in his mid-forties. He was a veteran. He was a Federalist and he was experienced in law and government.

Unfortunately, as I stated, his illness prevented him from serving long on our Court.

We have in the possession of the Court a line drawing of him which shows he was a stern looking man with a firm jaw and penetrating eyes who was held in great esteem by his fellow citizens and all those who worked with him. He is described by fellow delegate William Pierce from Georgia as, "A man of good rather than brilliant parts, a Judge of the Supreme Court of New Jersey, and is very much in the esteem of the people, and as an orator he has little to boast of, but as a man he has every virtue recommended him."

Such was the first member of our Court, and I would say that's not a bad eulogy to receive. (applause)

JUDGE BISSELL: When I asked Judge Brotman if he would be willing to speak about his predecessor in Camden, Judge John Thompson Nixon, who sat there in the wake of the Civil War, Judge Brotman was quick to remind me that despite Judge Brotman's lengthy tenure on this Court, Judge Nixon was not his immediate predecessor.

Stan, you're right, but let's hear about Judge Nixon.

Thank you.

JUDGE BROTMAN: Thank you.

It is my pleasure to speak briefly about John Thompson Nixon, who was one of my predecessors on the United States District Court for the District of New Jersey from 1870 through 1889. In fact, Judge Nixon sat in Camden for the most part, so, it is especially fitting that I should comment on his career.

In preparing my remarks today, what surprised me most was how little has changed about the issues one confronts as a judge. The similarities in the approach to the resolution of issues taken by Judge Nixon and that taken by many of us today are particularly striking. Some legal historians would have us believe that the legal scholars of the late nineteenth century were formalists, technicians who applied the law in a wooden manner without regard for the purpose of the legislation. My review of Judge Nixon's works reveals a judge who struggled to mete out justice.

But I'm getting ahead of myself. I would like to begin by sketching a brief biography of Judge Nixon and surveying some of the issues faced by him on the lower federal court. I would also like to take a slightly more detailed look at one of the most celebrated cases: one of the early prosecutions under the Enforcement Act of 1870—the prosecution of the Camden Election Rioters of 1870.

John Thompson Nixon was born in 1820 to one of the leading families of Fairton in Cumberland County. Some of you are familiar with southern New Jersey, and you realize that Vineland, my hometown, is in that county. When I learned of Judge Nixon's heritage, I must confess my ego was hurt as I had thought that I was the first United States District Judge from Cumberland County.

After attending Lawrenceville, Judge Nixon attended the College of New Jersey, which as Judge Brown already advised you, is now known as Princeton, which is now the alma mater of our illustrious Chief Judge, that is, John Gerry, the guy seated over there.

Judge Nixon stayed on as an instructor in languages at Princeton. In 1845, he entered the practice of law. In 1848 he was elected to the General Assembly of New Jersey, and in 1849 he was chosen to be the Speaker of that body. From 1858 to 1862, Judge Nixon was a member of the House of Representatives. He was a supporter of the Republic. His political beliefs may be seen in his handling of the Camden Rioters, as you will see.

After two terms in Congress, Judge Nixon returned to New Jersey and his law practice. He produced a digest of New Jersey statutes and served as a trustee for Princeton University from 1864 until his death. It was in 1870, when he was nearly 50 years old, that Judge Nixon was appointed by President Grant to the United States District Court for the District of New Jersey.

Prior to the Civil War, the District Court of New Jersey was seldom confronted with cases presenting issues of national significance. In the wake of the War, however, the lower federal courts began to take on greater powers, and they were to become instruments of national policy during the

reconstruction era. The District Court of New Jersey, and Judge Nixon in particular, confronted issues that would directly involve the economic development of the nation. The Judge handled significant cases in the areas of bankruptcy, patent and maritime law. Judge Nixon's patent cases involved patents for road building and, believe it or not, a patent for a better way to make chewing gum; and he showed a desire to foster and to reward inventiveness.

Among the maritime cases that Judge Nixon faced was *The Maria and The Elizabeth,* 12 Fed.Rep. 627 (D.C.N.J.1882). There Judge Nixon was required to interpret for the first time a provision of the Shipowner's Limited Liability Act, presently codified as amended—I'm sure Judge Gerry knows this—at 46 U.S.C. Section 181, a statute that still surfaces with some frequency in the District of New Jersey. In that case, one ship collided with another and was sold in partial payment of the damages. The injured parties sought complete payment from the owners of the ship which was at fault. The statute, however, provides that "the liability of the owner of any vessel . . . for any loss, damage or injury by collision . . . incurred without the privity or knowledge of such owner . . . shall in no case exceed the amount or the value of the interest to the owner in such vessel." The interesting twist in the facts in *The Maria and The Elizabeth* was that one of the owners was also the master of the ship, and he had been on board the ship at the time of the accident. Although the master-owner was asleep at the time of the accident, shades probably of the Exxon Valdez, there was still a strong argument that the owner had privity of knowledge of the accident and therefore was not entitled to the immunity of the Limited Liability Act.

