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ORIGINS OF THE FEDERAL COURT SYSTEM

by Caroline P. Stoel

The following article previews an early chapter that Caroline Stoel is contributing to the history of the U. S. District Court for Oregon—a book our historical society will publish in 1991. Stoel is a member of the society board and an adjunct professor of the history of law at Portland State University.

Today most of us take for granted our federal judicial system, giving little thought to the entanglements—political, geographic, and fiscal—which almost prevented its creation and at times threatened to curtail its effectiveness, if not its very existence. Much of the credit for its formation and preservation must be given to the wisdom and foresight of men like James Madison, Edmund Randolph, John Rutledge, Oliver Ellsworth, and John Marshall. They were convinced of the necessity of a comprehensive court system, with both trial and appeals courts, at the national level.

The Constitution of 1787 was a practical document, aimed at creating a machinery of government for a new nation. That machinery had to provide for the operation of the government and at the same time guarantee protection against the arbitrary exercise of authority. The Constitution represented an experiment in government, one for which there was no existing model. Its authors drew their ideas chiefly from two sources: British legal and constitutional tradition and the eighteenth-century ideas of the Enlightenment. Montesquieu's *Spirit of the Laws* inspired the division of power among the three branches of government—executive, legislative, and judicial. British constitutional principles of liberty under law, established gradually over the centuries, at times by arms but more often in the royal courts, were seen as a heritage worth preserving. The influence of this heritage on our legal system is clear.

The Judiciary and the Constitution

Article III, section 1, of the Constitution provides: "The judicial power of the United States shall be vested in one

Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Before enacting this provision, the Constitutional Convention of 1787 debated at length the desirability of establishing a national judiciary. Some of the delegates argued that only an appeals court was necessary to protect federal interests. Federal trial courts, they asserted, would duplicate the functions of state courts and constitute an unnecessary expense. Furthermore, their establishment would endanger ratification of the Constitution by states that regarded such courts as an encroachment on state jurisdiction. Other delegates, however, favored a strong federal judiciary, including courts of first instance as well as appeals courts. Among these were some of the most influential and respected figures of the day: John Jay, Thomas Jefferson, James Madison, and Edmund Randolph. At length a compromise was hammered out and on July 18 a resolution was adopted to establish a Supreme Court, leaving to Congress the option of establishing inferior courts.

The Judiciary Act of 1789

The organization of the federal courts was set out in the Judiciary Act of 1789, which was largely the work of Oliver Ellsworth, later appointed a Supreme Court justice. The act provided for a Supreme Court of six judges, with original jurisdiction as provided in the Constitution and jurisdiction to hear appeals from the circuit courts by writ of error when the

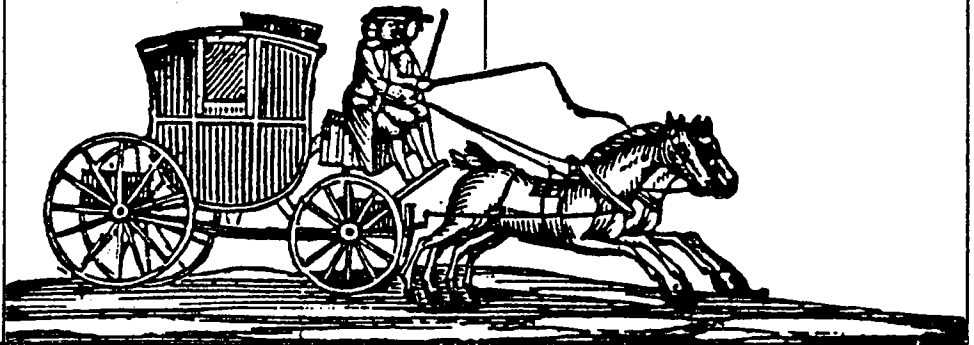
amount involved was more than \$2,000. The act also provided for the establishment of circuit and district courts. On the surface this may appear to resemble our present system, but in fact it differed in important respects.

