ON THE MYTHOLOGY OF "THE MOTHER COURT"*

BY JOSÉ A. CABRANES**

We are here to commemorate the 225th anniversary of the Judiciary Act of 1789, which established the basic structure of our federal judicial system under Article III of the new Constitution. And we celebrate also the centenary of this beautiful United States Courthouse.

Indeed, as denizens of Connecticut, we should feel tremendous pride of place as we think about our state's role in the formation of America as a constitutional democracy.

It was the Connecticut delegates to the Constitutional Convention of 1787, Roger Sherman and Oliver Ellsworth, who proposed the bicameral arrangement that would eventually become our country's legislative branch (the so-called Connecticut Compromise). And it was Ellsworth, Connecticut's

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* This is an annotated and lightly edited version of Judge Cabranes's remarks on the occasion of a ceremonial session of the United States District Court for the District of Connecticut on October 30, 2014, marking the 225th anniversary of the District of Connecticut and the 100th anniversary of the United States Courthouse in New Haven, Connecticut. The notes include references to some material published after that date, for the benefit of readers and researchers of this eminently (and deservedly) obscure question. These remarks build upon a lecture on the same topic delivered by the author on April 21, 1983, as part of a series of lectures on the courts of the Second Circuit, published in *Notes on the History of the Federal Court of Connecticut, in* UNITED STATES COURTS IN THE SECOND CIRCUIT: A COLLECTION OF HISTORY LECTURES DELIVERED BY JUDGES OF THE SECOND CIRCUIT 38 (Fed. Bar Council Found., 1992); *see also* José A. Cabranes, *Notes on the History of the Federal Court of Connecticut*, 57 CONN. B. J. 351 (1983) and 1984 SECOND CIRCUIT REDBOOK 678 (Thomas Charles Kingsley, ed., 1984). Finally, lest an innocent reader think otherwise, the author's body of work in the history of district courts is not limited to Connecticut. *See* José A. Cabranes, *History of the District Court of Puerto Rico*, 52 FED. LAWYER, no. 1, Jan. 2005, at 16, *and* José A. Cabranes, *Judging in Puerto Rico and Elsewhere*, 49 FED. LAWYER, no. 5, June 2002, at 40 (both were lectures delivered at Puerto Rico's federal court at the invitation of that court and the United States Court of Appeals for the First Circuit).

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first Senator and later the third Chief Justice of the United States, who drafted Senate Bill No. 1, later known as the Judiciary Act of 1789. That law, which we commemorate today, actualized the separation of powers that is at the heart of our constitutional system.

Today, we also commemorate the very building within which we now gather. In 1914, the cornerstone of this courthouse was laid at a ceremony graced by the presence of William Howard Taft, the former President of the United States and the future Chief Justice of the United States—the Chief Justice who would be responsible for the building of the greatest of all American courthouses, that of the Supreme Court of the United States.[1]

In the years between the White House and the Supreme Court, Taft taught at Yale as the Chancellor Kent Professor for Law and Legal History.[2] It is thus especially noteworthy that we are joined today by Professor John Fabian Witt of Yale Law School, who is, in the view of many, the pre-eminent legal historian of his generation.

As you may know, there are celebrations taking place throughout the country regarding the 225th anniversary of the federal court system. Our own interest in a special program here was piqued by the coincidence of the centenary of the courthouse and also, if truth be told, by the numerous and flamboyant programs planned in the city where I grew up, and especially in the judicial district that embraces, among other places, Manhattan and the Bronx.

Indeed, the Southern District's celebratory festivities include no less than a colonial fife and drum corps, a rendition of scenes from the famous SDNY-themed opera *Don Giovanni*, and more panels than a Midwestern log cabin.

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[1] *See* ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT: CHIEF JUSTICE 133 (1965).

[2] John H. Langbein, *Blackstone, Litchfield, and Yale: The Founding of the Yale Law School, in* HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES 34 (Anthony T. Kronman, ed., 2008).

Now, the Southern District understandably reflects the local culture in which it exists. So we cannot be entirely surprised that, in typically modest fashion, it has chosen to celebrate itself as the "Mother Court" of the federal judiciary.[3] (More than one person has wondered what meaning is to be given to the word "mother" here).