Judge Nixon decided, however, that Congress intended, and I quote, "to encourage commerce, and ownership in its instrumentalities," and that such a "narrow reading" would interfere with this purpose. The narrow reading, Judge Nixon reasoned, "would deprive all vessel-owners of the privileges of the act in cases where the master happens to have any interest, however small, in the vessel."

Another case which shows a level of legal sophistication previously overlooked by legal historians is *Andrew v. Dole,* 1 Federal Cases 779, Number 373, District of New Jersey, 1875. The plaintiff was an assignee in bankruptcy who discovered that the defendant had fraudulently transferred property to his brother-in-law and continued to receive the benefits of the property. Plaintiff had discovered the fraud seven years after the fact, and the statute of limitations provided that an assignee in bankruptcy was required to commence an action, at law or in equity, within two years of the accrual of the action.

Judge Nixon was the first judge to face this issue, and he decided that the equitable rule that a cause of action did not accrue until discovery of the fraud should not apply where the legislature had specifically stated that the two year statute of limitations should apply both at law and in equity. Judge Nixon concluded rhetorically that "if any hardship should result in a particular

case, because of such omission, is not the remedy to be found in the legislature rather than the courts?"

And so many times don't we also say that in our opinions today?

Now, finally, I would like to turn to the Election Riot of 1870. And that's really documented in the case of the *United States v. Souders*, 27 Federal Cases 1267, District of New Jersey 1871.

In the election of November 8, 1870, the emancipated slaves were voting for the first time after the ratification of the 15th Amendment. In the election of that year they were the decisive block in the struggle between the Democrats and the Republicans in Camden County. Most of the 400 new voters were registered as Republicans. As one would expect, there were many explicit racial overtones to the election. It was not expected to be a clean election, and the Republican papers urged the blacks to vote early in the day, to allow them to help others to get to the polls, but also to let them get clear of the troublemakers who were expected to gather in the afternoon.

On the day of the election black voters arrived early in the morning at the school house in Newton in Camden County. By the time that the judge and other state officials in charge of overseeing the election arrived, there were almost 200 black men in line to vote.

There were some white men—and note at this time only men were eligible to vote—there were some white men who also arrived early in the morning, but they, for the most part, did not want to wait in line with the black voters. Thus, the whites decided either to wait for the blacks to finish voting or to slip into the school house through a back door or windows. Not surprisingly, this annoyed some of the black people waiting in the line. The line moved even more slowly because the Democrats challenged the qualifications of many of the black voters.

There was a small disturbance at about 8 a.m., but the first significant trouble began around ten o'clock, when some of the whites were growing tired of waiting for the blacks to finish voting. Claiming that it was the turn of the whites to vote, a justice of the peace who was also a supporter of the Democratic party led a white to the front of the line to vote as a black voter was being challenged. Names were shouted, someone was kicked, and within a few minutes a small riot had broken out. This disturbance did not last very long, however. The polls were closed briefly, but voting had resumed by early afternoon.

The Camden County sheriff, who had been warned that some trouble might erupt, had taken no specific precautions. He decided to go to Newton after he had received news of the morning riot. When he arrived there he found that some black people were still voting while others who had voted remained to watch, and that all was proceeding in an orderly fashion. He did notice, however, that throughout the afternoon there was a growing crowd of whites who were strangers to the township. These were said to be "roughs" from Philadelphia, including almost 20 Philadelphia police officers who had been supplied with local ballots for the occasion by a Constable Souders.

The chairman of local Democrats, Thomas McKean, asked the sheriff to ask the blacks to disperse. The sheriff initially declined and said that he would only ask the blacks to leave if the "roughs" also disbanded. As time went by, the sheriff changed his mind and asked the blacks to leave, which they did.

At 4:30 or so the strangers, the roughs in other words, perhaps aided by the constable forcibly threw three black voters out of the school house. At this point, the sheriff went to Camden for the New Jersey National Guard. Once the word got out that help was on the way, the roughs acted. After snuffing the candles in the school house, another riot broke out during which the roughs seized the ballot box and scattered the ballots.

By the time the National Guard arrived the riot had subsided. In fact, voting was started again, and over 200 votes, both black and white, were counted by the close of the election. Nonetheless, the National Guard gave pursuit and found 17 of the "roughs" either in Camden or on ferries back to Philadelphia. These men were arrested, and after some delays, several, but not all, were indicted by a grand jury.

The trial of Francis Souders began on January 17, 1871. Souders had been indicted for preventing voters from exercising their right to vote under the Enforcement Act of 1870 and a jury convicted him. The issue presented was whether Souders had prevented a black from voting within the meaning of the statute when that voter had later been able to vote.

