BOOK REVIEW


Reviewed by ROGER J. MINER*

INTRODUCTION

The 102nd Congress of the United States is in its second session as this book review is written. The problems it faces, difficult as they are, pale into insignificance when compared with the tasks that confronted the first Congress when it convened in 1789 under the newly-ratified Constitution. Although the Constitution contained the broad outlines of a new national government, the members of the first Congress were constrained to draw a more detailed blueprint for governance. That they were able to do so in one session is a tribute to their sweeping visions of the future as well as to their political abilities. Their consensus-forging skills are worthy of study by modern-day lawmakers, who often seem incapable of compromise.¹ There is much else to be learned from an examination of the work of the first Congress, which set the stage for a new government of the United States by fleshing out the Constitution in the course of adopting twenty-seven separate Acts and four Resolutions.²

One of the most enduring of the twenty-seven Acts adopted by the first Congress was the one entitled "An Act to Establish the Judicial Courts of the United States."³ Frequently referred to
as the Judiciary Act of 1789, or the First Judiciary Act, this item of legislation established a three-level system of national courts that has continued, with various jurisdictional and functional alterations at each level, to the present day.  

Exercising the power granted to it under the Constitution to establish courts "inferior" to the Supreme Court, the first Congress in the First Judiciary Act established both District and Circuit Courts. No judges were authorized for the Circuit Courts, which were to be composed of two Supreme Court Justices "riding Circuit" plus a District Judge. For district court purposes, the nation was divided into thirteen districts, with at least one district in each state. One judge was provided for each district court. For circuit court purposes, three circuits were established, each consisting of two or more districts.

Under the Judiciary Act of 1789, both the district and circuit courts were courts of original jurisdiction, and the circuit courts had certain appellate jurisdiction as well. Conferred upon the district courts was (1) exclusive jurisdiction over maritime and admiralty causes, including seizures on the high seas (saving to suitors available common law remedies); (2) exclusive jurisdiction over all seizures on land and of all suits for penalties and forfeitures incurred under the laws of the United States; (3) jurisdiction, concurrent with the courts of the several states and the circuit courts, "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States;" (4) jurisdiction concurrent
with the state and circuit courts in suits at common law brought
by the United States "and the matter in dispute amounts,
exclusive of costs, to the sum or value of one hundred dollars;"
and (5) exclusive jurisdiction of suits against consuls or vice­
consuls, except for criminal offenses triable in the circuit
courts.10

The district courts were given exclusive criminal
jurisdiction respecting "crimes and offences that shall be
cognizable under the authority of the United States, committed
within their respective districts, or upon the high seas; where
no other punishment than whipping, not exceeding thirty stripes,
a fine not exceeding one hundred dollars, or a term of
imprisonment not exceeding six months, is to be inflicted."11

The circuit courts were given concurrent jurisdiction of the same
crimes and offenses and exclusive jurisdiction over all others.12

On the civil side, the Act accorded to the circuit courts
"original cognizance, concurrent with the courts of the several
States, of all suits of a civil nature at common law or in
equity, where the matter in dispute exceeds, exclusive of costs,
the sum or value of five hundred dollars, and the United States
are plaintiffs, or petitioners; or an alien is a party, or the
suit is between a citizen of the State where the suit is brought,
and a citizen of another State."13

The Act provided for removal of cases from state courts to
the circuit courts in private civil litigation where the amount
in dispute exceeded $500 and the petition for removal was filed
by a defendant who was an alien; a defendant sued in a state
different from his state of citizenship by a plaintiff who was a
citizen of the state where suit was brought; and by either party
to a dispute over a land title where one party claimed title
under a grant from the state where the action was brought, the
other party claimed title under a grant from another state, and
the matter in dispute exceeded $500. The circuit courts had
appellate jurisdiction over final decrees of the district court
in admiralty and maritime cases where the amount in dispute
exceeded three hundred dollars, and over final judgments of the
district court where the amount in dispute exceeded fifty
dollars. No right of appeal from any criminal conviction was
afforded in the federal court system until 1889, when the right
of direct review by the Supreme Court was provided for capital
cases. The First Judiciary Act also failed to confer general
federal question jurisdiction upon the lower courts, a deficiency
that was not finally remedied until 1875.