As most of us are aware, the Southern District is renowned for its charming sense of its own importance—it has long been referred to, variously and mockingly, by lawyers in the Justice Department ("Main Justice") as the "Sovereign District of New York."[4]

For the most part, this quaint self-regard is harmless and merely an expression of delusions of centrality—the delusions of centrality with which New Yorkers have charmed the country for so long.

That said, this label—the "Mother Court"—has recently moved from the category of inside joke to the seriousness of the title of a book, by James Zirin,[5] a former federal prosecutor in Manhattan who recalls stories of his years as an Assistant United States Attorney in the Southern District of New York.

Zirin's book is really quite good—but the impertinence of its title ("The Mother Court") prompts me to offer this brief response.

As a native New Yorker, I have found, in general, that it is always salutary to remind New York residents, including

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[3] Benjamin Weiser, *Judges Playfully Dispute Whether New York's Federal Court is the Oldest*, N.Y. TIMES, Dec. 25, 2014; *see also* Press Release, Office of the District Court Executive for United States District Court for the Southern District of New York, United States District Court for the Southern District of New York Announces a Special Session to Commemorate the Court's 225th Anniversary, (Apr. 21, 2014), http://www.nysd.uscourts.gov/file/news/sdny-anniversary.

[4] *See, e.g.,* Preet Bharara, U.S. Attorney for the Southern District of New York, Remarks at Citizens Crime Commission Event: Public Corruption in New York (Apr. 22, 2013) (*available at* http://www.justice.gov/usao/nys/pressspeeches/2013/citizenscrimecommissionApril2013.html) ("There is a reason we are known as the Sovereign District of New York.")

[5] JAMES D. ZIRIN, THE MOTHER COURT: TALES OF CASES THAT MATTERED IN AMERICA'S GREATEST TRIAL COURT (2014).

judges and lawyers, that there *is* life (and there *is* law) on the far side of the Big Apple. I say this, if I may indulge in a snippet of autobiography, as one who spent his childhood in the Bronx, and his adolescence in furthest Queens, deep in the Eastern District, until I came, in the ripeness of years and by the grace of Yale's President, Kingman Brewster, and U.S. Senator Abraham Ribicoff, to New Haven and to the bench of the District of Connecticut.

That being my personal odyssey, I look upon it as a progress of sorts: an educational journey up the Merritt Parkway.

My purpose today is the simple one of puncturing the myth that the Southern District, as categorically stated in a retrospective posted to its own website, was the "first court ever organized under the sovereignty of the United States."[6] (Like other myths and jokes, if it is said often enough, people will actually come to believe it. You've heard of "runaway grand juries"—well, this is a runaway joke).

As you may know, I was once a Judge of the District Court of Connecticut, and, like all trial judges, I have an attachment to facts. And so in recent days I began to review, not for the first time, this claim by the partisans of the Southern District.

The first point, of course, is that the concept of one federal court having precedence over all of the others is a joke cultivated originally by the judges of the Southern District of New York, most memorably by our friend, the late Charlie Brieant.

Judge Charles L. Brieant was the Chief Judge of the Southern District.[7] He was well known for his handlebar mustache, his bow ties, and his great good humor. He celebrated his beloved court in ways large and small.

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6 H. Paul Burak, *History of the United States District Court for the Southern District of New York* 1, Federal Bar Ass'n of N.Y., N.J. and Conn. (1962) *available at* http://history.nysd.uscourts.gov/docs/History1962.pdf (last visited Jan. 28, 2015); *see also* Weiser, *supra* note 3.

7 *See, e.g.*, 1999-2000 SECOND CIRCUIT REDBOOK 151 (Vincent C. Alexander, ed., 1999).

One large project, for example, was the construction of the new and beautiful U.S. Courthouse at 500 Pearl Street, named for the late Senator Daniel Patrick Moynihan. Charlie oversaw the project as Chief Judge.

But it was Senator Moynihan's formidable leadership of the Senate Finance Committee that made 500 Pearl possible.[8] Moynihan thus pre-empted Charlie for the credit, and for the naming of the courthouse at 500 Pearl Street. So it was only right that the *other* courthouse then still available for a "naming opportunity"—the U.S. Courthouse in White Plains—would come to be named for Charlie.