Judge Nixon wrote that "there are well settled rules in the construction of statutes. The object of our inquiry is to get to the intention of the legislature in passing the law." Judge Nixon recognized the general rule that penal statutes must be strictly construed, but, heeding the words of Chief Justice Marshall, Judge Nixon also observed that too liberal an application of this rule could result in defeating the intent of the legislature. Judge Nixon then disposed of the defendants' arguments as follows:

> It is further insisted, that to constitute the offense created by the clause of section 19 under consideration, the voter must be altogether frustrated in his efforts to cast his ballot; that the whole day is covered, so far as the meaning of the word prevention is concerned; and that, as these prosecutors found, the opportunity to vote after their ejection, although for a time hindered, the offense was not committed.
>
> It seems to me, as I have already intimated, that such a construction of the statute is too narrow, and that it defeats the purpose which Congress had in enacting it.

Judge Nixon went on to observe that the defendants' argument had not allowed for the statute's prohibition of preventing voters from, and I emphasize, freely casting their ballots. I would also like to quote from Judge Nixon's final paragraphs in this case, for I believe that the language is particularly eloquent:

> Thus, after a careful survey of the law and the evidence, the Court finds no sufficient reason to be dissatisfied with the result at which a

patient and intelligent jury arrived, and the motion for a new trial is denied. Motion denied.

Judge Nixon's opinion in the Souders case reveals an intellect that was far more adept than that of a mere formalist. Thus, I think that Judge Nixon's decision demonstrates that the District of New Jersey has more of an interest to offer than what legal historians have so far brought to our attention.

Sources for my remarks today and more information about Judge Nixon are included in several articles:

Judicial Ajax: John Thompson Nixon and the Federal Courts of New Jersey in the Late Nineteenth Century, reprinted in Studies of the History of the United States Courts of the Third Circuit, Presser Edition 1982, and reprinted in 76 Northwest University Law Review, 423, 1981.

Also, Ernst, *Enforcing the Enforcement Act: The Federal Prosecution of the Camden Election Rioters of 1870,* November 1984, Princeton University, unpublished manuscript.

And also the volume of Judges of the United States, Second Edition 1983.

It is a pleasure for me to give you this short report today. It is great to be here on this occasion. I would hope to be here 200 years from now, but that's impossible. Anyway, my words will be noted. Thank you. (applause)

JUDGE BISSELL: You have heard briefly from Judge Brown and Judge Brotman about judges who sat in this court in the 18th and 19th Centuries.

It is only appropriate that we also select for our continuing education today a piece about one of the most prominent judges who has sat in the 20th Century. For that we could look to no one better than his former law clerk. Judge Debevoise will speak to us about Judge Forman.

JUDGE DEBEVOISE: Chief Judge Gerry, Judge Bissell, friends of the United States District Court for the District of New Jersey.

We come to the third of three great judges of our court—Phillip Forman. He is in a somewhat different category from Judge Brearley and Judge Nixon—different because many of us knew him and tried cases before him while he was on the bench. Some of you sat with him while he was on the bench. Nevertheless, our purpose this afternoon is to view him in an historical, not a personal context.

The Forman years on this court extended from 1932 to 1959. His impact on the court resulted partly from the person he was and partly from the times in which he served.

First as to the person.

Although Herbert Hoover's presidency marked the end of an era, his last judicial appointee, Phillip Forman, represented a change in the kind of person selected to sit on this court. The 1982 Studies of the History of the Courts of this Circuit describe the judges previously appointed to the federal bench in New Jersey. From the decades prior to the Civil War to the Gilded Age and then to the Progressive Era and on until 1932, the court was marked by its homogeneity—a few of the judges were Episcopalians; the rest, as far as can

be ascertained, were Presbyterians; all were of the old stock. The four-judge court to which Phillip Forman was appointed was no exception. He joined Judges John Boyd Avis, William Clark and Guy Laverne Fake—all relatively young, the oldest being 57—but nevertheless of the traditional school. I suppose Judge Fake might be considered the ultimate traditionalist.

In a 1951 photograph of the court Judge Fake sits, austere, dignified and wearing his customary grey spats. This afternoon after this ceremony is concluded we shall gather and have refreshments beneath the watchful eye of the statue of Justice, an award winning sculpture by Romuald Krauss, originally designed to grace this very courtroom. In 1935 when the model was first exhibited it did not appeal to Judge Fake, who occupied this courtroom. The Art Digest of December 15, 1935 described his reaction, and I quote:

> Judge Guy L. Fake in whose courtroom the figure cast in bronze, seven-feet high, will be installed called the model "horrible" and asserted it smacked "blatantly of Communism." "If there must be a statue of Justice in my courtroom," said Judge Fake, "I am old fashioned enough to stand by the classical conception of a blindfolded justice with sword and scales, and looking like a human being."