Conferred upon the Supreme Court, in language tracking the
Constitution, was exclusive jurisdiction over civil controversies
where a state was a party, except between a state and its
citizens; original jurisdiction in suits against ambassadors or
other public ministers, consistent with the law of nations; and
original, but not exclusive, jurisdiction of all suits brought by
ambassadors, or other public ministers. Original but not
exclusive jurisdiction was provided in actions between a state
and citizens of other states or aliens. Manifesting the
importance of jury trials to the American citizenry, the Act provided that "the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury." Final judgments and decrees of the circuit courts in civil cases were appealable to the Supreme Court on writs of error if the matter in dispute exceeded $2,000 in value. Review of a final judgment of the highest court of a state was allowed where the question involved the validity of a treaty or of a statute of the United States or of an authority exercised under the United States.

The Judiciary Act of 1789 is more than just an object of historical interest. It is an important point of reference for those who are concerned with the present-day operation of the federal court system and care about its future. At a time when structural reform of the system is under serious consideration, the institutional antecedents of the existing structure are worthy of examination. Also of interest to those who would prepare for the future of the federal courts is the original treatment of subject matter jurisdiction, including diversity jurisdiction. It should be remembered that the Judiciary Act of 1789 did not vest in the federal courts the full judicial power provided by the Constitution, probably because the Federalists in control of Congress sought to appease the Anti-Federalists. Indeed, Congress never has conferred upon the courts the full constitutional judicial power it has been authorized to confer. Should it do so now, in response to
popular demand? Or should it cut back? Should the status quo be maintained? The answers to these questions, and others, can be informed by a study of the original Judiciary Act. One thing is certain: the ever-expanding menu provided in the lower federal courts, a consequence of the "underdeveloped capacity [of Congress] for self-restraint," is beginning to create a caseload crisis of major proportions.

Twenty-first century scholars, lawyers and judges have had occasion to refer to section 34 of the original Judiciary Act and, apparently, will have reason to do so again. In section 34, Congress went beyond the structural, jurisdictional and procedural aspects of the newly created judicial system and ventured into the area of the law to be applied by the federal courts. Section 34, which has survived in the statutes essentially in its original form, provided:

That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

It has been said that "[p]robably no statute regarding the federal courts has led to such difficulty" as this one.

According to present conventional wisdom, section 34 requires that state law, whether statutory or common, must be applied except in matters governed by the federal constitution, Acts of Congress or treaties duly ratified. This notion of course gained currency when Swift v. Tyson, interpreting laws in the section 34 context as statutory only, was overruled by Erie
R.R. v. Tompkins, in which Justice Brandeis wrote: "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." The Brandeis opinion was based in part on what the Justice referred to as "recent research of a competent scholar." The scholar was Professor Charles Warren, who had found in the attic of the Senate what appeared to be the original manuscript draft of the Judiciary Act of 1789. In the draft that Professor Warren found, there was a provision establishing as rules of decision at common law in courts of the United States, except where the federal constitution, federal statutes or treaties applied, "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise." Warren thought that the final version of section 34 was intended to say the same thing as the newly discovered draft. He believed that section 34 was grounded in federalism concerns.

In their fascinating examination of the First Judiciary Act, the authors of Rewriting the History of the Judiciary Act of 1789 put an entirely new spin on section 34. They say that it is not about federalism at all, admonishing the reader that "one ought not to read Section 34 as doing what to moderns it seems perfectly obvious that it does and should do, that is, to instruct national judges to look at state statutes and state decisions and follow their lead." The authors note that at the
time the Judiciary Act was adopted there were no common law decisions in print and the state statutes were not generally collected and printed. It therefore would make no sense for section 34 to refer to these as sources of law. Moreover, a persuasive argument is made that the manuscript discovered by Professor Warren was not the same version of the bill used by the Senate during its deliberations. The Warren view is said to be flawed by reliance on the manuscript.