But more modest efforts to aggrandize the Southern District were not ignored by Charlie. One involved Belmont Racetrack on Long Island.

In the late 1980s, Judge Brieant arranged to celebrate the Southern District by having the Belmont Racetrack bestow on one of its races the name "Mother Court Stakes."[9] On October 15, 1991, *The New York Times*, a hometown newspaper, reported that several judges of the SDNY, led by Chief Judge Brieant, had arranged with the New York Racing Association "a package deal."[10]

The newspaper that once modestly described itself as The Newspaper of Record described the package deal as follows: "[The judges] pay for a luncheon and [they] have a race named in their honor."[11]

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[8] Eric Lipton, *Moynihan Name Lives On At the Newest Courthouse*, N.Y. TIMES, Dec. 5, 2000 ("The 27-story federal courthouse at 500 Pearl Street—part of the $1 billion Foley Square courthouse and federal office building complex for which Mr. Moynihan helped to secure financing—is now known as the Daniel Patrick Moynihan United States Courthouse.").

[9] Racetrack aficionados may recognize the title of the race as a "knock-off" of one of Belmont's best-known annual races, the Mother Goose Stakes. *See, e.g.*, Steven Crist, *Life at the Top Captures Mother Goose*, N.Y. TIMES, June 15, 1986. Perhaps in pursuit of the Southern District's place in the sun, Judge Brieant sought inspiration from the proverbial source of nursery rhymes. *See* VINCENT STARRETT, ALL ABOUT MOTHER GOOSE (1930).

[10] Constance L. Hays, *Judges of the 'Mother Court' Spend a Day at the Races*, N.Y. TIMES, Oct. 15, 1991.

[11] *Id.*

According to the *Times*, the judges *did* indeed pay for the outing themselves. The Secretary of the New York Racing Association helpfully told the newspaper that, "We [also] have groups of senior citizens who do this [ ]."[12]

The joke about the Mother Court was apparently lost on The Newspaper of Record. Devoted as it is to printing the first draft of history, it solemnly declared as fact, for the benefit of generations of researchers to come, that "[t]he Southern District, based in Manhattan, is sometimes called 'The Mother Court' because it is the oldest court in the country, predating the Supreme Court by nine months."[13]

(And, as we all know, if The Newspaper of Record *says* it is so, it surely *must* be so.)

Another modest effort by Judge Brieant to enhance the status of the SDNY (at the expense of other federal courts in the Circuit) is worth mentioning.

As The Newspaper of Record also reported on another occasion,[14] Charlie kept in his White Plains chambers the long discarded oil portrait of a former chief judge of the Court of Appeals, Martin Manton. Still another inside joke: Martin Manton had been convicted, in the late 1930s, of taking bribes; he served nearly two years in prison. (This was one SDNY judge's view of the Court of Appeals.)

The invocation of the "Mother Court" by the voluptuaries of the Southern District is in keeping with their tradition of self-effacing good humor. In their minds, the Southern District is not *merely* the most prominent and important of the district courts of our Circuit—and therefore the most prominent and important trial court of the Republic. It is also the *first* district court and therefore, chronologically, the "Mother Court."

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[12] *Id.*

[13] *Id.*

[14] Benjamin Weiser, *Hang Him Up? The Bad Judge and His Image*, N.Y. TIMES, Jan. 27, 2009.

An occasion like this calls for some historical perspective.[15]

Some of you may already know that, on September 25, 1789, President Washington named James Duane as the first judge of the United States for the District Court of New York. Duane is aptly immortalized by Duane Street, off Foley Square, and by the Duane Reade drugstore chain—James Duane's lasting legacy is thus the annual reminder to get your seasonal flu shot.

That said, Duane's appointment has suggested to some that Duane was the first federal judge *nominated* under the Constitution.