It is hard to say which Judge Fake disliked the most—communism, modern art or the New Deal.

By way of footnote, you will observe that Judge Fake prevailed in part. There is an empty podium here and the statue is outside the courtroom, not inside.

Now, this was not the mold in which President Hoover's 1932 appointee was cast. Phillip Forman was not an Episcopalian nor was he a Presbyterian nor was he of the old stock.

The new judge's father had been a tailor for the Austro-Hungarian Hussars. He emigrated to this country with 25 cents in his pocket knowing no one. Walking through the streets of New York City he looked into a barbershop, saw a man from his native village and was taken in—the start of his life in a totally new world. He became a tailor for Macy's. In 1890, five years before his son Phillip's birth, he moved his family to Trenton to establish his own tailor shop.

Son Phillip graduated from Trenton High School in 1913. His principal knew of his interest in the law and arranged for him to work as a stenographer for the venerable law firm of Vroom, Dickinson and Scamell. Omitting college altogether he attended Temple Law School at night.

Before graduating, however, the young Phillip Forman passed the New Jersey State Bar examination in March 1917 and served as a chief petty officer in the Navy in World War I. He returned to graduate with his Temple Law School class in 1919.

There followed a brief period of private practice, appointment as an Assistant United States Attorney in 1923, appointment as United States Attorney in 1928 by President Coolidge and then appointment to the United

States District Court in 1932. At age 36 he was the youngest federal judge in the nation.

And at that point the district court in New Jersey began to show the diversity among its judges which has characterized it and has been one of its strengths ever since.

The court required this diversity and the wider perspectives diversity brought to face the challenges of the '30s, the '40s and the '50s.

In 1932 the country's social and economic system had failed dramatically. Emergency measures were required to preserve the banking system, to address the huge and growing number of unemployed, to meet the collapse of the farm economy. It appeared for a time in the mid-'30s that an ultraconservative Supreme Court would continue to invalidate measures the executive and Congressional branches deemed essential to address these problems. However, in 1937, Chief Justice Hughes, switching in time to save nine, altered the balance and set the Supreme Court on a new course.

In the decades that followed the Constitution was found to accord wide latitude to the federal and state legislatures to regulate economic matters and to redress perceived imbalances in the social order. Paralleling this change the Supreme Court increasingly recognized fundamental rights secured by the due process and equal protection clauses of the Fourteenth Amendment, rights which found protection in the federal courts.

The Forman years on this court also coincided with World War II and the beginning of the Civil Rights revolution in the 1950s, each of which presented new challenges to the law and to the court. By way of another footnote, Judge Forman was deeply moved by the events in Europe occasioned by the triumphs of Naziism in Germany. When he sought to return to active duty in the Armed Forces in World War II, he was prevailed upon to remain on the bench. Nevertheless, his very remarkable wife Pearl became a captain in the Navy.

Judge of the New Jersey District Court from 1932 until 1951, chief judge from 1951 until his appointment to the Court of Appeals in 1959, Phillip Forman was preeminently suited intellectually, temperamentally and philosophically to deal with the matters which came before him and to provide leadership to the court during the three decades when he served.

His output was prodigious. He only submitted for publication opinions which he believed dealt with novel issues of law or would help other judges. His first published opinion appeared in 2 Federal Supplement. His last and 295th opinion appeared in 176 Federal Supplement. He presided over major antitrust cases; he faced the array of new issues developing in the securities, patent, labor, diversity and criminal law fields. He handled his cases with patience, firmness, efficiency and humor. During his early years on the bench he sat with the three judges who were on the court at the time of his arrival and with Judge Thomas Glynn Walker who resigned in 1941.

Starting in 1951, as chief judge charged with the administration of the court for the better part of a decade, he was able to secure the full and even

affectionate support of the judges who served with him. These were judges who were noted for their abilities and also knew the full meaning of judicial independence—I refer to Judges William F. Smith, Thomas F. Meaney, Thomas M. Madden, Alfred E. Modarelli, Richard Hartshorne, Reynier J. Wortendyke, Jr. and Mendon Morrill.

Judge Forman did not view the rapid changes in society and the law with a jaundiced eye. In fact he welcomed them. They represented challenges and for the most part were totally congenial to his way of thinking.

He devised ways to address the mass tort case. Following the South Amboy ship explosion which caused hundreds of millions of dollars of damages, thousands of suits were started in federal and state courts in a number of states. It was before the day of the multi-district panel and other formalized procedures for handling such a multiplicity of lawsuits. After years of proliferating litigation Judge Forman took control of the situation, brought the parties together and effected a settlement which resolved the pending cases throughout the country.