Each state constituted a federal district, and courts were held by district judges at terms fixed by Congress. The districts (except for Kentucky and Maine, then a part of Massachusetts) were organized into three circuits—eastern, southern, and middle. The circuit court was held in each district by two Supreme Court judges and the district court judge, the terms of court being set by Congress. The district courts were courts of first instance, while the circuit courts had both original and appeal jurisdiction. Appeal from the circuit court was to the Supreme Court. These circuit courts should not be confused with today's circuit courts of appeal, which were not established until 1891.

Circuit Riders

One of the most interesting, and the most controversial, aspects of the new system was the provision that the Supreme Court justices should "ride circuit." The justices for the most part found this a time-consuming and burdensome duty. Travel in those days entailed many vicissitudes. Distances were often great, and transportation by horse-drawn carriages over poor and often muddy roads was slow. The justices argued that their time could be more profitably spent improving their knowledge of

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the law and pondering cases brought before the Supreme Court. Further, they contended, a conflict arose when as Supreme Court justices, they heard appeals from judgments they had rendered as circuit court judges.

A specific example will show just how burdensome circuit duty was. In the year 1838 most of the justices averaged about 2,000 miles of travel. But Justice John McKinley's total was 10,000 miles!

"Justice McKinley was assigned to the Ninth Circuit, which included Alabama, Mississippi, Louisiana and Arkansas. This circuit was established in 1837, and the court was held in the following order: Little Rock, Arkansas, on the fourth Monday in March; Mobile, Alabama, on the second Monday of April; Jackson, Mississippi, on the first Monday in May; New Orleans on the third Monday in May; and Huntsville, Alabama, on the first Monday in June. In the fall, the terms of the circuit court were held in New Orleans, Jackson and Mobile. Justice McKinley wrote that he must travel by boat from Little Rock through New Orleans to Mobile, a distance of approximately 850 miles, for the purpose of holding the circuit court. To get to Jackson he had to travel from Mobile back through New Orleans up to Vicksburg, Mississippi by water, and finally by stage to Jackson, a distance of 800 miles. The next term of the circuit court was in New Orleans, a city through which he had already passed three times." (E. C. Surrency, *28 Missouri Law Review* 221-2)

In spite of these hardships, many opposed the elimination of the justices' circuit court duty. It was argued that the American system was modeled after the English one, in which royal judges from earliest times had both original and appellate jurisdiction and had held courts throughout the kingdom. This system had proved worthy in all respects—it served to deliver the king's justice to the people in

the local communities and to make the law uniform throughout the land. By riding circuit, the Supreme Court justices would keep in closer touch with "sentiments and feelings" in the states and would not become "national" in their attitude.

The system never functioned completely as it was envisioned. Although the circuit courts handled a vast amount of business, in many cases the heavy schedule could not be met. In addition, because not all of the district courts were placed in a circuit, appeals from those courts went directly to the Supreme Court, where the amount involved in the case appealed had to be at least \$2,000. In the districts where the justice held a circuit court, an appeal could be made even if the amount involved was only \$50.

The Midnight Judges Act

A serious effort at reform was attempted in 1801 with the passage of a new judiciary act, sometimes called the "midnight judges act" because President Adams supposedly spent the last hours of his term making appointments for the newly created judgeships. Under its provisions the justices were removed from circuit duty, and special circuit court judges were to be appointed in their places. The act created six circuits, five with three circuit judges and the sixth with one. In addition to the sixteen new judgeships, the number of court officials was greatly increased. However, the new act was never fully implemented. The Jefferson administration, taking over from the defeated Adams administration, saw the act as an attempt to



perpetuate the Federalists in office. It was repealed in March 1802. The repealing act, however, lightened the burden of the Supreme Court justices by providing that the circuit court could be held when only one of the judges was present. This most frequently was the district court judge.