Conveniently overlooked is the fact that, one day earlier—September 24, 1789, while James Duane was still a mere office-seeker—President Washington nominated eleven other Judges to fill vacancies in the new District Courts across the country, including those in Virginia, South Carolina, New Hampshire and, of course, Connecticut.[16]

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[15] The following timeline is intended to help the reader keep track—and keep score—of the dates relevant to the question at hand:

- **September 24, 1789:** President Washington nominated the first 11 District Court appointments for the following districts: Delaware, Pennsylvania, Connecticut, Massachusetts, Georgia, New Hampshire, South Carolina, Virginia, Maryland, Kentucky, and Maine. For Connecticut, Washington nominated Richard Law.
- **September 25, 1789**: President Washington nominated James Duane to be the first judge of the United States District Court in New York and Judge David Brearly to be first judge for the District of New Jersey.
- **September 25, 1789**: Judge Duane of the District of New York and Judge Brearly of the District of New Jersey are both confirmed by the Senate on the same day of their nominations.
- **September 26, 1789**: The eleven District Judges nominated on September 24, 1789, including Richard Law of Connecticut, are confirmed by the Senate.
- **November 3, 1789**: The District of New York holds its first session of court. Without hearing a single case, the court promptly adjourns.
- **November 17, 1789**: The District of Connecticut holds its first session of court.
- **February 2, 1790**: The District of New York holds its first actual session of court.

[16] S. Exec. J., 1st Cong., 1st Sess., at 29 (Sept. 24, 1789).

For the District of Connecticut, President Washington nominated his old friend, the aptly named Richard Law. (As far as we know, no drug store or vaccine is associated with his name.)

Thus, by a span of some twenty-four hours, it could be said that the District of Connecticut—or the Districts of Virginia, South Carolina, or New Hampshire, for that matter—are our nation's "Mother Courts." (In a moment of exaltation, or irritation, the late Judge William H. Timbers of Connecticut, and later of the Court of Appeals, would respond that this made the District of Connecticut the "Grandmother Court").[17]

My subscription to the "newspaper of record" of New Hampshire, the *Union Leader*, has lapsed, but I suspect that New Hampshire's District Court has not decided to hold a "We-Got-Here-First" celebration this year.

Southern District supporters might respond that the eleven District Judges nominated on September 24, 1789, including Judge Richard Law, were not *confirmed* by the Senate until two days later, on September 26, 1789, while Judge Duane of the District of New York was confirmed, through a quirk of history, on the same day he was nominated, September 25, 1789.

Of course, to that point, we parry with the fact that Judge David Brearly, of the District of New Jersey, was also nominated *and* confirmed (along with Duane) on September 25, 1789—and as far as I know, our friends in Trenton have never had the impertinence to call the District of New Jersey the "Mother Court."

In any case, any first-year law student will recall the foundational decision of the *actual* "Mother Court"—the Court in the nation's capital—in *Marbury v. Madison*.

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[17] *See* William H. Timbers, Chief Judge for the District of Connecticut, Remarks at Commemoration of the Founding of the District of Connecticut (Sep. 25, 1970) (transcript on file with the Second Circuit Librarian); *see also* Robert Waters, *New Courthouse Called Out-of-Order by Judges*, HARTFORD COURANT, Oct. 26, 1966 ("Judge Timbers said the judges want to keep the current courthouse in the present building on the green—the site of the oldest seat of any federal court in the nation.").

The holding of our most famous case is that it is *not* the appointment or the confirmation that matters; what counts is having the *commission* in hand.

Indeed, an appointment without a commission is like a court without jurisdiction—something that judges on the Southern District of New York have probably never encountered!

But I digress. The simple point I am making here is that the claim of judicial priority for Judge Duane is dubious at best; Duane, as far as we know, received his *commission* on the same day as all the other new judges, including Judge Law, on or after September 26, 1789.

Undeterred, a relentless SDNY enthusiast might point to the date of each court's first proceeding to establish chronological supremacy. Admittedly, the District of New York did hold its first session of court on November 3, 1789, while the District of Connecticut held its first session two weeks later, on November 17, 1789.[18]

To this point, alas, there also are answers.

Those of you who have been listening closely will have guessed it. As noted earlier, Judge Duane was appointed, confirmed, and sworn in as a Judge of the *District of New York*, most certainly *not* a Judge of the *Southern* District of New York.

And the District of New York soon went the way of affordable housing in Manhattan—it ceased to exist.