The Supreme Court's growing willingness to protect fundamental human rights and rights of minorities accorded with Judge Forman's own sense of justice and fairness.

Clifford Moore was one of New Jersey's first black attorneys. Judge Forman hired him as his law clerk and later, through the Court, secured his appointment as United States Commissioner for New Jersey. As women started entering the legal profession in significant numbers, Judge Forman was among the first of the federal judges to hire women law clerks.

For years the DAR, as it does today, sent representatives to naturalization ceremonies and at the conclusion presented new citizens with American flags and a pamphlet about the American Heritage. Considerably before the civil rights movement began there was an occasion when the DAR refused to permit the great black singer, Marion Anderson, to sing in Washington, D.C.'s Constitution Hall. Judge Forman outraged patriotic sentiment by refusing thereafter to permit the DAR to participate in naturalization ceremonies conducted by him, suggesting that the DAR was not the appropriate organization to explain the American Heritage to new citizens.

Judge Forman welcomed the Supreme Court's expansion of protections accorded criminal suspects and defendants. In December 1946 in the police station located 500 yards from where we are sitting, an Assistant Essex County Prosecutor grilled a murder suspect for seven and a half hours while the attorney for the suspect waited outside repeatedly seeking to confer with his client. The attorney's request was granted—at the end of seven and a half hours, after a confession had been obtained.

The federal habeas corpus petition which challenged the suspect's murder conviction came to Judge Forman in 1956. Things worked slowly even then. That was ten years later. Obliged to follow Supreme Court precedent Judge Forman dutifully denied the petition, but encouraged an appeal by stating in his opinion simply that "This result is reached without enthusiasm."

The Supreme Court was not yet ready to uphold the right to counsel in those circumstances. In 1958, by a vote of five to three, it affirmed the Third Circuit's equally unenthusiastic affirmance of the district court. But six years later Judge Forman's anticipatory sense of what the law must be was vindicated. In *Escobedo v. Illinois,* on virtually identical facts, the Supreme Court, in effect, overruled itself and a suspect's unfettered right to counsel during police interrogation was established.

Generally district court judges do not shape the law through learned opinions, great scholarship or pioneering new legal or social directions. Their enduring influence is much more subtle. It is effected through the totality of their rulings and their relationships with their fellow judges, the manner in which they deal with litigants and lawyers, the processes they employ as they resolve the countless matters which come before them.

Through his day to day work the judge about whom I speak exerted an extraordinary influence upon our court in his time. It is an influence which persists. Justice Brennan suggested why he had this influence, and I quote:

> Judge Forman lived the belief that among mankind's most treasured documents of freedom are the United States Constitution and the Bill of Rights. He regarded it to be an awesome responsibility to assess their impact upon the problem areas fundamental in our constitutional democracy—the permutation of changing shapes of authority, justice, privacy, participation, diversity, property, freedom . . .

Judge Forman's father, the tailor from the Austro-Hungarian Empire, brought with him to this country more than 25 cents. He and his people brought with them and passed on to their children a rich heritage—a heritage of law having origins on the heights of Sinai, in the Valley of Moab and atop Pisgah and Mt. Nebo.

For 27 years this court was served by a judge who, in the tradition of the prophets, did justice, loved mercy and walked humbly with his God. (applause)

JUDGE BISSELL: At this time the Court would like to recognize probably the greatest friend that this Court has among its Bar. No one has done more for this Court and particularly for its Historical Society in its early years than Donald Robinson. The Court recognizes Donald Robinson for the purpose of making a presentation.

Mr. Robinson. (applause)

MR. ROBINSON: Thank you, Judge Bissell.

Chief Judge Gerry.

Now we are going to talk about the present. Our federal family isn't limited to this District Court and the lawyers who appear before it. We have always included the New Jersey members of the Court of Appeals. How fondly we remember Judges McLaughlin, Forman, Smith, Rosen and Hunter, and how fond we are of Judges Garth, Greenberg, Cowen and Chief Judge Gibbons.

The Chief and Mrs. Gibbons have been a devoted part of the federal family since 1950 when the Chief started practicing right here in Newark, his birth place. Then, with their growing children, courageously together they became part of the judicial part of the family in 1969.

In the ensuing 20 years his Honor has authored the astounding total of 692 published opinions plus 122 dissents. I'm not selecting some of his opinions for any quotes or any trends. Nearly every one, I am positive, is a carefully structured work of art reflecting his thorough intellect, his thoughtful scholarship. I can't resist, though, quoting from *Davidson v. O'Lone.* There the Chief dissented—in support of Judge Brotman—in a prisoner inmates civil rights case, and here's what he said, "Because I share a common humanity with the involuntarily committed, I dissent." It is this shared humanity that is his uniqueness.