1801-1891

After the repeal of the Act of 1801, it became increasingly difficult to obtain passage of a new reform bill. However, with the admission of new states to the union and the creation of new circuits, change was inevitable. In 1869 the office of circuit judge was created. The circuit judge possessed the same power as a Supreme Court justice sitting on the circuit bench. Either the circuit judge, the associate justice, the district court judge, or any combination of these three was empowered to hold the circuit court. The Supreme Court justice was required to go on circuit at least every two years.

Circuit Court of Appeals

Another tier of courts was added in 1891 with the creation of the circuit courts of appeals. These courts, held by two circuit judges and the associate Supreme Court justice assigned to that circuit, heard appeals from the district and circuit courts. The appeal jurisdiction of the old circuit court was abolished. The circuit and district courts performed essentially the same functions but in spite of recommendations that they be merged, duplicate jurisdiction was not eliminated until 1911, when the circuit courts were abolished. This left a three-tiered system: the district courts were the trial courts; appeals went from them to the circuit court of appeals; and from there they went to the Supreme Court (which also had certain original jurisdiction granted by the Constitution).

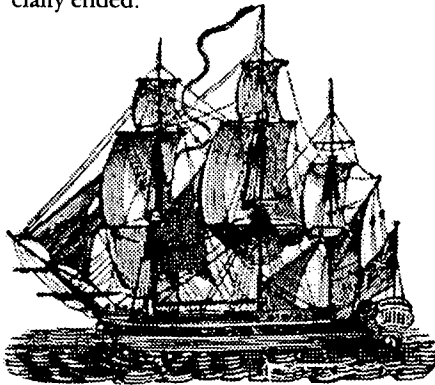
It was by custom rather than by statute that the Supreme Court justices ceased to preside in the circuit courts. By the end of the Civil War, the presence of a justice of the Supreme Court in a circuit court was

It's Annual Meeting Time!

The annual meeting of the U.S. District Court of Oregon Historical Society is scheduled for Monday, November 13, in the lobby of the Portland Center for the Performing Arts. The meeting begins at 5:00 p.m. with cocktails following at 5:30 and dinner at 6:15.

Reservations should be made no later than November 8 by calling Arlene Schmitzer's office (228-8476). The cost is \$35 per person.

rare, and by the beginning of the twentieth century even this rare presence had become a thing of the past. Even so, it was not until 1911, when the circuit courts were abolished, that the duty was officially ended.



Conclusion

The Judiciary Act of 1789 was never wholeheartedly approved. The first justices of the Supreme Court contended that Congress had only intended it to be temporary and shortly expected to establish a more workable system. But as we have seen, attempts at complete reorganization were never successful. As with the common law, the system grew and changed piecemeal in a rather haphazard fashion, somehow managing to fulfill the needs of the time. One of the most important provisions of the 1789 act has proved to be the establishment of "inferior courts," which the Constitution had made optional at congressional discretion. Historians, long mesmerized by the Supreme Court, are now beginning to work the rich lode of district and circuit court history. The seminal role of these courts in the development of American law is at last emerging. As the late Justice Tom Clark noted: "It was here [in the courts of original jurisdiction] where ninety percent of the law was made and continues to be made. The 7500 cases these courts disposed of during the decade 1870-1881 covered the whole range of litigation. The presence in these courts of members of the Supreme Court gave them great prestige and standing which added immeasurably to the early hammering out of the knotty questions presented. They securely established the foundation of our present system and at the same time gave indispensable support to the federal government which was sorely absent during the period of the Confederation." (Dwight F. Henderson, *Courts for a New Nation*, p. vi.)

Sources: Dwight F. Henderson, *Courts for a New Nation* (1971) and Edwin C. Surrency, *History of the Federal Courts*, (1987), and "A History of the Federal Courts," 28 *Missouri Law Review* 214 (1963).



BRIEFS

The United States Judicial Conference's Committee on the Bicentennial of the Constitution announces a summer stipend program to support research on the history and evolution of the federal courts. Up to five stipends for full-time summer research will be awarded—each consisting of an \$8,000 honorarium and \$2,000 for travel and expenses.

Scholars who hold a terminal degree in such fields as history, political science, and law may apply, with preference given to applicants who clearly intend to publish.