In 1814, the so-called Mother Court passed away, leaving two orphans in its wake: the Northern and Southern Districts of New York. Over time, these two courts were

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[18] The date of the District of New York's first session is by no means undisputed. In fact, according to I.N. Phelps Stokes, the author of an authoritative history of New York City, the first session of the court was not until three months later, on February 2, 1790. Stokes's claim is buttressed by the following announcement of the *Daily Advertiser* on February 2, 1790: "The Federal Court for the district of New-York will be opened this day in the Consistory room opposite the Dutch Church in Garden-street." 5 I.N. PHELPS STOKES, THE ICONOGRAPHY OF MANHATTAN ISLAND 1261 (1926); *see also* Weiser, *supra* note 3.

subdivided further with the creation of the Eastern (1865) and Western (1900) Districts of New York.

So—if the date of the first court proceeding is the relevant test, we should soon expect to hear claims that the "Mother Court" of the Republic now sits, not only in lower Manhattan, but also in, well … in Binghamton.

Moreover, calling the November 3, 1789 meeting the first "session" of a U.S. District Court is akin to calling New York pizza, rather than its New Haven progenitor, the first tomato pie. In fact, not one case was heard that day. "No business being before the court," The *Daily Advertiser* reported, "the same was immediately adjourned."[19] Thus, were one to accept the claim that this brief session gives the Southern District precedence, then the "Mother Court" is a judicial institution truly without historical parallel—one whose very first exercise of authority was to announce that it was closed for vacation.

It occurs to me that perhaps the relevant test should be compensation levels set by Congress.

Nowadays, law firms in New York ostentatiously lead the way in pay for associates. In that case, Southern District boosters will be horrified to learn that the salary apportioned to Judge Duane by Congress amounted to $1,500, as compared to the *$1,600* given to the federal judge in Pennsylvania and the *$1,800* awarded to judges in Virginia and South Carolina.[20] Then, as now, a dollar in Manhattan apparently goes much further than a dollar in Columbia, South Carolina.

All of this leads back to my original point—that the first 13 District Courts of the United States were created without any hierarchy—created *at the same time by the same law*, the Judiciary Act drafted in 1789 by Oliver Ellsworth of Connecticut.

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[19] *Quoted in* Weiser, *supra* note 3.

[20] Act of Sep. 23, 1789, ch. 18, 1789 First Congress Session I (providing compensation for judges of courts of the United States).

Indeed, as any grade-schooler could tell you, having all been born at the same time, no one court could be deemed the "mother." Each is its own proverbial "special snowflake." To affix the "mother" label on to the Southern District of New York is to invite . . . conjecture about the meaning of "mother"… and maybe even laughter.

And so, as we celebrate the 225th anniversary of the District of Connecticut and the centenary of this wonderful New Haven courthouse, we recall two apt insights separated by a century and a half.

The first belongs to a son of New Haven, Robert Moses, the greatest builder of American infrastructure, at the groundbreaking of the World's Fair of 1964. Comparing the projected pavilions of various states and industries, Moses said of his native Nutmeg State, with no hint of irony, "it isn't the size that counts."[21]

Finally, I recall Daniel Webster's peroration during oral argument before the Supreme Court in the famous *Dartmouth College Case* of 1818. Speaking of his alma mater, Webster famously declaimed at the end of an argument that lasted days and was reported to have brought some justices to tears: "It is, Sir, as I have said, a small college. And yet there are those who love it!"[22]

And so it is with our District of Connecticut.

We may be a small District, but it isn't the size that counts—and there are those who love it.

Thank you.

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21 Robert Moses, Remarks at the Groundbreaking of the New York World's Fair 1964-1965 (Aug. 15, 1963) (*available at* http://archive.org/stream/1964-65NewYork WorldsFairGroundbreakingAndDedication Booklets/lebanon_2005-03-06_djvu.txt).

22 Kate Stith-Cabranes, *Trustees of Dartmouth College v. Woodward and the Enduring Significance of Self-Governance, in* THE DARTMOUTH COLLEGE CASE: THE 175TH ANNIVERSARY COMMEMORATION 19 (1994); *see also* William H. Rehnquist, *Foreward: Daniel Webster and the Oratorical Tradition, and* Maurice G. Baxter, *Daniel Webster: The Lawyer, in* DANIEL WEBSTER: "THE COMPLETEST MAN" at xiii, 145, 169 (Kenneth E. Shewmaker, ed., 1990).