The Historical Society's presentation of this gift to you, Chief, results from our admiration and our gratitude. We admire you for your humanity, your intellect, your scholarship, your sincere compassion. Our gratitude is for your support when we needed it. You were our first speaker at our very first banquet, and your commentaries and analysis of some of the historical episodes of this court have been the framework for several of our projects.

For the other member of the Gibbons and Gibbons partnership we also have a gift because of our admiration and our gratitude. Our admiration is for your work helping in the redevelopment of the Newark Central Ward Housing and your devotion to Newark's inner city mothers needing child care as part of the Babyland Nursery day care work. Your years of social consciousness and action, while at the same time working with your partner in raising seven children and loving three grandchildren, one of whom we know is only three days old, earns from us even greater admiration. Our gratitude is for your selflessness in sharing your husband with us.

Gibbons and Gibbons, we wish you more and more health, happiness and success. We salute you. (applause)

CHIEF JUDGE GIBBONS: I'm sure he was talking about you.

I'm delighted and pleased to be here at this wonderful celebration of the 200th Anniversary of the District Court representing the junior court. It is the junior court because we will not celebrate our hundredth anniversary until sometime next year.

On behalf of the Court of Appeals I'm pleased and happy to join in your celebration.

As to the recognition by the District Court Historical Society, I must say that Don Robinson always overdoes it a bit.

Thank you very much. (applause)

JUDGE BISSELL: Realizing that would be a very tough act to follow, we sought to find for our featured speaker today a person who was capable of doing so, and I can assure you with great confidence that we have.

It is my privilege at this time to introduce our featured speaker for today's ceremony, Dr. Stanley N. Katz.

Born in Chicago, Illinois in 1934, Dr. Katz presently resides in Princeton with his wife and two children. He obtained his Bachelor of Arts from Harvard University magna cum laude and Phi Beta Kappa in the field of English history and literature in 1955.

In the next six years he also acquired a Master's and Ph.D. degrees from Harvard in American history. In 1970 he attained his law degree from the Harvard Law School.

A dedicated academician, Dr. Katz has held positions on the faculties of Harvard, University of Wisconsin, University of Chicago, including its Law School, University of Pennsylvania Law School, and most recently as a professor of the History of American Law and Liberty and a senior Fellow in public and international affairs at the Woodrow Wilson School of Princeton University.

Long active in the American Council of Learned Societies, he assumed the presidency of that esteemed organization in 1986, a position which he presently holds while continuing to teach at Princeton.

Dr. Katz has focused his considerable academic skills predominantly in the field of legal history. He has authored and co-authored numerous historical publications in the past 25 years with particular emphasis on the law and institutions of colonial, revolutionary and early America.

He is also active as an editor in this field, including an ongoing undertaking as co-editor with Professor Paul Freund of A History of the United States Supreme Court emanating from the Oliver Wendell Holmes devise.

Dr. Katz is also a member of many boards and associations in the field of legal history. We at this Court are particularly proud that he, together with Judges Biunno and Fisher, provided the initial impetus some five years ago which led to the formation of the Historical Society of the United States District Court for the District of New Jersey.

His talk today entitled "Out of Small Beginnings" will trace the significant growth of the federal courts in the American legal system over the past 200 years.

Ladies and gentlemen, may I introduce to you today our featured speaker, surely the most prominent legal historian of our time, Dr. Stanley N. Katz. (applause)

DR. KATZ: You can see that Judge Bissell also overdoes it.

If you think that others have had a hard act to follow, I've had a series of hard acts now, and I would like to assure you that nevertheless Judge Bissell has given me an internalized red light so that the history of 200 years of the federal courts won't keep you here until dinner time.

For the last two years I've had an exciting scholarly project which is relevant to this occasion. I've been running a series of conferences on constitutionalism outside the United States. We have given conferences in

Uruguay, Zimbabwe, Thailand, West Berlin, and we are having a final conference in Budapest on the intriguing subject of the transition from socialism to constitutionalism this coming June.

The conferences derived from the desire to celebrate the international significance of the United States Constitution, and, of course, we did that. But, now that we are nearly through with the process, my conclusion is that the Constitution itself, as well as the writing of that document and its ratification are really not nearly so significant as something that I have only come to appreciate fully through engagement with foreign lawyers and statesmen over the past three years.

The most remarkable thing about our constitutional enterprise is in fact the occasion we celebrate today; 200 years of the fair, equitable and peaceful administration of the rule of law. This is an accomplishment which is unparalleled in the modern world, and, however much we may disagree about details of our law or its interpretation, I can assure you that everywhere in the world this is the most treasured American accomplishment.

Now, as to the District Court itself, we have now had three learned and extremely interesting discourses by members of the court. I can't do better in talking about specific judges.