Through scholarly deduction, examination of ancient documents, legal reasoning, attention to the language then in use and an astute understanding of the tenor of the times, the distinguished legal historians who wrote this book have posited two alternative conclusions about section 34: that it was intended as a direction to the new courts to apply American rather than British law in all common law civil and criminal proceedings; or "most probably [that it] was intended as a temporary measure to provide an applicable American law for national criminal prosecutions, should national criminal prosecutions be brought in the national courts, pending the time that Congress would provide by statute for the definition and punishment of national crimes."36 They are certain that section 34 was not intended to apply to diversity cases and that "on its historical basis, Erie is dead wrong."37

Rewriting the History makes a forceful argument for the proposition that section 34 was designed to allow the national courts to apply American, rather than British, criminal common
law until a national criminal code could be adopted. The first session of the First Congress failed to pass a criminal bill, although it did define two crimes with punishment, both contained in the Collection Act and relating to the collection of duties, and one crime with no specified penalty relating to the registering of ships and contained in the Coasting Act. The Crimes Act of 1790, adopted at the second session of the First Congress, was the earliest criminal code. It defined crimes and provided penalties for four categories of prohibited activities within the exclusive criminal jurisdiction of the United States: felonies committed on the high seas, offenses directly affecting the operations of government, crimes committed within federal enclaves, and interference with the functioning of the federal courts. The offenses sanctioned in the Crimes Act were either mentioned specifically in the Constitution or established under the authority of the Necessary and Proper Clause.

At least between the first and second sessions of the First Congress, then, there was no criminal code in effect. Even the Crimes Act of 1790 can hardly be characterized as a comprehensive criminal code. What criminal law was to apply? It generally was assumed that some law of crimes was to be applied, else why grant to the lower federal courts such complete criminal jurisdiction? Even the Anti-Federalists arguing for a Bill of Rights that included guarantees relating to the criminal process "premised their argument on the assumption that the national courts under the Constitution did have a comprehensive criminal
Another historical curiosity supporting the contention of the authors is that the first federal judges, in giving their grand jury charges, seem to have accepted the extension of criminal jurisdiction to non-statutory crimes. Curious also is the position of section 34 in the First Judiciary Act. It is the next to last section, just before the provision for U.S. Attorneys in each district and for an Attorney General of the United States. Does the position signify a catch-all provision? And what about the power conferred upon the United States Attorneys to "prosecute in such district all delinquents for crimes and offences?" In light of all this, it is passing strange that the Supreme Court in 1812 held that there was no common law of crimes.

The book sheds much new light on many old notions. Its success lies in compelling the reader to forebear from reading the First Judiciary Act through the eyes of "moderns." The reader is thus constrained to avoid the ruinous vision of conventional wisdom. For example, it generally has been assumed that the national judicial system was modeled on then-existing hierarchical systems of state judiciaries. This was not so, as the authors of the book clearly demonstrate. They show that the state systems were subsequently modeled on the one established by the Judiciary Act of 1789. At the time the Act was adopted, there was in most cases no distinction between trial and appellate judges in the several states. What then existed was a corps of judges who presided over trials in the field and at
times assembled in the state capitals to hear appeals. The same group of judges sat in different courts. Often, there was no real distinction between trials and appeals, and review often meant a retrial by a court having more judges than the original "inferior" court.

Apparently, there were those who feared that the Article III provision for "appellate jurisdiction, both as to law and fact" in the Supreme Court would require litigants to travel to the nation's capital for retrials. As the authors put it: "The opponents of the Constitution, and even some of its friends, were alarmed by this provision, since they read it in the context of the then-existing state courts." Also frightening to some was the fact that the language of the Constitution seemed to dispense with juries on retrial in the Supreme Court. It was to address those concerns that the new three-tier system was established for the national courts. A jury was provided where the Supreme Court exercised its original jurisdiction in cases brought against citizens of the United States. The appeals process was designed to work in a different way from that extant at the time, since writs of error were provided to bring up cases on appeal. The Supreme Court would be limited to questions of law where a lower court was to be reviewed, and questions of fact could not be retried in those cases. Policy reasons, rather than tradition, informed the new hierarchical system and the procedures prescribed for the national courts.