Any topic in the field of federal judicial history is eligible for consideration, but the Committee encourages proposals that focus on federal courts other than the Supreme Court. Topics that explore the interaction between the state and federal judiciaries are also welcome.

Applications must be received no later than December 15, 1989, with winners announced by February 15 and awards made May 1.

For more information, contact Judge Frank X. Altamari, U. S. Court of Appeals

for the Second Circuit, Uniondale Avenue at Hempstead Turnpike, Uniondale, N. Y. 11553.



Kudos to Katherine H. O'Neil, our corporate secretary, for her fine work as president of the new organization, Oregon Women Lawyers. The group is presenting several excellent programs this year, including a November 4 seminar on becoming a judge, an April 7 statewide conference on achieving career satisfaction, and a February workshop designed to help attorneys prevent "burnout." The organization is open to both men and women in the legal profession. For more information, call Katherine at 222-4545.

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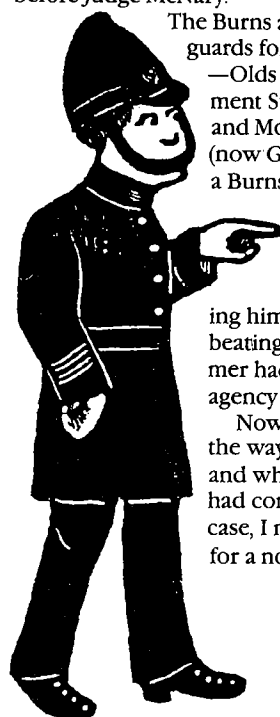
Membership is open to all lawyers on an individual basis only and to non-lawyer corporations and individuals.

The • Light • Side

The following story is by **Hy Samuels**, the third longest practicing attorney in Oregon, as told to **Carolyn Buan**.

When I started practicing law in Portland in 1927, the United States District Court for Oregon was on the second floor of the U. S. Courthouse, which in those days was at Fifth and Morrison streets (in the present Pioneer Post Office building). The court had two judges: John McNary and Robert Bean.

My first case was in 1928, when I was co-counsel representing the Burns Detective Agency in a case that came up for trial before Judge McNary.



The Burns agency provided guards for—among others—Olds & King Department Store on Tenth and Morrison streets (now Galleria). One day a Burns employee had gotten into a scuffle with an Olds & King customer, giving him an unmerciful beating, and the customer had sued the agency.

Now I was new to the ways of the court, and when the other side had concluded their case, I made a motion for a nonsuit.

It was close to the noon hour when I started arguing that motion, and during the break the district attorney, George Neuner, came up to me and said, "Say, young fella, you're in a lot of trouble!"

"First of all, Judge McNary likes to hear all the evidence in a case, and he doesn't particularly like motions for a nonsuit. Also, I suppose you don't know it, but in the federal court when you file a motion for a nonsuit and you don't prevail, you cannot put up any defense."

Well, I didn't know that, but I realized I'd better get some "good law" under my belt or I'd make a fool of myself. So during the noon hour, I went back to my office to do some research. As it turned out, luck was with me, for I found a case supporting my position that Judge Bean had written when he was on the Oregon Supreme Court.

Now I knew that Judge McNary admired Judge Bean, who was a good scholar of the law, and it was a good thing I did because—as it turned out—Judge McNary allowed the nonsuit.

Needless to say, I was very elated at my victory and congratulated myself all the way back to my office. I hadn't been back long, however, before I got a call from the clerk of the court that took the wind out of my sails.

"Young man," he demanded, "Are you a lawyer?" "Yes," I answered.

"Were you admitted by the Oregon Supreme Court?" "Yes," I said.

"Well, you were never admitted to the district court."

Now I hadn't known that! I had just won my very first case in the district court without ever having been admitted to it!!

Welcome to Our New Members!

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THE UNITED STATES DISTRICT COURT
OF OREGON HISTORICAL SOCIETY
503 U.S. Courthouse
20 SW Main Street
Portland, OR 97205