I would like to start my remarks by saying that the history of this court and of the United States District Courts generally is almost entirely unrecorded. Very little has been written about the federal courts, in spite of the fact that a number of notable judges and lawyers have urged historians and lawyers to do something about the lack of court histories.

The most famous of these was Justice Brandeis, who had just read Charles Warren's famous *History of the United States Supreme Court.* He wrote to Warren to tell him that he had performed "a very important public service because a better understanding of the function of our court is an essential of political and social health." But he thought there was more work to be done: ". . . much having makes me hunger more. Have you ever thought of writing on the lower federal courts?" A suggestion which Warren never either responded to or took up. That was in 1922.

About 15 years later when the famous book *The Business of the Supreme Court* by Frankfurter and Landis came out, they, too, turned to this subject. They said:

> Our national history will not have been adequately written until the history of our judicial system can adequately be told through monographic studies of the individual courts, especially inferior courts. Nor shall we be able to know how our courts function until an effective system of judicial statistics becomes part of our addition. What is needed is an annual detailed analysis of litigation; the courts whence cases come, the dispositions made of them, the nature of the questions involved, et cetera, et cetera, et cetera.

And, of course, no one has done that either. When the Revolution Bicentennial came around and the judicial histories of some of the circuits

were written, attention was paid to this court and to other district courts, but not very much.

There is really only one book written on a particular District Court which rises to the level of scholarship. It was written by a superb historian down in Louisville named Mary Kay Tachau who wrote on the Kentucky court. This is the way she saw the problem when she published her book about ten years ago.

> Ever since the Works Progress Administration surveyed federal records in the states in the 1930s, it has been known that federal court records were available even when they were not easily accessible. It seems now somewhat surprising that they have not been used. Apparently most scholars, if they thought about the lower federal courts, assumed that they already knew in general terms what went on in them. If mentioned at all they are described as inferior courts in every sense of that word.
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> It was in the early Federal Circuit Courts that the travesties of the Sedition Act of 1898 were carried out. It was in an early Federal District Court that Judge John Pickering so misbehaved that he was later impeached. Not until Robert Trembel of Kentucky was appointed to the Supreme Court in 1826 was any judge of lower federal court elevated to a high court. This fact suggests that the lower federal courts were not seen as useful training grounds for judicial eminence.

This is a comment on the way historians have seen the matter.

Furthermore, Professor Tachau comments that American historians have tended to concentrate almost entirely on the United States Supreme Court, its members and its most significant cases, as Brandeis and Frankfurter pointed out. Tachau says that:

> In doing so they have been aided by the court itself which recognized from the beginning that its decisions must be understandable if they are to be acceptable to the citizenry. Supreme Court opinions are written in terms that any interested literate person can comprehend and sometimes are truly eloquent.
>
> That public interest of which the Court has always been mindful has been well served by historians who have expanded the language of the court to explain policy issues and the public consequences of what were at heart legal questions. But to move from the Supreme Court to the lower federal courts means to move from constitutional history to legal history, and that is another world altogether.

And that is the theme of the few remarks that I have today.

It is urgent that we address ourselves to legal history rather than constitutional history, and in doing so we must attend to the lower courts where the real business of the law is done, the district courts, of course, preeminent among them.

This point of view, of course, is not original to me. It really is the dogma of what is called the "new legal history" and its prophet is Professor J. Willard Hurst of the University of Wisconsin Law School, whom almost all of my generation of legal historians followed.

In the series of books which he began to publish in the early 1950s, Professor Hurst reiterated Holmes' point, "The life of the law is not logic, but experience." He concluded that, if we were to understand our legal history, we should pay less attention to the traditional subjects which had preoccupied lawyers and legal historians: the United States Supreme Court, appellate courts generally, constitutional law, and especially judicial law emanating from Washington, D.C.

His point was that we had to attend to those multiple sources of law in this society which emanate from all over the society and all over the continent. He was interested in the role of law in everyday life. He was particularly fascinated by legislatures and administrative agencies, by the law of the several states and geographical regions, by non-judicial rule making bodies, and particularly by trial courts and their manuscript of records.

It is thus because the history of rule of law should be the story of how we govern ourselves, how we behave day to day, and how the courts and other legal agencies in this society, formal or informal, work with us.

Of course, if we are interested in federal law, it is by looking at the District Courts that we find out about those subjects which comprise the core of our daily existence. We find out about business, about property, about criminal activity, about real people and real conflicts. This is precisely what is done in this building and in other Federal District Courts.

What about the actual history of the court? Here is where you get a five-minute view of the last 200 years, in which one of the problems is overcoming the preconception of the very limited role of the Federal District Courts.

