Preface

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THE SUGGESTION FOR A STUDY OF THE UNITED STATES COURT OF APPEALS for the Second Circuit came from Professor Joseph Tanenhaus, who introduced me to the subject of judicial behavior at New York University. At the time, political scientists seemed to think that the federal courts of appeals or, for that matter, any American court below the Supreme Court, were unfit for study by the profession. Courses on the judiciary dealt exclusively with the Supreme Court and the constitutional decisions that it made. About the only mention made of lower courts in political science literature was the brief (and insipid) sketches usually included in introductory course textbooks.

Of course there have been many changes and improvements in our approach to courts and judges. We have learned that the Supreme Court alone does not make the American judicial system, nor do legal opinions a court make. Sophisticated analytical techniques have been developed or borrowed from other fields to permit us to probe more deeply into the judicial process. Whether quantitative or verbal, and no matter what their defects, we cannot deny that these techniques have made clear the inadequacy of the old Supreme Court-constitutional law tradition.
The behavioral thrust has extended the boundaries of political science beyond—or below—the Supreme Court and its justices. Professors Kenneth Vines, Sheldon Goldman, Sidney Ulmer, Stuart Nagel, Louis Loeb, Joel Grossman, Herbert Jacob, and Kenneth Dolbeare, among many others, have examined state and inferior federal courts. They have produced a significant body of work. Still, their studies have been directed to special aspects of the operations of these courts and, in any case, the bulk of recent research is Supreme Court oriented. If I have not relied specifically on the methodology and research of others who have worked in this field, I can say with all sincerity that the mood within the discipline that they have created has sparked this and other research on courts.

This book is an effort to present a comprehensive picture of a lower federal court. It is aimed at both lawyers and those political scientists who are interested in the legal process. The dearth of knowledge about the Second Circuit and the courts of appeals made it necessary to include in this study historical and biographical material that would introduce the reader to the subject. Beyond this, the dual audience made even more difficult the problem of which approaches to take toward the Second Circuit.

It is no secret that many lawyers, and not a few political scientists, have deprecated quantitative and other behavioral approaches to the judicial process. On the other hand, a good deal of scorn has been directed at the case method that has dominated legal education and scholarship for so long. I do not believe it necessary to take sides in the debate, for the separation of the two disciplines implies distinct approaches. I do feel strongly, though, that we political scientists who study courts must do more than imitate lawyers, if only because we cannot do as good a job as they do in analyzing case law. Since I am writing for lawyers and political scientists both, I have tried to employ techniques familiar to each. I confess to having doubts as to whether I have succeeded to the satisfaction of either; after all, I have been told by a couple of lawyers that the statistical approach is overdone in Chapters 9 and 10, while a colleague has found the same material a bit on the primitive side (that is, from a behavioral point of view).

I also have had to face several substantive problems and these ought to be briefly discussed here. This book is principally about ten years (1941–51) in the history of the Second Circuit. The selection of this period is easily justified on grounds of court membership. The source of the difficulty is that no matter how significant and worthy of the study is the period of Learned Hand’s chief judgeship, these years hardly constitute a neat analytical unit. After all, the court existed prior to 1941 and many of the decisions handed down during 1941–51
had precedential roots in earlier years. On an individual level, Learned Hand and Judges Swan, Augustus Hand, and Chase sat on the court as far back as the 1920’s, so that their definitions of the judicial role and approaches to many legal problems were already shaped before the years studied here.

The point is that I have deliberately selected a single decade out of the much larger context of Second Circuit history, law, and behavior. Study of these years is apt to be somewhat distorted, if only because so little is known of all the other years that the court has been sitting. I also recognize that even with regard to 1941-51 the Second Circuit functioned within judicial frameworks that are not the principal concern of this book. In the first place, it shared intermediate appellate status in the federal judiciary with ten other courts of appeals. Secondly, as an inferior court, the Second Circuit is affected by the actions of the Supreme Court.

Each of the contextual limitations imposed by the ten-year scope of this study has been considered in the preparation of Learned Hand’s Court. A great deal of time has been spent examining Second Circuit rulings to learn of their decisional origins and future impact and also to trace their relationship to Supreme Court decisions. The effect of this research has been to extend the study to at least some appeals heard by the Second Circuit outside of the Learned Hand years. Of course, overwhelmingly, attention is paid to 1941–51 decisions. With respect to this decade, I believe that for the most part the rulings that gave vigor to the court and provoked the greatest effort by the judges were those that had either no roots prior to 1941, or weak ones. In short, I believe that it makes sense to study a single decade.

With regard to the work of the other courts of appeals during 1941–51, it is sufficient to note here that I argue in the text (Chapter 4) that these courts are not much influenced by the actions of tribunals of the same rank.

But obviously the Supreme Court does affect lower court activity, and for this reason what the Supreme Court did during the period, particularly in appeals from the Second Circuit, is very much a part of this study.

Of all the major institutions of our government, the appellate courts are unique in the degree to which their actions are hidden from the public. We know more about the internal discussions preceding decision-making of various national security agencies than we do of the private discussions of the justices of the Supreme Court. Most of what we know and study about courts concerns their rulings. From the standpoint of law, this limited view is adequate, though barely so. After all, many important decisions are compromises of the differing
views of judges, arrived at after considerable bargaining; the decision that is published and then studied and applied often obscures the conflict and bargaining that took place in conference and elsewhere.

Courts as agencies of policy-making ought to be studied as systems with social and psychological characteristics relevant to the rulings they render. We must examine as deeply as we can their modes of operation. Because for the most part their business is conducted privately, we should be grateful for such opportunities as are available for learning about those features of their operations which traditionally are never publicized. For this study of the Learned Hand court I have been fortunate in securing access to the papers of Judge Charles E. Clark, which are at the library of the Yale Law School. I am deeply grateful to Mrs. Dorothy Clark and Professor Elias Clark for making available to me the papers of their late husband and father. Their willingness to allow me to use the Clark Papers has contributed importantly to this study. While they or others may at times disagree with the way I have used or interpreted some of the material, I can say with confidence that these papers have advanced significantly our understanding of the Second Circuit and the way appellate courts function.

The Clark Papers principally consist of the memoranda of Judge Clark and his colleagues in the cases that he heard, judicial correspondence involving Judge Clark, and other material relating to the work of the Second Circuit. Because it is an important matter, I have reserved discussion of my approach to the use of these papers for a place in the text (note at the beginning of Chapter 7) where I feel more assured that it will catch the eye of the reader.

I recognize that reliance on the papers of a single judge might well lead to the overemphasis of certain events in which this judge was involved and an underemphasis of some of the things that his colleagues did. The danger is real and I suppose that I have erred in some places. But it is not without importance that Judge Clark heard approximately one-half of the appeals that were decided by the Learned Hand court, and for these cases I have used the memoranda and other material prepared by the sitting judges. The most important feature of the Second Circuit during these years was the relationship between Judges Frank and Clark, and on this subject the Clark Papers contain a great deal of documentation.