This book, as promised, exposes myths, challenges premises
and uses new evidence in its examination of the Judiciary Act of 1789. It does so in an exciting way, and the interest of the reader is held from start to finish. The background of the First Judiciary Act is presented in a most informative manner. There are eight chapters in the book, each of which stands alone as a matter of separate interest. The chapter headings are descriptive of the material included in each: Introduction; Chronology and Description; The "Judicial Systems" of the Several States in 1789; Organization of National Courts Under the Judiciary Act of 1789; Word Usage in the Constitution and in the Judiciary Act of 1789; Criminal Jurisdiction of the National Courts; Section 34; and Epilogue: An Outline of the History and Interpretation of Section 34. There are three appendices: Charles Warren and the Judiciary Act of 1789; The Sources for a History of the Judiciary Act of 1789; and Letters to and from Caleb Strong During May 1789. The appendices are most valuable, as are the Notes, Table of Short-Form Citations and Index.

This is a book for those who have an interest in the federal judiciary -- in its past, in its present, and in its future.
FOOTNOTES

* Judge, United States Court of Appeals for the Second Circuit. Adjunct Professor of Law, New York Law School.

1. The National Legal Center for the Public Interest blames "the increased politicization of the legislative process" for the inaction of the 101st and 102nd Congresses, noting that legislation bearing on "[n]early every major issue--from campaign reform to unemployment insurance to employment discrimination to abortion to resale price maintenance to crime--found its way into a veto showdown that slowed and, in some cases, eliminated its prospects." National Legal Center for the Public Interest, Judicial Legislative Watch Report, Vol. XIII, No. 2 at 2 (Mar. 6, 1992).


3. An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1789) [hereinafter "Judiciary Act of 1789"].


6. Id. at § 4, 1 Stat. at 74-75.

7. Id. at § 2, 1 Stat. at 73.

8. Id. at § 3, 1 Stat. at 73-74.

9. Id. at § 4, 1 Stat. at 74-75.

10. Id. at § 9, 1 Stat. at 76-77.

11. Id.
12. *Id.* at § 11, 1 Stat. at 79.

13. *Id.* at § 11, 1 Stat. at 78.

14. *Id.* at § 12, 1 Stat. at 79-80.

15. *Id.* at §§ 21, 22, 1 Stat. at 83-84.

16. See Evitts v. Lucey, 469 U.S. 387, 409 (1985) (Rehnquist, J., dissenting) ("In 1891 Congress extended this right to include 'otherwise infamous' crimes.") (citation omitted).


20. *Id.* at § 13, 1 Stat. at 81. Trial by jury of factual issues was provided for in the district and circuit courts in all except admiralty, maritime, and equity cases. *Id.* at §§ 9(d), 12, 1 Stat. at 77, 79-80.

21. *Id.* at § 22, 1 Stat. at 84.

22. *Id.* at § 25, 1 Stat. at 85-86.


for Public Interest 1983); Martin H. Redish, Federal Courts 566-69 (2d ed. 1989). See also Study Committee Report, supra note 23, at 38-42 (recommending abolition of diversity jurisdiction, or in the alternative limiting its availability, and thereby easing federal caseload).

25. Ritz, Rewriting the History, supra note 2, at 5.

26. See Wright, Federal Courts, supra note 4, at 4, 26-27; Hart & Wechsler’s, supra note 4, at 37.


29. Judiciary Act of 1789, supra note 3, at § 34. The comparable provision today reads:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.


30. Wright, Federal Courts, supra note 4, at 5.


33. Id. at 72. See also Martin H. Redish, Federal Jurisdiction: Tension in the Allocation of Judicial Power 211 n.4 (2d ed. 1990).

34. Ritz, Rewriting the History, supra note 2, at 132.

35. Id. at 10-11.

36. Ritz, Rewriting the History, supra note 2, at 148.

37. Id.
38. *Id.* at 114-15.

39. *Id.* at 115.

40. Crimes Act of 1790, ch. 9, § 1, 1 Stat. 112, 112.


42. Ritz, Rewriting the History, *supra* note 2, at 110.

43. *Id.* at 118-20.


46. Ritz, Rewriting the History, *supra* note 2, at 5-6.

47. *Id.* at 6.