It is true, of course, that their original jurisdiction as spelled out in the Judiciary Act of 1789 is indeed quite narrow. As Judge Brown pointed out, the Circuit Courts were comprised of the District Judge in this state and two Federal Supreme Court Justices riding circuit did the bulk of the business. What isn't usually appreciated, however, is that when those two Supreme Court Justices were not available, and they frequently were not, the District Judge sat as the Circuit Judge and in fact performed the duties of the Circuit Court. Thus the histories of the two courts are really intertwined during the period up to about 1870.

It is true that the original jurisdiction of this Court was very narrow, and that it was, in theory at least, eclipsed by the Circuit Courts and by the participation of the judges from the national capitol. Professor Tachau has written about this problem: "One can think of the federal caseload in these early years as looking like a pie with the District Courts having a very small slice and the Circuit Courts having a larger share." Although there were minor changes, this proportional distribution remained constant throughout the early years of the Republic.

Initially there were the 13 District Courts and only three Circuit Courts. The Districts of the seaboard states were fitted into a system of Circuit Courts who heard their appeals. This system worked very well given the kind of caseload that existed at the time, but what historians are discovering as we begin to look at the actual caseload, is that the characterization of the caseload as being minor, inferior in substance as well as in content, may not be fair.

One would have thought, just looking at the legislation and at the relatively small proportion of the cases which are published, that aside from admiralty law and maritime cases there really was very little going on in these courts. What Professor Tachau found, however, in Kentucky, was a tremendous number of cases. She also found that nearly one third of the cases were actually brought by federal officials—Kentucky, then as now, was much involved in the whiskey business and the revenue laws were the source of considerable discontent. She also found that nearly half the caseload was comprised of civil suits between individuals, which is something that one hadn't anticipated in those courts.

It remains to be seen what actually happened to the New Jersey court. We don't know. It won't be until the ample records which are available here and in Bayonne are carefully studied that one can make the same statements about the court in New Jersey.

From a legal historian's point of view, however, the most dramatic thing that happened to this court and the other District Courts in the nineteenth century is the rapid expansion of federal law and of government. The story of formal expansion of federal jurisdiction is complicated, but the emphasis, particularly after the Civil War, is clear—a gradual expansion of the scope of power of the federal courts.

You will be familiar with the major themes—commerce power, diversity jurisdiction, growth of federal common law, expansion of federal statutory law, and the beginnings of the transformation of federalism by the rapid rise of national power. That story becomes even more dramatic and more important in the twentieth century, but here I can more or less skip what I planned to say, because Judge Debevoise has already told you the story much more eloquently than I could do.

Of course, during World War I there was enormous expansion, not only of the government in Washington, but, again, of the power of the federal government and correspondingly of the relevance and the power of these courts. Even more so as we move into the '30s with the New Deal and profoundly in the 1940s with World War II. As we then move into the post war period, the period in which Judge Forman was so active, there, of course, there was a tremendous expansion, the civil rights statutes, the welfare agencies of the federal government and, for that matter, the states, the revolution in the law of standing, the revolution in class actions.

What we get, is more courts, more judges, more clerks, more laws, and more business in these courts. We perceive the greater relevance of what

country. What we must avoid is self-congratulatory history. Plenty of bad things went on in this court—bad judges sat here, bad law was delivered—but that is not the primary theme. We have to find out exactly what happened and how it related to the practical development of our culture in business, in everyday life, in civil rights and so forth.

We have a wonderful challenge before us. Historians are now beginning to rise to it. And I would like to conclude by saying that I am particularly grateful to Judge Bissell and to Judge Fisher and the other members of this Court who have taken the initiative to seek out the cooperation of the scholarly community. This kind of cooperation I think bodes well, not only for the history of this Court, but for its relations to this community.

Thank you very much. (applause)

JUDGE BISSELL: Well, Judge Gerry, that's a peek at the last two hundred years. We place the next 20 in your capable hands.

JUDGE GERRY: 20?

Well, at least there has been a radical departure apparently from our historical origins as to any bad parts, because we obviously have only good judges on this court, and whereas it was not always so, it has evolved into outstanding leadership at the trial level.

Your remarks about inferior courts reminded me of some guy down in Camden who said that by the time old Gerry finishes his tour of duty as Chief Judge, perhaps his only accomplishment will be to have added a new meaning to the expression "inferior court."

So thanks everybody for showing up today and thanks to all of you for your contributions to the Historical Society that made this day possible, both your contributions of your time and resources and we hope that you will continue that support.

So you are all invited now to join the members of the Court down in someplace called the Great Hall.

JUDGE BISSELL: Just outside the door, Judge. Come up to see us more often.

JUDGE GERRY: Caesar doesn't visit the provinces often, and they get along remarkably well without him.

So, anyway, we have some exhibits there that we hope you will enjoy, and the birthday cake; and we hope that you enjoy that as well as our other refreshments and each other's company.

This proceeding is now adjourned.

THE COURT CRIER: Please rise.

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